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GRIFFIN *v.* J. E. SPEER LUMBER COMPANY.

4-9497 239 S. W. 2d 587

Opinion delivered May 21, 1951.

J. W. Patton, Jr., for appellant.

McKay, McKay & Anderson and *Pat Robinson,* for appellee.

GRIFFIN SMITH, Chief Justice. Deeds conveying standing timber of designated sizes and varieties gave the grantee lumber company a primary period of three years for removal, with the privilege to extend for two additional years upon payment of $300 per year in the one case, and $45 annually in the other. The critical question is whether belated tenders were sufficient. The Chancellor held that they were.

On February 27th and March 15th, 1946, the J. E. Speer Lumber Company paid Oce S. and Era L. Griffin, husband and wife, $3,500 for the timber on 320 acres, 240 of which are involved in this suit. In May and June, 1946, the Griffins conveyed in fee 120 acres upon which some of the timber stood, but the deeds were subject to the lumber company's rights. Oce Griffin died testate in September, 1946, having devised to his wife, an appellant here, and to others who intervened in this suit, all of the lands encumbered by the timber deeds, with the exception of the tracts sold in May and June.

The lumber company alleged in its complaint of August 9, 1949, that those named as defendants were interfering with its right to cut the timber, and procured a temporary restraining order. Answers, cross-complaints, and interventions denied that the plaintiff owned the timber and allege that the primary period of three years had expired and the right to extend had not been exercised.

At trial the company introduced testimony, with photostatic copies of its records, showing that on February 17, 1949,—ten days before the initial three-year period mentioned in the first deed, and more than a month before the primary period in the second deed, matured—it mailed to Mrs. Griffin from the Stamps office a check for $345. The remittance was enclosed in an envelope properly stamped, bearing the sender's return, and addressed to Lewisville, where Mrs. Griffin resided. When the company through an agent in charge of records undertook to introduce a copy of its letter of transmittal, counsel for appellees interposed with the statement: "We want to voice the same [objection set out in our written demurrer] —the mailing of the check is immaterial and would not constitute payment."

The effect of this plea was an admission that the check had been sent as the plaintiff contended, hence the only question is whether this act of good faith, when viewed in connection with attending circumstances, relieved the company of what the appellants think was an obligation absolute to make actual payment within a reasonable time. Through third party sources the company heard that Mrs.

Griffin had denied receiving the check, so another was written. This time the amount, $690, covered the full two-year period and the letter was registered August 9th to insure delivery. It was returned by Mrs. Griffin, who testified that when the company defaulted—or, rather, when it failed to exercise the right to extend—she offered the timber for sale. This suit followed.

The company's accountant-witness admitted that in examining bank statements each month she observed that the check sent February 17th had not cleared, but this did not indicate failure of delivery. It was not unusual for payees similarly situated to hold such checks until monetary needs required use of the proceeds. On previous occasions Mrs. Griffin had withheld timber checks that were later cashed, hence (inferentially) the delay of approximately five months did not suggest to the witness that the remittance had not been received.

Mrs. Griffin admitted that she did not inform anyone connected with the lumber company that the check, if sent, had gone estray; nor did she attempt to do so. She was in Lewisville February 17th and 18th, and [periodically] until March 9th, but had spent fourteen days in a hospital.

We think the Chancellor was justified in refusing to declare a forfeiture. The first deed gave the grantee three years to cut and remove, "and two additional years by paying $300 each year, [and the company shall] have and enjoy the full time herein granted." The second deed allowed three years, "and two additional years by paying $45 each year, and [the grantee] shall be entitled to all of that time within which to cut and remove the timber."

Appellee's construction of the pertinent phrases is that in each instrument five years were contemplated—three in any event, and an additional two by payment of the stipulated sum. One deed mentions "three years and two additional years," the other says the grantee shall be entitled to "all of that time," etc.

Whatever the inter-party intentions may have been, there are no words expressing defeasance. Neither is time

declared to be of the essence, nor is it necessarily inferred. Value of the contingent right was fixed by the predetermination that $300 in one case and $45 in the other, if paid annually, would compensate all damage or inconvenience to which the grantors might be subjected, and there is nothing to show that appellants would sustain any loss other than those incidental to a denial of the privilege of reselling the timber, or retaining it. No innocent reëntry, attended by good faith expenditures made in reliance upon abandonment, is shown. The matter resolves itself into the single proposition appellants seek to maintain: that appellee's delay in ascertaining whether the check had been received, and its consequent failure to *deliver* the rentals, was sufficient as a matter of law to justify the forfeiture.

In *Watson* v. *Stout Lumber Co.*, 175 Ark. 240, 298 S. W. 1010, the court held that contractual deed recitals (recitals in many respects similar to those considered here) amounted—in respect of the extension provision—to more than a mere option to purchase. The additional time depended upon *prepayment,* to be evidenced by the lumber company's act in depositing a stipulated sum in the Bank of Hampton to Watson's credit. When the grantor, who resided on a rural route, did not receive direct payment, he went to the bank and found that the deposit had not been made. When the required amount was received by check on the 18th, Watson consulted an attorney and was advised that the company's rights had terminated.

One distinction between the cited decision and the position of appellants in the case at bar is that Watson as grantor sued to cancel the deed, and he was therefore asking equity to enforce a penalty in his favor. Here the action was instituted by the lumber company to prevent a forfeiture.

Unyielding rules are not announced by the cases that have been collected. Rather, they appear to hinge upon essential facts creating comparative or relative equities. When failure has been intentional the difficulty is not great. Here the proof shows that a substantial portion of

the timber appellee bought on terms mutually satisfactory had not been removed. We are in accord with appellants' contention that a payment-delay of five months would, *prima facie,* be unreasonable; but where (as the court found) a check was actually mailed in a timely manner, and when the company acted promptly by tendering another remittance before a changed status had adversely affected appellants, it would be inequitable to reverse the decree.

Affirmed.

MOODY *v.* MOODY.

4-9501 240 S. W. 2d 22

Opinion delivered May 28, 1951.

Rehearing denied July 2, 1951.

Frank C. Douglas, for appellant.

James M. Gardner, for appellee.

HOLT, J. Appellants and appellee, Allen C. Moody, are the heirs at law of A. J. and L. C. Moody. Mr. Moody died February 19, 1930, and his wife died about two years later.

A. J. Moody and his wife were divorced September 25, 1925, and a property settlement made under the terms of which Mr. Moody's land was divided into two tracts (referred to as the north tract and the south tract), the south tract containing approximately 31.27 acres was to be the property of Mrs. Moody and the north tract the property of Mr. Moody.

April 15, 1926, A. J. Moody deeded to his son, Allen, both of these tracts, described as follows: "The west part of the north west one fourth of section eight (8) of township 15 north, range eleven (11) east, lying in the county of Mississippi, Chickasawba District, State of Arkansas, (approximately 59.75 acres). In consideration of the sum of $2,000—Two Thousand—by A. C. Moody, for one thousand ($1,000) dollars of which he is to board and bed me for the remainder of my natural life and for $1,000 he is to divide the * * * land equally between my five heirs namely, Lou Hendricks, Myrtle Crawford, Hubert Moody, Jodie Butler, and A. C. Moody."

In August, 1930, two grandchildren of Mr. and Mrs. Moody sued (this suit was case No. 4800) to set aside the above deed to Allen and to secure a one-sixth share in the property therein described. They were denied the relief prayed. The decree dated March 2, 1933, confirmed title in Allen but subject to a lien in favor of his brother, Hubert, and his three sisters (appellants) in the amount of $1,000. This $1,000 appears never to have been paid by Allen to appellants.

Hubert and the three sisters filed the suit against Allen in February, 1935, (this suit was case No. 5914)

alleging that they had entered into an agreement, in effect, a family settlement with their brother, Allen, whereby it was agreed that Hubert and the three sisters should take the south tract (which was their mother's part) and Allen the north part, in consideration that Allen was to be relieved of paying the $1,000 awarded them. This suit was never tried, but was finally removed from the docket for the reason, say appellants, that all parties had agreed upon a final family settlement as alleged by appellants in this 1935 suit (No. 5914).

The record reflects that under this alleged family settlement in 1935, Hubert and his three sisters made a temporary division of the south tract into eight acre tracts (approximately) and have had possession and farmed or rented these tracts since, a period of more than fifteen years, without objection on the part of Allen (appellee).

When one of the sisters, Mrs. Jodie Kenney, died in September, 1949, Allen took possession of her tract, claiming, for the first time, that she only had a life estate and also informed Hubert and the other two sisters that they too only held a life estate in the tracts they were occupying and that he owned the property. It was at this juncture that the present suit was filed, May 5, 1950, in which appellants sought to enforce specific performance of the alleged family settlement, and to have their title to the south tract (their mother's part) quieted in them as tenants in common, free of all claims of their brother, Allen. They alleged in their complaint, *inter alia,*—that "the date of the family settlement agreement is stated in the complaint, being some time in 1933, after the decree in Chancery in the suit of Lyman Moody and Virgie Moody Medlin, and the death of Mrs. L. C. Moody in the same year; it being understood between Allen C. Moody and his brother and three sisters that the entire tract would be divided into five equal parts as the deed provided for from A. J. Moody to Allen C. Moody; but when the court construed the deed to mean that Allen C. Moody should pay $1,000 to his brother and three sisters, then the family agreement started, and this argu-

ment finally terminated in Allen C. Moody taking the north part of the land and giving the south part to his brother and three sisters, this giving them about half what they were entitled to and expected."

Appellee denied all material allegations and pleaded the statutes of frauds and limitations, and also pleaded *res judicata.*

Taking of proof by appellants on depositions was begun August 25, 1950, and appellants' testimony completed prior to November 16, 1950. On the latter date, appellee (defendant below) recalled Hubert Moody "for further cross-examination on behalf of the defendant" and introduced in evidence appellants' complaint, and the depositions of Hubert Moody and Jodie Butler (containing about twenty-two pages) in case No. 5914, above. On December 14, 1950, Hubert was again recalled (for a third cross-examination) by appellee (defendant) and in open court was further questioned and over the objections of appellants introduced in evidence the original complaint, answer, amended answer, and decree in case No. 4800, above. On the preceding day, December 13, 1950, appellee, under the authority of Act 470 of 1939 (Ark. Stats. 1947, § 27-1729 as amended) had filed motion to dismiss appellants' complaint on the ground that appellants' evidence was not sufficient to grant the relief for which they prayed. The trial court sustained appellee's motion, dismissed appellants' complaint and this appeal followed.

The court erred in dismissing appellants' complaint in the circumstances.

Act 470 contemplates that the written motion to dismiss may be filed only after the plaintiff has rested or closed his testimony and before the defendant has offered any affirmative testimony in defense.

Here, the record reflects that after appellants rested and both before and after the motion to dismiss was filed, December 13, 1950, under the guise of cross-examination, and after, in effect, having made Hubert his own witness, appellee (defendant) introduced evidence which

tended to contradict appellants' contention that a family settlement had been made.

Allen had pleaded *res judicata.* The pleadings he introduced from former cases were not cross-examination, but were in support of his plea of *res judicata* for the sustaining of which he had the burden.

After a review of all the evidence, which we do not detail, we have concluded that the preponderance thereof is against the Chancellor's findings, but that the preponderance supports appellants' contention that the parties here made a binding oral family settlement. All of the appellants so testified and Judge C. M. Buck, who represented Allen in suit No. 5914, testified: "Sometime after the depositions of some two or three witnesses had been taken by the plaintiffs, I interviewed the attorneys representing the plaintiffs and asked when they would conclude their testimony. I was informed, either by the attorney representing the plaintiffs or by Allen C. Moody himself, that the parties had compromised and settled the litigation. Some months later, the suit was dropped from the docket and I assumed that it had been compromised and settled." Attorney, Mr. Claude Cooper, tended to corroborate Judge Buck.

Appellants further testified that when their father died, it was understood and agreed that appellants and appellee were to share his land in accordance with the intention which he had expressed in his deed (above) to Allen, but that a final agreement and settlement was made when case No. 5914 was abandoned on appellee's agreeing that for, and in consideration of, the thousand dollars that appellee owed appellants, they should have their mother's share, or the south part of their father's land, and appellee would retain the north part.

The principles of law announced in *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74, apply and control here. We there said: "Then, again, this was a family settlement of property rights, fairly made, and will not be set aside except for very strong and cogent reasons; neither will the consideration for the settlement nor the prior

legal rights of the parties be minutely inquired into. As was said in *Pate* v. *Johnson,* 15 Ark. 275: 'Amicable and family settlements are to be encouraged, and, when fairly made, . . . strong reasons must exist to warrant interference on the part of a court of equity.'

"The above was quoted in *Martin* v. *Martin,* 98 Ark. 93, 104, 135 S. W. 345, 353, where it was said: 'This was, in effect, a family settlement of the interests of these members of the family in these two remaining tracts of land which came from these two estates of the family. Courts of equity have uniformly upheld and sustained family arrangements in reference to property where no fraud or imposition was practiced. The motives in such cases is to preserve the peace and harmony of families. The consideration of the transaction and the strict legal rights of the parties are not closely scrutinized in such settlements, but equity is anxious to encourage and enforce them.' (Citing cases)."

On the evidence here, appellants took possession under the oral family settlement agreement, and exercised full ownership with appellee's knowledge and consent, and this takes the agreement out of the statute of frauds. We further said in *Hollowoa* v. *Buck*:

"The only other question of sufficient importance to consider here is, was it necessary, under the facts in this case, for the settlement or agreement to be in writing, since it involved the conveyance of real estate? This question must also be decided against appellant. The undisputed proof shows that at least two of the appellees actually entered into possession of their tracts, fenced them, pastured them, and exercised other acts of ownership over them with appellant's full knowledge and consent. They were therefore in the same attitude as a vendee who has been put in possession by the vendor under a parol contract to purchase, which takes the contract out of the statute of frauds, and, if taken out as to one, it is out as to all."

The decree is reversed and the cause remanded with directions to quiet appellants' title as prayed and for any further proceedings consistent with this opinion.

PEOPLES NATIONAL BANK OF LITTLE ROCK *v.* LINEBARGER CONSTRUCTION COMPANY.

4-9435 240 S. W. 2d 12

Opinion delivered May 28, 1951.

Rehearing denied July 2, 1951.

Donham, Fulk & Mehaffy, for appellant.

William M. Moorhead, E. Charles Eichenbaum and *A. F. House,* for appellee.

ED. F. MCFADDIN, Justice. The trial court refused to allow appellant any recovery for money which it had advanced to Floyd Cart in reliance on appellees' representations to appellant.

The appellee, Linebarger Construction Company (hereinafter called "Linebarger"), was a partnership composed of W. E. and Richard W. Linebarger, and was the principal contractor for building the Rivercliff Apartments in Little Rock. Linebarger subcontracted to Floyd

Cart the furnishing of labor—but not materials—for the plastering work in the said buildings. The subcontract was based on unit prices; and, through error of Linebarger, the original total of Cart's subcontract was placed at $62,551.70 for which he made surety performance bond to Linebarger. The correct total afterwards proved to be only $50,884.30.[1]

The Linebarger-Cart contract was dated February 18, 1948, and stated that Cart was to be paid on *monthly* estimates. But his laborers demanded payment each week; and Cart was unable to finance these payments from one month to the next. Accordingly, he asked Linebarger to pay him each week. This request was refused, but Linebarger suggested that Cart might get some bank to finance him from one monthly payment to the next. Linebarger learned from Cart that he carried an account with the appellant, Peoples National Bank (hereinafter called "Peoples" or "Bank"); and Linebarger then called the Peoples Bank and outlined the situation to Mr. Hadfield, one of its officials. Hadfield gave the following undenied version of the conversation:

"Mr. Linebarger called me by telephone. He told me that he had let a sub-contract for the plastering on the Rivercliff Apartments to Mr. Floyd D. Cart and that Mr. Cart would need money for his payroll from month to month and that he could only pay him once a month on his estimate and wanted to know if my bank would be interested in financing this payroll. I asked him how much money it would involve and I believe he told me the contract ran into some sixty thousand dollars total, but he would only want payroll money from month to

[1] The Linebarger-Cart contract contained these provisions: "It is further understood and agreed that the quantities set forth above are of close approximations only, and that the unit prices govern, with the quantities being adjusted to those actually developed in the job, and that the final gross consideration is to be the sum of the actual quantities at the unit prices set forth herein. . . . It is further agreed and understood that such partial or monthly payments shall only be made for 90% of the work performed, the remaining 10% being retained until the completion of the work and final payment under general contract conditions and then added to, and made a part of, the final or completion payment."

Another case in this Court growing out of the Linebarger-Cart contract is that of *Western Casualty Co.* v. *Linebarger*, No. 9434, post, p. 48, 239 S. W. 2d 753 (opinion delivered May 21, 1951).

month. He says, 'You will be taking no chances, however, on that; I will have an assignment drawn in my office of the contract in favor of your bank; I will give you a letter each month telling you how much money he will have coming to him from the next estimate so you will know how much money to lend him.' "

Linebarger prepared and had Cart execute an assignment from Cart to the Bank, and Linebarger executed the acceptance of the assignment, and gave Cart the completed instrument,[2] along with a signed letter from Linebarger to the Bank, dated May 21st, and reading:

"Confirming Mr. Linebarger's conversation with you, we enclose herewith Assignment of monies to be paid to Floyd D. Cart, Plaster Contractor, on his contract with us for work to be done on the Rivercliff Apartments. This Assignment has been duly completed by this company and it is our understanding that Mr. Cart will call at the bank in the morning to complete the transaction.

"By June 10 an amount near $6,000 will be due Mr. Cart on his contract."

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[2] It reads in its entirety:

"ASSIGNMENT

"KNOW ALL MEN BY THESE PRESENTS:

"THAT, for and in consideration of the sum of ONE DOLLAR ($1.00) to the undersigned in hand paid by PEOPLES NATIONAL BANK of Little Rock, Arkansas, the receipt of which is hereby acknowledged, and as security for the full repayment of loans made and to be made the undersigned by the said Peoples National Bank of Little Rock, evidenced by notes executed by the undersigned to the said bank, any renewals or extensions thereof, the said undersigned Floyd D. Cart, PLASTER CONTRACTOR, does hereby transfer, assign, and deliver to the said Peoples National Bank all sums due and to become due Floyd D. Cart, Plaster Contractor under that contract executed on February 18, 1948, by and between the undersigned and LINEBARGER CONSTRUCTION COMPANY for labor on lath and plaster work on the Rivercliff Apartments, it being understood that the within assignment covers all of the funds to be disbursed subsequent to the date of this instrument by Linebarger Construction Company, Little Rock, Arkansas.

"IN WITNESS WHEREOF this instrument has been executed in Little Rock, Arkansas, this 21st day of May, 1948.

"FLOYD D. CART, PLASTER CONTRACTOR
"By: /s/ Floyd D. Cart

"Notice of the above assignment is hereby acknowledged this 21st day of May, 1948. "LINEBARGER CONSTRUCTION COMPANY
"By: /s/ R. W. Linebarger, Partner."

Armed with these papers prepared by Linebarger, Cart then approached the Bank for the first time on the matter; and Mr. Hadfield agreed to make the loans, as suggested, and wrote Linebarger:

"You will find enclosed a signed and accepted copy of the assignment of monies coming to Floyd D. Cart from your company, and we have this day advanced Mr. Cart $3,000 on the strength of same.

"Mr. Cart advises us that he will need another pay roll next Saturday. In that event we would appreciate you giving us another letter as to the approximate amount that will be coming to him on June 10 or the next pay day."

The $3,000 loan was promptly repaid on June 10th by check of Linebarger, made jointly to Cart and Peoples Bank. After the first loan, the Bank made a series of loans to Cart, in reliance on the aforementioned assignment and Linebarger's letter of estimate to the Bank prior to each such loan. Each transaction was handled and concluded as follows:

(a)—On May 28th Linebarger advised the Bank that on June 10th there would be due Cart $7,000 on his contract; the Bank made loans to Cart for $4,500; and on June 10th Linebarger issued its check to Cart and the Bank for said amount, and Cart delivered the check to the Bank in payment of the loan.

(b) On June 12th Linebarger advised the Bank that on June 15th there would be due Cart $2,500 on his contract; the Bank made a loan to Cart for that amount; and on June 15th Linebarger issued its check to Cart and the Bank for said amount, and Cart delivered the check to the Bank in payment of the loan.

(c)—On June 18th Linebarger advised the Bank that on July 15th there would be due Cart $13,000 on his contract; the Bank made loans to Cart totalling that amount; and on July 15th Linebarger issued its check to Cart and the Bank for said amount, and Cart delivered the check to the Bank in payment of the loan.

(d)—On July 16th Linebarger advised the Bank that on August 15th there would be due Cart $13,000 on his contract; the Bank made loans to Cart totalling that amount; and on August 15th Linebarger issued its check to Cart and the Bank for said amount, and Cart delivered the check to the Bank in payment of the loan.

We come now to the transaction that caused this litigation. On August 12th Linebarger advised the Bank that on September 15th there would be due Cart $16,000 on his contract; the Bank made a loan to Cart for that amount; but on September 15th Linebarger refused to issue any check, claiming—as was a fact—that Cart had defaulted in his contract, and that the difference in the total figure of the contract (that is, the difference between $62,551.70 and $50,884.30) had also come to light.[3] It developed that Cart "had too many irons in the fire": he was operating various businesses, and had lost money in them to such an extent that he became a voluntary bankrupt. The Bank proved, by evidence, that of the $16,000 loaned to Cart on the strength of Linebarger's letter of August 12th, the sum of $11,996.07 was actually used to pay Cart's payrolls on his subcontract with Linebarger.

I. *Promissory Estoppel.* The Bank, in claiming that it is entitled to judgment against Linebarger, relies on the rule of estoppel, and particularly that of promissory estoppel. The broad general principle of estoppel[4] is:

". . . he, who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden."

We have many cases recognizing and applying the rule of estoppel. Most of the old cases held that the representation must relate to a past or present situation,

[3] Linebarger discovered this mistake sometime earlier, but never mentioned it to the Bank.

[4] The quotation is from *Dickerson* v. *Colgrove,* 100 U. S. 578, 25 L. Ed. 618. In *Keylon* v. *Arnold,* 213 Ark. 130, 209 S. W. 2d 459, and also in *Rogers* v. *Hill,* 217 Ark. 619, 232 S. W. 2d 443, other cases are listed stating some of the principles of estoppel.

rather than to something in the future. See 19 Am. Jur. 656, "Estoppel", § 52; and see also 31 C. J. S. 289, "Estoppel", § 80. But the Arkansas Supreme Court, in an early case—*Shields* v. *Smith,* 37 Ark. 47—held that if one, by his statements as to his intended abandonment of existing rights, designedly induces another to change his condition in reliance upon such statements, then the person so stating will afterwards be estopped in his efforts to enforce his rights contrary to his declared intention to abandon them.[5]

Later, in *Conley* v. *Johnson,* 69 Ark. 513, 64 S. W. 277, a party stated his intentions and allowed another to rely thereon, and estoppel was successfully invoked. Mr. Justice Wood quoted in the opinion from *Union Mutual Ins. Co.* v. *Mowry,* 96 U. S. 544, 24 L. Ed. 674:

"The doctrine of estoppel is applied with respect to representation of a party to prevent their operating as a fraud upon one who has been led to rely upon them . . . as to matters of fact or as to intended abandonment of existing rights."

And, again, he quoted from Bishop on Contracts:

"It is a palpable fraud for one man to entice another with promises to change his course of action and to his injury part with his effects or his services, . . ."

Again, in *Davis* v. *Shelby,* 136 Ark. 405, 206 S. W. 749, we held that when a party, by his statement of his intended abandonment of his purchase, induced another to buy the land from the vendor, then such party would be estopped to enforce his rights contrary to his declared intention of abandonment. In each of the foregoing cases the estoppel was based on the representation of a future matter, as distinguished from the representation of a past or present event.[6]

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[5] *Shields* v. *Smith* was cited in *American Surety Co.* v. *Ballman,* 115 Fed. 292, as one of the cases holding that a promise as to future conduct could form the basis of estoppel.

[6] In West's Arkansas Digest, "Estoppel," Key No. 85, two cases are listed as apparently holding that estoppel does not apply to representations concerning future events. These cases are *Rhodes* v. *Cissel,* 82 Ark. 367, 101 S. W. 758, and *Renner* v. *Progressive Co.,* 193 Ark. 504, 101 S. W. 2d 426. But a study of these cases shows that neither

The trend of modern cases is to extend the rule of estoppel to promissory statements, if the evidence clearly shows that the statements were made to induce action and that the promissor was culpable in some regard. Pomeroy's Equity Jurisprudence, 5th Ed., § 808b, states the holdings in this language:

"There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice. The name 'promissory estoppel', has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations."

To the same effect see 19 Am. Jur. 657, "Estoppel", § 53, and 31 C. J. S. 289, "Estoppel", § 80. See, also, Annotation on "Promissory Estoppel" in 115 A. L. R. 152 which lists and discusses many cases which have applied estoppel to promises.

The following are only a few of the many recent cases recognizing the development of the law of promissory estoppel, which development is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings: *Brewer* v. *Universal Credit Co.,* 191 Miss. 183, 192 So. 902; *Lacy* v. *Wozencraft* (Okla. 1940), 105 Pac. 2d 781; *Thom* v. *Thom,* 208 Minn. 461, 294 N. W. 461; *May* v. *City of Kearney,* 145 Neb. 475, 17 N. W. 2d 448; *In re* Jamison's Estate (Mo. 1947), 202 S. W. 2d 879; *Goodman* v. *Dicker,* 83 App. D. C. 353, 169 Fed. 2d 684; *Klein* v. *Farmer,* 85 Cal. App. 545, 194 Pac. 2d 106; *Swift* v. *Peterson,* 240 Ia. 715, 37 N. W. 2d 258; and *Waugh* v. *Lennard,* 69 Ariz. 214, 211 Pac. 2d 806.

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case directly concerned the matter of promissory estoppel. In *Rhodes* v. *Cissel,* the opinion says of Cissel: "He was not misled or influenced by Rhodes to take any course of conduct, and Rhodes is not estopped." In *Renner* v. *Progressive Co.,* the Court said: "It is not estoppel, however, but fraud upon which appellant relies."

In applying the rule of promissory estoppel to the case at bar, we only need to list a few of the salient acts, representations, and omissions by Linebarger:

(a)—Linebarger initiated a course of dealings with the Bank so that Linebarger's subcontractor, Cart, might meet his weekly payroll and thereby benefit Linebarger.

(b)—Linebarger stated to the Bank: "You will be taking no chances, however, on that; I will have an assignment drawn in my office of the contract in favor of your bank; I will give you a letter each month telling you how much money he will have coming to him from the next estimate so you will know how much money to lend him."

(c)—Over a period of months Linebarger gave letters of estimate to the Bank as to the amount Linebarger would owe Cart on future dates, and each one of these letters proved accurate; and Linebarger issued its check, in accordance therewith, up to the transaction involved in this litigation. In short, by its dealings and conduct, Linebarger led the Bank to believe that checks would be issued in accordance with Linebarger's letters.[7]

(d)—Then, on August 12th, at a time when Linebarger knew that Cart's total contract was not $62,551.70 but only $50,884.30, and when Linebarger knew that Cart was not properly performing the subcontract and was neglecting the work, Linebarger wrote the Bank that on September 15th Linebarger would owe Cart $16,000.

[7] On the witness stand, Mr. Linebarger was asked and gave answer: "Q. The point I am getting at, Mr. Linebarger, to be perfectly frank, is, you had a letter out here addressed to Peoples National Bank, dated August 12, 1948, in which you told the bank that between September first and fifteenth he would have approximately sixteen thousand dollars coming to him under his contract with your company. Now I just want you to state to the Court frankly, in your own way, whether you felt you discharged the obligation you had toward the bank in view of that letter you wrote them, or failed to discharge it by putting them on notice not to lend him any more money after that, when you knew he wasn't doing the work. A. Mr. Fulk, in my mind I had no obligation to the bank, and still I don't believe I have any obligation to the bank."

The rule of promissory estoppel is at variance with Mr. Linebarger's answer. He did owe an obligation to the bank: the obligation of fulfilling his representations.

Under the rule of promissory estoppel, and in view of all the course of dealings, we hold (a) that Linebarger's letter of August 12th was a representation by Linebarger that on September 15th it would issue its check to the Bank and Cart for any amount—up to $16,000.00—that the Bank might advance to Cart to meet his payroll; (b) that the Bank was justified in relying on Linebarger's representations and in advancing Cart money, of which $11,996.07 actually went to meet the payroll of Cart in the Linebarger construction; and (c) that Linebarger is now estopped from denying the promissory representations contained in the letter of August 12th.[8]

II. *The Amount the Bank Is Entitled to Recover.* With the rule of promissory estoppel thus applied, we come to the amount that the Bank is entitled to recover from Linebarger; and we find this amount to be $11,996.07 and interest. If special circumstances had not indicated a particular purpose for use of the money, then the estoppel might well have extended to the full amount stated in the representation; but the dealings between Linebarger and the Bank, as already shown, designated the particular purpose for which the Bank was to advance the money to Cart—*i. e.,* the meeting of payrolls. In relying on Linebarger's representations, the Bank was not free to let Cart have the money for general purposes, but only for the special purpose of paying his laborers. Since only $11,996.07 went to meet Cart's payrolls on the Linebarger job, the Bank, in asking a court of equity to give it relief on the basis of promissory estoppel, is likewise estopped to claim any amount greater than what actually went into the Linebarger job—this in view of the particular course

[8] In *Citizens National Bank* v. *Ross Construction Co.,* 146 Tex. 236, 206 S. W. 2d 593, the Supreme Court of Texas held the rule of promissory estoppel inapplicable in a situation in which a bank had advanced $13,000 to a subcontractor in reliance on the general contractor's acceptance of an assignment by the subcontractor. But in the Texas case there were not present the controlling facts found here, *i. e.,* (a) initiation of the credit by the general contractor; (b) regularly sending of letters containing estimates of amounts to be due at future dates; (c) course of dealings on which general contractor allowed bank to rely; and (d) knowledge of the general contractor as to mistake of total amount to be paid subcontractor.

of dealings in this case. A reasonable construction of relationships is that Linebarger represented to the Bank that on designated dates Linebarger would supply estimates of the amounts Cart would be entitled to receive for work actually performed on the building, the benefits of which were received by Linebarger. Since a preponderance of the evidence shows that Linebarger profited to the extent of $11,996.07 of the estimates so made, and upon which estimate the Bank relied, Linebarger will be estopped to deny the values accruing at appellant's cost.

Therefore, the decree of the Chancery Court is reversed and the cause is remanded, with directions to enter a decree in favor of the Bank, and against Linebarger, for the said sum of $11,996.07, with interest from September 15th, 1948, until paid, and together with all costs.

GEORGE ROSE SMITH, J., not participating.

SHERWIN-WILLIAMS COMPANY *v.* YEAGER.

4-9519 239 S. W. 2d 1019

Opinion delivered June 4, 1951.

Wright, Harrison, Lindsey & Upton, for appellant.

Martin K. Fulk and *W. J. Smith,* for appellee.

HOLT, J. This appeal is from a judgment of the Pulaski Circuit Court which reversed a finding and order of the Workmen's Compensation Commission, which order denied compensation to appellees, under Act 319 of 1939 as amended.

George P. Yeager, III, an 18-year-old son of Mr. and Mrs. Yeager, received fatal injuries arising out of and in the course of his employment. The father, mother and 14-year-old sister of deceased filed claim for compensation based on partial dependency. As indicated, the Commission denied appellees' claim and on appeal, the Pulaski Circuit Court reversed the Commission and allowed the claim on the ground of partial dependency.

The Commission's opinion recites: "Findings of Fact. 1. That the parties to this cause come within and are bound by the provisions of the Arkansas Workmen's Compensation Law. 2. That on September 14, 1948, the decedent, George Phillip Yeager, III, sustained an accidental injury which arose out of and during the course of his employment and as the result thereof met his death that same day. 3. That the claimant's average weekly wage was $24.32. 4. That at the time of the accidental death of George Phillip Yeager, III, the claimant father, George Phillip Yeager, Jr., the claimant mother, Helen Yeager, and the claimant minor sister, Margie Yeager, were not dependent upon the said George Phillip Yeager, III, within the meaning of the Arkansas Workmen's Compensation Law.

"Upon the foregoing findings of fact, the Commission reaches the following 'Conclusions of Law.' Section 15 (h) of the Arkansas Workmen's Compensation Law is as follows: 'All questions of dependency shall be determined as of the time of the injury.'

"In 1943 the decedent's father was making $175 per month on which he supported his wife and children, except for a little work the mother started doing in 1943. In September, 1948, the father was making $65

per week or in excess of $260 per month and he had been making this sum for about one year prior to the decedent's death. For about one year prior to September 1, 1948, the decedent's mother made 65c per hour and worked forty-three hours per week or $27.95 per week or in excess of $112 per month. In May, 1947, the decedent graduated from high school and it was the testimony of the parents that the decedent had taken care of himself to a certain extent. In July, 1948, the older daughter married and both she and her husband worked and took care of themselves. The only child left for the parents to take care of then was the younger daughter, Margie. It appears that the parents were quite capable of supporting themselves and their younger daughter on and long prior to September 14, 1948, and had been doing so.

"We are of the opinion the father somewhat exaggerated the decedent's income from his baseball activities.

"It was the mother's testimony that the $5.00 (weekly) average cash contributions made by the decedent was not a drop in the bucket and would not begin to buy the groceries the decedent consumed. The father's testimony on this point was substantially the same.

"Considering all of the evidence in a light most favorable to the claimants, it would appear that the decedent probably received and took from the home and family group more than he furnished. It would seem that he was not entirely self-supporting.

"Although the decedent apparently did buy gasoline for the family car and had some repair work done, it appears he used this car for his own pleasure. The Commission is of the opinion this activity and its extent on the part of the decedent does not show dependency on the part of the claimants.

"After a careful consideration of all the evidence in this case, the Commission is of the opinion that none of the within claimants was dependent upon the decedent at the time of his injury and death, within the meaning of the Arkansas Workmen's Compensation Law,

nor have they been for at least a year or more prior thereto, if ever. According to the testimony of the parents, it appears that the decedent was at least partially dependent upon them.

"The claimants' claims, therefore, are denied and dismissed; however, the within respondents will pay the reasonable funeral expenses not to exceed $250, as provided by the Act."

The question of dependency is one of fact. "All questions of dependency shall be determined as of the time of the injury. (Section 15 (h) of the Compensation Law).

"But that provision does not mean that the Commission should refuse to consider evidence of conditions prior to the injury to ascertain the true situation as to dependence. In *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161, we said: 'The question of dependency is one of fact in the determination of which all the circumstances of the particular case are to be considered.' " *Nolen* v. *Wortz Biscuit Company,* 210 Ark. 446, 196 S. W. 2d 899.

In *E. H. Noel Coal Company* v. *Grilc,* 215 Ark. 430, 221 S. W. 2d 49, this court said: "The question of dependency presented here is one of fact since there is absent in Act 319, *supra,* any provision making a parent wholly dependent on any one person."

In our construction of the Workmen's Compensation Act, we have many times said: "The rule is also well settled that in testing the sufficiency of the evidence before the Commission, the circuit court, on appeal from the Commission, and this Court, on appeal from the circuit court, must weigh the testimony in its strongest light, in favor of the Commission's findings." *Hughes* v. *Tapley, Administratrix,* 206 Ark. 739, 177 S. W. 2d 429.

We said in *Meyer* v. *Seismograph Service Corporation,* 209 Ark. 168, 189 S. W. 2d 794: "The rule is firmly established that the findings of the Commission, which is the trier of the facts, will not be disturbed on appeal to

the circuit court if supported by substantial testimony. Act 319 of 1939, § 25 b; (citing many cases). * * * 'In a long line of decisions since the passage of the act here in question, the rule has been clearly established that the findings of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court sitting as a jury, and when supported by substantial evidence, such findings will not be disturbed by the circuit court on appeal to that court or on appeal to this court.' * * * The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness.''

On the record here, in the light of the above rules, we hold that there was substantial evidence to support the Commission's findings.

Since, as indicated, there was substantial evidence to support the Commission's findings that appellees were not partially dependent, we must, and do, reverse the judgment of the Pulaski Circuit Court and remand the cause with directions to affirm the order of the Commission denying compensation.

CITIZENS BANK OF BOONEVILLE *v.* MILLER.

4-9525 239 S. W. 2d 1021

Opinion delivered June 4, 1951.

Taylor & Cravens and *Charles I. Evans,* for appellant.

Luke Arnett and *Mark E. Woolsey,* for appellee.

ED. F. MCFADDIN, Justice. This suit involves the conflicting claims of the parties to an automobile.

Appellee, Boyd, a dealer in secondhand automobiles at Caulksville, fourteen miles from Booneville, had a 1941 model Ford for sale. On October 6, 1947, Buster Sturdivant, a prospective purchaser, gained possession of the car under the pretense of showing it to his wife. He immediately drove the car to Booneville and mortgaged it to the appellant, Citizens Bank, and obtained $1,200 in cash. Sturdivant exhibited to the Bank an alleged bill of sale to the car, signed by some unmentioned person, with the name of the grantee left blank. Sturdivant informed the Bank: that he had purchased the car from Boyd; that Boyd had purchased the car from the party who had executed the previously mentioned bill of sale; and that Boyd had delivered the bill of sale to Sturdivant as full evidence of title and ownership. The Bank relied entirely on Sturdivant's statements and allowed him to keep the said bill of sale; but the Bank promptly filed its chattel mortgage in Sebastian County, in which Sturdivant resided.

After obtaining the $1,200 from the Bank, in the manner aforesaid, Sturdivant returned to Boyd and agreed to buy the said car. Sturdivant paid Boyd $600 cash and also executed a title retaining note on the car for the balance of $600. The note contained this language:

"Upon failure to pay any one of said installments when due, or if the property be removed from its present location without the written consent of R. L. Boyd and Son, or if said property be mortgaged or otherwise encumbered, possession thereof transferred, suffered to be levied on, or exposed to unusual hazard, R. L. Boyd and Son shall have the right to take possession of said property, and all previous payments made thereon shall

be retained as liquidated damages for the use and rental thereof."

Some time between five days and a month after Sturdivant signed the title retaining note, he went back to Boyd (who still had no personal knowledge of Sturdivant's dealings with the Bank), and surrendered the 1941 Ford car and gave Boyd $1,700 in cash, in return for which Boyd delivered to Sturdivant the said title retaining note and a 1946 Mercury car. What Sturdivant did with the Mercury car is not shown. After Boyd thus repossessed the 1941 Ford, he sold it to Miller, one of the appellees herein. Sturdivant died in December, 1947;[1] and shortly thereafter the Bank filed replevin action against Miller to recover the 1941 Ford on which the Bank claimed its mortgage to be superior. Miller filed cross-bond, retained the car, and resisted the replevin action.

A trial was commenced in the Circuit Court in 1948; but when the Circuit Judge heard the facts, detailed substantially as heretofore, he transferred the case to equity "in order to save a multiplicity of suits." In equity the Bank filed an "Amended Complaint," naming both Boyd and Miller as defendants, and claimed that if the Bank did not recover the car from Miller, then the Bank should have judgment against Boyd and Miller for $1,000 as the value of the car at the time of filing such Amended Complaint. Miller denied all rights of the Bank and called on Boyd to protect the warranty in the bill of sale from Boyd to Miller. Trial in the Chancery Court disclosed the facts substantially as heretofore detailed; and the Chancery Court refused the Bank any relief. From that decree comes this appeal.

We mention at the outset that the transactions occurred in 1947, so Act 142 of 1949 has no application. Furthermore, no party to this suit has referred to any provision of Act 386 of 1939, as found in § 75-101, *et seq.* of the Permanent Volume of Ark. Stats. Rather, the parties tried the case in the Chancery Court, and have

[1] We held in *Mutual Life Insurance Co.* v. *Sturdivant,* 215 Ark. 697, 222 S. W. 2d 812, that Sturdivant committed suicide.

briefed it in this Court, on the issue of whether the Bank's mortgage was superior to Boyd's reacquired title from Sturdivant. On that issue we reach the conclusion that the Chancery decree should be affirmed.

Sturdivant had no title to the car when he executed the mortgage to the Bank. Boyd testified that he gave Sturdivant no title papers when Sturdivant borrowed the car on the pretense of showing it to his wife; so evidently Sturdivant either found some papers in the car or prepared bogus papers to exhibit to the Bank. The motor number in the Bank's mortgage is slightly different from the actual motor number of the car. Boyd's title note was all the time superior to any claim of the Bank. See *Triplett* v. *Mansur,* 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284, and *Starnes* v. *Boyd,* 101 Ark. 469, 142 S. W. 1143.

Boyd had full right to repossess the car, because Sturdivant had violated the provision of the note by mortgaging the car to the Bank. The violation existed even though Boyd was ignorant of it. When Boyd repossessed the car under the title note, he took the car and the title as of the date of the execution of the note, because when the vendor repossessed the property under his title contract, he cancelled the sale. See *Meyer* v. *Equitable Credit Co.,* 174 Ark. 575, 297 S. W. 846, and cases there cited. See, also, West's Ark. Digest, "Sales," §§ 472, 473, and 479.

Affirmed.

HARVEY *v.* LEDBETTER.

4-9457 240 S. W. 2d 18

Opinion delivered June 4, 1951.

Rehearing denied June 25, 1951.

Moore, Burrow, Chowning & Mitchell, for appellant.

Carl Langston and *Philip DeSalvo,* for appellee.

Ed. F. McFaddin, Justice. This is a suit filed on behalf of the appellee, Clifford Paul Ledbetter, a minor, seeking, *inter alia,* to redeem from tax sale a tract of 2½ acres, hereinafter called "the property." From a decree of the Chancery Court allowing the minor to redeem, appellants bring this appeal in which they claim, *inter alia,* that the minor had no title on which to base a redemption.

In 1925 the Twin City Bank conveyed the property to C. W. Letbetter and Flora B. Letbetter, his wife. In December, 1932, C. W. Letbetter and Flora B. Letbetter executed, acknowledged and delivered a deed of the property to their son, J. Clifford Ledbetter.[1] Appellants claim that J. Clifford Ledbetter and Lois Ledbetter, his wife, contemporaneously executed and delivered an undated and unacknowledged deed of reconveyance of the same property to C. W. Letbetter and Flora B. Letbetter, his wife. Appellees deny the execution, as well as the delivery, of the said deed of reconveyance; and—as we see it—the decision in this case turns on the fact question, whether such deed of reconveyance was actually executed and delivered.

[1] The parents spelled the family name "Letbetter." The son spelled it "Ledbetter." The evidence contains explanation of the reason for the difference in spelling; but we regard the explanation as immaterial. In this opinion we will preserve the difference in spelling.

J. Clifford Ledbetter died intestate in 1935, survived by his wife, Lois Ledbetter, and one son, Clifford Paul Ledbetter. The said widow and minor are the appellees. The property forfeited to the State for nonpayment of 1938 taxes; and the tax title is now held by the appellants, V. T. Harvey and Richard H. Burleson. Mrs. Flora B. Letbetter died in 1948; and thereafter her husband, C. W. Letbetter (also one of the appellants), conveyed all his interest in the property to V. T. Harvey.

The appellees' theory of the case is: (a) that J. Clifford Ledbetter was the owner of the property at the time of his death in 1935; (b) that the property forfeited for taxes in 1938; and (c) that the minor, Clifford Paul Ledbetter, has a right, under § 84-1201, Ark. Stats., to redeem from the tax sale, even if the forfeiture for taxes was valid. The appellants' theory is: (a) that J. Clifford Ledbetter and wife executed and delivered the deed of reconveyance to C. W. Letbetter and Flora B. Letbetter; (b) that J. Clifford Ledbetter thereby conveyed all interest in the property, and his minor son, Clifford Paul Ledbetter, has no title on which to base the redemption from the tax sale[2]; (c) that C. W. Letbetter, as surviving spouse and owner of the estate of entirety, conveyed the property to the appellant, Harvey, who also has the tax title; and (d) that appellees have no interest in the property.

The foregoing are the main and salient facts. There are other matters which cloud the issues. One is the void appointment by the Pulaski Probate Court of Mrs. Flora B. Letbetter, as administratrix of the estate of J. Clifford Ledbetter, and her attempted private sale of the property to V. T. Harvey. This void appointment and private sale are explained by the attorney who handled the matter and he is not an attorney of record in this Court. The attorney was not fully informed as to the facts. Another matter is the testimony of Mrs. Lois Ledbetter and one of her relatives, that J. Clifford Ledbetter paid $2,500 in cash to his parents for the deed to the property. There is also the testimony of Mrs. Lois Ledbetter that her signature

[2] See *Bowles* v. *Dierks Lumber & Coal Co.*, 217 Ark. 892, 233 S. W. 2d 632.

on the deed of reconveyance is a forgery. This testimony will be discussed hereinafter.

In addition to insisting that there was execution and delivery of the said deed of reconveyance, the appellants have also argued the effect of Act 423 of 1941 on § 84-1201, Ark. Stats.: that is to say, (a) appellants urge that the minor, Clifford Paul Ledbetter, cannot redeem from the tax sale because the tax sale proceedings were confirmed by the Chancery Court under § 84-1315, *et seq.*, Ark. Stats., in 1947; and (b) the appellants contend that such confirmation decree cut off the minor's right to redeem. In making these contentions, appellants necessarily contend that Act 423 of 1941—which amended § 8719, Pope's Digest—had the effect of impliedly cancelling the minor's right to redeem, as allowed by § 84-1201, Ark. Stats. Mr. Justice HOLT agrees with the appellants in the contentions stated in this paragraph; and for those reasons only, he votes to reverse the Chancery decree.

We of the majority hold that a minor's right to redeem under § 84-1201, Ark. Stats., was not cut off by said Act 423 of 1941; but we have reached the conclusion that the deed of reconveyance to C. W. Letbetter and Flora B. Letbetter was actually signed by J. Clifford Ledbetter and Lois Ledbetter and was actually delivered to the grantees, C. W. and Flora B. Letbetter; and that such execution and delivery of the deed of reconveyance left the minor appellee no title with which to maintain this suit. For these reasons we hold that the Chancery decree should be reversed.

Here are some of the reasons impelling the conclusions reached:

(1)—In 1932 J. Clifford Ledbetter lived in Little Rock and was engaged in the business of making bonds for persons arrested and charged with crimes. He had no real estate in his own name, and he persuaded his mother and father to deed to him the property here in dispute, in order that he could be shown as an owner of real property in Pulaski County. Carlos Letbetter, a

brother of J. Clifford Ledbetter, and a son of C. W. and Flora B. Letbetter, testified by deposition:

"Q. Now, did your mother and father, do you know, convey this property to your brother, J. Clifford?

"A. Yes, I was present the day my brother made her a proposition of deeding the property to him so he could make additional bonds, and he in turn made a deed back to mother, and that this was for their protection, he said they could record the deed at any time.

"Q. Did you see the deed in your mother's possession?

"A. Yes, I did, but I did not pay particular attention.

"Q. But you do know it was delivered by your brother to her?

"A. Yes, sir.

"Q. Was your brother's wife, Lois Ledbetter, present when this conversation was had between your mother and your brother?

"A. No, she wasn't.

"Q. Where was the deed made up, do you know?

"A. That I could not say for sure; I believe it was Joe Wills who made those deeds.

"Q. Handing you this instrument marked Exhibit 'B' heretofore identified as a warranty deed, I ask if that is your brother's signature?

"A. Yes, it is without a doubt. He always made his J and C with a sort of flourish, and capitalized the B after the d.

"Q. Are you acquainted with your sister-in-law's signature?

"A. Not very well; apparently it is her signature as I remember it.

"Q. What did your brother say to your mother with relation to the payment for this property?

"A. Well, there was no agreement made as to the payment in the transfer of this property because mother was doing it only as a favor to him in order to make additional bonds.

"Q. What did he say regarding getting it back?

"A. He said that in making the two deeds that any time she wanted to she could record her deed and the property would automatically be hers again."

(2)—C. W. Letbetter—father of J. Clifford Ledbetter and grandfather of the minor, Clifford Paul Ledbetter —testified by deposition that as engineer of the Missouri Pacific Railroad Company on the Sunshine Special trains, he was out of the city each day and necessarily left business matters to his wife, Flora B. Letbetter. He could not recall the details of the reconveyance of the property but did testify:

"Q. Did your son Clifford pay you anything for this property?

"A. Not one cent I remember of.

"Q. What was the reason you conveyed this property to your son?

"A. So he could own some property in order to go into business.

"Q. In other words, did he tell you it was necessary he own some property to qualify as a surety?

"A. That is what I remember.

"Q. He did not own other property in the State of Arkansas?

"A. I don't think so.

"Q. And you conveyed it for that purpose?

"A. Yes, sir.

. . . . . .

"Q. Referring to the deed marked Exhibit 'B' signed by your son and wife, do you recall whether that deed was delivered to you or to Mrs. Letbetter,—

"A. I don't remember distinctly but I was simply giving him the property to use for the surety bond business and I believe he did execute a deed and give it back to me."

(3)—All of the testimony of Mrs. Lois Ledbetter is considerably weakened by the fact that she denied that she ever signed the deed of reconveyance to C. W. Letbetter and Flora B. Letbetter. Some of her admittedly genuine signatures were introduced in evidence, as also was the original deed of reconveyance; and a handwriting witness of considerable experience, after comparing the admitted signatures with the disputed one, testified that it was his opinion that the disputed signature was the genuine signature of Mrs. Lois Ledbetter. All of these instruments have been examined by us; and we believe the testimony of the handwriting witness to be true. With Mrs. Lois Ledbetter's testimony discredited on the matter of her signature, then her testimony on other vital points is considerably weakened.

(4)—The original deeds are in the transcript, and an examination of them has been most informative—*i. e.* (a) the deed from C. W. Letbetter and wife to J. Clifford Ledbetter; and (b) the deed of reconveyance from J. Clifford Ledbetter and Lois Ledbetter to C. W. Letbetter and Flora B. Letbetter. These deeds most convincingly establish that they were prepared on the same typewriter by the same person and at the same time. The attorney alleged to have prepared the deeds has been dead several years; but the deeds are mute evidence of their own genuineness. It is true that the deed of reconveyance from J. Clifford Ledbetter and Lois Ledbetter to C. W. Letbetter and Flora B. Letbetter is undated and unacknowledged; but these omissions do not affect the validity of the deed between the parties. A deed delivered passes the title between the parties though without date or acknowledgment, as the deed takes effect from delivery. See *Floyd* v. *Ricks,* 14 Ark. 286, 58 Am. Dec. 374, and *Williams* v. *Kitchell,* 212 Ark. 114, 204 S. W. 2d 873. See also 16 Am. Jur. 472.

(5)—Finally, the testimony is most convincing as to the delivery of the deed of reconveyance to C. W. Letbetter and Flora B. Letbetter. Carlos Letbetter testified that he saw this deed in the possession of his mother, Mrs. Flora B. Letbetter, in her lifetime. After her death the deed was found in her trunk, along with (a) the deed whereby she received the property from the Twin City Bank, and (b) the deed that she and her husband executed to J. Clifford Ledbetter. These three deeds were in between the pages of the abstract of the property. Thus the disputed deed of reconveyance (*i. e.,* from J. Clifford Ledbetter and wife to C. W. Letbetter and Flora B. Letbetter) was found in the possession of the grantee, Flora B. Letbetter.

In *Morton* v. *Morton,* 82 Ark. 492, 102 S. W. 213, Mr. Justice Wood, speaking for this Court, said:

"The production of a deed by the grantee is *prima facie* evidence of its delivery. 2 Greenl. Ev. § 257; *Maynard* v. *Maynard,* 10 Mass. 455; *Hatch* v. *Haskins,* 17 Me. 391; *Games* v. *Stiles,* 14 Peters, 322, 10 L. Ed. 476.

"In *Tunison* v. *Chamblin,* 88 Ill. 378, it is said: 'When a deed, duly executed, is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption.' See, also, *Ward* v. *Dougherty,* 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; *Griffin* v. *Griffin,* 125 Ill. 430, 17 N. E. 782. See *Haskill* v. *Sevier,* 25 Ark. 152."

To the same effect see *Carter* v. *McNeal,* 86 Ark. 150, 110 S. W. 222, and *Ellis* v. *Shuffield,* 202 Ark. 723, 152 S. W. 2d 535.

In the case at bar we conclude that the preponderance of the evidence establishes that J. Clifford Ledbetter and Lois Ledbetter, his wife, actually executed and delivered the deed which reconveyed the property to C. W. Letbetter and Flora B. Letbetter; that with the title thus reconveyed to C. W. Letbetter and Flora B. Letbetter, there remained no title in J. Clifford Ledbetter for his minor son to inherit from him; that the minor has no title to use as a basis for his attempted redemption

of the tax title from Harvey; and that since C. W. Letbetter, as surviving spouse of the entirety estate, has executed a deed to Harvey, his title should prevail.

Therefore, the decree of the Chancery Court is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion.

WALKER *v.* ELDRIDGE.

4-9608 240 S. W. 2d 43

Per Curiam Order of June 5, 1951.

Robert J. Brown, for appellant.

O. W. Pete Wiggins, for appellee.

PER CURIAM. Appellant and appellee were divorced in 1944. Custody of two minor children was given to the mother. A daughter, Sharon Carle Eldridge, is in her ninth year and was the subject of an action brought by the father, resulting in an order of May 23, 1951, transferring custody from the mother "during the summer vacation months." The mother was given the right to visit the child from nine o'clock until 5 each Saturday. The Chancellor stated that he would determine, "by (his) own investigation of the surroundings, where said child should be." Believing this to be a temporary order, the Court denied the right of appeal. This was error. A decree awarding or changing the custody of children is final, from which an appeal may be taken. *Gregory* v. *Jackson,* 212 Ark. 363, 205 S. W. 2d 471. See, also, *Sager*

v. *Hibbard,* 203 Ark. 672, 158 S. W. 2d 922; *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455.

The petitioner's prayer for *certiorari* will be treated as an application for appeal. The respondent is directed to deposit with the Clerk of the Chancery Court sufficient money to pay court costs, including a transcript of the record, and to make an initial payment of $50 to apply on the petitioner's attorney's fee. The Clerk of this Court will issue *certiorari* to bring up the appeal record.

MILLWEE and ROBINSON, JJ., not participating.

STATE, USE MILLER COUNTY *v.* EASON.

4-9524 240 S. W. 2d 36

Opinion delivered June 11, 1951.

G. L. Lookadoo, Thomas E. Webber and *Van Johnson,* for appellant.

Smith & Sanderson and *Shaver, Stewart & Jones,* for appellee.

Ed. F. McFaddin, Justice. This is a civil suit brought by a taxpayer, seeking to recover a Chevrolet truck alleged to be the property of Miller County, Arkansas. The suit was instituted and prosecuted, pursuant to the provisions of Act 193 of 1945, now found in § 17-304, *et seq.,* Ark. Stats.

Hon. Elmer Freeman was County Judge of Miller County for the four year period ending December 31, 1950. The appellee, I. C. Eason, was a Road Supervisor in the employ of Miller County, and had control of, and drove, the 1949 Chevrolet pickup truck here involved. In September, 1950, Judge Freeman orally ordered a new GMC truck from the Hughes Motor Company of Texarkana, with the understanding that the County would trade in the Chevrolet truck for $510 as part payment on the new GMC truck. Shortly before, or contemporaneous with the making of the contract with the Hughes Motor Company, Judge Freeman orally requested the Miller County Tax Assessor to appraise the 1949 Chevrolet truck; and the Tax Assessor gave Judge Freeman a letter, dated September 7, 1950, and reading:

"Miller County Road Dept.
"Miller County Courthouse
"Texarkana, Arkansas

"Sirs:

"On the 1949 Chevrolet ½ ton pickup, motor no. GBA 857597, I wish to submit my appraisal of $475.00.

"The appraised value of the property, described above, is given in accordance of Section 4, Act 193 of Acts of Arkansas 1945.

"Yours truly,

"/s/ L. B. Greer."

Judge Freeman also orally requested the Cargile Motor Company of Texarkana to state the value of the Chevrolet truck; and that company, under date of September 6, 1950, wrote the following letter:

"Miller County Roads
"Texarkana
"Arkansas

"Gentlemen:

"We have inspected the 1949 Chevrolet ½ ton pickup, motor no. GBA 857597, and wish to submit an offer on this truck of $500.00 either on the purchase of a new truck or an outright sale.

"Yours very truly,

"CARGILE MOTOR COMPANY."

There was no entry of any kind made in any of the records of the Miller County Court concerning any of the foregoing; and the term of the Court lapsed and a new term commenced in October, 1950.[1] Then, on December 4, 1950, Hughes Motor Company delivered to Judge Freeman the new GMC truck, accepted the Chevrolet truck as a trade-in, and filed a claim with Miller

[1] The terms of the County Court are fixed by § 22-603, Ark. Stats., to be the first Monday in January, April, July and October of each year.

County, Arkansas, which, omitting affidavit, reads entirely as follows:

"December 4, 1950

"COUNTY OF MILLER

"To: Hughes Motor Company DR.

"New GMC Truck, Model FC302,	
"Serial No. 44900. Motor No.	
"C248121716	2,493.00
"Less allowance for 1949	
"Chevrolet Truck	510.00
"New Difference	1,983.00

Appellee, I. C. Eason, in his capacity as Road Supervisor of Miller County, drove the Chevrolet truck to the Hughes Motor Company and surrendered possession of it. Then, on the same trip, I. C. Eason purchased the Chevrolet truck from Hughes Motor Company for $510 as his own property; and thereafter Miller County, Arkansas, spent $104.09 repairing the Chevrolet truck, because it was testified that the County Judge had agreed that the truck would be kept in good condition from September 6th until the delivery of the new GMC truck. On December 20, 1950, Judge Freeman allowed the claim of Hughes Motor Company for $1,983; and a warrant on the County Highway fund was drawn in payment of the claim.

Judge Freeman went out of office as County Judge on December 31, 1950; and Jewel Evers became County Judge[2] on January 1, 1951; and, as a citizen and taxpayer, instituted this suit on January 12, 1951, to recover for Miller County the Chevrolet truck then in the possession of I. C. Eason. The Hughes Motor Company

[2] The Chancellor, in his opinion, stated: "The evidence shows that Jewel Evers is an individual and taxpayer of Miller County, Arkansas, and whether the evidence shows it or not, the Court takes judicial knowledge of the fact that he is also the present County Judge of Miller County, having succeeded Judge Elmer Freeman on January 1st, 1951. In that connection, Judge Evers is to be complimented for his diligence in attempting to round-up property of Miller County, Arkansas. All transactions involving the property of the public should be inquired into carefully, regardless of when they were made."

intervened, and defended the title and possession of Eason. The Chancery Court held:

". . . that Act 193 of the Acts of the General Assembly of the State of Arkansas for the Year 1945 is applicable to the facts in this cause; that said Act has been substantially complied with in the transaction involved in this case; and that the complaint of the plaintiffs should be dismissed for want of equity."

This appeal challenges the Chancery holding and decree.

Prior to Act 193 of 1945, the law regarding the disposition of county property had been summarized by this Court in *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848:

". . . the control and management of all county property is placed in the county court, and authority is conferred on that court 'to sell and cause to be conveyed any real estate or personal property belonging to the county'."

To the same effect see *State* v. *Baxter,* 50 Ark. 447, 8 S. W. 188; *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006; and *Washington County* v. *Lynn Shelton Post,* 201 Ark. 301, 144 S. W. 2d 20. The 1945 Legislature adopted Act 193, captioned, "An Act to Prescribe the Manner in Which County Property May Be Sold and Conveyed".[3] The Act is now § 17-304, *et seq.,* Ark. Stats.; and by the said Act the Legislature prescribed definite and essential procedure to be followed when County property was to be conveyed. Since this is the first time this Act has been involved in litigation reaching this Court, we summarize the Act, insofar as concerns the issues in this case:

Section 1: "The county court . . . shall have power . . . to sell . . . any . . . property belonging to the county . . . by proceeding in the manner set forth in this Act."

[3] In 20 C. J. S. 1004, cases from various jurisdictions are cited to sustain this text: "The legislature may prescribe the manner in which county property may be sold, and such prescription must be complied with; . . ."

Section 2: "Whenever the county judge . . . shall consider it advisable . . . to sell . . . any . . . property belonging to the county, he shall cause an order to be made in the county court, setting forth (a) a description of the property to be sold, (b) the reason for such sale and (c), directing the county assessor to cause such property to be appraised at its fair market value and to certify his appraisal thereof to the county court within a time to be specified in the order. A certified copy of such order shall be delivered to the county assessor by the county clerk and the county clerk shall certify the date of the delivery . . . on the margin of the record where such order is recorded."

Section 3: ". . . the county assessor shall view the property . . . and shall cause the same to be appraised at its fair market value. The assessor shall, within the time specified in the order, file with the county clerk his written certificate of appraisal . . ."

Section 4: "If the appraised value of the property . . . is less than $500, such property may . . . be sold . . . by the county judge, either at public or private sale, for not less than three-fourths of the appraised value. . . . When such sale has been completed, the county court shall enter its order approving such sale, and such order shall set forth (a) the description of the property sold, (b) the name of the purchaser, (c) the terms of such sale . . ."

Section 5: "If the appraised value of property . . . exceeds . . . $500, the County Judge may sell such property to the highest and best bidder upon sealed bids," by following certain procedure and also subject to the Approval Board.

Section 6 provides that any conveyance of county property, not made pursuant to this Act, shall be void; and also authorizes a taxpayer's suit, such as this one. The entire section will be copied in a subsequent portion of this opinion.

I. *Substantial Compliance.* Some of the omissions that show absence of *literal* compliance with Act 193 of

1945 are: (a) no order was entered in the records of the County Court, as provided by § 2 of the Act; (b) the County Clerk was never given any order to deliver to the Assessor; (c) the Assessor did not file with the County Clerk his written certificate of appraisal, as provided by section 3; and (d) there was no order entered in the records of the County Court approving the sale of the property or containing any of the essentials stated in section 4. In short, literal compliance is wholly absent. The Chancery Court held, as previously quoted, "that said Act (193 of 1945) has been substantially complied with in the transaction involved in this case". Assuming, without deciding, that substantial, rather than literal compliance, is all that is required under Act 193 of 1945, we consider whether what was done in this case is sufficient to constitute substantial compliance.

The record shows these things to have been done: (a) Judge Freeman orally requested the Tax Assessor to appraise the Chevrolet truck; (b) the Tax Assessor wrote a letter stating his appraisal, saying that it was given in accordance with § 4[4] of the act 193; and (c) Judge Freeman received and kept the letter. Were these listed acts sufficient to constitute "substantial compliance" with the Act? In *Kasner* v. *Stanmire,* 155 Pac. 2nd 230, Justice WELCH of the Supreme Court of Oklahoma, said:

"We conceive it to be the law that substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served."

From the summary previously made, it is apparent that one of the clear purposes of the Act 193 was *to make public all dispositions* a county might make of its property. An order requiring appraisal was to be entered in the county records as the first step in any disposition. Nearly every County official was brought in as an actor in the disposition of County property: the County Judge entered the order, and delivered a copy to the County

[4] As a matter of fact, it was an attempted compliance with § 3 of the Act.

Clerk, who delivered a copy to the County Assessor, who redelivered the appraisal to the County Clerk. Then, if the property was appraised at more than $500, the Sheriff, the Treasurer and the Circuit Clerk became a Board of Approval. It is apparent (a) that the lawmakers intended that the County Judge would have to inform more persons than the County Tax Assessor; and (b) that orders would have to be entered so that any taxpayer might easily be informed. The entry of the orders is far more important than the mere writing of a letter by the Tax Assessor. The entire matter of the disposition of the Chevrolet truck, insofar as the County Court records are concerned, rested within the knowledge of the County *Judge,* who is not the County *Court.* See *Rebsamen* v. *Van Buren County,* 177 Ark. 268, 6 S. W. 2d 288; and *Lyons Machinery Co.* v. *Pike County,* 192 Ark. 531, 93 S. W. 2d 130. There was no entry of any order in the records of the County Court at any time during the entire term of Judge Freeman, except merely the allowance of $1,983 claim which is to be subsequently discussed.

We therefore reach the conclusion that there were not sufficient matters done in this case to constitute *substantial compliance* with Act 193 of 1945; and that the learned Chancery Court erred in finding that there had been substantial compliance.

II. *Ratification.* Appellee insists that when the Hughes Motor Company's claim for $1,983 was allowed by the County Court on December 20, 1950, such allowance constituted a ratification by the County Court of the conveyance of the Chevrolet pickup truck to the Hughes Motor Company, since the claim, as previously copied, contained these words:

"Less allowance for 1949
"Chevrolet Truck ..... 510.00."

To support this argument on ratification, appellee cites and relies on *Greenberg Iron Co.* v. *Dixon,* 127 Ark. 470, 192 S. W. 379; *Woodruff County* v. *Road Imp. Dist.,* 159 Ark. 374, 252 S. W. 930; *Watson & Smith* v. *Union*

County, 193 Ark. 559, 101 S. W. 2d 791; and *Watts & Sanders* v. *Myatt,* 216 Ark. 660, 226 S. W. 2d 800. The rationale of the holdings in these cases is summarized in the following language in *Watts* v. *Myatt* (*supra*):

"A county contract ineffectual because made only by the County Judge in his executive capacity may be bindingly ratified by subsequent approval by the County Court. *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, Ann. Cas. 1917D, 438. Such ratification may be by allowance of a claim for payment under the contract. *Wilcox* v. *McCallister,* 186 Ark. 901, 56 S. W. 2d 765; *Watson and Smith* v. *Union County,* 193 Ark. 559, 101 S. W. 2d 791. That was what happened on Dec. 7, 1948, in the present case. As of that date the contract was ratified."

We recognize the above quoted holding; and nothing herein changes the law as applied in the cited cases. Each of them was a case in which nothing more was required of the County Court in authorizing the contract, in the first instance, than was done by the County Court in the order allowing the claim. In other words, the act of ratification was of equal dignity and formality with what would have been required for the original act of authorization.[5] But in the case at bar the Legislature, by Act No. 193 of 1945, has prescribed certain essentials and formalities to be followed by the County Court in the disposition of county property; and the same essentials and formalities must necessarily be observed in the act of ratification, as were required to make valid the original act of authorization.

In *McCracken* v. *City of San Francisco,* 16 Cal. 591 (1. c. 623), Chief Justice FIELD of the Supreme Court of California (later Mr. Justice FIELD of the United States Supreme Court) stated the applicable rule:

"To determine the effect of these acts, as a ratification of the sale, it is necessary to consider the conditions essential to a valid ratification. To ratify, is to give

[5] In *Scott County* v. *Advance Co.,* 288 Fed. 739, 36 A. L. R. 937, the Circuit Court of Appeals discussed some limits on ratification by Arkansas Counties.

validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. *It follows, as a consequence, that where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode.* Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance." (Italics our own.)

In McQuillan on "Municipal Corporations", 3rd Ed., § 29.106, the holdings are summarized in this language:

"The ratification must be by the officer or body originally empowered to make the contract, and in the case of executory contracts in the mode and form required by law in the first instance, since ratification is equivalent to previous authorization and operates upon the act ratified in the same manner as though authority had been given originally. In other words, where contracts of a municipality are required to be made in a specified manner, and where an express contract is necessary, an invalid contract can be ratified only by an observance of the same formalities and provisions necessary to be complied with in the making of a valid contract."

The above quoted statements are applicable in the case at bar, because a county is in many respects likened to a municipal corporation. In *Eagle* v. *Beard,* 33 Ark. 497, Mr. Justice EAKIN quoted from *Laramie County* v. *Albany County,* 2 Otto. (92 U. S.) 307, 23 L. Ed. 552:

" 'Counties, cities and towns, . . . are municipal corporations, created by the authority of the Legislature; and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides.[6] . . .' "

[6] The same quotation is to be found in *City of Hot Springs* v. *Gray,* 215 Ark. 243, 219 S. W. 2d 930.

Furthermore, the County Judge—when he acts independently of the County Court—is acting as an agent of the County; and the general rule in agency matters is that the same essentials are required for ratification as are required to constitute original authorization. In 2 C. J. 485, and again in 2 C. J. S. 1088, the holdings are summarized:

"Accordingly the general rule is that whatever form of authorization would have been sufficient to clothe the agent with original authority to do an act will be sufficient to constitute a ratification of such act when done without previous authority; *and conversely that wherever the law requires a particular mode of authorization there can be no valid ratification except in the same manner.*" (Italics our own.)

Act 193 of 1945 prescribed certain preliminary essentials to be observed by the County Court before the County Judge could act as an agent of the county in making a valid disposition of the county property, even when it was appraised at less than $500. Among these essentials, we mention again: section 2 required the entry of an order in the County Court records setting forth the description of the property to be appraised, and also required that the certificate of the County Clerk be made "on the margin of the record where such order is recorded". Section 4 of the Act required that after the sale was completed "the county court shall enter its order approving such sale" and describing the property sold. So the Act required the entry of two orders in the County Court, each describing the property sold. We hold that the mere entry of an order allowing a claim against the County for the purchase of the new GMC truck, with a credit allowed for the surrender of the Chevrolet pickup truck—as was done in this case—was not an act of equal essentials and formalities with the requirements of Act 193 of 1945. In short, the ratification did not contain the essentials that were required to make the original authorization valid; and so the attempted ratification lacked sufficiency.

III. *Estoppel.* Finally, appellee says:

"By accepting, keeping and using the GMC dump truck, the county is estopped to deny the validity of its transaction with Hughes, an integral part whereof was the allowance of the trade-in value of the county's truck. It is estopped 'so far as the formality required by law is concerned.' "

To support his argument on estoppel, appellee cites and discusses these cases: *Howard County* v. *Lambright,* 72 Ark. 330, 80 S. W. 148; *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891; *International Harvester Co.* v. *Searcy County,* 136 Ark. 209, 206 S. W. 312; *Fort Smith* v. *U. S. Rubber Co.,* 184 Ark. 588, 42 S. W. 2d 1004; and *Yaffe* v. *Pulaski County,* 188 Ark. 808, 67 S. W. 2d 1017.

We find no merit in appellee's contention on estoppel. This is a proceeding instituted by a taxpayer for the benefit of the County, and § 6 of the Act 193 of 1945 says:

"Any sale or conveyance of real or personal property belonging to any county not made pursuant to the terms of this act shall be null and void and any taxpayer of the county may within two years from the date such sale is consummated bring an action in the Chancery Court of the County in which the sale is made or in any county where personal property so sold may be found for the use and benefit of the county to cancel such sale and to recover possession of the property sold; and in the event such property is recovered for the county in such action the purchaser shall not be entitled to a refund of the consideration paid by him for such sale."

We see no reason—and none has been suggested—why the above quoted Statute in all essentials should not be enforced as it is written. It contains no ambiguities and is clearly applicable to the case at bar. Anyone acquiring county property after the effective date of Act 193 of 1945 must comply with such Statute. The classic statement of Mr. Justice HOLMES[7] is most appropriate:

[7] See *Rock Island Co.* v. *U. S.,* 254 U. S. 141, 65 L. Ed. 188, 41 Sup. Ct. 55.

"Men must turn square corners when they deal with the government."

For the reasons herein stated, the decree of the Chancery Court is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion.

WESTERN CASUALTY & SURETY COMPANY *v.* LINEBARGER.

4-9434 239 S. W. 2d 753

Opinion delivered May 21, 1951.

Rehearing denied June 18, 1951.

Wright, Harrison, Lindsey & Upton, Charles R. Leick and *Barber, Henry & Thurman,* for appellant.

E. Charles Eichenbaum and *A. F. House,* for appellee.

ROBINSON, J. The appellee, Linebarger, was the principal contractor in the construction of the Rivercliff Apartments, consisting of several large apartment buildings, the contract price being $1,140,870 cash plus 565

shares of the common capital stock of the owner. Floyd D. Cart entered into a contract with Linebarger whereby Cart, for a stipulated consideration per square yard according to the method of plastering used, agreed to do the plastering on the job, and made a performance bond with the Western Casualty & Surety Company as surety. After Cart had done considerable work and had been paid $33,500 by Linebarger, Cart breached his contract by abandoning the project. Linebarger called on the surety to carry out the contract which the surety refused to do. Linebarger then employed another sub-contractor to do the job, and after the work was completed, filed suit against Cart for breach of contract and claimed damages in the sum of $36,491.73. The surety Company was made a party defendant.

Cart answered denying he was indebted to Linebarger in any amount and, by way of cross-complaint, alleged that Linebarger was in fact indebted to him in the sum of $5,737.26. The Western Casualty & Surety Company adopted the answer of Cart, and also contends that it is not liable for the following reasons:

"(1) Failure of Linebarger to pay on monthly estimates in accordance with the provisions of the contract.

"(2) Failure of Linebarger to withhold 10% retainage in accordance with the provisions of the contract.

"(3) Substantial and material changes made in the contract and specifications by Linebarger without notices to Surety."

The Chancellor made a finding that Cart was indebted to Linebarger in the sum of $33,201.78, and that Cart was entitled to credits against that sum in the amount of $9,058.67, and rendered a judgment in favor of Linebarger against Cart in the sum of $24,143.11.

It was the further finding of the court that the Surety Company, insofar as the corrective work was concerned, was only liable for 33 and 1/3 per cent of the cost thereof, and gave judgment against the surety Company in the sum of $16,222.60.

There was considerable evidence introduced in the case by both sides, and to set out here an abstract of the testimony showing just how the Chancellor arrived at his finding would unduly extend this opinion and would serve no useful purpose.

The parties hereto do not disagree as to the law governing this case, but there is a sharp disagreement with reference to the facts. The contract provides: "It is agreed and understood between the parties hereto that the party of the first part (Cart) agrees to accept, and the party of the second part (Linebarger) agrees to pay for the work performed on the basis of monthly estimates prepared by the party of the first part and checked for quantity and performance by the party of the second part."

Appellants contend that the evidence is clear and convincing that Linebarger did not require the monthly estimates and check them for quantity and quality. On the other hand, the appellees introduced evidence to prove that the monthly estimates were required and checked. Appellants also contend that Linebarger did not retain 10% in accordance with the terms of the contract and evidence was introduced tending to show that 10% was not retained. However, Linebarger introduced evidence to the contrary.

Appellants next claim that there were substantial and material changes in the contract without notice to the surety. Appellees say there has been no change in the contract. In this respect the surety Company asserts that the contract calls for a gross consideration to be paid Cart of $62,551.70. But, the contract specifically provides for payment on a unit basis. The contract mentions the number of square yards of several different methods of plastering and the price per square yard of each method, and then the contract provides: "It is further understood and agreed that the quantities set forth above are of close approximation only and that the unit prices govern." The total price on the unit basis came to $50,884.34. In view of the provision of the contract as to the unit price governing, it cannot be said

that there was a change in the contract in this respect. The prime contract by reference was made part of the contract between Cart and Linebarger. Article 15 of the prime contract is as follows:

"Art. 15. Change in the Work.—The owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

"In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

"The value of any such extra work or change shall be determined in one or more of the following ways:

"(a) By estimate and acceptance in a lump sum.

"(b) By unit prices named in the contract or subsequently agreed upon.

"(c) By cost and percentage or by cost and a fixed fee."

In the case at bar the architect was also the principal owner. He authorized and directed smooth finish of the plaster, instead of sand finish, in the bathrooms and kitchens, for which Cart was allowed additional compensation. A change of 1700 square yards of plastering from rock lath walls to metal lath walls was also authorized and directed by the architect owner, and the surety

Company now claims that this change voided the bond, but the Chancellor found that the items above mentioned were such changes as were anticipated by Article 15 of the prime contract.

The last and what we think is the most serious contention made by appellants is that the contract called for the use of "Knapp-mold" at the points where the plaster joined the concrete, the purpose of this mold being to prevent the plaster from cracking due to the difference in the expansion and contraction quality of the materials. This mold could not be readily obtained at the time and, at a conference between Cart, Linebarger and the architect-owner, Cart stated that he had been doing plaster work for a long time and that he could make a V-joint which would serve the same purpose as the "Knapp-mold". The parties agreed to the V-joint, but Cart did not make the V-joint. He plastered flush with the concrete and as a result the plaster cracked.

Several experts in building-construction testified that the change from "Knapp-mold" to a V-joint would not be a material change in the plans. Furthermore, insofar as the corrective work is concerned, the trial court held the surety Company liable for only one-third of the cost thereof. On cross-appeal appellees contend that the trial court erred in not holding the surety Company liable for the entire cost of the corrective work.

After considering all the facts in the case, we cannot say that the Chancellor's findings are contrary to the preponderance of the evidence.

Affirmed on both appeal and cross-appeal.

George Rose Smith, J., not participating.

Paul Ward, J., dissents.

AMALGAMATED ASSOC. OF STREET AND ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES *v.* MORLEY, COMMISSIONER OF REVENUES.

4-9521 239 S. W. 2d 745

Opinion delivered May 21, 1951.

Kenneth C. Coffelt, for appellant.

O. T. Ward, for appellee.

PAUL WARD, J. On December 3, 1946, appellants, as plaintiffs, filed their petition for a permanent injunction against the Commissioner of Revenues for the State of Arkansas, asking the court to permanently enjoin said Commissioner from collecting the five dollars required by the statute as a fee for all chauffeurs. An abstract of the material portions of the petition is set out as follows:

Come the plaintiffs in their own right and as officers of the above named labor organization and on behalf of the individual members thereof, and petition the court to restrain the defendant, in his official capacity or otherwise, from attempting to impose and collect chauffeur's license as provided by Act 291 of the 1937 Acts of the General Assembly of the State of Arkansas, and state; First, that the said Act reads as follows:

"Section 1. In addition to any other chauffeurs or drivers license required to be paid by law, every person desiring to operate a motor vehicle as a chauffeur, which

is hereby defined to mean any person operating a motor vehicle as a mechanic or employee or for hire, shall file in the office of the Commissioner of Revenues, on a blank to be supplied by said Commissioner, an application to be properly sworn to, which shall include his name and address and the motor power of the vehicle or vehicles he is competent to operate, and shall pay a registration fee of Five Dollars ($5.00) per annum." (We do not quote the entire Act as set out in the petition, as the above seems to be all that is material.)

Second, that the plaintiffs and the persons on behalf of whom this action is brought are employed by the Capital Transportation Company in the cities of Little Rock and North Little Rock, Pulaski County, Arkansas, as operators of street cars and public utility transportation buses under an operating franchise by the said Capital Transportation Company with the cities of Little Rock and North Little Rock.

Third, that plaintiffs do not come within the provisions or purview of said Act 291 of 1937, as they are not "operators of vehicles for hire."

Fourth, that plaintiffs individually are operators but not chauffeurs and said law is not applicable to them also for said reason. That plaintiffs operate the vehicles furnished by their employer under the franchise with said cities for a stipulated fare per passenger over a designated route and they are under the exclusive control of their employer, taking instructions from the officials thereof and are not under the control, supervision, or direction of said passengers as in cases of chauffeurs operating a vehicle for hire as was intended by the legislative body at the time said act was passed.

Fifth, that the plaintiffs have not been compelled to pay said tax since the passage of said act of 1937.

That the defendant, as Commissioner of Revenues in the State of Arkansas, is wrongfully attempting to collect chauffeur's license from these plaintiffs and unless restrained and enjoined by an order of this court

from so doing, plaintiffs and members of said local organization, will suffer irreparable damage and injury and will be forced to pay a tax or license fee which they do not owe.

Wherefore, plaintiffs pray that the defendant be permanently restrained from imposing and collecting said tax, designated as a chauffeur's license fee under the provisions of the Act of 1937.

On December 13, 1946, the defendant filed an answer in which it is stated: First, he admits that he is now attempting to enforce the provisions of Act 291 of 1937 as it applies to the members of this union, and states specifically that the members of this union who operate buses for the Capital Transportation Company, are chauffeurs within the meaning and definition of this Act; Second, that he denies each and every other material allegation of the petition.

So far as the record discloses no further steps were taken in this case until October 4, 1950, when the attorneys for both sides entered into the following stipulation:

"It is stipulated and agreed by and between the parties hereto and their attorneys, that the following statement shall be considered as the undisputed evidence in this case.

"That the Amalgamated Association of Street and Electric Railway and Motor Coach Employees of America, Local No. 704, W. W. Thompson, President, C. T. Grable, Secretary, is a Union of bus operators for public and private utilities and municipalities in the United States; that said Union has various Locals in the various Cities throughout the country; that Local No. 704 set forth in the complaint is the Local Union in Little Rock and has 304 members; that the members of this Union in Little Rock are the drivers and bus operators for the various buses owned and operated by the Capital Transportation Company in the City of Little Rock, Arkansas; that the Capital Transportation Company is a corporation, organized and existing under the laws of the

State of Delaware and is duly authorized to engage in business in Arkansas, with its principal offices in Little Rock; that it has a franchise with the City of Little Rock for the operation of the buses owned by it, within the city limits of Little Rock; that said buses are operated by said corporation for the purpose of transporting passengers for hire within the city; that the members of Local No. 704 operate the said buses for said corporation as its bus drivers; the said company operates approximately 100 buses within said territory; each of the drivers of said buses receives a regular wage for his work as bus operator from said corporation, based on an hourly pay basis; the Union, for the drivers, and the corporation have a working agreement which is negotiated and renewed annually under the labor laws of the State of Arkansas and the United States; the drivers and the members of the Union are not permitted in any manner to receive any private compensation or tips from any individual, other than the corporation for their work and activities in operating the bus; no passenger is permitted or allowed to pay any sum of money to the operators for the service of the operators; the passengers on the buses pay to the corporation a fixed fee for riding the buses from one destination to another, within said city; the public generally are accepted as passengers on each bus; no citizen within the territory has any more privilege than any other; each of the bus operators have fixed routes to travel with the bus they operate; when a passenger boards a bus, it is the duty of the operator of the bus to accept the fee charged the passenger for his ride upon the bus; the bus operator sees to it that the fee for the corporation for the passenger's ride upon the bus is collected and deposited in the fare box on the bus, and a service man, who is a member of the Union, takes the money out of the box and turns it over to the office of the corporation when the run of the bus operator for the day is completed."

No testimony was taken by either side and the case was submitted on the pleadings and the above stipulation to the Chancellor who, on December 15, 1950, ruled against the contention of the plaintiffs, stating that the

complaint should be dismissed for want of equity and that the Commissioner of Revenues of this State is entitled to collect the duly authorized chauffeur's fee or license of five dollars each for the drivers of said buses beginning January 1, 1951. From said holding appellants now prosecute this appeal.

Appellants contend that they do not come within the purview of Act 291 quoted above, stating that no case has been found where we have defined the word "chauffeur". The definition by Webster is, "Any person who operates a motor vehicle and who directly or indirectly receives compensation for services in connection with such operation." However, before resorting to the dictionary all the statutes bearing on the question should be fully examined, as was stated in the case of *Morley, Commissioner of Revenues* v. *Capital Transportation Company,* 217 Ark. 583, 232 S. W. 2d 641, decided by this court June 12, 1950. There, in discussing the meaning of the words "motor buses" the court said: "The answer cannot be arrived at merely by looking into the dictionary, but must be discovered from examination of the statute as a whole." We find that Act 280 of the Acts of 1937 § 3(c) defined the word chauffeur: "Chauffeur. Every person who is employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property." In addition to the above we have a further statutory definition of the word "chauffeur" in Act 235 of the Acts of 1949, § 1 (h) (Ark. Stats. 1947, § 75-201, sub. par. h) in the following words: "Every person desiring to operate a motor vehicle as chauffeur, which is hereby defined to mean any person operating a motor vehicle, either for himself or for another, as his or her occupation, to transport other persons or cargo, . . .".

As we consider the language of § 1, Act 291 of 1937 it leaves little room for doubt that the word "chauffeur" is defined clearly enough to include appellants in their employment as set out in the stipulation copied above.

It defines "chauffeur", ". . . to mean any person operating a motor vehicle . . . as an employee or for hire . . .". Any doubt that might remain, however, is fully dispelled by the definitions as set out in the later enactments referred to heretofore in this opinion.

From the stipulation set out above we find: "That the members of Local No. 704 operate the said buses for said corporation as its bus drivers; . . . (and) each of the drivers of said buses receive a regular wage for their work as bus operators from said corporation . . .".

We note that appellants' petition filed in the lower court contains the allegation that the Capital Transportation Company operates buses and "street cars". From this allegation in the petition it might be inferred that some of the buses driven by appellants are operated or propelled by electricity, but we fail to find that this allegation is substantiated by the stipulation. Moreover, it was held in the case of *Morley, Commissioner of Revenues* v. *Capital Transportation Company, supra,* that buses propelled by electricity are "motor buses" as defined by our statutes.

It is noted that this suit was not brought by the individuals upon whom the license fee is imposed, but by the Union to which they belong. The propriety of this procedure is not questioned by appellee and therefore we express no opinion thereon.

From what has been said above it follows that the lower court was correct in denying appellants' petition for a permanent injunction and its decree is therefore affirmed.

JABER *v.* MILLER.

4-9507 239 S. W. 2d 760

Opinion delivered May 21, 1951.

Rehearing denied June 18, 1951.

Lem C. Bryan and *Warner & Warner,* for appellant.

Franklin Wilder and *Lawrence S. Morgan,* for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by Miller to obtain cancellation of fourteen promissory notes, each in the sum of $175, held by the appellant, Jaber. The plaintiff's theory is that these notes represent monthly rent upon a certain business building in Fort Smith for the period beginning January 1, 1950, and ending March 1, 1951. The building was destroyed by fire on December 3, 1949, and the plaintiff contends that his obligation to pay rent then terminated. The defendant contends that the notes were given not for rent but as deferred payments for the assignment of a lease for-

merly held by Jaber. The chancellor, in an opinion reflecting a careful study of the matter, concluded that the notes were intended to be rental payments and therefore should be canceled.

In 1945 Jaber rented the building from its owner for a five-year term beginning March 1, 1946, and ending March 1, 1951. The lease reserved a monthly rent of $200 and provided that the lease would terminate if the premises were destroyed by fire. Jaber conducted a rug shop in the building until 1949, when he sold his stock of merchandise at public auction and transferred the lease to Norber & Son. Whether this instrument of transfer is an assignment or a sublease is the pivotal issue in this case.

In form the document is an assignment rather than a sublease. It is entitled "Contract and Assignment." After reciting the existence of the five-year lease the instrument provides that Jaber "hereby transfers and assigns" to Norber & Son "the aforesaid lease contract . . . for the remainder of the term of said lease." It also provides that "in consideration of the sale and assignment of said lease contract" Norber & Son have paid Jaber $700 in cash and have executed five promissory notes for $700 each, due serially at specified four-month intervals. Norber & Son agree to pay to the owner of the property the stipulated rental of $200 a month, and Jaber reserves the right to retake possession if Norber & Son fail to pay the rent or the notes. The instrument contains no provision governing the rights of the parties in case the building is destroyed by fire.

Later on the plaintiff, Miller, obtained a transfer of the lease from Norber & Son. Miller, being unable to pay the $700 notes as they came due, arranged with Jaber to divide the payments into monthly installments of $175 each. He and the Norbers accordingly executed the notes now in controversy, which Jaber accepted in substitution for those of the original notes that were still unpaid. When the premises burned Miller contended that Jaber's transfer to Norber & Son had been a sublease rather than an assignment and that the notes therefore represented

rent. Miller now argues that, under the rule that a sublease terminates when the primary lease terminates, his sublease ended when the fire had the effect of terminating the original lease.

In most jurisdictions the question of whether an instrument is an assignment or a sublease is determined by principles applicable to feudal tenures. In a line of cases beginning in the year 1371 the English courts worked out the rules for distinguishing between an assignment and a sublease. See Ferrier, "Can There be a Sublease for the Entire Term?", 18 Calif. L. Rev. 1. The doctrine established in England is quite simple: If the instrument purports to transfer the lessee's estate for the entire remainder of the term it is an assignment, regardless of its form or of the parties' intention. Conversely, if the instrument purports to transfer the lessee's estate for less than the entire term—even for a day less—it is a sublease, regardless of its form or of the parties' intention.

The arbitrary distinction drawn at common law is manifestly at variance with the usual conception of assignments and subleases. We think of an assignment as the outright transfer of all or part of an existing lease, the assignee stepping into the shoes of the assignor. A sublease, on the other hand, involves the creation of a new tenancy between the sublessor and the sublessee, so that the sublessor is both a tenant and a landlord. The common law distinction is logical only in the light of feudal property law.

In feudal times every one except the king held land by tenure from some one higher in the hierarchy of feudal ownership. "The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is 'held of' the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately. In the simplest case he holds it immediately of the king; only

the king and he have rights in it. But it well may happen that between him and the king there stand other persons; *Z* holds immediately of *Y*, who holds of *X*, who holds of *V*, who holds . . . of *A*, who holds of the king." Pollock and Maitland, History of English Law (2d Ed.), vol. I, p. 232. In feudal law each person owed duties, such as that of military service or the payment of rent, to his overlord. To enforce these duties the overlord had the remedy of distress, being the seizure of chattels found on the land.

It is evident that in feudal theory a person must himself have an estate in the land in order to maintain his place in the structure of ownership. Hence if a tenant transferred his entire term he parted with his interest in the property. The English courts therefore held that the transferee of the entire term held of the original lessor, that such a transferee was bound by the covenants in the original lease, and that he was entitled to enforce whatever duties that lease imposed upon the landlord. The intention of the parties had nothing to do with the matter; the sole question was whether the first lessee retained a reversion that enabled him to hold his place in the chain of ownership.

The injustice of these inflexible rules has often been pointed out. Suppose that *A* makes a lease to *B* for a certain rental. *B* then executes to *C* what both parties intend to be a sublease as that term is generally understood, but the sublease is for the entire term. If *C* in good faith pays his rent to *B*, as the contract requires, he does so at his peril. For the courts say that the contract is really an assignment, and therefore *C*'s primary obligation is to *A* if the latter elects to accept *C* as his tenant. Consequently *A* can collect the rent from the subtenant even though the sublessor has already been paid. For a fuller discussion of this possibility of double liability on the part of the subtenant see Darling, "Is a Sublease for the Residue of a Lessee's Term in Effect an Assignment?", 16 Amer. L. Rev. 16, 21.

Not only may the common law rule operate with injustice to the subtenant; it can be equally harsh upon

the sublessor. Again suppose that *A* makes a lease to *B* for a certain rental. *B* then makes to *C* what *B* considers a profitable sublease for twice the original rent. But *B* makes the mistake of attempting to sublet for the entire term instead of retaining a reversion of a day. The instrument is therefore an assignment, and if the original landlord acquires the subtenant's rights there is a merger which prevents *B* from being able to collect the increased rent. That was the situation in *Webb* v. *Russell,* 3 T. R. 393, 100 Eng. Reprint 639. The court felt compelled to recognize the merger, but in doing so Lord Kenyon said: "It seems to me, with all the inclination which we have to support the action (and we have hitherto delayed giving judgment in the hopes of being able to find some ground on which the plaintiff's demand might be sustained), that it cannot be supported. The defence which is made is made of a most unrighteous and unconscious nature; but unfortunately for the plaintiff the mode which she has taken to enforce her demand cannot be supported." Kent, in his Commentaries (14th Ed.), p. 105, refers to this case as reaching an "inequitable result"; Williams and Eastwood, in their work on Real Property, p. 206, call it an "unpleasant result." Yet when the identical question arose in California the court felt bound to hold that the same distasteful merger had taken place. *Smiley* v. *Van Winkle,* 6 Calif. 605.

A decided majority of the American courts have adopted the English doctrine in its entirety. Tiffany, Landlord & Tenant, § 151. A minority of our courts have made timid but praiseworthy attempts to soften the harshness of the common law rule. In several jurisdictions the courts follow the intention of the parties in controversies between the sublessor and the sublessee, thus preserving the inequities of feudal times only when the original landlord is concerned. *Johnson* v. *Moxley,* 216 Ala. 466, 113 S. 656; *Saling* v. *Flesch et al.,* 85 Mont. 106, 277 P. 612; *Mausert* v. *Feigenspan,* 68 N. J. Eq. 671, 63 Atl. 610, 64 A. 801; *Hobbs* v. *Cawley,* 35 N. M. 413, 299 P. 1073.

In other jurisdictions the courts have gone as far as possible to find something that might be said to constitute a reversion in what the parties intended to be a sublease. In some States, notably Massachusetts, it has been held that if the sublessor reserves a right of re-entry for nonpayment of rent this is a sufficient reversionary estate to make the instrument a sublease. *Dunlap* v. *Bullard,* 131 Mass. 161; *Davis* v. *Vidal,* 105 Tex. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084. But even these decisions have been criticized on the ground that at common law a right of re-entry was a mere chose in action instead of a reversionary estate. See, for example, Tiffany, *supra,* § 151.

The appellee urges us to follow the Massachusetts rule and to hold that since Jaber reserved rights of re-entry his transfer to Norber & Son was a sublease. We are not in sympathy with this view. It may be true that a right of re-entry for condition broken has now attained the status of an estate in Arkansas. See *Moore* v. *Sharpe,* 91 Ark. 407, 121 S. W. 341, 23 L. R. A., N. S. 937; Core, "Transmissibility of Certain Contingent Future Interests," 5 Ark. L. Rev. 111. Even so, the Massachusetts rule was adopted to carry out the intention of parties who thought they were making a sublease rather than an assignment. Here the instrument is in form an assignment, and it would be an obvious perversion of the rule to apply it as a means of defeating intention.

In Arkansas the distinction between a sublease and an assignment has been considered in only one case, and then in such circumstances that the litigants were in agreement as to the law. In *Pennsylvania Min. Co.* v. *Bailey,* 110 Ark. 287, 161 S. W. 200, the transcript in this court at first contained an instrument purporting to transfer possession for only ten years out of a term of about eighteen years. The appellant accordingly argued that the instrument was a sublease under the orthodox common law rule. The appellee then had the transcript amended to show that the original lessee had later executed an instrument purporting to transfer the entire remaining term. In view of this amendment to the tran-

script the appellee merely adopted the appellant's argument as to the distinction between an assignment and a sublease. It was therefore to be expected that the court would announce the traditional view, since both parties were urging that position. In one other case, *Crump* v. *Tolbert,* 210 Ark. 920, 198 S. W. 2d 518, we adverted by dictum to the customary distinction between the two instruments.

In this state of the law we do not feel compelled to adhere to an unjust rule which was logical only in the days of feudalism. The execution of leases is a very practical matter that occurs a hundred times a day without legal assistance. The layman appreciates the common sense distinction between a sublease and an assignment, but he would not even suspect the existence of the common law distinction. As Darling, *supra,* puts it: "Every one knows that a tenant may in turn let to others, and the latter thereby assumes no obligations to the owner of the property; but who would guess that this could only be done for a time falling short by something—a day or an hour is sufficient—of the whole term? And who, not familiar with the subject of feudal tenures, could give a reason why it is held to be so?" It was of such a situation that Holmes was thinking when he said: "It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." The Path of the Law, 10 Harv. L. Rev. 457, 469. The rule now in question was laid down some years before the reign of Henry IV.

The English distinction between an assignment and a sublease is not a rule of property in the sense that titles or property rights depend upon its continued existence. A lawyer trained in common law technicalities can prepare either instrument without fear that it will be construed to be the other. But for the less skilled lawyer or for the layman the common law rule is simply a trap that leads to hardship and injustice by refusing to permit the parties to accomplish the result they seek.

For these reasons we adopt as the rule in this State the principle that the intention of the parties is to govern in determining whether an instrument is an assignment or a sublease. If, for example, a tenant has leased an apartment for a year and is compelled to move to another city, we know of no reason why he should not be able to sublease it for a higher rent without needlessly retaining a reversion for the last day of the term. The duration of the primary term, as compared to the length of the sublease, may in some instances be a factor in arriving at the parties' intention, but we do not think it should be the sole consideration. The *Bailey* case, to the extent that it is contrary to this opinion, is overruled.

In the case at bar it cannot be doubted that the parties intended an assignment and not a sublease. The document is so entitled. All its language is that of an assignment rather than that of a sublease. The consideration is stated to be in payment for the lease and not in satisfaction of a tenant's debt to his landlord. The deferred payments are evidenced by promissory notes, which are not ordinarily given by one making a lease. From the appellee's point of view it is unfortunate that the assignment makes no provision for the contingency of a fire, but the appellant's position is certainly not without equity. Jaber sold his merchandise at public auction, and doubtless at reduced prices, in order to vacate the premises for his assignees. Whether he would have taken the same course had the contract provided for a cancellation of the deferred payments in case of a fire we have no way of knowing. A decision either way works a hardship on the losing party. In this situation we do not feel called upon to supply a provision in the assignment which might have been, but was not, demanded by the assignees.

Reversed.

HOLT, J., not participating

THOMPSON *v.* SEMMES.

4-9506 239 S. W. 2d 589

Opinion delivered May 21, 1951.

Carroll W. Johnston, for appellant.

Gordon & Gordon, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Paul Thompson, instituted this action as case No. 3479 in circuit court against appellee, C. M. Semmes, doing business as Semmes Motor Co., seeking actual and punitive damages in the sum of $2,529.22 for breach of appellee's alleged contract to promptly repair appellant's motor truck, which was damaged by fire in January, 1949. Appellee interposed a plea of *res judicata* which was sustained, and a verdict directed in appellee's favor, at the conclusion of the testimony offered by appellant.

Appellee's plea of *res judicata* is based on a judgment rendered in the same court in case No. 3420. In that case appellant filed suit against appellee and Service Fire Insurance Co. of New York on August 31, 1949, alleging a contract or agreement by both defendants to repair appellant's truck, a breach of said contract and asking the same relief against both defendants as that sought against appellee in case No. 3479. Appellee filed a general demurrer in No. 3420 alleging that the complaint did not state facts sufficient to constitute a cause of action against him. On October 5, 1949, the trial court

sustained the demurrer and dismissed the complaint as to appellee. Appellant then proceeded against the insurance company but took a non-suit against it on April 26, 1950, and filed the instant suit (No. 3479) on September 8, 1950.

The sole issue on this appeal is whether the order of October 5, 1949, sustaining appellee's demurrer and dismissing the complaint in case No. 3420 is *res judicata* and conclusive of appellant's rights against appellee in the instant action. The well-established general rule is that a judgment sustaining a demurrer based on the ground that the complaint does not state facts sufficient to constitute a cause of action is an adjudication on the merits which bars another action on the same facts. 50 C. J. S., Judgments, § 643b; 41 Am. Jur., Pleading, § 251.

This court has consistently followed the general rule. It was held in *McNeese* v. *Raines,* 182 Ark. 1091, 34 S. W. 2d 225, that a circuit court judgment sustaining a demurrer to a complaint on the ground that it did not state facts sufficient to constitute a cause of action against the defendant was a final and appealable order and became a decision upon the merits of the case. The court 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. Numerous other cases to the same effect might be cited, but the rule is so well settled as to render this unnecessary." See, also, *Tri-*

County Highway Improvement Dist. v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627; *Robinson* v. *Pringle,* 196 Ark. 219, 117 S. W. 2d 25.

The rule is otherwise where plaintiff fails on demurrer in the first action from the omission of an essential allegation in his complaint which is fully supplied in the second suit. In such case the judgment in the first action is no bar to the second although the respective actions were instituted to enforce the same right. *Barrentine* v. *Henry Wrape Co., supra.*

Appellant insists that the particular matter which he seeks to litigate in the instant suit was not determined in the first suit because that action was filed under the belief that his contract for repairs was with Service Fire Insurance Co., and that appellee was merely acting as agent of the insurance company. An examination of the respective complaints in the two actions refutes this contention. Appellant alleged the same facts, the same cause of action and sought the same relief against both appellee and the insurance company in the first suit as he alleged against appellee in the instant action. It follows that the judgment of October 5, 1949, sustaining the demurrer of appellee to the complaint in case No. 3420 was a final order going to the merits and from which no appeal was taken. The trial court correctly held that this judgment was conclusive of all issues raised in the instant case and a complete bar against maintenance of the present action.

Affirmed.

MITCHELL *v.* MITCHELL.

4-9510 239 S. W. 2d 748

Opinion delivered May 28, 1951.

Cecil E. Johnson, Jr., for appellant.

ROBINSON, J. On the 10th day of October, 1950, a complaint styled "William Frank Mitchell, in his own right and by his father L. B. Mitchell, as next friend, and individually, v. Bobby Jean Warren Mitchell" was filed in the Chancery Court. The complaint alleged that on the 4th day of October, 1950, William Frank Mitchell and Bobby Jean Mitchell were joined in marriage; that William Frank Mitchell was 18 years of age at the time; that he did not obtain the consent of his parents to the said marriage; and asked that the marriage be annulled. The case was tried on the 20th day of November, 1950. Neither William Frank Mitchell nor Bobby Jean Mitchell appeared as witnesses. The Chancellor denied the petition for annulment. § 55-102, Ark. Stats., provides:

"Every male who shall have arrived at the full age of 18 years, and every female who shall have arrived at the full age of 16 years, shall be capable in law of contracting marriage; if under those ages their marriage shall be absolutely void.

"Provided that males under the age of 21 years and females under the age of 18 years shall furnish the clerk, before the marriage license can be issued, satisfactory evidence of the consent of the parent or parents or guardian to such marriage, and, in all cases where the consent of the parent or parents or guardian is not provided or there shall have been a misrepresentation of age by a contracting party, such marriage contract may

be set aside and annulled upon the application of the parent or parents or guardian to the Chancery Court having jurisdiction of the cause." * * *

The only evidence in the record as to the age of Bobby Jean Mitchell is the marriage license which gives her age as 19. In any event, she is probably of legal age as no guardian *ad litem* was appointed to defend for her. The undisputed evidence is that William Frank Mitchell was 19 years of age at the time of the marriage. Therefore, the marriage is not void but may be annulled. The Statute provides: "Such marriage contract *may* be set aside and annulled upon application of the parent or parents, or guardian." The word "may" as used in the Statute does not mean "shall," but gives the court some discretion in the matter. *Mo. Pac. R. R. Co.* v. *Fish,* 181 Ark. 863, 28 S. W. 2d 333; *Smith* v. *John Hancock Mutual Life Ins. Co.,* 195 Ark. 699, 114 S. W. 2d 15.

In other words, the Statute gives to the parents the right to petition the court to annul the marriage and provides that the court *may* grant the petition. If it were the intention of the Legislature that the Chancellor should have no discretion in the matter, but would be compelled to grant the petition on application of the parent, parents or guardian, in all probability, the Statute would have been framed to read: "Such marriage contract shall be set aside and annulled upon application of the parent, or parents, or guardian." But such is not the case. The Statute provides that the marriage contract *may* be set aside upon such application. To hold that the Chancellor is required by law to grant the annulment on application of a parent or guardian and has no discretion in the matter, we would have to read something into the Statute that is not there, which would be changing the plain meaning of the Act. If the Chancellor had no discretion in the matter, one parent could have the marriage annulled, regardless of the injustice and hardship that might be caused by such annulment, and regardless of the fact that both parties to the marriage and three of the parents might vigorously protest the annulment.

In the case of *Keith* v. *Pack,* 182 Tenn. 420, 187 S. W. 2d 618, 159 A. L. R. 101, the Supreme Court of Tennessee had occasion to construe a similar Statute and there said: "It will have been observed that § 1 of the Act from which we first above quoted provides that a marriage, either of the parties being under 16 years of age, 'may be annulled upon proper proceedings'. The use of the word *may* obviously commits to the court a certain discretion as to the annulment of such marriages. The provision is not imperative. If it were, it could not be reconciled with § 6. The marriage is valid until set aside by the court." Likewise, in the case at bar, as provided by the first paragraph of the Arkansas Statute above quoted, the marriage is valid until such time as it is annulled by the court.

William Frank Mitchell will be 21 years of age before November 20th of this year. Neither he nor his wife, Bobby Jean Mitchell, was called as a witness in this case, and we cannot say that the Chancellor abused his discretion by not rendering a decree annulling the marriage.

Affirmed.

WARD, J., concurs; MILLWEE and GEORGE ROSE SMITH, JJ., dissent.

GEORGE ROSE SMITH, J., dissenting. I think the majority misconceive the purpose of § 55-102, which was enacted in 1941. The earlier statute, § 9044 of Pope's Digest, required parental consent to a minor's marriage but did not expressly permit the parent to bring an action for annulment when the consent had not been given. In *Witherington* v. *Witherington,* 200 Ark. 802, 141 S. W. 2d 30, the majority held that a nonconsenting parent could not bring an action to annul the marriage. Judge Frank G. Smith wrote a vigorous dissent in which he said: "If we refuse to give effect to and to enforce these mandatory statutory provisions, the result must be that any boy over 17 or any girl over 14 may contract a marriage which the parent or guardian cannot annul if there was found a county clerk, or a deputy, whose willing-

ness to earn the fee allowed by law for issuing a marriage license induced him to accept as true the affidavit of the parties as to their ages, although he may know the affidavit is false. . . . For the reasons stated, young Witherington was incapable of consenting to the marriage, and it should be annulled at the suit of his parent unless we are to discard the provisions of the law intended to prevent secret marriages of impetuous minors."

The Witherington case was decided in 1940, and the present statute was passed at the next session of the legislature. The statute was evidently intended to make Judge Smith's dissenting opinion the law. See Friday, "Nonage Marriages in Arkansas," 1 Ark. L. Rev. 55. And this change in the law is entirely logical. Ordinarily a minor's contracts are voidable, but the legislature has seen fit to permit a minor to enter into a binding marriage contract with the consent of his parents. If the parents do not have a right to have the marriage annulled when it was performed without their consent, then, as Judge Smith pointed out, the requirement of consent is meaningless in most cases.

But, say the majority, the present statute uses the permissive word "may." True, but it seems plain to me that the discretion lies with the parents and not with the court. The parents may ratify the marriage if they chose to, or they may seek its annulment. The legislature evidently thought that the parents, who have known their child all his life, are best fitted to decide whether he is sufficiently mature to enter into a contract so important as marriage. Here the chancellor did not even see these two young people in the courtroom, but he is nevertheless permitted to overrule the parents' judgment in the matter. Had the legislature intended for the chancellor's discretion to govern I think they would have required the chancellor to approve underage marriages in the first instance. But it is the parents' consent which is required, and I am not convinced that the legislature meant to give the chancellor the power to ratify a marriage which he could not have authorized before the ceremony took place.

4-9518 239 S. W. 2d 750

Opinion delivered May 28, 1951.

[redacted]

O. D. Longstreth, Jr., Dave E. Witt, Joseph Brooks and *Wm. J. Kirby,* for appellant.

Jack Holt and *John F. Park,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, Irving Newcomb, Jr., was discharged from the Little Rock police force by the Chief of Police on July 17, 1950, for violation of Article 3, § 9 of the Civil Service Rules and Regulations of the Police Department.[1] The letter of discharge specifically charged ". . . that you did on Saturday night, July 15, 1950, at approximately 7:45 p. m.

[1] Section 9 reads as follows: "Behavior on the part of any member of the Police Department unbecoming a gentleman, or of such nature as to bring disgrace or disrepute upon the Department, or any member thereof, shall, after a hearing thereon be punished by suspension without pay for not more than thirty days or dismissal from the service."

strike a Negro man, Bud Beal, 702 Abeles, on the head with your slapper knocking him to the pavement and then kicking or stomping him in the chest while he was lying on the pavement." Appellee denied the charge and requested a hearing before the Civil Service Commission. A hearing was held August 11, 1950, before three of the five commissioners. After taking the case under advisement, the full commission, on August 22, 1950, sustained the action of the Chief of Police in discharging appellee.

On appeal to Pulaski Circuit Court the case was heard on the transcript of the evidence before the Civil Service Commission and the additional testimony of fifteen witnesses before the court. This appeal is from the judgment of the circuit court reversing the order of the commission and ordering appellee's reinstatement as patrolman.

In reaching a conclusion on the pivotal question as to whether appellee used more force than was necessary in arresting Beal on the night in question, the circuit judge made extensive findings of fact and conclusions of law which were incorporated in the judgment. At the outset counsel for appellants frankly concede that a fair preponderance of the evidence fully supports the circuit court's findings, "(1) That Beal had been drinking and the officer was performing his sworn duty in making the arrest, (2) that Beal had a bad reputation for violence, and (3) that the officer knew of Beal's inclination to be unruly and was justified in being unusually careful under the circumstances."

The incident resulting in appellee's discharge occurred at Sixth and Townsend Streets in the City of Little Rock. On the night in question appellee and another patrolman, Tom Owen, parked their squad car in front of a cafe and beer tavern on the south side of Sixth Street. Appellee waited in the car while Owen made a routine check of the cafe. Appellee testified that about two minutes later he saw Beal across the street standing on the curb cursing; that he got out of the car, walked across the street and observed that Beal was

drunk; that he told Beal to go to the car across the street and that he was under arrest for drunkenness; and that when they reached the car appellee opened the door and told Beal to get in.

Appellee then testified: "At that time Bud Beal stated he would not get in the automobile, he had done nothing to be arrested for and that I would not put him in the automobile. I talked to Bud Beal and tried to get him in the automobile and at that time I took hold of his left elbow in an attempt to lead him into the automobile. As I pulled forward Beal pulled back away from me and at that time the only thing that I saw was his right fist clenched coming around at me; I blocked his right with my left and had nothing in my hand at that time; I slapped Bud Beal with my open hand the first lick that was struck, and at that time I tried to crowd Beal in an attempt to get hold of him because I had only padded him down, that is just run the hand over the pockets, did not have a chance to thoroughly search Bud Beal and at the time we both engaged in combat his arms were around my shoulder and we were twisting and turning in the fight and I wound up on the left rear fender of car No. 19. At that time Officer Owen came out of the cafe and something distracted Bud Beal's attention because he released my right arm. When he released my right arm I grabbed my leather slapper out of my back pocket and struck him once on his left cheek. And he released my left hand and started up with his hand again and at that time I struck him and knocked him to the pavement." Appellee further testified that he then stepped over Beal, caught him by the belt and with the assistance of Owen placed Beal in the car and took him to police headquarters where charges of drunkenness, disturbing the peace and resisting arrest were placed against Beal.

Beal was released from jail about 10:30 p. m. by the night Chief of Police and entered a hospital where he remained over night. A physician who examined him about 2:30 the next morning found bruises near the left eye and behind the left ear and a one-inch laceration of

the scalp. He found no trauma or bruises to the chest or abdominal areas although Beal complained of tenderness in those areas. He detected the odor of alcohol about Beal, but stated that the latter was not intoxicated at the time of the examination.

In his testimony Beal admitted that he refused to enter the squad car, stated that he had not "had a drop to drink" and denied that he was cursing. He stated that he was talking to two men at the time of the arrest but, neither of the parties named appeared as a witness at either hearing. He denied making any attempt to strike appellee and stated that when appellee ordered him to get in the car he held both hands up with his left hand open and the right hand clenched about some money he was carrying at the time. He also stated, and appellee denied, that the latter stomped him after knocking him down with the slapper. Five purported eyewitnesses supported Beal's statement that appellee kicked or stomped him after he was knocked down, while Owen and six other such witnesses supported appellee's version of the difficulty and were just as positive that appellee did not stomp or kick Beal. The medical evidence tends to support the testimony on behalf of appellee that Beal was not kicked in the chest or abdomen as charged.

In his findings the circuit judge stated that the case would be tried *de novo* and the findings of the commission treated as having no binding force on the court. In so ruling, the trial court was apparently following our holding in the case of *Civil Service Commission of Van Buren, Ark.,* v. *Matlock,* 206 Ark. 1145, 178 S. W. 2d 662, where in construing an earlier civil service act (Ark. Stats., § 19-1605), we said: "The statute (§ 9949 of Pope's Digest) regulating proceedings of this kind requires the circuit court, on appeal from the action of the Commission, to hear same on the record of the proceedings before the Commission, and also upon such additional relevant and competent testimony as either party may offer. This amounts to a provision for a trial of the matter *de novo* in the circuit court.

"In discussing the rule as to proceedings in court on appeal from the action of administrative bodies this rule is laid down in Am. Jur., Vol. 42, p. 664: 'The statute may expressly provide that the court may hear new or additional evidence, and this may be construed as requiring a trial *de novo.*' "

The controlling statute in the instant case is § 2 of Act 326 of 1949 (Ark. Stats., § 19-1032) which provides: "The findings of the Commission shall be subject to a right of review by the Circuit Court within whose jurisdiction the Board of Civil Service Commission is situated. Said appeal shall be filed in the Circuit Clerk's office within thirty (30) days from the date of the rendition of the decision by the Commission. Such trials before the Court shall be upon the transcript from the Clerk or Secretary of the Board of Civil Service Commissioners, which transcript shall contain all of the evidence introduced before the Board of Civil Service Commissioners, and any such other evidence that the parties thereto desire to introduce, provided same is legal, relevant and competent." While this statute does not specifically provide for a trial *de novo* in the circuit court, as was provided in the earlier act, we think the effect of the language used is to authorize a *de novo* hearing in the circuit court on the record before the Commission plus any additional testimony that might be offered at the hearing in the circuit court.

Appellants contend that no additional evidence was introduced in the circuit court upon the primary issue as to whether appellee used unnecessary force in effecting the arrest of Beal. It is further argued that since the evidence before the Commission on this issue was in hopeless conflict, it cannot be said that the Commission's finding was against the preponderance of the evidence if any weight whatever is to be given thereto. We cannot agree with the assertion that the additional testimony before the circuit court has no bearing on whether appellee used unnecessary force in making the arrest. It is true that no additional eyewitnesses to the difficulty at the scene of the arrest testified in circuit

court. However, there was considerable testimony in the circuit court to the effect that Beal was intoxicated when brought to police headquarters and at the time of his release; that Beal had a bad reputation for violence, which was well known to appellee; and that appellee had a good reputation as a peace officer. These were matters properly to be considered by the court in determining the question of appellee's guilt or innocence of the charges. The Commission did not have the benefit of this additional evidence which, if heard by that body, might have led to a different decision.

We conclude that the Legislature in enacting Act 326, *supra,* intended to provide for a *de novo* hearing by the circuit court on the record before the Commission and any additional competent testimony that either party might desire to introduce; and that this court should hear the matter *de novo* on the entire record before the circuit court, as in chancery cases. While this necessarily means that neither the circuit court nor this court, on appeal, is bound by the findings and conclusions of the trial tribunal, it does not mean that due deference is not to be accorded the trial tribunal's finding as to the preponderance of the evidence where the testimony is hopelessly conflicting, or evenly balanced. Although we try chancery cases *de novo,* we have frequently said that the judgment of the chancellor on the question of the preponderance of the evidence will be considered as persuasive when the evidence is conflicting and evenly poised, or nearly so. *Greenlee* v. *Rowland,* 85 Ark. 101, 107 S. W. 193; *Benton* v. *Southern Engine & Boiler Works,* 101 Ark. 493, 142 S. W. 1138; *Civil Service Commission of Van Buren, Arkansas,* v. *Matlock, supra.*

The findings and conclusions of the trial judge show that he carefully and fully considered the evidence before the Commission along with the additional testimony originally heard in circuit court. We are unable to say that these findings are against the preponderance of the evidence. The judgment is, therefore, affirmed.

HOLT, J., not participating.

GRIFFIN SMITH, C.J., and GEORGE ROSE SMITH, J., dissent.

4-9520 239 S. W. 2d 1018

Opinion delivered May 28, 1951.

Rehearing denied June 25, 1951.

[redacted]

J. F. Holtzendorff, Virgil R. Moncrief and *John W. Moncrief,* for appellant.

M. F. Elms, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee to recover a balance alleged to be due upon a contract under which he produced a rice crop upon land owned by the appellant. The defendant contended below that the parties had already agreed upon a final settlement of their accounts and that in any event the items which the plaintiff sought to collect were to be paid by the tenant rather than by the landlord. The jury returned a verdict for the plaintiff in the amount of $866.09, upon which judgment was entered.

The two litigants were the only witnesses at the trial, and no objections were made to any material testimony. In January, 1949, the parties made a written contract by

which Triska leased certain land to Savage, primarily for the production of rice. The contract provides that Triska will furnish the seed rice, water for irrigation, and all machinery necessary for cultivation and harvesting, and that Savage will perform all necessary labor in return for one-fourth of the rice crop. After a crop had been made under this arrangement the present dispute arose.

Triska contends that the parties arrived at a settlement in November, 1949. He testified that he then owed Savage a balance of $128.08 and that he accepted seventy-five bushels of inferior rice as a final settlement of the account. Savage, however, disputes this version of the matter. Savage testified that when Triska bought this rice he had not yet "figured out how much I owed him and how much he owed me." Savage said that he had never been told how many bushels of rice were produced in all and that the only statements he received were three penciled accountings. These statements were received in evidence and appear to be merely periodic statements of an account current, the last one being dated in October. Upon this conflicting testimony the trial court properly submitted this issue to the jury.

The items which Savage seeks to recover represent expenditures for fuel, oil, gasoline, grease, binder twine, and the hire of wagons and teams. The written contract is silent as to all these items. At the trial both parties tacitly treated the contract as ambiguous and were permitted to testify without objection as to their recollection of the oral negotiations that led to the written agreement. Savage testified that the understanding was that the landlord would furnish everything except labor, while Triska said that he was to furnish only the items specifically mentioned in the contract. The document is equally susceptible of either interpretation. We have held that when a written contract is ambiguous its meaning should be left to the jury. *Agey* v. *Pederson,* 191 Ark. 497, 86 S. W. 2d 930. Here the court followed that course, and the verdict concludes this issue.

It was Triska's attorney who drafted the contract. Triska complains of an instruction by which the court told the jury that if there were any ambiguity in the contract it was to be construed against the party who had prepared it. This is a correct declaration of a familiar rule of law, and we find no error in the giving of such a charge. In a number of cases similar instructions concerning the interpretation of ambiguous contracts have been approved. *Metropolitan Life Ins. Co.* v. *Bovello,* 56 App. D. C. 275, 12 F. 2d 810; *Clarke* v. *New Amsterdam Cas. Co.,* 180 Calif. 76, 179 P. 195; Branson, Instructions to Juries (3d Ed.) § 1254. It may true, as the appellant urges, that other rules of construction are also pertinent to the interpretation of this agreement. But if the defendant wanted the jury to consider those rules it was his duty to submit instructions embodying them, and that he did not do.

Affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* BROWN & ROOT, INC.

4-9509 239 S. W. 2d 1012

Opinion delivered June 4, 1951.

[redacted]

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

House, Moses & Holmes and *William M. Clark,* for appellee.

PAUL WARD, J. Appellees are a group of contractors, operating under the name of Ozark Dam Constructors, and are and have for some time been engaged in constructing Bull Shoals Dam on White River in Marion County, Arkansas. Necessary to the operation of a project of such magnitude they have large quantities of equipment consisting of locomotives, tracks, conveyors, cranes, bulldozers and machinery for the preparation of concrete, etc. In order to carry on their operations and to keep this vast amount of equipment in repair, and to supply their men with tools and accessories, they are required to make numerous purchases from time to time. Many of the purchased items come from outside the State of Arkansas. During the month of April, 1949, they purchased 85 such items of personal property, all from outside the State and the total purchase price amounted to $35,799.83.

Appellant, the Commissioner of Revenues for Arkansas, took the position that appellees were obligated under Act 487 of 1949, to pay the two per cent Use Tax on all of said purchases, which tax amounted to $716. Appellees paid the tax to the Commissioner, under protest, as the Act provides, claiming they were exempt therefrom under the exemption clause contained in the Act as set forth in § 6(d) thereof. Said § 6 is the same as § 84-3106 of the Ark. Stats. and the pertinent part reads as follows:

"Section 6. Exemptions. There are hereby specifically exempted from the taxes levied in this Act:

. . .

"(d) Tangible personal property used by manufacturers or processors or distributors for further processing, compounding, or manufacturing; tangible personal property used for repair, replacement, or expansion of existing manufacturing or processing facilities or in creating new manufacturing or processing facilities; and tangible personal property used in the repair, replacement, or expansion of existing, or in the creation of new, facilities used for public transmission, communication, or transportation purpose."

Appellees brought suit in the circuit court against the Commissioner for a return of the $716 paid under protest. The lower court found in favor of appellees and rendered judgment for the full amount and the Commissioner prosecutes this appeal.

Appellees admit they are liable for the tax unless exempted as indicated before and both sides agree that the only question involved is the interpretation of § 6(d) set out above. Sub-section (d) lends itself to further division into three parts, and it is so presented and discussed in appellees' brief. For the sake of brevity and clarity we will state these three sub-divisions in our own language. Part 1: Tangible personal property used by manufacturers for further processing is exempt. Part 2: Tangible personal property used in creating a new manufacturing facility is exempt. Part 3: Tangible personal property used in creating new facilities used for public transmission or communication is exempt. Appellees contend they are exempt under all three provisions, but insist, of course, that it is sufficient to show they are exempt under any one. In our opinion the one most favorable to appellees is the second provision and therefore our consideration will be limited to that one only.

Before deciding whether the items purchased by the appellees come within the exemption clause, two principal questions or issues (both of which are discussed

fully by the parties to this action) must first be resolved. First, will Bull Shoals Dam when constructed be used to generate or manufacture electricity within the provisions of the exemption clause? Second, will the Dam be a manufacturing facility within the meaning of the same clause? It is obvious that both questions must be resolved favorably to appellees if they are to prevail.

As to the first question, appellant calls attention to the language used in the Act of Congress, Public Law 228, 1941, authorizing the construction of the Dam and also to the preliminary reports of the U. S. Engineers which indicate, he says, that the main purpose of the Dam is for flood control and not to generate electricity. We recognize that such interpretation is reasonable and we also realize that the U. S. District Court of Alabama has announced in the case of *Ashwander et al.* v. *Tenn. Valley Authority et al.,* 8 Fed. Supp. 893, that the government has no authority to construct dams for the sole or principal purpose of generating electricity. But the opinion goes on to say that when such a dam is constructed it may be used to produce electricity and that under certain circumstances the electricity may be sold to the public. It is common knowledge that this is frequently being done. It is alleged in appellees' complaint and admitted in appellant's answer, that:

"The dual purposes of the dam (and resulting reservoir) are the generation and transmission of electric energy and power and the control of floods. The upper portion of the water storage reservoir created by the dam, for a water depth of 41 feet, has the purpose of aiding in the regulation of floods on the upper White River and will be used for this purpose an average of 20 days per year, and the remaining portion, for a water depth of 66 feet, is provided for and has the purpose of generation of electric energy and power. Initially the power output of the dam will approximate 575 million kilowatt hours in a year of average stream flow, with 3 turbines and generators in operation. Ultimately, a total of 8 turbines and generators are to be installed, and the dam is designed to provide and to accommodate the

total of 8 turbines and generators which are expected to proportionately increase the average power output."

It must therefore be admitted that at least one of the two primary uses of the Dam will be that of generating electric energy, and we think that is sufficient to bring it within the purview of the Use Tax Act and the exemption clause. To hold otherwise would be to erect an imaginary demarcation line between the primary and secondary uses and purpose of a dam or manufacturing plant which could only result in confusion and uncertainty. It is our view that it is sufficient if a substantial use and purpose of the Dam is to generate electricity. To this effect is the holding in the case of *Commissioner of Corporations and Taxation* v. *Assessors of Boston,* 321 Mass. 90, 71 N. E. 2d 874. There the court rejected the contention of the Assessors that the manufacturing operations of a corporation must comprise its principal business before it can be properly classified as a manufacturing corporation. Among other things the court said: "Corporations whose manufacturing operations are substantial, whether viewed with respect to the financial receipts they bring to the corporation, or the proportion of the entire corporate income that they comprise, or the percentage of the entire capital which is invested in them, or the number of persons employed in them as compared with the total number of employees of the corporations, or the ratio to the entire business activities of the corporation, must be regarded as manufacturing corporations within our statutory definitions specifying those that are exempted from local taxation of their machinery."

There can be little doubt that the desire of the Legislature to encourage new industries to locate in the State prompted the passage of this exemption section, and it is proper to view and interpret the section in that light. This fact was recognized by the Massachusetts court in the case of *Assessors of Boston* v. *Commissioner of Corporations and Taxation,* 323 Mass. 730, 84 N. E. 2d 129, where this language was used: "The statutes granting exemption from the local tax on the machinery of cor-

porations engaged in manufacturing must be fairly construed and reasonably applied in order to effectuate the legislative intent and purpose to promote the general welfare of the commonwealth by inducing new industries to locate here . . .".

This leaves for consideration the second question, is Bull Shoals Dam a manufacturing facility within the meaning of § 6(d)? It may not be generally considered that the generation of electricity is a manufacturing process, and so far as we are informed our own court has not passed directly on this question, but other courts have held such to be the case. The Alabama court in the case of *Curry* v. *Ala. Power Company,* 243 Ala. 53, 8 So. 2d 521 had under consideration a use tax statute which exempted machines used in "manufacturing" tangible personal property. After stating that this question had been presented to the court from various angles and under different subjects and circumstances, and after reviewing many authorities, the court stated that it was ready to decide the question presented and did so in the following language: ". . . We are constrained to consider and declare an electric light company a manufacturing corporation to all intents and purposes." Similar announcements were made in *Beggs* v. *Edison Electric Illuminating Co.,* 96 Ala. 295, 11 So. 381; *People* v. *Knickerbocker Ice Co.,* 99 N. Y. 181, 1 N. E. 669; and *Kentucky Electric Co.* v. *Buechel,* 146 Ky. 660, 143 S. W. 58, 38 L. R. A., N. S. 907.

In view of the above judicial pronouncements we are of the opinion that the Dam when constructed will be a facility for manufacturing electric energy, and that appellees come within the provisions of § 6(d). This leaves open however the question as to what extent the articles in controversy are exempt. We think the intent of the Legislature, as gathered from the language used, was to exempt only such items of personal tangible property as actually went into the construction of the Dam and became some part thereof. It appears to us that it would be a strained construction of the intent of the Legislature as expressed in the exemption clause and one that

would lead to unreasonable extremes to hold that gloves, goggles and flashlight batteries for use of employees of the constructors, and repair parts for locomotives (to mention a few of the items for which exemption is claimed) are used *in creating* the Dam. If it is said these items are used *in creating* the Dam, then why not include medicine and even the motor vehicles and gasoline used in transporting the men and equipment from distant places to the place of construction? Also under such construction it would be possible for a contractor to buy valuable equipment tax fee, to construct a small manufacturing plant in this state and when the job was finished the equipment would be available for other construction work. We think no such intent can reasonably be attributed to the Legislature, and we know of no limits or demarcation lines to fix other than mentioned above.

It would serve no useful purpose to set out the entire list of articles as they are set out in the record and approved for accuracy by both sides. It would be difficult if not impossible for this court to determine just what items are or are not exempt under the limitation announced, but it does appear that some items (such as those mentioned above) are not exempt. It may be necessary in some instances to have the items more fully described and their uses explained before a decision can be made. For this reason and others set forth above the judgment of the lower court is reversed and the cause is remanded for other proceedings consistent with this opinion.

In the opinion of Justices Holt and Robinson tangible personal property used in creating the Dam means tangible personal property which is used in the construction of the Dam and becomes a part thereof, such as the cement and steel which becomes a part of the Dam, also the machinery connected with the structure and by which it is made to function, and to this extent agree with the majority. However they think the tangible personal property consumed in creating the Dam as distinguished from the tools and machinery which are ordinarily used

by the contractors in their business and which are not consumed or worn out in creating the Dam should also be exempt.

The Chief Justice concurs in so much of the opinion as sustains the tax, but does not agree that the hydro-electric plant in contemplation is the type of industry the General Assembly sought to exempt from the tax in question. The answer is found in the fact that under Federal decisions the dam can be constructed only in aid of navigation or for flood control, and the structure and materials entering into it are not, therefore, within the law's purpose in setting up exemptions.

ED. F. MCFADDIN, *Justice* (Dissenting). I concur in so much of the majority opinion as sustains the tax[1] levied, and dissent from so much of the majority opinion as allows the appellees (constructors) any exemption from the tax imposed. I am convinced that the constructors have not brought themselves within the purview of the exemption clause.

The constructors here are claiming exemption from paying the Use Tax on materials used in the construction of a multiple purpose dam: that is, the dam is designed for (a) flood control, (b) a navigation project, and (c) a hydro-electric generating plant. The language of the Statute, relied on by the majority to justify any exemption, is this: ". . . tangible personal property used . . . in creating new manufacturing or processing facilities;". Other language contained in the same paragraph—*i.e.*, § 6 (d) of Act 487 of 1949—reads: ". . . tangible personal property used in . . . the creation of new facilities used for public transmission, communication, or transportation purposes."

Certainly neither the flood control nor the navigation project is within the purview of the exemption lan-

[1] Neither side discusses the constitutionality of the Use Tax levied by Act 487 of 1949. I regard the constitutionality as still an open question in this State, in view of certain language in *Mann* v. *McCarroll*, 198 Ark. 628, 130 S. W. 2d 72, as explained and discussed in *McLeod* v. *Dilworth*, 205 Ark. 780, 171 S. W. 2d 62. Because the constitutionality of the Use Tax has not been raised in this case, it is not discussed in this opinion.

guage, so the question is whether exemption is to be allowed for materials going into a multiple purpose dam, when only one use of the dam will at most be within the exemption clause. The law is well settled that exemption clauses are strictly construed against the taxpayer. In *Wiseman* v. *Arkansas Wholesale Grocers Asso.*, 192 Ark. 313, 90 S. W. 2d 987, Mr. Justice MEHAFFY cited authorities from Arkansas and other States to sustain this statement:

"In all cases of doubt as to the legislative intention or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption, bringing himself clearly within the terms of such conditions as the statute may impose."

In 51 Am. Jur. 526, the holdings generally are summarized in this statement:

"When the statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against the one who asserts the claim of exemption, . . . An exemption from taxation must be clearly defined and founded upon plain language, without doubt or ambiguity. Whenever doubt arises it is to be resolved against the exemption. These principles have been variously expressed. Thus, it is asserted that a claim to a tax exemption must be in terms too plain to be mistaken; that it must be founded upon language which cannot be otherwise reasonably construed, in clear and unmistakable words, or in regard to which there is no doubt as to meaning; that it must be granted in explicit terms; that it must be clear beyond a reasonable doubt; that it must be so plain as to leave no room for controversy, or so clear and unmistakable as to leave no doubt of the legislative purpose. No claim of exemption from taxation can be sustained unless within the express letter or the necessary scope of the exempting clause."

As illustrative of the strict construction applied to exemption clauses, the *prospective use* of property is not

sufficient to allow an exemption from taxation. See 51 Am. Jur. 542, and 61 C. J. 401. The burden is on one claiming an exemption to bring himself within the clear purview of the exemption sought; and this rule has been applied to cases involving the collection of Use Taxes. See 47 Am. Jur. 258, and Annotations in 129 A. L. R. 238 and 153 A. L. R. 628. In the case at bar the exemption is claimed by the constructors for materials to be used in a dam designed for flood control, a navigation project AND a hydro-electric generating plant. Only the latter—hydro-electric generating plant—is an exemption allowed by the Statute. The constructors are using the materials for the construction of a project, two uses of which are not within the exemption clause. In other words, they have not brought themselves entirely within the purview of the exemption. Therefore, they should not be allowed any exemption.

In *Missouri Pacific Hospital Asso.* v. *Pulaski County,* 211 Ark. 9, 199 S. W. 2d 329, we refused tax exemption to a hospital because the property was not "used exclusively for public charity." We held that the failure, to use the hospital exclusively within the purview of the exemption clause, thereby deprived the claimant of tax exemption. Applying the rationale of that holding to the case at bar it follows—as I see it—that the constructors have not shown that the items, on which exemption is sought were used exclusively for a purpose exempted by the Statute. Therefore, I am of the opinion that appellees are not entitled to any tax exemption under the Statute invoked.

DODD *v.* MILLS.

4-9493 240 S. W. 2d 25

Opinion delivered June 4, 1951.

H. A. Tucker and *Wood & Chesnutt,* for appellant.

B. W. Thomas and *Hebert & Dobbs,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from dismissal of plaintiff's suit to recover $5,500 she paid on the purchase price of property on Lake Hamilton. The contract stipulated that with payment of the balance of $28,970 a warranty deed showing good title, or policies of title insurance, would be furnished. After occupying the premises for several months Mrs. Dodd ascertained that restrictions running with the land limited its use to residential purposes, hence an unimpaired title could not be given. The Chancellor found that *laches* barred recovery.

Because credibility of witnesses is involved in the plea that the seller informed the buyer regarding the restrictions now complained of, it is necessary to mention some of the factual background.

In 1939 Horace M. Mills resigned as collector of county taxes in Texas. He was convicted of embezzlement and served a prison sentence. Upon release in 1941 he came to Garland county, Arkansas, and for the past few years has claimed Hot Springs as his home. Judgment for the tax shortage of $17,197.96 has not been satisfied. Appellee's mother, Mrs. Ida Mills, is a resident of Smith county, Texas. Horace handles her investments as attorney in fact. In this manner Mrs. Mills acquired, for $18,000, Lot 9 of Block D, Point Lookout subdivision.

The purchase was made in October, 1947. Horace testified that he used $1,800 of his own money, and that his mother paid the difference. Some improvements were thereafter made, but the value is not shown.

Mrs. Opal L. Dodd—a native of Nebraska, but for nine years owner and operator of a "motel" at Santa Monica, California,—came to Hot Springs in July, 1948, having sold her business. She is a widow with two children: a son 20 years of age, and a daughter two years younger. The three rented a lakeside cottage for temporary use, but immediately began scanning the newspapers to determine where desirable property could be procured. In this way Mrs. Dodd found advertisements by the Park Realty Company, with which Sam Ashabranner was at that time connected. Mrs. Dodd preferred a residence fronting Lake Hamilton with grounds suitable for cottages that might be built at reasonable costs. She thought week-end lettings would produce enough revenue to justify the enterprise as a whole. In selling the California property Mrs. Dodd had received $15,000 cash and a note for $60,000.

In 1948 Ashabranner was a licensed realtor and was actively engaged in selling the type of property Mrs. Dodd believed she wanted. He testified that the Mills estate had not been listed with his company; but remembering a conversation he had recently had with Mills, the realtor concluded he would "take a shot in the dark," and when Mrs. Dodd explained that she was not financially able to purchase another place offered at $49,000, Ashabranner took Mrs. Dodd to see Mills, who permitted an inspection of the place she later contracted to buy. Ashabranner testified that Mrs. Dodd expressed satisfaction with the place—"it was exactly what she was looking for." However, she wanted her daughter to be satisfied. A second appointment was made with Mills. Ashabranner drove out with Mrs. Dodd and with her daughter. He was not sure that the son accompanied them. Ashabranner's testimony was that when Mrs. Dodd first inspected the property Mills told her there were some building restrictions, but he wasn't certain what they were.

Ashabranner's testimony on this point is copied in the margin.[1]

The realtor thought he told Mrs. Dodd that she probably would not want to put up structures costing less than $2,000:—"you couldn't build anything very nice for less than that, could you?"—and she replied that he was probably correct. This, said the witness, was the substance of discussions relating to restrictions.

Horace Mills testified that when Ashabranner and Mrs. Dodd called the first time he told them the place was not for sale. Mills first met Ashabranner about a month before when some Texas prospects were brought to look at the place. Thereafter he had not seen Ashabranner until July 18th. After the informal inspection during the morning, Mrs. Dodd returned with her two children and Ashabranner. In the meantime Mills had communicated with the agent of a Mr. Foster, from whom he proposed to purchase a nearby home in the event Mrs. Dodd concluded to buy at the price he intended to ask. Mills said that because of painting requirements he reduced by $530 the $35,000 he had at first asked.

Before the Offer and Acceptance had been signed by either of the parties [said Mills] he voluntarily stated in the presence of all that the property was restricted to residential use. According to Mills, Ashabranner, at Mrs. Dodd's request, then telephoned and had the abstract verified, and "Ashabranner [came from the telephone] and quoted [the language of the restrictions as set out in the abstract] almost word for word. He didn't read from notes—just gave us the substance." The witness was quite positive that Ashabranner's discussion of

[1] Said Mr. Ashabranner: "[Mr. Mills] had told her there was a restriction on the property but he wasn't clear just what the restriction was—what she couldn't build or what she could build—so I asked him where the abstract was and he said First Federal had it and I called the First Federal and Mrs. Dodd was sitting in the room right next to the one where the telephone was, right at the door; I remember that very clearly, and I called Betty what's-her-name down at the First Federal, I don't know her last name, and had her read the restrictions from Mr. Mills' abstract to me and she did. I hung up and told Mrs. Dodd as best I could just what the restriction was, said that she couldn't build any boat landing, or couldn't build any buildings for less than $2,000 and I quoted as near as I could what she read back to me to Mrs. Dodd."

the restrictions occurred in the presence of Mrs. Dodd and her two children.

The down-payment of $4,000 was evidenced by Mrs. Dodd's check-draft on a Nebraska bank. It is dated July 20—two days later than the Offer and Acceptance, and was payable to Park Realty Company. The check was written on an Arkansas Trust Company form supplied by Ashabranner.

Mills testified that "up to that time" his discussions with Ashabranner and Mrs. Dodd had been on a cash basis; he did not know that terms were to be asked, although he consented that Ashabranner might retain a commission of $1,750, following a disagreement as to the amount.

Although Mills disclaimed any intention of selling on time-payment, he readily admitted instructing Ashabranner to apply to the First Federal Savings & Loan Association for an abstract. The Association held a $12,500 mortgage on the property.

Emphasizing his dissent from the proposal relating to credit, Mills said that Ashabranner brought Mrs. Dodd to see him the day after the Offer and Acceptance had been signed and explained why it would be necessary to make an escrow agreement. Mrs. Dodd produced letters tending to authenticate her contention that the $60,000 note was prime paper and that it could be sold upon short notice. Mills thereupon consented to a delay of 10 or 15 days.

Up to this time Mrs. Dodd had not been represented by counsel. She did not know any attorney in Hot Springs, and had to depend upon the recommendations by strangers. Ashabranner mentioned Virgil Evans,[2] to whom Mrs. Dodd applied. In consequence of a temporary understanding a joint letter was addressed to Evans August 3rd, identifying the sale, the then unpaid balance of $30,470, the execution of Mrs. Ida Mills' warranty deed and its deposit with Evans, Mrs. Dodd's prom-

[2] Mr. Evans' representation of Mrs. Dodd was professional and entirely ethical in all respects, and it is not even hinted that he acted other than for the client's best interests.

ise to pay the balance within fifteen days, and the seller's obligations to clear the property of all liens, etc.

Mills testified to conversations with Mrs. Dodd after the joint letter to Evans had been signed. He was short of money, but succeeded in procuring from Mrs. Dodd an additional $1,500 in consideration of a 30-day extension. The new agreement was prepared by Mills and dated August 27th. In the meantime he had received from Evans as escrow agent the deed executed by his mother and held under the joint letter contract of August 3rd. Evans was leaving for two weeks and expected the deal to be closed during his absence. As a matter of fact, Mrs. Dodd had employed Evans to go to California and sell the $60,000 note—a mission he successfully performed. In connection with the extension agreement, Mills testified: "We talked it over and they agreed to pay $1,500 more if I'd give them additional time—thirty days to sell the note—which was all right with me." Other than the conversation Mills said he had in the presence of Ashabranner, Mrs. Dodd, and her two children, nothing touching the restrictions had been mentioned—"nothing was said about it when we closed the deal."

Mills testified that he owed certain obligations—including $18,000 to a bank at Jackson, Miss.,—and that he had pledged $183,000 worth of securities. Half of these were later sold for $20,000.

After the contract of August 3d had been made Mrs. Dodd took possession of the lakeside property and kept it until September of the following year—a period of thirteen months; but in February preceding the surrender in September, Mrs. Dodd told Mills she would not go through with the deal. Mills said that Mrs. Dodd told him she wasn't going to get out until he refunded $3,000. "This was the latter part of February, [but] I had spoken to her two or three times—from January till then."

On cross-examination Mills was asked why, if the reservations were explained to Mrs. Dodd, nothing was

said in either of the three writings concerning them. Referring to the Offer and Acceptance, Mills replied: "That was just an interest in the sale: I didn't consider it a sale—not final; it was just an agreement." When asked whether he was familiar with oil leases and real estate transactions Mills replied that he had been working along those lines since he was 17 years of age—"I've had plenty of experience." Question: "So you are a man of wide experience on trades involving the exchange and sale of property, . . . [yet] you signed [this statement]: 'It is understood that the owner or owners shall furnish complete abstract showing good title, or policies of title insurance.' Now you signed that, binding you to give [Mrs. Dodd] her complete abstract of title—giving her good title with no restrictions or conditions, didn't you?" A. "I didn't see anything about restrictions or conditions in there." Q. "You said, 'complete abstract, showing good title?' " A. "I did give her abstract showing good title." Q. "You call it—with the restrictions in there—a good and complete title?" A. "I accepted it that way for residence. . . . I didn't tell Mr. Evans anything about restrictions. He had the abstract."

Mrs. Dodd testified very positively that when discussing the property with Mills and Ashabranner she told them it would be necessary, if the transaction went through, to sacrifice the $60,000 note, that she intended to build cottages to be rented, and that Mills walked over the place with her. Pointing to specific locations, he said, "You can put one here, another here, and one over there." And he then added, "in fact, I've been [contemplating?] doing that myself——putting in a retaining wall in there to hold for the second row of cottages." Ashabranner, she said, went to the telephone after inquiry had been made regarding restrictions, then came back with the statement: "There are no restrictions: you can build what you like here."

Dennis, Mrs. Dodd's son, testified that he had listened to his mother's testimony "about seeking a place on which to establish a tourist court or motel for an

income.'' The tentative contract was signed in Mills' home. Both Mills and Ashabranner assured his mother that there were no building restrictions. They stressed the point by saying that Vance Bryant was building, ''and you could see by the work that he had done that a lot of money was invested, and that a man of his standing wouldn't put that [amount] of money [in such a project] if there were restrictions.'' Ashabranner, he said, went to the telephone, put in a call, then returned and gave the assurances mentioned by Mrs. Dodd. The witness was quite definite in explaining that his mother told Mills she intended to build cottages with two rooms and a bath, ''to help along with financial requirements.''

Unless it can be said that the testimony of Mills and Ashabranner should be accepted in preference to that of Mrs. Dodd and her son, then the first definite information Mrs. Dodd had that the land was burdened with restrictions came in February, 1949, when Mrs. H. E. Addie, a neighbor, spoke of the deed requirements. Mrs. Addie's property was in the same subdivision and restrictions were the same as those applicable to the Mills property. It is undisputed that when Mrs. Addie procured an abstract and pointed to the limitations, Mrs. Dodd promptly stated that she would not go through with the deal—that she couldn't afford to risk losing what she had accumulated in California.

A careful reading of Mills' testimony and a comparison with Ashabranner's explanation of restriction discussions will disclose that Mills was far more declaratory than was the realtor. Ashabranner, after mentioning the telephone call, said that he told Mrs. Dodd ''as best I could'' just what the restrictions were. He then told Mrs. Dodd that she ''couldn't build a commercial boat landing, [and] couldn't build buildings for less than $2,000.'' As he remembered the circumstances, Mrs. Dodd replied that she would not want to put up a building costing less than $2,000. But the word ''commercial,'' as used by Ashabranner, applied to boat landings. A rational construction of Ashabranner's statement would be: ''You can't construct any building costing less than

$2,000, and you are prohibited from constructing a commercial boat landing at any price.'' [Deed restrictions are shown in the margin].[3]

While the Chancellor did not declare a factual finding regarding affirmative disclosures Mills claims to have made, we think the testimony supports appellant's contention that the essential information was not given. Assuming that Ashabranner did mention the $2,000 limitation and the restrictions against commercial boat landings, the most one can say for what was thereby divulged is that buildings costing less than $2,000 were prohibited, while [inferentially] a structure meeting the minimum requirements could be utilized for any non-forbidden purpose.

Although Mrs. Dodd was not without business experience, she at least was a stranger in Hot Springs, and the preliminary negotiations were carried on in circumstances where she was without the benefit of a disinterested advisor. The situation must have been known to Mills, who bargained to sell the place for nearly double what he paid for it less than a year before. There is no evidence that the improvements he made amounted to anything like the added value, or that a normal real estate market accounted for the difference. This, however, is not a matter that concerns us except to the extent that it may explain the seller's conduct in granting time extensions and in not pressing for legal relief when it became apparent that the buyer did not intend to consummate the contract.

Both the majority and dissenting opinions in *Hinton* v. *Martin,* 151 Ark. 343, 236 S. W. 267, discuss the vices

[3] "The further consideration is that said premises shall be used exclusively for residential purposes and that no commercial boat landing, house, building or other structure, save outhouses incident to such house, building or other structure, shall ever be placed or erected upon the lands or premises herein conveyed, either by the grantee herein or by his heirs, executors, administrators, privies, or assigns, unless it be a house, building or other structure of four rooms or more, and costing not less than $2,000 and in case of any violation of the above conditions, then this deed shall be null and void, and the said land and premises shall absolutely revert to the grantor herein, his successors or assigns, and no act or omission upon the part of any of the latter shall be a waiver of enforcement of the conditions."

in title justifying rejection by a purchaser. The result of all of the cases is a legal policy requiring the seller to convey that which the technical words used in a deed have been construed to include. In the case at bar the term "good title" unquestionably meant a title free of substantial restrictions or limitations—a construction not questioned by appellee. The question is not whether such an estate was owned by Mills, for admittedly it was not; but, rather, whether Mrs. Dodd, with knowledge of the restrictions, chose to buy the property; or, secondly, did her conduct in not promptly offering to surrender possession work such a hardship upon Mills that he should be permitted in all good conscience to retain the cash payments?

Mills testified that he made demands for possession some time in December, but Mrs. Dodd asked for permission to stay for a while—"she thought she could work it out." This occurred about Christmas, 1948. Mills thought the next conversations occurred in March, around income-tax time; and, said the witness, this was the first time Mrs. Dodd indicated she was not going through with the deal. He later said that he had spoken to Mrs. Dodd "two or three times from January," and when she did not move he employed a lawyer.

In his answer and cross-complaint Mills did not plead *laches,* estoppel, or waiver. Appellant's attorneys say that the first intimation regarding such a defense came when the cause was being argued before the Chancellor, hence, under the holding in *Barrett* v. *Durbin,* 106 Ark. 332, 153 S. W. 265, the plea should not be permitted here.

The record presents a case where the advantage of information, values, and the relative position of parties were so clearly favorable to Mills as to require clear and convincing proof that in accepting the written contract Mrs. Dodd did so with full knowledge of the limited title held by Mills. In this respect the testimony was insufficient. The test would be whether a suit for specific performance could be maintained.

By the weight of evidence Mrs. Dodd's first knowledge of the restrictions came when Mrs. Addie procured

her own abstract and pointed out the limitations. It then became Mrs. Dodd's duty to surrender possession, which she did not do until Sept. 3, hence she is chargeable with damages from February 10, or six months and 23 days. She paid insurance amounting to $382, but received a refund of $39, so the net outlay was $343. Interest on the payments of $4,000, and $1,500, is claimed, and an item of $300 for repairs is included in appellant's computations. In view of party relationships the interest and charges for repairs should not be allowed, but the insurance payment should be a credit against damages to be computed on a rental basis.

Appellee testified that "if all of the property could be rented it ought to bring in $350 per month. Actually, in 1950, appellee rented for a period of six months (beginning in February) for $1,250, or $208.33 per month. On this basis the damage for six months and 23 days would be $1,409.71, or $1,066.71 after payment of insurance. Deducting this sum from appellant's two checks would leave $4,433.29 for which appellant should have judgment.

Reversed with directions to enter a decree not inconsistent with this opinion.

DORSEY *v.* STATE.

4656 240 S. W. 2d 30

Opinion delivered June 4, 1951.

Rehearing denied July 2, 1951.

Coates & Lear, for appellant.

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

ROBINSON, J. On the 2nd day of August, 1950, the appellant Peter Dorsey and one, Aubrey Smith, stole a cow and calf in St. Francis County, and brought the

stolen animals to the stockyards in North Little Rock in an attempt to sell them, arriving there about 7 a. m., on August 3rd. While at the stockyards Dorsey and Smith aroused suspicion and were arrested by Pulaski County officers, who notified St. Francis County officers that the men were being held. Between 4 and 5 p. m., on August 3rd, Otis Tatum and Ray Campbell, Deputy Sheriffs of St. Francis County, arrived in Little Rock to return the prisoners, Dorsey and Smith, to St. Francis County.

After Tatum and Campbell obtained custody of Dorsey and Smith, they started their return journey and stopped at a roadside restaurant, at which time the prisoners were left alone in the automobile for about 30 minutes. The officers then returned to the car, Tatum taking the driver's seat and Campbell occupying the front seat to Tatum's right. Dorsey and Smith, the prisoners, occupied the rear seat, Dorsey sitting to the right of Smith. Dorsey's left wrist was handcuffed to Smith's right wrist. The officers, Tatum and Campbell, each had a pistol in a scabbard on his right hip. When they reached a point about a mile east of Wheatley, in St. Francis County, the two prisoners simultaneously grabbed for the officers' pistols. Officer Campbell managed to get hold of Dorsey's wrist, thereby preventing Dorsey from immediately obtaining Campbell's gun. Smith obtained Tatum's pistol without difficulty and shot Tatum in the shoulder and in the face. The second shot that hit Tatum was the one that struck him in the face and he was thereby rendered unconscious. Campbell was shot twice, once in the head and once in the back, and killed instantly. Tatum recovered from his wounds with the exception of being partially paralyzed. After the officers were shot the two prisoners fled. They managed to remove the handcuffs, but were captured the next day.

The Prosecuting Attorney, in separate Informations, charged Peter Dorsey and Aubrey Smith with murder in the first degree. Dorsey was charged under the name of "Dawson," but all the proof shows he is the person intended to be charged. Ark. Stats., § 43-1013; *Daniels* v. *State,* 186 Ark. 255, 53 S. W. 2d 231; *Bridges* v. *State,* 122 Ark. 391, 183 S. W. 962.

Both defendants filed a petition for a change of venue which was granted, the cases being transferred to Phillips County for trial. Smith was tried first, convicted and sentenced to death. *Smith* v. *State,* 218 Ark. 725, 238 S. W. 2d 639. Then Dorsey was tried, convicted and sentenced to death, from which conviction and sentence comes this appeal.

The Information charging the defendant with murder was filed by the Prosecuting Attorney in Circuit Court on the 7th day of August, and at that time the court made an order that the defendant be given a mental examination by the doctors at the State Hospital in Little Rock. The defendant was, therefore, transferred to the Pulaski County jail in Little Rock. On the following day, the 8th of August, the defendant made a statement to Ben Kent and W. T. Bolling, members of the Arkansas State Police Department. This statement was admitted in evidence over the objection of the defendant, it being the contention of appellant Dorsey that the statement was not admissible because it was obtained by the officers while the defendant was in custody without a warrant and prior to being taken before a magistrate. Also, in appellant's brief it is argued that the statement was given as the result of a horrible and unmerciful beating administered to defendant, but there is no evidence in the record, including the testimony of the defendant, to support this argument. The defendant testified that he was mistreated at the time he was arrested for stealing the cattle, but does not claim that he made the statement in regard to the killing of Officer Campbell due to any abuse suffered by him when under arrest in connection with the larceny of the cow and calf. The only thing said by the defendant in his testimony given at the trial from which it might be inferred that he was threatened at the time he gave his statement in regard to the homicide was that, after he was removed from the Pulaski County jail to the State Police headquarters where his statement was given, one of the officers pulled off his coat and said he wanted the defendant to tell the truth, the implication being that the removal of his coat by the officer constituted a threat. But, it must be remembered that this was on August 8th

in Little Rock, Arkansas. It would only be natural, under summer weather conditions, for the officer to remove his coat at the first opportunity. It is not claimed that the officers taking the statement did or said anything else whatever that could be construed as a threat of physical abuse or psychological coercion.

The principal contention on the part of appellant with reference to the statement is that it was obtained prior to his being taken before a magistrate. In this connection the appellant mainly relies on decisions of the Federal Courts. So far as the law of this State is concerned, the case of *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77, held adversely to appellant's contention. The Browning case was followed in *Palmer* v. *State,* 213 Ark. 956, 214 S. W. 2d 372, in which *certiorari* was denied by the United States Supreme Court, 336 U. S. 921, 69 S. Ct. 639, 93 L. Ed. 1083.

Aside from the issue of whether a confession is freely and voluntarily made, which is passed upon by the jury and trial court, but subject to review by the appellate courts, *Ashcraft* v. *Tenn.,* 332 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192, the Federal Courts will take into consideration whether there has been a violation of the Act of Congress providing: "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense to take the defendant before the nearest U. S. Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking of bail." 18 U. S. C. 595; also, 5 U. S. C. 300a, which requires that the person arrested shall be immediately taken before a committing magistrate. All courts will take into consideration whether there has been a violation of the 14th Amendment to the Constitution of the United States or the guarantees of the 5th Amendment that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

McNabb v. *United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819, and *Shaw* v. *United States,* 335 U. S. 410,

69 S. Ct. 170, 93 L. Ed. 100, turned on the question of whether the defendant's rights had been protected in accordance with the Federal Statutes and Rules of Criminal procedure in the Federal Courts, and not on the constitutional question. The case of *Watts* v. *Ind.,* 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801, was decided on the constitutional question. There it was held that the trial court erred in admitting a confession obtained in a manner which bears no resemblance to the facts in the case at bar.

In the case of *United States* v. *Mitchell,* 322 U. S. 68, 64 S. Ct. 896, 88 L. Ed. 1140, the court said: "We are dealing with the admissibility of evidence in criminal trials in the Federal Courts. Review by this court of State convictions presents a very different situation, confined as it is within very narrow limits. Our sole authority is to ascertain whether that which a state court permitted violated the basic safeguards of the 14th Amendment. Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice."

In the case at bar it is not claimed by the defendant that he confessed to anything against his interest because of torture, physical or psychological. In fact, there is very little difference between the statement introduced in evidence, as having been given to the officers, and the oral testimony of the defendant given at the trial. He claims that some things he told the officers were not put into the statement, and denies that he told the officers there was any plan between him and Smith to overpower the officers. He does not testify that he was forced to say that there was such a plan. He merely denies making the statement. The State's case did not hinge on any statement obtained from the defendant, and never at any time, was the defendant held for the purpose of wringing a confession from him. When the defendant was arrested subsequent to the killing, he had the murdered officer Campbell's pistol in his possession. It was known at the time that he participated in the killing and three days

after he was captured, and before he made any statement, he was formally charged with murder.

In *United States* v. *Mitchell, supra,* the court said the detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for long hours under psychological pressure were the decisive features in the McNabb case, which led the court to rule that a conviction on such evidence could not stand. Here, the defendant does not say that any inculpatory statements, differing from his testimony given at the trial, were obtained from him by any means. He simply denies that he made any such statements.

Defendant requested the following instruction: "If you find there was no agreement between Aubrey Smith and Peter Dorsey to murder Ray Campbell and you further find that Peter Dorsey did not aid or abet or assist Aubrey Smith in shooting Ray Campbell, then Peter Dorsey would not be responsible for the murder of Ray Campbell." The court is not required to give a multiplicity of instructions stating the law in various ways, and the court gave instruction No. 3 requested by the defendant, which is as follows:

"The court instructs the jury that the mere fact of one person being present at the time the shooting occurred, and the further fact that he followed along after the party doing the shooting, will not of itself be sufficient to convict the party following of aiding and abetting in the shooting, but before you can find that the defendant Peter Dorsey was aiding and abetting in the shooting, you must find that he was acting in concert with Aubrey Smith and actually participated in the shooting." Instruction No. 3 given as requested by the defendant was more favorable to him than he was entitled to under the law.

In the case of *Boone* v. *State,* 176 Ark. 1003, 5 S. W. 2d 322, it was said: "The general rule is that where persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in

a criminal result, though not the particular result meant, all are liable."

Section 41-119, Ark. Stats., provides: "An accessory is he who stands by, aids, abets or assists, or who not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime."

Section 41-118, Ark. Stats., provides: "The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such. In any case of felony, when the evidence justifies, one indicted as principal may be convicted as an accessory after the fact; if indicted as accessory after the fact, he may be convicted as principal."

There is no distinction between one who aids, abets or assists and the one who actually fired the shots. *Burns* v. *State,* 197 Ark. 918, 125 S. W. 2d 463.

The appellant contends that the court erred in refusing to give other instructions requested by the defendant. We have carefully examined the instructions. Every phase of the law involved was given to the jury, and no error was committed in the giving of any instruction on the part of the State, or the refusal to give any instructions requested by the defendant.

Defendant moved for a directed verdict claiming that the so-called confession is inadmissible, and that if ruled out there is not sufficient evidence to support the verdict. In the first place, the statement designated as a confession was admissible as has been heretofore pointed out. In the second place, the evidence would be sufficient to sustain a conviction if the confession had been ruled out. The jury could have found that Smith, whose right wrist was handcuffed to Dorsey's left wrist, could not have grabbed Officer Tatum's pistol from its holster, shot Tatum twice, and shot Officer Campbell twice without the aid of Dorsey. In fact, the evidence is that Dorsey was attempting to get Officer Campbell's pistol at the time Campbell was killed. Thus, Campbell was prevented by Dorsey from defending himself. The motion for a directed verdict was properly overruled.

The appellant, a Negro, filed a motion to quash the jury panel on the ground that there had been discrimination against the Negro race in selection of the jury panel because due regard had not been given to the proportion of Negro electors in Phillips County. Subsequent to the selection of the jury, the motion was renewed; both motions were overruled by the trial court.

The entire jury panel selected by the jury Commissioners was excused by the court because the veniremen were disqualified by reason of having served as jurors in the Smith case, *supra,* or were in the courtroom and heard the testimony in the case. The sheriff summoned 37 white and 3 Negro veniremen. In connection with appellant's "Motion to Quash the Panel," the court said:

"It is agreed by and between counsel for both sides in this case that the regular panel of petit jurors selected by the regular jury commissioners for the fall term, 1950, of the fall term of the Phillips County, Arkansas, Circuit Court were disqualified and that the court directed the sheriff of the county to summon forty (40) special veniremen from which to select a jury to try the defendant; that the sheriff has selected forty (40) qualified electors from the total qualified electors of Phillips County, both white and Negro, and has filed said list with the clerk of this court; that the sheriff has selected only three (3) Negro qualified electors and thirty-seven (37) white qualified electors; that according to the present list of qualified electors of Phillips County, Arkansas, there are 5,144 white electors and 2,616 Negro electors; that commencing approximately ten years ago the jury commissioners of Phillips County, Arkansas, have for each term of the court, in selecting the jurors to serve, have generally named one or two Negro electors to serve on the regular panel, with the exception of one year when three were named. It is further agreed by and between counsel for the State and counsel for the defendant that the figures in the records of the Phillips County Collector's office showing the number of white electors and Negro electors for each of the last preceding ten years, ending with 1950, are correct, and may be included in this record as the

correct number of electors, white and Negro, for said period of time.

"It is also agreed that the witness, C. E. Mayer, called to testify on a similar motion in the case of *State of Arkansas* v. *Aubrey Smith,* on the 20th day of November, 1950, if present would testify to the same facts as testified to by him in that case and that his testimony in that case may be incorporated herein as a part of this record."

In support of the "Motion to Quash" appellant cites *Ballard* v. *United States,* 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181. In that case the Court held that "the purposeful and systematic exclusion of women from the panel was a departure from the scheme of jury selection which Congress had adopted."

The case at bar was in Phillips County on a change of venue, which had been granted on motion of the defendant. There is no showing that the Sheriff of Phillips County, who summoned all the veniremen in this case, had systematically excluded Negroes from being selected for jury service. In fact, there is no showing that the Sheriff ever selected a jury panel previous to the one in question, or that he systematically excluded or included anyone on account of being a member of any geographical, political, racial, religious, or economic group. The defendant did not choose to call the sheriff as a witness and prove just how he selected the veniremen, or question him in regard to whether he excluded or included anyone on account of his race. The mere fact of inequality of the number selected does not of itself show discrimination. *Smith* v. *State,* 218 Ark. 725, 238 S. W. 2d 639; *Akins* v. *Texas,* 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307; *Zimmerman* v. *Maryland,* 335 U. S. 870, 69 S. Ct. 161, 93 L. Ed. 414, cites the Akins case. Also, the Akins case was cited with approval in the case of *Cassell* v. *Texas,* 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839, in which case Mr. Justice Reed, speaking for the court, said:

"Jurymen should be selected as individuals, on the basis of individual qualifications and not as members of a race." There is no showing in this record that the sheriff selected the veniremen on any other basis.

The Constitution requires a fair jury without regard to race. Proportional racial limitation is forbidden and an accused is entitled to have charges against him considered by a jury in the selection of which no one has been included or excluded because of race.

The burden of showing facts which permit an inference of purposeful limitation is on the defendant. *Martin* v. *Texas,* 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497.

It would not be proper for the court to instruct the sheriff to summon so many of one race and so many of another for there must not be inclusion or exclusion because of race. § 43-1904, Ark. Stats. provides:

"When the panel is exhausted, the court shall order the sheriff to summon bystanders, to at least twice the number necessary to complete the jury, whose names shall be placed in the box and drawn, and such jurors shall be sworn, examined and disposed of in the same manner as is provided for drawing, examining and disposing of the regular panel. If the jury is still incomplete, the bystanders shall again be summoned to twice the number necessary to complete the jury, who shall, in like manner, be drawn, sworn and disposed of, and the mode herein provided shall be continued until the jury is completed."

The regular panel was exhausted by reason of having been disqualified by the trial of the Smith case. Pursuant to the Statute, the court ordered the sheriff to summon 40 veniremen. There is no showing as to the reason 37 white and 3 Negro veniremen were summoned, and there is no showing that the sheriff employed a systematic course of action in selecting fewer Negro than white veniremen for jury service. We cannot assume that the sheriff did not do his duty, which was to summon 40 qualified electors, regardless of race.

In addition to examining the points argued in appellant's brief, we have explored the record searching for errors. Finding none, the judgment is affirmed.

RICHARDS *v.* MANER, JUDGE.

4-9574 240 S. W. 2d 6

Opinion delivered June 4, 1951.

Ben M. McCray, for petitioner.

M. M. Little and *W. A. Waddell,* for respondent.

GEORGE ROSE SMITH, J. This is an application for a writ of prohibition to prevent the circuit court of Saline County from proceeding to hear a condemnation suit filed by the city of Benton. The city brought the suit to condemn a small strip of petitioners' land for use as a city street. The suit was at first transferred to equity, but on motion by the city the cause was retransferred to law. Petitioners filed a second motion to transfer to equity, which was overruled. The circuit court set the case for trial, and the present petition was then filed.

In asking for a writ of prohibition the petitioners rely almost entirely upon our decision in *Burton* v. *Ward, Chancellor,* 218 Ark. 253, 236 S. W. 2d 65. There, as here, the motion to transfer to equity set forth various grounds for chancery jurisdiction, such as that the proposed taking was arbitrary, capricious, excessive, etc. In the earlier case we issued a writ of mandamus requiring the chancery court to hear the case.

We think the cases plainly distinguishable. In the *Burton* case the circuit court had transferred the suit to

equity, the chancellor had transferred it back to law, and the circuit court then declined to proceed. Thus an impasse was reached, each trial court insisting that the other had jurisdiction. The litigants were unable to obtain a trial in any court, and by mandamus we ordered the chancellor to assume jurisdiction.

Here the trial courts are in agreement. The chancellor has sent the case back to the circuit court, and that court proposes to proceed with the trial. Unlike the situation in the *Burton* case these petitioners are afforded the opportunity of a trial, but they insist that the hearing should be in chancery. It is settled, however, that the remedy for a refusal to transfer an action to equity is by appeal, not by prohibition. *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467. As we said in *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13: "The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction. To illustrate: The circuit judge certainly had jurisdiction to pass upon the motion to transfer to equity the case pending in its court. If it erroneously transferred the case to equity, prohibition is not the remedy. It can be corrected only on appeal." We then went on to point out that the party objecting to the transfer should have saved his objection and preserved his point for consideration by this court on appeal from the trial court's final judgment.

The writ is denied.

Ed. F. McFaddin, Justice (Dissenting). The majority opinion seems to admit that the basis for equity jurisdiction in the case at bar is our holding in *Burton* v. *Ward,* 218 Ark. 253, 236 S. W. 2d 65; but the majority opinion attempts to distinguish the case at bar from that case, by saying that prohibition cannot be used as a substitute for appeal.

That statement—that prohibition cannot be used as a substitute for appeal—is good law when, and only when,

appeal will provide an adequate remedy. In *Faver* v. *Golden,* 216 Ark. 792, 227 S. W. 2d 453, this Court, in issuing a writ of prohibition, said:

"Issuance of the writ depends on the inadequacy, rather than the absence, of the remedy by appeal. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59. Hence, we have held that the great expense of money and length of time required in an election contest render the remedy by appeal inadequate as to petitioners. *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534."

In the case at bar appeal is not an adequate remedy: in fact, it is no remedy at all. Preliminary to the trial on the value of the property in controversy, the Circuit Court has made an order of entry (pursuant to Sec. 35-902, Ark. Stats.), by the terms of which the city can enter and take the property upon depositing $400.00 in the registry of the Court. The execution of that order of entry is what the majority is refusing to prohibit. The majority is thus allowing the city to enter the property and convert it into a street.

After the Circuit Court jury shall have finally fixed the value of the property so taken, the majority says the property holder can *then* appeal and have this Court determine whether the property holder's motion, to transfer to equity, should have been granted. Allegations, similar to those here made, were held sufficient for equity jurisdiction in *Burton* v. *Ward (supra).* So if we follow that case, we will finally determine that this case should have been transferred to equity, in which forum the landowner could have introduced his evidence to support his allegations that the taking was arbitrary, capricious, etc.

But what of the condition of the landowner's property at the time we finally determine such appeal? The property will have been used as a street for many months; and the restoration of the property to a lawn, or orchard or similar use, will be practically impossible. So theoretically the "remedy by appeal" sounds nice: but practically, it is not adequate in a case like this one, wherein the taking of the property cannot be superseded pending the determination of the appeal.

Therefore, I think we should grant the writ of prohibition, in accordance with our holding in *Burton* v. *Ward (supra)*. Mr. Justice WARD joins with me in the views herein expressed.

MARTIN *v.* NATHAN.

4-9526 240 S. W. 2d 8

Opinion delivered June 4, 1951.

O. D. Longstreth, Dave E. Witt, Joseph Brooks and *Wm. J. Kirby,* for appellant.

Sharp & Sharp, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellee, Sol Nathan, against appellant, Bertie Lou Tays Martin, to quiet title to two parcels of land located in Cotton Plant, Woodruff County, Arkansas. Parcel No. 1 consists of a tract of approximately ten acres and Parcel No. 2 is described as "Lot 1, Block 8, the Town of Cotton Plant, Woodruff County, Arkansas."

In his complaint appellee, Nathan, after deraigning title from the government to appellant, Bertie Lou Tays

Martin, alleged that the latter conveyed said lands to the Booneville Banking Company of Booneville, Mississippi, on November 4, 1930; that the liquidating agent in charge of said bank conveyed Parcel No. 1 acreage to appellee on July 2, 1932, and Parcel No. 2 town lots, to appellee on December 29, 1934; that the deed from appellant to the bank was lost or destroyed and never placed of record; that appellee had been in adverse possession of said lands since the execution and delivery of the deeds to him and had erected a valuable home on Parcel No. 2.

In her answer and cross-complaint appellant denied executing a deed to the Booneville Bank; alleged that said bank and appellee were mortgagees in possession and that the liquidating agent had no authority to execute said deeds to appellee. Appellant asked for an accounting for rentals over and above the alleged mortgage indebtedness.

After denying the allegations of the cross-complaint, appellee pleaded the seven-year statute of limitations and laches as a bar to appellant's claim.

Appellant inherited the lands in controversy from her father, title being fixed in her by a decree of the Woodruff Chancery Court upon a mandate of the Supreme Court in May, 1927. See *Tays* v. *Johnson,* 173 Ark. 223, 292 S. W. 122. Appellant resided in Booneville, Mississippi, in 1927 when she borrowed $4,000 from the Booneville Bank. This loan was secured by a mortgage on the lands in controversy. Being unable to pay the loan, appellant on April 10, 1930, gave a new or renewal note to the bank for $5,079.80 payable December 1, 1930. The new note was also secured by a mortgage on the two parcels of land and the amount of the second note represented the original $4,000 borrowed plus interest and other smaller loans to appellant. The Booneville Bank became insolvent and was taken over by the Superintendent of Banks in Mississippi for liquidation on December 26, 1930. Appellant made no payments on the indebtedness and moved to Jackson, Mississippi, in 1930 where she resided until 1936 when she moved to Little Rock, Arkansas, where she has since made her home. The notes

and mortgages executed by appellant were pledged by the Booneville Bank to the Central Hanover Bank and Trust Co. of New York as security for the Booneville Bank's bills payable.

On petition of the Superintendent of Banks of Mississippi in charge of liquidation of the Booneville Bank, the chancery court of Prentiss County, Mississippi, authorized and approved the sale and conveyance of the two lots by decree to appellee in 1932 and 1934. The petition to sell Parcel No. 1 filed in 1932 by the Bank Superintendent in charge of liquidation of the Booneville Bank recites: "That prior to the closing of the Booneville Banking Company for liquidation a deed was taken from one Bertie Lou Tays to certain property in Cotton Plant, Arkansas, securing payment on a note due to the said Booneville Banking Company. That said deed was dated November 4, 1930, and conveyed the following described property, to-wit: . . . That the note of the said Bertie Lou Tays, as a payment on which said property was conveyed to the Booneville Banking Company, is held as collateral security to the indebtedness of the Booneville Banking Company by the Central Hanover Bank & Trust Company, of New York, and that they are entitled to the proceeds of the sale of said property, and have agreed for said property to be so sold for said price upon the condition that the proceeds would be paid to them."

The decree of the chancery court entered on June 18, 1932, in response to said petition recites: " . . . and it appearing to the court that the Superintendent of Banks in charge of the Booneville Banking Company in Liquidation holds among the assets of said bank a deed to the following described property in Cotton Plant, Arkansas . . . and that it is to the best interest of the bank in liquidation that said offer be accepted and that the Central Hanover Bank & Trust Company of New York which held the collateral from which said property was derived and is entitled to the proceeds thereof has agreed for the sale of said property at said price; it is therefore, ordered by the court that the Superintendent of Banks in charge of the Booneville Banking Company

in liquidation be and he is hereby authorized to make deed to said Sol Nathan to the above described property and deliver the same upon the payment of the said $640, and that the said $640 shall be paid to the Central Hanover Bank & Trust Company on the indebtedness of the Booneville Banking Company to it and for the doing of which this shall be the authority for the Superintendent of Banks."

Acting under authority of this decree, the Superintendent of Banks executed the first deed to appellee on July 2, 1932. This deed recites: "The above described property was conveyed to the Booneville Banking Company on November 4, 1930, by Bertie Lou Tays, and this deed is made by the Superintendent of Banks for the State of Mississippi, in charge of the Booneville Banking Company in liquidation, by authority of decree of the Chancery Court of Prentiss County, Mississippi, of date June 18, 1932." Similar proceedings were had in connection with the sale of Parcel No. 2 to appellee in 1934. Appellee filed the two deeds for record on February 5, 1935.

S. V. Crowe, cashier of the Booneville Bank at and prior to its insolvency in 1930, testified that he had known appellant for several years prior to 1930 and that she executed the deed to the Booneville Bank to apply on her indebtedness; that the details of the transaction were handled by J. W. Sanders, president of the bank; that said deed was either held by Sanders for the benefit of the bank or forwarded to the Hanover Bank, which held the note and mortgage as collateral; and that appellant thereafter made no claim of any interest in the property.

J. W. Sanders died shortly after the bank became insolvent. Other employees of the bank testified to their general understanding that appellant executed the deed to the bank although they could not recall having seen the instrument.

Appellee has held possession and assessed and paid taxes on the two parcels of land since he purchased them. He fenced the ten-acre tract in 1932 and rented it for farm purposes each year until 1948, realizing about $30

annually from said rents. There was a dwelling house on Parcel No. 2 which was in bad state of repair in 1934 and was rented by appellee for $4 per month for about eighteen months and then torn down. Appellee constructed a home on this lot in 1940 where he has since lived. This property had a market value of approximately $25,000 at the time of the trial in 1950.

Appellee first discovered that the purported deed from appellant to the Booneville Bank had not been placed of record in 1948 when he sold some lots off Parcel No. 1 and the purchaser had an abstract of title made. Upon appellant's refusal to execute a quitclaim deed, he instituted this suit in September, 1948.

Appellant denied making a deed to the Booneville Bank and testified that when she executed the renewal note and mortgage on April 10, 1930, she turned the property over to the bank under an oral arrangement with its president, "J. B. Sanders,"[1] whereby the bank would collect the rents, pay the taxes, keep up the property and apply the net income, if any, on her indebtedness. Shortly after this she moved to Jackson, Mississippi. She knew that the Booneville Bank became insolvent and was taken over by a receiver in December, 1930, and that its affairs were being liquidated. Although she maintained contact with friends in Booneville after leaving and her children returned for visits, she never had any correspondence with anyone connected with the bank nor made any inquiry about the property or the status of her loan until appellee's attorney approached her about making a quitclaim deed in 1948. In 1946 appellant's daughter married the son of Seth Pounds, who was receiver and assistant liquidating agent of the Booneville Bank when appellee purchased the property in controversy. Although appellant has known Mr. Pounds since 1930 and had visited with his family in Booneville, Mississippi, at times during a five or six-year period prior to the trial, she made no inquiry of Mr. Pounds in regard to the prop-

[1] Witness was evidently referring to "J. W. Sanders." According to the testimony of bank employees, J. B. Sanders died in 1925 and his son, J. W. Sanders, succeeded him as president and served until the bank closed in 1930.

erty. Appellant is a trained and experienced business woman and has worked in business offices since 1927.

By stipulation of the parties a certified copy of a statement of the assets of the Booneville Bank as of December 26, 1930, made in connection with the liquidation proceedings was introduced at the trial. In this statement the property in controversy does not appear in the list of real estate owned by the bank, and the note of April 10, 1930, is listed among the notes and securities held by the bank.

In a decree granting the relief sought by appellee and dismissing appellant's cross-complaint, the chancellor found that the proof established execution of the deed by appellant to the Booneville Bank. The court also found that appellant's cross-complaint was barred by laches and that appellee had been in adverse possession of the lands in controversy for more than seven years.

Appellant first insists that the evidence is insufficient to establish a deed from appellant to the Booneville Bank in that proof of the execution, loss and contents of such deed has not been shown by that clear and convincing evidence required under our decisions. It is argued that the testimony of S. V. Crowe, the only witness testifying to the actual execution of the deed, is too vague and uncertain in that the witness did not detail the contents of the instrument and could not remember the name of the party who notarized it. This court has used various expressions in stating the *quantum* of proof required to establish the existence and contents of a lost instrument.[2] Our cases generally support the rule stated in 54 C. J. S.,

[2] "In Arkansas it has been said that the proof should be clear, concise and satisfactory (*Dillard* v. *Harden* (1939), 197 Ark. 596, 124 S. W. 2d 10); clear and convincing (*Queen* v. *Queen* (1915), 116 Ark. 370, 172 S. W. 1018, Ann. Cas. 1917A, 1101; *Teel* v. *Burel* (1921), 148 Ark. 654, 229 S. W. 725); clear, convincing and satisfactory (*Slaughter* v. *Cornie Stave Co.* (1927), 172 Ark. 952, 291 S. W. 69; *Henry* v. *Texas Co.* (1941), 201 Ark. 996, 147 S. W. 2d 742); clear and decisive (*Wasson* v. *Walker* (1923), 158 Ark. 4, 249 S. W. 29; *Chambers* v. *Burke* (1937), 194 Ark. 665, 109 S. W. 2d 117); clear and satisfactory (*Kenady* v. *Gilkey* (1906), 81 Ark. 147, 98 S. W. 969; *Jacks* v. *Wooten* (1922), 152 Ark. 515, 238 S. W. 784); reasonably certain (*Hooper* v. *Chism* (1853), 13 Ark. 496); and clearest, most conclusive and satisfactory (*Erwin* v. *Kerrin* (1925), 169 Ark. 183, 274 S. W. 2; *Langston* v. *Hughes* (1926), 170 Ark. 272, 280 S. W. 374)." Anno. 148 A. L. R. 406.

Lost Instruments, § 27e, as follows: "While the evidence of the former existence, execution, and delivery of a lost instrument must be clear and convincing, and the greater the value of the instrument the more conclusive should be the proof of its existence, inferences from facts and circumstances may, however, be sufficient to prove the former existence of the instrument, or its proper execution and delivery. . . . When parol proof of the contents of a lost deed is offered as the only evidence thereof, ordinarily the witness must have seen it and read it, be able to speak pointedly and clearly to its tenor and contents, and to state the nature of the estate which it conveys."

The following rule is stated by the annotator in 148 A. L. R. 402: "Where there has been an unexplained and inexcusable delay in bringing an action for so many years that those who knew the facts are dead and the situation of the parties is materially changed, defendants who have been in uninterrupted possession relying upon a lost deed are not called upon to furnish that high degree of proof to establish the execution and delivery of the deed which might be required under other circumstances." See, also, Thompson on Real Property (Perm. Ed.), § 3983.

If a decision in the instant case rested on the testimony of S. V. Crowe alone, we would readily agree that appellee failed to meet the burden of proving the execution and contents of the deed by clear and convincing evidence, but this is not the case. The testimony of Crowe is strongly supported by record proof of the proceedings in the chancery court of Prentiss County, Mississippi, in connection with the sale of the lands to appellee. As noted above, the verified petition of the Superintendent of Banks recites the names of the grantor and the grantee, the date of the deed and the description of the property conveyed. The decree rendered in response to the petition finds that such deed was executed and the deed to appellee likewise recites the execution of the deed in proper detail.

The facts in the case at bar are similar in many respects to those in *Jacks* v. *Wooten,* 152 Ark. 515, 238

S. W. 784, where the court said: "In determining whether a deed claimed to have been lost was executed the court might consider how long the parties asserting the claim had been in possession of the land, its value, whether the land had been held adversely to such claim, and all the surrounding circumstances. *Carpenter* v. *Jones,* 76 Ark. 163, 88 S. W. 871." See, also, *Farris* v. *Bell,* 174 Ark. 689, 296 S. W. 56; *Dillard* v. *Harden,* 197 Ark. 586, 124 S. W. 2d 10.

In *Jacks* v. *Wooten, supra,* the grantor in the lost deed lived in the same town with the plaintiff and the parol evidence as to the execution and loss of the deed was more extensive than that adduced in the instant case, but such parol evidence was not supported by record proof such as that produced in the case at bar. Perhaps the strongest circumstance tending to show that appellant parted with title to the property in the instant case is the undisputed and admitted fact that she made no inquiry whatever about the matter from 1930 until 1948 when she was requested to make a quitclaim deed in place of the lost instrument. As was said of the grantor and her husband in *Jacks* v. *Wooten, supra*: "Their silence in permitting the plaintiffs during all these years to collect the rents and manage the property as their own is a strong circumstance tending to show that the defendant had parted with her interest in the property." Appellant's silence and indifference during the eighteen years that appellee occupied and exercised complete dominion over the lands, coupled with proof of the aforementioned court records, are potent circumstances which tend to corroborate the positive testimony of S. V. Crowe that appellant executed the deed in question.

Our conclusion is that appellee met the burden of establishing the execution of the deed from appellant to the Booneville Bank by clear and convincing evidence. It is, therefore, unnecessary to determine the issues of laches and limitations.

Affirmed.

4-9529 240 S. W. 2d 5

Opinion delivered June 11, 1951.

Jacobson & Meurer, for appellant.

S. J. Reid, for appellee.

PAUL WARD, J. On August 25, 1950, Everett Highsmith, appellee here, filed a complaint against appellant for a divorce on the ground of desertion. On the same date he made an affidavit for warning order stating his wife was a non-resident and the clerk appointed an attorney *ad litem.* On October 23rd, the attorney for the non-resident filed his report stating he had written and mailed a letter to appellant at her last known address and that the same was returned to him. A copy of the letter was attached as stated in the report and shows it was dated October 6, 1950, and addressed to appellant at "Charleston, S. C."

The testimony consisted of depositions by the plaintiff and one Zelma Pumphrey. The depositions were taken before and in the office of plaintiff's attorney. The record is silent as to any notice.

The testimony of appellee regarding desertion is that he and appellant married in June, 1948, and separated in February, 1949; that appellant ceased to care for him any more; that she willfully deserted him although he did not give her any cause to do so; that they have not lived together since separating; that he does not know where she is now and gave his attorney her last known

address; and that a little girl, named Dolline, now past one year of age, was born to them.

The only testimony purporting to corroborate desertion was by Zelma Pumphrey who stated that she knew the plaintiff, but never had occasion to visit in his home during his marriage; that plaintiff and his wife separated in February, 1949; that she could not say exactly what was the cause of separation, but *understands* appellant left her husband on the date of separation without cause; that she never heard of him treating her unkindly, but has the *impression* that he was good to her; and she *understands* one child was born as a result of their marriage. The Chancellor granted plaintiff a divorce and the defendant appeals to this court.

The decree of the lower court must be reversed because of the lack of sufficient corroboration. Our court has many times held in such cases that the testimony of the plaintiff must be corroborated. One case is *Sisk* v. *Sisk,* 99 Ark. 94, 136 S. W. 987, where the facts are similar to this case. A recent case (Jan. 29, 1951) is *Stimmel* v. *Stimmel,* 218 Ark. 293, 235 S. W. 2d 959. Here the deposition of Zelma Pumphrey plainly shows that she knew very little about the material issues and that her statements were based on impressions or hearsay.

It is not necessary to discuss other issues raised by appellant.

The decree is reversed and the cause remanded and the lower court is directed to set aside the decree heretofore entered.

KIRKPATRICK *v.* REESE, ADMINISTRATRIX.

4-9527 240 S. W. 2d 1

Opinion delivered June 11, 1951.

J. E. Hyatt, Jr., and *A. B. Barham,* for appellant.

D. Fred Taylor, Jr., for appellee.

George Rose Smith, J. This is an appeal from the action of the probate court in denying a $1,500 claim filed by the appellant against the estate of her deceased stepmother, Addie Pittman. The theory of the claim is that Mrs. Pittman's negligence resulted in the destruction of a tenant house on land which the appellant had gratuitously leased to Mrs. Pittman. The appellee, as administratrix, disallowed the claim, and the probate court upheld the disallowance.

The appellant's father died in 1935, survived by his widow and four children by a former wife. In order to provide an income for their stepmother the children leased to her, for a recited consideration of one dollar, certain property they had inherited from their father. Included in the lease was a tract, owned by the appellant, on which the tenant house was situated. The lease provided that Mrs. Pittman was to have the income from the property as long as she remained unmarried, that the property would be subleased judiciously, and that it would not "be committed to waste." The house was destroyed by fire on November 21, 1949, five days before Mrs. Pittman's death.

Mae Mueller, with her husband and children, was occupying the house as a subtenant when it burned. Mrs. Mueller was the only witness who testified below as to the cause of the fire. She said that the brick flues had cracks in the cement all during the six or seven years the family occupied the dwelling. For some time the family

burned coal, but the stove smoked so badly that they changed to an oil stove in the living room.

The fire occurred at about nine thirty in the morning, while a wood fire was burning in the kitchen. The blaze began in the attic, at a point about twelve feet from the kitchen chimney. The wind was blowing through cracks in the roof and toward the place where the fire was discovered. Mrs. Mueller did not see the fire start, but she believed that it must have been caused by a spark from the flue.

We agree with the probate court's view that this testimony does not show Mrs. Pittman to have been guilty of waste. The writ of waste originated centuries before the action on the case had developed to the point of recognizing negligence as a tort, and consequently the older decisions do not consider the tenant's liability for permissive waste as being founded on negligence. Kirchley, "Liability for Waste," 8 Col. L. Rev. 425, 624. But the modern decisions, especially in America, hold that the tenant's duty is to exercise reasonable care to guard the premises against injury. *United States* v. *Bostwick,* 94 U. S. 53, 24 L. Ed. 65; *Lothrop* v. *Thayer,* 138 Mass. 466, 52 Am. Rep. 286. Nevertheless the tenant is not an insurer. As the court said in the *Lothrop* case: "Most fires originating in buildings are undoubtedly due to negligence in the construction, or to a want of repair, or to the bad condition of the building, chimneys, or heating apparatus, or to negligence in the management of the building or of the fires in it; and to require the occupants at their peril always to adopt all improvements which are practicable, and to take all precautions which science can suggest to prevent fires, or the spread of fires, would be intolerable."

Tested by the standard of ordinary care Mrs. Pittman's conduct did not amount to negligence. The appellant argues that the testimony shows the fire to have been caused by a spark from the flue, and we may assume this to be true. There is still no liability, however, unless Mrs. Pittman should have discovered the hazard by the

exercise of ordinary care. On this point the appellant's proof falls short of making a case.

That the stove smoked when coal was burned is merely an indication that the chimney was obstructed by soot, a common occurrence. Indeed, Mrs. Mueller testified that the chimneys were mopped to alleviate the smoke. The only other indication of negligence is the existence of cracks in the cement of the brick flues. But it is a matter of common knowledge that cement develops cracks when exposed to heat. Mrs. Mueller does not say that the cracks were so large as to constitute a clearly present fire hazard, and her conduct implies the contrary. For the family continued to live in the house for at least six years, with their household belongings, without making a specific complaint that the flues were dangerous. It is not intimated that the house had ever caught fire before, or even that sparks had been seen coming from the flue, although one of the Mueller children slept in the attic. In these circumstances the probate court correctly denied the claim.

Affirmed.

SMITH *v.* HOPF.

4-9489 240 S. W. 2d 2

Opinion delivered June 11, 1951.

Shelby R. Blackmon and *J. Fred Jones,* for appellant.

Ben M. McCray, for appellee.

GRIFFIN SMITH, Chief Justice. W. L. Duncan does business as Duncan Lumber Company. He operates a sawmill and ordinarily buys logs delivered on the yard. W. A. Smith buys and sells timber and is sometimes financed by Duncan. Each denies a partnership or an agency by Smith. The questions are (a) whether a tract of timber purchased by Smith from Rosie Hopf was for the mutual benefit of Smith and Duncan; (b) whether Smith purchased for himself alone; or, (c) whether, in the alternative, Smith, in purchasing with Duncan's money, deceived Mrs. Hopf to her damage in circumstances justifying a prudent person in believing that he and Duncan were conducting a joint enterprise.

It is undisputed that Smith entered into a verbal agreement with Mrs. Hopf in 1948 for timber on a designated tract and paid with Duncan's check written in Mrs. Hopf's favor, with the indorsement: "For all standing pine timber on the E½ NE SW 6-25-12—20 acres, with six months to remove same and free access to land for removal."

Mrs. Hopf and those in interest with her contend that she agreed to sell all of the standing pine measuring eight inches, and that Smith at the time the accord was reached told her he was acting for Duncan. This is denied by Smith, and Duncan testified that he made an advance to Smith, but intended the indorsement to evidence his security for a loan. He had often bought from Smith, but Smith was not under obligations to sell him timber from any particular tract, and his interest in the Hopf transaction did not go beyond recoupment.

Mrs. Hopf and a witness who says he overheard essentials of conversations when the purchase was completed, testified that when the check was presented objection was made that nothing appeared in writing to show that the timber sold was not to be under eight inches, but Smith emphatically assured the seller that the limitation was thoroughly understood and it would not be necessary to verify that fact. Believing this declaration to be sufficient, Mrs. Hopf took the check.

Frank Rhodes, representing International Paper Company, testified that he paid Smith $200 for pulpwood taken from the Hopf property. Smith told him he was connected with Duncan, but did not elaborate in a manner disclosing what the relationship was. In return for the $200 International was to get all of the pine timber, to be removed within five months. The agreement was made in November, 1948. In supervising removal Rhodes observed that in some places timber under eight inches had been cut, and in taking what Smith had left, some "tops" were worked up, and the smaller growth was included. Smith told him that "they" [meaning Duncan and Smith] were owners of all of the timber, irrespective of size. About a third of the timber taken by International was "tops", the remainder having been cut from standing pine. Ordinarily nothing smaller than five inches is used—four inches at the little end. It was Rhodes' intention not to take anything under five inches at the butt.

Treating International's payment to Smith as evidence that the undersize timber sold by Smith and Duncan was worth $200, Mrs. Hopf sued for treble damages, and for $900 representing permanent damage to the land. The jury's verdict was for $600.

A great deal of improper evidence was admitted, but it does not appear to have been objected to. Some of the testimony relied on by appellees to prove Smith's agency was clearly incompetent under the rule that the declarations of an agent made to a third person in the absence of the so-called principal, which were not brought to the principal's knowledge or ratified by him, should not be used to prove the fact of agency, although circumstantial evidence may be sufficient. *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020.

Appellants' first assignment is that Instruction No. 3, given at plaintiffs' request, was inherently prejudicial because it referred to the check as having been in payment "of timber purchased by the defendant*s*". This was a binding instruction because it closed with the alternative direction, "then the defendant*s* would be liable to the

plaintiffs". It assumes as a matter of law that two defendants made the purchase, and was therefore inferential comment on the evidence. The motion for a new trial did not assign this instruction as error, hence we cannot consider it.

Instruction No. 5 deals with the measure of damage. It was objected to generally, and the objection is brought forward in the motion for a new trial. Like No. 3, it is binding. It told the jury that if it should find that the defendants actually purchased "only the timber above eight inches in diameter, and that they or either of them subsequently wilfully and without authority sold the timber on said lands, . . . and that by reason of said cutting and removing the plaintiffs were damaged, *then the defendants* are liable to the plaintiffs in three times the value of the timber so cut and removed."

The instruction, it will be observed, first deals with the defendants "or either of them", and correctly permits the jury to determine whether Smith acted as Duncan's agent. It then says that if either defendant acted wrongfully, the *defendants* would be liable.

Since agency was a question of fact, the jury might have found that Smith was liable, but not Duncan, notwithstanding the *prima facie* case presented by the check.

Affirmed as to Smith; reversed as to Duncan, and remanded for a new trial.

MENSER *v.* DANNER.

4-9515 240 S. W. 2d 652

Opinion delivered June 11, 1951.

Rehearing denied July 9, 1951.

Barber, Henry & Thurman and *Tompkins, McKenzie & McRae,* for appellant.

Denman & Denman and *Tom W. Campbell,* for appellee.

ROBINSON, J. On the 7th day of December, 1949, the appellee, Elsie Danner, was driving an automobile on West Second Street in Prescott. Paul Harris was driving a truck, belonging to Earl Menser, on Elm Street. The two automobiles collided in the intersection of the two streets. As a result of this collision, Mrs. Danner sued Earl Menser and recovered a judgment in the sum of $20,000, for personal injuries.

The evidence, viewed in the light most favorable to the appellee, is to the effect that on the day of the collision, the weather was very cold and ice covered everything. Mrs. Danner's husband had scraped the ice from the windshield of the car she was driving and there was no ice on the windshield at the time of the collision. There was ice on the windshield of the Menser truck, Harris,

the driver, having scraped away a small area in front of the driver. There was a stop sign at the intersection, whereby the users of Second Street were warned to stop before entering Elm Street. Mrs. Danner brought her car to a full stop and looked in both directions but did not see the Menser truck. Mrs. Danner testified that: "The truck must have been coming at an awful rate of speed or I would have seen it." She then proceeded to cross Elm Street and had reached a point more than half way across when her automobile was struck by the Menser truck. Mrs. Danner was knocked unconscious and her car proceeded some 50 to 100 feet on Second Street before coming to a stop. The Menser truck stopped against a post at one of the corners of the intersection. Mrs. Danner was seriously and permanently injured.

Most of the facts, as above stated, were sharply contradicted, but such are the facts when viewed in the light most favorable to the appellee, which we must do. *East Texas Motor Freight Lines* v. *Buck,* 213 Ark. 640, 212 S. W. 2d 13; *Schubach* v. *Traicoff,* 214 Ark. 375, 216 S. W. 2d 395.

Appellant contends that Mrs. Danner was, as a matter of law, guilty of contributory negligence in failing to see the approaching Menser truck and was, therefore, guilty of contributory negligence in driving out into the intersection when the truck was so close as to constitute a hazard. In support of this contention, appellant cites several cases dealing with collisions at railroad crossings, but the caution required, by the law of this State, of one about to cross over a railroad track has not been made to apply also to street crossings. Appellant also cites *Waters, Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342, but that case turned on the question of "physical impossibility." The court said:

"All the other facts and circumstances point to the same conclusion. Defendant's words cannot be believed, when contradicted, as they are, by the physical facts. Neither courts nor juries should be required to base their

actions or beliefs on physical impossibilities." We cannot say, as a matter of law, it was physically impossible for Mrs. Danner to fail to see the Menser truck at the time, the place, and under the conditions that existed unless she was negligent.

In the case of *Bauman* v. *Black & White Town Taxis Co.,* 263 Fed. 554, the court said: "Before attempting to cross, and as he left the curb, plaintiff in error looked both to the east and west and saw no motor car approaching. * * * The law does not say how often he must look, but he must exercise that care which an ordinarily prudent person would exercise in making a similar attempt in crossing the street. Even though the taxicab may have been within the 200 feet he said he had a view of and in the middle of the street, we cannot say as a matter of law that he should have seen the taxicab."

In the case of *Van Bibber* v. *Strong,* 203 Ark. 1090, 160 S. W. 2d 861, a car's headlights threw a beam of light 300 feet, but the driver, Strong, did not see a parked truck until within 30 or 40 or 50 feet of it. This court said: "Strong's actions are dangerously near the border line where contributory negligence as a matter of law should come to appellant's aid. Doubt, however, is resolved in favor of the verdict, and the questions of fact as found by the jury will not be disturbed."

"The rule is that where fair minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury." *St. L. I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786.

At the plaintiff's request the court gave the following instruction: "If you find from a preponderance of the evidence in this case that the plaintiff, Mrs. Danner, while in the exercise of reasonable care, had driven her car into the intersection in question before the truck of the defendant had entered said intersection, you are instructed that Mrs. Danner had the right-of-way." Of course, the court did not mean, and the jury could not have understood, by this instruction that Mrs. Danner

could bring her automobile to a stop before entering the intersection, then negligently drive out into the intersection, and still have the right-of-way, regardless of the fact that she might have been negligent in driving into the intersection when the Menser truck was so close as to constitute a hazard, for, in addition to the instruction which has been referred to, the court told the jury: "If you find from the evidence that Mrs. Danner was guilty of any negligence, however slight, which caused or contributed to bring about the collision, then you are told that she is not entitled to recover herein and your verdict should be for the defendant."

Also, the court instructed the jury: "If you find from the evidence that Mrs. Danner did not stop at the stop sign and you further find and believe from the evidence that her failure to stop caused, or proximately contributed to bring about the collision, she is not entitled to recover herein, and this is true regardless of whether the Harris truck was on its right or left side of Elm Street, and regardless of whether Paul Harris was negligent."

And the jury was further told: "If, after hearing all the testimony in this case, you find and believe from the testimony that Mrs. Danner and Paul Harris were both guilty of negligence in bringing about the collision, then you are told Mrs. Danner cannot recover herein, and your verdict should be for the defendant."

Moreover, the court also instructed the jury: "If you find from the evidence that, as Mrs. Danner approached the intersection, she stopped at the stop sign, and you further find that at the time Paul Harris was nearing the intersection and was in such close proximity thereto as to constitute an immediate hazard, and you further find that Harris was in plain view of any person making a reasonable use of his eyesight and situated as was Mrs. Danner at the time, then she had no right to continue into the intersection in front of the approaching truck, and if she did so, and her car was struck by the truck and she was injured, she is not entitled to recover

damages herein, and your verdict will be for the defendant.''

The sum and substance of the court's instructions to the jury in regard to the right-of-way at the intersection was that, if Mrs. Danner was in the intersection first, and there was no negligence on her part in getting there first, then she had the right-of-way, which is the law of this State. *Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 66.

Appellant argues that *Brown* v. *Parker* does not apply here because that case does not take into consideration § 75-623, Ark. Stats., which deals with the right-of-way at the intersection of a through street. Although *Brown* v. *Parker* does not specifically mention the Statute, the opinion is in harmony therewith. The instruction complained of in *Brown* v. *Parker* told the jury, *inter alia,* ''if you find that she [Mrs. Brown] failed to yield the right-of-way to Parker when she was under a duty to do so, and that such failure on her part was negligence, and that such negligence was the sole and proximate cause of the accident, or accidents; [3 parties were involved in the collision] then in that event you cannot return a verdict against Parker in this case.'' It will thus be seen that the instruction was in harmony with the Statute. After all, the issue in the Parker case, as here, is one of negligence. In the cited case it was pointed out that the court had held in *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. 2d 960, ''that the superior right of the driver first entering the intersection prevailed even when there was a city ordinance giving the right-of-way to the vehicle entering the intersection from the right, the ordinance being deemed not applicable when the driver on the right was last to enter the intersection.'' Also, in *Brown* v. *Parker* it was said: ''Thus, there might be a case in which the car that first enters the intersection does so by dashing out rapidly in front of a car that is proceeding slowly and properly toward the intersection, so that the driver of the second car has no opportunity to guard against the danger created by the first car which suddenly and unexpectedly looms up in the intersection beforehand.''

In the case at bar there is substantial evidence that Mrs. Danner stopped at the intersection, looked and did not see the Menser truck. Just who was negligent in the circumstances was a question for the jury.

Appellant assigned as error the court's refusal to give instruction No. 6 requested by appellant which deals with the right-of-way where two vehicles approach an intersection at approximately the same time. Even though Mrs. Danner did approach the intersection first, it is asserted that the stop sign made it her duty to stop, and yield the right-of-way to any vehicle approaching on the through street, if such vehicle were close enough to constitute an immediate hazard. The jury was correctly instructed on this point when the court gave appellant's instructions set out above. The court is not required to give a multiplicity of instructions covering the same point.

Complaint is made of the court's modification of appellant's requested instruction No. 10 which is as follows: "If you find from the evidence that as Mrs. Danner approached the intersection she stopped at the stop sign, and you further find that at the time Paul Harris was nearing the intersection and was in such close proximity thereto as to constitute an immediate hazard, and you further find that Harris was in plain view of any person making a reasonable use of his eyesight and situated as was Mrs. Danner at the time, *then you are told that Mrs. Danner will not be heard to say that she did not see the truck, but she is charged with having seen it as a matter of law,* and she had no right to continue into the intersection in front of the approaching truck, and if she did so, and she was injured, she is not entitled to recover damages herein, and your verdict will be for the defendant." The court struck out the underscored portion. That portion deleted by the trial court was argumentative, and also required Mrs. Danner, as a matter of law, to see the Menser truck. As heretofore pointed out, it was a question for the jury as to whether she was negligent in failing to see the approaching Menser truck; or whether the Menser truck was so close as to consti-

tute an immediate hazard at the time Mrs. Danner stopped and looked; or whether the truck struck Mrs. Danner before she cleared the intersection due to the speed at which the truck was traveling.

Instruction No. 11, requested by appellant and refused by the court, has to do with the agency of Harris, the driver of defendant's truck. The instruction would have tended to confuse the jury in that it would have told the jury that the burden was on Mrs. Danner not only to show the negligence of the defendant, but she must further show that Harris was, at the time, acting within the scope of his employment. Of course, there could be no negligence of defendant unless Harris was acting within the scope of his employment. Furthermore, the court told the jury in instruction No. 6 that, before they would be authorized to find for the plaintiff, they would have to find that, at the time of the collision, Harris was an employee of Menser and was acting within the scope of his employment.

Next, appellant says the verdict is excessive. The testimony is that prior to the collision Mrs. Danner was a strong, healthy, able-bodied woman; that since the collision, and, as a result thereof, she has lost approximately 50 pounds in weight; that she has constantly suffered pain and has to take medicine to relieve such suffering; that she has a partial paralysis of her left arm and hand, and at times a partial paralysis of both feet; that she wore a brace immobilizing her neck for some 6 weeks after the accident and still has to use it occasionally; that she is seriously and permanently disabled. The appellee introduced medical testimony that she was "seriously and permanently disabled," and although she had submitted to every medical examination requested by the appellant, the appellant produced no medical testimony at the trial. There is nothing in the record that would justify us in saying that the jury's verdict is excessive.

Counsel for appellee, in his closing argument to the jury, made a remark which appellant contends calls for a reversal of the case. The record is not clear as to just what was said as the court reporter was not present at

the time, and the record on the point was made up after the jury had returned the verdict. It is contended by appellant that counsel for appellee said to the jury:

"I have been practicing law since 1911—that is a long time, and I have tried lots of cases. I always represent the working man and the poor and down-trodden, but the lawyers for the defendant always represent the corporations and insurance companies."

When the matter was taken up with the court after the jury had returned its verdict, the court stated that he only heard that part of the remark mentioning "corporation," and at the time the court instructed the jury that the defendant was not a corporation but "was a citizen of this County and this town." Apparently, after the court had ruled on the objection and so informed the jury, no exception was made to the court's ruling. At least the record shows none. Counsel for appellants suggested that he would get bystanders to supplement the bill of exceptions on this point, but a bystander's bill of exceptions was not made a part of the record. In these circumstances, we cannot say that the court committed an error for which the case should be reversed. On the case as a whole we find no error.

Affirmed.

STATE BOARD OF EDUCATION *v.* WEAVER.

4-9504 240 S. W. 2d 659

Opinion delivered June 11, 1951.

Ike Murry, Attorney General, *Francis W. Wilson,* Assistant Attorney General and *J. B. Reed,* for appellant.

Sam Laser, Wm. M. Moorhead and *Ralph E. Ray,* for appellee.

HOLT, J. This appeal comes from the Pulaski Circuit Court, Second Division. Appellants challenge the correctness of that judgment.

The question presented, say appellants, is: "What are and what are not the powers of the State Board of Education with respect to across county annexations under the terms of Initiated Act 1 of 1948?"

More specifically, say appellees, the question is: "Does the State Board of Education have the sole and exclusive authority to originate and make across county line annexations of School District territory in districts located in different counties on its own initiative when not recommended by the County Board of Education in the affected area under Initiated Act No. 1 of 1948?"

The question appears to be of first impression.

The trial court filed the following written opinion on which the judgment was based: "By resolution adopted July 11, 1949, and reaffirmed on September 12,

1949, the State Board of Education undertook to annex to Pulaski County Special School District a certain area of Lonoke County which takes in all of the Old Toltec No. 91 School District, parts of Walt District No. 39, Cross Pikes Special District No. 15, and 4½ sections of Lonoke School District No. 1. Four and three-quarters sections of the area were excepted from the resolution, but a description of such sections is not important to a decision in this case. It is assumed that all of the territory in Lonoke School District No. 1 was excepted.

"The action of the State Board of Education was predicated on the petition of a majority of the qualified electors of the affected area which is located in Lonoke County and a resolution adopted by the Directors of the Pulaski County Special School District approving the annexation. The Lonoke County Board of Education refused to recommend the annexation. A minority of the electors in the area feel that the educational needs of the children in the affected territory can best be served by annexation to England School District No. 2 of Lonoke County. This minority is through certiorari undertaking to have the action of the State Board of Education in making the annexation reviewed. An attempt was first made to have the action of the State Board in making the annexation declared void by effecting an appeal to this court. After some unavoidable delay in obtaining a hearing, the appeal was dismissed because the law does not provide for an appeal from orders of the State Board of Education and thereupon this litigation was instituted.

"Numerous questions have been raised and capably presented in the excellent oral arguments of and trial briefs submitted by counsel. However, there appears to be only one vital question in the case, *i. e.*: Does the State Board of Education have the sole and exclusive authority to effect across county line annexations of territory in school districts located in different counties on its own initiative and without the recommendation or consent of any individual or organization? If the answer is 'Yes,' then the writ sought by the peti-

tioners must be denied. If the answer is 'No,' it necessarily follows that the writ should be granted.

"THE LAW—Disposition of this case calls for an interpretation of Initiated Act No. 1, adopted at the general election on November 2, 1948. It will be referred to herein as Act No. 1 or The Act. As of June 1, 1949, Act No. 1 created a new school district (designated as a United District by the Arkansas Supreme Court) in each county of the state, which said district was composed of the territory of all school districts administered in the county which had less than 350 enumerated school children on March 1, 1949, as shown by the 1948 enumeration. Provision is made for the election of directors of the new district, their duties are prescribed and the district is placed under the general supervision of the county school supervisor.

"Section 3 of the Act, in addition to authorizing appeals from orders of the County Board of Education on matters of annexation provides: 'It shall be the duty of the newly elected school board and the County Board of Education not only to provide an accredited elementary school for every child as close to his home as possible, but also to provide every child access to an accredited high school. To accomplish this purpose, each County Board of Education shall study the entire school program of its county. If it is found that some or all portions of the new school district as created herein can be served more effectively and more efficiently by another district or districts, the County Board of Education with the consent of the Board of Directors of the school district to which such annexation is proposed, is hereby authorized and directed to make such annexation or annexations. Provided that if any territory shall be annexed to a district administered in another county the question of annexation shall be submitted to the State Board of Education. If in the judgment of the State Board of Education the proposed annexation should be made, it shall adopt a resolution making the annexation. The resolution shall describe by metes and bounds each district affected by the annexation, and a copy of said

resolution shall be sent to the County Clerk of each County affected who shall record same.'

"Section 4 of the Act reads in part as follows: 'Except as otherwise provided in this Act, all matters of reorganization and annexation of the school districts undertaken under the provisions of this Act shall be made in accordance with existing laws.'

"Act 327 of the 1947 General Assembly provides a method whereby across county line annexations or changes in the boundaries of school districts located in different counties may be effected. Briefly, this is accomplished through orders of the County Boards of Education entered, in their discretion, upon petition of a majority of the qualified electors in each district affected.

"It will thus be seen that under the law there are three probable methods of effecting across county line annexations, to-wit:

"1. On order of the State Board of Education entered of its own volition without recommendation or petition from any source.

"2. On order of the State Board of Education based upon a proposal from the County Board of Education of the county in which the territory to be annexed is situated and with the consent of the directors of the District in other county to which the annexation is to be made.

"3. By following the procedure prescribed in Act 327 of 1947.

"No serious contention is made here that methods 2 and 3 above, were followed. In fact, the resolution adopted by the State Board of Education sets out that Act No. 1 gives the State Board 'power to make annexations across county lines.' The Act is ambiguous to such an extent as to justify judicial interpretation. In the construction and interpretation of laws, the intention of the Legislating Authority (in this case the people) is to be ascertained from the language of the Act if that can be done. In doing this, each clause and section of the Act

must be read and considered in the light of every other clause and section and the objects and purposes of the Act are likewise to be given consideration. In determining the legislative intent, the enacting clause may be studied in the light of the provisions of the Act itself, and a reasonable conclusion reached regarding the objective to be accomplished.

"It will be noted that among the purposes stated in the enacting clause are 'to empower the County Board of Education to annex any portion, or all, of the newly created district to another district or districts.' There is no mention of authorization for the State Board of Education to effect an annexation. In § 3 of the Act, the duty and responsibility is placed upon the school board and the County Board of Education to provide an accredited elementary school for every child as close to his home as possible and to provide every child access to an accredited high school. The same section requires that the County Board of Education study the entire school program of its county. After study of the situation, the County Board of Education may with consent of the Directors of the District to which territory is to be added annex any portion of the newly created district to another district, that is, within the county. The main contention arises from the proviso 'that if any territory shall be annexed to a district administered in another county, the question of annexation shall be submitted to the State Board of Education. If in the judgment of the State Board of Education the proposed annexation should be made, it shall adopt a resolution making the annexation.'

"It will be noted that the language 'if any territory shall be annexed to a district administered in another county' . . . implies previous action by some individual or organization before submission to the State Board of Education. Then the Act continues: 'The question of annexation shall be submitted to the State Board of Education.' Some pertinent questions immediately arise, such as, (a) If such territory shall be annexed, by whom? (b) Who is to propose the annexation? and (c)

Who shall submit the matter to the State Board of Education?

"Recalling that the primary responsibility for maintaining accredited elementary and high schools is placed upon the county boards of education and the school directors by the Act, it seems that the only reasonable and practical conclusion is that the County Board of Education, with the consent of the Directors of the District affected, would be the logical and practical ones to originate, propose, and submit questions of across county line annexation. It must be borne in mind that the objects and purposes of the Act are to provide accredited schools to all children within the county and the responsibility for doing this is placed solely on the County Board of Education and the School Directors.

"This being true, it would hardly be reasonable, in the absence of clear, plain, and unambiguous language, to say that the people intended to place the primary responsibility for maintaining standardized schools on local school authorities and at the same time place them in a position to lose revenue-producing territory without being able to be heard in protest. Had the initial responsibility for maintaining accredited schools in the United Districts of the various counties been placed on the State Board of Education rather than on local authorities, it seems that the objects and purposes of the act could have been best accomplished by placing the sole discretion for across county line annexations, or even within the county annexations, in the hands of the State Board of Education. But such is not the case here since local authorities are responsible for meeting standard educational requirements. In the determination of the question now before the court, it is not necessary to decide whether method 2 or 3 above-referred to might be followed by the parties. However, there is a possibility that the interested individuals and organizations may be helped toward a solution of their problem by the following language from an opinion of the Supreme Court delivered December 12, 1949, in the case of *Stroud* v. *Fryar*, 216 Ark. 250, 225 S. W. 2d 23, to-wit:

" 'Section 3 required the County Board of Education to "study the entire school program of its county"; and then the Act contains this highly important language: "If it is found that some or all portions of the new (1) School District as created herein can be served more effectively and more efficiently by another district or districts, the County Board of Education with the consent of the Board of Directors of the school district to which such annexation is proposed, is hereby authorized and directed to make such annexation or annexations." This quoted language gives the County Board of Education power to take any or all territory of the United District and annex such territory to any Large District or Districts, conditioned only on the consent of such larger Districts so affected; *and conditioned on approval of the State Board of Education* if annexation be across a county line.'

"The clear implication of the quotation from the Stroud case is that in order for the territory in Lonoke County to be annexed to the Pulaski County Special School District, it will be necessary for the County Board of Education of Lonoke County to act with the consent of the Directors of the Pulaski County Special School District and in addition thereto obtain the approval of the State Board of Education.

"*CONCLUSION*—From the foregoing, it necessarily follows that the Writ of *Certiorari* sought in this case should be granted and that the order of the State Board of Education annexing the involved territory, located in Lonoke County to the Pulaski County Special School District should be set aside."

After consideration of the briefs, and a review of the record presented, we have concluded that the trial court has correctly construed the provisions of Initiated Act 1 and the governing legal principles involved, and we adopt the court's opinion as our own.

Affirmed.

GRIFFEN *v.* NEWCOM.

4-9545 240 S. W. 2d 648

Opinion delivered June 11, 1951.

Rehearing denied July 9, 1951.

[redacted]

Douglas Bradley, for petitioner.

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

MINOR W. MILLWEE, Justice. Appellant, Raymond Griffen, instituted this proceeding by *habeas corpus* for custody of his nine-year-old daughter against the appellees, Earl Newcom and wife, who are the child's maternal grandparents. The chancellor found that ap-

pellees were entitled to retain custody of the child and dismissed appellant's petition for want of equity.

Appellant and Norma Newcom, daughter of appellees, were married in September, 1939, and the child, Ramola Ann, was born in November, 1940. Appellant and Norma were living in St. Louis, Missouri, in the spring of 1942 when they separated and brought Ramola Ann to appellees in Craighead County, Arkansas, and asked them to keep the child. In April, 1944, Norma obtained a divorce from appellant in the Craighead Chancery Court and was granted custody of Ramola Ann. In the meantime appellees kept and cared for the child for a period of approximately 33 months. After her divorce from appellant, Norma was married to Leon McHaney and took the child to her new home in Republic, Missouri. Appellant served in the armed forces from April, 1945, until October, 1946, and remarried in December, 1946. He and his present wife have two children of the ages of 2½ years and one year, respectively.

Norma was killed in an automobile accident in December, 1949, when appellees, with the consent of the child's step-father and in compliance with a previous request made by Norma, again took the child into their home at Nettleton, Arkansas, where she has since lived. Immediately after their marriage in Georgia in December, 1946, appellant and his present wife went to Florida for three or four months and then visited appellant's parents in Craighead County for about three months. They then returned to Douglas, Georgia, where appellant farmed on a share crop basis for two years under the GI farm program of the federal government. In December, 1949, they returned to Florida where appellant worked in the citrus fruit harvest. Appellant learned of Norma's death in the latter part of December, 1949, or the first part of January, 1950.

In the latter part of May, 1950, appellant and his family came to his father's home in Craighead County and later moved to a two-room farmhouse near Needham in Craighead County. After visiting his daughter, Ramola Ann, at appellees' home on several occasions, over

a period of three months, appellant demanded and appellees refused to surrender custody of the child. Appellant instituted this proceeding on September 9, 1950.

Appellees, Earl Newcom and wife, are 52 and 48 years old, respectively, and in apparent good health. They own their home at Nettleton where Mr. Newcom is employed as a carpenter. It is undisputed and admitted by appellant that appellees are of good character and have furnished a good home for the child. The child regularly attends school and Sunday School, is very happy in her present environment and strong ties of affection exist between the child and her grandparents.

The evidence is in dispute as to whether appellant supported and visited the child after placing her with appellees in 1942. He admitted that he saw the child only one time from the date of Norma's remarriage in 1944 until May, 1950, and the evidence is in dispute as to the frequency of his visits while the child was left with appellees from 1942 to 1944. Appellant testified in general terms that he gave money and clothes to appellees for the child's support prior to his induction into military service in 1945, while appellees denied that any substantial support was given or offered by appellant during this time. In explaining his failure to make an allotment for support of the child while in the armed forces, appellant stated that the child's mother told him that the child's step-father, who was also in the service, had made an allotment for the child, but this was denied by appellees. The evidence as a whole fails to show any regular or substantial contributions by appellant toward the support of his child after he surrendered custody to appellees in 1942.

Appellant testified that he had no intention of remaining in Arkansas, but planned to return to Georgia regardless of whether he was given custody of his child. His testimony relative to his present and past earnings and his plans for the future was vague, indefinite and conflicting. He first stated that he had a house rented near Douglas, Georgia, "for another year". He could not remember whether it had four or five rooms but had

inspected it in May before coming to Arkansas. He later stated that it was a farmhouse and that he could get as much land as he wanted with the place up to one hundred acres. He finally admitted on cross-examination that he had not actually closed a deal for the place. In this connection appellant's wife testified that before they left Georgia a neighbor told them of a place they could rent on a share crop basis; that there would be "over four acres" and that appellant would have two acres of tobacco. On the various trips from Georgia and Florida appellant and his family traveled in their pick-up truck which he stated was either a 1941 or 1946 model. They brought part of their household furniture to Arkansas in the truck and left part of it in Florida.

In contending that the chancellor erred in refusing to grant him custody of his child, appellant relies on the recent case of *Brown* v. *Brown,* 218 Ark. 624, 238 S. W. 2d 482. In that case we restated the general rule to the effect that upon the death of a parent who has been given custody of a child the right to such custody ordinarily devolves upon the surviving parent unless such survivor is unfit or has by his conduct forfeited such preferred right or the best interests of the child would otherwise require. In that case the father was regularly employed at a substantial salary, maintained an established home, regularly visited the child during the time that it was in the custody of the aunt and uncle and had been given custody of his two other children. We held that the father had not forfeited his preferred right to custody and that it was for the best interest of the child that she be with her brother and sister in the custody of the father. In *Johnston* v. *Lowery,* 181 Ark. 284, 25 S. W. 2d 436 the husband permitted the wife to have control of the child from the time of separation until the wife's death five years later. In refusing to grant the husband custody as against the child's aunt, who had had the care and custody of the child the greater portion of the time during the separation of the parents, the court said: "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 position of appellant is similar to, but less favorable than, that of the father in the early case of *Verser* v. *Ford, et al.,* 37 Ark. 27, where the court said: "The child was placed where she is by the father's assent, and has so remained. By his assent ties have been woven between the grand-mother and grand-daughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder. He has shown no urgent necessity for present action, and his appeal to the Circuit Court for aid was not such as to enlist in most hearts any very strong sympathy." See, also, *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S. W. 457; *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879.

The principles of law applicable in cases of this nature are well settled. The difficulty lies in the application of these settled rules to the different factual situations that arise in each case. In the nine years that have elapsed since appellant voluntarily placed his child in the care and custody of appellees his attitude of affection and solicitude toward her has been something less than laudable. He has allowed strong ties of love and affection to grow up between the child and appellees, who are furnishing an established home and proper training for the child. He now proposes to suddenly sever this happy relationship and take the child to another state and an uncertain environment. The child is a ward of the chancery court. In exercising that discretion which the

law places upon trial courts, the chancellor had the parties before him and was in a favored position to observe the demeanor of the witnesses and properly weigh the testimony. In the course of the cross-examination of appellant it became necessary for the chancellor on two different occasions to reprimand him for using profanity.

Under all the facts and circumstances disclosed by the evidence, the chancellor correctly concluded that it would be best for the permanent welfare of the child that custody should remain at present with the appellees. This conclusion does not, of course, preclude appellant from renewing his application for custody when, and if, new circumstances arise which would warrant a different result.

Affirmed.

JERMANY *v.* FOSTER.

4-9534 240 S. W. 2d 663

Opinion delivered June 18, 1951.

Crumpler & Eckert and *Melvin T. Chambers,* for appellant.

McKay, McKay & Anderson, for appellee.

HOLT, J. October 14, 1941, appellant, Z. W. Jermany, executed his note to J. I. Phelps in the amount of $605, due October 1, 1942, with 10 per cent. interest. As security, he executed, on the same date, deed of trust on the property here involved. Appellant never paid anything on the note. January 30, 1945, Phelps sold and assigned the note and deed of trust to appellee, R. S. Foster.

Foster, in May, 1945, brought foreclosure proceedings against appellant. Sale was had to Foster, approved, confirmed, and on November 12, 1945, Commissioner's deed was executed to him.

Foster, in 1950, executed a lease to the land for oil and gas, and thereafter on May 19, 1950, the present suit was filed by appellant in which he alleged, *inter alia,* that the foreclosure decree "did not affect the interest of this plaintiff (appellant) since he was not served with summons as required by law nor did he enter his appearance in said cause." His prayer was that he be allowed to redeem from the foreclosure decree, that title be quieted in him, for an accounting, and all equitable relief.

Appellees answered with a general denial. From a decree denying the relief prayed and dismissing appellant's cause for want of equity is this appeal.

The record reflects that appellant was proceeded against in the foreclosure decree as a nonresident and constructive service was attempted, and that no personal service was had.

Appellant says "the court never had jurisdiction of him in the foreclosure suit, and therefore no foreclosure of his right to redeem was ever had. * * * If the mortgagor is not a party to foreclosure, he has a right of redemption. He does not need to set the decree aside, as no point could be gained in that proceeding. His right is that of redemption only. He does not wish to defeat the debt."

Conceding, without deciding, that proper service was not had on appellant in the foreclosure proceedings, still appellant would not have the right to redeem merely because he was not properly served. That decree will not be vacated or set aside for the reason that it is undisputed that appellant did not allege, or attempt to show, a meritorious defense to the foreclosure decree.

"A decree rendered against a defendant without serving him with process will not be vacated without a showing of merit. It must appear that if the decree be

vacated the result upon another trial will probably be different. The right to vacate the decree is not a right of redemption." *Arkansas Mortgages* (Hughes), § 458, p. 385.

In support of the text, the case of *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905, is cited, and in this case we said: "Appellants contend that there was not proper service upon them in the mortgage foreclosure proceedings, and on this account the chancery court should have set aside the decree of foreclosure and the sale thereunder. Conceding that no service was had upon appellants in that suit, they are not entitled to the relief sought. * * * It has been well said that infinite confusion and mischief would ensue if the rule were otherwise. No meritorious defense to the foreclosure proceedings is set up or attempted to be proved," and in *The Federal Land Bank of St. Louis* v. *Cottrell,* 197 Ark. 783, 126 S. W. 2d 279, we said:

"Moreover, there is no contention that the debt secured by the mortgage was not due and unpaid when the foreclosure decree was rendered, but it is contended that Marie Cottrell has the right to redeem, because she was not served with process. The recent case of *Sweet* v. *Nix,* 197 Ark. 284, 122 S. W. 2d 538, is against that contention. There a decree of foreclosure was rendered at a time when all the heirs of the deceased mortgagor were minors. The sufficiency of the service upon them was questioned, and the right to redeem was claimed upon the ground that the minors had not been properly served in the foreclosure suit. In that case, as in this, the bill to redeem was filed after the expiration of the term of court at which the foreclosure decree had been rendered. It was there said: 'Not only is there no valid defense shown to the foreclosure action, but none is attempted to be alleged or stated in the complaint herein. Numerous cases might be cited to the effect that failure to allege a meritorious defense to an action in which the judgment or decree sought to be set aside was rendered is fatal to the action. Some of the later cases are: *H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308; *Horn* v. *Hull,* 169 Ark. 463,

275 S. W. 905; *Adams* v. *Mitchell,* 189 Ark. 696, 74 S. W. 2d 969. In the last cited case it was held that before a defendant may question the service upon which a judgment was rendered he must show the existence of a defense to the suit which terminated in the judgment.'

"In stating the reason for this rule it was said: ' * * * Courts should not be required to do vain and useless things, and it would be a vain and useless thing to set aside a judgment to which there was no defense and the same result would necessarily follow on a new trial.' "

As indicated, the present suit was filed approximately five years after the foreclosure decree and the deed to Foster, long after the expiration of the term of court at which the foreclosure decree had been rendered.

Affirmed.

LOCKEBY *v.* OZAN LUMBER COMPANY.

4-9539 242 S. W. 2d 115

Opinion delivered June 18, 1951.

Rehearing denied October 8, 1951.

P. L. Smith, for appellant.

S. Hubert Mayes, for appellee.

George Rose Smith, J. This is a workmen's compensation case in which the appellant, Roy Lockeby, seeks compensation for a temporary disability resulting from his having broken his leg on June 4, 1946. The principal question before the Commission was whether Lockeby at the time of his injury was an employee of the appellee lumber company or an independent contractor. The Commission denied the claim on the ground that Lockeby was an independent contractor, and the circuit court affirmed the decision.

Since we have concluded that the testimony is amply sufficient to support the Commission's action we think it necessary to state only the salient facts that justify a denial of compensation. Prior to 1945 the lumber company owned its own trucks, teams, and other logging equipment, and operated its business entirely as an employer. In 1945 the company changed its policy and began letting contracts for logging to independent contractors. Lockeby was formerly an employee of the company, but the Commission found that at the time of his accident he no longer occupied that status.

In 1945 the company sold a truck, tractor, and team to Lockeby, under a title retaining contract. Thereafter Lockeby employed his own crew, usually of four men. Lockeby had complete control over his crew, with sole authority to hire and discharge. He paid their wages, was responsible for their social security and withholding taxes, and supervised their work. The lumber company, however, did pay for workmen's compensation insurance on Lockeby's employees, as he was unable to advance the premiums.

By successive written contracts the company engaged Lockeby to cut timber which it owned. The company exercised no supervision over the cutting activities, except to examine the cutover tracts to see that all the timber had been removed. Lockeby furnished his own saws, files, and other tools, fed his teams, and supplied fuel and repairs for his truck. He was the sole judge of whether weather conditions permitted logging operations, was free to determine his own hours of work, and

could take time off when he chose. Lockeby was paid not by the hour, as formerly, but for each thousand feet of timber cut or hauled. Payments on the truck, tractor, and team were deducted from his compensation, and at the time of his injury Lockeby had an equity of about $400 in his purchase. The company retook the truck and tractor when Lockeby became disabled, but he kept the team, which was worth nearly as much as his equity.

On rare occasions, when there was no cutting or hauling to be done, Lockeby worked as an employee around the mill. His wages as an employee amounted to only $6.00 for the quarter ending December 31, 1945, $10.00 for the next three months, and $1.50 for the quarter in which he was hurt. In *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620, we held that a person may occupy the dual status of employee and independent contractor, and that only in the former capacity is he covered by the compensation law.

On the day of Lockeby's injury he had been employed to haul to the mill a small quantity of logs that the company had bought. The contract was oral, but the company's manager testified that it was the same type of agreement as those already described. Lockeby was free to select his own time for performing the contract. While the logs were being loaded on the truck he fell and broke his leg. A claim for compensation was filed, but it was allowed to pend for several years before being brought up for a hearing.

Under our decisions, such as *Ozan Lbr. Co.* v. *Garner,* 208 Ark. 645, 187 S. W. 2d 181, the facts that we have narrated are sufficient to support the Commission's conclusion that Lockeby was not an employee at the time of his accident. The distinction between an employee and an independent contractor has been well established by our decisions. With knowledge of those decisions the Legislature has not seen fit to broaden the coverage of the Act; instead the statutory definition of an employee has remained unchanged. When the original Act was repealed and a new statute adopted in 1948 the definition

of an employee was reënacted verbatim. Ark. Stats. 1947, § 81-1302.

It is argued, however, that the lumber company's method of operation after 1945 was merely a colorable arrangement to avoid liability for torts and workmen's compensation. No doubt the company was motivated by a desire to reduce its liability in those respects, but that fact is not decisive of the issue. The real question is whether, under the new arrangement, the company actually retained that supervision and control that mark the contract as one of employment, regardless of its form. There is substantial testimony to sustain the Commission's conclusion that such supervision and control were not retained by the company.

Affirmed.

KENNARD *v.* FUDGE.

4-9508 240 S. W. 2d 664

Opinion delivered June 18, 1951.

W. J. Arnold and *R. W. Tucker,* for appellant.

Chas. F. Cole, for appellee.

ED. F. MCFADDIN, Justice. The parties own adjoining farms; and a jointly owned fence is the common boundary. Piney Creek runs through the two farms; and in February, 1949, high water from the creek washed out a portion of the fence. Some of Kennard's cattle thereby strayed to Fudge's land and destroyed his hay stacked in the field. Fudge filed action against Kennard, seeking damages for the hay so destroyed. From a jury verdict and judgment awarding damages, Kennard brings this appeal, claiming that the trial court erred in refusing to give a requested instructed verdict for the defendant.

Section 78-1210, Ark. Stats., is conceded to be the applicable Statute. Two cases involving that Statute are: *Primrose* v. *Brown,* 173 Ark. 632, 292 S. W. 1003, and *Wilkerson* v. *White,* 182 Ark. 1014, 33 S. W. 2d 365. In *Primrose* v. *Brown, supra,* we said the complaint alleged:

"... appellant kept up his half of the fence, and that appellee has failed, neglected and refused to keep up the other half of said fence, and that his stock turned in on his premises would get through the unrepaired portion of the division fence ..."

In *Wilkerson* v. *White, supra,* we said of the duties of the respective parties:

"It was no more White's duty to maintain the partition fence so as to prevent animals from passing through than it was the duty of Wilkerson. In the absence of any agreement, the obligation to maintain the fence was mutual and equally operative upon both (§ 4654, C. & M. Digest), and Wilkerson, finding that hogs were getting into his field, should have looked for the holes and stopped them himself[1]."

From these cases it is clear that until the adjoining owners had agreed on specific portions of the fence which each was to maintain, the responsibility for the entire

[1] For general statements concerning adjoining property holders' rights and claims, see 25 C. J. 1036, 36 C. J. S. 669, and particularly, 3 C. J. S. 1296

fence was joint; and neither party could claim damages from the other by a mere showing that there had been a break in the fence. The parties had never agreed that each was to maintain a certain portion of the fence: so the responsibility of total maintenance rested equally on each party. When the creek washed out the fence, the task of rebuilding was thus a common responsibility. Neither party knew the fence was damaged until after the hay had been destroyed. It was as much the duty of Fudge to keep informed of the condition of the fence as it was the duty of Kennard. The latter was no more negligent than was the former. Under the holdings in our cases, previously cited, there could be no recovery by Fudge until he showed himself free of negligence and Kennard guilty of negligence—as for example, Kennard failing to repair after agreement with Fudge for joint repair.

Therefore, the trial court should have given an instructed verdict for the defendant; and for the error indicated, the judgment is reversed, and the cause—appearing to have been fully developed—is ordered dismissed.

Mr. Justice WARD disqualified and not participating.

MERRIMACK MUTUAL FIRE INSURANCE COMPANY *v.* SCOTT.

4-9533 240 S. W. 2d 666

Opinion delivered June 18, 1951.

Wright, Harrison, Lindsey & Upton, for appellant.

Grubbs & Grubbs, for appellee.

MINOR W. MILLWEE, Justice. This is an action by appellee, Estelle W. Scott, against appellant, Merrimack Mutual Fire Insurance Co., on a policy insuring appellee against loss to her automobile by collision. By agreement of the parties the case was tried on a stipulation of facts before the trial court, sitting as a jury, resulting in judgment for appellee.

Appellant resisted the claim of appellee upon a plea that the policy of insurance had been effectively canceled by it prior to October 17, 1949, the date of the collision. The correctness of the trial court's finding that the policy was in full force and effect on said date is the sole issue on this appeal.

The stipulation entered into by the parties reflects the following facts: Appellee and her husband, Dr. E. W. Scott, formerly resided in New York where appellant issued the policy in question to appellee with Dr. Scott named as an additional insured under the policy. On July 28, 1949, appellant executed a renewal certificate extending said policy from August 28, 1949, to August 28, 1950, and the premium was paid in full for the period covered

by the renewal certificate. The original policy and the renewal certificate were countersigned by the Automobile Club of New York Agency Co., Inc., as the authorized agent of appellant. On October 5, 1949, the manager of said agency mailed a letter addressed to appellee at 210 Clinton Ave., Brooklyn, New York, which was the assured's address as shown in the policy issued in 1948. The letterhead upon which the letter was written reads: "A.C.N.Y. Agency Co., Inc., Insurance AAA Exclusively for Members." This letter advised that appellant and another company, which carried the public liability and property damage covered on appellee's car, had elected to cancel said policies and there was enclosed a cancellation notice accompanied by a check representing refund of the unearned premiums computed on a pro rata basis. The cancellation notice stated that the policy "is hereby cancelled from 12:01 a. m. of October 13, 1949, after which the Companies will not be liable under the policy". The letter containing the cancellation notice and refund check was forwarded and reached Eudora, Arkansas, on October 10, 1949. The Automobile Club of New York and the Automobile Club of New York Agency Co., Inc. for a number of years have done business from one and the same office at 28 East 78th St., New York 21, New York.

At the trial it was stipulated that Dr. E. W. Scott would testify to certain facts. Although appellant objected and saved exceptions to the admission of this testimony as being incompetent and immaterial, the motion for new trial contains no assignment of error relative thereto. The facts to which it was stipulated Dr. Scott would testify are as follows:

"1. Dr. E. W. Scott is the husband of the insured, Estelle W. Scott, and an additional assured named in the policy and acted as her agent in acquiring the insurance policy involved, through the Automobile Club of New York. The said E. W. Scott had been a member of the Automobile Club of New York for a period of 17 years from 1932 to 1949 and all during this period he has purchased his automobile insurance through said club at its offices in the Hotel Statler (formerly Hotel Pennsyl-

vania) at 28 E. 78th St., New York 21, N. Y., and his club dues and insurance premium on this and other policies through the years were paid at the same desk and separate checks handed to the same person, or persons.

"2. On September 14, 1949, the Automobile Club of New York issued to Dr. E. W. Scott its 'Inter-club Membership Receipt' for dues for transfer to the Arkansas Automobile Club and in such receipt, or attached thereto is certain 'Personal Accident Insurance Policy Information,' showing that after September 30, 1949, both insureds' address would be Eudora, Arkansas, such receipt being attached hereto and marked Exhibit 'E'.

"3. Dr. and Mrs. Scott left New York City on September 30, 1949, and drove up into the Adirondack Mountains for a short vacation, after which they started on their trip to Eudora, Arkansas, in the automobile covered by the policy sued on and on the afternoon of October 17, 1949, the collision occurred near Rutledge, Tenn., and that evening Dr. Scott called the New York Automobile Club in order to report the accident and was told for the first time that his policy had been cancelled. Due to the wreck and minor injuries and a civil suit filed against them there, the Scotts did not arrive in Eudora, Arkansas, until October 24, 1949, at which time they received the written notice of cancellation of the policy herein involved, which had been forwarded from 210 Clinton Ave., New York City." It was also stipulated that appellee's car was damaged to the extent of $425 in the collision.

The policy contains a provision relating to appellant's right to cancel, as follows: ". . . This policy may be canceled by the Company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing."

It is the contention of appellant that, under the admitted facts, it fully complied with the above provision and that the policy was effectively canceled when it mailed the notice to appellee on October 5, 1949, directed to the New York address shown in the policy.

The purpose of provisions for notice to the insured, such as the one here involved, is to enable the insured to obtain insurance elsewhere before he is subjected to risk without protection. 29 Am. Jur. 7, § 282; 35 A. L. R. 900. It is well settled by the decisions of this court and the authorities generally that a strict compliance with the conditions of such a privision is a prerequisite to assertion of a right of cancellation thereunder. 45 C. J. S. 7, § 450 (b)(1); 29 Am. Jur. 7, § 275; *Commercial Union Fire Ins. Co.* v. *King,* 108 Ark. 130, 156 S. W. 445; *Home Ins. Co. of New York* v. *Jones,* 192 Ark. 916, 95 S. W. 2d 894.

There is another rule, which appears to be well recognized, to the effect that where notice of the insured's change of address has been sent to the insurer, or knowledge thereof has been acquired by its agents, a notice to the insured at the address originally stated in the policy is not effective to bind him as to the consequences thereof, at least in the absence of actual receipt of such notice or effective knowledge thereof. In an annotation on the subject in 149 A. L. R. 1316, the following cases, among others, are cited in support of this view: *Goodwin* v. *Provident Sav. Life Assur. Asso.,* 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Long* v. *Home Indem. Co.* (La. App.) 169 So. 154; *Wolonter* v. *U. S. Casualty Co.,* 126 Va. 156, 101 S. E. 58.

The applicable principles are aptly stated in Couch Cyclopedia of Insurance Law, § 1440, as follows: "Where the policy provides that notice shall be mailed to the latest address appearing on the company's books, the notice must be given in the manner prescribed. Furthermore, a policy provision that notice of cancellation may be given by mail addressed to the insured 'at the premises stated in or on this policy' is not complied with by addressing a notice which incompletely bears the address

as contained in the policy. The books, however, must correctly show the address, or a change thereof, if the insured has given insurer proper and sufficient notice thereof, as it is insufficient to mail a notice to the insured to the original address if the company has been notified of a change, even though such change has not been noted on its books."

In *Wolonter* v. *United States Casualty Co., supra,* the accident policy authorized cancellation by written notice to insured mailed to his latest address "appearing on the company's record". After issuance of the policy and prior to mailing of the notice of cancellation to insured at the address designated in his application, the company's agent was informed of assured's change of address. In holding the notice ineffective to cancel the policy, the court said: "But it was the duty of the company to see that its records correctly set forth the facts that were communicated to it, and it will be held to the same measure of responsibility as if it had done so. The company makes and keeps its own records, and the assured is powerless to do more than communicate to it such facts as are necessary to enable it to make proper entries on its records. If from negligence or other cause not chargeable to the assured, its records do not correctly state the facts, they cannot be vouched in bar of a valid claim of an assured."

In *Long* v. *Home Indem. Co., supra,* an automobile liability policy provided for cancellation by written notice mailed to the address of the assured as given in the policy. A notice sent to such address was held ineffective where the general agents of the insurer had actual knowledge that the assured received his mail elsewhere, the court saying: "We do not think the notice to cancel was mailed to the proper address of the assured. Placing the address of the assured in the policy was for the benefit and convenience of the insurer, as it could not be expected to keep watch over his movements and shifts from place to place; but, in this case, where the insurer has definite knowledge that the assured's address has been changed, it is required to govern itself thereby."

Appellant relies on the case of *Gendron* v. *Calvert Fire Ins. Co.,* 47 N. M. 348, 143 Pac. 2d 462, 149 A. L. R. 1310. In that case the court held that an automobile insurance policy was effectively canceled under a provision similar to the one involved here. The court stated there was nothing to show that the insurrer ever had notice of a change in the assured's permanent address. It was further stated that, conceding that the company's adjuster had notice of such change of address prior to notice of cancellation, there was nothing to show that insured desired the company to recognize such change. The court then said: "This is not to say that the address of the policy might not be changed if properly brought to the attention of the company and a suffiicent request made therefor, thereby indicating a clear intention that the insured would no longer rely upon contact with the insurer through letters mailed and to be forwarded from the address originally shown on the policy."

Appellant also relies on our case of *Home Ins. Co. of New York* v. *Jones, supra,* but the question of a change in the assured's address was not involved in that case and the court stated that there was a strict compliance with the cancellation provision by the mailing of a proper notice to the address stated in the policy, which was also the correct address of the insured at the time.

Appellee argues that the cancellation provision is ambiguous and invalid, and that actual receipt of the notice is essential to the right of cancellation, but we find it unnecessary to determine these questions. Assuming the validity of the cancellation provision, we think it was shown by competent evidence that appellee gave appellant proper and sufficient notice of a change of address from that stated in the policy and that a strict compliance with its terms required a mailing of the notice to the changed address at Eudora, Arkansas. On September 14, 1949, Dr. E. W. Scott, acting as his wafe's agent, gave written notice that after September 30, 1949, the address of appellee would be Eudora, Arkansas. While this notice was given to the Automobile Club of New York, we think it is clear from the testimony of Dr. Scott that it was

given to the same persons who had represented that club and the A. C. N. Y. Agency Co., Inc. in their joint office for several years. These persons countersigned the policy in issue, received the premiums thereon and mailed the notice to appellee as the authorized agent of appellant. While it was not necessary under the circumstances to show a reason for cancellation of appellee's policy, it is not unreasonable to assume that appellant elected to do so because of its knowledge of appellee's change of residence from New York to Arkansas, at least no other motive for cancellation is shown. We conclude there was sufficient evidence to support the trial court's finding that appellee's policy was in full force and effect at the time of the collision on October 17, 1949.

The trial court allowed appellee's attorneys a fee of $125. The motion of appellee for an additional attorneys fee of $100 for the appeal is granted.

Affirmed.

George Rose Smith, J., dissenting. It seems to me that the effect of this decision is to deny to the insurer its undoubted power to cancel the policy upon five days' notice. For had the notice been addressed to the insured at Eudora I have no doubt that the majority would have held (and I would have agreed) that such a procedure would not have been a strict compliance with the terms of the policy. The policy required that notice be sent to the insured "at the address shown in this policy." Here the insured had not requested the insurer to change her address on its records; all that happened was that her husband asked for a change of his club membership to Arkansas. There would certainly have been a valid reason for Mrs. Scott to want notices to be sent to her husband's business address until the couple reached Eudora, as she could have arranged for important mail to be opened in Brooklyn and word sent to her if any action appeared to be necessary. Similar arrangements could not have been made in Eudora, where the Scotts were strangers. Hence it seems plain that the insurer would not have complied strictly with the terms of the policy by officiously choosing to send the notice to an address

not named in the policy. It would therefore have been liable.

But it now developes that the insurer is also liable for its strict compliance with the terms of the contract, merely because the insured's husband had asked that his club membership be transferred to Arkansas. I certainly agree with the rule of strict compliance, but I do not think we ought to penalize the insurer when it has done exactly what it agreed to do and would clearly have been liable had it done anything else. Apparently the only safe course for the insurer in this situation is to send notices to both addresses, even though the contract does not require that procedure.

WARD, J., joins in this dissent.

ISGRIG *v.* THOMAS.

4-9480 240 S. W. 2d 870

Opinion delivered June 18, 1951.

John M. Lofton, Jr., for appellant.

A. F. House, Charles B. Thweatt and *Wood & Smith,* for appellee.

ROBINSON, J. On the 30th day of November, 1942, Nannie Isgrig died testate leaving surviving her three daughters and three sons, Rosie L. Gadd, Elsie Ware, Myrtie Wallis (now Thomas), W. B. Isgrig, Fred Isgrig, and Ben C. Isgrig, all adults. At the time of her death, the testator had by deed disposed of all of her real property with the exception of an apartment house on West Third Street in Little Rock. She willed this Third Street property in trust to her son. Fred. The net income from the property was to go to the daughters, Myrtie and Rosie, for a period of 8 years, at the expiration of which time the property was to be sold and the proceeds of the sale divided equally among the children of her body living at the expiration of the 8-year period.

All of the devisees named in the will were financially secure with the exception of Rosie and Myrtie. The other four, Ben, W. B., Elsie and Fred, agreed that they wanted to help Rosie and Myrtie, and they further agreed that if the will should be probated and the property sold at the expiration of 8 years as provided in the will, it might have to be sold on an unfavorable market. Therefore, the four met in Fred's office and while they were present Fred dictated an agreement to Mrs. Miller, his secretary, providing that the four brothers and sisters agreed not to probate the will, but to take the property according to the law of descent and distribution, and the four would convey a life estate therein to Rosie and Myrtie. Mrs. Miller typed the agreement, the original of which has been lost and was not produced in court.

Fred died in October, 1949. In January, 1950, a petition was filed in Probate Court asking that the administration be opened and the will probated. In March, 1950, Rosie and Myrtie filed suit in Chancery Court to compel specific performance of the family settlement agreement, whereby Myrtie and Rosie were to have a life estate in the property. The cases were consolidated for trial by agreement. The Chancery Court found for the plaintiffs in the specific performance suit. In the Probate proceedings the court found that the will had been superseded by the family settlement agreement.

The issue involved in this case is—did Ben, W. B., Elsie and Fred sign the family settlement agreement? Ben says he did not sign. Elsie and W. B. do not remember whether they signed. Mrs. Miller testified positively that she typed the agreement and all four signed in her presence; that it remained in Fred's office and she saw it several times thereafter. The will was not probated and nothing further was done about the matter until after Fred's death 7 years later. The 8-year period mentioned in the will expired after Fred's death. Therefore, his heirs would not take a portion of the property under the will if it should now be probated, as Fred was not living when the 8-year period expired.

It is not denied that the family settlement agreement would prevail provided the agreement was signed. Ben is the only one who says it was not signed. In addition to the testimony of Mrs. Miller that it was signed, the undisputed fact is that a family settlement agreement was dictated by Fred when the four were present, and it was typed. The will was not probated. No further action was taken for more than 7 years, and not until some few months after Fred's death. All the circumstances indicate that the agreement was signed and the Chancellor found that it was signed.

It is true that one claiming title under a lost instrument has the burden of proving the instrument by clear and satisfactory proof, and we think the evidence in this case measures up to that standard.

The judgment of the Probate Court holding that the will was superseded by the family settlement agreement is affirmed, and the decree of the Chancery Court is affirmed.

The Chief Justice and Mr. Justice George Rose Smith not participating.

4-9522 240 S. W. 2d 872

Opinion delivered June 18, 1951.

[redacted]

Bedwell & Bedwell, for appellant.

David L. Ford and *Roy Gean,* for appellee.

PAUL WARD, J. N. D. Wedge, one of the appellees, sold Lot 5, Wedge Place Addition to the City of Fort Smith, to Othal E. and Ruby R. Cronic, also appellees, and, by written contract, engaged M. A. Gibbs to build a house on said lot for the Cronics. The construction material was purchased from appellant, Kellogg-Fontaine Lumber Company, which knew of the contract and knew where the lumber was being used. Some weeks after the construction started Wedge issued a check for $1,400 pay

able to Gibbs and the Lumber Company and noted thereon "Material, Lot 5, Wedge Pl., Jenny Lind Rd." The check was delivered to Gibbs who took it to the Lumber Company. The Lumber Company applied $1,000 on the Wedge-Gibbs account and gave back to Gibbs $400, leaving a balance of more than $400 due on the account. Later, after Wedge had settled with Gibbs, it developed there was a balance of $400 due appellant and it brought suit for said amount against Wedge, Gibbs and the Cronics, first perfecting its lien according to statutes.

Upon trial in the lower court before a jury appellant recovered the amount sued for. Thereupon defendants, appellees, filed a motion for a new trial on the grounds that: (1) The court erred in refusing defendants' request for an instructed verdict; (2) the verdict was contrary to the law; (3) the verdict was contrary to the evidence; (4) the verdict was against the law and the evidence, and (5) the court erred in refusing to give certain instructions. The court granted appellees a new trial and the order recited as the only ground "that the verdict rendered . . . was contrary to law." Appellant duly excepted and prosecutes this appeal, first agreeing, in accordance with Ark. Stats., § 27-2101, that if there is an affirmance this court shall render final judgment against it.

In our opinion the court committed no reversible error in granting appellees' motion for a new trial.

If the notation mentioned above was on the check when the Lumber Company received and cashed it this, in addition to its knowledge of the construction contract and of where the material was being used, was sufficient notice to it of Wedge's desire to have the full amount of $1,400 applied on material, and appellant had no right under the law to give $400 of the amount of the check to Gibbs, the contractor. That the application of payments by a debtor must be credited in accordance with his wishes is a principle of law well settled by many cases of this court. Among such cases are: *Briggs* v. *Steel,* 91 Ark. 458 (at p. 465), 121 S. W. 754; *Harrison* v. *First National Bank of Huntsville,* 117 Ark. 260 (at p. 265),

174 S. W. 553; *Snow* v. *Wood,* 163 Ark. 280 (at p. 283), 259 S. W. 733.

Appellant admits it knew the material was being used on Lot 5, Wedge Place, and admits it saw the contract between Wedge and Gibbs which set out the location in the first line in bold type. When it received the check signed by Wedge with the notation, "Material, Lot 5, Wedge Pl., Jenny Lind Rd.," it could have meant but one thing to it, *i. e.,* that Wedge desired the payment to be applied to the material account. Even if it could be said that appellant did not fully understand the meaning of the notation, it was at least sufficient to put a reasonably prudent person on notice to make inquiry and it will be held to have notice of all facts that such inquiry would have revealed. In the case of *Trinity Royalty Company* v. *Riggins,* 199 Ark. 939, 136 S. W. 2d 473, the court said: "This court is committed to the doctrine that 'notice of facts which would put a man of ordinary intelligence on inquiry is equivalent to knowledge of all the facts that a reasonably diligent inquiry would disclose.' " The same principle of law has been announced many times in other cases by this court.

It is insisted by appellant, however, that the evidence presented a disputed question of fact as to whether the notation mentioned above was actually on the check when it was received; that this presented a question for the jury; and that, therefore, the lower court erred when it granted appellees' motion for new trial. The evidence on this point was not substantially disputed and does not, in our opinion, support appellant's contention.

The check was introduced in evidence and it showed the notation in question on its face. Wedge testified that he instructed Ivan Cope to write the check and had him to put the notation on it in order to show where the material was being used and so that "it would go down there and pay on the lumber bill." He stated that he made the check to appellant and Gibbs; that just before he did so he also gave Gibbs a check for all the labor due up to that time; and that he had Gibbs' name put on the check to the Lumber Company because he had a contract with Gibbs to build a house for "so many dollars."

"Q. Then the reason you put on that notation, you had that put on there or you put it on there?"

"A. I had it put on there; I don't write very well; all I did was sign the check.

"Q. It was on there when you signed it?

"A. Yes, sir, I sat there and told him what to write on the check.

"Q. You saw it before you sent it out?

"A. Yes, sir.

"Q. Your reason for doing that was to note where that money was being spent and what it was going for; that it was going for material that went out on that Jenny Lind location?

"A. Yes, sir.

"Q. The reason you put that notation on there was because you wanted it applied on the material bill?

"A. Yes, sir."

Ivan Cope stated that he was working for Wedge at the time and that he wrote the check.

"Q. Did you write that check?

"A. I did.

"Q. What did he tell you?

"A. He said to make it to Kellogg-Fontaine Lumber Company and M. A. Gibbs, and to make the notation at the bottom of the check for material, Lot 5, Wedge Addition, City of Fort Smith.

"Q. Was this notation here on this check at the time it was delivered to Mr. Gibbs?

"A. It was."

The only testimony on the part of appellant regarding the notation on the check was that of D. L. Fontaine, an officer of appellant corporation.

"Q. I hand you defendant's Exhibit A and ask you if that is the check you received from Mr. Wedge for $1,400?

"A. Yes, sir.

"Q. At the time you received that check did you notice that notation there?

"A. No, sir.

"Q. You won't swear under oath that it was not there, will you?

"A. No, sir. I won't swear that it was or wasn't.

"Q. He claimed there was a notation, 'Material, Lot 5, Wedge Place Addition,' on the check and you state that you did not see it if it was there; is that right?

"A. That is right, if there was any notation on there I didn't see it."

From the above it appears that there was clear and positive testimony to the effect that the notation was on the check and since this is not contradicted by substantial testimony it presented a question of law for the court to decide. In our opinion reasonable minds could only conclude that the notation was on the check when it was delivered to appellant. In *Brigham* v. *Dardanelle & R. Ry. Co.,* 104 Ark. 267, 149 S. W. 90, Judge KIRBY announced this rule: "The question of sufficiency of the evidence is one of law, and it is only when the facts are undisputed, and when different minds cannot draw different conclusions therefrom, that it becomes the court's duty to direct the verdict." The above rule was quoted in *United Van Lines, Inc.* v. *Haley,* 214 Ark. 938, 218 S. W. 2d 715.

At the close of all the testimony in the trial below appellees asked for a directed verdict, which the court overruled and allowed the case to go to the jury. After a verdict for appellant appellees moved for a new trial setting out therein, among other things, that the court erred in refusing to grant their original motion for a directed verdict. The court granted a new trial on the ground that the verdict of the jury was against the law. In our opinion the court specified a proper ground and it was fully justified in granting a new trial thereon.

We are of the opinion, therefore, that no reversible error was committed by the trial judge in granting a new trial, so judgment absolute will be entered here against appellant in accordance with Ark. Stats., § 27-2150.

GEORGE ROSE SMITH, J., dissenting. It seems to me that the testimony presented a question of fact for the jury. Fontaine's statement that he did not see the notation on the check justified the jury in inferring that the notation was not there. The appellee's failure to produce the bank's photograph of the check may have been considered by the jury as an indication that the notation was made after the canceled check was returned to Wedge. And even if the notation were conclusively shown to have been made before the check was delivered to Gibbs, I think there would still be a question for the jury. The check was payable jointly, indicating that Gibbs was to have part of the proceeds. And the notation merely mentioned "material," which could have meant material supplied by Gibbs as well as lumber supplied by the appellant. In short, had the motion for new trial been denied I do not think we would have reversed the judgment on the ground that it was not supported by any substantial evidence.

If I am correct in this view, then the circuit court was in error in finding the verdict to be contrary to law. If he had set aside the verdict as being against the preponderance of the evidence I should agree with the majority, but I do not think the verdict to be contrary to law.

GARDNER *v.* ALLRED.

4-9532 240 S. W. 2d 651

Opinion delivered June 18, 1951.

John L. Sullivan, for appellant.

Digby & Tanner, for appellee.

Griffin Smith, Chief Justice. By written contract L. E. Gardner agreed to build a garage for V. M. Allred for $4,688. It was to be a two-story affair with the second floor finished for living quarters. A four-page printed form used by the Federal Housing Administration was utilized in lieu of a personally-prepared contract. Typed interspacing on blank lines supplied explanations and specifications. Under a general stipulation in the printed portion there is a guarantee of sound materials. All construction is to be free of faults, and the work performed according to the best practices.

Item 1 deals with excavation and mentions clay soil, "minimum depth below finished grade, 14 [inches]." Item 2—foundations—provides for concrete footing material, not reinforced, with foundation wall material of concrete below grade.

Allred was out of the city when construction was begun, but returned after three days and ascertained that instead of excavating to a minimum depth of 14 inches for foundations, Gardner had undertaken to level off the plot and had substituted cement and chat. Appellant testified that twelve tons of this mixture were poured, the change in plans having been made because the land was sixteen inches lower than neighboring property, and Gardner thought the substitution would produce better results than the contractual specifications. About half of the concrete mixture had been poured when Allred made complaint. Gardner says that he asked for the plans, but was told that they had been left in Oklahoma, where

Allred had gone on a three-day trip. Gardner's defense was that Allred watched as the foundation was made. A two-strip driveway was included in the contract. Concrete pouring was completed on Friday in circumstances that justified appellant [he testified] in believing that the change in plans would be acceptable. Indeed, according to appellant, Allred complimented him on the character of the work.

On Monday following, Gardner was informed by his workmen that Allred had stopped the work, his principal complaint being that the foundation was faulty in that it was not supported by the trench-filled concrete provided for in the contract. Some of the wall tiles had then been set. Appellant mentions 1,225 blocks. Some plumbing preliminaries had been bought and partially installed, and gas and water connections had been provided for.

Allred sued to cancel the contract, asking in addition that the defendant be required to remove the structural matter from his premises. Effect of the answer is to admit deviations from the contract, but to assert that the work as done was better than the plans called for. In the alternative it was insisted that the work has been approved and that Allred had given the "go-ahead sign."

A preponderance of the testimony shows that the work was not qualitative under the contract and that Allred was not acting capriciously in objecting to the foundation. Barney Elias, an experienced builder, testified that good building practices, as applied to the structure in question (where a second story was to be supported) required a foundation extending below the frost line—18 inches in this latitude. Of course the contract called for but 14 inches and appellee was not entitled to the additional protection, but the figures were used by the witness in emphasizing his professional belief that the concrete slab was not appropriate, and that a trench should have been provided as the specifications indicated.

Photographs of exposed portions of the foundations show an apparent lack of solidity and lend credence to the beliefs of Elias that vices in the substituted construc-

tion were of a character justifying Allred's apprehension that the building when finished would be unsubstantial.

A closer question is whether Allred's conduct in standing by after the work began was a waiver of defects through acquiescence in changed plans he then thought were sufficient.

The trial court no doubt felt that Gardner's superior information regarding such matters should not be permitted to work injury to one who admittedly knew nothing about building requirements, hence the brief interval used by Allred in informing himself was not unreasonable and did not amount to estoppel. We accept these views and affirm.

WATSON *v.* PALMER.

4-9460 240 S. W. 2d 875

Opinion delivered June 25, 1951.

Hal B. Mixon, for appellant.

R. D. Smith, Jr., for appellee.

HOLT, J. The validity of a marriage between Edith Palmer,—formerly Eathie Hays,—appellee, and Richard Palmer is involved here.

June 5, 1937, Richard married Lucy Mae Walker in Lee County. They lived together for about four months and "separated by agreement in October, 1937." Some three months after separation, Lucy Mae moved to St. Louis, Missouri, where she lived until "the fall of 1943" when she returned to Arkansas and lived with her father in Lee County until March, 1944, when she moved to North Little Rock, where she has since resided. Lucy Mae did not see or hear from Richard after their separation in 1937.

Richard married appellee, Edith Palmer, January 20, 1944, but they separated seven or eight months thereafter. Richard died in 1947. He had sued Lucy Mae for divorce September 4, 1943, but the case never came to trial.

Richard had acquired a home in 1936, described as Lot 10, Block 21, Woods Second Addition to the City of Marianna, in which he had resided until his death in 1947. A few months prior to his death, his sister, Grace Watson, appellant, moved into his home and nursed and cared for him until his death.

Letters of Administration were issued to Edith Palmer, appellee, and thereafter claiming to be Richard's lawful wife, she sought dower and homestead in the above property. Grace Watson, appellant, intervened and alleged the invalidity of Richard's marriage to Edith Palmer, for the reason that when he married Edith he had a living first wife, Lucy Mae, and that his former

marriage to Lucy Mae had not been dissolved. She further alleged that she owned the property by deeds from the "sole surviving heirs" of Richard Palmer.

The Chancellor found that the marriage between Richard and Edith, appellee, was valid, that Edith was his "lawful widow," and entered a judgment setting aside to her dower and homestead in the above described property.

This appeal followed.

The material facts appear not to be in dispute.

We find no evidence that Richard's marriage to Lucy Mae was ever legally dissolved. She testified that she never obtained a divorce from Richard. Her testimony is not disputed. Richard had lived continuously in Lee County since 1937 in the above described property, and the records of that county show that no divorce was ever entered in the suit that he filed.

In these circumstances, while the rule is well established that "where a second marriage is established in form according to law, a presumption arises in favor of its validity as against a former marriage, even though the husband or wife (as the case may be) of the former marriage is living at the time the second marriage is brought into question," *Gray* v. *Gray,* 199 Ark. 152, 133 S. W. 2d 874, this presumption however is a rebuttable one, and may be overcome by sufficient proof as was said, in effect, in the above case, "the rule, however, has its limitations, and must give way to reality when facts opposing the presumption are presented."

We have concluded, after consideration of all of the evidence, that the presumption in favor of the validity of the second marriage here,—that is the marriage of Edith to Richard Palmer,—has been overcome by the evidence and that the finding of the Chancellor to the contrary is against the preponderance of the testimony.

But, appellee says that the marriage of Richard to Edith Palmer (the second marriage) was valid under § 55-109, Ark. Stats. 1947. We cannot agree. This sec-

tion provides: "In all cases where any husband shall *abandon* his wife, or wife her husband, and resides beyond the limits of this State for the term of five (5) successive years, without being known to such person to be living during that time, their death shall be presumed, and any subsequent marriage entered into after the end of said five (5) years shall be as valid as if such husband or wife were dead."

Under this section, as we construe it, there must first be an abandonment before it can apply in the present case. The separation of Richard and Lucy Mae in 1937, the evidence shows, was by mutual agreement, or consent, and not by abandonment. "Desertion or abandonment consists of the separation of one spouse from the other without consent or justification, and with the intention of not returning." 27 C. J. S., § 35, p. 562, under "Divorce." See *Goset* v. *Goset,* 112 Ark. 47, 164 S. W. 759, L. R. A. 1916C, 707, wherein this statute was construed.

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

PEERLESS COAL COMPANY *v.* JONES.

4-9530 240 S. W. 2d 647

Opinion delivered June 25, 1951.

Rehearing denied July 9, 1951.

Harper, Harper & Young, for appellant.

Yates & Yates, for appellee.

ROBINSON, J. The Workmen's Compensation Commission made an award to appellee for a disability due to silicosis. On appeal to the Circuit Court the action of the Commission was affirmed. It is the contention of appellant that there is no evidence in the record which would justify a finding that appellee was exposed to a silica hazard while working in appellant's mine, and for this reason the case is controlled by *Collier-Dunlap Coal Company* v. *Dickerson,* 218 Ark. 885, 239 S. W. 2d 9.

In our opinion the evidence in the case at bar is much more favorable to the employee than it was in the Dickerson case. At the time he became disabled, Dickerson had only worked in appellant's mine for a period of 25 months. Moreover, there was no evidence that the conditions in the mine where Dickerson worked constituted a silica hazard. It was pointed out in the Dickerson case that § 81-1314, Ark. Stat., provides that in the absence of conclusive evidence in favor of the claim, disability due to silicosis was presumed not to be due to the nature of any occupation unless 5 out of the 10 years immediately preceding the disability the employee had been exposed to the inhalation of silica dust.

In the Dickerson case the evidence was not conclusive in favor of the claim as no showing was made that there was any silica dust in the employer's mine where the employee had worked for only 25 months, and there was no showing that the employee had been exposed to the inhalation of silica dust for 5 out of the preceding 10 years. Here, however, the employee Jones worked in the same mine from 1941 to 1949, at which time he became disabled, a period of 8 years.

In addition to the evidence in the case at bar as to the period of time the employee had worked in appellant's mine, and that the mine contained rock dust, there is the direct evidence that Jones, the employee, acquired silicosis while working in a silica hazardous industry. Upon the presentation of his claim for disability by the employee, the appellant had the employee examined by a doctor of appellant's choice, Dr. Jesse E. Douglas, who,

by way of a statement introduced in evidence by agreement, testified:

"This man has a moderate amount of silicosia which was acquired through his occupation in a silica hazardous industry. I would estimate his disability to be 50%, which is permanent."

The evidence of Dr. Douglas on the point of appellee having acquired silicosis in a "silica hazardous industry" is positive and it stands uncontradicted. Dr. Douglas in effect says that Jones acquired silicosia while working in appellant's mine as Jones had worked there for 8 years before becoming disabled.

When all the evidence as a whole is considered, it is substantially to the effect that during the 8 years Jones worked in appellant's mine he acquired silicosis. And, there is no evidence to the contrary.

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. *Scobey, Admr.,* v. *Southern Lumber Company,* 218 Ark. 671, 238 S. W. 2d 640; *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26; *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; *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

Affirmed.

George Rose Smith, J., dissenting. I do not think that this case can be distinguished from the *Dickerson* case, cited by the majority. It is true that Dr. Douglas testified that the claimant had acquired silicosis through his occupation in a silica hazardous industry, but that statement does not show the existence of silica in the appellant's mine. Jones had worked as a coal miner for about thirty years, the last eight in appellant's mine. On the evidence in this record it is purely a matter of conjecture whether Jones contracted silicosis while working for the appellant or while working for some earlier em-

ployer. I think we should remand the cause for further proof, as we did in the *Dickerson* case.

HOLT, J., joins in this dissent.

STATE GAME & FISH COMMISSION *v.* HORNADAY.

4-9487 242 S. W. 2d 342

Opinion delivered June 25, 1951.

Rehearing denied October 8, 1951.

L. B. Smead and *Ed E. Ashbaugh,* for appellant.

J. Bruce Streett, Thomas E. Sparks and *Catlett & Henderson,* for appellees and cross-appellants.

GRIFFIN SMITH, Chief Justice. The Game and Fish Commission brought an action in Calhoun Circuit Court to condemn certain lands for use in conservation and propagation of fish. K. G. Hornaday and his wife, Catherine, as owners of some of the land needed for the project, defended on the ground that the primary purpose was not conservation or any of the kindred matters enumerated in Amendment No. 35 to the Constitution. They contended interested persons had purchased a large part of the adjacent lands and planned to organize a private corporation for the purpose of enjoying benefits of the enterprise, to be known as the Tri-County Lake.

It was further alleged that Caney Creek—across which it was planned to construct a dam—was too small in its natural state for adequate fishing, and the proposal to impound its waters was impractical from an engineering standpoint; but, in any event, the motivating influence was a selfish desire by a small group to improve the market for land that had been privately purchased with the expectation that the State would invest an appreciable sum in building the lake. More than $10,000, it was alleged, had been raised through private subscriptions to be spent for promotional purposes. Upon the defendants' motion the cause was transferred to Chancery.

The Commission's engineering plans call for a lake of approximately 500 acres, reaching to a point three miles from the City of Fordyce. It is conceded that local citizens initiated the undertaking and promised to procure the necessary land. The Hornadays first agreed to sell, but later concluded that 100 acres of the land asked

for by the Commission should not be severed from their other holdings, and they therefore declined to part with the needed area.

The Chancellor found that only 81.04 acres were required for actual operations, but seemingly thought that the remaining 18.96 acres would be exposed to such an extent that damage might result from excessive rains or "flash floods." There was preponderating testimony to the effect that security of the land condemned depended upon the additional acreage. The comprehensive plan thought necessary by the Commission could not be "usefully" consummated without the entire 100 acres. The Hornadays owned 1,100 acres in the lake vicinity, all connected except two forties. The land is used for grazing and maintains approximately 140 head of cattle. These cross-appellants had previously sold 300 acres "to certain individuals who are now promoting the proposed lake." Other than the lands owned by cross-appellants, the purchase price was $10 per acre. The Hornadays at one time verbally agreed to sell for $20 per acre, then concluded they would not dispose of any more of their lands. One witness thought an offer at $15 per acre had been made. Other holdings described by witnesses as equal in quality were thought to be comparatively worthless—a figure as low as $2 per acre having been named. The Hornadays, however, believed that $75 to $100 per acre would be about right. The Chancellor assessed damages at $30.

In addition to the defense (a) that the evidence establishes a private purpose to have the State build the lake for local convenience, it is argued (b) that Act 370 of 1949 appropriating funds for the Commission's use is unconstitutional as administered, and (c) the facts here are clearly distinguishable from those in cases where we have affirmed the Commission's right to condemn under Amendment No. 35.

The Commission maintains that fundamentals featuring the instant controversy were settled in the appeal by *Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948. Cross-

appellants think the controlling principle is stated in *Hampton* v. *Arkansas State Game and Fish Commission,* 218 Ark. 757, 238 S. W. 2d 950.

In the Wrape case, as here, it was argued that because local interests had contributed money and had importuned the Commission, the undertaking necessarily became *quasi*-private, and in the circumstances public funds should not be used, thereby defeating the right of condemnation.

We agree that the purposes mentioned in Amendment 35 must be present. See §§ 1 and 8 of the Amendment. In commenting upon broad powers conferred upon the Commission, it was said that the right to condemn extends not alone to property actually utilized, but also to lands "useful or convenient." The Commission determines what property is needed, and if its actions do not constitute an abuse of discretion courts will not interfere. We also held that the Amendment was complete within itself, "and that prior legislative Acts, whether directive or restrictive in nature," had been superseded. See *Arkansas Game and Fish Commission* v. *Edgmon,* 218 Ark. 207, 235 S. W. 2d 554.

Essence of the *Hampton* case is that Amendment 35 does not invest the Commission with authority to acquire land by condemnation "to establish shooting grounds where the public may kill migratory fowl." There it was admitted that of 40,000 acres the Commission proposed to acquire, 75% would be utilized for public shooting grounds as distinguished from conservation or propagation within the meaning of the Amendment. But we said that if the entire area should be subjected to use as a sanctuary or refuge, the taking would be lawful.

In the case at bar the lake will be stocked with fish. Sportsmen will be permitted, without discrimination and without restrictions other than those generally prescribed by law or by rules having legal effect, to use it. Cross-appellants think that a reasonable construction of the Amendment would limit the Commission's right of condemnation to areas intended for breeding purposes, and that private lakes and streams should be stocked from

such sources. This concept was rejected in the Wrape case, where it was also held that contributions by local interests and personal assistance extended by individuals and committees did not change the characteristics of an enterprise adopted by the Commission from a public to a private undertaking. We do not see in the evidence a distinction from the Wrape appeal sufficient to justify a finding that the Chancellor erred in holding that there was no collusion, subterfuge, or unwarranted manipulation.

The second contention is that $69,650 paid into the court registry June 29, 1950—one day before expiration of the fiscal year—was an attempt by the Commission to remove funds from the State Treasury in respect of which the 1949 appropriation would have expired. The Act carries an appropriation of $300,000 for use in acquiring lands, and for advertising. Section 3 reads: "Any and all projects or developments under this appropriation shall be approved by the U. S. Fish and Wildlife Service, and/or the U. S. Forestry Service, and/or the U. S. Soil Conservation Service, or similar Federal agencies having jurisdiction of Federal Aid programs in Arkansas." Secretary McAmis, on behalf of the Commission, conceded that the project was not in conjunction with the Federal Government. It was his belief that approval by the agencies mentioned in § 3 of Act 370 was necessary only in those cases where coöperative undertakings were contemplated. To this we agree.

Act 370 is distinct from the Commission's administrative appropriation and contains but three items, two of which are not questioned. Although Amendment 35 gives the Commission all funds arising from the sources upon which it relies, it is necessary that appropriations be made by the General Assembly. But, say the cross-appellants, Art. 5, § 29, of the Constitution, has not been complied with, hence the appropriation is void. It provides that no money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill; and the maximum amount which may be drawn shall

be specified in dollars and cents; and no appropriation shall be for a longer period than two years.

An appropriation that failed to fix the maximum amount a state agency might spend was discussed in *Dickinson, Auditor,* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909. The Game and Fish Commission (opinion written in 1916) undertook to act under an appropriation setting aside in the treasury "all moneys arising from fines, forfeitures, or licenses under any law for the protection of game and fish." The ground on which the appropriation was held invalid was that it did not fix a maximum beyond which the Commission could not make expenditures.

The Constitutional provision was discussed in *Hudson* v. *Higgins,* 175 Ark. 585, 299 S. W. 1000. Act 146 of 1927 authorized the board having control of the Agricultural, Mechanical and Normal School for Negroes, at Pine Bluff, to relocate and build a school plant on lands owned by the State. It was further authorized to acquire "such new property and to make such additions to the administrative and teaching staff and equipment as in [the Board's] judgment may be deemed necessary to carry out the purpose for which said institution was created." The State Debt Board was authorized to sell $275,000 in notes to pay for erecting and equipping buildings, "and for other permanent improvements at said school." Section 11 of the Act appropriated $25,000 from the Agricultural, Mechanical and Normal School Fund, "or so much thereof as may be necessary" to defray expenses incident to the sale of notes and for the payment of such interest as may fall due in the biennial period ending June 30, 1929.

Answering the contention that proceeds of the note sale had not been appropriated in conformity with Art. 5, § 29, of the Constitution, the Court said: "Since the maximum amount of money that can be realized from the sale of bonds, under the provision of the statute, is definitely fixed by the whole amount of the bonds authorized issued, $275,000, . . . the Act makes an appropriation of money raised by the sale of the bonds within the meaning of the constitutional provision." Three justices,

including the writer of the opinion (Mr. Justice KIRBY) did not agree with the result.

An appropriation not mentioning a particular project, but available for general purposes contemplated by the Act, was upheld in *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. 2d 41. The opinion (1929) was written by Chief Justice HART, who discussed Acts 18 and 153 of 1929. The purpose was to pay valid outstanding debts that were obligations against road improvement districts. No district was designated, nor was the amount due or to be paid in satisfaction of any single item set out in either Act. Commenting on the legislation the Chief Justice said: "[Act 153] sets apart or assigns to a particular use of a kindred kind a sum of money out of a specific appropriation made by the first Act, the maximum of which is stated in the bill. That is to say, it is for the payment of certain indebtedness of various road districts which had not been included in Act 18. The appropriation is specific as to the purpose for which it is to be used. It is specific as to the time of payment, and as to the fund out of which it is to be paid. That was sufficient to constitute a valid appropriation."

In *Arkansas Game & Fish Commission* v. *Page, Treasurer,* 192 Ark. 732, 94 S. W. 2d 107, Act 194 of 1935 was construed. By § 2 it was directed that $5,000 be transferred from the Game Protection Fund. The questioned provision was a part of the Act appropriating funds for the State Park Commission. In reversing a lower court decree permitting the transfer Mr. Justice BAKER said: "However apparently simple, direct and understandable [Art. 5, § 29 of the Constitution] may appear to the reader, it is certain that § 2 of Act 194 . . . complies with [the constitutional mandate] only in one particular, and that is, it fixes definite or certain amounts which may be transferred from the account of the Arkansas Game and Fish Commission, $5,000 for the year 1936; $4,000 for the year 1937. It does not distinctly state the purpose of the transfer of this money."

Headnote No. 5 to *Scougal* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023, summarizes the opinion of Special Justice

WOOTEN as follows: "Where the purpose expressed in § 3 of Act 278 of 1937, making the appropriation, was the payment of expenses to be incurred in refunding operations, and the appropriation was specific in that it transferred the money from the Bond Refunding Fund, and such additional funds as might be necessary for the appropriation made in § 1 of the Act, it was a sufficient compliance with Art. 5, § 29, of the Constitution." There were three recorded dissents.

The definition of an appropriation was reëxpressed by Chief Justice MCCULLOCH as "a setting apart from the public revenue of certain sums of money for a specific object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other." *Jobe* v. *Caldwell,* 99 Ark. 20, 136 S. W. 966.

In the Act questioned here the maximum amount, $300,000, is fixed and the primary purposes are definitely related, forming a general plan for the acquirement of lands, conservation, etc. A more tenuous question is that part of the appropriation authorizing funds to be spent "in advertising Arkansas' advantages," but there is no showing that any of the money was spent for advertising purposes—an enterprise as to which no maximum sum was mentioned. Since the overall purpose was conservation, as expressed by the language of Item 1 of the Act, the legislative purpose as a whole did not fail because there was included in the measure an indeterminate authorization not shown to have been resorted to.

Final objection is that because the money was vouchered June 29th from the appropriation for a fiscal period expiring the following day, there is no lawful fund for payment of condemnation damages. The record shows that three vouchers were issued. Each was converted into a warrant, and the warrants paid by the Treasurer of State, hence the money held in the Court's registry is the proceeds of these warrants.

Act 311 of 1945, regulating the time in which warrants and vouchers may be issued, no doubt supersedes Act 781 of 1923, § 8. Act 311, Ark. Stat's, § 13-554,

authorizes disbursing agents to issue vouchers for the payment of obligations incurred, or which become due, prior to the close of any fiscal year on June 30th. Such vouchers must be presented to the State Comptroller's office not later than August 15th following the close of the fiscal year; "and the Auditor of State shall issue his warrant in payment of such voucher not later than August 31 following the close of the fiscal year; . . . provided, that in the event a service is performed or contract entered into by any State agency, which would require that the obligation be incurred or commenced in the closing period of one fiscal year, and such obligation be not completed until after the close of the fiscal year, then the payment of such obligation may be made in whole or in part from either fiscal year."

There can be little doubt that the Commission's obligation, as reflected by resolutions, was incurred during the year the vouchers were issued, although the project could not be completed or physical construction begun until condemnation cleared the title. The deposit does not appear to have been resorted to as an indirect method of defeating any applicable statute.

Action of the trial Court in attempting to retain jurisdiction for the purpose of entertaining damage claims must mean that a preponderance of the evidence indicated that construction of the lake would result in occasional overflows. It follows that this small area of 18.96 acres was essential to the enterprise and it ought to have been included in the decree on the same basis of compensation, $30.

That part of the decree condemning 81.04 acres is affirmed, but that part denying condemnation of the remainder and retaining jurisdiction to permit future damage actions against the Commission is reversed.

Mr. Justice McFaddin and Mr. Justice Ward dissent.

Ed. F. McFaddin, Justice (Dissenting). This is the third case directly involving the eminent domain power sought to be exercised by the Arkansas State Game and Fish Commission under Amendment No. 35 of the Con-

stitution. The two previous cases are *Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948, and *Hampton* v. *Arkansas State Game and Fish Commission,* 218 Ark. 757, 238 S. W. 2d 950.

Wrape v. *Commission, supra,* was an eminent domain proceeding for the purpose of constructing a lake in Faulkner County; and one of the questions was whether the purpose was within the purview of the Constitutional Amendment. We recognized in that case, as we have all along, that the Commission has authority to exercise eminent domain within the purview of the Constitutional Amendment. We said:

"The Game and Fish Commission is given a very broad discretion in determining how wildlife shall be conserved. Not only may it acquire, by condemnation or otherwise, the property actually needed, but it may also procure any that may be '*useful or convenient* . . . in the exercise of any of its duties'; and, while in matters of mere convenience the power would not be unlimited, yet the italicized words serve to emphasize a plan by those who framed the Amendment—a bilateral purpose to conserve wildlife, and to place that duty with the Commission."

Hampton v. *Commission, supra,* was an attempt by the Commission to take land by eminent domain for the purpose of constructing a public duck shooting ground; and we said:

"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, refugees, reservations.' A public shooting ground could hardly be likened to any of these."

The effect of our holdings involving Amendment No. 35 is that eminent domain may be invoked by the Commission when the purpose is within the purview of the Amendment, *i.e.,* conservation; but eminent domain cannot be invoked by the Commission when the purpose is to create recreational facilities, hunting grounds, fishing lakes, etc.

In the present case the Commission is seeking to exercise eminent domain for the purpose of constructing a lake. The question is whether the primary purpose in the case at bar is to conserve fish or to create a lake for public fishing and recreation. I think the primary purpose of the lake is to create a recreational facility where the public may fish; and I do not believe the primary purpose is to restore and conserve wildlife. I will not review the testimony at length: it would serve no useful purpose. But after studying the entire record I am firmly of the opinion that the primary purpose of this project is to create a recreational facility. Eminent domain should be allowed by the courts only when it is clear that the State is taking the property to fulfill clearly allowed constitutional grants. Such showing has not been made in the case at bar, as I see the record. Therefore, I respectfully dissent from the majority holding.

PARKER *v.* TURNER.

4-9468 242 S. W. 2d 148

Opinion delivered June 25, 1951.

Rehearing denied October 8, 1951.

[redacted]

F. D. Majors, for appellant.

Caviness & George, Hays, Williams & Gardner and *J. M. Smallwood,* for appellee.

George Rose Smith, J. This is a suit brought by the appellant, Parker Parker, to recover damages for the wrongful cutting of timber on a forty-acre tract situated on a mountain in Yell county. By his pleadings and proof the plaintiff charged that one of the defendants, J. R. Turner, having no authority to sell Parker's timber, wrongfully executed a deed purporting to convey this timber to another defendant, C. J. Robinson. Robinson went upon the land, cut the timber, and sold it to the other defendants, a firm known as Nebo Lumber Company.

All the defendants interposed pleas of *res judicata,* asserting that Parker had previously sued Turner, Robinson, and Nobe Buckman for the same conversion, and that a consent judgment for the plaintiff had been entered in the earlier case. The circuit court sustained the pleas, finding (*a*) that the prior judgment was *res judicata* as to Turner and Robinson, and (*b*) that since the lumber company's liability depended upon the culpability of Turner and Robinson, who were the immediate actors in the tortious conduct, the release of Turner and Robinson operated to release the lumber company as well. In reaching the latter conclusion the trial court relied upon *Portland Gold Min. Co.* v. *Stratton's Independence, Ltd.,* 158 Fed. 63, 16 L. R. A., N. S. 677, and *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 9 N. E. 2d 758, 112 A. L. R. 401. The complaint was accordingly dismissed without a hearing on the merits.

The decisive issue is whether there was one trespass or two. Of course, if there was only one tort Parker can-

not split his cause of action into two lawsuits. *Ozan Lbr. Co.* v. *Tidwell,* 213 Ark. 751, 212 S. W. 2d 349. But the rule is different if there were two distinct trespasses. "Separate torts give rise to separate causes of action, and each cause remains unaffected by a judgment for any other tort subsequent or antecedent. One against whom or against whose property distinct and separate tortious acts have been committed has a cause of action for each; and a recovery for one does not bar a recovery for another, whether committed before or after the commencement of the action in which the recovery was had. . . . Successive suits may be maintained for distinct trespasses." Freeman on Judgments (5th Ed.), § 588. An example is given in the Restatement of Judgments, § 61: "If on two separate occasions the defendant beat the plaintiff, and the plaintiff brings an action for one of the batteries, the judgment in that action, whether for the plaintiff or for the defendant, does not preclude the plaintiff from subsequently maintaining an action for the other battery."

In this case we think there were two distinct torts. The forty-acre tract consists of two contiguous twenties, one on top of the mountain and the other on the slope. In October, 1947, Turner executed a timber deed purporting to give Robinson six months in which to remove the timber from the entire forty acres. During October and November, acting under that deed, Robinson removed the timber from the upper twenty acres, hauled it to his mill, and later sold the rough lumber to Nebo Lumber Company. There was no further activity until the following July—about seven months later. In that month Buckman set up a portable sawmill on the lower twenty acres, cut the timber, and sawed it into rough lumber on the spot. It is not shown what part Turner and Robinson played in the second conversion, except that they were joined as defendants in the original suit against Buckman. That complaint, directed primarily against Buckman, contained only this allegation as to Turner and Robinson: "J. R. Turner and C. J. Robinson are involved in the unlawful trespass of Nobe Buckman, the facts of which are well known to Nobe Buckman, and said parties should

be made party defendants.'' The consent judgment in that case was against all three defendants.

These facts prove two trespasses rather than a single continuing trespass. Robinson cut the timber from the upper twenty in October and November, while Buckman cut the timber from the lower twenty some seven months later. Robinson acted under Turner's timber deed, but that deed had expired when Buckman entered the land. Robinson hauled the logs to his own mill, but Buckman used a portable sawmill to saw the logs on the land. Robinson sold the lumber to the lumber company, which is alleged to have been a party to a conspiracy to convert Parker's timber, while Buckman is not shown to have been in privity with the lumber company. In these circumstances the Robinson trespass was distinct from the Buckman trespass, and separate suits may be maintained. It thus becomes unnecessary for us to consider the additional issues discussed in the circuit judge's opinion.

Reversed and remanded.

McFaddin, J., not participating.

Butler *v.* Alldredge, Administrator.

4-9542 242 S. W. 2d 136

Opinion delivered June 25, 1951.

Rehearing denied October 8, 1951.

Cracraft & Cracraft, for appellant.

A. M. Coates, for appellee.

ED. F. MCFADDIN, Justice. This is a proceeding instituted by the Administrator, Alldredge, to determine the heirship[1] of Minerva Riley Hampton, a Negro woman who died without descendants. There are two claimants: appellant, Willie Butler, who claims as a nephew, and appellee, Ed Riley, who claims as a half brother. The Probate Court held that the claimants should share the estate equally; and Willie Butler has appealed, insisting that he is entitled to the entire estate.

The decision necessarily turns on the marital status of Columbus Riley, the admitted legal father of Minerva and the claimed legal father of Ed Riley. The evidence shows that Columbus Riley's first wife was Lizzie Newsom, and that Minerva Riley (Hampton) and Lucy Riley (Butler) were children of that marriage. Minerva is the deceased whose estate is here involved; and Lucy is the mother of the appellant, Willie Butler, whose right to inherit some part of Minerva's estate is established, since he is an admitted legal nephew. But Ed Riley contends, and his witnesses testified, that Columbus Riley divorced Lizzie Newsom and married Polly Goode in 1881, and by her had two children: Ed Riley,[2] the claimant, and another child, Willie, who died without issue.

Appellant insists that the record here fails to show either a decree whereby Columbus Riley divorced Lizzie Newsom, or a marriage certificate whereby Columbus Riley married Polly Goode, the mother of Ed Riley. Because of the omission of the divorce decree and the mar-

[1] Section 173 of Act 140 of 1949 (now § 62-2914, Ark. Stats.) allows such a proceeding.

[2] By § 61-112, Ark. Stats., relations of the half blood inherit equally with those of the whole blood.

riage license from the evidence, appellant argues[3] that Ed Riley has failed to prove that he is a legal half brother of Minerva. This argument is evidently based on the assumption that the fact of marriage can only be proved by exhibition of a marriage certificate. Such is not the law. In *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808, we said:

"The law in this State is that marriage may be proved in civil cases by reputation, the declarations and conduct of the parties, and other circumstances usually accompanying that relation. Declarations of the parties are evidence tending to establish marriage. *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Jones* v. *Jones,* 28 Ark. 19; 2 Greenleaf on Evidence (16 Ed.), § 462; 1 Wigmore on Evidence, 268, and vol. 3, §§ 2082-2083."

To the same effect see *Daniels* v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401.

"It is also well established in Arkansas that community reputation is admissible as evidence of marital status. *Farmer* v. *Towers,* 106 Ark. 123, 152 S. W. 993; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808; *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189."

Ben Goode, brother of Polly Goode, testified positively that Columbus Riley was divorced from his first wife when he married Polly Goode in 1881. After saying that he personally knew all four of the children of Columbus Riley, Ben Goode further testified:

"I know that Columbus Riley had four children, two by his first wife and two by his second. The two by his first wife were named Minerva and Lucy and the two by

[3] Appellant says in his brief:

"The only issue for determination seems to be the legality of the second marriage of Columbus to Polly, the mother of Ed Riley.

"To establish the validity of that marriage, Ed Riley must show a divorce from the first marriage, followed by a marriage to the second wife, Polly. We are aware that when a second marriage is shown to have been properly solemnized, it is assumed to be valid, until it is affirmatively shown that there has been no prior divorce.

"But in the instant case the marriage of Polly is not shown to have been solemnized, except by indefinite, hearsay evidence. The best evidence of the marriage would have been the marriage certificate, or a certified copy of the record."

his second were named Ed and Willie. After Columbus Riley married my sister and at the time they lived in Brinkley, Minerva and Lucy lived with them."

Furthermore, there was introduced a photostatic copy of the birth certificate of Ed Riley, duly certified by the State Registrar of Vital Statistics, as provided by § 82-505, Ark. Stats. This birth certificate, filed as a delayed certificate in 1943 under the provisions of the said Statute, was filed long before this controversy arose as to heirship; and the certificate listed Ed Riley's birth as September 11, 1885, in Brinkley, Arkansas, and his father as Columbus Riley, and his mother as Polly Goode. A careful study of the evidence convinces us—just as it evidently did the trial court—that Ed Riley and his witnesses testified candidly and frankly, whereas Willie Butler's testimony is replete with matters at first apparently denied, and then grudgingly admitted.[4]

Without detailing all the evidence, we conclude that it abundantly establishes that Columbus Riley and Polly Goode were legally married in 1881 and lived together until Polly's death in 1897; and that Ed Riley was a child of that marriage. With the legal marriage established, it is presumed valid. The appellant has offered no evidence to rebut such presumption. See *Cash* v. *Cash,* 67 Ark. 278, 54 S. W. 744; *Estes* v. *Merrill,* 121 Ark. 361, 181 S. W. 136; *Lathan* v. *Lathan,* 175 Ark. 1037, 1 S. W. 2d 67; *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189; *Lockett* v. *Adams,* 212 Ark. 899, 208 S. W. 2d 428; and

[4] For instance, Willie Butler denied ever writing to Ed Riley or notifying him of the death of Minerva; and then when letters were introduced bearing Willie Butler's name, he admitted he had caused them to be written, saying:

"Since he visited us in '26, he claimed to be a half brother. He has been considered in the family on his own saying only, but as from that standpoint, I wish I could have seen my grandfather to ask him when he had the opportunity to tell me."

Again, letters were introduced purporting to be written by Willie Butler and addressed to "Dear Uncle Ed." After first denying ever writing the letters, Willie Butler finally gave answer to a question as follows:

"Q. You do admit you knew where Ed Riley lived and when 'Aunt Minerva' passed away, you notified him by telephone and he came over, and after he went back to Chicago, this letter was sent to him and the matters and things set out in this letter are true?

"A. Yes."

Daniels v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401. See, also, Annotations in 34 A. L. R. 464, and 77 A. L. R. 729.

The judgment of the Probate Court is affirmed.

LAMB *v.* MCKINNEY LUMBER COMPANY.

4-9540 242 S. W. 2d 121

Opinion delivered June 25, 1951.

Rehearing denied October 8, 1951.

P. L. Smith, for appellant.

Tompkins, McKenzie & McRae, for appellee.

PAUL WARD, J. Everett Lamb was an employee of McKinney Lumber Company during the year 1948 through Saturday noon of the 28th day of August, at which time he left his job as lumber trimmer and went home. His activities for the afternoon are disputed as will appear later, but he went to bed and was found early the next morning paralyzed and unconscious. On August 8, 1949, he filed, through his attorney, a claim before the Arkansas Workmen's Compensation Commission, and hearings were held before a special referee on September 21, and November 28, 1949. The Commission held adversely to claimant and so did the circuit court to which an appeal was taken. From the judgment of the circuit court appellant prosecutes this appeal.

According to the testimony of appellant he became overheated while working as a lumber trimmer some time before noon, and had cramps and went home and went to bed. Later that afternoon he went to town, which was only a short distance away, and then he returned home and again went to bed. The next morning about four o'clock his mother, with whom he lived, found him in his bedroom unconscious. He has not yet recovered and is now paralyzed in his right arm and partially paralyzed in his right leg and his speech is greatly affected. He contends his condition is the result of becoming overheated. Appellant is around fifty years old and weighs about two hundred thirty pounds and has a florid complexion. Dr. Burleson, his family physician, lived only a short distance away and treated appellant soon after he was stricken. Appellant admits he had syphilis for some time and that he has been a heavy drinker all of his life. The mother of appellant says that he came in at noon on Saturday, August 28, 1948, and said that he had gotten too hot at work; that he was sick and did not want any dinner; that he lay down and did not get up until six or seven o'clock; that he ate supper and went to bed around seven o'clock and nothing more happened during the night until she found him early the next morning in his bedroom in a paralyzed and unconscious condition. She says appellant stayed at home and slept all afternoon. At the second hearing, however, she says appellant did get up later in the afternoon and go to town.

There was testimony that appellant was sitting on the porch of Clyde Wingfield's store between 12:00 and 1:00 o'clock on the same date, that he was dressed in clean clothes, and that he appeared to be all right. Those who had been with appellant frequently stated they never heard him say anything about getting too hot until his claim for compensation was filed. Dr. Hesterly who treated him a little less than a month after he was stricken and also treated him several times later, testified that he had never heard anyone say anything about appellant getting too hot on said Saturday afternoon until he was so informed almost a year later.

It is not clear from the wording of the Commission's finding against claimant whether it found as a matter of fact that appellant did not become overheated on this occasion, or whether it merely found that claimant's stroke and present condition were not the result of becoming overheated. Since there is some doubt as to the specific holding on this point, we will resolve that doubt in favor of appellant and proceed to consider whether there is substantial evidence to support a finding that appellant's paralytic condition did not result from being overheated. This calls for a consideration of the medical testimony.

It is appellee's contention that the stroke suffered by appellant was not the result of becoming overheated, but was the result of his physical condition and particularly the result of his having syphilis and being a heavy drinker. It is not denied that appellant has syphilis and has had for some time or that he has been a heavy drinker most of his life.

There is a signed statement in the transcript by Dr. Joe W. Reid on his office stationery, dated May 5, 1950, but there is nothing in the record to show why or how it was included. However, we will assume it was properly included and quote it as follows:

"I have examined Mr. Everett Lamb this date. He gives a history of working in August, 1948, and thought he became too hot. At this time he developed a paralysis of right arm and right leg. He in my opinion is Totally Disabled, and in my opinion it is a permanent disability. His right arm is totally paralyzed, his right leg 75% paralyzed. His speech is markedly affected. His blood pressure is 122-82. Many factors can bring about this condition. I obtained history suspicious of Syphilis. I have sent blood to the laboratory but have not yet received result of this test. A heat stroke could easily be the whole cause of this condition or at least a contributing factor."

Two letters were introduced as exhibits. One dated August 10, 1949, is from appellant's attorney to Dr. J. B. Hesterly. The writer states he had talked with the doctor

about appellant's claim and enclosed a statement for the doctor to sign stating that it would be all right for the doctor to change it any way he pleased. The other letter is from the doctor to the said attorney, dated August 12, 1949, and is as follows:

"I have your inquiry with reference to Everett Lamb, whom I have been treating for a stroke since ..... August, 1948.

"At the time I was called to see Mr. Lamb, he was helpless, and could not talk at all, and I was not given any history of him getting too hot; but later, I received information that on the 28th of August he got too hot while working for the McKinney Lumber Company and began cramping and aching all over. He immediately went to bed and sometime during the night he had the stroke. From this history of the case, it is very probable that getting too hot was the cause of the stroke, and assuming that the history given to me is true, it is my opinion that getting overheated was the cause of the stroke. The case was different to any case I have ever handled, and I cannot think of any other reason that would have caused it."

The deposition of Dr. Hesterly was taken on October 21, 1949, in which he states he treated appellant a little less than a month after he had the stroke and also treated him after that on several occasions, and that on these occasions appellant had not told him about becoming overheated or about having cramps; that at the time he wrote the letter set out above he did not know appellant was a heavy drinker or that he had syphilis; that appellant had a florid complexion which indicated a susceptibility to high blood pressure or a paralytic stroke especially when taken in consideration of his over weight; that continued drinking would have a tendency to harden the arteries and cause a stroke; that ordinarily the symptoms of becoming overheated manifest themselves pretty promptly and not after twelve or fourteen hours and generally continue without interruption until the patient recovers or dies. In the doctor's opinion syphilis affects

the lining of the blood vessels and tends to increase the blood pressure.

Dr. William A. Snodgrass, a physician and surgeon for eighteen years, examined appellant and stated that his appearance indicated that he would be susceptible to a paralytic stroke because he was a heavy set man with a florid complexion; that ordinarily a paralytic stroke is caused by a cerebral hemorrhage, and that syphilis and the excessive use of alcohol are, among other things, contributing causes to a paralytic stroke; that reasonable manual labor in the summertime is not a contributing cause ordinarily; that the effect of becoming overheated would be manifest sooner than twelve or fourteen hours and in all of his practice he had never had a patient to have a stroke from being overheated twelve or fourteen hours previously, and he had never heard of such a case; and that usually a patient suffering from overheat will recover or die in from twenty-four to thirty-six hours.

Dr. A. S. Buchanan, who has been practicing over forty years examined appellant at the same time Dr. Snodgrass did and his testimony was substantially the same as that of Dr. Snodgrass.

Dr. A. J. Burleson, who lives close to appellant, and saw him soon after he was found in a paralyzed condition, was questioned by the special referee without the presence of the attorneys for either side, and the doctor declined to make any statement for or against appellant's claim.

From all of the above we are forced to the conclusion that there is substantial evidence that appellant's paralytic condition was not caused by becoming overheated on August 28, 1948, while in the employment of the McKinney Lumber Company. The well established rule as announced many times by this court is that the findings of the Commission, in controversies of fact, shall be given the same weight on appeal as is given to the verdict of the jury. *Price Construction Co.* v. *Southern,* 216 Ark. 113, 224 S. W. 2d 358.

In the circuit court, appellant filed motion to strike certain evidence from the record. The appellant did not

raise any such issue before the Commission, so the motion in the circuit court came too late.

The findings of the Commission and the judgment of the lower court are affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* MCGUIRE.

4-9528 242 S. W. 2d 112

Opinion delivered June 25, 1951.

Rehearing denied October 8, 1951.

O. T. Ward, for appellant.

Barber, Henry & Thurman, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Dean R. Morley, Commissioner of Revenues of the State of Arkansas, brought this action against E. L. McGuire and appellee, National Surety Corporation of New York, seeking recovery of $1,000 allegedly due the State under a bond executed by McGuire, as principal, and appellee, as surety.

By agreement the case was tried before the circuit judge, sitting as a jury, upon certain stipulations including the *ex parte* statement of E. L. McGuire, who was a non-resident of the state at the time of the trial and was never served with summons in the suit. The trial court found for appellee and dismissed appellant's complaint as against the surety corporation.

E. L. McGuire was formerly a partner in Ark-La-Tex Cigarette Service, which maintained a place of business at Texarkana, Arkansas, and held a permit as a wholesale distributor of cigarettes in Arkansas pursuant to Ark. Stats., § 84-2303. McGuire, as partner, was appointed stamp deputy by appellant to handle the required cigarette tax stamps used in the partnership business. On July 13, 1949, McGuire executed and posted with appellant a bond in which appellee is surety, pursuant to the provisions of Ark. Stats., § 84-2314, which reads, in part: "The Commissioner shall furnish to the distributors who have qualified by securing the permits as provided by section 3 (§ 84-2303) of this act stamps for the purpose of collecting the tax on cigarettes sold by them, provided that the Commissioner shall appoint and commission stamp deputies who shall be the owners of the wholesale firm or officers of corporations, when he deems it advisable, to handle these stamps and collect the tax on cigarettes before sales of cigarettes are made to the retailers. The Commissioner shall require from each such stamp deputy such official bond as may be by regulations prescribed.

"Stamp deputies shall be allowed such commission on account of sale of stamps and collection of the tax, and shall keep such records of sales and collections, and make such reports as the Commissioner may by regulations prescribe.

"Such stamp deputies shall be, within the scope of their authority, held to be agents of the Commissioner and accountable as such for any wrongful acts."

Section 84-2305(f) provides that every cigarette distributor shall, on or before the tenth of each month, furnish the Commissioner certain sales data and make payment of any taxes due for the preceding month.

On August 2, 8 and 16, 1949, McGuire, as stamp deputy, ordered and appellant shipped to him at Texarkana cigarette stamps in the total amount of $1,500. Under the terms of the bond appellee agreed to pay the State the amount of any loss of taxes (not in excess of $1,000) which McGuire should cause the State, ". . . through larceny, embezzlement, forgery, wrongful abstraction, willful misapplication, willful or careless improper stamping of tobacco and malt syrup products, willful or careless failure to attach stamps to tobacco products and malt syrup products, or any other fraudulent, neglectful, or dishonest act committed after noon of the 13th day of July, 1949, until noon of the 13th day of July, 1950 . . ." The parties stipulated that a balance of $1,000 remained due the State after crediting all payments made for the stamps purchased by McGuire for the partnership. Thus the sole question is whether appellee is liable on the bond in question for the $1,000 loss in taxes sustained by the State.

On June 22, 1950, E. L. McGuire, who then resided at Shreveport, Louisiana, gave attorneys for appellee a written statement of certain facts to which it was agreed at the trial that McGuire would testify, if present, with each party reserving the right to object to all immaterial and irrelevant matters. It does not appear that appellant's motion to strike certain parts of this statement was ever acted upon by the trial court. According to this statement, McGuire and two other persons were engaged as partners in the wholesale and retail sales of cigarettes by the use of vending machines located in the three-state area. One of the partners withdrew from the business prior to the execution of the bond in question. The business was continued, and a new partnership formed, by

McGuire and the other partner, S. E. Nielson of Shreveport, Louisiana, under the same firm name. After execution of the bond and the $1,500 purchase of cigarette stamps by McGuire, an audit of the business was made at the instance of Nielson in the latter part of August, 1949. According to McGuire, this audit showed there were then revenue stamps in the Texarkana office and the various vending machines in the amount of more than $1,300, and that most of these stamps had been attached to merchandise. Shortly thereafter McGuire and Nielson had some disagreement which apparently arose over business losses reflected by the audit. According to McGuire, Nielson declared his intention to notify the State Revenue Department that there would be a default on McGuire's bond in order to "cover up" a part of the business loss.

McGuire further stated that he notified appellee of Nielson's plans and that his lawyer notified the State Revenue Department. He then locked the doors of the business at Texarkana and had no further connection with the operation of the business. He also stated that a few days later Nielson "broke the lock on the doors of the business" and took possession thereof. McGuire also says that he locked up the business in order to preserve the records and enable the Revenue Department and the bonding company to make an immediate investigation, but it is not shown that either was requested to do so or that an investigation was ever made.

The law does not have the same solicitude for surety companies engaged in issuing indemnity bonds for a profit as it does for individual sureties who voluntarily undertake to answer for the obligations of others. Although calling themselves sureties, such companies are in fact insurers, and in determining their rights and liabilities the rule of *strictissimi juris,* which prevails as to a voluntary or accommodation surety, does not apply 50 Am. Jur., Suretyship, § 318. In *American Bonding Co.* v. *Morrow,* 80 Ark. 49, 96 S. W. 613, 117 Am. St. Rep 72, the court said: "It is now well settled that the bond of a surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the

insurer, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear." See, also, *Federal Union Surety Co.* v. *McGuire,* 111 Ark. 373, 163 S. W. 1171; *U. S. Casualty Co.* v. *Johnston Drilling Co.,* 161 Ark. 158, 255 S. W. 890, 34 A. L. R. 727; *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 298 S. W. 1032; *Trinity Universal Ins. Co.* v. *Willbanks,* 201 Ark. 386, 144 S. W. 2d 1092.

It is also the rule that a surety is liable for the negligent acts of a principal, or employee, where the bond is so conditioned. "Even though the bond does not use the term 'negligence,' but insures the faithful discharge of an employee's duties, it is held that if the employee, knowing the risk involved, fails to use such diligence in protecting property intrusted to his care as should be used by an ordinarily prudent person, the surety may be held liable for resulting loss." 50 Am. Jur., Suretyship, § 337.

Under the terms of the bond here involved, appellee agreed to pay the State the amount of any loss of taxes occasioned by any "fraudulent, neglectful or dishonest act" of McGuire. We agree with appellee's assertion that McGuire was not shown to be guilty of any act that was willfully fraudulent or dishonest which caused the State's loss in taxes. If, as McGuire stated, there were revenue stamps in the place of business at Texarkana and the vending machines operated at different places sufficient to cover the State's loss, this did not relieve McGuire of the duty to exercise ordinary diligence under the obligations of the bond. Just how the State would be expected to recover the tax stamps which had been attached to merchandise is not suggested by appellee. We think McGuire was clearly negligent in locking the doors of the business and abandoning it to a hostile partner, who had an equal right to possession, without making any effort to pay for the tax stamps furnished under the bond. Hence, appellee is liable under the bond for the loss occasioned by McGuire's "neglectful" acts.

The judgment of the circuit court is, therefore, reversed and the cause remanded with directions to enter judgment for appellant in the sum of $1,000.

WARD, J., dissents.

PAUL WARD, J., dissenting. I do not agree with the conclusion reached in the majority opinion. The statute under which appellee McGuire was appointed stamp deputy states that he shall be accountable to the Commissioner for "any wrongful acts." The bond executed by appellant says that he shall be liable to the Commissioner for any *careless acts*. Conceding without admitting that the wording of the bond is controlling there is still no testimony in the record upon which to hold appellant liable. A careful search of the records fails to disclose any *acts of carelessness* on the part of McGuire. All of the evidence on this point was furnished by McGuire himself. It appears to me that he did everything any reasonable person could have done to protect the Commissioner. When he discovered trouble was brewing in the partnership he immediately locked the doors of the place of business and reported the fact to all parties concerned. So far as the record shows the stamps were handled in the usual manner and in a manner known, or could easily have been known by the Commissioner. The question of construing the bond against the interest of the bonding company has no place in the opinion as there is no question about what the bond means—the only question involved is that of *carelessness*.

HUDSON *v.* HUDSON.

4-9536 242 S. W. 2d 154

Opinion delivered July 2, 1951.

Rehearing denied October 8, 1951.

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

C. D. Atkinson and *Chas. W. Atkinson,* for appellee.

ROBINSON, J. This action arises out of an effort to probate the will of Betty A. Kessel who died in the year 1935, leaving, as surviving heirs, two daughters and three sons, Ida Wages, Ada Wages, Ed Hudson, Loyd Hudson, and Ona Hudson; also, four children of a deceased son, Arthur Hudson. Mrs. Kessel left a will, the provisions of which made her son, Ona, the principal devisee.

It appears that Ona and his brother, Loyd, had always lived at home with their mother. Mrs. Kessel had no income but owned her home. Ona, who was disabled to some extent, and Loyd took care of their mother, providing the necessaries of life, including the employment of a woman who did the housework, cooking, etc. The other sons and daughters of Mrs. Kessel had homes of

their own. Immediately following his mother's death, Ona left the State and did not return for about 14 years.

Loyd Hudson placed the will, along with other papers, in a lockbox at the home, where it remained until after Ona's return to the State. No administration was had on the estate of Mrs. Kessel nor was the will filed for probate until the 26th day of May, 1950. The judgment of the Probate Court was that the will should not be admitted to probate. Ona, who is seeking to probate the will, appealed to this Court.

Loyd testified that it was understood by the brothers and sisters present the night of their mother's death that Ona should have the property as Ona and Loyd had stayed at their home and taken care of their mother. Loyd paid the funeral expenses by monthly payments over a period of several months without any help from his brothers and sisters. Loyd, who is not contesting the will, testified that it was his desire that Ona get the property. Ed Hudson, one of the contestants, testified:

"Q. You didn't expect anything?

"A. No—we had an understanding way back there that Ona and Loyd would get all of it for taking care of mother, and mother said she never did want any lawsuit over the property so that is the end of that."

In September, 1949, Loyd sold a portion of the property for the consideration of $1,100. Ada, Edward, Loyd, Ida, Ona, and also Josie Hudson and Jewell Hudson, signed the deed. Loyd turned the money over to Ona. On the 7th day of March, 1950, the contestants in the case at bar filed suit in the Chancery Court asking, among other things, that Loyd and Ona be required to account for the proceeds of the sale. On the 26th day of May, 1950, Ona filed his mother's will for probate. The genuineness of the will is not questioned. The Probate Court held that the will "is not entitled to probate and the petition of the said Ona Hudson should be dismissed."

To sustain the judgment of the Probate Court the appellees argue, first, that the transcript of the record filed in this Court by the appellant is not complete;

second, the will is barred by the statute of limitations; third, estoppel or laches. Appellees filed as an exhibit to the motion to dismiss for failure to comply with Rule 9 six pages of what is contended should be a part of the transcript. The transcript filed in this Court by appellant is certified by the court reporter as a true, correct and verbatim transcription of all the evidence introduced by either party. The transcript also contains the judgment of the Probate Court, signed by the probate judge. The exhibit filed by appellees contains a certificate of the court reporter to the effect that the matter contained therein was inadvertently left out of the transcript. The matter contained in the exhibit is not such as would change the outcome of the case even if it appeared in the transcript as a part of the record. Before the exhibit could be considered in determining whether appellant has complied with Rule 9, the record itself would have to be corrected. Applications for correction of a record, with exceptions not pertinent here, must first be addressed to the trial court. In the case of *Gill* v. *Burks,* 207 Ark. 329, 180 S. W. 2d 578, this Court said:

"Because affidavits and certificates which are outside of the record, even though made by trial judges, cannot be considered on appeal (*Hardie* v. *Bissell,* 80 Ark. 74, 94 S. W. 611), and because under our practice, in the absence of an agreement by the parties, applications for correction of a record must be first addressed to the trial court from which such record proceeded, [citing cases], we overruled appellee's motion to correct the record without prejudice to his right to make application to the trial court. Nothing has been subsequently filed here disclosing that the trial court has taken any action in the matter, and we must, therefore, accept as conclusive matters which are, and wholly disregard matters which are not, properly incorporated in the original transcript filed in this appeal."

Likewise, in the case at bar, nothing has been filed here showing that the trial court has taken any action in the matter or that it has been presented to the trial court.

Appellees cite *Whatley* v. *Whatley,* 205 Ark. 748, 170 S. W. 2d 600, as authority for their contention that where all of the testimony heard by the Chancellor is not brought into the record, the Court presumes that the evidence was sufficient to support the finding. The distinction between the Whatley case and the case at bar, is that in the Whatley case the record affirmatively showed that it did not contain all the evidence produced in court. In the case at bar there is nothing in the record showing that it is not the entire record.

Appellees next contend that the will is barred by § 37-223, Ark. Stats., which is as follows: "All actions not included in the foregoing provision shall be commenced within five years after the cause of action shall have accrued." This section of the Statute has not been considered as applying to the probation of wills. In the case of *Dudgeon* v. *Dudgeon,* 119 Ark. 128, 177 S. W. 402, this Court said:

"The right to probate this will would not be defeated merely by the delay in the institution of this suit, although, with full knowledge of all the facts, appellant delayed over ten years in moving for that purpose."

Act 140 of 1949 providing that no will shall be admitted to probate unless application is made to the court within 5 years from the death of the decedent is not applicable here, as the Statute in that respect is not retroactive in effect. If it were, the will would be barred by the Statute if filed for probate at any time subsequent to 5 years after the death of the deceased. In this case the testator's death occurred about 14 years before the passage of the Act. The Probate Code provision on limitation can operate prospectively only. *Trapnall* v. *Burton,* 24 Ark. 371; *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600; see, also, paragraph B of § 2, Act 140 of 1949. Also, we have not overlooked the case of *Johnson* v. *Beede,* 186 Ark. 558, 54 S. W. 2d 413.

Appellees also contend that Ona Hudson is now estopped and is barred by laches from probating the will. It appears that if anyone would be estopped or barred by laches in regard to the will, it would be the contestants.

There is no showing that Ona Hudson, the proponent of the will, even knew that there was a will in existence. He had heard some discussion of a will but nothing definite. He had nothing to gain by the will not being probated. He did nothing to keep it from being probated. The will was not in his possession and never had been. In fact, Ona would have no reason for not wanting the will probated. Before Ona would be estopped from asking that the will be probated, there would have to be a showing of some conduct on his part whereby it would now be unjust to probate the will. There is no showing of that kind.

Appellees quote from 19 Am. Jur., § 38, as follows: "The proper function of equitable estoppel is the prevention of fraud, actual or constructive, and the doctrine should always be applied so as to promote the ends of justice and accomplish that which ought to be done between man and man." We agree with this principle of law but we are of the opinion that it is in Ona's favor in this case. As to the argument advanced by appellees that Ona is now barred by laches from seeking to probate the will, the doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. *Hardie* v. *Hilton,* 211 Ark. 991, 204 S. W. 2d 163; (citing a long list of cases to the same effect). There is no evidence in this case that Ona should have spoken at any time before he did speak.

Delay in probating the will in this case could work to the disadvantage of no one except Ona. In our opinion the will should have been admitted to probate.

Reversed.

Opinion delivered July 2, 1951.

Rehearing denied October 8, 1951.

Reinberger & Eilbott and *Sid J. Reid,* for appellant.

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

GRIFFIN SMITH, Chief Justice. At Monticello Brooks Willis contracted to build a house for Calvin Miller for $4,400. Willis sublet to Herman Schultz for $3,400. Schultz was to furnish all labor, lumber, paint, and incidental necessities other than plumbing, light fixtures, and wiring. Willis was to supply and install the excepted items.

From time to time Willis made payments to Schultz, but did so only when emphasis was placed upon Schultz's duty to keep all bills paid, to the end that the property would not be subject to liens for labor and materials. Schultz, according to Willis, gave repeated assurances that the accounts were being cared for as they accrued. Finally, with completion of the building, Schultz was due an apparent balance of $370 and asked Willis for a check in full settlement. Willis testified that before making the payment he asked Schultz if there were any labor or material bills and was told in the most positive language that nothing was outstanding. In speaking of these assurances Willis testified: "When the work was completed January 9th, 1950, [Schultz and I] sat right in

front of the house and talked the thing over and he swore to me that everything was paid up and was in the clear, and he was very anxious to get his money right then."

Aggregate unpaid bills were $1,076, for which Willis became liable. Some had been paid by him at the time of trial. The defendant objected to introduction of statements from supply sources because the bills were made out to Schultz, although Willis testified they were given to him by the creditors as evidence of default accounts incident to the construction. It was also objected that bills less than ninety days old could not be shown (Ark. Stat's, § 51-613) because they were the individual obligations of Schultz. Insistence was that the injured party's remedy is to be found in § 51-601 of the Statutes.

Whether Schultz told Willis that all bills had been paid, and whether—if he did give this assurance—the purpose in misrepresenting an existing fact was to induce Willis to pay the relatively small balance then shown by Willis' books,—these were questions the jury decided against the defendant's contrary contentions. The appeal is from a penitentiary sentence of one year.

Insisting that his only purpose in asking for the check was to collect a just debt, as distinguished from a purpose to defraud, appellant thinks the Court should have directed a verdict in his favor. He cites *Woodruff* v. *State,* 61 Ark. 157, 32 S. W. 102. Substance of Special Justice WINCHESTER's opinion in the Woodruff case is that in order to convict it must be shown that the defendant made the representations with an actual intent to defraud. Whether the intent was an element of the act was a factual question for the jury.

In the case at bar the issues were clearly presented in Instruction No. 3. It required, as a condition precedent to conviction, that the jury should find beyond a reasonable doubt (a) that Schultz, . . . by false statements, . . . obtained Willis' signature to the check: (b) that at the time of making such statements Schultz knew they were false, and (c) that by virtue of such representations, if false, the defendant obtained $370 on the check. See Ark. Stat's, § 41-1901.

Defendant's second assignment as urged in his brief is that the Court erred in refusing to give requested Instruction No. 2. In effect it would have told the jury that if, when Schultz received the final payment, Willis was justly indebted to him "in that amount, then . . . you can not convict [Schultz], . . . for he would not be guilty of false pretense in collecting an honest debt irrespective of the representations used."

The effect of this instruction would have been a judicial declaration that the apparent balance of $370 was not affected by the accused's failure to pay the outstanding accounts.

Our view is that the Court correctly declared the law and that there was no error in refusing the requested instruction.

Affirmed.

JENKINS *v.* JENKINS.

4-9488 242 S. W. 2d 124

Opinion delivered July 2, 1951.

Rehearing denied October 8, 1951.

Wilson, Kimpel & Nobles and *Paul K. Roberts,* for appellant.

Ovid T. Switzer and *W. P. Switzer,* for appellee.

ED. F. MCFADDIN, Justice. From a decree of the Chancery Court granting the wife a divorce, and making a division of the property, the husband prosecutes this appeal, presenting the questions now to be discussed.

I. *Sufficiency of the Evidence as to Grounds of Divorce.* Appellant, Roy Jenkins, and appellee, Ida Goodwin Jenkins, were married in April, 1944. Their only child, a boy, was born in May, 1945. They lived in Crossett, Ashley County, Arkansas, where appellant worked at the paper mill and appellee was sometimes a chemist at the mill and sometimes a public school teacher. The parties separated on April 2, 1949; and this divorce suit was filed on April 26, 1949, by Mrs. Jenkins on the ground of indignities.

According to the testimony of the wife and her witnesses, Mr. Jenkins had a violent and ungovernable temper; and on occasions would strike and beat his wife. One witness saw bruises on her body inflicted by a broomstick. Others testified to tongue lashings and cursings. Mrs. Jenkins testified that on the morning of April 2, 1949, she told him that she was leaving; that he took their child from her;[1] and that when she and her

[1] The Chancery decree awarded the custody of the child to Mrs. Jenkins.

brother (Vascoe Goodwin) were leaving in the car, Mr. Jenkins cursed them and threatened them with a gun. In the encounter, Vascoe Goodwin shot Roy Jenkins. Appellant and his witnesses give an entirely different version of each incident; but after a careful study, we reach the conclusion that the preponderance of the evidence supports the Chancellor's findings in favor of Mrs. Jenkins as to grounds of divorce.

Furthermore, we find no merit in appellant's claim that the appellee had unconditionally condoned all of appellant's misconduct for the years prior to April 2, 1949. What we said in *Franks* v. *Franks,* 211 Ark. 919, 204 S. W. 2d 90, is *apropos:*

"Assuming, without deciding that her acts in returning and resuming the marital relation, based on his promises not to repeat the offense, constituted condonation for past mistreatment, still it was only conditional condonation. If the condition is broken by future misconduct, condoned past conduct may then be relied on in support of an action for divorce on the subsequent misconduct or both."

See, also, *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41, and *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055.

II. *Jurisdiction of the Court.* The parties were living in Ashley County at the time of the separation, and neither had acquired a new domicile when the suit was filed on April 26, 1949, or when defendant's answer was filed on May 16, 1949. But the trial was delayed by the defendant; and on June 12, 1950, he filed his "Motion to Dismiss on Account of Loss of Jurisdiction," in which he made the claims: (a) that Mrs. Jenkins had in fact become a resident of Louisiana; and (b) that she was estopped to deny her Louisiana residence. The question of jurisdiction properly received first consideration and determination by the trial court, although we have, for convenience, discussed the grounds of divorce as the first item in this opinion. The testimony going to the appellant's motion is quite voluminous. As previously stated,

Mrs. Jenkins' brother, Vascoe Goodwin, shot Roy Jenkins in the encounter of April 2, 1949. Mrs. Jenkins regained custody of her child and obtained a position as school teacher at Elm Grove, Louisiana, fifteen miles from Shreveport. She was employed there during the 1949-50 term, and returned to her home in Arkansas after the completion of the school term.

(a)—Appellant contends that Mrs. Jenkins in fact became a resident of Louisiana, because when she taught school in Louisiana, she thereby changed her residence to that State. Appellant cites the following cases which hold that domiciliary residence is essential to jurisdiction of the court to grant a plaintiff a divorce: *Barth* v. *Barth,* 204 Ark. 151, 161 S. W. 2d 393; *Gilmore* v. *Gilmore,* 204 Ark. 643, 164 S. W. 2d 446; *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49; *Porter* v. *Porter,* 209 Ark. 371, 195 S. W. 2d 53; *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585; and *Walters* v. *Walters,* 213 Ark. 497, 211 S. W. 2d 110.

We affirm our holdings in the cited cases; and nothing herein is contrary to them. But, here, the plaintiff, Mrs. Jenkins, was a lifelong domiciled resident of Arkansas and went to Louisiana for only a short period without intending—or in fact accomplishing—a change of domiciliary residence. She had a home in Crossett which she leased during her absence. She testified:

"Q. When you went to Louisiana after your separation did you have any intention of establishing your home in Louisiana?

"A. I did not.

"Q. Did you have any intention of abandoning your home in Arkansas and not returning?

"A. I did not. I had all my income tax returns made in Arkansas and my home is in Arkansas. Everything I have other than my job was and is in Arkansas.

"Q. Have you taught in Louisiana before?

"A. Yes, sir.

"Q. Did you always return home to Crossett after school was out?

"A. I did.

"Q. Is it your present intention to maintain your home in Arkansas and Ashley County?

"A. Yes."

In *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681, the contention was made that the court lost jurisdiction to grant a divorce because the plaintiff was temporarily absent from the State; and this Court, speaking through Chief Justice McCulloch, said:

". . . the proof is sufficient to show that plaintiff resided in Jefferson County, Arkansas, where the suit was brought, and that she had never removed from this State, but that her absence of a few months on a visit to her sister in Mississippi was only temporary."

In 27 C. J. S. 647, in discussing actual residence as essential to the jurisdiction of a court to grant a divorce, cases from many jurisdictions are listed to sustain the text:

". . . nor is a loss of domicile or residence effected by temporary absence with the intention to return."

To the same effect see, also, 17 Am. Jur. 286.

The case at bar is within the above quoted rule. This is not a case in which jurisdiction is claimed under the 90-day divorce law: the question here is whether appellee, a lifelong resident of this State, lost her legal residence by temporarily sojourning in another State while teaching school for a nine months term, after which she returned to her home in this State where she has since remained. Without reviewing the evidence in detail, we conclude that Mrs. Jenkins all the time remained, in fact, a domiciled resident of Arkansas.

(b)—Appellant next claims that Mrs. Jenkins is estopped to deny her Louisiana residence. On March 15, 1950, Roy Jenkins, claiming to have acquired residence

in Louisiana, filed, in the United States District Court at El Dorado, Arkansas, an action against Vascoe Goodwin and his wife, and also Mrs. Ida Jenkins, claiming damages for the pistol wounds sustained by Jenkins in the encounter heretofore mentioned. Diversity of citizenship between palintiff and defendants was essential to maintenance of the suit in the Federal Court.[2] Vascoe Goodwin's attorney contacted Mrs. Jenkins' attorney and obtained from him permission to file a pleading for Mrs. Jenkins in the federal case; and in the said pleading so filed in the federal case, it was stated that Mrs. Jenkins was a resident of the State of Louisiana. The effect of that pleading, if its recital were true, would have been to destroy the complete diversity essential to Federal jurisdiction.[2]

When the aforesaid pleading was filed by Vascoe Goodwin's attorney in the Federal Court, Roy Jenkins' attorneys voluntarily dismissed the federal case. There was never any testimony offered in the Federal case to show that Mrs. Jenkins was a resident of Louisiana. She never made any such statement and never signed any pleading in the federal case. She claimed that she went to the federal court as a witness and did not know that any pleading was being filed for her. Mrs. Jenkins never talked to Vascoe Goodwin's attorney.

With becoming frankness, Mrs. Jenkins' attorney in this divorce case stated that he had never discussed the Federal case with her when her intervention was filed. And, likewise with admirable candor, the attorney for Vascoe Goodwin who filed the pleading in the Federal Court—to the effect that Mrs. Jenkins was a resident of Louisiana—frankly stated that he obtained his information from Vascoe Goodwin and not from Mrs. Jenkins. There is not the slightest reflection on any attorney on either side in either the Federal case or this case. There was a plain, honest misunderstanding. Merely because some person, unauthorized by her, made a statement to the contrary, Mrs. Jenkins is not estopped in the present case from proving her actual domiciliary residence to be

[2] See U. S. C. A., Title 28, § 1332.

the State of Arkansas. See *Carson* v. *Hyatt,* 118 U. S. 279, 30 L. Ed. 167, 6 Sup. Ct. 1050.

So we hold that the Chancery Court of Ashley County had jurisdiction to hear and determine this divorce action between Mr. and Mrs. Jenkins.

III. *The Decree as to Division of the Property.* Appellant also attacks that part of the decree of the trial court which made a property division. As regards the personal property, we leave the decree undisturbed; because there is no showing that the personal property was owned by the parties as tenants by entirety. But the situation regarding the real estate is different. The parties owned real property which was the homestead, and the title was held by them as tenants by the entirety and had been so held since 1946.

The Chancery Court, by its decree, changed the entirety estate to an estate of tenancy in common, and awarded each spouse an undivided one-half interest as tenant in common, but all subject to the homestead rights of Mrs. Jenkins during the minority of the child. The Chancery Court also decreed Mrs. Jenkins a life estate in one-third of Mr. Jenkins' half interest in the property, and also adjudged a lien in favor of Mrs. Jenkins, on Mr. Jenkins' remaining interest, to repay her for money which she had paid to satisfy a mortgage on Mr. Jenkins' part of the real property.

We are here concerned with that portion of the decree which, in effect, changed the tenancy by entirety to tenancy in common. In so doing, the trial court was evidently following the provisions of Act 340 of 1947,[3] which may now be found in § 34-1215, Ark. Stats., and which reads as follows:

"Courts of Equity, designated Chancery Courts within the State of Arkansas, shall have the power to dissolve estates by the entirety or survivorship, in real or personal property, upon the rendition of a final decree of divorcement, and in the division and partition of said

[3] Another Act, No. 161 of 1947, is not applicable here because the property is the homestead. We have not overlooked the Act, and are not passing on it.

property, so held by said parties, shall treat the parties as tenants in common."

The question before us is whether this Act No. 340 may be constitutionally applied to an entirety estate, which, as here, was created prior to the passage of the Act.

Several cases have been before this Court necessitating, in some manner, a reference to the said Act 340. They are: *Wilkins* v. *Wilkins,* 212 Ark. 242, 206 S. W. 2d 126; *James* v. *James,* 215 Ark. 509, 221 S. W. 2d 766; and *Price* v. *Price,* 217 Ark. 6, 228 S. W. 2d 478. In *James* v. *James* (*supra*) we said:

"We find it unnecessary to pass on the applicability of said act (No. 340 of 1947) to an entirety estate alleged to have been created prior to the passage of the statute."

In a footnote to *Price* v. *Price* (*supra*), we said:

"We are not called on, at this time, to determine the effect of the 1947 Act on entirety titles created before its enactment. (See 1 Ark. Law Review 220.)"

In none of the cases cited have we decided the question here presented which is, whether the Act 340 of 1947 must be viewed prospectively only, or whether it may constitutionally be applied to entirety estates created before its passage.

We have repeatedly held that a decree of divorce cannot dissolve an entirety estate. See *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690; *Heinrich* v. *Heinrich,* 177 Ark. 250, 6 S. W. 2d 21; *Ward* v. *Ward,* 186 Ark. 196, 53 S. W. 2d 8; and *Davies* v. *Johnson,* 124 Ark. 390, 187 S. W. 323. In *Heinrich* v. *Heinrich* (*supra*) we said:

"An estate by entirety, either legal or equitable, cannot be divested out of the husband and invested in the wife, or *vice versa,* by the courts. The right to the whole estate by the survivor prevents this. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690, 74 A. S. R. 97."

The majority of the jurisdictions hold that divorce dissolves the entirety estate; but our holding to the opposite conclusion has become a rule of property in this State.

In order to enable the Courts in a decree of divorce to dissolve an entirety estate, the Legislature adopted the Act 340 of 1947. But entirety estates created prior to the enactment of that legislation had given the holders vested rights; and absent—as here—any question of police power, the authorities on constitutional law recognize that the Legislature may not retrospectively destroy vested rights.[4] In 41 C. J. S. 446, "Husband and Wife," § 31, in discussing the effect of subsequent legislation on entirety estates, the rationale of the holdings is summarized:

"*Subsequent legislation.* Where an estate by entirety has been created and the rights of the parties have become fixed and vested, neither the nature of the estate nor the rights of the parties are enlarged, abridged, or otherwise affected by subsequent legislation."[5]

We therefore hold that said Act 340 of 1947 cannot operate retrospectively so as to affect entirety estates created prior to the passage of such legislation. It follows, therefore, that the Learned Chancery Court was in error in changing the preëxisting entirety estate to an estate of tenancy in common, and in awarding Mrs. Jenkins dower in the entirety estate. For the error indicated, the decree is reversed as to the division of the real estate, and the cause, as to that point only, is remanded for entry of a decree in accordance with this opinion. In all other respects the decree is affirmed. All costs are adjudged against the appellant, including the attorney's fee of $50 already allowed by this Court, and an additional fee of $100 now allowed.

The Chief Justice and Mr. Justice WARD dissent in part.

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[4] In 12 C. J. 955, this is stated: "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

[5] The text in Corpus Juris Secundum continues:

"Thus statutes abolishing survivorship in estates by entirety unless such right is expressly provided for, statutes providing that all conveyances to husband and wife shall be construed to create estates in common and not in joint tenancy or entirety unless it appears from the tenor of the instrument that the intention was to create an estate in joint tenancy with a right to the survivor, and statutes relating to the separate property of married women have been held to have no retroactive effect as regards estates by entirety."

4-9538 242 S. W. 2d 116

Opinion delivered July 2, 1951.

Rehearing denied October 8, 1951.

[redacted]

Tom Pearson and *James R. Hale,* for appellant.

Rex W. Perkins and *Suzanne Chalfant Lighton,* for appellee.

PAUL WARD, J. In 1945 and for many years prior thereto appellee, J. Q. Springstun, and his wife, Faner Springstun, now deceased, lived on a 110 acre farm in Washington County, valued around $12,000. Both parties were old and Mrs. Springstun in particular was somewhat feeble and they felt the need of someone to look after and care for them, consequently they wrote to their granddaughter, Melba Ross, married to Clyde Ross, who lived in California, and asked her and her husband to come back and take care of them and promised to give the farm to Mrs. Melba Ross if they would do so. Clyde Ross at the time had a job in California which paid around $100 a week, but he and his wife decided to accept the proposition made by Mr. and Mrs. Springstun and did come to Washington County and moved on the farm in November of 1945. Clyde and Melba Ross took charge of the farm and started taking

care of Mr. and Mrs. Springstun. On December 11, 1945, Mr. Springstun, pursuant to his agreement, executed a codicil to his will whereby he willed the farm to Melba Ross. This situation obtained until some time in March, 1947, when some dissatisfaction arose and the Springstuns moved to the home of another granddaughter, Dorothy Webb, who with her husband, Pete Webb, lived in Fayetteville.

On March 21, 1947, J. Q. Springstun executed another will in which he gave his estate, including the farm, to his granddaughter Dorothy Webb in consideration that she and her husband would take care of Mr. Springstun and his wife, Faner Springstun. Dorothy Webb died on March 16, 1949, after which Mr. Springstun and his wife continued to live at the Webb home until the first week in June, 1949, when they moved to the home of McKinley Morton and Grace Morton, who also are appellees. On June 14, 1949, Mr. Springstun executed another will in which he gave McKinley Morton and Grace Morton, his wife, all of his estate after giving one dollar each to four other persons. The Mortons are not related to the Springstuns. September 10, 1949, Mrs. Springstun died at the home of the Mortons and Mr. Springstun has continued to live there ever since. During all of this time Mr. and Mrs. Ross have been living on the Springstun farm.

Mr. Springstun as plaintiff filed a suit on January 10, 1950, in Washington Circuit Court against Clyde and Melba Ross as defendants, seeking to gain possession of the 110 acre farm and also judgment for a reasonable rental. The defendants answered and on their motion the cause was transferred to equity. About three months later appellants, Clyde and Melba Ross, filed suit in the same Chancery Court against these appellees seeking specific performance of their contract with J. Q. Springstun and seeking to enjoin him from executing any will other than the one made to them and to enjoin Springstun from disposing of the said farm. The two cases were consolidated and tried on July 5, 1950, when the Chancellor took the matter under advisement and rendered a decree September 15, 1950. The lower court

refused to grant specific performance in favor of Clyde and Melba Ross, finding that they had breached their part of the agreement, but did render judgment in their favor in the sum of $2,000 against Mr. Springstun, making said judgment a lien against the farm with sixty days in which to pay the same, whereupon, the possession of the farm was to be returned to Mr. Springstun, together with all improvements placed thereon by appellants. From the above findings and judgment of the lower court, both sides have appealed.

Appellants have presented able arguments and briefs on the question of specific performance in situations such as this, but this question becomes moot if the lower court was correct in finding that appellants breached their part of the agreement with the Springstuns and we are of the opinion that the evidence sustains the holding of the lower court.

Clyde Ross was thirty-one years old and prior to 1945 lived in Oakland, California, where he worked as an operating engineer, making around $100 a week. He is the husband of Melba Ross, who is the granddaughter of Springstun. He and his wife came back to Washington County because they knew Mrs. Springstun had had a stroke and was partially paralyzed and unable to do her house work. They came back because Mr. and Mrs. Springstun had requested them to do so and because they said they would turn the place over to them. Pursuant to the agreement the Springstuns stayed on the farm about a year and a half or until March, 1947, and the Rosses provided everything for them on the place, made improvements, etc., to the amount of approximately $1,700. Mrs. Springstun was past seventy years of age, in bad health, was crippled and had to be helped around the house. Mrs. Ross did most of the caring for the Springstuns, provided for the table, and bought the food. Mr. Ross would stay with Mr. Springstun when he would have "spells" with his heart and one time stayed in the house with him three days. He was eighty-two or three years old and when he would have "spells" with his heart he would "black-out." There was a nice tenant house on the farm, and after Mrs. Springstun passed

away Clyde and Melba Ross made arrangements for Springstun to come and live in the tenant house and also made arrangements for Mrs. Utter to come to the farm and take care of him. Mr. Ross says he does not know why Mr. Springstun left the farm as they have been and still are able and willing at all times to perform their contract.

Mrs. Melba Ross, the granddaughter, stated that when they took the Springstuns to Mr. and Mrs. Webb's house, they did not know they were going to stay; that the Springstuns did not take any clothes with them but just decided to remain there; that up until the time when Mrs. Webb died on March 16, 1949, witness visited them, washed and ironed and helped take care of Mrs. Springstun and also washed Mr. Springstun's clothes; she tried to get them to come back to the farm and did everything she knew how to do. At the present time she is taking care of Dorothy Webb's two small children. The first time she knew that the Springstuns were not returning to the farm was the day before they were to move and Mr. Springstun said he was going to the Mortons to stay a couple of weeks; and that he never made any complaint to her or her husband as to why he left the farm, except that Mr. Springstun did say his life depended on the doctors in Fayetteville. After Dorothy died she told Mr. Springstun that her sister, Mrs. Webb, would have been alive today if she had had more help and that she could not get any rest as her grandmother hollered at her day and night. Mr. Webb stated that while the Springstuns were with Mr. and Mrs. Ross he visited them every week or two and did not observe anything out of the ordinary on those visits, and thought that the Springstuns were being given proper attention; that the only thing that Springstun ever said to him was that some time the Rosses would be gone in the day time; that after his wife died he tried to get Mr. Springstun to return to the farm and stay with the Rosses, but he stated he had made a deal with the Mortons and was going to stay with them.

Mrs. Lucy F. Utter, who nurses invalids and old ladies, nursed Mrs. Springstun in the Webb home beginning in February, 1949, and continued to do so until June

1, 1949, testified that during that time Mrs. Ross was a frequent visitor in that home and performed services and helped her grandmother in washing, and cleaning her up; Mrs. Ross asked Mr. Springstun if he would like to return to the farm and he replied that he could not live without being close to Dr. Butt; as far as she knows that is the only reason he gave and he made no complaint about the attention given him and Mrs. Springstun by the Rosses.

According to the testimony of appellee, J. Q. Springstun, there was no agreement or understanding between him and the Rosses; they came to the farm and "stayed with us," but he told them that he would will them the farm if they would take care of him and his wife; he did will the farm to his granddaughter, Mrs. Ross, and turned over possession of the farm to them, with the understanding that they would take care of it and receive all the income. He had a talk with the Rosses about the care they were giving him and his wife and he asked them to stay close to home, but Mrs. Ross stated that they were young and were going to go as long as they were able to be up and around; he was up and around but Mrs. Springstun was feeble and tottering; the Rosses would have company and lots of times they wanted him and his wife to go back in the bedroom and stay there and that he (Springstun) did not like that; Mrs. Ross wouldn't let his wife cook anything when she wanted to help; he would come in the house and find his wife crying; his granddaughter, Mrs. Ross, told him if he did not make "Granny" mind she was going crazy, and it would upset him when he found his wife in this condition; and the situation got so bad that he and his wife decided to leave and go live with Mr. and Mrs. Webb. After the death of Mrs. Webb the Rosses tried to get him and his wife to go back to the farm but wanted to put them in a three-room house, and he and his wife did not want to live in it and he told Ross they were not going, and he never intended to go back to the farm. He says that while his wife was sick Mrs. Ross came to see her only one time and that was three days before she died. He stated that Mrs. Ross seemed to be high tempered and that she told him that

she and her husband were young and were going to run around and if he did not like it he could get out.

Mrs. Grace Morton testified that she and her husband lived on the Springstun farm from 1942 until the fall of 1943; that Mrs. Springstun had had a stroke and otherwise was not well; that before she left the farm Mrs. Ross told her she could not make Granny and Granddad go back in the room and that she felt like they ought to go to bed, and also she had told them her things were not unpacked and she could go back to California.

There was other testimony by neighbors who lived close to the Springstun farm and had visited in the home of Mr. and Mrs. Ross while they were taking care of the Springstuns, tending to refute the statements made on behalf of appellee, Mr. Springstun.

After this cause was tried on July 5th and after the formal decree was rendered on September 17th the court, on September 27, 1950, dictated into the record "A Statement by the Court," from which we set out the following excerpts:

"In this case, when it was tried on July 5, I thought Mrs. Ross ought to have a little time to see if she could reconcile her differences with her grandfather, and work out some way to let them be together; but since that time she has been down to see him one time, and nothing happened. I don't think it's necessary to condemn anybody in this case, too much, but it's the opinion of the Court that the most of the trouble in this case was on the part of Mrs. Ross. In other words, she didn't realize her obligations when she failed to take care of these old people.

. . . . .

"The old folks stayed there 16 months but they have been gone 3½ years; they stayed from November, 1945, until about the 20th of March, 1947. Since that time the Rosses have not been out a thing for the support of these people except, I believe, they did say they paid two weeks, $10.00 a week, nurse hire, or $20.00; and that is all they have been out from March, 1947. Mr. Springstun had some money, $1,200 or $1,400, and he spent all that or gave it to his other granddaughter while with her.

"The Rosses did do some improving out there on the place; the testimony, I think, shows $1,678.50 worth; and they kept those old folks for 16 months. They did leave their business out in California; left a good job out there and came back to take care of them with the expectation of getting the place.

. . . . .

"I could understand how unreasonable demands could not be met; but from the testimony, I think she failed to measure up to the standards of affection and daily attention required in a case of this kind, so far as Mr. and Mrs. Springstun were concerned. And her attitude on the witness stand showed that she would never give in, she would have it her way, that was her attitude on the witness stand. But when you make a contract to take care of old people you take the obligation of satisfying the old people as long as they don't make unreasonable demands on you.

. . . . .

"The thing that worried me most is how to do justice in turning the place back to Mr. Springstun. This is what I'm going to do, and when the Rosses leave there, they are not to remove any of the electrical fixtures or the pump that furnishes the water system; I am going to allow them pay for that. They testified how much they put in the Grade A milk barn; that item was $670. The electric pump cost $206, and I expect them to leave that on the place, but I am requiring these other people to pay for it. They show total improvements of approximately $1,698.50, say $1,700, and they have had the use of the place for five years, or it will be that long in October. They kept these old folks for 16 months; of course, a lot of the upkeep was from things that the old people had on hand, and they lived off of that the same as the old folks.

"I think it would be fair for Mr. Springstun to pay Mrs. Ross $2,000, and for Mr. Springstun to have the place exactly as it is now, with all the improvements which I am requiring him to pay for here. I want them left on the place. I will give him 60 days to pay, and at

that time I will declare a lien on the place, if it is not paid, and if he doesn't pay you can have an order of sale; but as soon as Mr. Springstun pays that, he is to have immediate possession."

It must be conceded that it is a difficult question to decide just who was most at fault in the relationship that existed between Mr. and Mrs. Springstun on the one hand and Mr. and Mrs. Ross on the other, which resulted in the original agreement not being carried out, because of that close personal relationship. On the one hand it is apparent that old people, situated as this couple was—particularly when afflicted—can be troublesome and bothersome, but on the other hand it must be realized by those agreeing to take care of them in their old age that such will likely be the case. In this case the Chancellor had the opportunity of observing all of the witnesses who appeared before him and we are unable to say that his decision was against the weight of the evidence.

It is insisted by appellees that the lower court erred in giving judgment in favor of appellants in the sum of $2,000 against Mr. Springstun. The argument is that if appellants breached the contract then they would not be entitled to any damages. Ordinarily this would be true, but other factors are present in this case. It was because of Springstuns' overtures and promises that appellant Ross left a good job in California and he and his wife came to Washington County to fulfill their agreement and they did take care of and provide for the Springstuns for approximately seventeen months. In the meantime appellants made improvements on the farm. We have not abstracted the testimony in connection with these improvements because they are fairly stated in the "Statement of the Court" set forth above. In our opinion the judgment of the court in awarding $2,000 to appellants did justice and equity between the parties and is not against the weight of the evidence.

The decree of the lower court is affirmed both on direct and cross appeal.

4-9514 242 S. W. 2d 348

Opinion delivered July 2, 1951.

Rehearing denied October 15, 1951.

[redacted]

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

John S. Mosby, for appellee.

PAUL WARD, J. Appellant brought this action in Chancery Court on February 23, 1949, to cancel a deed made to the incorporated town of Caraway by the "Chicago Mill & Lumber Company" on the 10th day of October, 1934. The property involved is Lot 8 of the town of Caraway. Appellant, plaintiff below, claimed title to said Lot 8 by reason of Deed No. 96370 from the State Land Commissioner, dated August 6, 1948, and duly recorded, alleging that the State became the owner because said lot was subject to taxation on the ..... day of ....., 1933, as the property of "Chicago Mill & Lumber Company," that the taxes became delinquent and the land sold according to the law, and that the State duly confirmed its title by decree dated June 17, 1943. It was further alleged that at the time the deed mentioned above was made to appellee there was not in existence any corporation named or known as the "Chicago Mill & Lumber Company" which, it was alleged, ceased to be

a corporate entity by that name on October 23, 1928. The prayer was that the deed to appellee be cancelled and that appellant's title be quieted.

After denying the allegations in the complaint, appellee states that it secured a deed from the "Chicago Mill Timber Corporation" October 10, 1934, and holds good title thereunder, and by way of cross-complaint state that the State Land Commissioner's deed and the forfeiture and sale on which it was based are void: First, because Lot 8 was not subject to taxation, being the property of the town of Caraway. Second, that the County Clerk failed to attach his certificate at the foot of the record of the list of delinquent lands showing publication of notice as required by the statute. Third, the decree of confirmation mentioned in the complaint was void because it was signed by a Special Chancellor and there is no record of his election. The prayer is that the complaint be dismissed, that the tax forfeiture and the deed from the State Land Commissioner be cancelled, and that title be quieted in appellee. The Chancellor held against appellant and confirmed the title to said Lot 8 in the town of Caraway, from which holding appellant appeals.

The proof shows that appellant does hold a deed from the State Land Commissioner, that there was an apparent forfeiture for taxes and that there was a confirmation decree, all as alleged. A deed from the "Chicago Mill Timber Corporation" to appellee dated October 10, 1934, and shown to have been recorded was introduced in evidence and its authenticity is not questioned, other than as stated above. Several documents from the office of the Secretary of State were introduced showing that the name of the "Chicago Mill & Lumber Company" had been changed in 1928 and that its successor had withdrawn from the State in 1929 (before the deed to appellee was executed, in 1934), but also showing that the "Chicago Mill Timber Corporation" filed articles of incorporation June 3, 1933. From the record it appears that the confirmation decree was entered June 17, 1943, and that it was signed by "Arthur L. Adams, Special Chancellor," but there is nothing in the record to show the

election of Adams as such Special Chancellor. According to the undisputed testimony of the Deputy County Clerk there was no Clerk's certificate attached at the foot of the 1934 list of delinquent lands.

Immediately after the town of Caraway received its deed to Lot 8 in 1934 it began to erect buildings thereon and the time of the trial there had been built a mayor's office, police station, a fire truck house, a city jail, and an auditorium.

From the above it appears that the town of Caraway received a good and sufficient deed to Lot 8 in 1934 unless it is defeated by the tax forfeiture and sale to the State and, subsequently by the Land Commissioner's deed to appellant. Conceding, without so holding, that appellant is correct in asserting that Lot 8 was subject to taxation when the forfeiture occurred, still the sale to the State was voidable because of the failure of the Clerk to attach his certificate to the list of delinquent lands. In the absence of confirmation this omission would be fatal, as was held in the case of *Cecil* v. *Tisher and Friend,* 206 Ark. 962, 178 S. W. 2d 655. In the supplemental opinion the question was discussed at length in connection with §§ 10082, 10084 and 10085 (§ 84-1103 Ark. Stats.) of Crawford and Moses' Digest and was resolved as stated above.

Appellant contends however, that even though the sale was voidable because of the failure of the clerk to attach his certificate, yet this defect was cured by the State's confirmation decree. We would agree with this contention except for the fact that, in our opinion, the confirmation decree is void and of no effect. The decree itself shows that it was signed by a Special Chancellor and there is nothing whatever in the record to show his election as such. The case of *Wall* v. *Looney,* 52 Ark. 113, 12 S. W. 202, is in point and since the *per curiam* opinion consists of only a few lines we quote it in full. "The record fails to disclose that the special judge who presided at the trial of this cause, was ever elected for that purpose. The motion to dismiss the appeal will be granted."

We do not find that the *Wall* case has been overruled or modified. On the contrary, this court announced the same rule in *Arkadelphia Lumber Co.* v. *Asman,* 72 Ark. 320, 79 S. W. 1060; *Dansby* v. *Beard,* 39 Ark. 254, and *Greenstreet* v. *Thornton,* 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735.

The decree of the lower court is affirmed.

BROWN *v.* HAWKINS.

4-9583 240 S. W. 2d 863

Opinion delivered July 2, 1951.

Kenneth C. Coffelt, for appellant.

Quinn Glover and *Carl Langston,* for appellee.

GRIFFIN SMITH, Chief Justice. The controversy is a sequence to *Hawkins* v. *Hawkins,* 218 Ark. 423, 236 S. W. 2d 733.

The appeal is from an order of April 25, 1951, dismissing a petition to set aside a judgment of probate, to the end that the minor as an adopted son might be represented as an interested party in the contest now narrowed to the single question of the testator's mental capacity.

The will was admitted to probate May 4, 1950, with notice by publication only. The order from which the appeal comes was predicated upon the minor's petition of February 27, 1951—filed a day following the Supreme Court decision in the *Hawkins* case.

The sole ground for dismissing the petition is that it was filed too late. Ark. Stat's, § 62-2114. The trial judge held that the new probate code (Act 140 of 1949) did not contain a savings clause in favor of minors, excepting them from limitation.

We agree with this determination. The principle was stated by Judge HART in *Jenkins* v. *Jenkins,* 144 Ark. 417, 222 S. W. 714. Courts can not, in the absence of a showing that fraud was practiced in procuring the order, or that some omission involving jurisdiction vitiated the judgment, give relief contrary to clearly expressed legislative purposes. We are not permitted to read into the statute something the lawmaking body withheld.

Appellants' brief does not point to any particular error other than the general proposition that in the circumstances here the judiciary should work out a method for the minor's protection. This could be done if jurisdictional errors were present. The petition of May 4, 1950 (asking that the will be probated) named six persons as surviving spouse, heirs, and devisees, but the minor was not mentioned. But the will was before the court, and it contained this statement:

"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 by 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 him the sum of $1]."

There is no legal requirement that the names of heirs and devisees be published in the warning order.

We feel that the overall intent in limiting the time of contest and in not making an exception in favor of minors was part of a plan to give certainty to court orders and provide security for those who in dealing with property must necessarily depend upon recorded transactions.

Affirmed.

Mr. Justice HOLT, Mr. Justice MCFADDIN, and Mr. Justice WARD, dissent.

PAUL WARD, J., dissenting. The majority opinion, as well as appellee's brief, assumes that appellant was given proper notice of the original petition to probate the will of Jacob B. Hawkins and then a conclusion is reached on the ground that there is no savings clause for minors in the Probate Code. I would agree with the conclusion reached by the majority except for the fact that it is my opinion that appellant was not given the notice required by the Probate Code which is Act 140 of 1949.

Let us examine certain sections of the Code and for convenience all references will be made to sections of said Act 140. Let us at all times keep in mind that the only notice relied on by appellee is that of publication in a newspaper. Section 45 sets forth the required contents of a petition to probate. It states that the petition must contain the "names, ages, relationship to the decedent and residence addresses of the heirs and devisees, if any, so far as known or can with reasonable diligence be ascertained." It is conceded that when the widow of the deceased filed her petition for probate she omitted to include the name (and of course the residence) of appellant. It cannot be said that the petitioner did not know of the existence of appellant because his name was mentioned in the will and also he was a devisee in the will which was being probated.

Let us now examine Section 53 which deals with the time within which a contest must be filed. Sub-paragraph (2) is the portion that must be relied on in the majority opinion in order to limit appellant to six months' time in which to contest the will. By referring back to sub-paragraph (1) immediately above we find that it refers to Section 49 for the kind of notice that must be given where we find the following: "Notice thereof shall be given by one or more of the methods set out in Section 12 to each heir and devisee whose name and address is given, including notice other than by publication to each person who has filed demand for notice." Section 12 describes four different kinds of notices. The one relied on here by the majority opinion is sub-section (4) of said Section 12 which deals with newspaper pub-

lication and where we find the following language: ". . . when service by publication only is employed, all persons whose *names* and *addresses* appear in the petition shall be served by ordinary mail bearing on the envelope the return address of the clerk, in the same time and manner as provided in subsection (3) with respect to notice by registered mail, except that no registration shall be required." It is obvious that this portion of sub-section (4) was not complied with in respect to appellant for the reason that his name did not appear on the petition to probate. It was omitted through no fault of his but solely by the careless or willful act of the petitioner. It must follow then that under sub-section (3) of Section 53 appellant has five years in which to contest the will if he so desires and unless he is hereafter given proper notice.

PASCHAL *v.* FOSTER.

4-9535 241 S. W. 2d 115

Opinion delivered July 2, 1951.

[redacted]

Crumplet & Eckert, Melvin T. Chambers and *Dinning & Dinning*, for appellant.

McKay, McKay & Anderson and *W. H. Kitchens, Jr.*, for appellee.

HOLT, J. October 20, 1936, appellees procured from Ike Jermany and Nellie Jermany (his wife) a timber deed (on a printed form) to lands in Columbia County. The deed recited in part: "That we, Ike Jermany and Nelly Jermany, his wife, of the County of Columbia, State of Arkansas, for and in consideration of the sum of $500.00, Five Hundred.....($.....) cash in hand paid, to us by R. S. Foster, R. S. Grayson, Foster-Grayson Lbr. Co., J. B. Lee, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Foster & Grayson Lbr. Co. all timber standing or being upon the following lands situated in Columbia County, Arkansas, to-wit: (Description).

containing 1,022 acres, more or less, Granting 4 years
at expiration of 4 years Foster-Grayson has right to pay 10%
from this date to cut and remove the said timber, also right of
purchase price for 4 years by paying one year in advance to
way for teams, wagons and trams for hauling said timber, together
be deposited in Farmers Bk. & Trust Co., Magnolia, Ark.
with free and unobstructed right of Foster-Grayson Lbr. Co., etc."

The indented and italicized portion of the above deed was interlined in ink and for convenience and clarity, we again set it out: "At expiration of four years, Foster-Grayson has right to pay 10% purchase price for four years by paying one year in advance to be deposited in Farmers Bank & Trust Company, Magnolia, Arkansas."

Ike Jermany died March 28, 1937, and the property was partitioned among his heirs. Z. W. Jermany was appointed administrator of his estate.

Appellants, grandchildren of Ike Jermany, sought damages against appellees for the alleged willful, intentional and unlawful cutting of the timber on the property in question.

Appellees answered with a denial and alleged *inter alia* "that Ike Jermany and wife, October 20, 1936, executed timber deed conveying all timber on land described in complaint and other lands to defendants for four years with option to extend same an additional four years; the option was exercised for an additional three years, and said timber deed was in full force and effect as to all heirs of Ike Jermany until October 20, 1943.

"On or about October 20, 1941, defendants negotiated with some of heirs of Ike Jermany for extension of that timber deed for an additional five years from October 20, 1943, and during the negotiations, learned that some of the Ike Jermany heirs, including plaintiffs, were minors, and defendants decided to cut and remove the timber on lands so allotted to plaintiffs prior to October 20, 1943, and not thereafter."

A jury trial resulted in a verdict in favor of appellees and from the judgment comes this appeal.

It appears from the evidence that appellees did not cut any of the timber on the lands in question during the four year primary period named in the timber deed, but did thereafter cut and remove the timber in 1942 and 1943, all within three years from the primary period. The evidence showed that appellees, after Ike Jermany's death, by check, on October 7, 1940, deposited $150 in the "Farmers Bank & Trust Company, Magnolia, Arkansas" to an account designated "Estate of Ike Jermany, deceased, and Nellie Jermany" in payment for an extension of three years beyond the four year primary period covered by the deed.

Appellants say: "The only question of law involved on this appeal is whether or not the appellees made a

valid exercise of the option contained in the original timber deed by depositing the amount required in the Farmers Bank & Trust Company to an account 'Estate of Ike Jermany, deceased, and Nellie Jermany.' "

Appellees "contend that the clause, 'At expiration of four years, Foster-Grayson has right to pay 10% purchase price for four years by paying one year in advance to be deposited in Farmers Bank & Trust Company, Magnolia, Arkansas,' was more than a mere option to buy, and the deposit of the amount required in the Farmers Bank & Trust Company was a valid exercise of this right."

The above option clause for extension of time was, we hold, more than an option to purchase since appellees had already purchased and paid a valuable consideration, —$500,—for the timber and this consideration included not only the purchase of the timber and the right to remove it, but also the right of extension as provided in the option clause.

What was said by this court in *Watson* v. *Stout Lumber Company,* 175 Ark. 240, 298 S. W. 1010, in which an extension provision in a timber deed was construed, applies with equal force here: "We think that this provision of the contract for an extension of the time for removal of the timber was more than a mere option to buy where the consideration is only paid for the time in which to do something else necessary to effect the purchase, the grantee herein having already purchased and paid for the timber, with the right to remove it, and partakes rather of the nature of a condition subsequent. * * *

"The purchaser of the timber, with the right to remove it, had paid a substantial consideration, the amount required by the seller, and owned it, till the expiration of the time allowed for removal. He had also paid for the privilege of an extension beyond the three-year period for removal, for two years, upon the further payment of 10 per cent of the purchase price of the timber yearly in advance. He certainly was the owner of the timber during the three-year period granted for its removal, and could continue his right to the removal of

his property for another two years upon compliance with the terms of the contract, and unless he forfeited such ownership and right by the failure to comply with the terms of the contract."

Here, appellees, by depositing $150 to the account of "Estate of Ike Jermany, deceased, and Nellie Jermany" in the "Farmers Bank & Trust Company, Magnolia, Arkansas," substantially, if not literally, complied with the above option provision, and gave them a three-year extension beyond the primary period of four years.

While the evidence is not clear that this money has ever been paid to appellants, or their legal representative, the fact remains that it was deposited in the bank for the estate and if appellants have not received it, it is still there, subject to their order. In the circumstances, the bank occupied the position of a depository for the money and not appellants' agent.

Of strong significance is the fact that on October 20, 1941, a year after the primary term for cutting and removing the timber expired, appellants, including Z. W. Jermany, individually and as administrator of the estate of Ike Jermany, executed and signed an extension agreement, extending the time for cutting and removing the timber on the lands for five years from that date. In this extension agreement, appellants and the administrator acknowledged that the time for cutting and removing the timber "expires on October 20, 1943, and this is a five year extension which will make deed read expiration date October 20, 1948."

This would indicate that appellants must have known that appellees had done all that was necessary for extending the time for cutting and removal for three years, which would include the $150 deposit in the bank.

Appellants complain that they never had any notice of this $150 deposit. The answer is that notice was not required by the terms of the timber deed. As indicated, in the circumstances, all that was required was that appellees "pay 10% purchase price for four years by paying one year in advance to be deposited in Farmers Bank &

Trust Company, Magnolia, Arkansas." Appellees complied with this provision, paying for a three-year extension.

Finding no error, the judgment is affirmed.

O'QUIN *v.* O'QUIN.

4-9548 241 S. W. 2d 117

Opinion delivered July 2, 1951.

Lee Miles and *A. F. House,* for appellant.

L. M. Alexander and *Gerland P. Patten,* for appellee.

MINOR W. MILLWEE, Justice. This is the second appeal of this case and involves certain questions growing out of a division of property ordered on the former appeal in *O'Quin* v. *O'Quin,* 217 Ark. 321, 230 S. W. 2d 16.

The parties were married in 1941. On August 28, 1948, they entered into a property settlement and appellant was granted a divorce a few days later. Shortly thereafter the parties became reconciled and on Septem-

ber 14, 1948, the decree of divorce was set aside at their joint request. On December 7, 1948, there was another separation and appellee, Mrs. O'Quin, sued for divorce and division of property contending that the property settlement of August 28, 1948, was void and that she was entitled to one-half of all their property which had been acquired by their joint efforts. The trial court denied appellee a divorce and refused to disturb the property settlement of August 28, 1948.

On the former appeal we sustained the chancellor in denying appellee a divorce, but reversed as to the property settlement of August 28, 1948, which was annulled. We there said: "On the issue of the property settlement, we hold that the court erred in denying Mrs. O'Quin's contention that all of the property involved here was acquired and owned by the parties as tenants by the entirety and that she was therefore entitled to a one-half interest in said property." We further said that an account of $12,299.85 in the name of O'Quin Plumbing Company in the Twin City Bank of North Little Rock, Arkansas, on December 6, 1948, constituted the joint bank account of the parties. The concluding paragraph of the opinion reads: "Accordingly, the decree denying the divorce is affirmed, but, as to the property rights, is reversed and the cause is remanded with directions to set aside any and all instruments by which the parties have destroyed the tenancy by the entirety existing between them, and to enter a decree that the parties are tenants by the entirety as to all real and personal property owned by them before the instruments of August 28, 1948. If, since August 28, 1948, either party has made unfair or prejudicial disposition of any of the personal property to the disadvantage of the other, then the Chancery Court will, on proper petition of the aggrieved party, require restoration of such personal property to the entirety estate."

After issuance of the mandate in conformity with this paragraph of the opinion, Mrs. O'Quin filed a petition asking the trial court to require restoration to the entirety estate of all real and personal property owned

by the parties, including all rentals collected from the real estate since December 7, 1948, and all stock and equipment owned and being used by the plumbing company at the time of the filing of the petition. Appellee also asked that appellant be required to restore the $12,299.85 in the O'Quin Plumbing Company account on December 6, 1948, and that one-half of said account be delivered to her. She also sought one-half of all profits of the plumbing company after December 7, 1948.

In his response to the petition appellant admitted that appellee was entitled to have all the real estate restored to the entirety estate and this was done by exchange of deeds. It was also admitted that appellee was entitled to an accounting for her part of the real estate rentals since December 7, 1948, and this adjustment was made. Appellant denied that appellee was entitled to any part of the bank account or the personal property or profits of the O'Quin Plumbing Company.

Upon a hearing the chancellor found that as of August 28, 1948, the parties owned as tenants by the entirety an undetermined interest in the $12,299.85 bank account and the equipment used in the operation of the O'Quin Plumbing Company. However, the court found that Gerrel O'Quin, son of appellant and step-son of appellee, was an indispensable party to the suit inasmuch as it had been claimed that he and his father were partners in the O'Quin Plumbing Company, and that his interest therein could not be determined because he was not a party to the suit. It was also held that appellant had a right to use the equipment of the plumbing company without accounting to appellee for profits; that the trial court was without authority to divide any of the property between the parties under the mandate of this court; and that $1,500 received by appellee and $1,600 deposited in the registry of the chancery court by appellant should be restored to the joint bank account of the parties. Both parties have appealed.

We first consider the chancellor's finding with reference to the $12,299.85 bank account. In order to determine the correctness of the holding on this item it is also

necessary to notice the further finding that Gerrel O'Quin claimed an interest as a partner in the O'Quin Plumbing Company and was, therefore, a necessary party to the suit. In this connection it must be remembered that the suit originally instituted by appellee on December 23, 1948, was for an equal division of all real and personal property owned by the parties as of December 7, 1948, the date of their final separation. The opinion on the original appeal made specific findings to the effect that the $12,299.85 account was the joint bank account of the parties and that appellee was entitled to one-half interest therein. The fact that no specific direction was made as to this item in remanding the cause on the former appeal is perhaps the principal cause of the present controversy.

While the principle of the law of the case is applicable to the joint bank account as well as the equipment of the plumbing business, we find no material difference between the testimony at the original trial and that given in the present hearing with reference to the bank account and Gerrel O'Quin's connection with the O'Quin Plumbing Company. The preponderance of this evidence shows that appellant and his son were engaged as partners in the plumbing business prior to the first separation of the parties. When appellant and appellee resumed marital relations in September, 1948, Gerrel O'Quin withdrew from the partnership and appellant paid him $3,000 for his interest therein. Appellant and appellee restored to the account certain funds which were involved in the void settlement of August 28, 1948, and the account was continued in the name of the O'Quin Plumbing Company. Rentals from real estate owned by the parties jointly were deposited in the account along with the salary checks of appellee who was employed at a veterans' hospital. Appellee also kept the books of the plumbing business and had equal authority to draw on the account which was treated in all respects as a joint account of the parties.

About the time of the final saparation on December 7, 1948, Gerrel O'Quin returned to the business and the partnership with his father was reinstated. Appellant tes-

tified that he withdrew $3,000 from the partnership at the time of his son's return. An audit of the plumbing business from December 7, 1948, failed to disclose a check representing this payment, but an entry was made in the cash book showing such disbursement on December 13, 1948. After the separation on December 7, 1948, appellant changed the O'Quin Plumbing Company bank account to his own name and made certain withdrawals therefrom. In the original suit an order was issued restraining the Twin City Bank from permitting reduction of the balance in the account below $5,000.

From the above evidence, we conclude that Gerrel O'Quin had no interest in either the bank account or the equipment of the plumbing business at the time of the final separation of the parties on December 7, 1948, and that he was not, therefore, an indispensable party to the suit. When he resumed the status of a partner in December, 1948, he did so subject to the rights of appellee in the personal property used in the business. We construe our former opinion as holding the parties to be tenants by the entirety in the equipment in use in the operation of the O'Quin Plumbing Company on December 7, 1948, free from any claim of Gerrel O'Quin and that decision is binding here as the law of the case. *Biscoe* v. *Tucker,* 14 Ark. 515; *Tucker* v. *Stewart,* 209 Ark. 856, 192 S. W. 2d 766.

As to the items of $1,500 and $1,600 which the trial court directed the parties to restore to the joint account, the evidence shows that appellee received $1,500 in cash at the time of the settlement in August, 1948, and that she returned this amount, plus $100, to the plumbing company account when she returned in September, 1948. After appellant had changed the plumbing company bank account to his own name, following the final separation, he subsequently deposited $1,600 in the registry of the court and this amount represents part of the $12,299.85 bank account.

It is our conclusion that the chancellor erred in holding that Gerrel O'Quin was an indispensable party to the suit, in directing the parties to return the $1,500 and

$1,600 items to the joint account, and in refusing to order one-half of the $12,299.85 joint bank account paid over to appellee. We also reaffirm our holding on the former appeal that appellant and appellee are owners of an entirety estate in the equipment in use in the plumbing business on December 7, 1948. The decree is accordingly reversed on cross-appeal and the cause remanded with directions that appellant pay over to appellee $6,149.92 which represents one-half of the joint bank account. It is further directed that such payment be made from the $5,000 deposit now impounded in the Twin City Bank of North Little Rock and so much of the $1,600 on deposit in the registry of the court as may be required to equal $6,149.92 and the costs of this appeal. Except as otherwise indicated in this opinion, the decree is affirmed.

George Rose Smith and Sam Robinson, JJ., not participating.

Caples *v.* Wages.

4-9549 241 S. W. 2d 111

Opinion delivered July 2, 1951.

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

John C. Sheffield, for appellee.

Robinson, J. This case involves the adoption of a little girl who was born to appellant on the 8th day of February, 1948. The baby was born at the home of the appellee. On the day of its birth the baby was given by

appellant, the natural mother, to the appellee. The natural mother also gave her written consent to the adoption of the baby by the appellee and appellee's husband.

On the 28th day of March, 1949, the Probate Court on the petition of appellee and her husband made and entered an interlocutory order of adoption. On the 18th day of October, 1950, the appellant and the State Welfare Department filed objections to the granting of the final order of adoption alleging that:

"1. Defendants were divorced in the Chancery Court of Phillips County, Arkansas, on September 7, 1950.

"2. That defendants have failed and neglected to perform their obligations to the infant, Beverly Jane Caples, in that Mr. Parker has left the State of Arkansas and his address is unknown, and Opal Parker has left the State of Arkansas and now resides in the State of Tennessee; that prior and subsequent to said divorce, defendants did not have custody of infant Beverly Jane Caples and did not give her the care, supervision, love and affection of a natural or adoptive parent.

"3. That it is for the best interest of infant Beverly Jane Caples that said temporary decree be cancelled, set aside and held for naught, and that the care and custody of said infant be placed with either one or both of interveners."

The Probate Court, after hearing the evidence, entered a final order of adoption. From that judgment comes this appeal. This case turns on a question of fact and it would serve no useful purpose to set out here an abstract of the testimony upon which the Probate Judge based the judgment. In rendering judgment the court made the following remarks:

"1. That the allegation of the interveners that Frank and Opal Parker are now divorced is sustained and admitted; that Opal Parker was awarded a final decree of divorce from Frank Parker on September 7, 1950, by the Chancery Court for Phillips County on the ground of desertion, and that she subsequently married Kenneth

D. Wages in November, 1950. The court takes judicial notice that many natural parents are divorced and their children continue to receive the love and affection, care and support of one or both parents; that the divorce in the case at bar is not of itself, sufficient basis upon which the former order of adoption should be set aside.

"2. That the allegations of the interveners that the child is not receiving the love, affection and care to which it is entitled, are wholly unsupported by the evidence, and the allegations are not sustained.

"3. That the allegations that the best interests of the child will be served by taking the child from the adopted parent and placing its custody in the natural mother and the Welfare Department are not supported by any substantial evidence, and therefore are not sustained.

"4. The court having heard and considered all the testimony and the statement of counsel; having observed and considered all the testimony and the demeanor of the natural mother, the manner and demeanor of the child, and manner and demeanor of the adopted mother and the adopted relatives of the child, the court is convinced that there exists no love or affection of the natural mother toward the child, or of the child toward the natural mother, or even of recognition of their natural relationship toward each other; that the adopted mother is the only mother, and the adopted relatives are the only relatives the child ever has known; that the mutual love and affection of the adopted child, the adopted mother and the adopted relatives is plainly apparent. The child is happy, active, well cared for, well mannered and sincerely loved by her adopted mother and her adopted relatives. That the moral and financial environment is much preferred to that of the environment proposed by the interveners and that the child is now being and will continue to be well cared for, loved and properly reared under the present arrangement. To uproot the life of this child, to tear apart the tender tendrils of love and affection which bind it to its adopted family would be a tragedy to this tender and innocent life, which this court,

with due regard to the expressed interests of all concerned, cannot in good conscience, lend itself to be the instrument. It is to the best interests of this child to remain in the custody of its adopted mother, Opal Parker Wages, and it is so ordered.''

Also, the appellant contends that the Welfare Department was not given an opportunity to resist the granting of the interlocutory order and that the Welfare Department had made no report in connection therewith. However, the interlocutory order shows that the report of the Welfare Department was considered at the time of the making of the order. The interlocutory order was made and entered on the 28th day of March, 1949, and no effort was made to set it aside.

Affirmed.

McCLELLAND *v.* McCLELLAND.

4-9512 241 S. W. 2d 264

Opinion delivered July 2, 1951.

[redacted]

F. O. Butt, for appellant.

J. E. Simpson, for appellee.

Ed. F. McFaddin, Justice. This is a controversy between two brothers: each has a deed from their father. G. W. McClelland owned in excess of 1,200 acres of land. By various instruments, he conveyed most, if not all, of his lands to the appellant and the appellee; and there is no dispute except as to the two tracts now to be discussed.

Appellant's deed from G. W. McClelland was dated in 1939 and recorded in 1942, and contains this description:

"Part of Southwest Quarter (121 acres) Section 13; . . . and Part of Northeast Quarter of Northeast Quarter (10 acres) Section 23; all in Township 21 N. R. 25 W. and . . . Subject to existing mortgage thereon. A life estate therein is hereby reserved to the grantor."

Appellee's deed from G. W. McClelland was dated in 1945 and recorded in 1950, and contains this description:

". . . SW¼ Sec. 13 . . . and 10 acres in NE¼ NE¼ Sec. 23, all in Twp. 21 N. R. 25 W. . . . .; all subject to mortgage to Federal Land Bank of St. Louis . . . A life estate in said lands is reserved and retained by the grantor . . ."

After the death of G. W. McClelland, Roy McClelland (appellant) filed suit against Elwin McClelland (appellee) praying, *inter alia:*

"WHEREFORE plaintiff prays that . . . the aforesaid deed, to defendant dated Sept. 11, 1945, recorded Jan. 14, 1950 . . . be by the court found and declared to be of no force and effect, and that said deed and the record thereof be cancelled as a cloud on the title of plaintiff, and that plaintiff's title to all the lands here-

in first described and claimed by plaintiff be quieted, established and confirmed against defendant; . . . and for all other necessary and proper and general relief."

Upon issued joined, the Chancery Court, after a patient and extended hearing, made this finding:

"That plaintiff's said deed included a description, to-wit: Part SW¼ Sec. 13, 121 acres, and Part of NE¼ NE¼ (10 acres) Sec. 23, in said township and range, and that same were not legal descriptions, and that said deed to plaintiff is void in so far as it pretended to and did purport to convey any lands in said SW¼ Sec. 13 or any lands in NE¼ NE¼ Sec. 23 aforesaid. That the said deed to defendant above mentioned described definite lands in SW¼ Sec. 13 and in NE¼ NE¼ Sec. 23 aforesaid, by valid and legal descriptions; and by reason thereof the said deed to defendant is superior and paramount to the said deed to plaintiff as to all said lands in said Section 13 and in NE¼ NE¼ said Section 23; . . ."

From a decree entered in accordance with the foregoing findings, Roy McClelland has appealed, contending (a) that he showed by evidence exactly what lands his father owned and intended to convey to him in the 1939 deed, and (b) that the Chancery Court should have reformed the descriptions in his said deed.

I. *Appellant's Title.* The burden was on appellant—out of possession—to recover on the strength of his own title. See *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660. But the descriptions in the appellant's deed concerning the two tracts herein involved were insufficient to describe definite lands and were therefore void, and the recording of the deed constituted no notice: see *Adams* v. *Edgerton,* 48 Ark. 419, 3 S. W. 628; *Neas* v. *Whitener,* 119 Ark. 301, 178 S. W. 390, L. R. A. 1916A, 525; *Evans* v. *Russ,* 131 Ark. 335, 198 S. W. 518; *Bunch* v. *Crowe,* 134 Ark. 241, 203 S. W. 584; and *Moore* v. *Jackson,* 164 Ark. 602, 262 S. W. 653. G. W. McClelland retained possession of the lands after making the deed to the appellant. Appellee had no notice, actual or constructive, of appellant's deed and became a *bona fide* purchaser under his own deed. Therefore appellant was not

entitled to reformation against appellee under the authority of the cases just cited.

II. *The Appellee's Title.* The appellee's deed contained a legal description of the Southwest Quarter of section 13; and so he needed no reformation to make his deed valid to such tract. When the Court dismissed appellant's claim, appellee's deed remained valid as to the lands in section 13.

But appellee's deed contained an insufficient description as to the tract in section 23, since the deed said "10 acres in NE¼ NE¼ Sec. 23." Appellee was not entitled to have his deed reformed or his title confirmed as to such ten acre tract because all of the heirs of G. W. McClelland were not parties to this suit. The general rule is that in a suit to reform a deed, the grantor, or his heirs, or those claiming under him, are necessary parties. See *Oliver* v. *Clifton,* 59 Ark. 187, 26 S. W. 817; *Ward* v. *McMath,* 153 Ark. 506, 241 S. W. 3; and *Hayes* v. *Gordon,* 217 Ark. 18, 228 S. W. 2d 464. G. W. McClelland died intestate, survived by four sons, only two of whom are parties to this suit. Until all the heirs of G. W. McClelland be made parties, there can be no decree of reformation, since this case does not fall within the exceptions recognized in either *Hargis* v. *Lawrence,* 135 Ark. 321, 204 S. W. 755, or *Hayes* v. *Gordon (supra).* The Chancery Court should have dismissed appellant's complaint as to the ten acre tract, and also left appellee without confirmation of his title thereto. See *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660.

Therefore, the Chancery decree is affirmed in all respects, except as to the confirmation of appellee's title to the lands in section 23. Appellee's possession is left undisturbed, but so much of the decree, as confirmed his title to the lands in section 23, is reversed and remanded with directions to vacate the decree of confirmation, but without prejudice to the appellee to later seek confirmation upon filing suit against all necessary parties. The Chancery Court order as to costs in that Court is affirmed. All costs of this appeal are adjudged against appellant.

TURNER *v.* TURNER.

4-9474 243 S. W. 2d 22

Opinion delivered April 30, 1951.

Rehearing denied June 25, 1951.

O. E. Westfall and *Gaughan, McClellan & Gaughan,* for appellant.

Walter L. Brown, for appellee.

PAUL WARD, J. This suit involves three main issues, viz., a divorce, a property settlement and an attorney's fee. The question of divorce can be disposed of summarily in favor of appellee since there is sufficient evidence to support the chancellor's finding and since appellant in his brief concedes the issue.

On February 15, 1949, Mrs. Dee Turner (appellee) filed suit for divorce against Alfred B. (Buck) Turner and asked that she be awarded her "dower interest in all property, both personal and realty owned by the defendant." The chancellor entered a decree of divorce on July 27, 1949, and retained jurisdiction for the purpose of adjudicating the property rights of the parties. Appellee then filed a separate petition asking the court for her allowances in accordance with § 4393 of Pope's Digest (34-1214 Ark. Stats. 1947). Two days later appellant filed a response stating that a complete settlement of all dower rights and interest of appellee in his property had been settled as set out and pleaded in his answer. In his answer appellant alleged that his wife filed suit for divorce on June 9, 1948; that reconciliation and settlement were reached; that he executed certain royalty deeds to appellee in complete and final property settlement with her, and that the suit was dismissed.

After a hearing on the issues involved the court rendered its decree on August 15, 1950, (as of date June 28, 1950) finding there had been no property settlement between the parties, and awarded Mrs. Turner an undivided one-third (for life) of the real estate her husband was seized of when the divorce was granted on July 27, 1949; a one-third (for life) of the production of oil and gas from certain mineral interests of her husband (this item was set out in detail); and also a one-third interest (in fee) in her husband's personal property as specifically described; and granted to her attorney a fee of $18,000.

The record is replete with motions, hearings, and orders pertaining to restraining certain oil companies

from paying royalty checks pending the final outcome of the controversy and to determine the nature and extent of appellant's property, but all of that seems to have terminated satisfactorily to both parties and need not be gone into here.

On the question whether there had been a previous property settlement there was conflicting testimony.

Mrs. Turner testified in substance: We were married twenty years and reared two children. We were poor when we married and I worked and helped until we separated. The property which he owns was accumulated during our married life. The income from the property averaged $24,000 a month from January to June of this year and produced more in 1948. I filed a suit for divorce in 1948 and we were reconciled in August. The reconciliation was brought about by him asking Mr. Homer Gentry, who is the minister of the church which I attend, to come to his room in the hospital; then Mr. Gentry came to my home to see me and stated that my husband had promised he would do better and go to church and would never mistreat me any more. The two of us went to see Mr. Turner on Monday afternoon when Turner began to promise me quite a few things if I would come back to him and told me what he would do. He said he would build a real fine home anywhere I wanted it, that he would give me an interest in the Ritchie lease and the Renfro lease; and that he was going to live better and go to church and we were going to be happy. He said he was going to give the interest just to prove to me he was going to live right and be good to me. I agreed to withdraw the divorce suit. The next day he left the hospital and I met him in Mr. Streett's office where I stated what had happened between us and that I wished to withdraw the suit. Mr. Streett looked over some papers we had and then we went to Mr. Gaughan's office, who drew up a deed for us and I put the deed on record. Nothing was said about my dower rights as a consideration for him signing this deed and nothing was said by anyone about dower rights; Buck (appellant) explained it to Mr. Streett and to Mr. Gaughan, and it was not a property settlement. It was only recently that I learned

it was supposed to be a property settlement. No one ever suggested to me that this deed was for my part of the other property. My income from the property described in the deed has been about $1,700 a month and the fixed income from all of his property was about $30,000 a month. On cross-examination: Mr. Turner first developed his oil properties about 1946 and prior to that time he worked in the oil field as a rig builder and that is where I first met him. When I went to the hospital I did not tell Mr. Turner that I wanted a property settlement, and property settlement was not mentioned. When we went back together we lived together from the latter part of August until January, 1949. The deed mentioned above which, leaving out certain portions that do not effect its meaning, is as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"WHEREAS, A. B. Turner is the owner of an interest in the oil and gas leases in the production of oil and gas under the leases on the lands in Ouachita County, Arkansas, described as follows: (Here the land is described.)

"WHEREAS, it is the desire of the said A. B. Turner to assign, transfer and convey to his wife, Dee W. Turner, one-sixteenth of his interest in and to the leasehold estate which he holds covering the above described lands, to be paid to her as an overriding royalty interest, free and clear of all cost of production.

"NOW, THEREFORE, I, A. B. Turner, for and in consideration of the sum of Ten Dollars and other good and valuable considerations, receipt of which is hereby acknowledged from Dee W. Turner, do hereby grant, bargain, sell, convey and assign unto Dee W. Turner, and unto her heirs and assigns forever, the following property, to-wit: (Here is described in detail certain oil productions.)

"As stated above, the said Dee W. Turner is to become the owner, under this assignment, of one-sixteenth of the interest of A. B. Turner in the above leases, subject to the unitization agreements which may be shown of record covering said property, and which said one-

sixteenth of the A. B. Turner interest herein assigned and conveyed to the said Dee W. Turner is to be paid to her as an overriding royalty, free and clear of all costs of developments, production, etc., and the assignment is to be effective September 1, 1948, at 7 a. m.

"To have and to hold the same unto the said Dee W. Turner, and unto her heirs and assigns forever, with all appurtenances thereunto belonging.

"And I, Dee W. Turner, do hereby join in the execution of this assignment, and release and relinquish all of my dower interest in and to the property herein assigned, so that I may hold said property in fee simple and as my own property.

"Witness our hands on this 25th day of August, 1948.

(Signed) "A. B. Turner

(Signed) "Dee W. Turner."

Homer Gentry, a witness for appellant, testified in substance: I have known Mr. and Mrs. Turner approximately seven or eight years and I am the pastor of the church of which Mr. and Mrs. Turner are members. I am not sure however that Mrs. Turner is a member, but she attends church. At the instance of Mr. Turner I made a trip to see Mrs. Turner to persuade her to go to Camden and have a talk with Mr. Turner. I hesitated at first as I thought it might look like I was taking advantage of Mrs. Turner due to the fact that I was a good friend of the family, but Mr. Turner promised me at that time that whether he and Mrs. Turner went back together or not he would never drink any more whiskey and he had promised God that he was through with it, and so I told him that if that was so, especially for the sake of the children, I would do what I could to bring about a reconciliation. I went to see Mrs. Turner and she promised me she would meet me at the hospital Monday afternoon and talk with Mr. Turner, and she did. When we went into the room—I don't remember just what the first part of the conversation was; but Mrs. Turner told Mr. Turner that she doubted if he would be willing to meet her terms, and he asked her what they were, and

she said the first thing he would have to do would be to join the A.A. and make her a property settlement; Mr. Turner said he could not meet her request in the property settlement, that if he did and something should happen to him and she was a mind to do it, she could then come in and take the part that belonged to the children; I do not remember anything about what per cent of the property was requested, or that he promised, but Mrs. Turner told him those terms would have to be met in her attorney's office. She indicated she was satisfied with what he had offered her and said that they would have to go to her attorney's office. I don't believe anything was said about dismissing the divorce suit, but do remember she told him there would have to be a property settlement. I don't remember whether she asked him for one-third of his property or not.

A. B. Turner, appellant, testified in substance: When brother Gentry and my wife came to the hospital she said she wanted a property settlement; and she first asked for a third interest and I said I can't afford that; you are not entitled to it to start with and it wouldn't be fair to the children if we go back together, then we agreed on the one-sixteenth interest; she asked for a settlement "for keeps" and said she wasn't to have any further claim in the property, and then I agreed that day that I would give her this interest, and later on did give it to her. We went the next day and I had the papers fixed up and I gave them to her and then we went back together and lived together a while—from August until January of this year. When the papers were fixed up she seemed to be satisfied and it was my intent and purpose that that would be full settlement. On cross-examination: She said the only way she would ever come back to me was for her to have her own property and that before she dismissed this divorce suit she was going to get it and we agreed on the interest which I gave her, and I didn't give it to her as a gift, but was trading out with her; she surrendered a one-third dower interest in the property for a one-sixteenth interest that I gave her.

"Q. The point is she wasn't entitled to a one-third interest because she didn't help make the money?

"A. I made all of this money myself, every penny of it.

"Q. You didn't consider she was entitled to it?

"A. She had no part in helping make the money.

"Q. It was yours?

"A. Absolutely.

"Q. Did you draw up that agreement in writing?

"A. Yes, I made an assignment to her.

"Q. Where is that agreement?

"A. Here some place.

"Q. You gave her a deed?

"A. Yes, sir.

"Q. She has never at any time surrendered her dower interest in any of the property not in writing has she?

"A. No, sir.

"Q. What was your income in 1948?

"A. $190,000 or $200,000.

"Q. It was around $30,000 a month?

"A. Roughly."

Appellee on redirect examination:

"Q. Were you asked to release your dower interest?

"A. No, sir.

"Q. Was it ever suggested in any paper drawn up that you were releasing your dower?

"A. No, sir.

"Q. That was never thought of, mentioned or discussed was it?

"A. No, sir."

At this time Mr. Brown for appellee and Mr. Westfall for appellant stipulated in substance as follows: It is agreed and stipulated between counsel for both sides

that if Mr. J. Bruce Streett were present he would testify as follows: That Mr. and Mrs. Turner came to his office and told him that they were going back together and that she wanted the suit dismissed, and that Mr. Turner was turning over to her an operating interest in certain property, and she had the description, and she wanted him to look over the deed after it was drawn up.

This is all the testimony on the question of the property settlement mentioned above.

It will be noted that the testimony makes reference to an agreement which was entered into and signed, but since we find no such separate agreement in the record we assume that the witnesses were referring to the deed. We are of the opinion that the finding of the lower court, to the effect that no property settlement whereby appellee released all her rights of dower in her husband's property was entered into at the time of the reconciliation, is supported by sufficient evidence. Appellee was positive that no such final settlement was entered into and appellant was just as positive that one was entered into. Homer Gentry, Mr. and Mrs. Turner's pastor, was present and heard most if not all of the conversation between appellant and appellee and he states that reference was made to a property settlement. Testimony of Gentry however in this connection is not wholly irreconcilable with the contention of appellee. Even though a property settlement was discussed by the parties it might well have related to a settlement which appellee demanded before she was willing to dismiss her law suit and try living with her husband again, and the term "property settlement" could to them possibly have referred to a gift or a kind of atonement for former misconduct on the part of appellant. It is significant that after Mr. and Mrs. Turner visited the law office of Mr. Bruce Streett, who was her attorney, they then went to the law office of Mr. Gaughan, who is Mr. Turner's attorney in this case, and who, according to the testimony of Mr. Turner, was the man who did much of his legal business. If Mr. Turner had explained to his attorney that the deed was to be a full settlement of all

of Mrs. Turner's dower rights in and to his property, as he now contends it was, then it is not unreasonable to suppose that appropriate language to that effect would have been included. There is nothing in the deed itself which conveys from Mrs. Turner her rights of dower in the property of her husband, but on the contrary it appears that the only reason for her signing the deed at all was to release and relinquish all her dower rights in and to the property conveyed by said deed so that she would hold said property in fee simple and as her own property.

Appellant makes the contention that it is not equitable for appellee to be allowed to retain the benefits under the deed and in addition obtain one-third of appellant's property as set out in the decree, but we cannot agree with this contention. Having once decided the deed was not a settlement in lieu of dower, the deed would stand then as a gift from her husband to her or it would be in consideration of her dismissing the divorce suit and effecting a reconciliation. The question of who was to blame for them not being able to live together again is not an issue before us and cannot be considered in this connection. Appellant cites § 34-1214 Ark. Stats. 1947. The part pertinent to this issue reads as follows:

"In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; . . .".

The question at once arises, was the property conveyed by this deed to appellee obtained "in consideration or by reason" of her marriage to Mr. Turner? On the authority of *McNutt* v. *McNutt,* 78 Ark. 346, 95 S. W.

778, we hold it was not so obtained. In the cited case the husband and wife were separated, though still married, and "concluded to live together again upon condition that the husband would deed her one-half of the farm on the 'State Line,' . . .". The deed was made and after McNutt and his wife had lived together a while the husband obtained a divorce, but the lower court refused to restore to him the above mentioned property. The husband appealed and relied on § 2684, Kirby's Digest (§ 34-1214, Ark. Stats.) for a reversal. Judge Wood for the court, after reviewing the Kentucky decisions based on practically the same statute as ours, approved the lower court, using the following language: "It follows from what we have said that the property in controversy was not in consideration and by reason of the marriage, and cannot be restored to appellant under the statute."

Appellant next contends that the chancellor erred in awarding appellee an undivided one-third interest for life in appellant's land, when he should have awarded her one-third of the land, specifically described, for her life. With the exception of some lots in the town of Stephens and 120 acres of land held by appellant in fee, all his real estate consisted of oil and gas interest in lands situated in several different sections. The decree described these interests in detail regarding sections and sub-sections, and then gave her a one-third interest for life in all of it. There was no error in the court's decision on this point in so far as it pertains to appellant's oil and gas interests. It was in harmony with former holdings of this court. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63; *Warren* v. *Martin,* 168 Ark. 682, 272 S. W. 367.

The matter of assignment of dower in lands owned in fee by appellant will be discussed at the close of this opinion.

Finally it is contended that the court abused its discretion in allowing an excessive fee for appellee's attorney. Early in the proceedings the court allowed $1,000 and in the final order an additional fee of $17,000 was

allowed. Testimony by reputable attorneys was to the effect that $100 a day for each day actually engaged would be reasonable and, on this basis, appellee's attorney should be allowed $5,000 to $6,000. Other attorneys testifying for appellee thought a fee of from $25,000 to $40,000 would be reasonable. The lower court had a right also to take into consideration many other facts and circumstances developed in the case such as, the large amount of property involved, the effort of appellant to establish a previous property settlement, the amount of work performed by appellee's attorney and the responsibility involved, and the results obtained by the skill and efforts of said attorney. Considering all these things, a majority of the court thinks the decision of the chancellor in allowing a fee of $18,000 was not an abuse of his sound discretion.

We consider now the matter mentioned above relative to the assignment of dower in the lands owned in fee by appellant. The court's order found that he owned in fee certain real estate consisting of eighteen full lots and parts of two lots in the town of Stephens and 120 acres in sections 27 and 28; township 15 south, range 18 west, and then "Finds that plaintiff (appellee) should be awarded an undivided one-third life estate in said above described property." Section 34-1214 of the Ark. Stats. 1947 provides:

". . . and the wife so granted a divorce against the husband shall be entitled to . . . one-third of all the lands whereof her husband was seized . . . and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled; . . ."

The same section then provides that if the real estate is not susceptible of division without prejudice to the parties the court shall order a sale. Pursuant to the above statute the court should have divided the real estate owned in fee by appellant, allocating one-third in value, in kind, to appellee for life, or if this could not be done without prejudice to the parties, the court should

have ordered a sale. This section, designated as § 2684 of Kirby's Digest was partially interpreted in the case of *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841, at page 171. For the error indicated the cause must be reversed in so far as it relates to a division of the real property and remanded to the lower court for further proceedings, if requested by either party, consistent with this opinion. In all other respects the decree of the lower court is affirmed.

REEP *v.* REEP.

4-9499 241 S. W. 2d 262

Opinion delivered July 2, 1951.

Max M. Smith, for appellant.

O. E. Gates and *B. Ball,* for appellee.

George Rose Smith, J. This suit was brought by the appellees, a partnership operating the Rye Gin Company, to obtain an accounting of the company's business for the 1944-1945 ginning season. The defendant is Glynn Reep, who was employed as manager of the cotton gin for the year in dispute. The complaint charges that Glynn handled the firm's receipts and disbursements during the season in question and failed to account for funds amounting to $4,284.84. Glynn's father, J. B. Reep, who was formerly a member of the partnership, filed an intervention asserting that the firm is indebted to him for various advances and capital contributions. After hearings extending over a period of years the chancellor entered a decree which gave the appellees judgments against Glynn Reep totaling about $1,350 and also adjusted the accounts between J. B. Reep and his former partners. The father and son appeal.

The chancellor, in his effort to adjudicate the conflicting claims, was hampered by the fact that only meager records were kept during the year in controversy. Many witnesses testified, and each side employed an accountant to audit the company's books and state the accounts. In many instances the auditors found the records so inadequate that it was necessary to explore outside sources, such as the books of those with whom the ginning company did business. The chancellor found, and we agree, that the testimony and the audits are in irreconcilable conflict. The parties, however, have accepted the chancellor's findings, with the exception of six items now questioned by appellants.

One disputed issue is whether Glynn accounted for the proceeds of an $80.50 check which was payable to the company and cashed by Glynn. Glynn admits cashing the check but says that a few days later he deposited the money in the firm's bank account. His only supporting evidence, however, is a deposit slip which shows that the sum of $100 in currency was deposited. We are not able to say that the chancellor was wrong in doubting that Glynn preserved the $80.50 and added just enough of other company funds to make an even hundred dollars.

It may be added that this was only one of many transactions during the season, and Glynn testified from memory alone after an interval of several years.

Another item is that of interest charged against Glynn, upon the theory that he has been continuously indebted to the partnership. A major part of this debt arises from the chancellor's conclusion that Glynn wrongfully used $1,114 of company funds to buy a car for himself. Glynn admits the transaction, but he explains that the firm then owed his father more than the amount of the withdrawal, and Glynn was sure that his father would not object to Glynn's using the money. Mr. Reep testified that he approved the transaction when he was told about it, but it is not intimated that the other partners knew anything about it. We uphold the chancellor's refusal to sanction what was clearly a misuse of partnership funds. The accounts between J. B. Reep and his partners were still a matter of dispute when this suit was filed, and we cannot approve the action of an employee in assuming to strike a balance for the partners and withdrawing for his personal use funds thought to be due his father.

A third item of $54 was charged to Glynn, but he testified that this money was spent for legal fees and the hauling of cotton. We find no reason for rejecting this testimony, which is not disputed. The judgment against Glynn is reduced to the extent of this item.

A fourth issue centers upon Glynn's personal account with his employers. Here the major contention is that Glynn should be credited with a salary of $130 a month for eight months, or a total of $1,040. The appellees' auditor allowed a salary of $5 a day for 133 days—a total of $665. The appellants attack the auditor's figure, but in doing so they overlook the fact that the chancellor did not accept the auditor's finding. Instead, in his opinion the chancellor allowed a salary of $135 a month for seven months, totaling $945. This allowance is fully as liberal as Glynn is entitled to demand.

Still remaining are *(a)* other debits and credits to Glynn's personal account with the firm, *(b)* a controversy

as to the total amount of cotton seed bought and sold during the season, and *(c)* a dispute as to the quantity of cotton seed hulls and meal that were sold. The appellants' abstract is insufficient to enable us to pass upon these issues with the same knowledge the chancellor possessed. These issues can be decided only by a detailed study of the auditor's worksheets, recapitulations, profit and loss statements, etc. These documents consist of about 125 pages, none of which has been abstracted or reproduced by the appellants. It is probably true that the amounts involved would not have justified the cost of reproducing these calculations for our consideration, but without them we are unable to determine the issues without examining the transcript and its exhibits. For the reasons given in *Files* v. *Law,* 88 Ark. 449, 115 S. W. 373, we cannot follow that procedure and at the same time dispatch the other business before the court. From the abstract we conclude that the chancellor analyzed the case patiently, thoroughly, and conscientiously, and with the modification mentioned above his decree is affirmed.

MAURICE *v.* CHAFFIN.

4-9554 241 S. W. 2d 257

Opinion delivered July 2, 1951.

David L. Ford, for appellant.

Bland, Kincannon & Bethell, for appellee.

HOLT, J. The present suit was filed August 15, 1950, by appellee, M. N. Chaffin. He alleged in his complaint, in effect, that L. T. Maurice sold him a heavy duty truck (GMC-302-1941 model); the consideration was an International 1939 truck and $900 additional, evidenced by note of even date and mortgage as security. Appellee further alleged that appellant represented that the GMC truck was in first class condition, in good running order, that all parts had just been completely overhauled, and that the truck was in good usable condition; that said representations were falsely and knowingly made with the intent to defraud appellee, that in fact, the motor, transmission and rear end assembly were completely worn out, rendering the truck worthless and unusable and that he had expended $358 in repairs.

He asked "to have said contract rescinded and tender said GMC truck to the defendant (appellant) and is entitled to have returned to him his International truck and to have said note and mortgage cancelled," and also for recovery of the amount of the repairs.

Appellant answered with a general denial.

A trial resulted in a decree for appellee, rescinding the sale, cancelling the note and mortgage and appellee "is ordered to deliver to the defendant and transfer title to the GMC-302-1941 model truck upon his payment to the C. & W. Auto Garage of Fort Smith, Arkansas, the sum of $178 and upon the payment into the court subject to

the orders of the court the sum of $188 for the use and benefit of Williams Motor Company, and the defendant is ordered to deliver and transfer title to the plaintiff to the IC-35-1939 model truck and to pay the costs of this action," etc.

This appeal followed.

Appellee testified that while he was having some repairs done on his 1939 model International truck, appellant came up, and after looking over it, said: "Boy, I got a truck out here that is just exactly what you need. This is too light for what you are going to use it for. I have just what you need, a large truck at the foot of the hill."

Following this conversation, they immediately went to a shop where appellant's truck (GMC, 1941 model) was stored and appellant told appellee that he (appellant) had (quoting from appellee's testimony): "A. Overhauled it from one end to the other, and it was in A-1 shape. He told me whose truck it used to be and all that stuff. Everything was supposed to have been in A-1 shape from one end to the other. Of course, I could see it was a new frame and a new cab and everything like that, and I went and talked to the head mechanic, and he said, 'Yeah, we overhauled it,' but I still didn't know it had been in there four years, or five, working on it."

That relying on the truthfulness of appellant's statement, he traded for the truck, in consideration of his (appellee's) 1939 International truck and $900 additional, evidenced by note and mortgage. Appellee further testified that the truck was worn out and useless and that he offered to return it within a few weeks after the sale and rescind the sale but appellant refused. Appellee also tendered the truck to appellant the date the present suit was filed.

A competent mechanic, apparently disinterested, testified, in effect, tending to corroborate appellee's testimony.

It appears to be undisputed that appellee spent approximately $366 in attempting to repair the truck following the sale.

While the testimony offered by appellant, which we do not detail, tended to contradict that of appellee, after considering all of the evidence, we are unable to say that the trial court's findings were against the preponderance thereof.

Under our "Uniform Sales Act," Ark. Stats. 1947, § 68-1412 (vol. 6, p. 613), an express warranty is defined as: "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," and § 68-1469 provides the remedies for the breach of a warranty in a contract for the sale of goods. Subsection (d) provides: "Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid," and subparagraph (3) provides: "Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale."

As indicated, we hold that the preponderance of the evidence shows that appellant knowingly misrepresented to appellee that the GMC truck was in A-1 condition and suitable for appellee's purposes, that appellee relied on these representations which amounted, in the circumstances, to warranties (more than opinions) and was thus induced to buy. The truck was practically worn out or useless and these representations, upon which appellee

had the right to rely, amounted to a breach of warranty in the sale of the truck to appellee, and therefore, appellee had the right to rescind as the trial court found.

"When the representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him," *Evatt* v. *Hudson,* 97 Ark. 265, 133 S. W. 1023, and the very recent case of *Fausett & Company, Inc.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490: "Representations are considered to be fraudulent if made by one who 'either knows them to be false, or else, not knowing, asserts them to be true.'" (Citing cases.) See, also, *Logue* v. *Hill,* 218 Ark. 797, 238 S. W. 2d 753.

The evidence also shows that appellee, within a reasonable time (a few weeks) after appellee sold him the truck, notified appellant (seller) of his election to rescind, and further offered to return the truck, in substantially as good condition as when the sale was made. This, appellee had the right to do under the above sections, (d) and (3) of the statute, that is "rescind * * * the sale * * * return or offer to return them (the goods) to the seller and recover the price * * * which has been paid."

The trial court correctly allowed for the repairs made at appellee's expense after the sale of the truck to him. In the recent case of *Williams* v. *Maier,* 213 Ark. 359, 210 S. W. 2d 499, the purchaser of a pump attempted to rescind the contract of sale for an alleged breach of warranty. In an attempt to make the pump function and serve the purpose for which it was bought, the purchaser made certain repairs. Recovery for these repairs was allowed on the ground that such repairs were the proximate result of the seller's misrepresentations and breach of warranty. We there said: "In addition she would be entitled to the cost of installation of the pump, and the cost of the repairs, and the parts which she bought.

"The annotation to the Uniform Sales Act, p. 338, cites cases which hold that such expenses are recoverable.

Among others the case of *Moss* v. *Yount,* 296 Ky. 415, 177 S. W. 2d 372, 151 A. L. R. 441, in which case it was held that where a tractor sold was worthless except as junk, buyer's reasonable efforts to restore tractor to condition where it would serve purpose for which it was bought, and expenses while making such efforts were proximate result of seller's breach of warranty. Other cases cited to the same effect are *Stevens* v. *William S. Howe Co.,* 275 Mass. 398, 176 N. E. 208, and *Plumbers Supply Co.* v. *Lanter,* 280 Ky. 523, 133 S. W. 2d 739."

The decree is correct.

Affirmed.

SMITH *v.* SMITH.

4-9552 242 S. W. 2d 350

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

Philip S. Moyer, Rex W. Perkins, and *Henry Donham,* for appellant.

Clifton Wade, Robert P. Smith, Robert V. Smith, and *Beloit Taylor,* for appellee.

GRIFFIN SMITH, Chief Justice. The Chancellor held that appellee was a resident of Arkansas within the meaning of Act 71 of 1931, Ark. Stat's, § 34-1208; and also decreed that as plaintiff Smith was entitled to a divorce under the seventh subdivision of the Annotated Statutes, § 34-1202. Conceding correctness of the finding that separation without cohabitation had continued for three years, appellant asks that the decree be set aside on the ground that appellee was not a *bona fide* resident. *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585.

Quite obviously appellee undertook to supply the deficiencies mentioned in *Swanson* v. *Swanson,* 212 Ark. 439, 206 S. W. 2d 169—Joseph Swanson's failure to testify in his own behalf or offer evidence of an intention to make Arkansas his domicile. In the case at bar appellee did all that the quick use of material resources could supply and that self-serving declarations could

reinforce to show that he moved to Washington county because of its ideal summer climate and geographical location.

We take judicial knowledge of Fayetteville's livability and many of the other advantages emphasized by appellee in explaining the shift from state to state while endeavoring to find a suitable divorce jurisdiction, but we must consider his five-month tenure in Arkansas in connection with former conduct and acknowledged intentions. When this is done the verity of Smith's residential assertions clashes so sharply with the expeditionary motive that Reason supplies the logical answer: a denial of what he asserted in the lower court, and what he contends for here.

Appellee and appellant lived for many years at Camphill, Pa., just across the Susquehanna River southwest of Harrisburg. They were married in December, 1916, and lived together until May, 1945.

Ralph M. Koltze, who said he was comptroller of all of the companies in which appellee is interested, testified that from 60 to 65% of Smith's business was outside of Pennsylvania; that after moving to Fayetteville Smith gave instructions to have all of his mail sent there, saying he intended to make it his home, and in executing official documents Smith gave Fayetteville as his residence.

One of the primary enterprises was L. B. Smith, Incorporated, producing heavy construction equipment "and belts and conveyors for parts." Smith is president of that corporation, the net worth of which "is in the neighborhood" of $2,000,000. He is also president of Keystone Acceptance Corporation, worth $400,000. Mention was made of the Wolf Company. The estimated net worth was testified to by Koltze as being approximately $100,000 to $150,000. He then added, "But the actual worth is doubtful—from my point of view, nothing." Smith was president of Buffalo Gravel Corporation: net worth a million dollars. He was also president of the Hubbard Ford Agency, New York, the

value of which was $90,000; is president of L. B. Motors, Inc., worth $100,000 to $150,000. He had other interests. His salary is $54,000 per year, paid by some of the corporations. In addition, he drew dividends, the aggregate of which was not stated.

Six daughters—one of whom died—were born to appellee and appellant. There were no sons. The five daughters are married. Appellant testified that her husband's attitude began to change in 1943. He made two trips to Mississippi, one to Florida, and perhaps others. Inferences to be drawn from this testimony is that in similar circumstances Mrs. Smith had been asked to accompany her husband, but as early as 1943 he quite clearly did not want her to be with him. While in Camphill Smith would come from the office, leave suddenly without explanation, and sometimes be gone two or three weeks—"he was always in a hurry when he came home." By 1944 his habits were such that his home-comings would not average a day a week—"just long enough to get his laundry."

In May, 1945, appellant called Smith at his office and asked him to take her to a Shrine party. With some hesitation he agreed to do so:—"After the party I saw he was in no condition to spend the night at home, and I asked why. He replied that he was going to a hotel, then began to cry and acted hysterically." In response to appellant's further questions, Smith replied: "I am in so deep now there is no turning back." Appellant finally coaxed her husband to go to bed, but when he left the following morning he said, "I won't be back this evening: I'll be in Washington." Later he packed some personal belongings, then told appellant he wanted her to get a divorce "while I am away." When appellee seemingly became convinced that his wife did not intend to file suit he told her he would take the initiative, adding, "I'm going to do something about it soon."

Throughout appellant's testimony there is the thread of suggestion that he had become involved with Mrs. Vera Chapman. The Washington telephone directory disclosed

that Mrs. Chapman's residential listing was at 4813 Blagden Ave., that Smith listed his office telephone and his residential 'phone at the same address, and that Mrs. Chapman accompanied him on trips.

After remaining in Washington for a year appellee went to Florida. He first rented a house in the village of North Bay Island, then purchased a Miami residence for $82,000 and moved into it. From that time his legal contests were relatively continuous.

He reached Florida in April, 1946, but did not attempt to invoke that state's 90-day divorce law until August 22. After filing the suit he returned to his office at Camphill, Pa. There process was served on him in a suit instituted by appellant to enjoin prosecution of a divorce action "in any state wherein [Smith] has not acquired a *bona fide* domicile."

Appellant thinks the record clearly discloses that appellee became enraged when this process was served and announced in the presence of witnesses that he did not intend to live with his wife; that he could not be compelled to do so, and that if unsuccessful [in Florida] he would go to another state and bring a different action. These alleged statements, transcribed in a record excluded as incompetent by Washington [County, Ark.] Chancery Court, were testified to by George W. McKee, who said that when process was served on Smith he became "a little excited" and in substance made the declaration it was sought to bring forward from the excluded record. The witness, however, conceded on cross-examination that it was possible Smith did not use the word "divorce," but "he certainly inferred it." The word "action" may have been employed, [said the witness], but the only action contemplated was divorce.

While the Pennsylvania injunction was in effect Smith dismissed his Florida divorce action without prejudice, and in Pennsylvania applied for a dissolution of the injunction. This action was successful, but the court retained jurisdiction upon the theory, no doubt, that fur-

ther consideration would be given the matter if Smith should start a new action in Florida. Shortly thereafter Smith undertook to procure a Florida declaratory judgment of residence. Thereupon Mrs. Smith filed a supplemental bill in the Pennsylvania case in which she sought to restrain her husband from prosecuting the Florida litigation. A restraining order was issued. On July 3, 1948, Smith filed a second divorce suit in Florida. A supplemental bill was then filed in Pennsylvania, resulting in a temporary restraining order. Smith answered the second supplemental bill in Pennsylvania. On final determination the trial court found that appellant (Mrs. Smith) had not sustained the burden of proof necessary to show that her husband had not established a Florida residence. On appeal the lower court was affirmed by a divided court in a decision handed down January 17, 1950. *Smith* v. *Smith,* 70 Atl. 2d 630, 364 Pa. 1. The opinion found that Smith was a resident of Florida, enumerating the conduct thought sufficient to justify the holding. A paragraph in the opinion reads as follows:

"Plaintiff contends that defendant, in moving to Florida, was motivated solely by the desire to obtain a divorce and bases that contention on the undisputed evidence of his adultery. It is true that continuous adultery with one woman tends to show that he wanted a divorce in order to marry that woman. . . . And since motive may reflect on a person's intent to change domicile, . . . his evidence of that intent must be subjected to close and careful scrutiny. Even after such an examination we have no difficulty in finding that whatever may have been the defendant's motive in moving to Florida, he has, on this record, established his intent to make that state his domicile. . . . Plaintiff also complains that defendant's declarations of intent to stay in Florida were self-serving and should have been excluded. Statements tending to show intent are admissible in evidence, although self-serving. But such oral declarations are of but little probative value without corroboration. For that reason evidence of a person's acts and writings are given greater weight than his declarations."

In a dissenting opinion Mr. Justice STEARNE said: "Curiously enough, while his true motives are sharply in issue, [Smith did not] testify in court even by deposition. He relies upon what he is alleged to have told others, who in turn testified as to defendant's intent. . . . In my opinion, defendant's pretended change of domicile from Pennsylvania to Florida, in the circumstances of this case, constitutes a fraud and a sham."

After proving to the satisfaction of three courts—a trial court in Pennsylvania and that State's Supreme Court, and to a Dade County (Fla.) trial court—that he was a *bona fide* resident of Miami; after investing $82,000 in a home, joining clubs, promoting business enterprises, declaring the intent to vote, and executing contractual documents subsequently used as evidence of a state of mind at the time they were signed, Smith suddenly concluded (about thirty days after the Florida court ruled that he had no cause for divorce)—very suddenly, after adopting the Everglade State for social, business, and domestic purposes and spending approximately three years building a record with documentary memorials attesting the intent, Smith left Florida with less ceremony than he employed in entering it and asks us *de novo* to believe that the change was without ulterior motive. It is in evidence that appellee consulted an Arkansas friend, and it is a fair inference he was informed by attorneys that Arkansas is a primary State where the lawmaking authority has authorized an offending spouse to divest himself or herself of an unwanted mate on the sole ground that there had been separation without cohabitation for three years.

Appellant regards as significant (and we concur in the view) that when Smith went to Fayetteville he was accompanied by two attorneys—each highly reputable—one a resident of Arkansas, the other a Washington lawyer. This occurred on Saturday, May 6th. On the following Monday Smith went to a local bank and opened an account. The Washington lawyer had been one of his regular attorneys in the Pennsylvania and Florida

litigation. Smith explained to the Fayetteville court that the attorneys' presence was "a mere coincidence."

Appellee did most of his traveling by airplane. Advantageous purchases of large government planes [said the witness] offered opportunities for reconditioning and reconversion in a plant be directed. Fayetteville was looked upon as a centrally located point from which he could radiate in contacting executives of large industries who might be interested in private air travel. Two or three sales were mentioned, one in this state. Smith very promptly joined the Chamber of Commerce and the Country Club. He first registered at the Washington Hotel, then changed to Mountain Inn where he remained until June 10. At that time he leased an apartment and moved into it. The divorce suit was filed July 18, 1950, and tried October 4. The decree was signed three days later. An attorney's fee of $1,500 was allowed the defendant.

We have not overlooked the oral statements made by Smith regarding his intention to make Arkansas his home; nor have the transactions evidenced by documents been minimized. He bought Arkansas Stadium bonds, purchased a residential lot and said he intended to build on it, supplied testimony that he spent half of his time in Fayetteville, maintained a cabin plane and employed two pilots—one of whom "gave up" his leased home in Florida and purchased a residence in Fayetteville where he was joined by his wife and four children, and the other pilot moved some of his household belongings to Fayetteville.

Although Smith's affirmative behavior and his personal acts within this state, standing alone, would satisfactorily show an intention to remain here, this course cannot be separated from what has concededly been his plan for several years. In Florida he was certain that the state's advantages, as distinguished from a personal purpose to repudiate the matrimonial contract, motivated and activated abandonment of Pennsylvania and Washington. In view of the Florida judgment and the Pennsylvania Supreme Court opinion that the certainty

Smith professed was a factuality, it is definitely established that Florida *was* his home; but in spite of this transcript evidence of good faith in dealings touching Florida justice, we find appellee doing (in effect) exactly what he told the Pennsylvania process-server he would do: keep on trying in different states until the unoffending mother of his six children had been dealt with in a manner satisfactory to his desire for legal freedom from all matrimonial pledges.

Our conclusions are that appellee did not have a *bona fide* intent to reside in Fayetteville, hence the decree must be reversed. All costs will be adjudged against appellee. In addition, $2,500 supplementary to allowances already made will be awarded as attorneys' fees.

HOLT, J., dissenting. It is conceded that the parties here have lived separate and apart for three years (approximately six years in fact) without cohabitation and, therefore, appellee would be entitled to a divorce in Arkansas if he had established the jurisdictional prerequisite here of residence at the time suit was filed and the decree granted. The only question before us, therefore, is that of residence, a fact question.

The chancellor found that the preponderance of the evidence showed that legal residence had been established, and on this appeal, where we try the case *de novo,* I am unable to say that the trial court's finding was against the preponderance of the testimony and, therefore, I think we should affirm.

At the time appellee moved to Fayetteville, I think he abandoned his Florida residence. He, therefore, had the absolute right to establish his residence in Arkansas. His intention is controlling, *Hillman* v. *Hillman,* 200 Ark. 340, 138 S. W. 2d 1051. No definite length of time is necessary in order to establish domicile or residence. "Under the common law every person has a domicile; when any person attains his age of majority he at that moment has a domicile previously assigned to him by law. He may thereafter acquire a new domicile, but if he does not acquire a new one the old one persists.

"The principal manner by which a new domicile can be acquired is by physical presence at a new place coinciding with the state of mind of regarding the new place as HOME. New domicile arises instantaneously when these two facts concur. The motive actuating establishment of the new home is wholly immaterial. It may be for the purpose of taking advantage of lower tax laws, or easier divorce laws, or to evade civil or criminal liabilities about to be imposed in another state, or for any other purpose, worthy or unworthy. If presence at the new place is with the intention merely to make use of the more favorable laws there in force or gain other advantages there available without actually making a new and exclusive home at the new place, no domicile is there acquired. Presence at the new place need not have continued for any particular length of time in order to establish a new domicile, . . . ," Leflar, Conflict of Laws, Arkansas, p. 70, § 13.

We said in *McGill* v. *Miller,* 183 Ark. 585, 37 S. W. 2d 689: "It must be remembered that a man has the absolute and unqualified right to change his place of abode when he pleases, for any reason which prompts him so to do, and that he does change his place of abode when he removes from one place, with the intention of abandoning it as his place of abode, to another place, where he expects to abide, without having the intention of returning to the place from which he removed." And in 28 C. J. S. 17 the textwriter uses this language: "If the requisite intention is shown to exist, the law will not, according to most authorities, scrutinize the motive or purpose prompting a change of domicile; . . . ," and in support of the text is cited *Hillman* v. *Hillman,* above. And in Restatement of the Law, Conflict of Laws, under Domicile, Chapter 2, § 22 it is said: "a. If the new dwelling-place is acquired with the necessary intention of making it a home, it becomes a domicile of choice although there may be a special, even an unworthy, motive in making the change.

"1. A changes his dwelling-place for the purpose of diminishing his taxes or avoiding the payment of a debt

or for the purpose of securing a divorce. He intends, however, to make the new place his home. A's domicile is changed."

With these guiding rules in mind, I consider the evidence. Appellee in April, 1950, closed his house in Florida, placed it for sale with an agent, publicly advertising it. May 5, 1950, he moved bag and baggage by private plane to Fayetteville, closed his bank account in Florida and directed federal authorities to change his income tax file to the office of the Collector of Internal Revenue in Little Rock and notified taxing authorities in Florida of his move to Fayetteville. He removed his name from the voting registration list in Florida, and notified social and fraternal organizations, clubs, insurance companies and hotels where he had credit cards of his change in residence to Fayetteville, at the same time resigning his membership in the Miami Beach Country Club. After arriving in Fayetteville he opened bank accounts and safety deposit boxes at the McIlroy Bank and at the First National Bank of Fayetteville, informing the bank officials that he had come to Fayetteville to make it his home. He joined the Fayetteville Country Club and its Chamber of Commerce, opened a business office and employed a secretary. He purchased an Arkansas poll tax June 8, 1950, and leased an apartment for a year. After some investigation he purchased four acres of land adjoining the country club at $1,500 an acre on which he contemplated building a home at the cost of $50,000. It is practically undisputed that Fayetteville is the center or hub of his various and extensive business enterprises.

Of strong significance and supporting my view that appellee intended to establish his domicile in Fayetteville and abandon his Florida residence was the undisputed fact that the skilled and trusted pilot of his private plane who had served him faithfully for many years, moved his family (his wife and three children) and all his belongings, from Florida to Fayetteville, placed his children in school in Fayetteville and purchased a home for $10,000 (paying $4,000 cash and $6,000 through a Fay-

etteville building and loan company), and the further fact that appellee's co-pilot also moved his family to Fayetteville and leased a home. It seems to me that these actions of appellee's pilots when considered along with all the other evidence were sufficient to turn the scales in favor of the chancellor's findings when the evidence appeared to be so evenly divided. Obviously appellee must have a domicile somewhere. The rule, as pointed out, is that one may change his domicile at will, with no certain length of time required to effectuate the change. Intention controls.

I make no defense of appellee's moral concepts. It is conceded, however, that he has a valid ground for divorce here and it is also undisputed that appellant (his wife) has property of the value of $350,000 and, in addition to the income from it, appellee pays to her $500 monthly. I would affirm the decree.

I agree with the majority that appellee should pay to appellant's counsel an additional attorney's fee of $2,500.

Justices MILLWEE and ROBINSON join in this dissent.

SUPERIOR OIL COMPANY *v.* ETHERIDGE.

4-9553 242 S. W. 2d 718

Opinion delivered July 9, 1951.

Rehearing denied October 22, 1951.

Davis & Allen and *H. W. Varner,* for appellant.

Y. W. Etheridge, for appellee.

ED. F. MCFADDIN, Justice. The trial court awarded appellee a lien under Act 615 of 1923 (now found in § 51-701, *et seq.,* Ark. Stats.); and appellant challenges the correctness of the said judgment.

The appellant, Superior Oil Company (hereinafter called "Superior"), was the owner of certain oil and gas leases in Ashley County, and made a "letter agreement" with Claud R. McSpadden. Superior addressed a letter to McSpadden reading in part:

"The Superior Oil Company agrees that, in the event of complete performance as hereinafter provided of the following conditions, it will assign to you without warranty of any kind, express or implied, all its right, title and interest, . . . in and to the following oil and gas leases: (The letter contains a description of leases.)

"The conditions of which prior complete performance upon your part is required are:

"1. You must on or before August 1, 1949,[1] commence operations for the drilling of an oil well upon some

[1] By subsequent exchange of letters, this date was changed to August 21, 1949, and other provisions added to this Paragraph No. 1.

part of the above described leases at a location to be selected by you and thereafter diligently and in good faith continuously prosecute the drilling of said well to a depth sufficient to satisfactorily test, in the opinion of this company, the Cotton Valley sand, from which production is presently being obtained in the No. 1 well drilled by this company upon said premises, unless at a lesser depth oil is discovered and produced from said well in paying quantities."

In numbered Paragraphs 2 to 9, inclusive, Superior required of McSpadden, *inter alia*: that representatives of Superior should have access at all times to the drill site, the log, the core record and the drill samples; that surface casing would be set; that all formations would be tested when Superior's geologist so indicated; that Superior would be duly notified in advance of such testings; and that daily progress reports would be made to Superior. The letter continued:

"This agreement may not be recorded or assigned by you or by you made the subject of any lien or contract either voluntarily or involuntarily without the written consent of this company first had and obtained and any action in violation of any of the provisions of this act shall cause all of your rights hereunder to terminate without notice.

"If this agreement meets with your understanding and approval, kindly execute the duplicate copy hereof in the space provided thereon and return to us within ten (10) days; otherwise this agreement shall be of no force and effect.

"Yours very truly,

"THE SUPERIOR OIL COMPANY."

In the space provided in the said letter, McSpadden signed the following worded statement:

"The undersigned hereby acknowledges his understanding and approval of the foregoing letter agreement

and agrees to be bound by the covenants, terms and conditions thereof.

"EXECUTED this 14 day of June, A. D. 1949.

"/s/ Claud R. McSpadden."

McSpadden began performance of the agreement, and made a contract with appellee, Etheridge, whereby the latter furnished the lumber and labor and constructed a plank road from the railroad terminus to the location of the drilling site and also furnished timbers which were placed around the pump location. Etheridge's account was $6,656.32; and when it remained unpaid, he filed action on December 16, 1949, against McSpadden and other named parties, "and the unknown owners of oil wells in sections 11 and 12, township 19 south, range 10 west, in Ashley County, Arkansas, known as Bradley No. 1 and Claud R. McSpadden No. 3." The prayer of the complaint was:

"WHEREFORE, he prays judgment against the defendants, separately and severally, in the sum of $6,656.32, for a lien on said property as authorized by sections 51-701 *et seq.* of the Statutes of Arkansas, 1947, and for attachment of the premises and property of the defendants as set out in this complaint and in affidavit for attachment filed herein, and for such other and further general and special relief as may be justified herein."

The leasehold and property thereon were seized by order of attachment; and on March 21, 1950, Etheridge obtained judgment awarding him a lien, sustaining the attachment, and ordering the leasehold and property sold to satisfy his claim. Thereupon, on March 30, 1950, Superior intervened, saying:

"Intervener claims ownership of the property involved in this cause and Intervener alleges that Claud R. McSpadden, a Defendant in said cause, has no right, title or interest in any of the property so ordered sold. . . . This Intervener has heretofore stored upon the property described above approximately 6,200 feet of oil well cas-

ing. Said casing was purchased by Intervener in the regular course of business and was transported to and stored upon the property described above for its own use. . . . Intervener alleges that it is in no wise responsible or obligated to pay to the Plaintiff any part of the obligations, if any, incurred by the Defendant Claud R. McSpadden, and that no part of its property is subject to the claims or liens of any person as security for any such indebtedness incurred by Defendant Claud R. McSpadden."

Etheridge replied to this intervention:

"That from the statements made by intervener herein, it should be made a party defendant and the original pleadings filed herein against other defendants should be made applicable to it as such defendant."

The prayer of the reply was in accordance with the above quoted language. At the trial on July 27, 1950, Superior exhibited its "letter agreement" with McSpadden and also an instrument from him dated May 1, 1950, entitled "Acknowledgment of Forfeiture and Release," in which McSpadden stated that he had not performed the conditions stated in the "letter agreement" with Superior, and therefore released Superior from any liability to him because of said "letter agreement." Etheridge proved his unpaid account for $6,656.32 for materials, etc., as aforesaid. The Circuit Court denied Superior's intervention; and from that judgment Superior brings this appeal, presenting the questions now to be discussed.

I. Superior says:

"Inasmuch as there was no denial by Etheridge of any of the facts alleged by Superior in its verified Intervention, the Circuit Court should have entered an order or judgment protecting the rights of intervener, by sustaining the prayer of Intervener."

In support of its contention, Superior cites § 31-157, and § 27-1121, Ark. Stats., and also the following cases: *Guynn* v. *McCauley*, 32 Ark. 97; *DeLoach Mill Mfg. Co.* v. *Little Rock Mill*, 65 Ark. 467, 47 S. W. 118; and *Rosewater* v. *Schwab Clothing Co.*, 58 Ark. 446, 25 S. W. 73.

We hold against Superior on this contention, because in Etheridge's reply to Superior's intervention there was the language previously copied, to-wit:

"That from the statements made by intervener herein, it should be made a party defendant and the original pleadings filed herein against other defendants should be made applicable to it as such defendant."

When we consider (a) that the case, as originally styled, showed that Etheridge attempted to bring in "the unknown owners" of the oil wells, and that (b) Superior had bound McSpadden not to record the "letter agreement," it is clear that the effect of the quoted language in Etheridge's reply was that Etheridge claimed he was entitled to a lien against Superior and its property, under § 51-701, just as he had prayed in his original pleading against McSpadden. Etheridge's reply thus amounted to more than a denial of Superior's intervention: it was a cross complaint against Superior.

II. Superior says:

"Plaintiff Was Entitled To No Lien Upon the Leasehold Involved, and Equipment Thereon, Under § 51-701, Arkansas Statutes."

This brings us to the real controversy in the case—*i. e.*, whether Etheridge is entitled to a lien under Act 615 of 1923.[2] Section 51-701, Ark. Stats., contains germane language:

"Any person . . . who shall under contract express or implied . . . with the owner . . . of any . . . mineral leasehold interest in land . . . or with the . . . *agent* . . . *of any such owner* . . . furnish . . . machinery or supplies used in . . . operating, completing, equipping . . . or repairing such well . . . shall have a lien . . . upon the whole of such . . . leasehold interest . . . and upon all . . . buildings and appurte-

[2] We are not considering Etheridge's claim to a lien for labor under Act 513 of 1923 (now found in § 51-320, Ark. Stats.), because there is no evidence as to labor that Etheridge personally performed, as distinct from the labor that he hired. See *Sain* v. *R. Abramson Co.*, 218 Ark. 415, 236 S. W. 2d 585.

nances, including pipeline . . . for which said materials and supplies were furnished . . ." (Italics supplied.)

In the light of the contractural relations between Superior and McSpadden, it is possible that McSpadden was an "agent" of Superior within the purview of the above quoted Statute, to the extent of the enforcement of the lien herein involved. But our decision need not be put on that ground, because Etheridge is clearly entitled to a lien under § 51-703, Ark. Stats., the germane language of which reads:

"Any person . . . who shall furnish . . . . . materials or supplies to a *contractor* . . . shall have a lien upon . . . the leasehold interest . . . or the lease for oil or gas purposes, the buildings and appurtenances, and . . . oil or gas pipeline . . . in the same manner and to the same extent as the original *contractor* for the amount due him for the material furnished . . ." (Italics supplied.)

In *Home Oil Co.* v. *Helton,* 179 Ark. 132, 14 S. W. 2d 549, we had under consideration the definition of a "contractor" under our mechanics' lien statute, and we said:

"The term 'contractor,' as used in our statute relating to mechanics' lien, refers to one who, under a contract with the owner, agrees for a consideration to furnish the material, labor, and superintendence necessary to the erection of the building or other improvement on the owner's premises . . . The word 'contractor' as used in the statute means a person engaged in making a contract with the owner for the improvement of certain real estate."

Superior was the "owner" of the oil and gas leasehold and made an agreement, with McSpadden looking toward the "improvement" of the leasehold estate, so McSpadden was a "contractor."[3]

The "letter agreement" between Superior and McSpadden, and his work thereunder, made McSpadden a "contractor" for the drilling of the well; and under

[3] In *Arkansas State Licensing Board* v. *Lane,* 214 Ark. 312, 215 S. W. 2d 707, we again defined the word, "contractor."

§ 51-703, Ark. Stats., Etheridge, in furnishing materials to McSpadden, became entitled to a lien, just the same as a contractor would have been entitled to one under § 51-701. In other words, we construe the concluding language of § 51-703 (*i. e.*, "in the same manner and to the same extent as the original contractor") to mean that a supplier of materials to a contractor, under § 51-703, has a lien just as a contractor has a lien under § 51-701.[4]

Superior says that the "letter agreement" between it and McSpadden was unilateral and therefore McSpadden was not a contractor. Assuming, without deciding, that the original agreement might have been unilateral, nevertheless, McSpadden actually performed work and labor under the "letter agreement," and such performance made him a contractor, irrespective of what might have been the original status. See *Mid-Continent* v. *Russell,* 173 Fed. 2d 620.

Superior claims that *Roberts* v. *Tice,* 198 Ark. 397, 129 S. W. 2d 258, 122 A. L. R. 1177, supports Superior in its contention; but that case is factually different from the one at bar. In *Roberts* v. *Tice* (*supra*) the holder of the overriding royalty had assigned the leases to a company which undertook to drill, and we held that such reserved overriding royalty was not subject to lien under § 51-701, *et seq.*, Ark. Stats. But in the case at bar Superior, *as the leaseholder,* made the contract with McSpadden to drill and agreed to pay him in leases and oil as a "turnkey contract";[5] so McSpadden was a contractor for Superior, and Superior does not occupy the position of a holder of an overriding royalty.

The case at bar has aspects like that of *Bennett* v. *Weis,* 205 Ark. 198, 168 S. W. 2d 379. In that case Thompson owned oil and gas leases and made a contract with Howard to drill a well and furnish Howard 300 feet of

[4] In reaching our conclusion, we have carefully considered the case of *Brooks* v. *Superior Oil Co.,* 96 Fed. Supp. (Advance Sheets) 641.

[5] In *Continental Oil Co.* v. *Jones,* 177 Fed. 2d 508, the Circuit Court of Appeals said: "A turnkey contract has a definite meaning in the oil industry. It is a contract where the driller undertakes to furnish everything, and to do all the work required to complete the well, place it on production, and turn it over ready to 'turn the key' and start the oil running into the tanks."

surface pipe. Bennett let Howard have a drilling rig; and the question was as to the extent of the lien of the material supplier, Weis. We held that Weis had no lien on Bennett's rig; but we sustained the lien of Weis, the supplier, "as to the surface pipe and the lease." In short, we held that the lease and pipe of Thompson, the leaseholder, were subject to the lien of the supplier. Under the authority of that case the pipe on the drill site[6] and also the lease of Superior (the leaseholder in the case at bar) were properly subjected to the lien of Etheridge.

Affirmed.

ROBINSON, J., dissents.

HEARN *v.* EAST TEXAS MOTOR FREIGHT LINES.

4-9421 241 S. W. 2d 259

Opinion delivered July 9, 1951.

[6] When we say "pipe on the drill site," we do not refer to some casing that was never unloaded on the drill site. Pipe in transit and never on the drill site was not subject to the lien; but discussion of this becomes an immaterial matter because Superior executed a forthcoming bond when it intervened and also a supersedeas bond when it appealed; and the affirmance of Etheridge's lien—which we now do—as to the leasehold and pipe on the drilling site accompliance an affirmance within the provisions of the said bonds.

Ted McCastlain and *Fletcher Long,* for appellant.

Wright, Harrison, Lindsey & Upton and *Alston Jennings,* for appellee.

GRIFFIN SMITH, JR., Special Justice. Appeal is from a judgment based on the verdict of a jury denying R. A. Hearn recovery from East Texas Motor Freight Lines for claimed personal injury.

A collision in Brinkley involved appellant's truck with a tractor-trailer unit operated by appellee. Appellant charged negligence, appellee contributory negligence. The issue: whether appellee's Instruction 5, in omitting a portion of the definition of contributory negligence, misled the jury so that error resulted.

The challenged instruction set forth § 75-623, Ark. Stats., (requiring drivers to stop before entering a through highway intersection). It then told the jury that,

"Violation of this or any other statute, if you find any violation, is evidence of negligence which you shall consider along with all of the facts and circumstances of the case, as revealed by the evidence, in determining whether either party was negligent, *and if you find that the plaintiff was guilty of any negligence, however slight, your verdict must be for the defendant.*"

Appellant contends that the italicized portion is fatally defective because it omits an element essential to proper statement of the rule of contributory negligence —that to defeat recovery claimant's negligence must have caused or contributed, in some degree, to his own injury.

This instruction, reasons appellant, is *binding* because it concludes with the phrase "your verdict must be for the defendant," and is erroneous because it re-

quired the jury to find for appellee if any negligence on the part of appellant was shown, irrespective of whether such negligence caused or contributed to appellant's injury.

Appellee insists that there was no misconception of the law because a previous instruction, separated from appellee's instruction 5 only by a statement as to burden of proof, correctly defined contributory negligence as that which "caused or contributed to (appellant's) damage or injury"; and because the instruction immediately following instruction 5 reiterated that a verdict for appellee was required if it was found that "R. A. Hearn failed to exercise ordinary care, as defined in this instruction, or other instructions, and that such failure, if any, caused or contributed to his injuries, * * *."

The concluding phrase "you will find for the plaintiff" or "you will find for the defendant" is the mark of a binding instruction. *Reynolds* v. *Ashabranner,* 212 Ark. 718, 207 S. W. 2d 304; and where a binding instruction is given which ignores an essential issue on which evidence conflicts, reversible error is committed, even though a separate instruction correctly defines such issue. *Vaughan* v. *Herring,* 195 Ark. 639, 113 S. W. 2d 512.

The rule has been applied where an instruction purports to recite conditions under which recovery should be granted or denied, but requires the jury to find for a particular party without mention of such controverted affirmative defenses as assumption of risk (*Garrison Company* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396), contributory negligence (*Natural Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395), adverse possession (*Bayles* v. *Daugherty,* 77 Ark. 201, 91 S. W. 304), and others.

The purpose of instructions is to inform the jury of the legal principles applicable to the facts presented, and furnish a guide to assist in reaching a verdict. They are ordinarily read to the jury with continuity and unless contradictory as a matter of law must be considered as a whole. If, when so considered, the legal issues presented are properly explained, no prejudice results. *St. Louis*

I. M. & S. Railroad Co. v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199.

Tested by this standard, the present charge is sufficient. Contributory negligence was succintly defined in a previous instruction. After digressing from this particular definition only momentarily, and without material deviation from the related issues, the court gave instruction 5. This was followed immediately by further admonition which defined ordinary care and connected it with the facts in issue.

It cannot be assumed that appellee's instruction 5 received special emphasis, either from its position with relation to the remaining instructions or because of its wording.

Not only do appellee's instructions take contributory negligence into account, but appellant's instruction 5 is likewise drawn so that the issue was not ignored. It stated the rule from a negative standpoint by binding the jury to find for appellant if it believed that injury resulted solely and proximately from appellee's negligence.

We conclude, therefore, that failure to fully redefine contributory negligence in appellee's instruction 5 was not error.

Affirmed.

ROBINSON, J., not participating.

GRIFFIN SMITH, Chief Justice, dissenting. This appeal was submitted February 26th. Mr. Justice ROBINSON announced that he would not participate in the determination. Result was that three of the Judges thought the judgment should be reversed and the cause remanded for a new trial, while three believed that the instruction complained of was distinguishable factually from cases controlling where binding directions had been given. The effect of a binding instruction was discussed in *Missouri Pacific Railroad Co.* v. *Burks,* 196 Ark. 1104, 121 S. W. 2d 65. I concede that Hearn v. East Texas is a closer case, but feel that any relaxation of the rule applicable to binding instructions should be preceded by notice to

courts and attorneys. *Anheuser-Busch, Inc.*, v. *Manion*, 193 Ark. 405, 100 S. W. 2d 672. I therefore dissent.

McFaddin, J. concurs in this dissent.

Hays *v.* State.

4660 241 S. W. 2d 266

Opinion delivered July 9, 1951.

J. B. Dodds, for appellant.

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

Holt, J. A jury convicted appellant, Fred Hays, of involuntary manslaughter and assessed his punishment at a term of two years in the State Penitentiary. From the judgment is this appeal.

For reversal, appellant alleged (1) that the evidence was not sufficient to support the verdict, and (2) that "the court failed to instruct the jury generally on matters of law." Both of these contentions are without merit.

(1)

A number of Negroes, including Buster Jordan, had gathered at appellant's home for the purpose of gambling with dice. A dispute arose between appellant and Jordan and Jordan left and in about five or ten minutes returned with a loaded shotgun. He knocked on appellant's door and appellant's wife admitted him.

Witness, John Hodges, testified that when Jordan came in, he said: "I came back to kill Fred (appellant),

but I done changed my mind now," that he handed his gun to Fred's wife who deposited it in another room, that Jordan "leaned against the furniture and he and Fred started a conversation." Fred was standing in a closet (or bathroom) at the time, that Fred said: " 'Did you really mean to kill me, Buster?' and he said, 'Yes, I did, but I changed my mind and I am ready to have some fun.' Q. Had Fred raised the gun and pointed it at Buster? A. Yes, but he put it back down. Q. When Fred said that, he again raised the gun and pointed it at Buster? A. Yes, sir. Q. What did Fred say? A. I don't remember him saying nothing—he shot."

Shortly thereafter, Buster died as a result of the gunshot wound inflicted by appellant.

Without detailing more of the testimony, we hold that it was substantial and amply warranted the jury's verdict.

(2)

The record reflects that there were no objections or exceptions to any of the instructions given by the court. It is only fair to say, however, that appellant's attorney here did not participate in the trial of the case below.

Upon a review of all the instructions, it appears that the court fully and clearly declared the applicable law to the case.

The jury was correctly instructed on the various degrees of homicide,—murder in the first degree, murder in the second degree, and manslaughter. The court also clearly defined and explained to the jury the law of self defense and when it may be exercised.

However, as indicated, the record reflects that there were no objections or exceptions to any of the instructions given on the trial, therefore, appellant cannot now complain of any alleged errors. " 'It is well settled that it is not the duty of the court to give an instruction on any point unless a correct instruction on that point is asked. *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Horton* v. *Jackson,* 87 Ark. 528, 113 S. W. 45; *Lucius* v. *State,* 116 Ark. 260, 170 S. W. 1016.'

"In the case of *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. 2d 909, it was held (headnote 6): 'Where accused desired an instruction on a particular issue not covered by the instructions given, he should request a correct instruction thereon.' " *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933. See *Cellars* v. *State,* 214 Ark. 326, 216 S. W. 2d 47.

Appellant also argues that the trial court erred in permitting counsel for the State to elicit from appellant admissions on cross-examination that he had been convicted of various misdemeanors, gambling, immorality, drinking in a public place, and possessing untaxed liquor.

Under proper instructions, this testimony was allowed to go to the jury solely as to the effect it might have on appellant's credibility as a witness. This was proper.

"Neither was error committed by the court in permitting appellant to be asked, on cross-examination, while testifying in his own behalf, if he had not been convicted for disturbing the peace. *Turner* v. *State,* 100 Ark. 199, 139 S. W. 1124; *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773, L. R. A. 1915B, 131; *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. 2d 909, and "There was testimony also that appellant had been fined for the commission of certain misdemeanors, one for drunken driving. This testimony was admitted and limited to the consideration of appellant's veracity as a witness, and was admissible for that purpose. *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. 2d 909; *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636; *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123; *Younger* v. *State,* 100 Ark. 321, 140 S. W. 139;" *Black* v. *State,* 215 Ark. 618, 222 S. W. 2d 816.

Finding no error, the judgment is affirmed.

4-9551 241 S. W. 2d 113

Opinion delivered July 9, 1951.

[redacted]

Ed B. Cook, for appellant.

Graham Sudbury, for appellee.

GEORGE ROSE SMITH, J. This is a complaint in equity filed by the appellant against his sister, the appellee. The complaint alleges that under the will of Dollie Smith, the mother of these litigants, the appellee received a life estate in a certain house and lot in Blytheville. (An

alternative allegation is that the devise is void for uncertainty, but we consider this contention to be without merit.) It is further alleged that Dollie Smith died intestate as to the remainder, which passed to these parties as the only heirs of their mother. The complaint charges that as life tenant the appellee is committing waste. The prayer is that the court declare a forfeiture of the life tenancy, appoint a receiver to make repairs, and grant a partition in kind or by sale. The chancellor sustained a demurrer to this complaint and dismissed the suit when the plaintiff refused to plead further.

This is the disputed paragraph in Dollie Smith's will: "I give my home in Blytheville . . . to my daughter, Lorene (Smith) Smith to be used by her as a home as long as she wishes, and in case she should not use it as such and wish to sell it, then the proceeds to be divided between my son, Floyd Smith, and my daughter, Lorene (Smith) Smith in equal shares." Floyd contends that this language created a life estate in Lorene, while she contends that the fee was devised to her.

We agree that only a life estate was created. This will does not expressly describe the estate intended, which distinguishes this case from *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A. N. S. 1028, and other cases in which a fee was definitely defined. If Dollie Smith had intended to devise the fee there would have been no need for her to mention the use of the property as a home or to provide that in the event of a sale the proceeds should be divided. Hence these clauses tend to rebut the suggestion of a fee simple. As we said in *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417: "If the property were given to her in fee simple there would be no occasion to say anything about her power to sell." See, also, Rest., Property, § 112, Illustration 2.

The appellee relies also upon the presumption against partial intestacy to support her contention that she owns the fee. But this is merely a presumption, and it certainly does not operate to convert a life estate into a fee in every case in which the life estate might have been more accurately described. Here the presumption

is materially weakened by the existence of other instances of partial intestacy in the same will. In devising her other two parcels of land Dollie Smith made no provision for their devolution in the event that both her children died without issue, and hence the testatrix died partly intestate as to these tracts. In this situation we are more readily inclined to accept the existence of partial intestacy as to the land now in controversy.

A second question is whether the complaint sufficiently alleges facts constituting waste. Construed liberally on demurrer, the complaint charges that the house on the property is old and rapidly deteriorating, that it has rotten flooring and a leaking roof, that Lorene and her husband refuse to make repairs, and that a receiver should be appointed to restore the property to the condition it was in when Lorene received it. It is permissive waste for the life tenant to fail to make such ordinary repairs as are necessary to protect the building from the effects of wind and rain, if the structure was in good condition when the life tenancy began. Tiffany, Real Property (3d Ed.), § 641. We may reasonably infer from the appellant's complaint that failure to repair the roof has caused the floors to rot, and hence waste is adequately alleged.

A cause of action being stated, the prayer for relief is relatively unimportant. *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S. W. 2d 633. The remainderman is entitled to various remedies for waste, Simes, Future Interest, § 616; so in this case the trial court may grant whatever relief the proof justifies, regardless of the plaintiff's prayer. Nevertheless it may be helpful to the chancellor and to the litigants for us to discuss briefly the forms of relief that are prayed in this complaint.

Floyd first asks that Lorene's life estate be forfeited, but he is not entitled to this drastic action. Forfeiture of the life tenancy for the commission of waste is enforced only when specifically authorized by statute, and in Arkansas we have no such statute. It is true that forfeiture and triple damages were allowed by the Statute of Gloucester, enacted in 1278, 6 Edw. I. c. 5. But this statute

soon became obsolete in England and was finally repealed in 1879. The strict English law of waste has never been appropriate to a new country like ours, in which timber must be cut to permit the nation to expand through the cultivation of wooded areas. Tiffany, *supra,* § 630. Hence it is uniformly held in America that the Statute of Gloucester did not become a part of our common law merely by the enactment of laws similar to Ark. Stats. 1947, § 1-101, which adopted English statutes of a general nature that were passed prior to 1607. Rest., Property, § 198. Since our legislature has not re-enacted the English statute, the remedy of forfeiture is not available in this State. *Ibid.,* § 199.

Floyd's complaint also asks for a receivership and for partition. The former is one of the remainderman's remedies for waste and may be granted by the chancellor if the proof justifies it. And even without a forfeiture of the life estate the plaintiff may demand partition if he likes, since our statute permits a partition subject to an outstanding life estate. § 34-1801. It follows that the complaint is not demurrable.

Reversed, with direction that the demurrer be overruled.

BAILEY *v.* TOLLESON.

4-9562 241 S. W. 2d 110

Opinion delivered July 9, 1951.

O. D. Longstreth, Jr., and *Dave E. Witt,* for appellant.

Talley & Owen, for appellee.

MINOR W. MILLWEE, Justice. Appellant, E. L. Bailey, was plaintiff in the circuit court in an action against appellee, Marie Tolleson, for the conversion of an automobile. The case was heard on a stipulation of facts and the testimony of appellant and his former attorney.

It is set out in the stipulation that appellant was the owner of the car in controversy on November 19, 1946, when he sold it to W. R. Davis under a title retaining note; that on December 19, 1946, Davis sold the car to Phil Schwartz, a used-car dealer, who sold it to another party early in 1947 and repurchased it in April, 1947, when he sold the car to appellee; that appellee sold the car either in April or May, 1948, to a third party; and that the only question involved in the suit is whether appellee knew at the time she owned the car or at the time she sold it that appellant had a title retaining note on the car.

At the conclusion of the evidence both parties moved for a directed verdict. The trial court then withdrew the cause from the jury and rendered judgment for appellee.

In passing on the correctness of the trial court's finding and judgment, we apply the rule stated in *Green* v. *Ozark Land Co.,* 204 Ark. 627, 163 S. W. 2d 325 (Headnote 1) as follows: "Where both parties ask for instructed verdicts and for no other instructions and the court withdraws the case from the jury, his findings, are as binding as the verdict of the jury, and if there is any substantial evidence to support them the judgment rendered thereon will be affirmed."

Under our holding in *Schwartz* v. *Fulmer,* 214 Ark. 572, 217 S. W. 2d 254, it was incumbent on appellant in the trial court to prove by a preponderance of the evidence that appellee had notice of appellant's claim of title to the car while she owned it or when she sold it in April or May, 1948.

Appellant testified that he located the car on Schwartz's car lot and afterwards had a conversation with one of the salesmen in the office where appellee was employed in regard to appellant's claim of title to the car. Appellant first testified that this conversation took place either the same day or a few days before the instant suit was brought. It is undisputed that the present action was filed on November 3, 1948. The court asked and appellant answered as follows: "The Court: I didn't get it quite clear when it was you had the conversation with the salesman and Miss Tolleson. A. (Appellant) I imagine it was sometime in '48, Judge. I don't remember what time it was." Appellant's former attorney testified that after appellant located the car on Schwartz's lot, he (the attorney) had a conversation with Schwartz in appellee's presence about bringing suit to recover the car. He was uncertain about the date of this conversation and stated that he filed the instant suit "a few months" later.

The trial court was warranted in concluding that appellant did not meet the burden of proving the notice required to establish the charge of conversion against appellee. The judgment is, therefore, affirmed.

UNITED STATES *v.* SOLOMON, ADMINISTRATRIX.

4-9544 241 S. W. 2d 369

Opinion delivered July 9, 1951.

Holmes Baldridge, James T. Gooch, Gerland P. Patten, Samuel D. Slade and *Arthur W. Murphy,* for appellant.

GRIFFIN SMITH, Chief Justice. The apeal is from an order of the Probate Court disallowing the Government's claim against the estate of Lafe Solomon. A balance of $47.56 plus interest is asked. Allowance was rejected by Retta G. Solomon, administratrix, followed by appropriate notice and a court hearing. No reason for rejecting the demand was given.

Solomon owned a farm in Lee County near Brickeys. On March 10, 1947, his tenant Hays applied for Federal Crop Insurance, representing that he had a share in 36 acres that were to be planted to cotton. The Insurance Corporation is an agency of the U. S. Department of Agriculture. 52 Stat. 72, 7 U. S. C., § 1503.

The application was signed by Hays and Solomon. This provision was in the print subscribed to: "The undersigned co-signer [Solomon] . . . is a surety for the payment of the premium due the first crop year of the contract." The applicable regulations permit payment in cash or cotton. For Arkansas the due date in 1947 was September 30. The regulations have the force of law in matters affecting expressly authorized administrative procedure where the details would be too cumbersome for congressional treatment. The application contains a paragraph providing that the contract shall not be waived or changed except as authorized by a duly acting officer or representative of the Corporation.

Appellee has not filed a brief, nor was the administratrix represented when the case was presented by oral argument. Appellant's brief assumes that the claim was disallowed on the grounds of estoppel or *laches,* based

upon Hays' conduct in first inquiring what the premium would be, then procuring Solomon's check for $239.11, the amount asked, and delivering it to the agency. The check is dated Oct. 17, 1947, and appears to have been deposited November 3d. It is payable to the Treasurer of the United States. W. E. Bowden, county administrative officer for the A. A. A., local administrative agency for the Insurance Corporation, testified that the check was received October 24th.

It was discovered at a substantially later date that the premium had been computed on lint cotton only, whereas the application was for lint plus seed. The undisputed testimony is that the lint factor was 729 pounds for which settlement was made, whereas the correct equation would have been 729 plus 20% (the later representing insurance on seed),—a total of 875 pounds of lint or an equivalent at the prevailing commodity price Sept. 30, 1947. It is stated in appellant's brief that when Hays' attention was called to the error he claimed to have paid Solomon, but there is no testimony to this effect. Quite clearly all parties were mistaken. The premium correctly computed (allowing for mathematical errors of a few cents in comparing the contract with testimony) was $287, and the contract calls for interest at the rate of half of one percent per month.

It is conceded that the application does not "contain a place" where the premium can be computed so that anyone other than a representative of the Insurance Corporation can determine what the amount is. This, however, does not affect validity of the promise to pay. Dates when notices of the deficiency were sent, or whether Solomon was informed of the error,—neither is satisfactorily shown. There is no contention that the State Office or Board of Directors of the Corporation had authorized county administrative agents to vary the regulations.

By virtue of Title 31, ch. 6, § 191, U. S. C., debts due the United States are entitled to priority in payment from assets of a decedent's estate.

It was held in *United States* v. *Summerlin,* 310 U. S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283, that the Federal gov-

ernment "is not bound by statutes of limitation" nor is it "subject to the defense of *laches* in enforcing its rights," and "The same rule applies whether the United States brings its suit in its own courts or in a state court," citing *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 44 S. Ct. 552, 68 L. Ed. 987.

Mr. Justice STONE, in writing the court's opinion in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 61 S. Ct. 995, 85 L. Ed. 1361, said: "Power to release or otherwise dispose of the rights and property of the United States is lodged in Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted."

In *Federal Crop Insurance Co.* v. *Merrill*, 332 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (where the result was such as to call for three dissents and the usual powerful expressions from Mr. Justice JACKSON),[1] it was held that the Federal Crop Insurance Corporation is wholly governmental. Said Mr. Justice FRANKFURTER in the majority opinion: "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional agencies or through corporate forms especially created for defined ends. . . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the

[1] In Judge Jackson's dissent he discussed the injustice resulting from the majority rule, saying: "I would hold [these governmental agencies] to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment."

bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority.''

With these explicit rules and higher decisions as guides, the conclusion is inescapable that the claim is (a) an obligation due the Government, (b) that it is not barred by limitation or *laches,* and (c) that the evidence forecloses any suggestion that the amount contended for is incorrect, or that the payment of $239.11 made in good faith discharged the debt.

Reversed, with directions to enter a judgment for the Government, including interest and cost.

STATE *v.* BRYANT.

4667 241 S. W. 2d 473

Opinion delivered July 9, 1951.

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

Leffel Gentry, for appellee.

ROBINSON, J. Appellee was arrested and charged with a violation of Act 151 of 1951, which requires certain signal devices on trucks of certain dimensions and exempts other trucks from the operation of the Act, although such exempted trucks may come within the named dimensions. The trial court held the Act to be void. The State has appealed. Act 151 of 1951 amends § 75-619, Ark. Stats., and provides:

"The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device in good mechanical condition of a type approved by the State Highway Commission, provided when a commercial vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle then such signals shall be given by such lamp or device. A vehicle shall be considered as so constructed or loaded that a hand and arm signal would not be visible both to the front and rear when the distance from the center of the top of the steering post to the left outside limit of the body cab or load exceeds 24 inches (on the right outside limit in the case of a right hand drive vehicle), or when the distance from the center of the top of the steering post to the rear limit of the body or load thereon exceeds 14 feet, which limit of 14 feet shall apply to single vehicles or combination of vehicles.

"Section 2. The provisions of section 1 hereof shall not apply to haulers of forest products, small farm vehicles, luggage and/or horse trailers drawn by automobiles where the width of the trailer is of the approximate width of the automobile drawing the same."

The constitutionality of the Act is challenged with the assertion that the Act violates Amendment No. 14 to the Constitution of Arkansas prohibiting the passage of special Acts, and section 18 of Article 2 of the Constitution of Arkansas, providing that "the General Assembly

shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Also, the Act is challenged on the ground that it is vague, indefinite, and not enforceable in a uniform manner. "The courts require a Statute to be definite and reasonable." 5 Am. Jur. 532.

"A statute making it unlawful to operate an automobile the front lights of which project a light of such glare and brilliancy as seriously to interfere with the sight of, or temporarily blind the vision of, a driver of a vehicle approaching from the opposite direction is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him, since glare and brilliancy are not described by any standard that is certain and that may be known in advance by the citizen." 5 Am. Jur. 533.

That part of the 1951 Act which applies to "small farm vehicles" is so vague and indefinite that it would be wholly impractical to enforce it. A person is entitled to know when he is violating the law. A "small farm vehicle" is not defined in the Statute nor does the Statute provide as to how it is to be determined whether a farm vehicle is small. A court and jury in one section of the State might determine a certain vehicle to be small, and, in another section of the State, a court and jury might find the same vehicle to be large. Assuming that a very large vehicle could be definitely classified as large and a very small vehicle could be definitely classified as small, no one would know where the dividing line would be. One of the leading cases on the subject is that of Andrew Jackson, *ex parte,* 45. Ark. 158. That case involves the constitutionality of the revised Statute which made it a misdemeanor to "commit any act injurious to the public health or public morals, or to the perversion or obstruction of public justice, or the due administration of the law." There, Mr. Justice EAKIN, speaking for the court, said:

"We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

Likewise in the case at bar, whether a person had violated the Act would depend on the idea of the court and jury as to when a vehicle is large or small, without the law furnishing any guide in that respect. "Where an act is too vague and uncertain to be effective, it is void on that account. *Bittle* v. *Stuart,* 34 Ark. 224, and *Ex parte Jackson,* 45 Ark. 158." *Snow* v. *Riggs,* 172 Ark. 835, 290 S. W. 591.

In *Casey* v. *Casey,* 142 Ark. 246, 218 S. W. 678, *Ex parte* Jackson, *supra,* was cited with approval on the point of uncertainty. *Green* v. *Blanchard;* 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84, also cited the Jackson case with approval and added:

"So, too, in discussing the principle in *United States* v. *Reese, et al.,* 92 U. S. 214, 23 L. Ed. 563, the court held the Statute too vague and indefinite for enforcement and, in discussing the question, said: 'Penal Statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by Statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute

the judicial for the legislative department of the government."

In citing with approval the Jackson case, *supra,* the Court of Criminal Appeals of Texas said: "We believe the criticism of the appellant which we have quoted is a just one. The Statute is so framed as to be obnoxious to the rule which requires some degree of certainty in informing one accused of a crime of the nature of the accusation against him, to which he is entitled under article 1, § 10 of the Constitution." *Griffin* v. *State,* 86 Tex. Crim. R. 498, 218 S. W. 494.

In the case of *Chicago & Northwestern Railway Company* v. *Dey,* 35 Fed. 876, 1 L. R. A. 744, the Jackson case, *supra,* is cited, and the Court said: "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may or what he may not do under it."

In the case of *U. S.* v. *Spokane Dry Goods Company,* 264 Fed. 209, there is a long list of citations to cases holding Acts void for uncertainty.

Act 151 of 1951 cannot be upheld because of the uncertainty of the Act with reference to "small farm vehicles," and the Act cannot be sustained by striking out that part for the reason that to do so would be contrary to the expressed purpose of the legislation, which was to exclude from the operation of the Act "small farm vehicles." *Ex parte,* Deeds, 75 Ark. 542, 87 S. W. 1030.

Since we are holding the Act void for uncertainty, it is unnecessary to discuss the question of the validity of the Act under § 18, article 2, and Amendment 14, to the Constitution of Arkansas.

Affirmed.

HOLT, MCFADDIN and WARD, JJ., concur.

PAUL WARD, Justice, concurring. The conclusion reached by the majority is correct, but in my opinion there is a much sounder reason that might have been given.

The laudable purpose of Act 151 of 1951 was to prevent accidents on the highways by requiring directional lights on motor vehicles which exceeded certain specified dimensions. Section 2 of the act exempts vehicles carrying forest products, farm products, luggage, and/or horses.

This classification is arbitrary and bears no logical relation to the sole purpose of the act or to the results to be achieved and, therefore, violates both § 18 of article 2 of the constitution and Amendment 14.

In the case of *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. 2d 991, this court held unconstitutional under Amendment 14 an act giving counties of 75,000 or more "the right to condemn lands for the protection of public roads." In so holding Chief Justice HART used this language:

"The amendment was intended to prevent arbitrary classifications based on no reasonable relation between the subject-matter of the limitation and classification made."

An act of the legislature designed to relieve the collector and sureties on his bond if a suit was pending in circuit court at the time of passage was held in violation of both provisions of the constitution mentioned above in the case of *State, ex rel. Attorney General* v. *Lee,* 193 Ark. 270, 99 S. W. 2d 835. The following are quotes from the opinion written by Judge MEHAFFY:

"The people of the state, by the adoption of Amendment No. 14, did alter, reform and abolish the power of the Legislature to pass local or special acts. We do not see how the amendment could have been made plainer. It simply says they shall not pass a local or special act."

"This act . . . also violates § 18 of article 2 of the Constitution which reads as follows: 'The general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.' "

In the case of *Conway County Bridge District* v. *Fullerton,* 196 Ark. 413, 117 S. W. 2d 1065, an act fixing

certain fees for the collection of Special Improvement District taxes was held to violate amendment No. 14 because it exempted counties where the collectors were on a salary. Justice SMITH, who wrote the opinion, gave this reason:

"There is, therefore, no basis for the classification which results in this diversity of compensation for the identical service."

This court, in the case of *State ex rel. Burrow* v. *Jolly,* 207 Ark. 515, 181 S. W. 2d 479, held that an act providing for appointment of road overseers in counties with certain populations violated amendment No. 14 because population was an arbitrary basis on which to make the classification.

In this case the classification made by the legislature was arbitrary because it bears no relation to the purpose for which the act was designed. It is not reasonable to presume that a truck loaded with logs, wheat, baggage or horses is a less hazard on the highways than one of the same dimensions loaded with other substances.

Edelmann v. *City of Fort Smith,* 194 Ark. 100, 105 S. W. 2d 528, is a case in point and many others could be cited, but it would serve no useful purpose to do so.

BONDS *v.* ROGERS.

4-9537 241 S. W. 2d 371

Opinion delivered July 9, 1951.

S. L. Richardson, George H. Steimel and *W. J. Schoonover,* for appellant.

George M. Booth, for appellee.

Ed. F. McFaddin, Justice. A local option election, called pursuant to Initiated Act No. 1 of 1942, was held in Randolph County on May 11, 1950, to decide whether the manufacture or sale of intoxicating liquors would be legal in that County.

On the face of the returns, the County voted "dry"—*i. e.,* against the manufacture or sale of intoxicating liquors. Appellants contested the election in the County Court and in the Circuit Court, and now appeal from the Circuit Court judgment which found that a majority of those voting in the County had voted against the manufacture or sale of intoxicating liquors. After a thorough, painstaking count of the challenged votes, the Circuit Court found that a majority of the legal votes were in favor of the "drys"; and the correctness of such count is not challenged on this appeal. Rather the contestants (appellants here) insist for reversal on the points now to be discussed.

I. *No Election Held in One Township.* The election called was County-wide; but for some unexplained reason, the polls were never opened in Butler Township, one of the political townships in Randolph County. Appellants claim that the failure of the officials to open the polls in

the one township rendered void the entire voting in the other twenty-odd townships. The motion and the Circuit Court's ruling thereon are as follows:

"The contestants request the Court to hold that the purported local option election, of May 11, 1950, is null and void, and that, under the undisputed evidence, no election was held in Butler Township, and for that reason there was no County-wide election held, as ordered by the County Court.

"BY THE COURT: Suppose all of the Judges and Clerks failed to appear, could the voters present go ahead and hold the election? There is nothing to show that the ballots were withheld. The Court thinks, if any voters appeared at the polls they had a right to go ahead and hold the election. The motion will be overruled."

While it is not shown how many qualified voters there were in Randolph County, it is clear that in excess of 2,800 legal votes were cast in this election. Likewise, while it is not shown how many qualified voters there were in Butler Township, appellants say in their brief that there were 42 such voters. The result of the appellants' argument is that 42 voters, by failing to hold an election in one township, could thereby defeat the balloting of 2,800 voters in the other townships of the county. If that argument be true, then by like symbol, one county, by failing to vote, could defeat an entire state-wide election; and one state, by failing to vote, could defeat an entire national election. We mention this to show the result that would follow if we adopted appellants' argument.

Apparently the voters in Butler Township were not interested in the election. Since there is no showing in the case at bar (a) that anyone in Butler Township was deprived of a desired right to vote, or (b) that the opening of the polls was suppressed by force or fraud, we conclude that the appellants' argument on this point is without merit. See *L. & N. R. R.* v. *Davidson County* (Tenn.), 1 Sneed 637, 1. c. 693.

II. *Counting of the Vote by the Election Officials at Each Polling Place.* When the polls closed, the Judges

and Clerks at each polling place proceeded to count the ballots, tabulate the results, and make returns to the County Election Commissioners, as prescribed by the General Election Law—*i. e.*, § 3-1001, *et seq.*, Ark. Stats. Appellants strenuously insist that the Judges and the Clerks at the respective polling places had no right to count the ballots and tabulate the results: instead—say appellants—the said Judges and Clerks should have forwarded the unopened ballot boxes to the three County Election Commissioners who should have counted the ballots in the first instance. This contention of appellants makes necessary a study of certain language in Initiated Act No. 1 of 1942[1] (as now found in § 48-802, Ark. Stats.), which reads:

"Said election shall be held on the day designated in said notice in conformity with the general election laws of the State, and shall be conducted by the Election Commissioners in the same manner as General Elections are conducted, and the same responsibility shall rest upon all election officials conducting said election as in conducting General Elections, and only qualified electors shall be eligible to vote therein. *All returns from said election shall be sealed up and forwarded immediately to the County Election Commissioners* of the proper county. *Said Election Commissioners shall count the votes and deliver their certificate declaring the result of said election,* together with the election returns, *within three (3) days after the date of said election,* to the County Clerk of said County."

We have italicized certain language to emphasize appellants' contention which hinges on the words, "All returns . . . shall be . . . forwarded . . . to the County Election Commissioners (who) . . . shall count the votes." Because of such language appellants urge that the Judges and Clerks, at the respective polling places, had no right to count the votes. There are two reasons why we do not agree with the appellants' conten-

[1] This Act has been considered by us in a number of cases, some of which are listed in *Tollett* v. *Knod*, 210 Ark. 781, 197 S. W. 2d 744; but in none of our cases have we considered the points under discussion in this case.

tion; in the first place, the Statute, as previously copied, says:

". . . the same responsibility shall rest upon all election officials conducting said election as in conducting General Elections, . . ."

Section 3-1002, Ark. Stats., in prescribing the responsibilities of Judges and Clerks in General Elections, says:

"After the closing of the polls, the judges of election shall proceed to count the ballots deposited in the ballot-box, . . ."

Thus the General Election Law requires the Judges and the Clerks at each polling place to count the ballots. We hold that the Initiated Act No. 1 of 1942 (§ 48-802, Ark. Stats.) imposed the same duty on the Judges and Clerks as provided by the General Election Law—*i. e.*, to count the ballots.

In the second place, the said Initiated Act No. 1 says, "All returns . . . shall be forwarded immediately to the County Election Commissioners." Webster's New International Dictionary says of "election returns":

"An account, or formal report, of an action performed, of a duty discharged, of facts or statistics, and the like; . . ."

Throughout our Election Laws the word, "returns," means the report made by the polling officials to the higher authority as to the number of votes cast for each candidate, or the number of votes cast for or against the proposition voted on. The word, "returns," in Election Laws, connotes that the Judges and Clerks at the respective polling places are, in the first instance, to count the ballots and tabulate the results. Cases from other jurisdictions are persuasive in this regard. See *Spear* v. *Marshall,* 95 Utah 62, 79 Pac. 2d 15; and *Carlson* v. *Burt,* 111 Calif. 129, 43 Pac. 583. In 29 C. J. S. 331, "Elections," § 229, in discussing "returns," the text states:

"It is the continuing duty of the election officers to make a proper return of the result of the election. . . ."

To the same effect see 18 Am. Jur. 345, "Elections," § 251.

We therefore conclude that it was the duty of the Judges and Clerks at the respective polling places to count the ballots and make returns; and that when the Initiated Act No. 1 says: "Said Election Commissioners shall count the votes," it means that the County Election Commissioners shall canvass the result, just as in General Elections. We conclude that the appellants' contention is without merit.

III. *Conduct of County Election Commissioners.* Section 2 of said Initiated Act No. 1 (being now § 48-802, Ark. Stats.) requires the County Election Commissioners to certify the election result "within three (3) days after the date of said election." The three Election Commissioners of Randolph County were Messrs. Brown, Hollowell and Grier, with the first named being the Chairman. The election was held on Thursday, May 11th; and two of the Commissioners (Messrs. Brown and Hollowell) met on Saturday, May 13th, and performed the duties as required by Statute. Mr. Grier left the County on a short trip at 6:00 A. M., Saturday, May 13th, and did not return until several days thereafter.

(a) Appellants' first contention is that because of the absence of Mr. Grier from the meeting on May 13th, the other two Election Commissioners were powerless to act and their actions were not only void, but also destroyed the integrity of the ballots. We reject appellants' said contention. Section 3-602, Ark. Stats., says:

"Each Commissioner shall have one vote, and two shall constitute a quorum, and the concurring votes of any two shall decide all questions before them."

It was Mr. Grier's duty to ascertain when the Commissioners were to meet. His trip was for his own pleasure; and he must abide the action of the two Commissioners who met and performed the duty imposed on them.

(b) Appellants make another contention: Section 2 of said Initiated Act No. 1 (§ 48-802, Ark. Stats.) further provides:

"Upon petition of twenty-five (25) interested legal voters in the territory affected, within ten (10) days after the date of said election, the Election Commissioners of said County shall immediately recount the votes and declare the result of the election as determined by such recount."

There was such a petition for recount filed in the case at bar; and on May 19th, Messrs. Brown and Hollowell—being a majority of the Election Commissioners—met in the vault of the County Clerk's office and made the recount required. Because Mr. Grier was absent from such meeting, appellants assail the integrity of the ballots. We say, again, that two Commissioners constituted a quorum. There was evidence that Mr. Grier was notified of the meeting. He could not, by his absence, defeat the majority from complying with the statutory requirements.

(c) Appellants make a further contention: because of the absence of Mr. Grier, the other two Commissioners secured Mr. Pace to assist them in the tabulation of the results of the recount; and appellants say that the participation of Mr. Pace was a fatal error. Under the facts in this case we hold that the presence of Mr. Pace did not destroy the integrity of the ballots.

We have examined the appellants' other contentions and find them to be without merit. Therefore, the judgment of the Circuit Court is in all things affirmed.

EVANS *v.* EVANS.

4-9956 241 S. W. 2d 713

Opinion delivered July 9, 1951.

F. O. Butt, for appellant.

Claude A. Fuller, for appellee.

ROBINSON, J. This appeal is from a decree of the Chancery Court granting a divorce to the appellee. The appellee alleged in his complaint that his wife had been guilty of such conduct as to render his condition in life intolerable; that she had openly kept company with men late at night, drinking liquor, attending dances, and neglecting the children of appellee. Defendant denied the allegations of the complaint, except that of the marriage, and alleged that the plaintiff, for more than 18 months, had maintained and kept a woman named Genie, (it is not necessary to set out here her last name) and had had numerous assignations with her. The effect of appellant's allegation of wrong-doing on the part of the appellee was to set up the defense of recrimination.

In 1944 the appellee obtained a divorce from a former wife in Mexico, then married appellant. He had three children by the former marriage, two boys and one girl, a baby in arms. The appellee obtained custody of the two boys. In 1947 it was ascertained that the divorce he had obtained in Mexico was not valid, and appellee, therefore, procured another divorce from the same person and then remarried his present wife. Soon after their marriage, the appellee, his wife and two boys moved to Eureka Springs, Arkansas. Because his duties in the United States Navy, in which he has served for many

years, required him to be elsewhere, appellee was at home in Eureka Springs for only short periods of time.

In April, 1949, appellee began an extended cruise, returning in September of that year, at which time his wife with the two boys met him at Virginia Beach, where they lived together until the 9th day of January, 1950, when his wife left him. On the 13th day of September, 1950, the appellee filed this suit.

There does not appear to be any question about the domicile, for the parties agree that they had not abandoned Eureka Springs as their residence. There are two issues in the case: First, did the appellee make out a case under the statute which makes conduct rendering one's condition in life intolerable a ground for divorce? Second, if the appellee did make out a case under the statute, is appellant's plea of recrimination as a defense sustained?

The appellee testified that he knew nothing about anything that could be called improper conduct on the part of his wife while she lived at Eureka Springs. Although appellee did testify that his wife had been put out of a petty officer's club at Virginia Beach because of obscene language and conduct, such testimony is not corroborated. Also, the appellee testified that his wife was jealous and embarrassed him by complaining to his superior officers in the Navy. Furthermore, he says his wife left their apartment without just cause on the night of January 9, 1950. Desertion is not alleged as a ground for divorce and sufficient time had not expired from the time his wife left to the time of the filing of the suit to sustain a plea of desertion, even if she had left without just cause, which we do not hold.

Within ten days after appellant left the apartment at Virginia Beach she entered a Naval Hospital where she underwent an operation whereby one of her breasts was removed. At a later date she underwent another operation for a condition in the region of the pelvis, and still another when the other breast was removed. She is now in need of a fourth operation. At the time appellant

left the apartment at Virginia Beach, she was sick, mentally and physically, and needed an operation.

In an attempt to prove improper conduct on the part of his wife at Eureka Springs, the appellee produced some evidence to the effect that her reputation was bad, without the witnesses being able to point out any improper conduct on the part of the appellant. Appellant was seen a few times, under circumstances not improper, with a good friend of the appellee. The appellee encouraged his wife in that respect and sent to this friend, through his wife, a wrist-watch for Christmas. It is true that appellee's mother testified that on one occasion she hid in a garage near appellant's home at Eureka Springs and heard appellant invite some "rough talking" man into the house. Her testimony is not convincing, especially when she stands impeached by a letter from the appellee, which is as follows:

"My dear Mother:

"I received your two letters, one yesterday and the other today. It would be proper for me to say I was glad to get them but in this case to be proper would not be truthful since I did not enjoy them and neither of them was appreciated. Neither of them deserve an answer, but if it can possibly prevent more like them, I'm going through them and attempt one.

"I have been extremely busy and haven't been down town since I returned from St. Louis after Thanksgiving. For that reason I asked Pearl to send a Christmas card to you for me, which she did. I probably wouldn't have done that if it hadn't been for that one letter you wrote me just before Christmas. It was the only one I've received from you that wasn't full of back-biting and half-truths.

"I don't know what reasons you have figured out for yourself that give me cause for worry but I can assure you that your left-handed reference to Pearl and the children are the one thing I have no cause at all to worry about. No man could ask for a wife who is more loving, more subservient to her husband's welfare, and more

devoted in her training of the children to teach them the value of family and a home and to attempt to make good men of them with a normal adjustment to life and the world without either babying or spoiling them. Such training can only be given with a complete absence of outside interference. Even more than that, there must be outside cooperation but that cooperation must be chosen with care. I do not believe that the influence of one such as Berry, either directly or as it works out, indirectly, is of any benefit to them. I have told you I do not care to discuss the subject of Berry but in answer to your letter I must say just one thing. As you say, I think I know the truth about Berry, but it does not necessarily follow that I believe the truth is as you told it. There are too many concrete things that cannot be overlooked. . . .

"Now, about that sewing machine—you will eventually get it, I say eventually because I have no idea how soon it will be. I will say this—the machine was given to Pearl as a gift, it is her machine. It is only in order to make her life a little more bearable as it would most definitely be without your constant nagging about it that I will ask her to give you the machine when the following two conditions are satisfied: 1. That I can find a machine for her to replace it and buy it for her and 2. That my dishes are returned to my home either prior to or at the time the machine is given to you.

"I am at a loss to know why you mention it so often, but I can certainly find no fault in Pearl's choice to include the Rev. and Mrs. Stokes among her circle of friends. In fact, I have acted in an advisory capacity to Pearl in some of their discussions, especially where the Hebrew Ethical Wills are included since that stems from those contained in two volumes of my library that Rev. Stokes has borrowed. Neither can I find fault in the studies and discussion of all religions since in those discussions only can bigotry and intolerance be combatted. I do object, and Pearl was angry because I was, to your inferential method of shading the truth of what I already know is an all too transparent attempt to sow discord."

This letter was turned over to the appellant by appellee's mother.

There is no substantial evidence in the record that the appellant kept company with men late at night, attended dances, drank liquor, or neglected the children, which would justify a divorce on the ground of indignities or any other ground. There is evidence to the effect that the appellant was jealous and, as a result of this jealousy, she wrote some indiscreet letters to Genie, and complained to the Navy Department. But, if appellant's conduct due to jealousy could be held to be grounds for divorce as rendering appellee's condition in life intolerable, that ground would be barred by appellee's misconduct amounting to recrimination.

Upon examination of the record, we are convinced that appellee, who was stationed at Bethesda, Maryland, was having an illicit affair with Genie, who lived in Washington, D. C., and that such relationship had existed since 1947. On June 5, 1949, appellee wrote to his wife:

"You wanted to know why I went to Washington when I came back from Gitmo Bay. . . . I did not see J..... while I was there, with the result that we had one big fight because, as I have told you, I had done a lot of thinking in Gitmo and come to the conclusions that were not very well liked in all quarters. It was not my desire for her to come to Norfolk and that is the reason why I wired her not to do so. I did not know whether you would want to see me at all or not, and that is the reason I wired you that I was there and did not say anything about coming down. I do not regret the trip to Washington since if I hadn't come down, I wouldn't have known whether my thinking in Gitmo was really true, or was a case of distance smoothing over feelings. You know what I found out and when it was told to J....., it started the fight; at which time I walked out as I have done before, but this time there was no opportunity for telephone calls to start it over again as there was the other times. . . . I think you are doing right in not accepting any calls from Washington because I know how upsetting they are to you, and that you do not know whether to

believe what I say from now on. I am doing just what you want me to do and giving a truthful answer, and I say this—you can believe what I say from now on. I am so nervous I can hardly write."

On July 7, 1949, appellee wrote the appellant:

"We are trying to save the children from the stigma brought on by my own follies, and a course such as you have set will ruin them as much, no, more than if it were me. Many of the things I have said are the result of the remorse I feel in trying to salve my guilty conscience. . . . I know I am not deserving either to love or to be loved by you because I was so weak as not to be able to resist a plum when it was offered me. I took it and imagined myself in love. I did not realize it was so long ago. I have a lousy memory for chronology and dates as you say. It is hard for me to believe that it goes back as far as April, 1947. . . . I have always felt that my love for you was real, but if that were true would I have strayed off the path so easily and done the things I did? The only thing I can say for myself is that I tried several times to stop it, but that does not hold much water since each time I thought it was stopped for good it got started again."

The following is a copy of a letter which the evidence shows was sent by Genie to appellee:

"We must and we will keep our chins up high for one another. I don't want my precious to lose any weight or to worry until you are sick and have a breakdown, because I have a feeling this trip has done you a world of good, and I just won't stand for her to make you ill with worry; and, darling, please try to sleep because your Genie wants you to. Please call me as soon as you arrive in Norfolk and here is my office phone number again—Ordway 4040. I hope and plan that we can be alone for a couple of days anyway and have the weekend. I will either take Thursday and Friday off or Monday and Tuesday, whichever."

The appellant testified that appellee admitted his illicit relations with Genie and her testimony in this

respect is corroborated by her mother and sister. Without extending this opinion, suffice it to say the evidence is convincing that appellee was living in a state of adultery with Genie.

If ground for divorce existed as alleged in the complaint, it would be barred by recrimination. § 34-1209, Ark. Stats., provides: "If it shall appear to the court that . . . both parties have been guilty of the adultery, or such other offense or injury complained of in the bill, then no divorce shall be granted or be decreed." This statute has been construed by this court as preventing one who has been guilty of conduct, which is a ground for divorce, from securing divorce upon another statutory ground.

In the case of *Wilson* v. *Wilson,* 128 Ark. 110, 193 S. W. 504, this Court said:

"Habitual drunkenness for one year and statutory cruel treatment are each grounds for divorce in our statute. Hence, each is a good recriminatory defense to the other. It is well settled that one who has been guilty of misconduct, which is in itself a ground for divorce, has no standing to demand a divorce upon another statutory ground. In such cases the parties will be denied relief because they are equally in fault." *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840; *Healy* v. *Healy,* 77 Ark. 94, 90 S. W. 845.

In the case of *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, 152 A. L. R. 327, this Court held that recrimination as a defense had been abolished where the ground for divorce was a three-year separation, but that recrimination is a good defense to all other grounds for divorce.

The case of *Widders* v. *Widders,* 207 Ark. 596, 182 S. W. 2d 209, is very similar to the case at bar, and Mr. Justice Robbins, speaking for the Court, said: "Before a suitor may be granted a divorce it must ordinarily appear that the party asking for the divorce is innocent and the one from whom the divorce is sought is guilty of some act or conduct which the law has designated as ground for divorce."

The appellee contends that the complaint should be treated as amended to include the allegation of jealousy on the part of his wife, as constituting a part of the charge against the appellant in connection with indignities, but when this is done, still the appellee has not made out a case when it is taken into consideration that his wife was very, very sick. She needed kindness, consideration, attention, love and affection, and instead she received the knowledge that appellee was bestowing his affections on someone else. Moreover, if the complaint is treated as amended, and as thus amended some ground for divorce other than a three year separation were proved, still the appellee would be barred by recrimination from obtaining a divorce.

Reversed with directions to enter a decree not inconsistent with this opinion.

TALKINGTON *v.* SCHMIDT.

4-9550 242 S. W. 2d 150

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

E. G. Ward, for appellant.

Bloodworth & Bloodworth, Gerald Brown, and *Kirsch & Cathey,* for appellee.

PAUL WARD, J. This is an action brought, originally in Chancery Court but later transferred to Circuit Court, by appellee on a foreign judgment rendered in the Circuit Court of Saint Louis, Missouri, which granted to her on December 22, 1932, a divorce from her husband, appellant, and at the same time awarded to her $5 a week for the support of their daughter, Bobbie Jean Talkington, who became twenty-one years of age December 19, 1948. Twenty-one years is the age for majority under Missouri Revised Statutes of 1949, § 457-010. Appellee, after admitting the application of the ten years statute of limitations and after entering a remittitur correcting a typographical error in the judgment of the court, now contends that she is entitled to judgment for $5 a week, with interest as hereafter mentioned, for ten years immediately prior to November 9, 1949, the date the original complaint was filed in Chancery Court, less the time between December 19, 1948 (when the daughter became of age) and November 9, 1949. In other words, appellee seeks judgment for accumulations between November 9, 1939, and December 19, 1948, with interest thereon at six per cent to January 8, 1951. On the latter date the lower court gave appellee judgment in accordance with the above in the amount of $3,350.61, which judgment was to bear interest at six per cent per annum. The remittitur referred to above reduces the judgment by the sum of

$42.57. After appellant's motion for a new trial was overruled he prosecutes this appeal and raises many interesting questions which we now proceed to discuss.

The original complaint (captioned "Action on Foreign Judgment") alleges the Saint Louis divorce, the weekly award and non-payment thereof, the facts relative to Bobbie Jean Talkington, and that a copy of the decree of divorce was attached as "Exhibit A." After answer appellee, on April 29, 1950, filed an amended complaint, captioned "Plaintiff's First Amended Complaint" which contained substantially the same allegations as the original complaint but added that Robert Leslie Talkington was duly served with personal summons in the Saint Louis case. Service of summons was issued on the original complaint but not on the amended complaint. Appellant answered the amended complaint without mentioning the lack of service.

As stated above the cause of action was transferred to Circuit Court, but over the objections of appellant, and after the pleadings were completed and certain motions disposed of the court permitted appellee to call as her witness one George Bridges, Deputy Circuit Clerk for Clay County, and through him to introduce in evidence certified copies of all the papers, including decree and summons, in the Saint Louis divorce case. These documents had however been formerly introduced as evidence and used in an action which this appellee had brought in the Clay County Chancery Court in 1937 against this appellant wherein she sought and recovered judgment for weekly payments accruing under the Saint Louis decree up to that time.

Appellant, in his pleadings, by motion for a new trial, and by timely objections, has saved and now urges the following grounds for a reversal of the lower court.

First. That the cause should have been transferred to the Chancery Court and that it was error to allow Bridges to testify after the cause was submitted on the pleadings. We see no merit in either of these contentions. This was a suit on a foreign judgment for a sum

of money alleged to be due and no equity question was involved. There is nothing in the record to indicate the case was to be or was submitted on the pleadings and it was proper to allow the introduction of competent testimony.

Second. That the suit brought by appellee in 1937 to collect weekly payments is *res judicata* of this action. This could not be true because the payments sought to be collected here had not accrued in 1937. It is not sought here to collect any payment accruing prior to November 9, 1939.

Third. Appellant pleaded *nul tiel* record contending, (a) that before appellee could rely on a foreign judgment it was not only necessary to introduce and prove the foreign judgment but also all proceedings, including proof of service, upon which that judgment was based, and (b) that it was error to allow the introduction of the files in the 1937 suit. It is not suggested that the 1937 files did not contain (as exhibits) all the necessary papers to support the Saint Louis judgment or that they were not properly verified and exemplified according to the provisions of the United States statutes. We think appellant cannot be sustained on either contention. We know of no rule of law that prevents properly verified and exemplified documents from being introduced at one trial just because they have been previously introduced in another trial. Also it is not questioned that appellee attached, as "Exhibit A," to her complaint a copy of the decree of the Saint Louis court and, in our opinion, that was sufficient. The rule is well stated in Am. Jur., Vol. 31, page 352, § 858, as follows:

"In an action on a judgment rendered by a court of general jurisdiction of record, it will be presumed that the judgment was legally obtained, and that the court which rendered the judgment, had jurisdiction of the cause and of the parties in the original action, where such jurisdiction is not disproved by extrinsic evidence or by the record itself. Until the contrary appears, there is also a presumption in an action on a judgment that the judgment remains in full force and unsatisfied."

Of course the introduction of these documents presented evidence which appellant had the right to rebut had he chosen to do so.

Fourth. It is insisted that the Saint Louis judgment is not a final judgment because the court, as shown by the decree, had a right to change it. In the absence of any proof to the contrary it will be assumed that the weekly payments continued, unchanged and unpaid until Bobbie Jean became of age. It is stated, § 859 of the above cited volume of American Jurisprudence that the plaintiff suing on a judgment does not bear the burden of proving the judgment has not been satisfied. The Saint Louis court had no power to change payments that had already accrued on December 19, 1948, when Bobbie Jean became twenty-one years old. In *Nelson* v. *Nelson,* 282 Mo. 412, 221 S. W. 1066, the Supreme Court of Missouri said:

"If not otherwise impelled thereto, we would be constrained to hold for reasons of public policy alone that the courts of this state have no power to revoke or modify an installment of alimony which has accrued prior to the making of an application therefor."

In *Schneider* v. *Schneider,* 273 S. W. 1081 (Missouri), the St. Louis Court of Appeals said:

"It does not, however, give the court the power to annul or modify the judgment retroactively. The judgment in respect to past due and unpaid installments, is a fixed debt, and the wife has therein a property right which vests as the installments accrue."

Fifth. Appellant earnestly and ably insists that the Amended Complaint filed April 26, 1950, superseded the original complaint filed November 9, 1949, and consequently this would shorten the time for which appellee could recover. In support he cites *Waters-Pierce Oil Company* v. *Bridwell,* 103 Ark. 345, 147 S. W. 64, where we find this announcement: "An amended pleading filed as a substitute for the original pleading supersedes it, and the original pleading ceases to be a part of the record." In the cited case the opinion is silent as to whether the allegations in the amended complaint are

different from those of the original, but in the statement of facts by the attorneys for the appellant it is alleged that the substituted complaint states a wholly different cause of action. The opinion cites 31 Cyc. 465 from which the above quotation was taken. Lifted from context the quotation is misleading for we find, under the same topic, on page 464 the following: "It is a well recognized principle that an *amended* pleading based on the same cause of action or defense as the original relates back to the date when such original pleading was filed." Also the closing sentence of the section from which the first quotation above was taken reads as follows: "However, it is the province of the court, not of counsel, to declare on what pleadings a case shall be tried."

The case of *Webb* v. *Strait, Judge,* 214 Ark. 890, 218 S. W. 2d 722, is cited by appellant in further support of his contention. There the first complaint stated the defendant was a resident of this state and the second complaint stated he was a resident of Louisiana, and this court held the second complaint took the place of the first because the allegation of non-resident was essential to make the provisions of the Non-resident Motorist Act applicable.

In our opinion it makes no difference what name is given to the second complaint—that is whether it is designated "Amendment to Complaint" or "Amended Complaint"—but that the real test is whether the second complaint states a new cause of action. In the case of *Western Coal & Mining Company* v. *Corkille,* 96 Ark. 387, 131 S. W. 963, we quote the headnote: "Where the original complaint was not barred by the statute of limitations, the statute will not be a defense against an *amended* complaint which did not set forth a new cause of action, but merely amplified the original complaint." In the opinion the words "amendment" and "amended" appear to be used without distinction as to meaning. In *Paris Purity Coal Co.* v. *Pendergrass,* 193 Ark. 1031, 104 S. W. 2d 455, we find this language:

"An amendment to 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."

In the recent case of *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S. W. 2d 645, we said:

"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. . . . We agree with the trial court that the amendment to the complaint did not constitute a new cause of action."

Here appellee's amended complaint did not state a new cause of action or any new grounds for a cause of action and therefore relates back to the date the original complaint was filed.

Finally it is urged that appellee could not maintain this action because the weekly payments had not been reduced to a final judgment by the Saint Louis court. It was held to the contrary in *Tolley* v. *Tolley,* 210 Ark. 144, 194 S. W. 2d 687 where the suit was based on a judgment in a Kansas court for weekly payments (together with a judgment for a definite sum) and the decision was based on the fact that the Kansas court had no power to modify a judgment for weekly payments which had already accrued. Neither does the Missouri court have the power to modify its judgments under like circumstances as shown by the quotation from *Nelson* v. *Nelson,* and *Schneider* v. *Schneider, supra.*

Other questions briefed but not raised at the time of the trial are not considered.

The judgment of the lower court, as modified by the remittitur, is accordingly affirmed.

BOONE *v.* GENERAL SHOE CORPORATION.

4-9541 242 S. W. 2d 138

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

[redacted]

Paul Johnson, for appellant.

James A. Ross, Randall L. Williams and *Sims & Clarke,* for appellee.

PAUL WARD, J. The General Shoe Corporation is domiciled in the State of Tennessee and is authorized to do business in Arkansas, and as such is engaged in the wholesale distribution of shoes. Mrs. Pearl Boone is the owner, or at least the principal owner of "The Jacqueline Shop" and under this business name is engaged in the retailing of ladies ready to wear in Drew County at Monticello, Arkansas. One J. E. Jones is also doing business—apparently engaged in selling shoes—in "The Jacqueline Shop" in the same room and building, using the same entrance, but his relationship to "The Jacqueline Shop" and to Mrs. Pearl Boone is not clearly established.

On August 21, 1950, the General Shoe Corporation, appellee, filed a complaint in the Drew County Circuit Court against Mrs. Pearl Boone, J. E. Jones, and "The Jacqueline Shop", making the following allegations: It is advised, believes and alleges that Mrs. Pearl Boone and J. E. Jones are the owners and operators of "The Jacqueline Shop" and are engaged in the retailing of ladies ready to wear and ladies shoes; it sold to "The Jacqueline Shop" through its agent or partner J. E. Jones during the period beginning in July, 1949, through October 20, 1949, goods to the value of $2,092.17 and the defendants owe a balance of $1,989.90. An itemized statement marked "Exhibit A" is attached to the complaint. It sold said goods with the understanding and belief that J. E. Jones was a partner or agent of "The Jacqueline Shop"; that the merchandise was shipped to "The Jacqueline Shop" and accepted by it in that name until on October 20, 1949, when Mrs. Pearl Boone gave notice that she was not liable for the debts of the said Jones; that it relied on the credit of "The Jacqueline Shop" and treated it as principal to the contracts of sale and

shipped direct to it in that name. After receiving the notice referred to above it sold to J. E. Jones merchandise to the value of $457.53 of which amount $40.83 has been paid, leaving due from Jones $416.70. It was led to believe that J. E. Jones was acting as agent of or a partner with the defendant, Mrs. Pearl Boone, because the shoe department and ladies ready to wear department are both operated as one business, in the same building, and under one firm name, "The Jacqueline Shop"; that said conditions and acts of Mrs. Boone caused plaintiff to extend credit which was based on her credit rating and not that of Jones; that Mrs. Boone held Jones out to the public as her partner or agent allowing him to hold himself out to the public as such partner or agent, and that she (Mrs. Boone) is now estopped to deny it as against this plaintiff (appellee). Judgment is asked against Mrs. Boone and J. E. Jones jointly and severally in the sum of $1,989.90 and against J. E. Jones individually in the sum of $416.70 together with interest at six per cent after thirty days from the date of sale of each item of merchandise.

Mrs. Boone and Jones filed separate answers denying all allegations made in the complaint, and Jones pleaded affirmatively that both amounts sued for, including interest, had been paid by him with a promissory note in the amount of $3,011.21 executed on November 20, 1949, in favor of plaintiff.

Based on the verdict of the jury the court rendered judgment in favor of appellee in the sum of $1,989.90 against Mrs. Pearl Boone and J. E. Jones and against J. E. Jones in the additional sum of $416.70. It will be noted that no interest was allowed in either judgment. From this judgment both sides have appealed.

The record, containing much testimony and many exhibits, is voluminous, but as we view the case it is not necessary here to detail the testimony extensively. The correctness of the amounts of the judgments is not questioned except that appellee contends the court should have given it judgment for interest. J. E. Jones has not appealed.

Mrs. Boone, appellant, bases her contention for a reversal largely on the theory that admissible evidence under the pleadings was insufficient to establish an actual or ostensible agency, or a partnership. In this we do not agree for it is our opinion that appellee's complaint, as abstracted above, is sufficient to justify a recovery against Mrs. Boone on the ground that she, by the manner in which she allowed her business to be conducted as disclosed by the evidence, led appellee to believe Jones was clothed with authority to purchase merchandise for "The Jacqueline Shop" either as her agent or partner.

The law applicable to the pleadings and evidence in this case was announced in *Brugman, et al.,* v. *McGuire, et al.,* 32 Ark. 733 at page 739 where the instruction set out below was given by the lower court and approved by this court:

"First—It was not necessary to entitle the plaintiffs to recover, to prove that the defendants were partners or jointly interested in the mill, but if their acts and conduct were such as to induce the plaintiffs to believe them to be partners or jointly interested, and, under that impression and belief so created, the work was done and the materials furnished, both were liable to the plaintiffs therefor, although Peter Brugman was not, and Philips E. Brugman was alone interested in having the work done and materials furnished, and the same was for his sole use and benefit."

On page 740 of the same citation appears this language:

" 'It is undoubted law', says Judge Parsons in his work on partnership, 'that one held out as a partner with his own consent is liable as such whether he be a partner in fact or not.' Par. on Part., 87, 123; Sto. on Part., § 64; *Humphries* v. *McGraw,* 5 Ark. 61; *Olmstead* v. *Hill,* 2 *Ib.,* 346."

We approach our decision in this manner for the same reason that our view expressed above simplifies and clarifies our disposition of the numerous contentions (for

a reversal) made by appellant, which we now proceed to discuss in the order set forth in appellant's brief.

First. The note from J. E. Jones destroyed appellee's cause of action on the account against Mrs. Pearl Boone. There is nothing in the record to show that appellee accepted the note with the understanding and agreement that it would extinguish the open account and in the absence of such evidence this case is controlled by the law as stated in *Henry* v. *Conley,* 48 Ark. 267, 3 S. W. 181, and we quote from page 271:

"The taking of the note, bill or check of a debtor, or of one of several joint debtors, or of a stranger for an antecedent indebtedness, is no payment, unless it is agreed to be taken as such. It is only conditional payment, dependent on the payment of the paper. If that is dishonored, the original debt revives."

Also on page 740 of the Brugman case, *supra,* the same announcement is made in these words:

"That the debt for which the notes were given was not paid and extinguished by the notes of Peter Brugman unless it was the intention and understanding of the parties at the time the same were given, that they were in payment and discharge of it and so received."

Second. Error is urged in that a joint and several judgment was rendered against Mrs. Boone and J. E. Jones. It was not error to render judgment against J. E. Jones because he admitted he owes the entire amount and has not appealed. Mrs. Boone's liability is a question for decision and if she is liable the form of the verdict is immaterial.

Third. Here appellant claims that the evidence was insufficient to justify a verdict against her upon the theory of agency as alleged in the complaint. As mentioned above we hold that appellee was not limited to recovery on the theory of agency alone. The sufficiency of evidence on the whole will be discussed later.

Fourth. It is first insisted that it was error for the court to allow introduction as exhibits the first order

sheet, certain ledger sheets, and a copy of the original invoice of merchandise through the testimony of T. D. Oxford, a witness for appellee. We see no error in the introduction of these exhibits as they are a part of the entire picture tending to show Mrs. Boone's connection with the entire transaction.

Appellant next objects to the testimony of Preston Ballard. Ballard was one of appellee's salesmen and as such had been in appellant's place of business for the purpose of taking orders from "The Jacqueline Shop". He testified among other things that the stock of shoes was in the same building with the dress shop; that there was only one front entrance; that the only name on the place of business was "The Jacqueline Shop"; that Mr. Jones was in the place of business and gave him orders for merchandise; that the orders were taken in the name of "The Jacqueline Shop"; that there was nothing to indicate to him that Mr. Jones did not have an interest in the business. There was no error in the introduction of this testimony.

It is insisted also by appellant that when the note given by Jones was tendered in court it operated to immediately discharge Mrs. Boone from all liability under the pleadings. In our opinion it was not only proper but necessary for appellee to produce Jones' note in court and surrender the same. Appellee could not sue on the note and on the open account both at the same time and it was necessary for it to make a selection, which it did. It is also stated in Am. Juris. Vol. 1, p. 269, § 8, under Accounts and Accounting, from which we quote in part as follows:

"The giving of a note for a debt represented by an account does not, however, extinguish the debt, and an action may be maintained on the original indebtedness if the note is not paid. But, if one accepts from another, in liquidation of an open account, a negotiable promissory note, he cannot recover in a suit upon the original cause of action unless, upon the trial, he produces the note or satisfactorily acocunts for its absence."

Appellant objects to the introduction of a report from Dunn & Bradstreet and to the introduction of two newspaper advertisements showing that "The Jacqueline Shop" was offering for sale shoes, as well as ladies ready to wear. This evidence, we think, was proper as it tended to develop the entire picture as stated before. The fact that Oxford, one of appellee's salesmen, testified that he had no knowledge of these advertisements in the newspaper would not render them incompetent as testimony for the reason stated.

Fifth. Appellant objects to the instructions as a whole given by the court but does not deem it necessary to discuss the instructions separately. Appellee agrees with appellant and likewise does not discuss the separate instructions given by the court. Our examination of all of the court's instructions reveals no reversible error. A different conclusion regarding the instructions might be reached if we agreed with appellant on her theory of this case as heretofore mentioned, but we do not so agree.

Sixth. Appellant contends that the forms of the verdicts given to the jury were wrong and that they practically excluded the jury from finding in favor of Mrs. Boone. It appears that the forms were dictated by the court and appellee insists that appellant made no objection at the time and that the copy of the transcript which was delivered to it by the clerk showed that no objection had been made. It appears that the transcript was later amended by interlineation to show that appellant did object. We think, however, it is immaterial whether any objection was made or not since it appears from the record that the forms of the verdict furnished ample opportunity for the jury to find in favor of appellant if it had so desired.

Seventh. The record reflects that appellees introduced photostatic copies showing the running account with "The Jacqueline Shop". Appellant does not object to the introduction of the sheets because they were photostatic copies, but does insist and did in her motion for a new trial, that the photostatic copies show they were not

true copies of the original and that the originals had been tampered with before the photostats were made. This applies only to the first two ledger sheets. The name "The Jacqueline Shop" appears in the photostat at the top of each sheet, but the first two sheets indicated that a slip of paper had been pasted on top. On orders of the court the originals were later brought in and showed, as admitted by appellee, that the two ledger sheets first had on them the name J. E. Jones. While this at first appears to be a very serious matter we are of the opinion that it reflects no reversible error. Testimony was introduced by appellee to the effect that the mistake was an error in bookkeeping and that the change was made "October 27 to 31st, 1949" before they had any knowledge that the debt would not be paid. The record reflects that the owner became insolvent in August, 1950. The explanation made concerning the change seemed reasonable since the ledger sheets which had not been changed showed that something like thirty charges had been entered on sheets which had not been changed and which contained the heading "The Jacqueline Shop". We cannot say the lower court erred in refusing a new trial.

It is our opinion that there is an abundance of testimony to support the verdict of the jury on the ground that the action or lack of action on the part of Mrs. Boone, together with the manner in which the business was conducted and the apparent relationship between Mrs. Boone and Jones, led appellee to believe that Jones had authority to purchase merchandise for "The Jacqueline Shop". They were doing business together in the same room which had only one entrance, and the only name by which the business was known was "The Jacqueline Shop". Appellee had shipped merchandise to "The Jacqueline Shop" over a period of months and had on each occasion sent an invoice showing that the merchandise was charged to "The Jacqueline Shop" and mailed to that address. The evidence shows clearly that Mrs. Boone had access to the mail and could not but have known these facts. The evidence also shows that over this period of time 150 or 200 invoices were mailed to

"The Jacqueline Shop". All of these facts were known to appellee's employees who went to the place of business and solicited orders for merchandise. Although appellant contends that she sold only ladies ready to wear and that Jones alone was interested in the sale of shoes yet the newspaper advertisements offered both classes of merchandise under the name of "The Jacqueline Shop". Jones himself at unguarded moments on the witness stand spoke of the business as "our business".

In our opinion no error prejudicial to appellant was committed by the lower court and the judgment should be affirmed on direct appeal.

On cross-appeal appellee contends that it should have been given judgment for interest at the rate of six per cent on all merchandise sold and not paid for within thirty days after delivery. This was alleged and asked for in its complaint and there was evidence to support the allegation. As has been noted the jury gave judgment only for the sales price of the merchandise and no judgment was entered for interest. Appellee did not ask for an instruction on interest and we think that was not necessary, however, after the verdict was returned appellee did ask the court to add interest to the judgment and it also asked for it in its motion for new trial. In both instances it was denied by the court. We think this question is settled in the case of *Rogers* v. *Atkinson,* 152 Ark. 167, 237 S. W. 679 and we quote the headnote:

"Where it was an undisputed fact that, if a party is entitled to a verdict, he was entitled also to the interest, as in the case of a liquidated demand, and the jury brings in a verdict for the principal sum without mentioning interest, the court should add interest to the amount of the verdict in its judgment."

A late case in harmony with the above is *Norton* v. *Hickingbottom,* 212 Ark. 581, 206 S. W. 2d, 777.

Affirmed on direct appeal and on cross-appeal the cause is reversed and remanded with directions that judgment for interest be entered for appellee as prayed.

George Rose Smith, J., concurs.

COPELAND *v.* CITY OF MAGNOLIA.

4-9601 242 S. W. 2d 143

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

J. G. Milham, for appellant.

GRIFFIN SMITH, Chief Justice. As is usual with lawsuits that develop bitter controversial phases, the testimony here is at sharp variance respecting employment of Spencer & Spencer (attorneys) by the appellants, and regarding consent of the condemnation defendants to arbitration.

The City of Magnolia needs certain real property for municipal airport purposes. When the property could not be purchased it instituted actions to condemn and to fix compensation. The complaint contains a statement that it is not necessary to take oil, gas, and other minerals, but that certain drilling and operating restrictions are essential.[1]

[1] The restrictions exception reads: "No person, firm, or corporation shall build, erect, construct, or maintain, any derricks, tanks, structures, pits, or other physical hazards of any kind or character on the surface of said airport at any location within 300 feet of the center line of the runways and/or landing strips and 200 feet of the center line of the taxi strips that may be constructed." [Certain secondary precautions were mentioned].

The suit against Copeland, an old Negro who owns 40 acres, was filed June 28, 1950, and answered August 18. Sam Spralls and his wife own 34 acres. As to them suit was filed July 7. Answer was filed by Spencer & Spencer the same day they answered for Copeland.

On September 12, a regular day of the court term, the proceedings against Copeland were reached on the docket call, whereupon there were filed what purported to be (a) an agreement between the plaintiff and defendants (including the Spralls and others) for arbitration; (b) a resolution of the City authorizing the Mayor to execute an arbitration agreement; (c) the appointment of a third member of the appraisal committee, and (d) the appraisers' affidavits. The contentions in each case are substantially the same. Appellants insist they are not bound by the agreement to arbitrate because (a) their relations with Spencer & Spencer were not those of client and attorney, or principal and agent; (b) they did not understand the transaction, were not familiar with court procedure, had no thought of paying a fee for representation, but (c) if any discussions occurred, they (the appellants here) were overreached and should not be bound; (d) under the constitution there is always the right of trial by jury to determine whether the property is being taken for a public purpose, and to fix just compensation.

The award in favor of Copeland was $3,000. Of this sum $2,400 represented the fair market value of the land, while $600 was to compensate damages to other lands owned by Copeland, including damage to oil, gas, and minerals which were reserved to the defendants; but, as to these, there were the restrictions heretofore mentioned. See footnote No. 1.

Spralls and his wife were allowed $2,301 for the land and $600.35 for damages similar to those mentioned in the Copeland judgment—a total of $2,901.35.

Copeland and Spralls denied attending any of the court proceedings.

The contract relied upon by Spencer & Spencer included about twenty property-owners. Copeland is alleged to have signed by mark. The writing offered in evidence called for a fee of 20% of any sum recovered, either by settlement or judgment. Two checks, one to Copeland and Spencer & Spencer, and the other to Spralls, Spencer & Spencer, and other interested persons, were drawn. Appellants refused to accept settlement on the basis the attorneys said they were entitled to under the contract.[2] Thereupon Spencer & Spencer (Nov. 7, 1950) filed a petition asking that the judgment in Chancery Case No. 132 (styled *City of Magnolia* v. *Nathaniel Henry* and [other designated defendants] be modified. The First National Bank—a cashier's check having been issued—was named as a defendant. The prayer was that the check be split, one payable to the respondents in settlement of their respective interests, the other ($580.28) payable to Spencer & Spencer as their fee. A similar action was filed against Copeland, who responding Nov. 20th filed his motion to vacate the condemnation judgment of October 18th. He alleged fraud in the procurement in that Spencer & Spencer were not his attorneys, and asserted a meritorious defense, including the want of due process.

Appeals are from judgments denying all essential contentions.

J. V. Spencer, Sr., testified that his firm represented a number of condemnation defendants; that Copeland's son asked him to "go by" and see his father, and thereafter the witness and Appellant Copeland went together to Nathaniel Henry's home, where the matter was discussed. Copeland said he wanted to join with the others, then authorized his son to sign the contract, first having touched the pen. [Copeland's signature is by mark]. Later, when the proposal to arbitrate[3] was current, Cope-

[2] The check for $2,901.35 was payable to Nathaniel and Gena Henry, Sam and Mattie Spralls, Lee and Grady Spralls, Ninnie and Leroy Thomas, and Spencer & Spencer.

[3] The agreement to arbitrate permitted landowners to name one representative, the City another, and the two so selected to name a third.

land agreed it was the proper thing to do; again he authorized his son to sign for him, and touched the pen. The witness, (referring to himself) said: "I was over here several times. I made it a point to go by and discuss [the matter] with him, as well as with the others."

Spencer, in testifying, admitted very frankly that he did not see Spralls sign either the contract of employment or the agreement to arbitrate. However, after they had apparently been executed they were discussed, and Spralls admitted that he did agree to arbitrate. Spralls thought his daughter must have signed the contract. He then asserted: "I never did agree with anybody to arbitrate for an award." Regarding the contract, Spralls was asked on cross-examination: "Who signed the [employment] contract: do you know who signed it?" A. "No, sir, I didn't sign it: my daughter must have signed it." Q. "Your sister signed it, didn't she?" A. "Yes, sir. You can asked the colored man here in the room: he will tell you the same thing."

As to the appraisement agreement Spralls admitted that he was at the home of his brother-in-law (Nathaniel Henry) "one time" when Spencer was there. He was also in Attorney Clegg's office "for a while" when appraisers were selected:—"I thought it was over with, and I left and went back on the job."

A little later he was asked whether he agreed that Jim Kendricks should be one of the appraisers. The reply was: "Yes, sir. I didn't accept any of the others, and I told them if I couldn't get the appraisers I wanted I wouldn't take any at all. That is what I told Mr. Kendricks, and I told [Mr. Spencer] the same thing."

There was other evidence, (Copeland did not testify) some in support and some in contradiction, of appellants' contentions. The court patiently heard these witnesses, had an opportunity to observe their demeanor; was familiar with the entire record, and was no doubt favored with argument touching the issues. Result was that the checks were ordered reissued and contentions of the peti-

tioners were overruled. Our duty is to determine whether there was an abuse of discretion, and the answer is contrary to appellants' position.

Affirmed.

HUNT *v.* ELLIS.

4-9531 242 S. W. 2d 146

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

J. L. Shaver, for appellant.

John N. Killough and *Walter N. Killough,* for appellee.

GEORGE ROSE SMITH, J. This is an action brought by the appellees, the widow and children of M. E. Ellis, to

redeem certain lands from tax forfeitures. Ellis was the owner of the lands when he died intestate in 1931. Part of the property was sold to the State in 1932 for non-payment of taxes, and the rest was similarly sold in 1933. The appellant, defendant below, bought the land from the State in 1937 and obtained possession in 1938 as a result of bringing a suit in ejectment. The present suit for redemption was filed in 1947, before the youngest of the Ellis heirs had reached his majority. The appellant concedes the right of a minor to redeem tax forfeited lands within two years after the expiration of his disability, Ark. Stats. 1947, § 84-1201, but in this case it is contended that the minor's right of redemption was extinguished by either of two earlier suits. The chancellor permitted redemption but gave the appellant a money judgment for the amount by which his tax payments, improvements, and other expenditures exceeded the rental value of the property. Both sides have appealed.

The appellant first contends that the minor's right to redeem was barred by a foreclosure suit in 1933. M. E. Ellis had mortgaged the lands in 1931 to a bank in Wynne. After Ellis' death the bank filed a foreclosure suit against the widow and children. The suit proceeded to a sale, at which the bank bid in the property for the amount of the debt. The sale was confirmed, but the commissioner's deed was never delivered to the bank. An officer of the bank testified below that the mortgage debt was later paid—by whom the record does not show —and that the bank claimed no interest in the property. The circuit clerk testified that he still has the commissioner's deed, as the bank refused to pay the costs in the foreclosure suit and disclaimed any interest in the matter.

In these circumstances the suit did not destroy the minor's right of redemption from the tax sales. The appellant stresses the fact that the foreclosure sale was confirmed, and we recognize the rule that a decree divesting title is ordinarily more important than the deed executed in obedience to the decree, the latter being mere evidence of the transaction. *Person* v. *Johnson,* 218 Ark. 117, 235 S. W. 2d 876. But the rule is for the benefit of

the winning litigant and presupposes a desire on his part to obtain the benefit of his victory. That was not the bank's attitude in the foreclosure suit relied on by appellant. The debt was eventually paid, and the bank abandoned its suit by declining to pay the costs as a condition to obtaining the commissioner's deed. The bank asserts no claim to the land. It follows that the title remained in the Ellis heirs, for it is not the purpose of the rule to force the title upon an unwilling recipient. Since the heirs' title was not divested by the 1933 suit, the right of redemption continued.

The other suit relied on by the appellant is his own action in ejectment, which he won in 1938. The Ellis heirs were parties to the suit, but the minor's right of redemption was not put in issue. The case is similar to and controlled by our holding in *Pulaski County* v. *Hill*, 97 Ark. 450, 134 S. W. 973, where, on virtually identical facts, we said: "The holder of the tax deed, if the tax sale was valid, was entitled to the possession of the land as against the owner, even though he was laboring under disability at the time of the tax sale. Until the owner made redemption in the manner prescribed by the law, the holder of the tax title had the right of possession of the land. But the owner laboring under the disability had the right to make such redemption at any time during the period named in the statute, and he did not have to assert that right at the time of such ejectment suit, nor did he lose the right to assert it after such suit and before the expiration of such period." This holding is entirely logical, for otherwise the tax title purchaser could extinguish the right of redemption in a manner not contemplated by the redemption law and at a time when an infant of tender years might be unable to tender even a small sum to redeem. We conclude that the ejectment suit did not affect the minor's rights.

The remaining controversies concern the $647.92 judgment that the appellant obtained below. The appellees contend that the amount is too large, while the appellant thinks it inadequate. Both sides agree that the appellant was properly credited with the amount of his tax payments. The appellant's principal contention is

that his improvements are worth much more than the $500 figure fixed by the chancellor. But the estimates of value were so sharply disparate that the chancellor may well have concluded that neither side's testimony was reliable. For example, the appellees' witnesses fixed the worth of a small barn at $25, while the appellant's proof put the figure at $250—ten times as much. Photographs show all the improvements to be roughly constructed unpainted structures that may not have greatly enhanced the value of the land. With the testimony in such conflict we cannot say with any degree of certainty that our judgment in the matter would be better than, or even as good as, that of the trial court, who heard the testimony as it was given.

Appellant also insists that he was allowed too little for having cleared some of the acreage, but this claim is pretty well offset by the appellees' contention that they were not allowed enough for timber cut by the appellant. It is evident that the more land the appellant cleared the more timber he must be charged with having cut; so the two contentions tend to counterbalance each other. On the issue of rental value we are likewise unwilling to say that the weight of the evidence supports the appellees' argument that the allowance is too small. After a study of the entire record we are unable to revise the trial court's figures either upward or downward with any firm feeling of assurance.

Affirmed on direct and cross appeal.

DIXIE DOWNS, INC., *v.* ARKANSAS RACING COMMISSION.

4-9600 242 S. W. 2d 132

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951.

Eichenbaum, Walther & Scott and *Wm. M. Moorhead,* for appellant.

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

MINOR W. MILLWEE, Justice. This is an appeal from a judgment of the Pulaski Circuit Court denying appellants' petition for a writ of certiorari.

On May 25, 1948, appellant, Robert J. Boileau, as an officer and one of the three directors and stockholders of appellant, Dixie Downs, Inc., filed an application and bid with appellee, Arkansas Racing Commission, for a franchise to operate pari-mutuel wagerings on the results of horse racing in Crittenden County, Arkansas, under Act 46 of 1935, as amended. Upon filing of the application the Racing Commission advertised for sealed bids in compliance with Ark. Stats., § 84-2709. On June 21, 1948, appellant Boileau, in his own behalf and as agent for Dixie Downs, Inc., refiled the unverified application and bid for said franchise. This application stated that Dixie Downs would be incorporated at the time of the opening of the bid; that said corporation had adequate

capital to construct and operate the racing plant, the general plans for which were in the hands of the secretary of the Commission in blueprint form; and that upon receipt of a franchise the applicant would seek approval of the racing project by the voters of Crittenden County in an election on the question. Dixie Downs, Inc. came into corporate existence on April 14, 1949, when it filed articles of incorporation with the Secretary of State.

At a meeting of the Racing Commission at Hot Springs, Arkansas, on March 3, 1951, appellants' application was rejected by a vote of six to one upon a secret ballot. On April 12, 1951, appellants instituted the instant proceeding by *certiorari* in the Pulaski Circuit Court to review the action of the Commission and to quash its order of March 3, 1951, rejecting appellants' application and bid for a franchise.

The petition alleged that the action of the Commission was without legal authority in that the public, press and bidders were excluded from the meeting held on March 3, 1951, without notice to appellants; that no reasons existed for rejection of the application, which was done without consideration of any of the grounds prescribed by law. The prayer of the petition was that the circuit court enter an order quashing the action of the Commission and directing that body to act forthwith and favorably upon appellants' application for a franchise.

In their response the Commission and its individual members denied the allegations of the petition and alleged that the court was without jurisdiction of the action. Upon a hearing the trial court sustained appellees' plea of lack of jurisdiction and denied the writ.

The correctness of the trial court's decision involves an interpretation of Act 46 of 1935, as amended, which is found in Ark. Stats., §§ 84-2701—84-2723. The Act is lengthy and loosely drawn. Sections 9 and 10 of the Act (Ark. Stats., § 84-2709,-10) deal at length with rules, regulations and procedures in connection with the issuance of both franchises and licenses to hold racing meets.

The heading of § 9 (Ark. Stats., § 84-2709), as enacted by the Legislature, reads: "Acquirements (Requirements) necessary to obtain franchise to operate track and to obtain license from Commission to conduct meeting." After detailing the steps necessary for the submission of bids and applications for a franchise, it is provided in paragraph 5: "The franchise shall extend for a period of ten (10) years from the date of the acceptance of the successful bid by the Commission. The Commission shall have the right to reject any and all bids if, in its opinion, the highest bidder is not financially qualified to operate, or in the event the Commission shall determine that the bidder or the stockholders and directors of the corporation making the successful bid are not morally qualified."

It is further stipulated in this section that every franchise granted under the Act shall provide that the successful bidder shall hold a race meeting within a year from the date of the franchise and annually thereafter during the term of the franchise and that failure to conduct any such meeting shall automatically forfeit said franchise. After further setting out certain steps in connection with an application for a license to hold race meetings, it is further provided: "The Commission may, in its discretion refuse racing dates or licenses to hold a racing meeting to any franchise holder for any cause which the Commission may deem advisable in the furtherance of the public interest, or which they may deem violative of the intents and purposes of this Act."

The heading of § 10 (Ark. Stats., § 84-2710), as enacted by the Legislature, reads: "Issuance of Licenses; Hearings; Expenses Thereof." After specifying the contents of a license and enumerating other regulations pertaining to the holding of racing meets, paragraph 3 provides: "In case any license is refused or revoked by said Commission or *in case any applicant is aggrieved at the action of the Commission,* the party or parties affected by said refusal, revocation or action shall be entitled to a hearing in the manner hereinafter provided; such hearing shall be held at such place in the State of Arkansas and at such time as the Commission may designate and

notice shall be served on the party or parties affected by mailing the notice of the time and place that such hearing will be held by registered mail to the party or parties affected . . ." (Italics supplied.)

After specifying the rules and procedures to be followed in conducting such hearing, the fourth paragraph of § 10 provides: "At the conclusion of such hearing the Commission shall make its findings to be the basis for the refusal to issue license, the revocation of a license issued, or other action taken by the Commission. Such findings shall be final, provided, however, that the section (action) of the Commission and the property (propriety) thereof shall be subject to review on questions of law only, in any Circuit Court in the County where the applicant for a license or the party or parties affected by the action of the Commission, intended or desire or applied to the Commission for a license to conduct a horse racing meeting."

It is the earnest contention of appellants that under §§ 9 and 10, *supra,* the Legislature intended to provide for a hearing and review of the rulings of the Commission by the circuit court only in the case of an application for an annual license to hold racing meetings as distinguished from an application for a franchise. While it is undisputed that appellants have never offered any evidence of their financial or moral qualifications, it is also argued that the burden was on the Commission to raise such questions before appellants' application could be properly rejected. Since, say appellants, they had no right to a hearing or an appeal from the action of the Commission, and since that body made no finding of moral or financial disqualification, then it should follow that *certiorari* lies and the trial court should have quashed the order of the Commission and ordered issuance of the franchise as a ministerial act.

We cannot agree with the assertion that an applicant for a franchise is not entitled to a hearing and review of the Commission's action thereon. It must be conceded that there is ambiguity in the statute on this point. It is noted that § 9 provides for the granting of both fran-

chises and licenses and the section is incomplete without further consideration of the provisions of § 10. Paragraph 3 of § 10 provides for a hearing and review when a license is refused or revoked, "or in case *any applicant is aggrieved at the action of the Commission. . . .*" When this language is considered in connection with the § 9 and the provisions of the entire Act, we hold that it is broad enough to include an applicant for a franchise and that the Legislature intended to grant a hearing and the right of review to an applicant for a franchise who may be aggrieved at the action of the Commission. The writ of *certiorari* lies only to review the judicial or *quasi*-judicial acts of an inferior court, board or officer. *Pine Bluff Water & Light Co.* v. *City of Pine Bluff,* 62 Ark. 196, 35 S. W. 227. Unless appellants are entitled to a hearing, considerable doubt might arise as to whether the action of the Commission in rejecting the application constituted the type of act contemplated to support a proceeding by *certiorari.* See Anno. 102 A. L. R. 534. There is nothing in the Act prohibiting the Commission in the first instance from making an independent investigation of an applicant's qualifications for a franchise. If this is done and the applicant furnishes no evidence of his qualifications, and the Commission makes no findings with reference thereto, how can a superior court on *certiorari* determine whether the Commission has acted in excess of its jurisdiction? Such is the state of the record which the circuit court was asked to review in the instant case. If a hearing is held, the reviewing court is furnished with a record from which it may intelligently determine the validity of the Commission's acts.

As we construe the statute, appellants were entitled to a hearing before the Commission if they were aggrieved at the latter's action in rejecting their application. Having failed to ask for such hearing, and without furnishing evidence of their moral and financial qualifications, appellants failed to exhaust an administrative remedy afforded by the statute. "The doctrine of exhaustion of administrative remedies requires that where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the

courts will act." 42 Am. Jur., Public Administrative Law, § 197. In § 202 of the same text the author states: "It seems settled that an administrative remedy has not been exhausted by one who, prior to applying for judicial relief from an administrative determination initiated without a hearing, has not applied for such a hearing before an administrative agency, although a pertinent statute or rule, by its terms, or as construed by the administrative agency, or even as construed by the court resorted to, provides for a hearing of the aggrieved party." We have applied the rule of exhaustion of remedies in suits by property owners to restrain the enforcement of a zoning regulation without first exhausting the remedies provided by the zoning ordinance. *City of Little Rock* v. *Evans,* 213 Ark. 522, 212 S. W. 2d 28. It is also the general rule, subject to certain limitations, that *certiorari* will not issue if there is another adequate remedy available to petitioner. 14 C. J. S., *Certiorari,* § 37 b(1). Here appellants had an adequate remedy which they failed to pursue and their petition for a writ of *certiorari* was premature.

Under the provisions of paragraph 4 of § 10, *supra,* venue for review of the hearing to which appellants were entitled is fixed in the circuit court of the county where racing meetings are to be held, which, in this instance, is Crittenden County. Since appellants have not exhausted the remedies afforded them under the statute, the trial court correctly held that it was without jurisdiction of the *certiorari* proceeding. The judgment denying the writ is, therefore, correct and is accordingly affirmed.

GRIFFIN SMITH, C.J., concurs.

OAKES *v.* OAKES.

4-9567 242 S. W. 2d 128

Opinion delivered July 9, 1951.

Rehearing denied October 8, 1951

Vol T. Lindsey and *Jeff R. Rice,* for appellant.

George H. Jennings and *Little & Enfield,* for appellee.

ED. F. MCFADDIN, Justice. The trial court granted the wife a divorce; and in this appeal by the husband it is claimed that the wife did not have her domicile in Arkansas.

In September, 1946, Mr. and Mrs. Oakes, with their two children, moved to Benton County, Arkansas, and lived on a farm owned by Mr. Oakes' father. Mrs. Oakes had developed active tuberculosis in 1936; and on August 4, 1947, in order to enter a sanatorium in Albuquerque, New Mexico, she left Benton County, Arkansas. She took only her clothing; the furniture and household goods

were left in the home in Arkansas.[1] The two children were sent to Texas to live with Mrs. Oakes' parents, who resided in Kerrville in the summers and elsewhere in the winters.

Mrs. Oakes remained in the sanatorium in Albuquerque, New Mexico, until 1949 when she went to Kerrville, Texas, to be with her parents and children during the summer. After a short visit in Kerrville, Mrs. Oakes returned to the sanatorium in Albuequerque and came direct from that institution to Arkansas to testify in this case on October 26, 1950. She stated that she would immediately return to the sanatorium for further treatment of an indefinite duration. The two children have all the time been with Mrs. Oakes' parents, as Mr. Oakes is now, and has been for some time, confined in a psychiatric sanitarium in Oklahoma.

In 1947, Mrs. Oakes filed suit in the Benton Chancery Court, seeking a divorce on the ground of indignities. That suit was not tried because the defendant obtained an indefinite continuance. In 1948 the Court ordered Mr. Oakes to make monthly contributions to the support of his wife and children, but he is now considerably in arrears in such payments. On August 24, 1950, Mrs. Oakes filed an amendment in the pending divorce suit, seeking a divorce on the ground of three years separation (*i.e.*, the eighth ground in § 34-1202, Ark. Stats.). The answer to this amendment stated:

"... that at the time of the filing of the amendment to said complaint the plaintiff was not a resident of the State of Arkansas and this Court does not have jurisdiction of the parties or the subject-matter."

[1] What disposition the husband made of the furniture and household goods does not appear. She testified:

"Q. Was it your intention to maintain Benton County, Arkansas, as your home, as your residence?

"A. That is right. I left my furniture there and everything on the farm.

"Q. Did you make any agreement with Harry (*i.e.*, Mr. Oakes) about moving that furniture and establishing any other home?

"A. No.

"Q. If there has been any moving done, have you had anything to do with it?

"A. No, I don't know whether anything is moved."

The divorce suit was tried *ore tenus* on October 26, 1950, and the Chancery Court awarded Mrs. Oakes a divorce on the ground of three years separation. As previously stated, the domicile of Mrs. Oakes is the issue controverted by appellant.

In *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, we said:

"So, now, we overrule *Squire* v. *Squire,* (186 Ark. 511, 54 S. W. 2d 281) *supra,* insofar as it holds that a person who comes to this state for the purpose of obtaining a divorce and who does not have the *animus manendi* (which has always been held an essential ingredient of residence), may be said to be a *bona fide* resident of this state; and by '*bona fide* residence,' we mean the same as domicile. We quote from, and adopt as our own and as ruling in this state, the language of the United States Supreme Court in *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366:

" 'Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile. *Bell* v. *Bell,* 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804; *Andrews* v. *Andrews,* 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this court nor any other court in the English-speaking world has questioned it. Domicile implies a *nexus* between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a state gives power to that state, we have held, to dissolve a marriage wheresoever contracted.' "

It is unquestioned that Arkansas was the domicile of Mrs. Oakes before she went to the sanatorium in New Mexico in August, 1947. Has she lost her Arkansas domicile? In *State* v. *Red Oak Bank,* 167 Ark. 234, 267 S. W. 566, we said:

"The intent to abandon one's domicile[2] and take up another must be ascertained from all the facts and circumstances in any particular case."

And we quoted from 9 R. C. L. 452:

" 'To effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home.' "

Our holding in the foregoing case is in accord with the authorities generally. In 17 Am. Jur. 600,[3] the holdings are summarized:

"In other words, to effect a change of domicile from one locality, state or country to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home. Moreover, the acts of the person must correspond with such purpose. The change of residence must be voluntary; the residence at the place chosen for the domicile must be actual; and to the fact of residence there must be added the *animus manendi.* The mere intention to acquire a new domicile, without the facts of an actual removal and an actual residence in the new locality, avails nothing, neither does the fact of removal without the intention.

"The rule is well settled that a domicile once established continues until it is superseded by a new domicile, and that the old domicile is not lost until a new one is acquired. This follows from the proposition that everyone must at all times have a domicile somewhere."

In the light of the foregoing, we cannot find in this record any evidence that Mrs. Oakes has acquired a new

[2] Some of our more recent cases on domicile are: *Central Ins. Co.* v. *Friedman,* 213 Ark. 9, 209 S. W. 2d 102, 1 A. L. R. 2d 557, and *Mo. Pac.* v. *Lawrence,* 215 Ark. 718, 223 S. W. 2d 823.

[3] To the same general effect, see also Leflar "Conflict of Laws," Sec. 13.

domicile. Her removal to New Mexico was entirely for reasons of health; and in 17 Am. Jur. 608, it is stated:

"A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

Neither has Mrs. Oakes acquired a domicile in Texas, because since 1947 she appears to have been there on only one or two visits of short duration when she left the sanatorium to see her parents and children.

We therefore hold that Mrs. Oakes' domicile in Benton County, Arkansas, has continued because she has acquired no new domicile since 1947.

The decree is affirmed.

GRAYS *v.* STATE.

4669 242 S. W. 2d 701

Opinion delivered October 8, 1951.

Elbert S. Johnson and *Gene Bradley,* for appellant.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

PAUL WARD, J. On March 12, 1951, appellant, Arthur Nox Grays, was charged with first degree murder for the killing of Homer Tucker on the 4th day of the same month. Tucker was a taxi driver operating out of Blytheville and the killing occurred about eight miles east of there near a place called Amorel. The trial, held on the 7th day of the following May, resulted in a conviction for murder in the first degree with the death penalty attached. Motion for a new trial was filed and overruled and on May 9th the court sentenced appellant to be electrocuted on the 15th day of August, 1951. From the above sentence and judgment of the court this appeal has been properly executed.

The deceased left Blytheville in his taxicab sometime during the night of Saturday, March 3, 1951, with appellant in the back seat and another colored man, called "Albert," who is charged with the same offense and to be tried later, in the front seat with the deceased. Later that night about one o'clock the deceased was found dead on the road near his own car. There was blood on both seats of the car and on all the door handles. Deceased had been stabbed in several places about the throat with a knife or other sharp instrument. Appellant, when apprehended the next morning, first claimed that three boys had committed the murder after they had forced him to take off his clothes and give to them, but later changed his story. Appellant admitted that "Albert" asked him for his knife and after he had given it to him, "Albert" inflicted the mortal wounds. When appellant was arrested at his home the officers found his clothes were spotted with blood and he had in his possession a pocketbook which belonged to the deceased and which contained deceased's social security card. A knife with

blood on it, found in a field near the scene of the murder, was identified as belonging to appellant and appeared to be the same knife he admitted getting from a neighbor sometime previously.

In the defendant's statement which was admitted in evidence, he admitted, among other things, that he and a "dark boy," whose name he did not know, talked about robbing Mr. Tucker a few hours before the killing; that they got in the taxi with Tucker and started out; that he let the other boy, who was in the front seat, have his knife with which he stabbed Tucker; that he got blood on his trousers, shirt, and jacket; that the knife he threw in the cotton field was his and that he handled it after it had blood on it; and that he took Tucker's pocketbook while he (Tucker) was scuffling in the front seat.

No testimony was introduced on behalf of the defendant (appellant).

During the course of the trial the defendant objected to the introduction of the pocketbook or billfold in evidence on the ground that the proof did not show that it was in the same condition as when taken from him. We find no error in this connection. The pocketbook was identified by the widow of the deceased as being his and, though some of the money had been taken out, the pocketbook had been in no way altered. It was competent to show a connection between the defendant and the murder. In the case of *Cross* v. *State,* 200 Ark. 1165, 143 S. W. 2d 530, the court used this language:

"Where the changed condition of clothing worn by deceased when killed does not prevent them from tending to prove or disprove an issue in the case, then it is proper to admit the clothes to be introduced in evidence."

The only other objection made by the defendant related to the introduction of pictures of the deceased's taxicab. After both sides had rested, the court, over the objection of the defendant, allowed the pictures to be introduced by the State. Again we find no error prejudicial to appellant. The pictures were shown to have been properly taken soon after the murder and they accurately showed the condition of the car with reference to

blood stains about which testimony had been given. In fact no contention was made that the pictures were not accurate or properly made. This court has many times held photographs to be admissible in evidence. In the case of *Simmons* v. *State,* 184 Ark. 373, 42 S. W. 2d 549, it was said:

"The objection to the photographs was that they were immaterial and do not shed any light on the case as to defendant's guilt or innocence and that they were introduced for the purpose of inflaming the minds of the jury. The photographs introduced in this case were shown to have been accurately taken and to correctly represent what they intended to show. This court stated the rule with reference to the introduction of the photographs as follows: 'As a general rule photographs are admissible in evidence when they are shown to have been taken accurately and to be correct representations of the subject in controversy and are of such nature as to throw light upon it.' *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840; *Washington* v. *State,* 181 Ark. 1011, 28 S. W. 2d 1055; *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527." Appellant, however, contends that it was improper to allow them to be introduced after both sides had rested. This was a matter that addressed itself to the sound discretion of the court and under the circumstances we think the court did not abuse its discretion. Our court sustains this view in *Levells* v. *The State,* 32 Ark. 585, where it was said:

"The testimony of Whitlow would have been more properly offered before the evidence of the defendant was adduced, but its admission at the time when offered was within the sound discretion of the court, which, without some showing to the contrary, we must presume was properly and judiciously exercised."

Also, to the same effect in *Walker* v. *State,* 100 Ark. 180, 139 S. W. 1139:

"Error of the court is assigned in permitting the State to introduce testimony not properly in rebuttal after defendant had rested his case. The statute (Kirby's

Digest, § 2378) authorizes the presentation of testimony in chief after the defendant has closed his case when it appears to be necessary 'in furtherance of justice,' and of that the trial court must be the judge. It rests within the sound discretion of trial courts to permit testimony to be adduced out of time, and the exercise of that discretion will not be disturbed by this court unless an abuse is shown."

The same rule was likewise announced in *Whittaker* v. *State,* 173 Ark. 1172, 294 S. W. 397, in this language:

"The reopening of a case for the re-examination of a witness, or the taking of further testimony after the testimony on both sides has been concluded and the cause has been submitted to the jury, is a matter, under our statutes and decisions, within the sound discretion of the trial court, and this court will not reverse the ruling of the trial court unless it appears that the court, in making such ruling, has abused its discretion."

In addition to the above, appellant sets out in the motion for a new trial three additional grounds for a reversal, *viz:* The verdict and judgment are (a) contrary to the law; (b) contrary to the evidence; and (c) contrary to the law and the evidence. These three contentions, with the exception mentioned below, merely challenge the sufficiency of the evidence. This is true because it is not insisted that there is any error contained in the instructions, and after a careful scrutiny we find none. In our opinion the evidence is sufficient to support the verdict of the jury and the judgment of the court. The testimony must be viewed in the light most favorable to the State as announced many times by this court and recently in *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376:

"On appeal, we are required to view the testimony in the light most favorable to the State, and the jury's verdict, when supported by substantial evidence, as here, is binding on us. *Brown* v. *State,* 208 Ark. 180, 185 S. W. 2d 274."

As intimated above, this leaves for consideration the principal contention of appellant that there is no evidence to show malice, premeditation and deliberation. It is argued that if the information had charged (as it did not) the defendant with killing the deceased while in the perpetration of robbery, it would not have been necessary to prove malice, premeditation and deliberation. It is true that these are necessary elements of first degree murder, but it is also true that these elements may be inferred from other facts and circumstances, as has been consistently held by this court. In the case of *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32, we find:

"The State is not bound to prove a motive for the killing and the absence thereof is only a circumstance to be considered with other facts and circumstances in determining guilt or innocence. *Hogue* v. *State,* 93 Ark. 316, 124 S. W. 783, 130 S. W. 167."

Also, see, *Craig* v. *State,* 205 Ark. 1100, 172 S. W. 2d 256, where it was said:

"While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault, such as the use of a deadly weapon in a manner indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death, or great bodily harm. . . .

"Under the express provisions of our statute 'malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition.' Pope's Digest, § 2967."

In our opinion the facts and circumstances surrounding this case as set forth above are such as to support the finding of the jury on all the necessary elements constituting first degree murder.

During the trial of the case below the prosecution sought to introduce in evidence a question-and-answer statement signed and sworn to by the defendant, in the presence of witnesses, and the defendant's counsel stated to the court that he would like to cross-examine the wit-

ness before the statement was admitted. In reply, the court stated that it would be admitted temporarily with the understanding that after later cross-examination, if it appeared the statement was not admissible, it would be withdrawn. This procedure was followed without any further objections by the defense. Later, after full examination and cross-examination, the court, without any objections on the part of the defense, admitted the statement as exhibit number four. In our opinion this procedure was in no way prejudicial to the defendant. It further appears to us that the facts and circumstances surrounding the taking of defendant's statement, as disclosed by the evidence and the statement itself, clearly show that it was properly admissible in evidence.

The judgment of the lower court is affirmed.

FIELDS *v.* STATE.

4661 242 S. W. 2d 639

Opinion delivered October 8, 1951.

J. H. A. Baker, for appellant.

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

ED. F. MCFADDIN, Justice. Appellant was convicted of knowingly receiving stolen property[1] of a value less than $35[2] and was fined $25. From such conviction there is this appeal, presenting the issues now to be discussed.

I. *Sufficiency of the Evidence.* Two boys, each 15 years of age, admitted stealing 73 pounds of copper wire from the Arkansas Power & Light Company warehouse in Russellville, and immediately selling the wire to appellant at his junk yard adjacent to the place from which the wire was stolen. Appellant paid the boys 9c per pound for the wire. As soon as the theft was discovered the wire was found in appellant's possession; and this prosecution followed.

The boys testified that the appellant asked them no questions as to their ownership of the wire. Appellant and his witnesses testified that he did so inquire and that the boys claimed to be *bona fide* owners. Thus, there was a dispute as to the investigation appellant made when he received the property. Furthermore, one of the boys who negotiated the sale to the appellant testified that he had lived in appellant's home for a long time and had sold appellant other property.

In *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93, we reiterated our holding: "The possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction either of larceny or of receiving stolen property. It was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by appellant of his possession of the stolen property." See, also, *Shoop* v. *State,* 209 Ark. 498, 190 S. W. 2d 988; *Daniels* v. *State,* 168 Ark. 1082,

[1] See § 41-3934, Ark. Stats.

[2] See § 41-3907, Ark. Stats., as amended by Act 243 of 1949.

272 S. W. 833; *King* v. *State,* 194 Ark. 157, 106 S. W. 2d 582, and *Williams* v. *State,* 202 Ark. 951, 154 S. W. 2d 809.

Appellant urges that he did not conceal the wire when he purchased it from the boys, that he left it in a place plainly visible, and that he instantly offered to return the wire to the lawful owner when the officers told him that it had been stolen. Because of these facts appellant argues that he never intended "to deprive the true owner," which is an ingredient of the offense here charged.[3] But such argument by the appellant is one that should have been addressed to the jury, rather than to this Court on appeal. The recently stolen property was found in appellant's possession; and the reasonableness of his explanation was a question for the jury under the holding of our cases previously listed. The evidence was sufficient to sustain the verdict.

II. *Instructions.* Appellant argues that the trial court erred in refusing some instructions which he says he requested. But the appellant's abstract in this Court is not sufficient to allow the point to be considered. He was convicted of a misdemeanor; and in misdemeanor appeals it is the appellant's duty to abstract the record and brief the case on the points that he desires to have considered. See *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673, and *Davis* v. *State,* 196 Ark. 721, 119 S. W. 2d 527. Appellant has not abstracted any of the ten instructions which the Court gave. Under the well known rule,[4] we must presume that the instructions which the appellant requested and the Court refused were covered by other instructions that were given.

Affirmed.

WARD, J., dissents.

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[3] See § 41-3934, Ark. Stats.

[4] See *Carpenter* v. *Hammer,* 75 Ark. 347, 87 S. W. 646, and *Hood* v. *Hinds,* 198 Ark. 678, 130 S. W. 2d 711. See other cases collected in West's Arkansas Digest "Appeal and Error," Key No. 928.

PAUL WARD, J., dissenting. It is my opinion that the testimony in this case, giving it the strongest probative value, only raises a suspicion that appellant knew the property was stolen.

The judgment should be reversed and a new trial granted under the authority of: *Jones* v. *State,* 85 Ark. 360, 108 S. W. 223; *Andrews* v. *State,* 100 Ark. 184, 137 S. W. 1134; *McCoy* v. *State,* 177 Ark. 1053, 9 S. W. 2d 241; *France* v. *State,* 68 Ark. 529, 60 S. W. 236.

ROBBINS *v.* STATE.

4665 242 S. W. 2d 640

Opinion delivered October 8, 1951.

Gordon B. Carlton and *M. M. Martin,* for appellant.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. This is an appeal from a verdict and judgment entered in the circuit court finding appellant guilty of a felony for a third conviction of selling liquor in dry territory (Polk County) under the provisions of Ark. Stats., § 48-803.

On April 18, 1951, the prosecuting attorney filed information against appellant which, omitting formal parts, charged: "The said defendant on the ..... day of November, 1950, in Polk County, Arkansas, did unlawfully and willfully sell to one Jim Evans one-half pint of intoxicating liquor in a prohibited territory, to-wit: Polk County, Arkansas. . . ."

On April 25, 1951, appellant entered a plea of not guilty to the charge and the case proceeded to trial. After qualification of the jury generally and when counsel started to make their peremptory challenges, the trial court announced that the State would be entitled to six and the defendant eight challenges, the numbers allowed in prosecutions for felonies except those punishable by death or life imprisonment. When appellant asked for an explanation of this statement for the benefit of the record, the court stated that such explanation would be made in chambers. Court and counsel then retired to the judge's chambers, but the record is silent as to what transpired there.

After the jury was selected and sworn to try the case and during the course of the opening statement, appellant objected and excepted to remarks of the prosecuting attorney to the effect that the defendant would be tried

for a felony in the event it was shown that he had been twice previously convicted of the unlawful sale of liquor in Polk County. There was no offer by the State at any time to either amend the information or file a new one alleging any prior conviction of appellant, or to otherwise charge him with a felony. Trial proceeded and testimony was adduced by the State, but denied by appellant, tending to prove the sale charged in the information. The State, over appellant's objections and exceptions, also introduced evidence to establish prior convictions of appellant on similar charges in Mena Police Court on October 21, 1950, and in Circuit Court on April 24, 1951, the day before his conviction in the case at bar.

At the conclusion of the testimony the trial court gave State's instruction No. 1, as follows: "The section of law upon which this charge is based reads as follows, to-wit:

" 'It shall be unlawful for any person, firm or corporation, to manufacture, sell, barter, loan or give away intoxicating liquor in any county, township, municipality, ward or precinct in which the manufacture or sale of intoxicating liquor is or shall be prohibited under the provisions of this Act (§§ 48-801—48-806). Any person who, or officers of any firm or corporation which, shall manufacture, sell, barter, loan or give away any intoxicating liquor in any territory which has been made dry under the provisions of this Act shall, upon first conviction, be deemed guilty of a misdemeanor and shall be fined not less than $100, nor more than $1,000; for a second conviction, shall be fined not less than $200, nor more than $2,000; and for any subsequent conviction, shall be guilty of a felony and shall be sentenced to not less than one year nor more than five years in the State Penitentiary.'

"So if you find from the testimony in this case beyond a reasonable doubt that the defendant, Jack Robbins, did in Polk County, Arkansas, within one year next prior to the filing of this information, sell, barter, loan or give away intoxicating liquors in said county, township, municipality, ward or precinct, in which the manufacture or sale of intoxicating liquors is, or shall be prohibited

under the provisions of this Act, then you will find the defendant guilty of this charge and fix his punishment at some time in the State Penitentiary of not less than one nor more than five years."

Appellant's specific and primary objections to the giving of this instruction were, (1) that it permitted the jury to find appellant guilty of a felony upon an information insufficient to constitute a felony charge, and (2) that it merely told the jury to find the defendant guilty of a felony if they found that he sold liquor on the occasion charged in the information and without any requirement of a finding on their part as to prior convictions.

The jury found appellant guilty "as charged" and fixed his punishment at one year in the State Penitentiary.

Several interesting questions are argued in the briefs. At the outset, however, we are faced with the proposition that appellant was convicted of a felony with which he was never charged. It is well settled that an accused may not be convicted of a felony where an indictment or information charges only a mis-demeanor. 42 C.J.S., Indictments and Informations, § 300. This principle is embodied in § 262 of the Criminal Code, which now appears as Ark. Stats., § 43-2157, and provides: "When the proof shows the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him guilty of the degree charged in the indictment." Under this section, no judgment could be rendered against appellant for an offense higher than that charged in the information.

That portion of § 48-803, *supra,* which is set out in instruction No. 1 given by the court appears in § 3 of Initiated Act No. 1 of 1942 (Acts 1943, p. 998). We cannot agree with the State's contention that this statute merely increases the punishment upon a second or subsequent conviction and does not create a separate or higher offense. The statute plainly says that a defendant "shall

be guilty of a felony'' upon a third or subsequent conviction.

The State also relies on Ark. Stats., § 43-1006 which provides that it shall not be necessary to allege in an indictment or information that the acts constituting the offense were done willfully, unlawfully, feloniously, etc., but the name of the offense charged shall carry with it all such allegations. We have held that this act was adopted for the purpose of simplifying procedure in criminal cases and eliminating some of the technical defenses through which criminals had theretofore escaped punishment for their crimes, and the statute has been liberally construed to that end. In *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, this court construed this statute in connection with § 43-1024 which authorizes the prosecuting attorney to amend an indictment so long as the amendment does not change the nature or degree of the crime charged. There the defendant was charged with burglary and grand larceny in the information as originally filed and the court held that an amendment by the State alleging the value of the property stolen did not have the effect of changing the nature of the crime charged or the degree thereof in view of other allegations of the information as originally filed.

In the case at bar there is no allegation in the information charging appellant with prior convictions or to put him on notice that he was charged with a felony. The information stated facts showing that a misdemeanor only had been committed and was not subject to either demurrer or a motion for bill of particulars as a misdemeanor charge for a first offense. Appellant, therefore, waived no right by failing to demur or file a motion for a bill of particulars.

Although there is some authority to the contrary, the general rule is that the indictment or information must allege the prior convictions in order to warrant a judgment imposing additional punishment under the habitual criminal statutes. 24 C.J.S., Criminal Law, § 1971 (c). The rule as to the sufficiency of allegations generally is stated as follows in 42 C.J.S., Indictments

and Informations, § 145 (b): "The allegations of an indictment or information seeking to charge accused as a second or subsequent offender should bring him clearly within the statute providing an increased penalty for such an offense and should comply with the general rules of pleading in respect of certainty and particularity, but it has been held unnecessary to allege a prior offense with the same particularity as the current offense."

In 25 Am. Jur., Habitual Criminals, § 26, the author says: "In the absence of controlling statutory provisions to the contrary, and despite some authority to the contrary, the general rule is that in order to subject an accused to the enhanced punishment as a second or subsequent offender or as a habitual criminal, it is necessary to allege in the indictment or information the fact of a prior conviction or convictions." In 58 A.L.R. 64, the annotator cites numerous decisions of the courts of thirty-six states which support the general rule. See, also, Anno.: 82 A.L.R. 366 and 116 A.L.R. 229. We applied the rule in *Hettle* v. *State,* 144 Ark. 564, 222 S. W. 1066, and held that an indictment which failed to charge a prior conviction would not sustain a conviction for illegal cohabitation as for a second offense under Ark. Stats., § 41-805.

If the information in the case at bar had charged the prior convictions of appellant only in general terms, then it might have been sufficient under our liberal rules of procedure, at least in the absence of a motion for bill of particulars. But the information here embraces no charge of a prior conviction nor any other allegation calculated to put appellant on notice that he was charged with a felony.

The evidence, although disputed, was sufficient to support a verdict against appellant as for a first conviction under the statute which was the only offense charged in the information. The case stands as if the jury had found appellant guilty as a first offender but failed to assess the punishment provided by law. *Simpson* v. *State,* 56 Ark. 8, 19 S. W. 99; *Eastling* v. *State,*

69 Ark. 189, 62 S. W. 584. The judgment convicting appellant of a felony is accordingly reversed and the judgment affirmed as for a first offense. The cause is remanded to the circuit court with directions to set aside the judgment convicting appellant of a felony, and to impose the punishment as for a first conviction under the statute.

WILSON *v.* STATE.

4658 242 S. W. 2d 644

Opinion delivered October 8, 1951.

Wendell Utley, for appellant.

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

GRIFFIN SMITH, Chief Justice. Appellant operates the Highway Cafe several miles from Magnolia. Fines were assessed against her in Municipal Court on consolidated charges of selling liquor in dry territory and

possessing untaxed intoxicants. On appeal a Circuit Court jury found her guilty and fixed punishment at $1,000 on the liquor-selling charge, and $500 for possessing the untaxed commodity. The motion for a new trial alleges that the verdict is contrary to law, contrary to the evidence, and that the maximum fine for selling the small quantity involved shows as a matter of law that the jury was prejudiced. It is also urged that laughter by court visitors deprived the trial of due solemnity, and that error was committed in the refusal to require Sheriff Linton to name the persons whom he had heard say that the defendant's reputation was that of a bootlegger, or one engaged in the illegal sale of liquor.

In her brief appellant contends that affirmative evidence established the venue in Union County, therefore the Columbia Circuit Court was without jurisdiction. The point was not raised in the motion for a new trial and we do not take judicial notice of a county boundary at an indefinite place based on testimony such as that stressed in the brief.

There was testimony of a substantial nature showing that an officer bargained with appellant for whiskey, that a pint bottle of Cascade was brought to the officer's automobile where another agent was waiting, but that appellant undertook to withhold delivery when she became suspicious of the purchaser, who had paid four dollars for the whiskey while in the cafe. It is insisted that when the officer reached for the bottle and took it after appellant had indicated that she did not intend to consummate the transaction the sale was incomplete, therefore no crime was committed. After acquiring the liquor in the manner mentioned, the officers searched appellant's premises under authority of a warrant and found other bottled intoxicants, some of which did not have the required stamp evidencing payment of the excise tax. Of two pints and five half pints, all of the bottles were stamped except a half-pint of Early Times. The untaxed liquor was found in a cafe closet. Another half-pint (taxed) was found under a bed, together with a

partially filled half-pint bottle, while four bottles of whiskey were found in the yard.

There is nothing in the record showing that appellant's counsel was the subject of ridicule through laughter, as the motion for a new trial alleges. Conceding that the statement is true, its prejudicial nature could not be determined in the absence of a record of the incident, and this is not to be found in the bill of exceptions. Nor may we, under our rules, consider appellant's contention that reversible error occurred when the Sheriff was not required to name the persons he had heard say that the defendant's reputation was that of a bootlegger. Before the question could be answered the Judge halted the inquiry on that issue. No objection was interposed, and the complaint first appears in the motion for a new trial.

We have held that in the absence of a showing that the jury was influenced by prejudice and passion, its action in assessing a penalty the law authorizes will not be disturbed.

The final argument is that a directed verdict of acquittal should have been given when, as appellant insists, it was shown by the state's testimony that delivery of the contraband liquor was not voluntary. Milton Mozier, one of the arresting officers, testified that appellant, after receiving the four one-dollar bills in the cafe, came to the side of the car. Mozier lowered the window glass, reached for the bottle, and said, "You are under arrest." Appellant attempted to jerk away, but Mozier's hand closed around the bottle. His statement was, "She was in the process of handing [the whiskey] to me when arrested."

A sale may be proved by circumstances. This was the holding in *Scoggin* v. *City of Morrilton,* 124 Ark. 585, 187 S. W. 445. It was there said that the circumstances must warrant the inference that there was a seller and a purchaser and compensation for the thing sold. See, also, *Davidson* v. *State,* 180 Ark. 970, 23 S. W. 2d 615.

Affirmed.

4659 242 S. W. 2d 697

Opinion delivered October 8, 1951.

Everard Weisburd, for appellant.

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

HOLT, J. A jury found appellant guilty of the crime of involuntary manslaughter and fixed his punishment at a term of three years in the penitentiary and a fine of $1,000. From the judgment is this appeal.

The information was based upon the following sections of the statute: (Ark. Stats., 1947, § 41-2207) "*Manslaughter defined.* Manslaughter is the unlawful killing of a human being, without malice express or implied, and without deliberation." "Section 41-2209. *Involuntary manslaughter defined.* If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. Provided further that when the death of any person ensues within one (1) year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter."

1.

Appellant first challenges the sufficiency of the evidence to support the jury's verdict.

October 7, 1950, Mr. M. W. Clifton, while driving his Plymouth sedan automobile from Memphis, Tenn., west on Highway 70 near Lehi, Ark., about midnight, in company with his wife, baby and three relatives, collided with a Cadillac automobile driven by appellant. There was evidence that at the time of the mishap Clifton was driving carefully at about a speed of thirty-five miles per hour, on the right side of the highway westward. It had been raining. As appellant approached from the west, traveling about forty-five miles per hour, he drove his

car to the left to pass a car immediately in front, but Clifton's approaching car was so near that appellant, in attempting to pull back within the line of traffic on his side of the highway, skidded into Clifton's car, resulting in great damage to both cars and Mrs. Clifton's death. There was evidence that appellant had been drinking intoxicating liquor.

Under our well established rule, we must consider the evidence in the light most favorable to the State, and if substantial, we must permit the jury's verdict to stand. *Padgett* v. *State,* 212 Ark. 716, 207 S. W. 2d 719, and *Puterbaugh* v. *State,* 217 Ark. 686, 232 S. W. 2d 984.

Appellant offered evidence tending to contradict that offered by the State. However, all conflicts in the testimony were determined against appellant by the jury. The evidence was ample to support the verdict.

2.

Next, appellant insists that the cause should be reversed for the reason that "the defendant (appellant) did not get a fair trial because he was required to select a jury from a jury panel, who, immediately prior to his trial had heard him vigorously denounced and his credibility violently attacked and was thereby prejudiced against him," contrary to his constitutional rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States and Art. 2, § 10 of our own Constitution.

The record reflects that immediately preceding the trial of appellant, a jury of the regular panel had convicted James Thompson of an assault with a deadly weapon on Montaque (appellant in the instant case) who was the principal prosecuting witness for the State against Thompson, and for a similar assault on appellant, (both cases being tried together). This jury assessed Thompson's total punishment on the two charges at a term of two years imprisonment in the county jail and a fine of $1,500. The Montaque case was called for trial immediately upon the conclusion of the Thompson case and the jurors in that case made them-

selves available for *voir dire* examination for service in the Montaque case. During the selection of the jury in the Montaque case, the court, out of the jurors' hearing, made the following statement: "At the time of the calling of these jurors named for *voir dire* examination, counsel for the defendant moved that they be excluded from the panel and that they not be called for examination on the ground that they were members of the jury which tried the case of State against James Thompson and that by reason of their participation in that case would be ineligible to serve as jurors in the present case, citing as reasons for their ineligibility the following:

"(1) That in his argument to the jury in the case of State of Arkansas versus Thompson one of the counsel for the defendant, James Thompson, had characterized the present defendant, Freeman Montaque, as a 'Big Negro in West Memphis,' 'one of the biggest slickers that ever came into this courtroom,' 'a liar,' 'a Negro who drove a big Cadillac and went around all dressed up in fancy clothes' and that the present defendant, Freeman Montaque, 'was going to take all of the money of his present wife and then go looking for another.' The above jurors on their *voir dire* examination, when these things recited above were called to their attention recited in response to questions that they had from the previous trial formed no opinions as to the credibility of Montaque as a result of that trial, were neither prejudiced in his favor or in favor of the State, nor would they be in the present trial, that they could try the present case impartially, giving to the defendant and the State of Arkansas a fair hearing, and that they would base their verdict in this case solely on the evidence and instructions of the Court. In the course of the *voir dire* examination of the entire panel the defendant exercised seven (7) pre-emptory (sic) challenges and the State exercised two. At the time that the members of the petit jury of the case, State of Arkansas against James Thompson, were called for *voir dire* examination the defense had exhausted six (6) of its pre-emptory (sic) challenges. The Court refused to quash the remaining members of

the panel, that is those members who were on the Thompson petit jury, to which ruling of the Court the defendant objects and excepts."

The trial court is given a large discretion in determining the bias or prejudice of a juror as affecting his qualifications to serve in any particular case. In *Lane* v. *State,* 168 Ark. 528, 270 S. W. 974, we held (Headnote 2): "The question of the impartiality of the jury, as guaranteed by the Constitution, Art. 2, § 10, is a judicial question of fact within the sound discretion of the trial court."

Jurors must be presumed to possess the qualifications required under §§ 39-208 and 39-206 of the statutes (Ark. Stats., 1947) and that is "persons of good character, of approved integrity, sound judgment, and reasonable information." We find no abuse of the trial court's discretion here. The jurors appear to have been carefully examined on their *voir dire* as to possible bias or prejudice against appellant and each answered that he had none. Of strong significance is the fact that those members from the Thompson jury who were accepted on the Montaque jury convicted Thompson for assaulting Montaque in spite of the rather severe castigation of Montaque by defense counsel in that trial. We find no error.

3.

Appellant further argues that the court committed error "in permitting the prosecuting attorney to ask the defendant whether or not he had been arrested on a traffic violation in Forrest City and whether or not he had ever been arrested on a charge of disposing of mortgaged property."

Appellant's position is untenable for the reason that the alleged error was invited by appellant. The record reflects that after appellant took the stand in his own behalf, his counsel questioned him as follows: "Q. Have you ever been convicted of violating a traffic ordinance or regulation or statute? A. I wouldn't say I had been convicted. I had an accident in Little Rock, on Broad-

way. I paid it. I didn't know. I newly started driving an ambulance and I up and paid it. He said, 'You owe $14.' And I up and paid it. Q. When was that? A. 1945. Q. Have you been arrested since then? A. No. Q. Have you been arrested by any county officers, local officers or State troopers since you have been in West Memphis? A. No, sir."

On cross-examination of appellant, appellant says in his brief: "The prosecuting attorney asked the defendant (appellant) this question. 'In Little Rock were you arrested for disposing of mortgaged property?' Appellant's attorney objected to this question then (Tr. p. 121) and again (Tr. p. 122) and asked that the question be stricken from the record. Appellant was never required to answer the question, but the mere fact that the question had been asked was certainly prejudicial to him. . . .

"The same is true of the question asked by the prosecuting attorney on page 122 of the transcript. He asked, 'I will ask you whether or not you were arrested on a traffic violation in Forrest City about a month before this wreck happened.' "

The general rule is well established that where an accused takes the stand in his own behalf, he subjects himself to the same rules of cross-examination as any other witness. *McGuire* v. *State,* 189 Ark. 503, 74 S. W. 2d 235; *Peterson* v. *Jackson,* 193 Ark. 880, 103 S. W. 2d 640.

Counsel for the State had a right to question appellant on cross-examination as to prior arrests, in the circumstances, in an effort to show that he had not truthfully answered the above questions propounded by his own counsel on direct examination. The Court, therefore, properly admitted this testimony as affecting appellant's credibility and the weight to be given his testimony.

4.

Appellant also assigns as alleged error, the refusal of the Court to give one of his instructions (No. 5) to

which he specifically referred in his motion for a new trial. This requested instruction does not appear in the bill of exceptions nor do the facts upon which the assignments were based. No objection was made or exceptions saved to the action of the Court in refusing this instruction.

In *McFadden* v. *A. B. Richards Medicine Company,* 170 Ark. 1011, 282 S. W. 353, we said: "It is well settled in this State that exceptions to the action of the trial court in giving or refusing instructions must be made during the trial and brought into the record by bill of exceptions. It is not sufficient to merely assign the giving or refusing of instructions as grounds for a motion for a new trial. *De Queen & Eastern Rd. Co.* v. *Pigue,* 135 Ark. 499, 205 S. W. 888; and *Martin* v. *Duke,* 156 Ark. 54, 245 S. W. 173," and in *Thompson* v. *State,* 130 Ark. 217, 197 S. W. 21, we said: "The facts upon which the assignment of error are based must be set forth in a bill of exceptions, as the motion for new trial operates only as assignment of error and not as an authoritative narrative of the incidents of the trial."

Appellant next contends that there was error in the Court's refusal to give the following requested instruction: "You are instructed in order to find the defendant guilty of involuntary manslaughter you will have to find that he was guilty of a greater degree of negligence than would cause him to be civilly liable."

This instruction appears to have been fully covered by the court in the following instruction which was given without objection. "The phrase 'reckless, willful, or wanton disregard for the safety of others,' as used in the statute read to you in these instructions requires that the actions of the defendant constitute criminal negligence rather than ordinary negligence, which is characterized by a failure to use that degree of care exercised by ordinary prudent persons, and the phrase implies something more than mere inadvertence or misadventure. Criminal negligence indicates a reckless disregard of consequences, or a needless indifference to the

rights and safety of others with a reasonable foresight that injury would probably result. It is a recklessness or indifference incompatible with a proper regard for human life."

The Court was not required to multiply its instructions on a particular issue. *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26.

Other alleged errors have been considered and found to be without merit.

Affirmed.

JACKS *v.* STATE.

4668 242 S. W. 2d 704

Opinion delivered October 8, 1951.

J. Fred Jones, George Holmes and *H. A. Tucker,* for appellant.

Ike Murry, Attorney General, and *Francis W. Wilson,* Assistant Attorney General, for appellee.

George Rose Smith, J. Appellant was convicted below of having violated Initiated Act No. 1 of 1950 (Acts of 1951, p. 1013), which made it a misdemeanor for the owners of cattle, horses, mules, hogs, sheep, or goats to allow them to run at large on any public highway in the State. Appellant admits that he permitted his cattle to run at large upon a public highway, but he contends that because the asserted offense occurred within a stock law district his conduct was lawful under Act 120 of 1951, which purported to amend the 1950 initiated act. The trial court held the amending act to be unconstitutional and imposed a fine of $10, from which this appeal is taken. Our decision turns upon the validity of Act 120.

Act No. 1 contained no exception to its broad prohibition against the running at large of the animals we have enumerated. But by Act 120 the General Assembly undertook to limit the operation of the initiated act in two respects. (The State does not question the legislature's power to amend an initiated act, as Amendment 7 to our constitution clearly permits such an amendment by a two-thirds vote of all the members in each house. Act 120 received the required vote.)

First, Act 120 provides that the initiated act shall apply not to all public highways but only to United States highways, hard-surfaced highways, and highways within the corporate limits of any city or town. The State insists that this provision infringes the guaranties of Article 2, § 18, of the Arkansas Constitution; but we find it unnecessary to pass upon this question.

Second, Act 120 exempts from its operation any county or district having a stock law enacted prior to January 1, 1951. The State contends that this exemption marks Act 120 as a local law of the type forbidden by Amendment 14 to the State constitution. We think this issue to be decisive.

The distinction between a general law and a local or special law is so well established in Arkansas that a detailed review of the decisions is unnecessary. General laws often apply uniformly throughout the State, but absolute uniformity is not essential in every instance. Classification is permitted, but the differences in the impact of the statute must be reasonably related to the purpose of the law. *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617; *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. 2d 991. Thus the legislature may restrict the city manager form of government to the larger cities, as there is less need for the system in small communities. *Knowlton* v. *Walton,* 189 Ark. 901, 75 S. W. 2d 811. But a statute which applies only to counties of a certain population is local if relative population has nothing to do with the subject-matter of the law. *State ex rel. Burrow* v. *Jolly,* 207 Ark. 515, 181 S. W. 2d 479.

Both Act No. 1 and Act 120 are manifestly intended to promote public safety upon the highways. Act No. 1 applied to the entire State, but Act 120 exempts areas having a stock law. The question, then, is whether the exemption is reasonably consistent with the goal of uniform traffic safety throughout the State. If local stock laws accomplish substantially the same purposes as the initiated act the exemption is not unreasonable. But if such local laws fall demonstrably short of accomplishing these purposes, if such local laws do little or nothing toward safeguarding highway traffic, then the exemption is arbitrary and makes the statute a local one. It is immaterial whether the inadequate stock laws are few or many in number, for we have repeatedly held that a statute is local when only a single county or other small area is arbitrarily excluded from its purview.

Our statutes contain a wide variety of stock laws. Under general law the electors of three or more townships may restrain the running at large of horses, mules, asses, cattle, goats, swine, sheep, "or any two or more of said animals." Ark. Stats. 1947, §§ 78-1401 to 78-1412. Under another statute counties may prevent the running at large of hogs, sheep, and goats. Section 78-1413 *et*

seq. A great many stock laws have been adopted under these acts, and it is evident that in some districts there is no restraint upon large animals, such as horses, mules, and cattle.

Apart from districts created under general law, well over a hundred stock law districts were created by special acts before the adoption of Amendment 14. In many of these districts the prohibition is against straying livestock of any kind, and we may suppose that such laws achieve about the same result as Act No. 1, although in some cases there is no criminal penalty for a violation of the law.

In other districts, however, the ambit of the stock law is narrowly limited. Some of these laws are intended to protect crops and apply only to such small animals as hogs, sheep, goats, etc. Examples in this category include Act 128 of 1901, Act 35 of 1909, Act 329 of 1911, Act 411 of 1917, and Act 447 of 1921. Other laws are intended to prevent hybrid animals from mingling with purebred stock and are directed against straying bulls or boars alone, with an exception which allows registered blooded animals to roam freely. Examples in this category include Act 270 of 1913, Act 144 of 1915, Act 335 of 1919, and Act 422 of 1923. The statutes we have cited apply to fifteen entire counties in all, and many similar laws are on the books.

These examples demonstrate that many county and district stock laws do not restrain all the animals listed in Act No. 1, or even the larger ones that constitute the most serious hazards to motor traffic. It follows that the substitution of local stock laws for the provisions of Act No. 1 is not reasonably calculated to promote traffic safety in every part of the State. Under Act 120 one owner of cattle may be criminally liable for allowing them to wander upon the public roads, while his neighbor may pursue the same course with impunity, merely because he lives within the boundaries of a stock law district wherein restraints are imposed upon hogs, sheep, and goats. Yet the second man's cattle are equally as

dangerous to traffic as are those owned by the first man. Widespread inequalities like this one show that the classification contained in Act 120 bears no fair relationship to the purpose of the statute. The exemption of stock law districts must therefore be condemned as local and arbitrary.

Inasmuch as § 2 of Act 120 is invalid, the Act fails in its entirety. In this respect the case is similar to *Webb* v. *Adams, supra.* There an otherwise general law contained a proviso by which two of the seventy-five counties were arbitrarily excluded from the scope of the statute. We were urged to abrogate the proviso alone, thus converting the law into one of state-wide application. But Judge HART pointed out that such a construction would make the law apply to the two counties explicitly excluded by the legislature and thus would amount to judicial legislation. The present case is even stronger, as the sole purpose of Act 120 was to limit the effective scope of Act No. 1, and we have no reason to think that the legislature would have adopted Act 120 had stock law districts not been exempted. The circuit court was therefore correct in declaring Act 120 to be wholly unconstitutional.

Affirmed.

ROBINSON, J., dissents.

ROBINSON, J., dissenting. Initiated Act No. 1, approved at the general election, November 7, 1950, makes it unlawful for owners of cattle, horses, mules, hogs, sheep or goats to allow them to run at large along or on any public highway in the State of Arkansas. Act No. 120, 1951, amends Act No. 1 to the extent of prohibiting the running at large of the stock mentioned only on U. S. highways or paved highways, and provides that the Act does not apply to "any county or stock law district which had enacted a county or district stock law prior to January 1, 1951." Because Act 120 excludes from its operation any county or stock law district which already prohibited the running at large of the stock with which the Act was deal-

ing, this Court held that Act 120 is local or special legislation and, therefore, unconstitutional.

Under the general laws of the State, three or more townships, by a vote of not less than 25% of the qualified electors of said district, can petition the County Court to call an election for the purpose of prohibiting the running at large of livestock in the designated district. Many such districts have been formed in the State. Even if Act 120 had not exempted those districts which had voted a stock law and the Court should hold that the Act applied to those districts, there is nothing to prevent the County Court, on petition of a sufficient number of qualified electors from calling an election for the purpose of again adopting a stock law. Hence, it would be a futile thing to apply an act of the legislature to a local stock law district voted by the people when the voters' power to re-enact a stock law was left intact.

In my opinion, Act 120 would not have affected stock law districts mentioned therein even if the exemption had not been specifically set out. "Where there is a special Act made to apply in particular cases, it only applies, and not the general act." *Mills* v. *Sanderson,* 68 Ark. 130, 56 S. W. 779. Therefore, the exemption was a nullity. It did nothing, and cannot be construed as making Act 120 special or local legislation. For this reason, I respectfully dissent.

FLOWERS *v.* MANN.

4-9546 242 S. W. 2d 840

Opinion delivered October 15, 1951.

Rehearing denied November 12, 1951.

Walter N. Killough and *John N. Killough,* for appellant.

Giles Dearing, for appellee.

HOLT, J. The record shows that appellee, Mrs. Mary Lee Mann, entered into an oral agreement with her second cousin, Iva Flowers, and Iva's husband, Gary, (appellants here) to buy a home in Wynne, Arkansas, and own, occupy and hold the property "as joint tenants with right of survivorship." They agreed to share the property, the insurance, taxes, upkeep, and living expenses equally and live in the house as "one family." Their ages were: Mrs. Mann—71, Mrs. Flowers—44, and Mr. Flowers—50.

Pursuant to the agreement on May 18, 1948, they purchased a residence in Wynne for $14,000. Of this amount, Mrs .Mann contended that she agreed to pay, and did pay $8,000, and that appellants agreed to pay the balance of $6,000. Appellants, on the execution of the deed, voluntarily paid $1,000 on the purchase price, which they termed an "appreciation" payment. The $5,000 balance was evidenced by five one thousand dollar installment notes, the first to become due November 15, 1949.

The deed to the property contained the following recital: "In consideration of the sum of Fourteen Thonsand Dollars, paid and to be paid by Mary Lee Mann, Gary Flowers and Iva Flowers as follows, to-wit: Nine Thousand Dollars cash in hand (the receipt of which is hereby acknowledged), and the remaining $5,000 payable in annual installments of $1,000 each, the first installment being due on or before November 15, 1949,

and a like installment being due on or before the 15th day of each succeeding November, until all of said remaining unpaid purchase price, with interest as hereinafter mentioned is fully paid, and all of said installments being evidenced by notes of even date, bearing interest from date until paid, at the rate of five per cent per annum, do hereby grant, bargain and sell unto the said Mary Lee Mann, Gary Flowers and Iva Flowers, as joint tenants and unto their heirs and asisgns forever, * * *

"To have and to hold the same unto the said Mary Lee Mann, Gary Flowers and Iva Flowers, as joint tenants, with right of survivorship."

The five notes were all signed by appellants and appellee and they moved into the home June 2, 1948. After several months under this arrangement, a coolness developed and the relations of the parties became strained. They discontinued eating at the same table, lived in different parts of the house, and quit speaking, creating an almost intolerable situation, according to the testimony.

When the first installment note came due, November 15, 1949, appellants refused to pay it. They frankly admitted that they did not intend to pay it or any of the remaining notes, insisting that they had never agreed to do so and that these notes were the obligation of Mrs. Mann. Following their refusal to pay, Mrs. Mann paid the $1,000 note and then brought the present suit, alleging that appellants had breached their agreement or contract with her and prayed "that the said agreement to be cancelled, and that any and all right, title or interest the defendants have in or to the said property be by decree of this court divested out of the defendants and vested in this plaintiff; that the defendant be required to account to plaintiff for rents for the time they have used said residence, and an accounting be had between them," etc.

The trial court found that appellants had breached their contract with Mrs. Mann, that the deed to the parties "should be reformed, to strike out and eliminate the

clause as to survivorship in said deed, and to divest the defendants of any and all right or title to the said property and to vest the title to same exclusively in the plaintiff.

"That all personal property owned jointly by the parties be sold by J. W. McElroy who is appointed as Commissioner for such purpose, and the proceeds of the sale be divided among the parties according to their interests, and that the defendants be charged with $25 per month from May 18th, 1948, until September 8th, 1950, and that from and after that date the defendants be charged with the sum of $37.50 per month as rent on said premises occupied by them if an appeal be taken herein.

"That the plaintiff pay to the defendants the difference between the rents and the said $1,000 so paid by Gary Flowers, and that the defendants vacate the said premises at once upon payment of such difference," and entered a decree accordingly. This appeal followed.

The primary and decisive question presented is whether appellants entered into a contract with Mrs. Mann, whereby they agreed to pay the balance of the purchase price of this house if she would pay the $8,000 and whether they breached this contract.

We hold that the finding of the trial court in favor of Mrs. Mann on this issue was not against the preponderance of the testimony. Mrs. Mann testified positively that appellants did agree to pay the balance over $8,000 and the testimony of Mr. Drexel, who negotiated the sale of the property to the parties, and other witnesses tended to corroborate her. Appellants denied any such agreement and testified, in effect, that Mrs. Mann was to pay all of the purchase price and that they were to pay nothing, and did not intend to pay anything on the purchase price. The undisputed fact that appellants signed, along with appellee, the five installment notes, thereby obligating themselves to pay, tends to contradict their testimony and to corroborate Mrs. Mann.

Since it appears that the first $1,000 note became due November 15, 1949, and appellants refused to pay it,

their breach of the contract must begin from this date (November 15, 1949) and appellants charged with rent from this date and not from May 18, 1948, as the court found. With this modification only, the decree is affirmed.

McHENRY *v.* STATE.

4672 242 S. W. 2d 707

Opinion delivered October 15, 1951.

Ovid T. Switzer and *W. P. Switzer,* for appellant.

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

ROBINSON, J. The appellant was tried on an indictment charging him with having in his possession two pints of wine upon which the Arkansas excise tax had not been paid. He was convicted and his punishment fixed at a fine of $500 and imprisonment in the county jail for a period of 6 months. On appeal appellant contends that there is no law prohibiting the possession of wine on which the Arkansas tax has not been paid unless such wine has been illegally manufactured, and that

the evidence shows the wine to have been bought in Louisiana, and not to have been illegally manufactured. Appellant also contends that the punishment fixed by the jury is excessive.

Section 48-404, Ark. Stats., prohibits the shipment or transportation into the State of Arkansas of any spirituous liquors, vinous liquors, wines, or other than Arkansas wines, beer, etc., without first having obtained a permit from the Commissioner of Revenue. Section 48-913, Ark. Stats., provides that any person who has in his possession intoxicating alcoholic liquor not obtained under and in conformity with the provisions of the Act shall be deemed guilty of a misdemeanor, and shall upon conviction be fined not less than $50 nor more than $500, and imprisoned for not exceeding 6 months, or both so fined and imprisoned in the discretion of the court or jury.

Section 48-934, Ark. Stats., provides: "It shall be unlawful for any person to buy, bargain, sell, loan, own, have in possession or knowingly transport illicitly distilled liquor or intoxicating liquors of any kind upon which the Arkansas excise tax prescribed by law, has not been paid, and it shall be unlawful for any person to buy, bargain, sell, loan, own, have in possession or knowingly transport an illicit distillery for the unlawful manufacture of intoxicating liquors, or any apparatus designed for the unlawful manufacture of spirituous, vinous, malt or intoxicating liquors." The penalty for the violation of this section is a fine of not less than $50 nor more than $500, and imprisonment not exceeding 6 months, or both fine and imprisonment.

Appellant says that § 48-934 should be construed as applying only to those liquors which have been illicitly distilled, as the Statute deals with illicitly distilled liquors and illicit distilleries; that the doctrine of *ejusdem generis* should apply in that respect.

The emergency clause is highly persuasive of the fact that the Legislature intended to prohibit the pos-

session of intoxicating liquors without the Arkansas tax having been paid. The emergency clause provides:

"Whereas, it has been ascertained that large quantities of intoxicating liquors are being illegally manufactured and sold in the State of Arkansas and large quantities of intoxicating liquors upon which the State tax has not been paid are also being sold in the State of Arkansas, and the State is losing great sums of money in the form of revenue, by reason thereof," etc.

Section 48-934 provides that it shall be unlawful for any person to have in his possession intoxicating liquors of any kind upon which the Arkansas excise tax prescribed by law has not been paid. The emergency clause, after referring to the fact that large quantities of intoxicating liquors are being illegally manufactured and sold, further states:

". . . and large quantities of intoxicating liquors upon which the State tax has not been paid are being sold in the State of Arkansas", etc. Courts will give effect to all language employed in a Statute when reason and consistency permit. *Wiseman* v. *Affolter,* 192 Ark. 509, 92 S. W. 2d 388.

In *Burrell* v. *State,* 203 Ark. 1124, 160 S. W. 2d 218, the conviction of the defendant for possessing intoxicating liquors upon which the Arkansas tax had not been paid was upheld by this court. In that case the liquor involved had, in all probability, been illegally manufactured, but the case did not turn on that point.

With regard to the punishment fixed by the jury, it does not exceed the maximum punishment allowed by the Statute, and from the record we cannot say that it is excessive. *Garner* v. *State,* 184 Ark. 1093, 44 S. W. 2d 1092; *Cox* v. *State,* 164 Ark. 126, 261 S. W. 303.

Affirmed.

ALTUS-DENNING SCHOOL DISTRICT NO. 31 *v.* OZARK SCHOOL DISTRICT NO. 14.

4-9543 242 S. W. 2d 709

Opinion delivered October 15, 1951.

[redacted]

Wiley W. Bean and *Mark E. Woolsey,* for appellant.

Yates & Yates, John J. Cravens and *Jeta Taylor,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal presents three primary issues: (a) Was the annexation of Alix School District No. 33 to Ozark School District No. 14 effective when the Franklin County Board of Education, and Circuit Court on appeal, dealt with five districts in 1930?; (b) may a majority of a segment of a school district (where no part of the territory is contiguous to the parent body) be legally annexed on petition of electors of the segment only?; (c) had the right of appeal in the case at bar been lost? Secondary issues are discussed in the briefs.

In 1950—after retaining petitions, resolutions, certificates, etc., about a year in order to give the subject full consideration, the Franklin Board of Education found that a majority the electors in "former" Alix School District No. 33 had petitioned for annexation to Altus-Denning District No. 31. It was also found that

no part of Alix district touched the Ozark district, that matters of transportation and other elements of economy and convenience supported the change, and that in all respects the petitioned result would be for the best interest of the community served. With these conclusions there does not appear to be serious disagreement and it is quite clear that the Board, in making its order, entertained a sincere conviction that correct results were being reached.

There was no Supreme Court appeal from the Circuit Court judgment consolidating the five districts Sept. 26, 1930. But it is argued that legal authority did not exist at that time for the annexation of non-contiguous territory, hence the Board's order and the Circuit Court judgment are void on the face of the record. Authority for the consolidation appears to have been Act 156 of 1927, which does not expressly or by necessary implication prohibit the inclusion of a non-contiguous area. The 1927 enactment amended § 8823 of Crawford & Moses' Digest, and, of course, preceded the recodification measure of 1931—Act 169, and its amendments. Since the annexations in Franklin County occurred in 1930, Ark. Stat's, § 80-404, had no application until the consolidation of 1950 was undertaken. It follows that in the absence of some showing that a matter essential to jurisdiction was omitted when the earlier consolidations occurred, the objections now raised cannot be reached collaterally or directly.

With the record in this condition the trial court from which this appeal comes correctly treated Alix district as part of Ozark No. 14 and had no alternative but to say, upon undisputed record facts, that the petitions coming from the Alix area were insufficient as a matter of law.

Our attention is called to Judge Mehaffy's language in *Priest* v. *Moore,* 193 Ark. 999, 39 S. W. 2d 710, where the broad discretion of county boards of education was commented upon and emphasized. The opinion was cited in *Lyerley* v. *Manila School District No. 15,* 214 Ark. 245, 215 S. W. 2d 733. The Priest-Moore reference, however, was immediately preceded by the statement that county

boards of education are charged with the duty of determining whether petitions are signed by the requisite number of electors. Favorable action depends upon an affirmative finding, and only in that event may the board grant the prayer of the petition "if it deems it best for the interests of the inhabitants of the territory affected." See Ark. Stat's, § 80-216.

Our attention is also called to Initiated Act No. 1, of 1948, § 3 [Acts 1949, p. 1414], but the directive there for county boards to study the entire school program is aimed at "the new school district as created herein."

There is a proviso authorizing *non-contiguous* territory to be included in any district, "and a district or districts not adjoining may be added to or consolidated with another district or districts." Ark. Stat's, § 80-404. Appellant thinks this was intended as authority for the transaction whereby the county board directed that the Alix territory be transferred to Altus-Denning. We think the entire statute must be read as a whole, and that it was not the intent of lawmakers to permit a portion of a district to make its own election and then, if supported by the county board, become attached to a new district.

Matters complained of in contending that the appeal was not perfected were supplied by a supplemental filing.

Affirmed.

MEADOWS *v.* HARDCASTLE.

4-9547 242 S. W. 2d 710

Opinion delivered October 15, 1951.

[redacted]

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

Richard Mobley and *Robt. J. White;* for appellee.

Ed. F. McFaddin, Justice. Appellants brought this suit to quiet their title to real estate, and from a decree refusing the prayed relief there is this appeal.

Mrs. Johnnie Bell Teal was the admitted common source of title. In 1937 she died testate, survived by her husband, W. J. Teal, and children and grandchildren. Her will, duly admitted to probate in Pope County in 1937, appointed Mr. Teal as executor and also stated: "I give to each of my children (naming them) or their heirs the sum of One Dollar. . . . I hereby give and bequeath to my husband, W. J. Teal, all my real estate . . . for his natural life and at his death it is hereby decreed that all my property and estate revert back to the heirs above named and they are to share equally in my estate."

"The heirs above named", as stated in the will, were the children of Mrs. Teal by her two prior marriages or the descendants of any deceased child. Mr.

Teal, as executor, paid $1.00 to each of the beneficiaries, and in 1937 conveyed Mrs. Teal's real estate to Dr. Berryman by warranty deed, under circumstances subsequently to be mentioned. Dr. Berryman conveyed the real estate to the appellants who in 1948 filed this suit to quiet title against the children[1] and heirs of Mrs. Teal, alleging that such defendants were barred by limitations, laches and estoppel from all claims of ownership to the property. Mr. Teal is alive, and was a witness for appellants. The Chancery Court dismissed the suit to quiet title.

I. *Limitations.* The appellants claim that when Mr. Teal conveyed to Dr. Berryman in 1937, such conveyance amounted to an abandonment of the property by Mr. Teal, and that limitations commenced at that time to run against the appellees. This contention brings us to the circumstances surrounding such conveyance. Mr. Teal and other witnesses for appellants testified that Mrs. Teal owed Dr. Berryman $1,440 for services rendered in her last illness; that in 1937 the property here involved was worth only $1,200; that Mr. Teal offered to convey the property to any of Mrs. Teal's children who would pay Dr. Berryman's claim; that all refused; and that thereupon Mr. Teal conveyed the property to Dr. Berryman to satisfy the claim of $1,440. Although Mr. Teal testified that Dr. Berryman's claim was filed and allowed by him, and also allowed by Probate Court order, nevertheless, a search of the probate records failed to disclose any order of the Court showing either filing or allowance of the claim. Furthermore, some of the appellees who testified denied Mr. Teal's testimony regarding his offer to convey the property to any of them who would pay Dr. Berryman. They also denied any knowledge of any claim of Dr. Berryman and insisted that Mr. Teal held only a life estate in the property.

[1] The complaint alleged that Floyd Willis was a son of Mrs. Teal and had executed a quitclaim deed to appellants, so he was not made a party to this suit.

As previously stated, appellants insist that the conveyance by Mr. Teal to Dr. Berryman in 1937 was an abandonment of the property by Mr. Teal, and that such abandonment started the statute of limitations against the appellees and in favor of Dr. Berryman and these appellants. To sustain such position, appellants cite, *inter alia, Killeam* v. *Carter,* 65 Ark. 68, 44 S. W. 1032; *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359; *Bowen* v. *Black,* 170 Ark. 237, 279 S. W. 782; *Clark* v. *Friend,* 174 Ark. 26, 295 S. W. 392; *Cunningham* v. *Dellmon,* 151 Ark. 409, 237 S. W. 450; and *Smart* v. *Murphy,* 200 Ark. 406, 139 S. W. 2d 33.

Appellees insist that Mr. Teal was and is a life tenant, and that, since he is still alive, limitations will not begin to run against the appellees until Mr. Teal's death. They cite, *inter alia, Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718, and *Bradley Lumber Co.* v. *Burbridge,* 213 Ark. 165, 210 S. W. 2d 284.

The appellees are correct in their contentions. It is clear that Mr. Teal held a life estate under the will, and that he recognized the will by having it probated, and by paying $1.00 to each of the persons named in the will. We have, therefore, a clear case of a life tenant making an attempted conveyance of the fee; and in *Bradley Lumber Co.* v. *Burbridge, supra,* Mr. Justice Robins, speaking for the Court, said:

"No principle of law is better established than that the possession of one claiming under a life tenant is not adverse to the remainderman until the death of the life tenant. . . . Nor did the attempted conveyance by Isabella J. Burbridge of the entire estate to J. F. Ritchie work a forfeiture of the life estate or start the statute of limitations to running against appellee."

The rule that the abandonment of the homestead by the widow starts the statute of limitations to run against the heirs does no apply when a person holding as a life tenant conveys property. In *Killeam* v. *Carter,* 65 Ark. 68, 44 S. W. 1032, Mr. Justice Wood pointed out the dis-

tinction between the widow's right of homestead and the right of a life tenant:

"The question, then, is, in case of abandonment of the homestead by the widow and notice thereof to the heirs, will the statute of limitations begin to run against them before her death? We are aware of the well-settled rule that a remainderman or reversioner expectant upon an estate for life, 'though he may, if he will, take notice of any disseisin done to the tenant of the particular estate, is yet not bound to do so, but may wait until his right of entry accrues upon the death of the tenant for life.' *Kessinger* v. *Wilson,* 53 Ark. 400, 14 S. W. 96; *Ogden* v. *Ogden,* 60 Ark. 70, 28 S. W. 796. But this doctrine has no application, even by analogy, to a reversioner expectant upon the homestead rights of a widow, having notice of the termination of such rights. The law wisely grants to the widow the privilege of occupying the homestead so long as she desires. But it is a privilege purely personal to her, which she can neither convey to nor share with another. She may enjoy the rents and profits only so long as she intends it as a home. Strictly speaking, she has no estate in the land itself, but only the privilege of occupancy. Alienation by her confers no rights, but it means abandonment, and the termination of her right of homestead. Not so with an estate for life. That terminates only upon the death of the life tenant."

Other cases that have recognized the distinction between the estate of a life tenant and the widow's right of homestead are: *Neeley* v. *Martin,* 126 Ark. 1, 189 S. W. 182; *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972; and *Maloney* v. *McCullough,* 215 Ark. 570, 221 S. W. 2d 770. In the case at bar limitations had not commenced to run against the appellees as remaindermen when this suit was filed to quiet title; and the Chancery Court was correct in refusing to sustain the appellants' plea of limitations.

II. *Laches and Estoppel.* Little need be said as to these points. Laches is generally considered to be a shield of equitable defense rather than a sword for the

investiture of legal title. See *Taylor* v. *Leonard,* 94 Ark. 122, 126 S. W. 387, and *Anders* v. *Roark,* 108 Ark. 248, 156 S. W. 1018. See also 19 Am. Jur. 340. Assuming, not deciding, that appellants were in a position to invoke either laches or estoppel, nevertheless, we find no facts in this case to support either of such pleas. The appellees, as remaindermen, were under no obligation to act in the case at bar, so they could not have been guilty of laches. Neither did the appellees do, or fail to do, anything on which appellants could base an estoppel.

III. *Improvements.* Appellants claim that they have improved the property and should recover for such improvements. Appellees claim, *inter alia,* that appellants have merely kept the property in repair. But this matter of improvements is premature because the life tenant is still alive and his grantee is in possession. This is a suit to quiet title rather than to establish the fact or value of improvements.

CONCLUSION

As against the appellees, the appellants owned only an estate for the life of Mr. Teal; and the Chancery Court correctly refused to quiet appellants' title to the fee.

Affirmed.

STIENBARGER *v.* KEEVER.

4-9557 242 S. W. 2d 713

Opinion delivered October 15, 1951.

[redacted]

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

Mahony & Yocum, for appellee.

George Rose Smith, J. This is a suit by the appellee to cancel a tax title to the leasehold interest in the oil and gas underlying 160 acres of land. This interest was sold to the State for nonpayment of taxes in 1934, and the appellant has acquired the tax title. The chancellor held the sale void and granted the relief sought by the complaint.

The appellee relies principally upon a defect in the sale similar to the defects considered in *Sorkin* v. *Myers*, 216 Ark. 908, 227 S. W. 2d 958, and *Davis* v. *Stonecipher*, 218 Ark. 962, 239 S. W. 2d 756. In those cases it was shown that severed mineral interests were listed for taxation in a separate book in the alphabetical order of the owners' names, instead of being subjoined to the corresponding surface ownerships, which are required to be arranged by section, township, and range. We held that the alphabetical listing of mineral interests is not permitted by the statutes and renders the sale void for want of power to sell.

Here, as in the earlier cases, taxes against minerals were extended in a book separate from that in which other real property was listed. But in the case at bar there was an alphabetical list for each school district instead of a single list for the entire county. The appellant argues that this circumstance distinguishes this case from the earlier decisions, for the reason that a taxpayer can more readily find the amount of taxes levied against his property when there is a distinct list for each school district. A deputy collector testified that when he was supplied at the trial with the legal description of the appellee's leasehold interest it took only two or three minutes to find the 1933 tax against the property. The process involved first a reference to the acreage tax book to ascertain the particular school district and then

a reference to the Leases and Royalties book to determine the tax.

We do not agree that the existence of alphabetical listings by school districts is enough to require a decision contrary to the previous holdings. It may be true that the taxpayer's effort to find the description of his property is made easier when the county-wide list is broken down into smaller district listings. But this fact does not answer the difficulty that led to the *Sorkin* decision. There we reasoned that an alphabetical arrangement has not been authorized by statute; on the contrary, the governing law requires that the books be made up in the order of section, township, and range. So here, the statute does not permit alphabetical lists by school districts, and the fundamental defect is not cured by the fact that one unauthorized method of assessment may be slightly better than another.

Affirmed.

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

4-9563 242 S. W. 2d 714

Opinion delivered October 15, 1951.

Henry Donham and *Pat Mehaffy,* for appellant.

Kenneth C. Coffelt and *C. B. Erwin, Jr.,* for appellee.

PAUL WARD, J. This action was brought by Evert Lester, a boy five years and four months old, by his mother as his next friend, and in her own right, against appellants for injuries to the boy resulting from a severe burn. Evert was playing on appellants' right-of-way near his home when his clothes were ignited from a fire which appellants' employees built to warm their hands, and later abandoned. The trial below resulted in a verdict for appellees in the sum of $10,000 from which comes this appeal.

There is very little conflict in the evidence regarding the circumstances of the injury. The train crew was

switching cars near the South Elm Street crossing in the City of Little Rock and a switchman kindled a fire about 1½ feet high with oil rags on the right-of-way about six or eight feet from the crossing. Evert, who lived about 100 yards away and had on previous occasions visited the locality of the fire to the knowledge of appellants' employees, on this day, November 6, 1949, left his home around 6:30 a. m. and came to where the switchmen were standing around the fire. He was dressed in a polo shirt and a pair of khaki pants. One of the employees attempted to get Lester to return home, but he continued to stand around the crossing and observe the switching activities. Later, the switching crew, having finished their duties in that vicinity, left the boy near the fire which was still burning. Shortly thereafter Evert's clothes caught fire. A witness heard him "hollering," ran to him, and smothered the fire. Evert was severely burned and spent about four months in the hospital where he suffered much pain. He will probably be crippled for life, and the amount of the judgment is not questioned by appellants. It is conceded that Evert had average intelligence for a child his age. He had been told by his mother that fire was dangerous and that it would burn him. Evert, along with other children in the neighborhood, had on previous occasions played at the Elm Street crossing where appellants' employees would sometimes talk with them and give them candy or gum.

The complaint alleges that appellants were negligent in leaving the child alone near the blazing fire; that appellants knew, or by the exercise of ordinary care should have known, they placed the child in a position of danger when they abandoned him near the blazing fire; and that building and abandoning the fire under the circumstances created an attractive nuisance dangerous to a child the age of Evert.

For reversal the appellants present their reasons under six distinct headings which in brief are as follows: First, the attractive nuisance doctrine does not apply; second, there is no evidence from which the jury could find Evert did not appreciate the danger; third, appel-

lants' employees were not acting within their scope of authority; and the fourth, fifth and sixth grounds relate to allegedly erroneous instructions. In our opinion none of these assignments contain reversible error, as will appear from the following.

First. Appellants say two elements are lacking which are necessary to bring this case within the attractive unisance doctrine, *viz*: (a) Their employees did not and could not know the fire presented an unreasonable risk to appellee; and (b) the child was old enough and had sufficient intelligence to recognize the danger. In substantiation of their contention, appellants cite excerpts from Prosser on Torts and from *St. L. I. M. & S. Ry. Co.* v. *Waggoner,* 112 Ark. 593, 166 S. W. 948, 52 A. L. R., N. S. 181, to the effect that this doctrine does not apply to *common objects* such as fire, and they also cite 38 Am. Jur., Negligence, § 151, to show the doctrine applies only where the danger is hidden or latent. These are conceded to be correct declarations of law, but we think they do not necessarily bar recovery in this case. The rule in this state is well stated in *Ark. Valley Trust Co.* v. *McIlroy*, 97 Ark. 160, 133 S. W. 816, 31 L. R. A., N. S. 1020, and restated in *Garrett et al.* v. *Ark. P. & L. Co.,* 218 Ark. 575, 237 S. W. 2d 895, in 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."

Also, as stated in the last cited case, the doctrine applies especially and exclusively to children of tender years. Here, Evert's immaturity presented a question for the jury to decide under proper instructions. It is not here contended that there was any error in the court's instructions on this particular issue. In the case of *Lombardi* v. *Wallad,* 98 Conn. 510, 120 A. 291, where the facts were similar to the facts in this case, the court allowed

recovery where an eight year old boy was involved, using this language:

". . . For in this case, when the defendant Wallad went away from the burning embers of the fire, without precaution of any kind, he had been familiar for some years with the yard and its situation in the rear of two houses containing 14 tenements in which more than 20 children lived; and he knew that these children frequently used this yard as a playground; and he knew also that they were likely to approach any fire which he kindled. From the burning embers which Wallad had left unguarded the boy got the lighted stick by which the fatal injuries were directly effected. . . . Wallad's negligence exposed the children who came near the burning embers to the risk of injury if another person also should afterward be negligent."

In the case of *Nashville Lumber Co.* v. *Busbee,* 100 Ark. 76, 139 S. W. 301, 38 L. R. A., N. S. 754, also involving an eight-year-old child, it was said:

"Even though a child of tender years may be warned of the danger, it is still a question for the jury as to whether the child, considering its age and intelligence, had sufficient mental capacity to appreciate the danger after such warning."

The above is a sufficient answer to appellants' second contention that the evidence was insufficient for the jury to find Evert did not appreciate the danger.

Appellants, in the third assignment, contend there was insufficient evidence for the jury to find that the switchmen were acting within the scope of their employment when they built the fire. We do not agree. The evidence shows the fire was built on the railroad right-of-way and for the purpose of warming the workmen's fingers. Presumably this was done so they could perform better services and be more comfortable in the discharge of their duties. At any rate, it was a question for the jury under instruction which, in this case, were proper.

Regarding the fourth and fifth assignments, we also find no reversible error. Plaintiffs' instruction No. 1 is objected to because, as appellants say, it does not point out that their employees knew or should have known the fire involved an unreasonable risk to a child the age of Evert. A careful reading of this instruction convinces us that it does cover the point about which complaint is made. Among other things the instruction contained these words: ". . . if you further find from a preponderance of the evidence that said employees knew, or within the exercise of ordinary care could and should have known that it was dangerous to make said fire, or to leave the same unguarded, and they further knew, or within the exercise of ordinary care could and should have known, that Evert Lester was near the fire, or might be near the fire, or that he was attracted to said fire by it, or might be attracted to it, and as a result be injured thereby. . . ." Moreover, this point is involved in the attractive nuisance doctrine disposed of above. Appellants also complain of the court's instruction relating to the scope of the switchmen's authority in building the fire. It is urged that the instruction is erroneous because: (a) It ignores the well established principle that the act of the servant must pertain to the particular duties of the employment; and (b) it failed to state that the servants' departure from the employer's business for a purpose of his own, however short, will absolve the master of liability. The court's instruction on this point was lengthy and it would serve no useful purpose to set it out in full, but we think it sufficiently covers the objection mentioned above and that it contains no reversible error.

The last ground urged by appellants for a reversal relates to a statement made by the court to the jury when it reported unable to agree on a verdict. After the jury had deliberated approximately two hours it returned into the court room and announced it was unable to reach a verdict, whereupon the court said, among other things, that he would like for it to reach a verdict if possible to do so without waiving any juror's con-

scientious objections, because the litigants on both sides had been to considerable expense and the county was always put to expense in maintaining courts. Appellants contend this constituted error particularly because it was known that the plaintiffs were poor people. No case is cited in support of this contention. We are of the opinion that the court used appropriate wording to protect all parties and that no reversible error was committed.

Appellees have prayed a cross-appeal, asking for a reversal under *Ark. Stats.* (1947) § 41-510 which provides for double damages for injury occasioned by fire. The above section is a part of Act 85 of 1935 which is entitled "An Act to Protect the Forests of the State". Said Act is embraced in *Ark. Stats.* (1947) §§ 41-507 to 41-514. Not only the title of the Act but the entire wording, in our opinion, shows that it was intended to deal with damage to property and not to personal injuries. If any doubt exists, and none does in our minds, then it would be resolved in favor of the party to be charged, since the Act is penal. The rule is well stated in *Simmons* v. *American Railway Express Co.,* 147 Ark. 339, 227 S. W. 414, in this language:

"It is a rule of construction, of universal application, that these penalty statutes are to be strictly construed, and no one can invoke the benefit of such a statute who does not bring himself strictly within its terms."

The judgment of the lower court is affirmed both on direct and cross-appeal.

CAPITAL TRANSPORTATION COMPANY *v.* ALEXANDER.

4-9558 242 S. W. 2d 833

Opinion delivered October 22, 1951.

[redacted]

Bailey & Warren, for appellant.

L. A. Hardin, for appellee.

George Rose Smith, J. This is a suit for personal injuries sustained by the appellee while attempting to alight from a city bus operated by the appellant in Little Rock. In the court below the appellee obtained a verdict and judgment for $1,348.

This is the plaintiff's version of the accident: On the afternoon of January 18, 1949, she rode one of the defendant's buses on her way home from work. When the bus stopped at Sixteenth and High streets plaintiff attempted to leave by the rear door. This door is usually held rigidly shut by air pressure and can be opened only if the bus driver releases the air by operating a lever at his seat in the front end of the bus. When the pressure is released the door hangs in a slack position and can be pushed open easily by passengers.

In trying to leave the bus the plaintiff pushed against the door, but it would not open. The driver called to her several times, saying, "Push, push," and while the plaintiff was doing so the door opened and she fell to the ground, suffering a fractured wrist and other injuries. This evidence is not uncontradicted, but the jury were justified in believing that the accident happened in this manner.

The bus company first argues that the plaintiff "did not prove her case by a preponderance of the evidence." It is not our function to weigh the testimony in common law cases; the verdict must be sustained if it rests upon substantial evidence. Here the proof is of that character. The mechanism controlling the rear doors of the appellant's buses must evidently not be released while a passenger is pushing strongly against the door, else there is danger of an occurrence like that of which the appellee complains. Obviously a passenger can almost never be in a position to offer proof of the exact instant at which the bus driver pulled the lever at his end of the vehicle. The issue was properly submitted to the jury, who were at liberty to infer that the proximate cause of the accident was the driver's negligence in releasing the air pressure while the plaintiff was vigorously pushing against the door in obedience to the driver's directions.

The other grounds for reversal have to do with the giving and refusal of instructions. At the defendant's request the court gave two general instructions on the subject of contributory negligence, both of which told the jury that the plaintiff was not entitled to recover if her own carelessness contributed in the slightest degree to the cause of her injuries. The appellant insists that the court should also have given three other instructions on the subject, which would respectively have told the jury that (a) the plaintiff's failure to use the hand supports at the door may have been contributory negligence, (b) her failure to abandon the rear door and leave by the front door may have been contributory negligence, and (c) her exertion of more force against the door than was necessary may have been contributory negligence. The court modified the third of these instructions, to permit the jury to consider the bus driver's directions that plaintiff push against the door; the other two instructions were refused.

We think the court acted correctly in the matter. The issue of contributory negligence had been fully covered by general instructions, and the court was not required to over-emphasize this defense by devoting a sep-

arate charge to each act that might be thought to amount to negligence. The case is similar to *Dunman* v. *Raney,* 118 Ark. 337, 176 S. W. 339, which was an action by a patient against a physician for malpractice. In addition to general instructions on the issue of contributory negligence the defendant requested two instructions detailing specific conduct that might amount to such negligence. We held that the requests were properly refused as being abstract and also as being sufficiently covered by the instructions given. Here the requests were not abstract, but they were adequately covered by the rest of the court's charge. Of course counsel were free to, and doubtless did, bring these matters to the jury's attention during the argument of the case.

Appellant also objects to the plaintiff's principal instruction, which summarized her theory of the case and submitted the main issues to the jury. The instruction is said to be abstract, but we are not told in what particular and do not find it subject to this objection. It is also argued that here too the court should have incorporated the various specific acts that might constitute contributory negligence, but for the reasons already given we think it was enough for the court to refer to this defense in general language.

Affirmed.

WARD, J., dissents.

PAUL WARD, J., dissenting. In my opinion the lower court committed reversible error in failing to give appellant's requested instruction No. 9.

In appellant's amended and substituted answer, it was stated: "She (appellee) failed to use the hand supports which are for the use of passengers leaving through the rear door of the bus." Appellant's superintendent testified as follows: "We have a number of vertical stanchions around that door, but the main hand hold is a vertical stanchion that is fastened to the bottom just

immediately in front of the rear door which would be to the passengers left."

As indicated above appellant requested but the court refused to give the following instruction:

"You are instructed that if you find that plaintiff failed to use the hand supports provided at the rear exit of the bus for the use of passengers in departing from said bus and that a person of ordinary care and prudence would have used these hand supports, and that the failure to use said supports on the part of the plaintiff resulted in her falling from the bus and receiving injuries alleged in her complaint, then you should find for the defendant, Capital Transportation Company."

The court gave no other instruction covering the matter mentioned above. It is conceded that the court did give proper instructions on the general law of contributory negligence. From 38 Am. Jur. 1071, under the heading of "Instructions to Jury," we quote as follows:

"The court should, however, clearly and concisely define the issues as presented by the pleadings and the proof, and state the correct principles of law applicable thereto as defined in the foregoing discussion of the substantive law of negligence. The particular matters to be covered in the instructions depend upon the *issues joined by the pleadings and supported by the evidence; they should cover all the issues that are properly raised for determination.*"

In the case of *St. L. & S. F. Ry. Co.* v. *Crabtree,* 69 Ark. 134, 62 S. W. 64, involving a railroad crossing accident, it was testified by the plaintiff that he stopped, looked and listened and the court instructed the jury properly that it was his duty to do so. The defendant requested that the court instruct the jury that it was the plaintiff's duty to look in both directions but the court refused. This court held this constituted reversible error, using this language: "It is therefore error for the trial judge to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law is in a general way covered by the charge

given, unless the court can see that no prejudice resulted from such refusal."

In the case of *Hamilton-Brown Shoe Co.* v. *Choctaw Mercantile Co.*, 80 Ark. 438, 97 S. W. 284, although the facts were different the same rule was applied by the court in these words:

"It is error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted."

I am not willing to say that no prejudice resulted to appellant because of the court's failure to give instruction No. 9. The better view is that expressed by the court in *Western Coal & Mining Co.* v. *Buchanan,* 82 Ark. 499, at p. 503, 102 S. W. 694, where the court said:

"It cannot be said in this case that no prejudice has resulted because appellant's whole case in concrete form has not gone to the jury, and it is impossible to tell what weight the jury would have given to appellant's testimony unless it was fairly submitted for their consideration under appropriate instructions. The court has no discretion to withhold instructions appropriate to any theory of the cause sustained by competent evidence."

The case of *Nebraska Underwriters Ins. Co.* v. *Fouke,* 90 Ark. 247, 119 S. W. 261, involved the question of negligence in using a blow lamp or torch to remove paint from a dwelling. The evidence showed that it was on a windy day and the court refused an instruction embodying that element. This court held this failure on the part of the lower court to give such instruction was error, using this language:

"The refused instruction was a specific one; no other was given on the subject, and it was prejudicial error to refuse it. The court gave general instructions to the effect that the defendant would be liable if the fire resulted from the use of the blow lamp, and the employee failed to exercise care in its use; the plaintiff was entitled to have a specific instruction on the subject."

An instruction much like the instruction No. 9 requested by appellant herein was given and approved by this court in the case of *Missouri Pacific Transp. Co.* v. *Robinson,* 191 Ark. 428, 86 S. W. 2d 913. The court's language at page 430 and 431 is as follows:

"In the instant case the court instructed the jury that, if the plaintiff failed to exercise ordinary care to use the appliances furnished by the carrier, and such failure to use ordinary care caused or contributed to the cause of the injuries to the plaintiff, injuries of which the plaintiff complained, then she could not recover."
The word "appliances" used above referred to "hand holds" that passengers might take hold of in alighting or boarding the bus.

GREER, TRUSTEE *v.* WINE, RECEIVER.

4-9565 243 S. W. 2d 13

Opinion delivered October 22, 1951.

Rehearing denied November 26, 1951.

A. F. Triplett and *A. F. House,* for appellant.

Atchley & Vance, Shaver, Stewart & Jones, and *Frank S. Quinn,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is a sequence to Case No. 4-9336, *Greer, Trustee,* v. *Blocker, Receiver,* 218 Ark. 259, 236 S. W. 2d 68.

On remand the Chancellor quite clearly entertained for the landowners the same sympathetic view that

prompted this court to leave undetermined by affirmative language certain phases of the litigation. It was felt that district assets of approximately 13,000 acres of foreclosed lands—as to which it was hinted there were substantial grazing and mineral values—might prove sufficient, if judiciously dealt with, to satisfy bondholders whose principal and interest were long overdue. This thought was reinforced by the admitted fact that a mathematical differential of 6.65% between assessed benefits and aggregate levies could be collected. Whether payments exhausted 93.35% of the benefits, or whether unclassified levies expressed in percentages became, as a matter of law, credits on interest,—that issue is now definitely before us. In oral argument appellees conceded that directions respecting the tax-acquired lands are secondary to the main issue.

A paragraph in the January opinion resulting in construction differences between the contending parties reads: "It is admitted by pleadings of the landowners, and clearly established by the evidence, that the total tax levied to date is an amount equal to 93.35% of the assessed benefits; so unquestionably there remains an amount equal to 6.65% of the assessed benefits, plus also interest in some amount on the assessed benefits."

It will be observed that the expression "an amount equal to" was twice used. But the contention is that we necessarily found that the payments were on benefit assessments and that all but 6.65% had been exhausted, "plus some interest."

The error of this reasoning is emphasized by *Watson* v. *Drainage District,* 218 Ark. 361, 236 S. W. 2d 423. The Watson case was under submission when *Greer* v. *Blocker* was decided and the two appeals were discussed in parity.[1]

In the Watson litigation the method of computation was made applicable to cases *where another procedure*

[1] See *Flat Bayou Drainage District* v. *Atkinson,* 217 Ark. 575, 232 S. W. 2d 76, for citation of the rule announced in *Richey* v. *Long Prairie Levee District,* 203 Ark. 1, 155 S. W. 2d 582. The dissent in the Flat Bayou District case did not go to the questions here involved.

had not been adopted by the district. Here there is nothing to indicate that the payments were percentages of the benefits to be so treated in derogation of the legally-approved formula, hence the collections fall into the interest classification as set out in the cited cases. This leaves the benefits intact.

In the decision of January 22d it was said that when a property-holder "makes the plea of limitation in a suit against him to collect such interest, there will be a justiciable issue before us on such plea of limitation [in respect of interest]." The holding here is not intended to affect this statement.

Reversed, with directions to enter a decree that payments aggregating 93.35% were interest, and that the benefits have not been reached.

Mr. Justice George Rose Smith did not participate in the consideration or determination of this case.

Paul Ward, J., dissenting. The decree of the Chancery Court should be affirmed because it follows out, almost verbatim and most certainly literally, the explicit directions of this court in the last two sentences of the second to the last paragraph in the case of *Greer, Trustee* v. *Blocker, Receiver,* 218 Ark. 259, 236 S. W. 2d 68. By every known rule of judicial construction the cited case is the law in this case. To rule otherwise would in effect allow a rehearing of the cited case nine months after the time for a rehearing has elapsed.

If appellants' interpretation of the meaning of the first case is correct even then their contention could not be presented to this court until after the decree of the chancellor in this case had been fully executed.

Justice Millwee concurs in this dissent.

4-9555 243 S. W. 2d 15

Opinion delivered October 22, 1951.

Rehearing denied November 26, 1951.

[redacted]

Burke & Burke and *Bridges, Bridges, Young & Gregory,* for appellant.

D. S. Plummer, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Dr. H. W. Mattice, recovered a verdict and judgment for $12,500 against appellant, Coca-Cola Bottling Company of

Helena, Arkansas, for injuries sustained from the alleged explosion of a bottle of Coca-Cola manufactured by appellant at its bottling plant in Forrest City, Arkansas.

The evidence on behalf of appellee is to the following effect: Appellee resides at Marianna, Arkansas, where he has engaged in the practice of dentistry since 1922. About 10 a. m. on the day of his injury in September, 1947, appellee's wife purchased from a Marianna grocer a case of Coca-Colas which had been delivered to the grocery store by a truck from appellant's plant at Forrest City. The case of drinks was removed from a stack in the store where it had been placed by appellant's truck driver and carefully placed in the car driven by appellee's wife and transported to the Mattice home. Mrs. Mattice carefully placed the case behind a shrub where such drinks were usually kept.

After lunch at the Mattice home, appellee, his daughter, Clyde Mattice, and office assistant, Sybil Rice, started to return to appellee's office in his car about 1 p. m., when appellee indicated that he would like to take some Coca-Colas to the office. Either Mrs. Mattice or Miss Rice took five or six bottles of Coca-Cola from the case and placed them on the floor of the rear compartment of the two-door sedan on the right side with the bottles lying flat on the floor and the crowns facing the rear seat. Clyde Mattice entered the front seat and appellee the rear seat of the car. Appellee was seated slightly to the left side on the rear seat of the car and was reaching over the bottles of Coca-Cola to open the right-hand car door for Miss Rice to enter, when one of the bottles exploded. Appellee's hand was about twenty-four inches above the bottles and the flying glass severed the radial nerve of his right wrist and cut his index finger. Since there is no contention that the verdict is excessive, we refrain from further detail of the serious and disabling nature of the injury.

Appellee and his daughter were positive in their statements that he did not touch the bottles with his feet

and that said bottles were not otherwise agitated after they were placed on the floor of the car.

At the conclusion of the testimony on behalf of appellee, appellant moved for an instructed verdict on the ground that appellee had failed to establish the material allegations of the complaint and particularly the allegation that appellant was negligent in putting too high a carbonation in and otherwise negligently charging, filling, and capping the bottle which allegedly caused the injury. The motion was overruled on the ground that a *prima facie* case had been made under the doctrine of *res ipsa loquitur,* which the court held applicable.

Appellant then offered general but detailed proof of its bottling operation at its Forrest City plant about the time of the injury showing the various precautionary steps in the bottling process designed to prevent overcharging with carbonation or the use of defective bottles. Although daily written reports were made showing the hourly bottle pressure, bottle temperature and gas volume employed in the bottling process in September, 1947, such records were not preserved or introduced in evidence.

Scientific proof was also introduced to show that Coca-Cola bottles generally could withstand pressures several times greater than appellant's equipment, when properly used, could put in them and that during the bottling process the bottles were subjected to such pressure as to eliminate weak or defective bottles. There was also general proof to the effect that the bottled product was handled carefully in making deliveries to retail stores but no specific proof as to the manner in which the case in question was handled.

Appellant's first contention for reversal is that the trial court erred in holding the doctrine of *res ipsa loquitur* applicable. We held the doctrine applicable to exploding bottled beverages in the recent case of *Coca-Cola Bottling Co. of Fort Smith* v. *Hicks,* 215 Ark. 803, 223 S. W. 2d 762, but it is insisted that this is the minority rule and that appellee's proof is insufficient to invoke

the rule announced in that case. We there held that the fact that the instrumentality causing an injury may have actually passed out of the physical possession of the defendant does not foreclose application of the *res ipsa loquitur* doctrine, "when a plaintiff shows that an exploding bottle was handled with due care after it left the control of the defendant and that the bottle had not been subject to extraneous, harmful forces during that time." It is undisputed that the case of Coca-Colas which contained the bottle which later exploded was delivered to T. K. Fong's Grocery by appellant. Appellee offered testimony tending to show that the case of Coca-Colas remained undisturbed in the store where it was stacked by appellant's driver until it was carefully placed in appellee's car and transported to his home and deposited in the shrubbery near the house where it remained unmolested for about two hours when six of the bottles were removed and placed on the car floor without any undue handling of the bottles. There was further evidence that the six bottles were in no manner disturbed from the time they were placed on the floor until the bottle exploded.

In instructions requested by both parties the jury was required to find, and the burden was placed on appellee to show, that the explosion was not caused by any act of appellee or third persons who may have handled the bottle and that no other independent cause intervened to bring about the explosion from the time the bottle left the control of appellant. When the evidence is considered in the light most favorable to appellee, we deem it sufficient to satisfy the burden thus placed upon him.

It is next argued that even if the *res ipsa* doctrine is applicable, the *prima facie* case made by appellee, or the presumption of negligence arising from proof of the circumstances of the injury, was completely dispelled when appellant "offered" proof of its due care "at or about" the time the bottle of Coca-Cola in question was manufactured and sold. In support of this contention appellant cites several cases that do not involve the doctrine of *res ipsa loquitur*. Typical of these are some of

our later cases which deal with statutes creating a presumption of negligence on the part of a railroad company upon proof of injury caused by the operation of a train. After the decision in *Western & Atlantic R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884, holding similar statutes in other States unconstitutional when construed as requiring the railroad company to overcome the statutory presumption of negligence by a preponderance of the evidence, this court was obliged to change its former holdings to conform to the new interpretation thus placed on such statutes. Our later railroad cases hold that the presumption of negligence created by the statute disappears upon production by the railroad company of some substantial proof to the contrary and that the question of negligence is ordinarily one for the jury upon all the evidence. See, *St. Louis-San Francisco Railway Co.* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992; *St. Louis-San Francisco Railway Co.* v. *Mangum,* 199 Ark. 767, 136 S. W. 2d 158.

In several cases where the doctrine of *res ipsa loquitur* was involved, and not some other type of presumption, we have refused to apply the rule laid down in the railroad cases. These cases hold that where a defendant offers proof to offset the presumption of negligence raised by the doctrine, the question whether he has done so is for the jury to determine under proper instructions. Such is the effect of our holdings in *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564; *Arkansas Light & Power Co.* v. *Jackson,* 166 Ark. 633, 267 S. W. 359; *Arkansas Gen. Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S. W. 2d 178.

In the recent case of *Johnson* v. *Greenfield,* 210 Ark. 985, 198 S. W. 2d 403, we said: "It is argued that the presumption of negligence arising from the doctrine of *res ipsa loquitur* was completely dispelled by the proof offered on behalf of appellant, and appellee, therefore, did not meet the burden of proof resting upon her on the whole case. We cannot agree with appellant in this contention. The presumption of negligence raised by the *res ipsa loquitur* doctrine will ordinarily carry the plain-

tiff's case to the jury and does not take flight on the presentation of rebutting evidence. The rule supported by the great weight of authority is stated in 38 Am. Jur., Negligence, § 355, p. 1062, as follows: 'In those cases in which the doctrine of *res ipsa loquitur* applies and an inference of negligence is permissible from the mere happening of an accident, or where a presumption of negligence results from the acts of the defendant, it is generally deemed sufficient evidence to take the case to the jury, and the case may present a question of fact for the jury and not one of law for the court, even though the evidence of the defendant would, if true, be sufficient to rebut the presumption of negligence. It is said that the presumption of negligence raised by the *res ipsa loquitur* doctrine will carry the plaintiff's case to the jury, even where there is strong rebutting evidence.' "

The same rule is stated in 65 C.J.S., Negligence, § 220 (9) d (b), as follows: "According to most authorities, the mere fact that defendant has introduced evidence which, if accepted by the jury, would exonerate defendant does not ordinarily destroy the presumption of negligence raised by plaintiff's proof or authorize the jury to disregard it or authorize a finding of the absence of negligence as a matter of law or warrant an affirmative direction for defendant. The rule is that, when all the evidence is in, the question whether defendant has rebutted the inference or presumption is for the jury, and the case must be submitted to the jury to determine where the preponderance of evidence lies, for the weight of the explanation, like the weight of the inference, is for the determination of the jury; and it has been said broadly that this is true regardless of the strength or probative value of defendant's evidence."

Appellant relies on the case of *Heard* v. *Arkansas Power & Light Co.*, 201 Ark. 915, 147 S. W. 2d 362, and correctly says that there is a substantial conflict between the holding in that case and those above cited. It is not certain from the majority opinion whether that case was tried on the *res ipsa* doctrine or the ten specific acts of negligence alleged in the complaint which the court found

the plaintiff wholly failed to prove. But the court assumed, without deciding, that the *res ipsa* doctrine was applicable and applied the rule followed in the railroad cases holding that the rebuttable presumption of negligence disappeared and had no further place in the case when the defendant "offered" proof of its due care. This holding is not only contrary to the great weight of authority but also contrary to the rule which this court has consistently followed in *res ipsa loquitur* cases and to that extent it is overruled. We think the majority rule is salutary. If the *prima facie* case made by plaintiff in a case where the doctrine of *res ipsa loquitur* is applicable may be completely dissipated by merely offering some proof of due care on defendant's part, then the whole doctrine is dangerously weakened if not completely devitalized. If the trier of facts is bound to accept such offered proof regardless of its questionable or perjured character, the jury's time-honored province of determining the credibility of witnesses and the weight to be given testimony is not only invaded but utterly subdued.

We next consider the assignments of error relating to the giving of Plaintiff's Requested instructions Nos. 2 and 3 which read: "No. 2. If you find from a preponderance of the testimony that the bottle of Coca-Cola exploded and proximately caused the injury complained of, was manufactured, sold and distributed by the defendant herein and that it actually exploded and caused the injury; and you further find from a preponderance of the evidence that there was no negligence on the part of the plaintiff H. W. Mattice and that no independent cause intervened between the time the bottle left the exclusive possession of the defendant and the time of the explosion, that would cause the explosion, you are then instructed that the fact of the explosion of the said bottle raises a presumption of negligence on the part of the defendant and your verdict will be for the plaintiff, unless you should find that the presumption of negligence has been overcome by evidence on the part of the defendant.

"Upon proof of the fact of the explosion, as set out in the above instruction, the burden of proof then shifts to the defendant to show by a preponderance of the evidence that it was free from negligence and upon failure of the defendant to meet that burden of proof you will be warranted in finding for the plaintiff. (Italics supplied.)

"No. 3. You are instructed that where the explosion is caused by a bottle of Coca-Cola that is under the control and custody of the defendant, or that after it left the control and custody of the defendant it is shown by a preponderance of the evidence that the bottle has not been subjected to extraneous harmful forces during that time, and that the explosion and injury is such that in the ordinary course of things would not occur, if those who have such control and custody use proper care, the happening of the explosion with the resulting damage is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused by the negligence of the defendant."

Each of the instructions was specifically objected to because it placed the burden of proof in the whole case on appellant to show that it was not guilty of negligence when the burden is actually upon appellee to prove negligence and because the instructions set up two different burdens for appellant and were contradictory within themselves and with other instructions given. In disposing of this contention, we examine briefly the development of the *res ipsa* doctrine. It was first announced by the English courts apparently as a court-made rule of substantive law. The English decisions hold that the presumption of negligence arising under the doctrine is a legal presumption which shifts the burden of proof to defendant to prove himself free from negligence by a preponderance of the evidence. The English cases were followed by early decisions in this country. Typical of these is our own case of *Railway Co.* v. *Hopkins,* 54 Ark. 209, 15 S. W. 610, where an instruction was approved which definitely recognized the burden shifting rule, cit-

ing the English case of *Kearney* v. *London Ry. Co.*, L. R., 6 Q. B., 759; 10 Central L. J., 261. See, also, *Railway Company* v. *Mitchell*, 57 Ark. 418, 21 S. W. 883; *Arkansas Telephone Co.* v. *Ratteree*, 57 Ark. 429, 21 S. W. 1059; *Jacks* v. *Reeves*, 78 Ark. 426, 95 S. W. 781.

In later American cases much confusion and division of authority has developed concerning the effect of the doctrine on the burden of proof, as is demonstrated by the following statement in 65 C. J. S., Negligence, § 220 (9) b: "The general rule, as broadly stated in the cases, is that, where plaintiff has established a presumptive or *prima facie* case of negligence by virtue of the doctrine of *res ipsa loquitur*, it is then incumbent on defendant, if he wishes to avoid the effect of the doctrine or the risk of the inference or presumption which may arise, to introduce evidence to explain, rebut, or otherwise overcome the presumption or inference that the injury complained of was due to negligence on his part. Although it has been variously said by some courts that the application of the doctrine of *res ipsa loquitur* shifts or regulates the burden of proof, and not merely the burden of going forward, and some cases have even held or stated that it shifts to, or imposes on, defendant the burden to establish his freedom from negligence, according to the judicial decisions on the question, by a preponderance of the evidence, in many cases it is held that the application of the doctrine shifts to defendant the burden of proceeding or going forward with the evidence or the burden of explanation, but that the burden of proof does not shift and that, . . . defendant has successfully discharged his burden when he has introduced evidence of sufficient weight to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Accordingly the general rule that the burden of proving negligence on the part of defendant rests throughout the trial on plaintiff is generally held not affected by the doctrine of *res ipsa loquitur*, and the burden is still on plaintiff to establish the negligence of defendant, and, on the whole evidence, he must have the preponderance in order to succeed, although where de-

fendant fails to overcome the presumption or inference raised by the doctrine this burden is sustained. The application of the doctrine of *res ipsa loquitur* does not convert defendant's plea of the general issue or general denial into an affirmative defense with respect to the burden of proof." The confusion becomes more confounded when the list of cases cited in support of the above statement shows several states following both views.

While our earlier cases clearly recognized the rule as adopted by the English courts, later cases have adopted the so-called general rule as above stated and hold that the true burden of proof in the sense of the risk of nonpersuasion does not shift but that the burden of producing or going forward with the evidence does shift. In *Arkansas Light & Power Co.* v. *Jackson, supra,* the following instruction was challenged: "You are instructed that, where injury or death is caused by a thing or instrumentality that is under the control or management of the defendant, and the injury or death is such that, in the ordinary course of things, would not occur if those who have such control or management use proper care, the happening of the injury is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through lack of care on defendant's part." In approving this instruction the court said: "This instruction does not tell the jury there was a presumption of negligence from the mere occurrence of the injury, nor did it relieve the plaintiff from the burden of proving negligence. The burden of proof to establish negligence was on the plaintiff, and the instruction did not shift this burden. . . . The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of proving negligence; it merely declares the conditions under which a *prima facie* showing of negligence has been made, and, where this has been done, the defendant having the custody and control of the agency causing the injury and the opportunity to make the examination to discover the cause, must furnish the explanation which this opportunity affords to overcome the *prima facie* showing made by the plaintiff. Such is the purport of the instruction, as we understand it, and no error was com-

mitted in giving it under the facts of this case." A similar instruction was approved in *Johnson* v. *Greenfield, supra.* See, also, *Chiles* v. *Fort Smith Comm. Co.,* 139 Ark. 489, 216 S. W. 11, 8 A. L. R. 493; *Pine Bluff Company* v. *Bobbitt,* 168 Ark. 1019, 273 S. W. 1; *Kirkpatrick* v. *American Ry. Expr. Co.,* 177 Ark. 334, 6 S. W. 2d 524; Anno. 59 A. L. R. 486.[1]

Under the decision in *Ark. Light & Power Co.* v. *Jackson, supra,* and subsequent cases, we find no error in the giving of Plaintiff's Requested Instruction No. 3 or the first paragraph of Instruction No. 2. But the language of paragraph 2 of Plaintiff's Requested Instruction No. 2 clearly shifted the true burden of proof to the appellant to show by a preponderance of all the evidence that it was free from negligence. It conflicted with other instructions given placing the burden of proof on appellee to establish his case by a preponderance of all the evidence. In the annotation in 42 A. L. R. 865 numerous cases are cited from those jurisdictions which recognize the so-called general rule, holding the giving of similar instructions prejudicial and ground for reversal. So we hold that the giving of paragraph 2 of Requested Instruction No. 2 resulted in reversible error.

Appellant also objected to the giving of Appellee's Requested Instruction No. 4 and the refusal to give Appellant's Instruction No. 12. These instructions deal with the measure of damages and we do not set them out. Appellant's Requested Instruction No. 12 would have told the jury that appellee could not be compensated for an

[1] The following appraisal of the status of our cases by Dean Robert A. Leflar and Joe E. Covington appears in Vol. 8, No. 2, University of Ark. Law School Bulletin, p. 63 (1940): "Most of the Arkansas cases bear out the idea that it does not make much difference whether the instruction to the jury says that the burden of proof has shifted to the defendant or only that the burden of going forward with the evidence has shifted. Both statements mean about the same thing to a jury, and as long as the jury gets from the instruction only a general idea that it is up to the defendant to produce rebutting evidence there is certainly no prejudicial error committed. That at bottom seems to be the effect of the Arkansas cases. But if an instruction saying that the burden of proof shifts be accompanied by further instructions setting out what would be the legal effect of a placement of the true burden of proof on the defendant, requiring the defendant to establish his case by a preponderance of all the evidence, the instruction would doubtless be held prejudicially erroneous."

aggravation of the original injury even though such aggravation flowed directly from the original injury. It was correctly rejected. If the instruction had been properly modified so as not to exclude recovery for an aggravation flowing directly from the original injury, it probably would have been given. There was no error in the giving of Appellee's Requested Instruction No. 4 when it is read in connection with Appellant's Requested Instruction No. 13 given by the court.

Error is also assigned in the admission of certain evidence. A witness for appellee was permitted to testify that he saw one of appellant's drivers pitch cases of Coca-Cola up on a platform six or eight feet from where he was standing shortly before the trial. Witnesses on behalf of appellant had previously testified in general that the drivers used great care in handling the cases and did not throw them around. While the challenged testimony was not admissible to prove one act of negligence by another, it was admissible as rebuttal testimony.

In the course of the cross-examination of two of appellant's witnesses, counsel for appellee exhibited a Coca-Cola bottle to and questioned them as to whether they considered the bottle safe. These witnesses stated that the exhibited bottle would not fill and would probably break in the bottling machine and that they did not consider it a safe bottle. In rebuttal counsel for appellee testified that he purchased the exhibited bottle from a local grocer a few days previously, that the bottle was full and the contents volatile when opened and in the same condition then as it was at the time of the trial. The only objection made to this testimony was that the bottle evidently came from the Helena plant of appellant and not from its Forrest City plant. It was shown that similar machines were used at other plants to that used at the Forrest City plant and the testimony of the witnesses cross-examined related to bottling machines in general. Like the testimony previously mentioned, this evidence was inadmissible to prove one act of negligence by another but competent to rebut the statement of appellant's witnesses. However, it would have little proba-

tive value as rebuttal testimony in the absence of a showing that the bottle was in a damaged condition when it was actually filled at the plant.

For the error indicated in the giving of Appellee's Requested Instruction No. 2, the judgment is reversed and the cause remanded for a new trial.

PAUL WARD, J., not participating.

GRIFFIN SMITH, C. J., dissents.

CAPITAL TRANSPORTATION COMPANY *v.* MATHEWS.

4-9566 242 S. W. 2d 836

Opinion delivered October 22, 1951.

Bailey & Warren, for appellant.

J. R. Booker and *L. A. Hardin,* for appellee.

GEORGE ROSE SMITH, J. This is a suit for personal injuries sustained by the appellee while attempting to alight from a city bus operated by the appellant in Little Rock. In the court below the appellee obtained a verdict and judgment for $2,000.

Both as to the facts and as to the law the case is in all material respects similar to *Capital Transportation Co.* v. *Alexander, ante,* p. 419, 242 S. W. 2d 843, also decided today. In the case at bar the accident happened in the same manner as that in the other case. The two trials were only a week apart. The attorneys in the earlier case participated in this one, offered the same instructions, and now urge the same grounds for affirmance or reversal. Since this case is completely controlled by the other opin-

ion we see no need for repeating the reasons for our conclusions.

Affirmed.

WARD, J., concurs because the instruction concerning the use of hand supports, which was refused in the *Alexander* case, was given in this case.

MULKEY *v.* WHITE.

4-9561 242 S. W. 2d 836

Opinion delivered October 22, 1951.

Ralph E. Wilson and *Bruce Ivy,* for appellant.

W. H. Fisher, Louis Peiser, and *Frank C. Douglas,* for appellee.

ED. F. MCFADDIN, Justice. The question is, whether the Chancery Court abused its discretion in refusing to approve the Commissioner's report of sale.

In a partition suit between the heirs of Tom Washington, the Chancery Court ordered the Commissioner in

Chancery to sell the 40-acre farm owned by the parties, some of whom were minors. The sale was held on September 16, 1950; and appellant, D. E. Mulkey, became the purchaser for a bid of $975. He was not one of the parties in the partition suit. On September 18, 1950, when the sale was reported by the Commissioner, all of the heirs of Tom Washington protested the approval of the sale. After hearing testimony, the Chancery Court sustained the objections and refused to approve the sale; and Mulkey has appealed.

At the outset, certain well established holdings may be stated as applicable:

(1) Mere inadequacy of price, unless so great as to shock the conscience or amount to evidence of fraud, will not justify the Court in refusing to approve the sale. *Nix* v. *Draughon,* 56 Ark. 240, 19 S. W. 669; *George* v. *Norwood,* 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143, 7 Ann. Cas. 171; and see other cases collected in West's Arkansas Digest, "Judicial Sales," paragraph 39.

(2) When great inadequacy of price is shown, the Courts will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to approve the sale. *Stevenson* v. *Gault,* 131 Ark. 397, 199 S. W. 112, and Ann. Cas. 1918E, 433.

(3) In judicial sales the Court is the vendor, and, in the exercise of a sound judicial discretion, it may confirm or refuse to confirm a sale made under its order. The Courts will not reject a sale and refuse a confirmation for captious reasons, but only in the exercise of sound discretion. The trial court is vested with sound judicial discretion in these matters; and the appellate court, in reviewing the action of a trial court to see if there has been an abuse of discretion, does not substitute its own decision for that of the trial court, but merely reviews the case to see whether the decision was within the latitude of decisions which a judge or court could make in a case like the one being reviewed. *Summars* v. *Wilson,* 205 Ark. 923, 171 S. W. 2d 944.

Applying the rationale of such holdings to the case at bar, it is clear that the Chancery Court did not abuse

its discretion in refusing to approve the sale. In ordering a resale, the Court had ample evidence to justify its findings:

"That heretofore an order was made in the partition suit to sell the land above described for division among the plaintiffs and the defendants, and the Commissioner of this Court advertised said sale and held the sale September 16, 1950, and at that time there were none of the parties present or represented, and the sale attracted only two bids, the highest being only for $975; that this offer is far below any reasonable value of said lands, was not a competitive bid, and because of the misunderstanding among the parties as to the time and place of said sale, and the inadequate price offered for the land, the said sale was not fair and reasonable, and should be set aside and a new sale ordered, because offers of $100 or more per acre have been made in open court, showing that said land is desirable and will bring a fair price."

To summarize: the Chancery Court found that the price was inadequate and also that there were other circumstances sufficient to justify a refusal to approve the sale. Salient facts shown by the evidence are, that the representatives of the minors had without fault relied on one adult heir who agreed to commence the bidding at $4,000; and that such adult heir was not present at the sale because of a misunderstanding. We hold that the chancery court did not abuse its discretion in ordering a resale.

Affirmed.

COOK *v.* LANGHORNE.

4-9568 242 S. W. 2d 838

Opinion delivered October 22, 1951.

[redacted]

Frank S. Quinn and *L. Jean Cook,* for appellant.

Willis B. Smith and *A. G. Sanderson, Jr.*, for appellee.

PAUL WARD, J. In 1928, Bero Eldridge, owning acreage near Texarkana, in Miller County, Arkansas, platted same into lots, blocks, streets and alleys as shown on a plat which was designated "Forest Park Addition to Texarkana, Arkansas" and filed for record. The lots involved in this suit were forfeited in 1928-29-30 to the state for taxes—some in 1928, some in 1929 and the balance in 1930. The county forfeiture records describe the land in question as lots and blocks in Forest Park Addition to Texarkana *in* the City of Texarkana. In 1931 Bero Eldridge sold the lots to appellant L. Jean Cook. Prior to 1945 appellees bought the lots from the state, taking from the State Land Commissioner a deed which describes the lots and reads in part as follows:

"The following lots situated *in* the city of Texarkana, County of Miller, in the State of Arkansas . . .

No. of lot	No. of Block	Addn. or Subdiv.
7	9	Forest Park Addition"

All the lots appellees bought from the state were described as set out above. It is conceded that "Forest Park Addition to Texarkana, Arkansas" is not within the corporate limits proper of the City of Texarkana, but is separated by about ¼ mile of unplatted land on the north side of the City. The record does show that Forest Park Addition is connected to the City by other platted areas, and the evidence shows that the Addition and the City are joined by development so that a casual observer could

not tell where the corporate limits end and the Addition begins. In 1945 appellees went into possession (denied by appellant) by fencing same and putting up signs. After two years of such possession appellees brought suit in Chancery Court, alleging, in substance, the above facts, and asked to have their title quieted against appellant under provisions of the two year statute of limitations—Ark. Stats. § 34-1419. From a decree of the lower court in favor of appellees, appellant has prosecuted this appeal, urging for a reversal the grounds set out hereinafter.

First, appellant contends that since the lots are described as being *in* the City of Texarkana when in fact they are in an addition not even physically connected with the City's corporate limits, the description [of the lots] is so indefinite as to render the forfeiture and the State deeds null and void. Therefore, it is urged, appellees' deeds from the State, being void, do not constitute such color of title as to support adverse possession. This being true, appellant further states, the description cannot be reformed, citing in support *Daniels* v. *Newsom,* 213 Ark. 736, 213 S. W. 2d 367. Many cases are cited in an attempt to show that, in situations such as obtain here, the description must be definite. In *Schattler* v. *Cassinelli,* 56 Ark. 172, 19 S. W. 746, it was said that the description must be so definite as to be understood by persons ordinarily versed in such matters and not merely by one with a higher order of legal understanding. We agree with these general legal principles but we think they do not apply to the facts of this case. In our opinion the description of these lots, as they were forfeited and also deeded by the State, was definite to and understandable by any person of ordinary knowledge. There is only one Forest Park Addition to Texarkana and it is difficult to see how one could possibly be misled as to where the lots were located. Certainly appellant, who bought from the man who platted the lots and named the addition, gives no indication that he was ever confused or misled by the description. This being true no question of reformation arises. Regarding the location

of Galloway College at or in the town of Searcy this court held in *Rogers* v. *Galloway Female College,* 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636, that *in* Searcy did not necessarily mean within the corporate limits.

It is next insisted that appellees cannot claim adverse possession because during the two year period they acknowledged the ownership of appellant. This contention is based upon the fact that appellees instructed their attorney to do what was necessary to clear any clouds on their title, and pursuant thereto the attorney offered appellant $300 for his claim. In this connection the attorney wrote appellant two letters which appear in the record. This contention is not supported by the testimony. Appellant admitted that this offer to him was explained as being in lieu of what it would cost to hire an attorney and prosecute a suit. The letters corroborated the above explanation of the offer, and also stressed the fact that appellees were claiming title to the lots. This did not constitute a disclaimer of title or an intent to hold adversely on the part of appellees, as was held in *Broad* v. *Beatty,* 73 Ark. 106, 83 S. W. 339; and *Meaders* v. *Moore,* 134 Tex. 127, 132 S. W. 2d 256, 125 A. L. R. 817.

It is finally urged by appellant that appellees' control over the lots did not constitute actual adverse possession, because their fence enclosed not only the lots but also the platted streets and alleys. It is conceded that appellees' deeds did not include the streets and alleys. Appellees' testimony shows that they enclosed each block separately in October, 1947, (more than two years before this suit was filed) and that they posted and rented the land. We think the evidence is ample to support the finding of the chancellor on this issue.

We are of the opinion that appellees had, for more than two years, adverse possession of the lots, holding same under deeds containing descriptions sufficiently definite, and that they were entitled to have their title quieted under the provisions of the aforementioned statute. Therefore the decree of the lower court is affirmed.

4-9576 243 S. W. 2d 1

Opinion delivered October 29, 1951.

Rehearing denied November 26, 1951.

Keith & Clegg, for appellants.

Gaughan, McClellan & Gaughan, Tompkins, McKenzie & McRae, Melvin Chambers and *Mahony & Yocum,* for appellees.

GRIFFIN SMITH, Chief Justice. As owners of the mineral, royalty, and leasehold estates pertaining to part of a 40-acre tract on which there is a producing oil well, appellees contend that they are entitled to their respective shares to the exclusion of appellants who own the adjacent 22 acres. Each tract—appellees' interests in 17.85 acres, and the undrilled 22 acres constituting appellants' holdings—is in the southeast quarter of the northwest quarter of section 7, etc., in Ouachita county. Pipeline runs have been paid into the court's registry with a prayer through impleadment for distribution. The total of $62,415.68 is not questioned.

The well, known as Boyce No. 1, was drilled to a depth of approximately 4,000 feet in June, 1942, where the so-called "Smart sand" was encountered. It was abandoned in July because of non-production. No casing

was then set. In January, 1945, the well was extended to a depth of 4,020 feet. The Travis Peak sand found at 3,906 to 3,920 contained water only, but the same stratum at 3,764 to 3,769 yielded some production during January to March. Appellants say that the recovery during this period was 1,157 barrels against an allowable of 2,108 barrels.

The well was again plugged back, and, as appellants express it, *recompleted* March 26, 1945, in the James lime at 3,124-3,140 feet.

The well in question was placed 330-ft. north and 260-ft. east of the southeast corner of the tract that is treated as a quarter-quarter section.

September 26, 1941, the Oil and Gas Commission adopted field rules for the Travis Peak Pool in the Stephens field, limiting drilling to one well on any ten-acre lease or ten-acre subdivision of a lease. The rule applied specifically to "the same producing horizon." There was a further provision that in the event the drilling should be on a lease covering more than ten acres owned by one person or by persons in moiety, the additional area "in no event more than ten acres in excess of ten acres upon which such well is drilled, shall be assigned to that particular well." The right of integration was given where tracts were separately owned, but where the owners failed to effectuate such integration the Commission's duty incident to the prevention of waste and avoidance of unnecessary drilling contemplated affirmative action looking to the development of such lands as a drilling unit.

Appellants, who by the decree were denied the right of participation in production coming, *prima facie,* from the 17.85-acres, concede there is no formal Commission order as to wells drilled to the James lime pool, from which the production now comes. They rely primarily upon estoppel to give them participation in production to the extent of 22/40ths, contending that Crow's acts and record statements preclude him from denying that in equity unitization occurred when in renovating after

the first failure it became necessary to procure steel affected by government priorities (Petroleum Administrative Order No. 11), and that such casing would not be furnished where operations were on less than forty acres. The regulation covered the *use* of casing and extended to plugging back, deepening, reworking, and recompletion. It contemplated as a condition precedent to procurement of the steel that property interests in drilling units should be consolidated, otherwise the casing would not be supplied. Appellants point to the fact that in a Commission's "well-completion form" filed by Crow February 10, 1945, it was stated that 40 acres were in the drilling unit.

Facts essential to the litigation were stipulated. There is no proof that operations drained oil from the 22-acre tract, hence the controlling question is whether procurement of the casing at a time when the government's rules limited the supply to 40 acres had the effect of creating equities in appellants' favor entitling them to participation in production admittedly originating on appellees' property. *Yelvington* v. *Alston, Trustee,* 207 Ark. 266, 180 S. W. 2d 120, is cited by appellees as authority for the Chancellor's ruling, but as appellants point out, facts are different. In the Yelvington case there was testimony that both permits were issued on ten-acre tracts. In the case at bar the only rule promulgated by the Commission authorized drilling to the Travis Peak Pool on any ten-acre lease or ten-acre subdivision of a lease "to the same producing horizon." No complaint appears to have been made by the Commission that its overall purpose had been misunderstood, or that there was an intent to unitize.

In the absence of a showing that the well was drilled in circumstances objectionable to those interested in the 22-acre tract because the natural consequence of production would be to take oil from it, we are unable to see how appellants were injured by a trespass upon the Federal rule allocating casing. On the contrary it is just as reasonable to believe that at a time when the Commission was recognizing 10-acre drilling sites for the mentioned

structure appellants stood to profit by the development. If the area proved worthless the test cost them nothing; if successful to a point justifying operations on the 22-acre tract, they would be the beneficiaries of exploration.

Affirmed.

HORN *v.* HAYS.

4-9572 243 S. W. 2d 3

Opinion delivered October 29, 1951.

Gordon Armitage and *R. W. Tucker,* for appellant.

W. M. Thompson and *Chas. F. Cole,* for appellee.

GEORGE ROSE SMITH, J. This suit in ejectment, brought by the appellants as plaintiffs, is actually a boundary line dispute. The plaintiffs jointly own a tract of land lying immediately north of the defendant's property. In 1950 the defendant built a house on what he thought to be his land, but the plaintiffs contend that he

put the structure so far to the north that it is actually on their land. The trial court submitted the dispute to a jury, which returned a verdict for the defendant.

At the trial both sides undertook to locate the true boundary by first determining the southwest corner of the plaintiffs' property and then running the disputed line due east from that point. Hence the issue of fact below narrowed down to the correct location of the southwest corner of the plaintiffs' land. For the plaintiffs the county surveyor testified that he had determined the position of the corner in question and that a line running due east would lie south of the defendant's house, thereby putting the building on the plaintiffs' property. For the defendant several witnesses testified that they had assisted in making earlier surveys which placed the disputed corner sufficiently farther north to result in the defendant's house being on his own land. The testimony, if admissible, was in such conflict as to support a verdict for either side.

The plaintiffs—now the appellants—offer two objections to the testimony adduced by the defendant. First, it is contended that surveyors' assistants should not have been allowed to testify about the location of the disputed corner. We think the evidence to be admissible. It is true that chain carriers, rodmen, and other surveyors' helpers cannot be permitted to give expert opinions involving a knowledge of the science of surveying. But we have recognized the rule that they may properly describe matters which lie within the observation of lay witnesses. *Mason* v. *Mason,* 167 Ark. 304, 267 S. W. 772; see, also, Wigmore on Evidence, § 1339. Here these men testified merely that the surveyors by whom they were employed located the corner now in controversy by running their measurements to what proved to be a visible monument consisting of a pile of stones. From this point they had seen indications of a boundary line running to the east, marked by blazed trees and the cutting of underbrush along the line now contended for by the defendant. We find nothing in this testimony that goes beyond the limits within which a lay witness may describe what he has seen.

Second, it is argued that evidence of earlier surveys was inadmissible for the reason that they were made long before the present litigants bought their tracts and at a time when the plaintiffs were not present. This argument is without merit. The testimony was offered to show the true position of the southwest corner of the plaintiffs' forty-acre tract, a point originally fixed by the federal government's survey. The exact position of this point is a fact that has remained unchanged ever since the determination was originally made, and obviously the ownership of the land and the plaintiffs' presence or absence at the time of any particular survey are equally immaterial.

Finally it is insisted that the court should have instructed the jury that the defendant had the burden of proving the county surveyor's plat to be erroneous. By Ark. Stats. 1947, § 12-1215, a county surveyor is required to keep a well-bound record book of his surveys, and § 12-1220 provides that a certified copy of this record shall be *prima facie* evidence. But here the plaintiffs did not introduce a certified copy of the official record; they offered merely a plat bearing the county surveyor's signature. As we said in *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348: "The statute is precise in prescribing that it is only a certified copy of the record of the county surveyor which shall be admitted as *prima facie* evidence." The requested instruction was therefore properly refused.

Affirmed.

WARD, J., not participating.

BEASLEY *v.* STATE.

4674 242 S. W. 2d 961

Opinion delivered October 29, 1951.

George F. Edwardes, for appellant.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

HOLT, J. On information charging the crime of burglary, a jury convicted appellant and assessed his punishment at a term of two years in the State Penitentiary. From the judgment comes this appeal.

—(1)—

For reversal, appellant first questions the information. He argues that as originally filed it failed to state an offense in that it "did not allege the intent to commit a felony" and that the court erred in permitting State's counsel to amend following the empaneling of the jury. We cannot agree.

As originally filed, the information did not contain the words "felony and grand." As amended, the words "*felony and grand*" (in italics) were inserted and as so amended it read, omitting the formal parts: "Accuse the defendants, Walter Johnson & Nathaniel Beasley, of the crime of burglary committed as follows, to wit: The said defendant on the 31 day of Jan., 1951, in Miller County,

Arkansas, did unlawfully, willfully, and feloniously and burglariously break and enter Bobbie's Cafe and broke and tore into the juke box and taking what money that was contained therein, and broke and tore into the cigarette machine and took what cigarettes that were in said machine which was more than 40 packages, with the unlawful and felonious intent to commit a *felony & Grand* Larceny and did steal, take and carry away said money and said cigarettes after having burglariously broken into Bobbie's Cafe, owned and operated by Bobbie Bates, against the peace and dignity of the State of Arkansas."

The authority of the court to permit counsel for the State to amend the information, in the circumstances, was given by Initiated Act No. 3 of 1936, now §§ 43-1006 and 43-1024 Ark. Stats. 1947.

We said in *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, that "it is well settled by the decisions of this court that under the provisions of § 3853 of Pope's Digest (now § 43-1024 Ark. Stats. 1947) above quoted, the attorney representing the State, with leave of the trial court, may amend an indictment or information, provided such amendment does not have the effect of changing the nature of the crime charged or the degree thereof."

Appellant was charged with the crime of burglary and adding the words "felony and grand" before the word larceny did not change "the nature of the crime charged or the degree of the crime charged."

We have two statutes on burglary, § 41-1004 and § 41-1001, Ark. Stats. 1947. Appellant was tried under § 41-1001, which provides: "Burglary is the unlawful entering a house, tenement, railway car, automobile, airplane, or other building, boat, vessel, or water craft with the intent to commit a felony or larceny. [Acts 1921, No. 67, § 2, p. 69; 1937, No. 349, §§ 1, 2, p. 1311; Pope's Dig., § 3058; Acts 1941, No. 360, § 1, p. 929.]"

That he was so tried is clear from the court's instruction No. 1 which, in part, provided: "Now, burglary is defined by our statute as being the 'unlawful entering a

house, tenement, railway car, automobile, airplane, or other building, boat, vessel, or water craft with the intent to commit a felony or larceny,' * * *."

Here we point out that § 41-1001, prior to its amendment by Act 360 of 1941, did not contain the two last words "or larceny" now appearing in § 41-1001. Prior to Act 360 above, to constitute burglary the breaking or entering of a building must have been with intent to commit a felony. Since its enactment, if there is a breaking but no entering, then the breaking must have been at night and with the intent to commit a felony provided by § 41-1004, to amount to burglary. Now under § 41-1001, if there is an "unlawful entering" with intent to commit a felony, or larceny, grand or petit, then this would constitute burglary. The purpose of Act 360 is to make any unlawful entry with intent to commit, either grand or petit larceny, burglary.

—(2)—

Next appellant says that the evidence is not sufficient to support the verdict. We hold that it was.

The principal witness for the State was Walter Johnson, an accomplice. He testified that January 31, 1951, he and appellant, Nathaniel Beasley, were in Bobbie Bates' Cafe in Texarkana, Arkansas, until closing time, 10 o'clock at night. Bobbie Bates, who operated the cafe, corroborated this testimony. Johnson further testified that he told appellant that he had to have some money and was going to get it before daylight and while they remained in the cafe, the glass in the front door was broken and he suggested to appellant that someone could break in there easy. Bobbie Bates testified that the front door was broken that night. Johnson further testified that following the closing of the cafe, appellant waited outside while he went through the hole in the front door, broke open a cigarette vending machine, took all the money therefrom, and a quantity of cigarettes. He also broke open a "juke box" and took the money which it contained. Bobbie Bates corroborated this testimony of Johnson to the effect that the machines were broken open and the money and cigarettes stolen. Johnson further

said he placed the cigarettes in four sacks, one of which he handed to appellant to carry "but told him not to look in the sack," that he and appellant took the cigarettes to appellant's home where they were placed in a suitcase and while there, the stolen money was divided between them, that they then entered a cab, proceeded to the home of appellant's brother and left the suitcase.

Mrs. Anna Beasley, the wife of appellant's brother, testified that appellant came to their house, as stated by Johnson, and left the suitcase containing cigarettes. The brother of appellant, Mrs. Beasley's husband, corroborated Mrs. Beasley and stated that the suitcase contained "35 or 40 packages" of cigarettes. Appellant's brother further testified that the suitcase containing the cigarettes which appellant had left at his house was picked up the following morning by officers and that the suitcase and cigarettes were the same as the suitcase and cigarettes presented at the trial. Officers Giles and Woodruff testified that the cigarettes and suitcase in evidence were the ones obtained at appellant's brother's home. While Johnson denied that appellant had anything to do with the burglary, the jury evidently chose to believe the State's version and, as indicated, the evidence in support of the verdict was substantial, and must be allowed to stand.

While as appellant contends, in felony cases, an accused may not be convicted on the uncorroborated testimony of an accomplice, "unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof," (Ark. Stats. 1947, § 43-2116), "The rule in this state is that the corroborating evidence need only tend to connect the defendant with the commission of the offense, and not that such evidence of itself be sufficient, and where there is sufficient evidence tending to connect the defendant with the offense, its sufficiency is a question for the jury, together with that of the accomplice. (Citing cases.)" *Fleeman and Williams* v. *State,* 204 Ark. 772, 165 S. W. 2d 62.

We think Johnson, the accomplice, was sufficiently corroborated to take the case to the jury. Appellant knew what was being done and the jury had the right to draw the conclusion that he was present, aiding and knowing that a crime was being committed, and participated therein.

Finding no error, the judgment is affirmed.

MOTHERSHEAD *v.* DOUGLAS.

4-9560 243 S. W. 2d 761

Opinion delivered October 22, 1951.

Rehearing denied December 17, 1951.

R. W. Tucker, for appellant.

Chas. F. Cole, for appellee.

ROBINSON, J. In 1948, a corporation, the Polk-Southard Company, owned considerable property used in the business of mining and processing ore. A. C. Hendrix and A. R. Hendrix held a mortgage on the personal property, securing a note in the sum of $45,000. E. P. Douglas was president of the Polk-Southard Company; J. Roy Nuchols was treasurer, and the other appellees herein were directors and stockholders.

The appellees bought the $45,000 note and mortgage from Hendrix for the sum of $15,000. At that time Polk-Southard was indebted to appellees in the sum of $4,000 for money advanced to that Company. Subsequent to the purchase of the $45,000 note and mortgage, appellees caused Polk-Southard to execute to them a note and mortgage in the sum of $49,000, being the amount of the original note and mortgage for which appellees had paid $15,000, plus the $4,000 appellees had advanced to the Company.

On April 13, 1948, the appellees filed suit to foreclose the mortgage asking judgment in the sum of $49,000 and interest. On June 1st thereafter, a decree of foreclosure was rendered giving appellees judgment in the sum of $49,000 plus interest in the sum of $1,378.66, making a total of $50,378.66. On July 8, 1948, and prior to the sale under the foreclosure decree, the appellant herein, Mothershead, a stockholder, filed an intervention claiming that Polk-Southard was indebted to appellees in the sum of not over $15,000. On July 29th a portion of the property was sold under the decree to the appellee Douglas for the sum of $35,000. On August 17, 1948, the Chancery Court refused to confirm the decree because of the filing of the intervention by Mothershead, and, at the instance of the appellee Douglas, who had purchased the property at the foreclosure sale and was one of the plaintiffs in the suit, appointed C. E. Baxter to take charge of the property. The order of appointment provides:

"To take immediate control and possession of all the property for this Court and for E. P. Douglas, and to make sales of the same at the most advantageous price he is able to obtain, and he is to keep accurate account of sales . . . and he is to report the same to this Court on September 6th and turn into the registry of this Court all money received by him at said sale, and the said money is to be retained in this Court pending the outcome thereof."

Baxter did not report to the Court on September 6th or any other time before the confirmation of the sale,

and paid no money into Court. He acted entirely as agent for Douglas, and, the Court so found in the decree rendered. In disallowing items of expense claimed by Baxter, the Chancellor said:

"In passing upon these items, the Court finds that the said Ed Baxter was not in fact a receiver or appointee of this Court, but should be at all times considered an agent of the plaintiffs for the reason that he was originally appointed at the request of the plaintiffs on August 17, 1948, which was after the foreclosure suit was filed on the 1st of June, and after the intervention was filed on July 8th, and after the first sale was had on July 29th; that he was ordered to pay all money into court which was not done."

In the order dismissing the intervention of Mothershead and approving the sales, the order provides: "And it now appearing that there is no further need for C. E. Baxter to report to this court regarding his actions under said order, and the plaintiffs stating in open court that they are willing that said C. E. Baxter, be relieved of any responsibility to this Court, or to them, for the properties taken possession of by him. . . ."

Also, in the order made on October 7th, the sale of July 29th in the sum of $35,000, and the sale of October 6th in the sum of $7,500 to Douglas were confirmed. The interveners appealed to this court where it was held that insofar as the mortgage indebtedness was concerned, the plaintiffs could only recover from Polk-Southard the amount they had paid for the note and mortgage. But, this amount could not be definitely ascertained from the record before the court. This court said:

"Accordingly, the decree is reversed and the cause remanded with directions to set the sales aside and ascertain the correct amount expended by appellees and enter a decree in their favor and for further proceedings consistent with this opinion." *Mothershead* v. *Douglas,* 215 Ark. 519, 221 S. W. 2d 424.

When the case came up for a hearing again in the Chancery Court, it developed that Baxter had sold a sub-

stantial portion of the property involved for about $20,000; that he had on hand property with a salvage value of about $9,500, and that property with a salvage value of about $23,000 was unaccounted for. The property which was proven to have been disposed of by Baxter was dismantled and sold to various people, some of whom had in turn resold part of it. It is not clear just what became of the property sold to Douglas by the Commissioner in Chancery on September 6th. In any event, it was definitely ascertained that the property could not be re-assembled and restitution in specie could not be made.

In these circumstances, the appellants say that Douglas is bound by his bid of $42,500. The appellees contend that Douglas made the bid of $42,500 without any regard for the true value of the property, but only because he had recovered judgment in the Chancery Court for about $50,000, and that Douglas should be charged with the actual value which he claims is much less than $42,500. A great deal of evidence was taken in regard to the actual value of the property, and the effect of the Chancery decree was to hold Douglas, the purchaser, liable for only the amount which he or his agent, Baxter, had sold. When the property was sold to Douglas it was in place at the site of the mining operation. It consisted of all kinds of machinery, tools, buildings, pipe, engines, rock crushers, etc., necessary to the business of mining and processing ore. Between the time of the purchase at the foreclosure sales by Douglas and the time the case was reversed by this Court, the property was dismantled and the great portion of it sold to various people; even some of the buildings were sold. It could not be re-assembled and again offered for sale. Section 27-2153, Ark. Stats., provides:

"If any judgment of the Circuit Court shall be reversed by the Supreme Court on writ of error or appeal, and such judgment may have been carried into effect before the reversal thereof, such defendant may recover from the plaintiff in such judgment the full amount paid thereon, including costs, by an action for so much money had and received to his use." Section 27-2156 provides

that § 27-2153 is also applicable in Chancery cases. Construing the statute which is now § 27-2153, Ark. Stat., in the case of *Dodson* v. *Butler,* 101 Ark. 416, 142 S. W. 503, 39 L. R. A. N. S. 1100, this Court said:

"Where property has been recovered or money has been received upon a judgment subsequently reversed, the remedy of the judgment-debtor is to obtain restitution of the identical property recovered, or specific money received, if that can be done; but, in event this cannot be had because the same is not in the possession of the judgment-creditor, then the remedy of the judgment-debtor is the recovery against him for the value of such property obtained by him, or of such money received."

In the case of *McCracken* v. *Paul,* 65 Ark. 553, 47 S. W. 854, the court said: "Plaintiff purchasing at his execution sale, on reversal of the judgment under which the sale is made, is entitled to the benefits of the order of restitution, so that he may restore the property in specie, if he can. If he cannot, he is responsible to the defendant for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser there is no recovery against plaintiff, except for the money paid, because the defendant has what he claims."

Freeman On Judgments, 5th Ed., § 1169, has this to say: "But whether the defendant may elect to affirm the sale, notwithstanding the reversal of the judgment, and recover of the plaintiff the value of the property sold is an unsettled question. According to some authorities he has this privilege. However, this position would seem to be hardly logical, if the action taken under a valid judgment is lawful and the plaintiff's liability is merely that of a trustee to account for property lawfully in his possession. Consequently it has been held that the losing party has the right to restore the thing sold, and when he can do so, cannot be required to account for its value. If the judgment is modified by reducing its amount, the

appellant cannot compel the respondent to keep the property purchased, and to pay the difference between the amount at which it was sold under execution and the amount of the judgment as modified. So if the property sold consisted of stock in a corporation which had deteriorated in value, plaintiff is not required to account for the value of the stock at the time of the sale, nor to retain it at the amount of his bid. On the same theory, the amount which the defendant may recover when the property sold is not restored to him cannot exceed the amount realized at the sale thereof. In other words, insofar as the mere right to restitution is concerned, and independent of any additional claim of negligent or willful tort, the plaintiff is not required to restore a sum in excess of that which he received under the judgment, with interest. Some courts, however, have not so restricted the successful appellant but permit a recovery of all the damage suffered by him."

Here, we have a situation whereby the plaintiff bought the property at his foreclosure sales for $42,500, and he would be permitted to restore the property in specie if he could do so, but he cannot restore it. Plaintiff claims the value of the property is the sum received by Baxter for that portion sold plus the amount on hand. We do not agree with this theory. A considerable portion of the property was sold by Baxter to the Company that he manages. Baxter says that he sold property to one person for which he received something over $4,000. The purchaser says he paid something over $6,000. Property having a salvage value of about $23,000 is unaccounted for. It is not clear just what became of this property or when it disappeared.

Also, it may be that other bids were made at the sales, and that plaintiff Douglas bid $42,500 because it took that amount to top some other person's bid. It is pretty well established that the salvage value of all the property, including that unaccounted for, amounts to some $57,000. When all the facts and circumstances in this case are taken into consideration, we think that,

since Douglas cannot restore the property in specie, he is bound by his bids amounting to $42,500.

On cross-appeal, appellees contend that the intervention should have been dismissed because no bond for costs was filed as provided in § 27-2301, Ark. Stats. Even if this section of the statutes should be construed as applying to an intervener, (which we do not decide) no motion to require bond was filed until after the original judgment, which was too late. *Adair* v. *Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S. W. 909. Also, appellees contend Mothershead's stock should be cancelled and judgment rendered against him for stock in the sum of $3,750; that Baxter should have been allowed a fee, and that Douglas should have been allowed $1,505 as expenses. We find no merit in appellees' cross-appeal.

Reversed on appeal with directions to enter a decree not inconsistent with this opinion.

Affirmed on cross-appeal.

WARD, J., not participating.

STARRETT *v.* NAMOUR.

4-9559 242 S. W. 2d 963

Opinion delivered October 29, 1951.

James P. Baker, Jr., for appellant.

William J. Smith, for appellee.

ED. F. MCFADDIN, Justice. The Workmen's Compensation Commission denied appellant's claim, and only one point is argued here: "There is no substantial evidence . . . to uphold . . . the decision of the . . . Commission."

James S. Starrett was employed by Habib's Bakery, which was owned by the appellee, Namour, who carried compensation insurance with appellee, Employers' Liability Assurance Corporation, Ltd. About May 1, 1948, the employer, upon inquiry, learned that Mr. Starrett had an ulcer slightly above the ankle on the outer side of his left leg. The employer immediately had Mr. Starrett treated by Dr. Storm; and on May 7, 1948, Dr. Connally became the attending physician of Mr. Starrett. On May 9, 1948, Mr. Starrett was admitted to the hospital because the ulcer had failed to yield to treatment and his left leg was considerably swollen. He was suffering not only from the ulcer but also from arteriosclerosis in an advanced stage. Mr. Starrett remained in the hospital until his death on May 26, 1948, at the age of 69 years, 7 months and 10 days; and the death certificate, signed by Dr. Connally, said:

"Immediate cause of death:	Nephritis
"Due to:	Arteriosclerosis
"Other conditions:	Trophic ulcer."

Claim was filed for Mr. Starrett on May 17, 1948; and, after his death, his widow,[1] as sole dependent, prosecuted her claim. The basis for the compensation claim was: that Mr. Starrett, while suffering from arteriosclerosis, sustained an injury to his ankle sometime about February, 1948, which injury resulted in the ulcer; that the ulcer, failing to heal because of the arteriosclerosis, required hospitalization and bed rest; that the bed rest, along with the arteriosclerosis, caused the nephritis which resulted in death. Claimant thus relies on our holdings to the effect that an injury is compensable when it aggravates a preëxisting condition. See *Triebsch* v. *Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S. W. 2d 26, and cases there cited.

[1] Mrs. Starrett died pending this appeal; and the claim is now prosecuted by her estate.

The claim was resisted on two grounds: (a) that any injury which Mr. Starrett sustained to his ankle occurred prior to April 25, 1946, and the claim based on that injury is therefore barred by limitations,[2] since it was not filed until May 17, 1948; and (b) that there is no causal connection between any injury to the ankle and the nephritis which resulted in Mr. Starrett's death. The Commission, after hearing doctors and lay witnesses, denied the claim because of defense (b)—*i. e.,* absence of causal connection—; and found it unnecessary to decide the question of limitations. The denial of the claim by the Commission was affirmed by the Circuit Court; and this appeal followed.

At the outset the claimant recognizes the well known rule that if there be substantial testimony to support the Commission's findings, then the Commission will be affirmed. See *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; and *Tinsman Manufacturing Co.* v. *Sparks,* 211 Ark. 554, 201 S. W. 2d 573. But claimant contends that there is no substantial testimony to support the Commission's findings; and says that all of the testimony shows that there was a causal connection between Mr. Starrett's injury to his ankle and his death thereafter.

We hold against the claimant in this contention. The main question before the Commission was, whether Mr. Starrett received an injury which aggravated his arteriosclerosis. To decide that question the Commission had to weigh the testimony on several other questions, some of which were:

(1)—When did Mr. Starrett receive his injury?

(2)—Exactly where was the injury on his leg?

(3)—Were statements obtained from Mr. Starrett when he was partially irrational?

(4)—Did the claim adjuster for the insurance carrier "color" the statements from Mr. Starrett and the other witnesses by omitting some facts and over-emphasizing others?

[2] See Ark. Stats., § 81-1318, as amended by § 18 of Initiated Act No. 4 of 1948.

The Commission necessarily had to decide which witnesses to believe on the four questions above, because as to each matter the testimony was in conflict. There was introduced in evidence a signed statement from Mr. Starrett in which he said that he received the injury to his ankle by hitting it against a bench in the bakery shop at a time when a worker by the name of Jim Goins was working with him. The statement said in part:

"I did not tell anyone about my hitting my ankle except Jim Goins. When I hit my ankle it did not break the skin and it did not bleed. When I hit my ankle I did not have to sit down or stop work. I did not go see a doctor with my ankle at the time I hurt it, but I did go to the doctor about a year later."

It was stipulated that Jim Goins, the person named in the foregoing quotation, died on April 25, 1946. So if Mr. Starrett hit his ankle during the lifetime of Jim Goins, and worked two years or more thereafter with no injury reported, such fact, along with the other evidence in the record, goes to support the Commission's findings that there was no causal connection between the ankle injury and the death. Although the Commission did not decide the claim on the point of limitations, nevertheless the Commission found as a fact that Mr. Starrett sustained an injury in April, 1946.

Another question was, whether the insurance adjuster had obtained the statement from Mr. Starrett when he was in an irrational condition. The Commission necessarily determined this question from all of the evidence presented; and if the Commission found that Mr. Starrett was rational when he gave this statement, such finding has evidence to support it. Furthermore, Dr. Storm testified that Mr. Starrett had swelling of both ankles and that the swelling in the right ankle was not caused by the ulcer on the left leg. Dr. Storm refused to say that Mr. Starrett's confinement because of the ulcer accelerated the arteriosclerosis and resulting death. Thus the doctor left the inference that the connection

between Mr. Starrett's injury and his death was entirely a matter of speculation.[3]

It is not a question of what we would hold if we were the *de novo* triers of fact. The question before us is, whether the Commission had substantial evidence to support its findings; and a careful study of the record discloses that there was such evidence. Accordingly, the judgment is affirmed.

FRANKE'S, INC., *v.* WALLACE.

4-9564 242 S. W. 2d 968

Opinion delivered October 29, 1951.

[3] A portion of Dr. Storm's testimony is:

"Q. Let's assume the man does have arteriosclerosis and has an ulcer on his ankle and as a result of the ulcer, he has to be confined to bed. Do you have an opinion as to whether the confinement would aggravate the arteriosclerosis or that as a result of the confinement and the arteriosclerosis, that he would develop some other malady?

"A. I don't see how it could increase his arteriosclerosis except as I have stated before, it might cause some accidental thrombosis of a vessel from the inactivity.

"Q. In other words, the mere confining of a man who had had arteriosclerosis would not necessarily mean anything in itself?

"A. No, sir.

. . . .

"Q. Doctor, there is one thing I would like for you to elaborate on. You mentioned a moment ago that the swelling in the right ankle would not have been due to the other leg but would have been due to a systemic condition. Is nephritis a systemic condition?

"A. Yes, sir."

Wright, Harrison, Lindsey & Upton, for appellant.

Gentry, Tisdale & Shamburger, for appellee.

MINOR W. MILLWEE, Justice. This is an action by appellee, Mrs. Nellie W. Wallace, in which she recovered judgment for $750 against appellant, Franke's, Inc., on account of illness and injuries allegedly caused by having eaten food that was unwholesome and unfit for human consumption at appellant's cafeteria in Little Rock.

The verdict and judgment are challenged on the sole ground that the trial court erred in refusing to direct a verdict for appellant because of the insufficiency of the evidence. More specifically, appellant says there is a complete absence of any proof that the food sold by it to appellee was unwholesome or deleterious.

There is little dispute in the evidence which, viewed in the light most favorable to appellee, is substantially as follows: On Easter Sunday in 1949, appellee ate her usual breakfast of oatmeal, toast and coffee about 5:30 a. m. She attended church with her niece and nephew who lived with, and were reared by, appellee and her husband. The three ate lunch at appellant's cafeteria about 1 p. m. They had the same food to eat except that appellee and her nephew had boiled custard, while appellee's niece had pie, for dessert. They went from the cafeteria to a movie where appellee became nauseated shortly before 4 p. m. and began regurgitating the custard which had a very offensive taste and odor. When the three arrived home about 4 p. m. appellee and her nephew became violently ill and began vomiting and purging.

The family physician, Dr. N. F. Weny, whose qualifications were admitted by appellant, was summoned. He described appellee's condition upon arrival as follows: "Mrs. Wallace was very acutely ill, she was suffering from violent vomiting, purging and cramping in

the abdomen and shock, had a rapid pulse, blood pressure was low, she was very pallid." Appellee's nephew was found in the same condition. Dr. Weny diagnosed appellee's trouble as acute food poisoning and treated her for that ailment. Sedatives and a stimulant were administered to relieve pain and combat shock. Upon a second visit the next day Dr. Weny placed appellee and her nephew on a liquid diet and had other medicine sent out from a drug store. Appellee remained in bed for a week and was unable to perform her customary household duties for a month. She later suffered from a spastic colon which might or might not have been caused by the food poisoning. Dr. Weny had given appellee a thorough check-up a week or two before Easter Sunday and found her in excellent physical condition.

On cross-examination Dr. Weny stated that the medical term for appellee's illness is acute gastroenteritis, the most common cause of which is food poisoning; that gastroenteritis could be caused by epidemic virus in which there might be a little vomiting and purging, but not of the severe type suffered by appellee. While he diagnosed appellee's trouble as acute food poisoning and treated her for that trouble, he stated that no one could say positively that appellee was poisoned by eating bad food unless "they saw her eat it or tested it out, that has to be assumed."

Appellee made complaint to appellant's president. She testified that about a week after she became ill a Mr. Jessie, who stated that he represented appellant, called upon her. After identifying the time, place and persons present in response to appellant's objection, appellee was asked to relate the conversation and stated that Jessie asked her if she was ready to settle. Appellant's objection to this testimony was promptly sustained and the court admonished the jury not to consider any testimony about a settlement or compromise. Appellee was then permitted to testify, without objection, that Jessie told her that three other people eating at appellant's cafeteria on the same day had also suffered from food poisoning. Appellee ate nothing on the day in ques-

tion other than breakfast at home and the lunch at appellant's cafeteria. She had previously eaten boiled custard in the cafeteria without ill effects and was not allergic to the custard or any other food.

H. R. Lewis, vice-president of appellant in charge of cafeterias, testified that he was in the cafeteria about an hour in the morning on the day in question. He named the ingredients and described the method usually employed in preparing and serving boiled custard. He stated that normally three gallons of custard was prepared on Sunday which would furnish 102 four-ounce servings and that any custard left over was thrown away at the end of the day. He did not see the custard in question prepared and no record was kept of the number of servings sold on that day. He did not know whether any custard was left over either on the Sunday in question or the day before. He did not send anyone to see appellee, but was not in charge of investigating complaints and did not receive any other reports of complaints about the custard in question. Appellant's president informed him of appellee's complaint which was handled in accordance with their normal procedure in such cases.

This court is committed to the rule that when articles of food are sold to the consumer for immediate use, or by one engaged in the business of serving food for immediate consumption on the premises, there is an implied warranty that the food is wholesome and fit for human consumption and the seller is liable upon the breach of such warranty, without proof of negligence, to a consumer injured by eating deleterious food. *Nelson* v. *Armour Packing Co.,* 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; *Lewis* v. *Roescher,* 193 Ark. 161, 98 S. W. 2d 956. While this was formerly the minority rule, it is now supported by a majority of the jurisdictions in which the question has arisen. See 1951 Cum. Supp. to 22 Am. Jur., Food, § 101; Anno. 7 A. L. R. 2d 1032.

The instant case was tried on the implied warranty theory. Appellant concedes this to be the correct rule,

but says that the instant case is identical with, and controlled by, the decision of this court in *Franke's, Inc.* v. *Bennett,* 201 Ark. 649, 146 S. W. 2d 163, where the implied warranty rule was recognized but recovery denied on the particular facts. In the opinion by a divided court it was there said: "It is true, as argued by learned counsel for appellee, that there is an implied warranty of fitness for human consumption and wholesomeness, by the owner of an eating place to the customer, of food purchased therein for immediate consumption. *Heinemann* v. *Barfield,* 136 Ark. 500, 207 S. W. 62; *Safeway Stores* v. *Ingram,* 185 Ark. 1175, 51 S. W. 2d 985; *Lewis* v. *Roescher,* 193 Ark. 161, 98 S. W. 2d 956. But this rule does not dispense with the necessity of proof that the food so sold is deleterious or unwholesome." It was then held that the fact of illness of the plaintiff after eating at defendant's restaurant is insufficient of itself to establish liability on the defendant, but that the proof must further show that the particular food consumed was in fact unwholesome and unfit for human consumption; and that the plaintiff in that case had failed to meet this burden.

In the Bennett case plaintiff's illness was alleged to have been caused by eating sea scallops at appellant's cafeteria in Hot Springs, Arkansas. She had never eaten scallops before and another who ate of the same scallops at her table made no complaint. There the undisputed proof showed that every precaution was taken in purchasing, shipping, and the storage and preparation of the scallops in question; that thirty-six servings were prepared under proper sanitary conditions and served to thirty-six patrons, including the plaintiff, on the same day; that no complaint was received from any of the other thirty-five patrons who ate of said scallops, and four of those testified in the case. It was there said that the fact that thirty-five other persons partook of the scallops without injury was a strong circumstance of purity. The court also observed that the plaintiff might have been allergic to the scallops, so that they would make her ill, even though they were entirely wholesome.

The factual differences between the Bennett case and the one at bar are apparent. In the instant case appellee's nephew, who ate of the boiled custard at the same table, did become violently ill while appellee's niece, who did not partake of the custard, did not become ill. There was also testimony, admitted without objection, to show that three other persons eating at appellant's cafeteria on the day in question suffered from food poisoning. Also, the evidence here is that appellee was not allergic to boiled custard and that her condition was not caused by an epidemic virus. In other words, the corroborating evidence in the case at bar tends to support the jury's finding that the boiled custard was in fact unwholesome while such evidence in the Bennett case had the opposite effect.

Counsel for both parties have cited and discussed cases from this and other jurisdictions in support of their respective contentions. Each of the cases cited presents a different state of facts and in none of them are the facts exactly parallel to those in the instant case. Many of these cases are collected in the Annotation in 130 A. L. R. 616. These cases hold generally that where a person, after consuming certain food, becomes afflicted with an illness of a kind generally attributable to the eating of tainted food, the contamination of the food eaten is inferable from proof of such sickness plus additional or corroborating evidence, such as that produced here, supporting this conclusion. We do not understand appellant to contend that it is essential that the fact of contamination be shown by direct testimony as distinguished from circumstantial evidence, which is generally regarded as competent to establish any given fact at issue in a civil case. 20 Am. Jur., Evidence, § 272. We conclude that the evidence here is sufficient to support the jury's conclusion that the boiled custard was unwholesome and unfit for human consumption, and that the trial court did not commit error in refusing to direct a verdict for appellant.

Affirmed.

WARD, J., dissents.

4-9569 242 S. W. 2d 971

Opinion delivered October 29, 1951.

G. W. Lookadoo, for appellant.

Lookadoo & Lookadoo and *McMillan & McMillan,* for appellee.

ROBINSON, J. The appellants herein, plaintiffs in the Circuit Court, are engaged in the automobile business in St. Louis, Missouri. They filed suit in the Clark Circuit Court to replevy an automobile which they had sold to one, Jack Wortham, who gave them a check in payment of the purchase price, representing the check to be good, when, as a matter of fact, it was worthless.

The appellee, Shepherd, is in the automobile business at Arkadelphia, Arkansas, and bought the car in question from Wortham at Mauldings' Auto Auction in North Little Rock, Arkansas. It developed that the automobile had been originally sold new at retail by the Metropolitan Chevrolet Company of Springfield, Illinois, to Maury Furman, who in turn sold the car to Hoehn Chevrolet Company of St. Louis, and transferred the Illinois certificate of title to Hoehn Chevrolet Company by signing the certificate in blank. Hoehn sold the car to Roland Edens Auto Sales Company of St. Louis and delivered to it the Illinois certificate of title in the same condition they had received it from Maury Furman. Edens acknowledged the signature of Maury Furman on the Illinois certificate of title. Edens then sold the car to Guthrie Nuckles, who in turn sold it to Pingleton and Cantrell, appellants herein, and they in turn sold the car

to Jack Wortham, who gave the bad check for the purchase price. With each sale of the car the original Illinois certificate of title issued to Maury Furman was passed on to the purchaser without, in fact, complying with the Missouri statutes with regard to the transfer of titles to automobiles. Both plaintiffs and defendant requested a directed verdict and the Court rendered judgment in favor of the defendant Shepherd, appellee herein.

The appellants contend that, since Wortham obtained the car from them on the false representation that the check he gave for the purchase price was good, when in fact it was worthless, they did not part with the title and can replevy the car. Appellee contends that appellant did not comply with the Missouri law with regard to the title certificate, and, therefore, never did have title to the car and cannot repossess it; also, that the appellee Shepherd bought the car in good faith, for value, and without notice of the seller's defect of title.

Section 68-1424, Ark. Stats., provides: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

This section of the statute is a part of the uniform sales act (§ 24), and is applicable to the situation presented here. The seller, Wortham, had a voidable title to the automobile by reason of having obtained it by falsely representing the check he gave for the purchase price to be good. But, his title had not been avoided at the time he sold the car to Shepherd, who bought the automobile in good faith, for value, having paid $1,455 for it, and without notice of the seller's defect of title. Shepherd, therefore, according to the statute, acquired good title to the automobile.

The courts of several states which have adopted the uniform sales act have passed on this question. *Uniform Laws Annotated,* Vol. 1, § 24, cites *Island Trading Co.,*

Inc. v. *Berg Bros., Inc.,* 209 App. Div. 63, 204 N. Y. S. 523, 146 N. E. 345, and a long list of other cases to the effect that a fraudulent sale may not be rescinded if the goods have been transferred to a *bona fide* purchaser.

Where property is obtained from its owner by fraud and facts show sale by owner to fraudulent buyer, an innocent purchaser of property from fraudulent buyer will take good title. *Snyder* v. *Lincoln,* 35 N. W. 2d 483, 150 Neb. 580.

Since a fraudulent purchase of personal property accompanied with delivery is not void, but only voidable at the election of the seller, until it is avoided by the seller the buyer has power to make a valid sale of the goods to a *bona fide* purchaser who has no notice of the fraud. *Parr* v. *Helfrich,* 189 N. W. 281, 108 Neb. 801.

Where persons selling lambs to one whose purchase-money checks were dishonored failed to rescind sale and avoid purchaser's title to lambs before his sale thereof to another, second purchaser and persons to whom he subsequently sold lambs, acquired good title thereto as purchasers in good faith, for value, without notice of any defect in original seller's title. *Keegan* v. *Kaufman Bros.,* 156 Pac. 2d 261, 68 Cal. App. 2d 197. See, also, Brown on Personal Property, § 70, p. 211.

It is unnecessary to discuss the question of whether appellants are precluded from repossessing the car by reason of having failed to comply with Missouri law in regard to the certificate of title.

The judgment of the Circuit Court is affirmed.

REED *v.* SHAW.

4-9581 243 S. W. 2d 4

Opinion delivered November 5, 1951.

Y. W. Etheridge, for appellant.

Thomas Compere and *DuVal L. Purkins,* for appellee.

GRIFFIN SMITH, Chief Justice. The record presents an example of fine judicial coöperation in this: The Chancellor, in addition to the formal decree, wrote an informative opinion setting out salient facts, discussing the testimony in detail where substantial conflict occurred, and citing cases thought to be controlling or highly persuasive respecting the conclusions reached.

J. P. Blanks died testate in May, 1942. Marguriete B. Shaw, the testator's niece, of Conway, Ark., took under the will, and the land in question goes to her unless effect is given to the contentions of the Reeds who assert that they have the right in equity to pay certain indebtedness and procure compliance with a contract the Hamburg Bank made with Pleas Reed and his wife February 23, 1940. The two are Negroes quite advanced in years. Henry is their son, but does not claim a present interest. He works the property and in general acts for his parents, and was named as a defendant. The Reeds believe that transactions with the bank culminating in the February contract, when viewed in the light of subsequent conduct, created a mortgagor and mortgagee relationship with possession, hence the right of redemption.

The appeal comes from a decretal order finding that the contract was an option to purchase, and cancelling it as a cloud on the devisee's title. The Chancellor granted Mrs. Shaw an appeal from an allowance of $475 in favor of the Reeds for permanent improvements, but the appeal was not perfected within 90 days. No appeal as to this item was prayed in this court, hence the alleged error is not before us.

Pleas Reed, although 79 years of age, testified with the utmost clarity and there is no indication of mental deficiency of a character impairing the capacity to contract even if the suggestion of senility should be tested as of the time of trial; but it must be remembered that the contract was made in 1940, predicated upon business dealings of earlier dates. In speaking of the foreclosed property Reed said that the south 80 acres were acquired by his wife, Bethel, through paternal inheritance and that the north eighty had belonged to W. H. Maxwell. The tracts were cultivated by the proprietors and two sons of Pleas and Bethel and their son-in-law until financial stringencies compelled a mortgage to Hamburg Bank.

In a letter written Dec. 2, 1949, addressed to Mrs. Shaw's husband, it was asserted by counsel for the defendants that the sale was permitted in reliance on a preceding agreement that if the mortgagors would not

take advantage of the Frazier-Lemke Act, and thereby cause delay, the bank would accord the obligors the right "to pay out the mortgage indebtedness of $6,360". However, by amendment to the answer, it was asserted that the debt was $4,655.73, "as found by the Ashley Chancery Court in its foreclosure decree".

In all things of primary importance the Reeds were represented by competent counsel. When the foreclosure was consummated the Hamburg Bank became the purchaser, subject to a Federal Land Bank mortgage given in 1927. As a witness Pleas Reed testified that when the Hamburg Bank debt was incurred he and Maxwell were partners; but Pleas contended he had paid "his portion" and that Maxwell was the defaulter. Maxwell (Nov. 28, 1939) quitclaimed to Pleas Reed under a deed describing the entire 160 acres. This occurred eight days after entry of the foreclosure decree. At the sale January 6, 1940, the bank's bid of $6,000 was accepted and the commissioner's deed of February 26, 1940, was duly approved and recorded. The bank conveyed to Blanks January 15, 1942, and on April 22 that institution paid its creditors and went into voluntary liquidation. The bank vault appears to have been acquired by Frederick P. Blanks, J. P.'s nephew, who testified in respect of bank records that book entries and incidental papers touching the dealings with Reed were intact.

Frederick Blanks emphatically asserted that in handling certain rental matters, and during the period from 1940 to 1947, he had never heard of the bank's contract with the Reeds, but on the contrary dealt with those who were in physical possession—particularly with Henry Reed who acted for his father—on a rental basis. The first knowledge Blanks had that Reed was asserting proprietary interests came in the form of a letter from Attorney Y. W. Etheridge addressed to Mrs. Shaw July 19, 1947. Etheridge quoted a contractual sentence, "It is agreed that if Pleas Reed and Bethel Reed . . . comply with this contract as specified, then the Hamburg Bank must execute to them a deed on December 1, 1949". The contract, said Etheridge, provided for a payment of

$636 per year from February 23, 1940, "until and including the year 1949". The attorney thought that because the Reeds were in possession when the bank's deed was made, Blanks was charged with notice of any claims possession might sustain, and Mrs. Shaw's rights could not be greater than her uncle's.

In commenting that the Chancellor in effect found that "the defeasance contract was in form and wording a rental contract with option to purchase", appellants' counsel says he "has no quarrel" with that construction; but counsel insists that preponderating evidence shows an intention by the parties that the old debt should be continued, with the result that the contract to purchase for $6,360, though an option in terms, was a mortgage in fact.

Some of the legal principles considered by the Chancellor in determining the nature of the contract between the bank and Reed were mentioned by Judge Hart in *Watts* v. *England,* 168 Ark. 213, 269 S. W. 585. But whatever the original intentions may have been as they affected the Hamburg Bank on the one hand and the Reeds on the other, the evidence does not sustain a finding that essentials of the contract were complied with.

Following preliminary language, the contract is that "the said renters [Reed and his wife] rent [from the bank] the following lands . . . The terms of rent are that the lessees shall pay to the Hamburg Bank $500 March 1, 1940, for rent for 1940, and execute a rent note or notes for $6,360, the total lease price, as hereinafter set out, being the sum of $6,860. And said rent amount shall be payable $636 November 1, 1940, and said sum on said date each year thereafter until and including the year 1949. On December 1, 1949, the Hamburg Bank . . . for the consideration of the rents on [the 160 acres] by Pleas and Bethel Reed . . . and for their faithful services in paying the above amounts promptly at dates of their maturity, . . . [agrees] to give [the Reeds] only the option of purchasing the lands on December 1, 1949", . . . for the following consideration. The obligations thus assumed were that there should be

repayment, with 8% interest, of taxes *"for each year for the past ten years"* paid by the Hamburg Bank, payment of any other loans made to the Reeds by the bank, and full discharge of any personal obligations due to either J. P. or F. P. Blanks.

Authority to sublease or subrent without written consent was expressly withheld for 1940 "until after the $500 payment . . ." [to be made March 1] had been made, but should the payment be made before March 1 the right was given Reed to rent for 1940. As to future years the privilege of subleasing for more than a year had to be with the bank's written consent. Title in the bank was expressly retained until all payments had been made, but taxes were to be paid by the bank "as heretofore expressed" and charged to the Reeds. Subsistence of the Federal Land Bank's first mortgage was recognized in a paragraph providing that if the Reeds should fail to meet the installments (referred to as annual, but in fact due semi-annually), the contract would be void; but the bank, by direct language, disclaimed an intent to in any way become responsible for the debt, for ". . . [the Reeds] are to pay same in addition to the amounts specified herein . . ."

We concur in the Chancellor's finding that the contract was a ten-year rental agreement with an option to purchase. Appellants contend that they undertook to pay the Federal Land Bank installments, but found that they had already been discharged. They also insist that the initial item of $500 was paid. The testimony is in irreconcilable conflict regarding specific transactions: whether Pleas Reed made certain payments personally to J. P. Blanks, whether they were made by Henry Reed, and whether J. P. or F. P. Blanks received them.

The testimony of Henry Reed is at sharp variance from statements made by his brother, and Pleas does not agree with either of his sons or with other witnesses as to matters of detail. Frederick Blanks was certain he rented the land to Henry for 1940, but it must be remembered that a lapse of ten years would inevitably affect

one's recollection. None of the bank records discloses payment of the initial $500. There was evidence that the Reeds had between them about $225 and that they mortgaged personal property and borrowed $275 to make up the difference. A mortgage for $275 was in fact executed to Barnes Powell, who is not involved in this litigation.

The Reeds testified that the money was delivered in currency and that no receipt was taken because Blanks said it wasn't necessary. Henry Reed's contention was that the 1940 rent was figured on a third and fourth basis, that the bank was offered $636 in payment, but wouldn't accept that much. His father who had subrented to some of the kinsmen formerly mentioned was paid $325. The agreement for a third and fourth was made with Frederick Blanks. Every year, said Henry, they offered the bank or its successors $636, but the sum was refused.

Jasper Reed testified that the 1940 agreement to rent was made with J. P. Blanks, adding: "We offered to pay him cash rent in 1940, but he refused." Jasper was under the impression that after a short crop was made in 1940 "he changed it then to a cash rental basis" for 1941. Henry says his father "came up here to have some understanding with J. P. Blanks as to how to work [the farm]". The witness then went on to say that Blanks agreed to rent the place for $600, "but at the end of the year when the crops had been gathered my Dad went in to pay, and he claims to make some apologies and said that the crop wasn't much. He paid him $643.40". The understanding was that from time to time the difference would be "made up".[1]

A receipt dated Oct. 16, 1942, acknowledges payment of $615 by Pleas, Henry, and Jasper Reed "in full for the Hamburg Bank farm". Payments for 1943 and each year through 1949 were $625. They were marked "payment of rent", or "rental in full", etc.

[1] The transcript, p. 121, shows that Henry testified that the payment was $643.40. This is probably a typographical error, since a receipt reads: "Received $463.40 as payment in full of account and interest due for 1941 to date. F. P. Blanks."

F. P. Blanks testified that the rental payment for 1940 was $125.23. Blanks was inferentially corroborated when Carl McCaig, cashier for Hamburg Bank, testified that the old records disclosed deposits of $78.40 Nov. 27, 1940, and $46.83 Dec. 30 of the same year, a total of $125.23 placed to the credit of "Maxwell and Reed farm". When asked whether he found any other entries for that year McCaig said he had not, but qualified the statement with the explanation that he hadn't looked through the records thoroughly, but they were available.

On cross-examination Pleas Reed again emphasized his payment of $500 in March, 1940, but said he did not pay the rental charge of $625 until 1941. As to all payments showing that the bank or its successors received $625 annually, Reed maintained that he offered $636 but Blanks would not accept it. Henry Reed's testimony, as abstracted by appellants, is that *they* talked with their lawyer in 1941 when the $463.40 payment was made [and] Blanks wouldn't accept a tender of $636.

Henry wrote Mrs. Shaw February 14, 1947, that he had learned she owned the Maxwell and Reed place. He asked whether she would sell and wanted to know what the price and terms would be, adding, "Would you please give me a chance to buy?" The letter, in some of its aspects, is similar to one written by Everett Wallace, p. 885 of vol. 217 of the Arkansas Reports, *Wallace* v. *Johnson,* 234 S. W. 2d 49. In that case Wallace explained that his letter was, in effect, a *feeler* because he had seen the land advertised. Here Henry Reed testified that a white man advised him to make the inquiry.

In arguing that the contract was a mortgage, appellants say there were two antecedent debts: one for $854.73 it is claimed was paid during negotiations, the other for $4,655.73 on which there was foreclosure. Pleas Reed testified that the difference of $1,344.27 between debt and the bank's $6,000 bid was not paid to him or otherwise accounted for. In his opinion the Chancellor found that while the decree recited a judgment for the larger sum ($4,655.73) with costs, actually two items were dealt with. The obligation of $854.26 corresponds with a debt the

Reeds identified, but claimed was paid. On the face of the judgment the $4,655.73 debt drew interest from November 20, 1939; but, said the Chancellor, in the receivership suit filed May 12, 1939, the larger debt is referred to as $4,655.73 with interest from May 23, 1935, to February 8, 1939—$1,745.88. At a hearing June 22, 1939, J. P. Blanks testified that the amount due was the note with interest from May 23, 1935, less a payment of $351.01.

A statement filed by Hamburg Bank in the receivership suit supplied verification. In the foreclosure suit filed September 14, 1938, the prayer was for judgment for $4,655.73 with interest from May 23, 1935. A docket entry made by the Chancellor when the decree was rendered reads: "Judgment for sum sued on, on the pleadings and evidence." In the appeal now before us the Chancellor said: "All the transactions touching the contract took place with that situation prevailing. Both parties were represented by counsel and the question was not raised. Furthermore, in the original answer filed in this case it was stated that the amount for which foreclosure was had was the sum of $854.26 and $4,655.73. Defendants' answer in the foreclosure suit is not with the papers in this case."

There is satisfactory evidence that the property, when foreclosed, was worth $35 to $40 per acre. The cleared land was slightly more than a hundred acres. A defense witness testified that it was highly productive —as good or better than any in the community. F. P. Blanks testified regarding rental value of other lands from which a clear inference would arise that $625 per year for the farm in question would not be excessive.

On the question of credibility it was shown that in 1922 and 1923 P. R. Reed and W. H. Maxwell were indicted for fraudulently issuing school warrants. Reed was president and Maxwell secretary of the board of directors, School District No. 30. Three charges were preferred against each. A certified copy of the criminal records of Ashley county shows that in Circuit Court pleas of guilty were entered. The defendants were given

suspended sentences and probation on condition that the misappropriated fund be repaid.

While we do not take judicial notice of economic conditions in a particular locality, we do know that after 1941, in consequence of World War II and the government's program for increased farm production, agricultural values in general began an upward spiral and have continued in that direction with but slight occasional recessions. In assuming that the Maxwell-Reed farm was not an exception to the general rule—an assumption supported by admissions—we are not engaging in speculation. It is therefore understandable that the Chancellor should look to the foreclosure transaction in the sense that a realist would have viewed it from 1935 through 1940.

Federal Land Bank payments on the first mortgage made during the period in controversy amounted to more than $1,200, none of which was paid by any of the Reeds or on their account. If the debt subsisted as an obligation of Pleas Reed, interest was chargeable on the installments. With the exception of 1947 and 1949 the Bank, Mrs. Shaw, or Blanks paid the taxes.

The Chancellor's finding that the $500 payment was not made is supported by ample evidence. It is not contended that the Land Bank installments were met, and the trial court did not believe testimony regarding payment of rent for 1940.

What appears to have happened is that because of the short crop in 1940 the Reeds abandoned the written contract, and J. P. Blanks so understood it. His death eliminates the possibility of testimony touching specific acts.

If the apportionable annual payments of $636 asserted by appellants had in fact been refused for so long a time, and with recurring regularity, certainly suspicion of misunderstanding would have occurred to the Reeds before 1947; nor does it seem likely, in view of interparty dealings, that with knowledge by Reed that Blanks

declined to issue a receipt for the $500 claimed to have been paid under the contract, there would have been a seven-year delay in clarifying the status now asserted. A strong circumstance is Henry Reed's letter to Mrs. Shaw.

Characteristics of a lease with purchase privileges were discussed in *Smith* v. *Carter,* 213 Ark. 937, 214 S. W. 2d 64. Abandonment of an option was dealt with in the Wallace-Johnson case, *supra.*

Affirmed.

MOONEY *v.* GANTT.

4-9570 243 S. W. 2d 9

Opinion delivered November 5, 1951.

W. H. Kitchens, Jr., for appellant.

N. J. Gantt, Jr., and *McKay, McKay & Anderson,* for appellee.

ED. F. MCFADDIN, J. Appellants sought to cancel an instrument which their mother had executed to the appellee; and from a decree refusing the prayed relief, they prosecute this appeal.

Mrs. L. E. Mooney, being the owner in fee of 120 acres of land in Columbia County, executed and delivered

to appellee an instrument, the germane portions of which read:

"CONTRACT FOR THE SALE OF SAND AND GRAVEL

"THIS CONTRACT made and entered into on this the 11th day of June, A.D. 1940, by and between Mrs. L. E. Mooney, party of the first part, and C. J. Gantt, party of the second part.

"WITNESSETH:

"For and in consideration of the sum of One Dollar, receipt of which is hereby acknowledged, I, Mrs. L. E. Mooney, party of the first part, hereby agree to sell to C. J. Gantt, party of the second part, all gravel and sand located in and on the following described land lying in the County of Columbia and State of Arkansas, to-wit: (Here follows description of land) for the price of 15 cents per cubic yard for stripped gravel, and 10 cents per cubic yard for unstripped gravel, said sand and gravel to be measured at the gravel washing plant of the Gantt Gravel & Sand Company, such measurements to be made by the party of the second part. . . .

"It is further understood and agreed that the party of the second part is now exercising his right to remove gravel from the above described land and shall have the right to continue the mining and removing of sand and gravel from said land so long as sand and gravel are being mined and hauled from said land, and it is further understood that the party of the second part may at any time thereafter cease to mine and remove gravel and sand from the above described land at his option with no other charges incurred than the payment to the party of the first part the sum of 15 cents per cubic yard for stripped gravel and 10 cents per cubic yard for unstripped gravel as above stipulated for the actual quantity of sand and gravel removed from such land.

"This contract is to remain in full force and effect so long as the party of the second part continues to mine

and remove sand and gravel from any pit or pits that are or may be located upon the above described lands."

Appellee Gantt regularly removed sand and gravel from the land; and over the years his checks to Mrs. Mooney averaged from $35 to $65 per month. Mrs. Mooney died February 4th, 1950, having devised her property to the appellants who are her four sons. They filed this suit on February 20th, 1950, seeking to cancel all of Gantt's rights under the aforesaid instrument; and the complaint alleged:

"That said instrument lacks mutuality of both obligation and consideration: defendant paid no consideration for the instrument, which is indefinite as to amount and time within which gravel and sand are to be removed, and completely devoid of any obligation on part of defendant to actually mine and remove gravel and sand from said lands, and said instrument is void.

"That under terms of said instrument, it was and is entirely optional with defendant whether or not he mines and removes sand and gravel, and defendant being never bound on his part to do the act which formed the reason for the promise of Mrs. L. E. Mooney, said instrument is void for want of mutuality."

The prayer was:

"WHEREFORE, plaintiffs pray said instrument and record thereof be cancelled, set aside and held for naught, that plaintiffs' title be quieted and confirmed as against defendants, and for all other, further and general equitable relief, and in any event, plaintiffs ask the right to mine and remove gravel and sand."

As aforesaid, trial in the Chancery Court resulted in the decree refusing the prayed relief; and this appeal followed. We affirm the Chancery Court.

I. *Consideration.* Even assuming that in the absence of allegations of fraud, etc., appellants could be permit-

ted to introduce evidence to impeach the existence of all consideration[1] recited in the written instrument, nevertheless there was positive testimony that the recited dollar was actually paid to Mrs. Mooney when the instrument was signed by her in the lawyer's office. We therefore hold that consideration was established. See *Jones* v. *Ainell,* 123 Ark. 532, 186 S. W. 65.

II. *Mutuality.* To support their claim of want of mutuality, appellants cite and strongly rely on *Grayling Lumber Co.* v. *Hemingway,* 124 Ark. 354, 187 S. W. 327.[2] But that case involved a labor contract rather than a lease of real estate or a grant of right to explore for minerals. In *Lawrence* v. *Mahoney,* 145 Ark. 310, 225 S. W. 340, and in *Epperson* v. *Helborn,* 145 Ark. 566, 225 S. W. 345, 15 A. L. R. 597, we held one dollar to be sufficient consideration for an oil and gas lease, since there was the implied covenant to develop and the express covenant to pay royalty.[3] The case of *Morley* v. *Berg,* 218 Ark. 195, 235 S. W. 2d 873, involved the removal of gravel; and we there cited the oil and gas case of *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837. So the holdings in the oil and gas cases apply to a case like this one, where there is a grant, or lease of premises, for mining and removal of minerals, and with the promise by the grantee to pay royalty. The evidence in the case at bar shows that the appellee has all the time continued to diligently fulfill the implied covenant to mine the sand and gravel and the express covenant to pay royalty.

Affirmed.

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[1] See *Mitchell* v. *Smith,* 206 Ark. 936, 175 S. W. 2d 201; and see other cases collected in West's Arkansas Digest, "Evidence," Key No. 432.

[2] See same case on second appeal, 128 Ark. 535, 194 S. W. 508.

[3] For other cases to like effect and involving implied covenants to develop, see *Grooms* v. *Minton,* 158 Ark. 448, 250 S. W. 543; *Miller* v. *Mauney,* 150 Ark. 161, 234 S. W. 498; *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; *Poindexter* v. *Lion Oil Refining Co.,* 205 Ark. 978, 167 S. W. 2d 492; and cases collected in West's Arkansas Digest, "Mines and Minerals," Key No. 58.

DORN *v.* HUTSON.

4-9575 243 S. W. 2d 11

Opinion delivered November 5, 1951.

[redacted]

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

Reece Caudle and *Richard Mobley,* for appellee.

ROBINSON, J. Appellee owned a farm subject to a life estate of her sister, Sophia, and her mother, Therese Dorn, and in May, 1948, entered into negotiations with her brother, Henry Dorn, one of the appellants herein, for sale of the place. The negotiations resulted in a deed from appellee, Anna Dorn Hutson, to Henry Dorn and his wife, Belle Dorn, the deed showing a consideration of $2,000 and reserving a life estate in Sophia Dorn and Therese Dorn.

Appellee was never paid anything for her interest. Appellant is contending that, under the agreement, appellee was not to receive anything; that he was to pay a mortgage indebtedness of $3,000; $275 to a Mrs. Mourning; $118 to one Bocksnick, and that he was to pay nothing else.

The Chancellor found that, according to the agreement for purchase of the property, appellants were to pay to appellee $2,000, less $275 to be paid Mrs. Mourning and $118 to Bocksnick, making a total owed by appellants to appellee of $1,607.

On May 3rd, 1948, appellant wrote the appellee, excerpts from the letter being as follows: "Now, you say in your letter that you would sell me the home place for $6,000. If I understand everything you want $2,000,

and the loan is $3,000, and Sophia $1,000. Now, I will give $6,000 for the place, and Mama and Sophia can live there."

On June 8th, appellant wrote: "As for the payments you have made on the loan, that is just like putting money in the bank for you as I am going to pay out as I agreed $6,000 less any payments I make, so you get all that back.

"As for a bargain, there isn't any. I am doing this for Mother's sake. I know I am paying more than the place is worth, but I am figuring to sell this one the same way."

The appellant claims that all negotiations for the purchase of the place had been ended in a telephone conversation with his sister, Anna, in June when he refused to pay $300 for an option; that negotiations for the purchase of the property were renewed in a letter which he received from his sister in July, and that he bought the property according to the terms of this letter, which is as follows:

"If it isn't too late to accept your offer on the farm, I have no choice right now to do otherwise. I can't work in Texas until I take the State Board exam, here in August 3, and if I have to leave J. B. to go back to Arkansas, it means not ever coming back, for he is due some consideration too. The farm has been nothing but expense to us and hard feeling—which I don't blame him too much. If it means losing all the money I've put on the farm that's it too. I owe Johnnie Bocksnick $118 for the work he did on the farm and Mrs. B. A. Mourning a balance of $275. Mrs. Mourning is a personal friend of mine and I was to pay it back $50 a month and have. I borrowed it to buy lumber and roofing, until I got the money from the loan, but Johnnie's figures were small to begin with and costs lots more than he had figured on so as the result there wasn't enough money left to pay Mrs. Mourning in full. She doesn't need all of it or she would probably wait until I could work to pay her. The reason I had ask for the $300 when I did it would have settled everything until I could work.

"Instead of giving you a legal option I'd rather change the deed to you, that is if you still want the place. If you pay these bills I have mentioned, and then when you do sell your farm if you want to pay me the rest you can if not just forget it. I can always make my own living and you seem to think you are paying too much for the farm anyway. All I want is to get rid of it and let someone else worry awhile, that's all it has ever meant to me. I can say one thing Sophia is paid. I don't owe her one penny for giving me my beauty course, and it doesn't mean I have to take care of her the rest of my life. Sophia has the deeds to the farm and she can take it to an attorney there in Russellville and have the deed changed. There will be some charges to that. You may have to pay for having it recorded, etc., also the fee for handling it, but that will save the one thing of making an option.

"Please don't wait long for writing me one way or other. You have a reason for being sore at me, and I apologize, but if you knew how much it means to me and how upset I have been doing up there on the farm, and what I've had to put up with too, after you live there awhile you'll know what I mean.

"Hope your family is all well now, you have had your share of sickness, maybe it will be over now. Let me hear from you soon."

The above letter was dated July 3rd, and it is clear that Henry received it before writing his letter of July 8th, in which he states: "Received your letter this morning . . . About the farm, I will do that—pay J. Bocksnick $118 and Mrs. Mourning $275. . . . I am not forgetting anything. I am going to pay you all you ask for, a total of $6,000. As to changing the deed you should do that yourself. Make the deed to both Belle and me. I am sending in another payment to the loan company as it is due, I believe, the 15th, but will wait until I receive the deed and where to send the other payments, Mrs. Mourning. Hope everything is clear now."

After receiving Henry's letter of July 8th, Anna executed and delivered a deed which shows the considera-

tion to be $2,000 and reserves a life estate in her sister and mother. Appellants have received the deed and appellee has been paid nothing for her interest.

The decree is affirmed.

MERCHANTS & PLANTERS BANK *v.* SPEARS.

4-9693 243 S. W. 2d 751

Opinion delivered November 5, 1951.

Rehearing denied December 3, 1951.

Elton A. Rieves, Jr., Nance & Nance and *Hale & Fogleman*, for appellant.

Bailey & Warren, for appellee.

ED. F. MCFADDIN, Justice. This suit stems from a dispute between rival groups in the Merchants & Planters Bank of West Memphis. Appellants constitute the majority faction and are directors of the Bank. Appellees, the minority faction, filed suit to require the Bank and the appellants to recognize the appellees as stockholders. From a decree in favor of the appellees there is this appeal.

The capital stock of the Bank consists of 500 shares. On December 12, 1949, appellants, Smith, Cooper, Johnson, McCaa, McKee, Johnson, *et al.,* owning or controlling 285 shares, entered into a voting trust agreement which provided, *inter alia,*

"The said parties shall at all times vote their stock as a unit. The decision as to the way said stock shall be voted on any issue shall be determined by the majority of the stock covered by this agreement.

. . . .

"The parties hereto agree that they will not sell any stock covered by this agreement to anyone not a party to the agreement.

. . . .

"This contract shall remain in effect for a period of ten (10) years from the date of execution of same, unless sooner cancelled by mutual agreement of all parties hereto."

At the time the said voting trust agreement was signed Jack Rich owned 163 shares, and his brother-in-law, B. G. Dickey, owned 52 shares; and these constitute the remaining 215 shares against which the voting trust agreement was apparently directed. Rich was one of the directors of the Bank in 1949; but when he learned of the said voting trust agreement he resigned as director, and removed from the Bank the accounts which he controlled, although he and Dickey retained all of their stock in the Bank, except the 20 shares now to be discussed.

On November 27, 1950, Jack Rich sold five shares of his bank stock to each of the four appellees, Spears, O'Bryant, Fallis and Wood. Each purchaser paid Rich $1,250 which was 2½ times the face value of the stock, even though the book value at that time was probably 3.9 times the face value. Each of the purchasers was a trusted friend and business associate of Jack Rich; and Rich testified that it was his thought that three of these men might become directors in the Bank, in which he held such a large block of stock, but that he would not

be a director because he felt the other directors had evidenced animosity against him by the adoption of the voting trust agreement. Each of the four appellees is a good business man; and it was frankly stated by the attorneys for the appellants in the oral argument before this Court that the only thing wrong with any of the appellees is the close association with Jack Rich.[1]

Among other stock certificates, Rich held Certificate No. 32 for 20 shares of stock in the Bank. On November 27, 1950, he endorsed this certificate in blank and forwarded it to the Bank by mail with a letter reading:

"I enclose Capital Stock Certificate No. 32 for twenty shares of stock in the Merchants and Planters Bank. This stock has been sold, and I ask that you reissue as follows and mail to me for delivery.

"J. H. Spears ..... 5 shares
L. R. O'Bryant ..... 5 shares
R. R. Fallis ..... 5 shares
James Wood ..... 5 shares"

The majority faction (appellants) in charge of the Bank refused to comply with Rich's direction that the shares be issued to the four appellees. Also, at a directors' meeting on December 12, 1950, the majority: (1) advanced the annual meeting of stockholders from the second Tuesday in January (as it had been), to the first Wednesday of January of each year beginning in 1951; and (2) closed the stock books against transfer for a period of forty days prior to any annual stockholders' meeting. At the same meeting the directors adopted "Resolution Number 4," which reads:

"That no one shall be eligible to serve as a director of this bank who is an officer of, or member of a board of any competitive institution of banking in Crittenden County, Arkansas, or whose business connections, interests, or conduct, are hostile to or antagonistic to the well-being of this institution."

[1] The State Bank Commissioner testified in the Chancery Court that his Department would approve the transfer of the stock to the appellees. (See § 67-318 Ark. Stats.)

On December 20, 1950, appellees filed suit, alleging that each of them had purchased from Jack Rich five shares of stock in the Bank; that appellants had refused to allow the stock to be transferred to appellees; and prayed that appellants be mandatorily enjoined to transfer the said stock certificates, and recognize appellees as the shareholders.

On January 25, 1951, appellees filed amendment to the complaint, alleging that at the so-called annual stockholders' meeting on January 3, 1951, the appellants, as the majority faction in the Bank, had arbitrarily and illegally refused to admit appellees as stockholders; and had refused to count votes cast for appellees, Spears, Wood and O'Bryant for directors; and that the said three appellees received more votes than three of the persons whom the appellants claimed to have been elected as directors. In the amendment, appellees prayed, *inter alia,* that they be issued their five shares of stock, that the meeting of January 3, 1951, be declared void, that a new stockholders' meeting be called.

The cause was heard by the Chancery Court and resulted in a decree in favor of the appellees. The learned Chancellor used this language:

"The Court is of the opinion that the defendants totally failed to allege facts in their answer sufficient to justify their action in refusing to recognize the transfer and that the evidence offered in support of their pleadings likewise failed to justify such action.

"The integrity of the transferees is admitted and the main objection to them seems to be that they will be representatives of an alleged hostile stockholder and, as such, will be passing upon matters of vital importance to the Bank.

. . . .

"It is, therefore, the holding of the Court that the transferor had the right to sell and the transferees had the right to purchase the Stock Certificate in question and the order will be to the effect that Stock Certificate

Number 32 be cancelled and reissued in the names of the plaintiff, five shares each, and that such transfer be made upon the books of the Bank."

The Chancery Court also ordered that a meeting of the stockholders be held for the purpose of conducting a legal election for directors. From the decree in favor of the appellees, the appellants prosecute this appeal, and argue, here, these points:

(1)—The Stock Certificate No. 32 was never legally delivered by Rich to the appellees, nor by the appellees to the Bank.

(2)—The appellees were not *bona fide* stockholders, but were merely representatives of Rich.

(3)—The majority had, and has, the right to refuse to allow any of the appellees to be directors because of Resolution No. 4.

With becoming candor the appellants say:

"At the outset counsel would suggest that they are familiar with the general rules of law governing the transfer of bank stock and stock in business corporations; that *ordinarily* the motive of one seeking to transfer stock may not be questioned; and that stock may be transferred for the purpose of qualifying one to become a member of a board of directors. It is submitted, however, that this is no ordinary situation, to which the general rule may blindly be applied, . . ."

The rationale of appellants' argument is, that Rich's conduct and declarations reflected an intention to greatly damage the Bank; and that, appellants, as the majority stockholders and directors, occupied a highly fiduciary relationship to the Bank and were justified in doing all that they did in their efforts to protect the Bank against the machinations of Rich.

It is impossible to clear the record of the ill will and personality "digs" that have been injected into the case. The appellants say that when the bank was organized, it was orally agreed that no one person would ever seek to obtain a majority of the stock of the Bank; and

that the appellants entered into the voting trust agreement only after they had learned that Rich was secretly acquiring stock and had actually obtained 42 per cent. of all of it. Rich is not a party to this case but was the main witness for the appellees, and claims that in selling the stock to the appellees and in persuading them to be willing to become directors he was trying to bring about harmony. We do not decide the personal grievances as between Rich and appellants, but only the justiciable rights of the respective parties to this litigation. Businessmen of the caliber of the appellants and the appellees and Jack Rich should certainly compose[2] their differences for the best interest of the Bank and the community.

After a careful study of the entire record we reach the unanimous conclusion that the Chancery decree should be affirmed. The directors had the legal right to change the date of the annual stockholders' meeting from the second Tuesday in January to the first Wednesday in January (which in the year 1951 moved the meeting from the 9th of January to the 3rd of January.) "Also, assuming—but not deciding—that the directors had the legal right to pass a resolution closing the stock books against transfer for as long as 40 days prior to the annual meeting, nevertheless the exercise of these powers by the directors . . ." must have been in good faith and must have operated prospectively only, and must not have been done so as to defeat the rights of the appellees which arose prior to the meeting of December 12, 1950, at which such resolutions were passed. We find: (a) that the appellants' refusal to transfer the stock to appellees and the appellants' action in advancing the date of the annual stockholders' meeting, and in adopting Resolution No. 4, were acts, all in furtherance of the majority's plan to prevent Rich's associates from having any voice in the affairs of the Bank; and (b) that the Bank and the appellants are without any sufficient reason for refusing to transfer the stock and for refusing to recognize appellees as *bona fide* shareholders. The stock should

[2] We use the word, "compose," in accordance with the meaning given in the dictionary: "To free from agitation or disturbance; to tranquilize, settle, or sooth; to calm; to quiet."

have been transferred to the appellees in accordance with Rich's letter of November 27th; and the appellees should have been recognized as stockholders and the votes counted for them as directors at the annual stockholders' meeting.

"The chancery court directed that a special stockholders' meeting be held in October, 1951, for the purpose of electing directors. But since only a short time now remains until the annual stockholders' meeting in January, 1952, and since by this opinion the appellees are made stockholders of record as of Nov. 27, 1951, we perceive no reason for a special stockholders' meeting to elect directors to be held prior to the annual meeting in January, 1952. We therefore delete from the chancery decree the provision for a special stockholders' meeting to elect directors. With this exception only, the decree of the chancery court is in all things affirmed."

COWAN *v.* POWELL.

4-9590 243 S. W. 2d 373

Opinion delivered November 5, 1951.

Rehearing denied December 3, 1951.

Carroll W. Johnston, for appellant.

Gordon & Gordon, for appellee.

George Rose Smith, J. This suit was brought by the appellant, Geraldine Cowan, individually and as administratrix of the estate of Bill Cowan, to recover certain assets of the estate that were alleged to be in the possession of the appellee, Billie Faye Powell. Geraldine, the plaintiff, is Cowan's widow, and Mrs. Powell is his daughter by an earlier marriage. By his will, which the widow renounced, Cowan left a dollar to Geraldine and the rest of his property to his daughter. By her pleadings Billie Faye denied that she had possession of any assets of the estate and by cross-complaint asserted certain claims against Geraldine individually and as administratrix. Five major issues were developed at the trial, and in each instance the chancellor held that neither the widow nor the daughter should be required to surrender any property to the estate. The

complaint and cross-complaint were accordingly dismissed, and both litigants have appealed.

I. In May, 1948, about ten months before his death, Cowan opened a bank account in his daughter's name and deposited $5,000 to her credit. At Cowan's death the sum of $2,325.45 remained in the account, which the bank paid over to Billie Faye. The appellant contends that this money is an asset of the estate and should be paid to the administratrix. This contention is based on the fact that the bank account was carried in the name of "Mrs. A. C. Powell, c/o Bill Cowan," and that all checks against the account were signed "Mrs. A. C. Powell by Bill Cowan." It is the appellant's theory that Cowan was merely carrying his own bank account in his daughter's name.

We agree with the chancellor's finding that the account belonged to Mrs. Powell. During her minority she had received $850 in payment of a judgment for personal injuries and had inherited $1,758.26 from her grandfather. Bill Cowan took charge of these monies for his daughter and acted somewhat informally as her guardian, investing at least part of the funds in his cotton buying business. It is a fair inference from the testimony that when Cowan deposited $5,000 in Billie Faye's name he intended it to be in settlement of his account as her guardian, and in any event the proof justifies a finding that a gift was intended and completed. Both Billie Faye and her husband testified that Cowan gave the deposit slip to her and told her that the money was hers. Billie Faye accepted the settlement or gift but asked her father to continue to invest the money for her as he had in the past. This proof amply supports the chancellor's conclusion that the account was Billie Faye's and not an asset of the estate.

By cross-appeal Billie Faye contends that the court should have held the estate liable for the difference between the original deposit of $5,000 and the amount that remained when Cowan died. But the proof is insufficient to sustain such a charge against the estate. Billie Faye concedes that she gave her father full power to

invest the funds as her agent. According to the testimony as abstracted, she has neither shown nor even attempted to show that any of the money was taken by Cowan personally or otherwise wrongfully spent, although all the canceled checks were available for her inspection and investigation. Her proof consists only of the fact that the initial deposit was $5,000 and that the account contained only about $2,300 when Cowan died. On this scanty proof the trial court correctly concluded that the burden of proving liability had not been met.

II. In 1946 Cowan bought a Chevrolet car and gave it to Billie Faye. The appellant now contends that this gift should be treated as an advancement and considered as part of the estate in the division between the widow and daughter. We find not a syllable in the testimony to indicate that Cowan, in giving his daughter a car, intended the gift to be in anticipation of what Billie Faye would receive upon his death. Yet, if the gift is to be held to have been an advancement, Cowan must have entertained that intention. *Holland* v. *Bonner*, 142 Ark. 214, 218 S. W. 665, 26 A. L. R. 1101. The doctrine of advancements is based upon the parent's supposed desire to treat all his children equally; so the applicability of the doctrine to a gift to an *only* child is evidently doubtful. But even if the doctrine be assumed to be applicable the proof shows that Cowan had promised his daughter a car during World War II and was finally able to obtain one as a Christmas gift in 1946. There is not the slightest indication that an advancement was intended.

III. Also in issue is another car, a Buick which Cowan bought and registered in his own name. The chancellor found that Cowan had given this car to Geraldine, but we think this finding contrary to the weight of the evidence. Several witnesses testified that Cowan had referred to the Buick as his wife's car, while about as many others testified that Cowan had referred to the car as his own. We attach little weight to such casual statements about a family vehicle. It is not disputed that Cowan paid for the car and took title in his own name. For Geraldine to overcome this *prima facie* proof it was necessary for her to show some act on Cowan's

part that amounted to a gift to her. Such evidence is wholly lacking. Her sole testimony on the point is this question and answer: "Q. They refer to a green Buick car. Whose car is that? A. Mine." In the absence of any proof whatever of conduct amounting to a gift we are not willing to say that a claimant may overcome unimpeached written evidence of the decedent's ownership by simply voicing a conclusion of law, "It's mine." The trial court's finding upon this issue must be set aside.

IV. Billie Faye insists that her stepmother has in her possession warehouse receipts representing seventeen bales of cotton owned by Cowan and that the negotiation of these receipts should be enjoined. The proof shows convincingly that Cowan bought the cotton before his death, that the bales are still in warehouses, and that the negotiable receipts have not yet been presented to the warehousemen. But the question of whether Geraldine has the receipts is purely one of credibility. Billie Faye testified that after her father's death she saw the receipts in Geraldine's purse, while Geraldine denies that she has or has ever had the receipts. Where the conflicting testimony of the two litigants is not otherwise corroborated we are guided by the chancellor's decision as to which witness to believe. *Leftwich* v. *Cash Lbr. Co.,* 214 Ark. 586, 217 S. W. 2d 357. We conclude that Billie Faye has not established her right to injunctive relief, but of course this conclusion is without prejudice to any action that may be taken on behalf of the estate if the receipts should be discovered.

V. The most difficult issue concerns the ownership of $1,606 in cash that was found in Cowan's safety deposit box. This money was contained in four envelopes, each bearing on the outside the appellee's name and a notation of the amount within the envelope. On this showing alone Billie Faye would have no claim to the money, the gifts being undelivered. *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495.

Billie Faye testified, however, that the money was actually delivered to her and later placed in the deposit box for safekeeping. In substance this is her version of the incident: On May 10, 1948, she sold a house to her

father for about $3,000. Cowan agreed to pay $2,000 in cash and to assume certain unpaid bills which Billie Faye had incurred in purchasing household goods. On the day of the sale the father and daughter went together to a bank in Morrilton, where Cowan obtained a cashier's check for $1,169.17 as part of the $2,000 cash payment. An officer of the bank assisted in calculating the amount of this check. After leaving the bank Billie Faye and her father went to the car, where he gave her an additional $1,606. She did not want to carry that much money with her; so the two went to Cowan's office, where Billie Faye counted the money and had her father put it in four envelopes with her name and the amount on the outside of each. She asked him to keep the envelopes in his deposit box, and there they were found after Cowan's death almost a year later. When the box was opened the bank permitted Billie Faye to take the money, which the appellant now seeks to recover for the estate.

The burden of proof was on Billie Faye to show that property found in Cowan's deposit box belonged to her. There are so many circumstances at variance with her version of the matter that we cannot conscientiously say that the burden of proof has been sustained. To begin with, the cash figure of $1,606 must evidently have been arrived at by calculation of some sort, especially as the cashier's check was also calculated to the penny. Yet there is no way to arrive at the $1,606 figure on the basis of the many figures submitted by Billie Faye. She introduced invoices to show the amount of the unpaid furniture bills; but we have been unable to arrive at any method of calculation by which the unpaid cash balance would be $1,606, nor has any such calculation been suggested by counsel. Indeed, the appellee's testimony about this transaction is so vague that it is impossible even to be sure what the alleged agreement was.

Second, the cashier's check was in the sum of $1,169.17, which is said to have been calculated by taking into account the outstanding furniture bills. But it is undisputed that on the same day, May 10, Cowan closed a small bank account in his name as guardian and with-

drew the balance of $69.17. It is almost impossible to believe that the $69.17 so withdrawn does not also represent the odd dollars and cents in the cashier's check for $1,-169.17. Yet this explanation would have to be rejected if we are to find that the amount of the cashier's check was determined by taking into consideration unpaid bills also involving odd dollars and cents.

Third, it is unlikely that part of the transaction would have been calculated in the presence of the bank officer, and with his assistance, and yet the payment of the cash have been delayed until Cowan and his daughter were alone in their car a few minutes later. And if Billie Faye were afraid to carry the money with her it would have been simpler to return to the bank, where her father carried the account in her name, than to resort to the odd procedure of sealing it in various labeled envelopes.

Fourth, the envelopes themselves indicate that the notations on the outside were not all made at the same time. Three of the envelopes bear the name "Mrs. A. C. Powell," but the fourth is inscribed "For Billie Faye Powell, 1509 West 12th Street, North Little Rock, Ark." It is improbable that Cowan, in simultaneously addressing four envelopes, would have used one name on three of them and a different name, as well as a street address, on the fourth.

Any one of the circumstances we have mentioned might not be sufficient in itself to overcome the appellee's testimony, but the cumulative effect of them all is so great that we cannot say that the weight of the evidence shows a manual delivery of the envelopes to the appellee. Nor did the chancellor so find. Instead, he awarded the $1,606 to Billie Faye upon a finding that it had been "placed in envelopes, marked and put in the lock box to which Mrs. A. C. Powell had a key, whereby she could have taken possession at any time." It is now argued that since Cowan gave Mrs. Powell a key to the deposit box this constituted a sufficient symbolic delivery of the envelopes. But the trouble is that Cowan retained another key himself, so that the asserted symbolic delivery lacks the requirement that the donee's con-

trol be exclusive. "There is no gift where the subject matter instead of passing into the exclusive possession of the donee or his agent, is placed in a receptacle of the donor's, or in a safety vault, to which the donor as well as the donee has access." Brown, Personal Property, § 39. The appellee relies on *Gross* v. *Hoback,* 187 Ark. 20, 58 S. W. 2d 202, but in that case duplicate keys were not involved.

As to the Buick and the $1,606 in cash the decree is reversed and the cause remanded with directions that these assets be surrendered to the estate. In other respects the decree is affirmed, each party to bear her own costs.

WARD, J., dissents as to Part V of the opinion.

VAUGHN *v.* DOSSETT.

4-9571 243 S. W. 2d 565

Opinion delivered November 5, 1951.

Rehearing denied December 10, 1951.

Neill Reed and *R. W. Tucker,* for appellant.

G. P. Houston and *J. L. Bittle,* for appellee.

MINOR W. MILLWEE, J. This is a suit by appellees, J. B. Dossett and D. L. Dossett, father and son, against appellant, W. W. Vaughn, in which each side seeks to quiet its title as against the other to a forty acre tract of land in Cleburne County, Arkansas.

The preponderance of the evidence tends to establish the following facts: The land in question was formerly owned by C. A. Hockett. On June 11, 1934, Hockett executed a deed conveying the land to Jesse DeLoach who, on the same date, executed a mortgage back to Hockett to secure payment of the purchase price of $120, payable $20 annually beginning November 1, 1934. The deed from Hockett to DeLoach was never placed of record, but the mortgage executed by DeLoach was filed for record August 5, 1935.

DeLoach went into possession and constructed a two-room house on the tract from materials furnished by Hockett. He remained in possession until the latter part of 1936 when G. T. Carter began negotiations with Hockett and DeLoach to purchase the tract. DeLoach had paid none of the purchase price and, upon being approached by Carter, agreed to surrender his interest in the property and the deed from Hockett for $10. Carter paid this amount and DeLoach surrendered possession and the deed from Hockett which was returned to Hockett who executed a warranty deed to Carter on December 28, 1936. This deed was recorded December 30, 1936, and recited a consideration of $120, with $60 paid in cash and the balance payable $20 per year beginning November 1, 1937, and provided: "This deed to be good and clear when last note of the series is paid, or void upon failure of payment of any note of series." The record of this deed shows satisfaction of the indebtedness on April 29, 1947, by Lethyes Burnett as "legatee and devisee and sole beneficiary of the Ella Hockett and

C. A. Hockett estate." Marginal entry also shows satisfaction of the mortgage from DeLoach to Hockett by the latter on January 2, 1937.

The land forfeited to the state for the 1935 taxes while still in Hockett's name on the tax records and Carter redeemed from this sale on December 30, 1936. Upon receipt of the deed from Hockett, Carter and his son went into possession and remained on the land until the house was destroyed by tornado in 1938. The land remained on the tax records in DeLoach's name, but no taxes were paid thereon from 1936 to 1945. On November 11, 1946, appellees purchased the land at the annual collector's sale of lands delinquent for the taxes of 1945 and received a certificate of purchase. Hockett died in 1939.

On November 14, 1946, DeLoach, who then resided in Indiana, executed a quitclaim deed of the tract to appellant who filed the deed for record on November 25, 1946, and on the same date redeemed the land from the tax sale to appellees of November 11, 1946.

On May 2, 1947, G. T. Carter, who then resided in Missouri, executed a warranty deed to appellees who placed the deed of record May 5, 1947. Appellant paid taxes on the land for the years 1946, 1947 and 1949 while appellees paid the 1948 taxes. The land remained vacant and unoccupied until the instant controversy arose in 1949 when appellant began cutting and removing timber.

The chancellor found that DeLoach had no title or interest in the land when he conveyed by quitclaim deed to appellant in November, 1946, and that appellees had acquired title under the conveyance from Carter in May, 1947. A decree was entered cancelling the deed from DeLoach to appellant and quieting appellees' title to the land as against appellant upon payment to the latter of the sums expended by him for taxes.

Appellant earnestly insists that when he obtained the quitclaim deed from DeLoach in 1946, record title was in the latter as against Hockett by virtue of the

recorded mortgage from DeLoach to Hockett, which had been satisfied; that in order to transfer the record title back to Hockett it would have been necessary for DeLoach to execute a proper conveyance and place it of record, which was not done; and that the recorded deed from Hockett to Carter dated December 28, 1936, was ineffectual to constitute notice to appellant. Hence, appellant argues that he was an innocent purchaser for value and that the deed from Carter was ineffective to convey title to appellees who were bound to take notice of the record title at the time Carter acquired his deed from Hockett. Appellant is correct in his contentions unless his grantor, DeLoach, would have been estopped to deny the title of Carter and appellees are in position to claim the benefit of such estoppel. We agree that Carter's action in acquiring the unrecorded Hockett-DeLoach deed and in returning it to Hockett was ineffectual to transfer title, but the question remains whether, under this and subsequent actions of DeLoach and Carter, the latter was entitled to invoke estoppel as against the former and whether appellees, as purchasers from Carter, may rely thereon.

At the time appellant acquired the quitclaim deed from DeLoach the records disclosed the mortgage from DeLoach to Hockett and the satisfaction thereof. A prospective purchaser would readily have discovered the missing link in DeLoach's chain of title, since there was nothing of record to show how he acquired title to the land which he mortgaged to Hockett. A search of the deed records would have readily disclosed the deed of December 28, 1936, to Carter from Hockett, who was the grantor of both DeLoach and Carter. This should have put a prudent purchaser on inquiry as to the nature of Carter's interest in or title to the property.

The applicable rule is that if anything appears in an instrument in his chain of title that would put a prudent man on inquiry, the purchaser is charged with actual notice which he would have received had he pursued the inquiry with reasonable diligence. *Gaines* v. *Saunders*, 50 Ark. 322, 7 S. W. 301; Jones, Ark. Titles, § 102 and cases there cited.

In the opinion in *Gaines* v. *Saunders, supra,* Judge BATTLE said: "A person purchasing an interest in lands 'takes with constructive notice of whatever appears in the conveyances constituting his chain of title.' If anything appears in such conveyances 'sufficient to put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it he is guilty of bad faith or negligence,' and the law will charge him with the actual notice he would have received if he had made it." (Citing authorities.)

The facts also bring the instant case within the rule of equitable estoppel repeatedly approved by this court and stated, as follows, in *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553: "The principle invoked is that a party who, by his acts, declarations or admissions, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not have otherwise entered upon is estopped to assert his rights afterwards to the injury of the party so misled." It is also well settled that the vendee, or grantee, of one estopped from claiming title is also estopped. *Allen* v. *Daniel,* 94 Ark. 141, 126 S. W. 384; *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30. The rule is more broadly stated in *Mason* v. *Dierks Lumber & Coal Co.,* 94 Ark. 107, 125 S. W. 656, 26 L.R.A., N.S. 574, as follows: "With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate or by contract." A privy in estate is one who takes title to the property in question by purchase or by conveyance. *Johnson* v. *Commonwealth Building & Loan Association,* 182 Ark. 226, 31 S. W. 2d 136.

We think DeLoach was clearly estopped by his conduct from asserting title to the forty acre tract as against Carter and that appellant, as DeLoach's grantee, is also estopped. After living on the land two years, DeLoach failed to pay the purchase price and voluntarily surrendered possession and the Hockett deed to Carter for

$10. It was further shown that he remained in the neighborhood some time after Carter went into possession and had knowledge of Carter's claim after he left the state. For a period of ten years he made no assertion of title to the land and had paid no taxes thereon when he executed the quitclaim deed to appellant in 1946. DeLoach would be estopped from claiming the title as against Carter, and appellees, as successors in title to Carter, are entitled to invoke estoppel as against appellant who is bound by the acts and conduct of DeLoach.

We cannot agree with appellant's assertion that the deed from Hockett to Carter was not in his chain of title. Appellant is not in the position of Turman in the case of *Turman* v. *Sanford*, 69 Ark. 95, 61 S. W. 167, upon which appellant relies. Appellant's grantor, DeLoach, had no claim of title except through Hockett who was also Carter's grantor.

The decree quieting appellees' title as against appellant and cancelling the deed from DeLoach to appellant is affirmed.

PAUL WARD, J., disqualified and not participating.

BENGEL, EXECUTRIX *v.* CITY OF COTTON PLANT.

4-9579 243 S. W. 2d 370

Opinion delivered November 5, 1951.

Rehearing denied December 3, 1951.

W. J. Dungan and *Forrest E. Long*, for appellant.

John D. Eldridge, Jr., and *Dennis W. Horton*, for appellee.

HOLT, J. This litigation involves title to the west forty-six feet of the W ½ of lot 21, block 16 of the City of Cotton Plant, Woodruff County, Arkansas.

The City alleged title by adverse possession and payment of taxes for more than fifty years by its predecessors. Appellant denied that the City had any interest in the property and claimed absolute ownership. There was a decree in favor of appellee, City, and this appeal followed.

The record shows that on June 30, 1900, White & Black River Valley Railroad Company leased all of its property between the towns of Brinkley and Batesville to the Choctaw, Oklahoma & Gulf Railroad Company for eighty years, and on the same date executed its mortgage for $800,000 to Farmers Loan & Trust Company. The lessee, railroad, transferred its lease and all interest therein to the C. R. I. & P. Railroad Company March 24, 1904. September 30, 1941, the above mortgage was foreclosed and the property sold to J. B. Angell and wife, who on February 16, 1942, deeded the property to appellee, City of Cotton Plant, under a description alleged to embrace the property involved.

Appellant says: "The record shows that White & Black River Valley Railway Company had record title to lot 20 and the east 50 feet of lot 8, block 16 of Cotton Plant at the time the (above) mortgage was given, and the record also shows the main railroad track was located on these lots the Company owned by deed. The official city plat at Tr. 148 shows lots 20 and 8 of block 16 to be contiguous to the W ½ of lot 21 on its west."

The preponderance, if not the undisputed evidence shows that the Southern Cotton Oil Company had title to the land here involved under proper and definite description and paid taxes thereon until it forfeited and was certified to the State for the 1911 taxes, confirmed in the State May 10, 1937, and purchased from the State by J. H. Rayburn November 5, 1941. Rayburn died testate in June, 1949, leaving all of his property to appellant, Louise Bengel. Rayburn paid the taxes until his death.

It also appears that the Rock Island Railroad Company paid the taxes on all of the property that it owned in Woodruff County from and including the 1911 taxes through subsequent years down to 1941 when, as above indicated, the mortgage on the property of the railroad was foreclosed and purchased by Angell and wife February 16, 1942, who in turn deeded to the City of Cotton Plant, appellee. There is no evidence that appellee's predecessors, railroads, ever had title to the property involved unless by adverse possession, and payment of taxes over a period of some thirty-five years or more. There is no showing that the railroads ever complied with our statutes which required the filing in the office of the Secretary of State, "a map and profile thereof, and of the lands taken or obtained for the use thereof, and file the same in the office of the Secretary of State, and also line maps of the parts thereof located in different counties, and file the same in the office for recording deeds in the county which said parts of the said road shall lie, there to remain as of record forever. Second. A certificate specifying the line upon which it is proposed to construct the railroad and the grades and curves." § 73-604 Ark. Stats. 1947.

The trial court sustained appellee's claim that the Rock Island Railroad Company had acquired title by adverse possession and owned the property at the time of the foreclosure decree in 1941. We cannot agree. We hold that the great preponderance of the evidence shows, as indicated, that at the time the property forfeited for the 1911 taxes, it was owned by the Southern Cotton Oil

Company, was certified and sold to the State by a definite description, and the sale confirmed May 10, 1937, and title remained in the State until it sold to J. H. Rayburn November 5, 1941. Since the Statute of Limitations does not run against property owned by the State, appellee's claim of title by adverse possession must fail.

Appellee argues that we must presume ownership of the property here involved by appellee's predecessors by virtue of the long payment of taxes by the Rock Island Railroad, citing *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699, as authority. That case is distinguishable on the facts. There, the taxes had been paid over a long period of years (34) under a definite description, but here, as we have pointed out, appellee's predecessors, railroads, did not pay the taxes under any definite description embracing the property here.

Accordingly, the decree is reversed with directions to enter a decree not inconsistent with this opinion.

MAXWELL *v.* STATE.

4662 243 S. W. 2d 377

Opinion delivered November 12, 1951.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. This is the third appeal from a conviction of the appellant for the crime of

rape. In each instance the jury assessed the death penalty. On the first appeal we held the evidence sufficient to sustain the judgment, but reversed because insufficient time was given appellant to prepare his defense. *Maxwell* v. *State,* 216 Ark. 393, 225 S. W. 2d 687.

On the second appeal we again held the evidence sufficient to support the verdict and judgment, but reversed on account of the trial court's denial of appellant's motion to quash the jury panel. *Maxwell* v. *State,* 217 Ark. 691, 232 S. W. 2d 982.

No brief has been filed on behalf of appellant in the present appeal, but the Attorney General has fully briefed the case and furnished us with a thorough abstract of the record. The transcript contains a formal order overruling appellant's motion for new trial, but no such motion appears in the record. Upon suggestion of a diminution of the record by the State, *certiorari* was issued to the Circuit Court Clerk who certified that no motion for a new trial was filed on behalf of appellant and that the record is silent with respect to any action thereon.

We have carefully examined the record which reflects that appellant made no objection to any of the testimony introduced by the State and offered none in his own behalf. Appellant requested no instructions and did not object to any of the instructions given which fully covered presumption of innocence, reasonable doubt and appellant's right to refrain from testifying or offering testimony in his behalf without prejudice.

At the instant trial appellant renewed his motion to quash the information on the ground that his constitutional rights were violated in that he was charged by information instead of indictment by a grand jury. We rejected this contention on the second appeal and adhere to that holding. We have repeatedly held such procedure constitutional, as has the United States Supreme Court. *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307; *Adamson* v. *California,* 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

It is unnecessary to detail the evidence which is set out in the opinion on the first appeal and is the same as that adduced here, with one exception. At the first trial appellant testified that he was persuaded by the prosecuting witness to indulge in the admitted sexual act, while he did not testify at the instant trial. We again hold the evidence ample to sustain the verdict and judgment.

The record is free of reversible error and the judgment is affirmed.

McFaddin, J., not participating.

Southwestern Gas & Electric Co. *v.* City of Hatfield.

4-9523 243 S. W. 2d 378

Opinion delivered November 12, 1951.

[redacted]

Hal L. Norwood, Townsend & Townsend and *Arnold & Arnold,* for appellant.

Bobby Steel and *Louis Tarlowski,* for appellee.

MINOR W. MILLWEE, Justice. This is an appeal from a judgment of the Pulaski Circuit Court entered on review of an order of the Arkansas Public Service Commission, hereinafter called "Commission." Appellants are Southwestern Gas & Electric Company and Rich Mountain Electric Cooperative, Inc., hereinafter called respectively, "Southwestern" and "Rich Mountain." Appellee is the town of Hatfield, Arkansas, hereinafter called "Hatfield."

Since 1927 Southwestern has owned and operated electric distribution systems in the towns of Hatfield and Cove, Arkansas. On March 25, 1950, appellants filed with the Commission their joint application for an order authorizing Southwestern to sell the distribution systems in said towns to Rich Mountain under an agreement which stipulated that it should be subject to prior approval of the Commission and the town councils of Hatfield and Cove. Following a hearing before the Acting Chairman of the Commission on May 25, 1950, the matter was taken under advisement. On June 8, 1950, the Commission entered an order approving the proposed sale as being in the public interest and reciting, ". . . the record reflects that both towns have acquiesced in the transfer."

Hatfield was not represented at the hearing on May 25, and on June 20, 1950, filed a petition with the Commission alleging that ninety percent of the citizens of the town opposed the sale; that such opposition had been noted by proper resolution of the town council opposing the sale, notice of which action had been filed with the Commission prior to the hearing; that J. M. Stephenson, manager of Rich Mountain, had subsequently, by misrepresentation, persuaded at least two members of the council to sign a paper which they did not understand; and that by reason of such misrepresentation the Commission had approved the sale. Prayer of the petition was that the Commission grant a rehearing and give Hatfield an opportunity to present its objections to the proposal, and that the application of appellants be denied. The town of Cove apparently acquiesced in the proposed sale.

On July 14, 1950, the Commission entered an order directing that its order of June 8 be held in abeyance until such time as additional testimony might be taken. This order recites: "At the time of the hearing, the Commission, as the record will reflect, was informed that the citizens of the Cities had no objection to this transfer. The Commission further requested that the Cooperative furnish documentary proof that such was the case. Such proof was forthcoming for the City of Hatfield in the form of individual letters filed by Councilmen for that City. However, on June 20, 1950, the Commission received a petition from the City of Hatfield which, through its allegations, cast doubt in the minds of the Commission as to whether or not the information elicited at the hearing and thereafter was conclusive as to the position of the citizens of the City of Hatfield."

On August 9, 1950, the Commission held a hearing on the petition filed by Hatfield and again took the matter under advisement. On August 29, 1950, the Commission entered an order denying the petition of Hatfield and confirming the order of June 8, 1950. This order contained a finding as follows: "On March 21, 1950, the Town Council of the town of Hatfield, Arkansas, was

duly assembled in a called meeting at which time the Southwestern Gas & Electric Company was represented by Mr. C. L. Leighton and the Rich Mountain Electric Cooperative, Inc., was represented by Mr. Jim Stephenson. The matter of the sale of the electric distribution system was presented to the Town Council, and Mr. Leighton and Mr. Stephenson were dismissed from the Council Chambers and returned a short time later and were advised that the Town Council had voted their approval of such sale; under date of March 22, 1950, a letter was written to the Public Service Commission advising this Commission of the action of the Town Council and was signed by Mr. Kermit Myers, as Mayor, and Mr. Harold Faulkner, as recorder, which says that a unanimous vote in favor of the sale was had and no protest would be offered; that there was no fraud practiced upon the Town Council or any member thereof to obtain this resolution and agreement; that the meeting constituted a called meeting of the Town Council; that all members of the Town Council were present and took part in the meeting."

On September 2, 1950, Southwestern filed application for rehearing and amendment of the order of August 29, and on September 5 Hatfield also applied for a rehearing. The Commission overruled Hatfield's petition, but Southwestern's application for amendment of the order of August 29 was granted. This amendment was to the effect that Southwestern had a legal right to sell the properties without liability of any nature to it and that upon consummation of said sale, Southwestern should be relieved of all contracts, obligations and duties it then had or could have with respect to the two towns and the inhabitants thereof.

On September 18, 1950, Hatfield filed a petition in circuit court pursuant to Ark. Stats., §73-233 for review and vacation of the Commission's final order. The petition alleged that the Town Council of Hatfield had not approved the proposed sale but had expressly disapproved same, that the alleged council meeting of March 21, 1950, was not, and did not purport to be, a legal coun-

cil meeting, but was informally held for the purpose of hearing explanation of the proposed sale and not for the purpose of taking final action thereon; that any expressions coming from said meeting for or against the proposal were not made as, and did not purport to be, the action of a legal meeting of the council; that, even if said meeting was valid, the results thereof were abrogated and superseded by a resolution opposing the sale which was duly adopted at a valid meeting of the council on April 21, 1950. In separate responses to the petition by the Commission and Southwestern, the latter specifically requested the court to adjudicate the matter of whether the town council of Hatfield had approved the contract between Southwestern and Rich Mountain.

The able trial judge made extensive findings which were incorporated in the judgment dismissing the petition of Hatfield and confirming only that part of the order of the Commission entered on June 8, 1950, which approved the sale as being in the public interest. In reaching this conclusion the court found: "The case under consideration here involves, (1) a contract between seller and purchaser; (2) a contract between Hatfield and Southwestern; and, (3) the legality of the action of the Hatfield Council. These are questions to be determined by a Court of competent jurisdiction and not by the Public Service Commission.

"By its petition filed in this Court on September 18, 1950, Hatfield undertakes to have the order of the Public Service Commission disposing of the above questions, contrary to the contentions of Hatfield, set aside. A review of the authorities cited above leads to the conclusion that this Court does not have jurisdiction, and that the Public Service Commission was without jurisdiction in the first instance to pass on any question other than whether the proposed sale would be in the public interest."

In view of the disposition we make of the case, we find it necessary to decide only the question of the Commission's jurisdiction to determine whether the town council of Hatfield validly approved the proposed sale.

In deciding that the Commission was without jurisdiction to determine the validity of the action of the Hatfield council, the trial court held that such determination involved the exercise of judicial powers and functions, while the Commission was only competent to exercise legislative or administrative powers. The court cited the following cases as a basis for this conclusion: *Jones* v. *Cooper,* 154 Ark. 308, 242 S. W. 550; *St. L.-S. F. Ry. Co.* v. *Mo. Pac. Rd. Co.,* 156 Ark. 259, 245 S. W. 806; and *City of Fort Smith* v. *Dept. of Public Utilities,* 195 Ark. 513, 113 S. W. 2d 100. None of these cases involved the question of the sale of a utilities system. The instant proceeding was brought pursuant to Ark. Stats., § 73-253, which requires the consent of the Commission as a prerequisite to the proposed sale and authorizes a public hearing before that body to determine whether the proposal is consistent with the public interest. The gist of the holdings in the above cited cases is that the functions of the Commission are legislative or administrative in character although its decisions are *quasi*-judicial in the exercise of the powers conferred for the general purpose of regulating and controlling public utilities.

In *City of Fort Smith* v. *Department of Public Utilities, supra,* this court quoted with approval from the case of *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150. In that case it became necessary to determine whether the Virginia State Corporation Commission was acting in a legislative or judicial capacity in promulgating railroad rates. Justice HOLMES said: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals. . . .

". . . And it does not matter what inquiries may have been made as a preliminary to the legislative act.

Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering* v. *Barkley,* Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

In 42 Am. Jur., Public Administrative Law, § 38, the rule is stated as follows: "The distinctive character of a proceeding or act of legislative or judicial is imparted by the nature of the final act and the character of the proceedings, rather than the character of the body conducting the proceedings."

The Commission was established by the Legislature to act for it, and has the same power the Legislature would have, when acting within the power conferred by the Statute (Ark. Stats., § 73-101, *et seq.*). *Department of Public Utilities* v. *The Arkansas-Louisiana Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213. The nature of the final act of the Commission in the instant case was the determination of the question as to which supplier should in the future own and operate the electric distribution systems in the towns of Hatfield and Cove. We think this is manifestly a function which the Commission was authorized by the Legislature to determine. In making such determination the Commission may consider and determine questions of law, or mixed questions of law and fact, where such questions are germane and incidental to the final legislative act. Now the question whether the

town council of Hatfield validly approved the sale is a mixed question of law and fact. But a determination of the question was a necessary step in a legislative or administrative proceeding leading up to and culminating in the final legislative act. The Commission's determination of the question is subject to review by the courts. Orderly procedure and administrative efficiency demand that the regulatory body be vested with authority to make preliminary determination of legal questions which are incidental and necessary to the final legislative act. Otherwise endless confusion would result because different phases of the same case might be pending before the Commission and the courts at one time. *St. Clair Borough* v. *Tamaqua & Pottsville Elec. Ry. Co.,* 259 Pa. 462, 103 A. 287, 5 A. L. R. 20; *State ex rel. Cirese, et al.* v. *Ridge, Presiding Judge,* 345 Mo. 1096, 138 S. W. 2d 1012. It is our conclusion that the Commission had jurisdiction to determine whether the town council of Hatfield approved the sale in question and that the trial court erred in holding otherwise.

This brings us to a consideration of the correctness of the Commission's finding that Hatfield approved the proposed sale. The matter of supplying electric energy to a community is one of vital concern to its inhabitants. Unless there is substantial evidence to support a conclusion that the town council of Hatfield clearly and definitely approved the sale, the Commission's order should not be allowed to stand. Testimony of council members at the hearing on August 9, 1950, was that they opposed the proposed sale because a great majority of Hatfield citizens had expressed their opposition to the proposal by petition to the council, and for other express reasons; that no resolution was introduced or passed at the meeting on March 21, 1950, and no vote taken; that no minutes were kept of the meeting; and that some members expressed approval of the sale while others disapproved. The next day the mayor and the recorder signed a letter to the Commission stating that the council had adopted a motion by unanimous vote approving the sale. After a majority of the citizens of the town filed a petition with the council op-

posing the sale, another special meeting was called and held on April 21, 1950, at which a resolution was adopted by unanimous vote opposing the sale, but there is some question as to whether one absent member had been properly notified of the meeting.

Equally clouded is the question whether all members were present at the first meeting on March 21. In answer to a question as to the number present, one member of the council stated that all were present, another stated that he did not believe he was there, while a third member was uncertain on the matter. In this connection J. M. Stephenson, Manager of Rich Mountain, testified as follows in regard to the March meeting: "Mr. Myers was the mayor at the time, and they were a little late in getting started. Some of them came in late, and I think everybody was there except Mr. Sandlin, and he said, well, we are all here except Mr. Sandlin. Someone said they thought he was sick and probably wouldn't be here, and they might as well call the meeting to order and get started, so he called Mr. Leighton first and he got up and explained the deal to them and then I told them our position in the thing. Then we were asked questions and then Mr. Leighton suggested we go outside until they took action." Mr. Stephenson also testified at the first hearing on May 25 that one council member was absent from the March 21 meeting on account of sickness. Mr. Sandlin did not testify at the hearing on August 9, but it was stipulated that he and another absent member of the council would, if present, testify that they were opposed to the transfer.

At the conclusion of the first hearing on May 25, 1950, the Acting Chairman of the Commission, having been apprised of the apparently conflicting council actions, requested Mr. Stephenson to attempt to secure either a resolution from the council or one signed by the majority of its members. In response to this request, Mr. Stephenson drafted and obtained the signatures of four members of the council to four separate but identical letters dated May 26, 1950, stating that the member had opposed the sale in order to protect the citizens of Hatfield against certain specified losses. Each letter concluded: "As

long as the Public Service Commission has been satisfied that these losses will not occur, and that the electric service to our community will be improved, I have no objections to the sale." At a council meeting on May 30, 1950, a motion was unanimously adopted to employ counsel to represent the town in opposition to the proposed sale and this was done.

Special meetings of a town council are legal meetings where all of the members are present and participate in the meeting, or where there has been a compliance with all conditions precedent to such meeting if only a quorum is present. *Harrison* v. *Campbell,* 160 Ark. 88, 254 S. W. 438; *Carpenter* v. *City of Paragould,* 198 Ark. 454, 128 S. W. 2d 980. There was no compliance with the requirements as to call and notice of the special council meeting on March 21, 1950. When the testimony in the whole record is considered, we also conclude that substantial evidence is lacking to support a finding by the Commission that all members were present and participated in the meeting. It follows that the town council of Hatfield has not validly consented to or approved the proposed sale.

We cannot agree with appellants' further contention that Hatfield is estopped to deny the validity of the meeting of March 21, 1950. J. M. Stephenson stated that he made arrangements for funds to consummate the purchase and made a trip to Washington in connection with the proposal. The evidence is vague as to the extent of such arrangements and this was done several weeks before the matter was heard by the Commission. This was insufficient to work an estoppel as against Hatfield.

Hatfield has cross-appealed from that part of the judgment finding the proposed sale to be in the public interest. The testimony of all the witnesses who testified on this point is to the effect that the proposed transfer of properties would be in the public interest. The conclusion of the Commission is amply supported by the evidence and the trial court correctly so held.

The judgment of the circuit court is accordingly affirmed on the cross-appeal. On direct appeal the judg-

ment is reversed and the cause remanded to the circuit court with directions to set aside the Commission's order approving the sale and to remand the cause to the Commission for further proceedings not inconsistent with this opinion.

The Chief Justice concurs.

VAUGHT *v.* FREY.

4-9586 243 S. W. 2d 384

Opinion delivered November 12, 1951.

Rehearing denied December 3, 1951.

William H. Donham, for appellant.

Clark & Clark, for appellee.

ROBINSON, J. On the 21st day of December, 1948, acting on a petition purported to have been signed by a majority of the qualified electors of Houston School District No. 39 and Bigelow School District No. 17, the County Board of Education of Perry County consolidated the districts into East End District No. 1. No appeal was taken from the order of consolidation.

On the 20th day of December, 1949, acting on the petion of Hubert Jones, Jim Vaught, and C. A. Lively, the

County Board of Education made an order attempting to rescind its action consolidating the districts. This action of the Board was appealed to the Circuit Court and there it was held that the setting aside by the district of its order of consolidation was not authorized by law and was void. No appeal was taken from the judgment of the Circuit Court.

On the 15th day of February, 1950, the present case was filed in the Chancery Court. It is alleged, among other things, that the original petition for the creation of East End District No. 1 was not signed by the requisite number of qualified electors; that the signatures on the petition were obtained by fraud; and that the action of the Board in creating the district was void *ab initio*. A demurrer to the complaint was filed and overruled by the court, and upon a hearing on the merits, the complaint was dismissed.

Appellant contends that the undisputed proof shows a majority of the qualified electors did not sign the petition as required by the Statute, and that the County Board of Education, therefore, had no jurisdiction to act on the petition. Records of the County Board of Education show filing of the petition to have been advertised as required by law and that the petition contained the signatures of a majority of qualified electors of the districts involved.

Section 80-408, Ark Stats., provides that "appeals may be taken to the Circuit Court from the findings of the board on the ground that the requisite number of electors have not signed the petition, or because the notices herein required were not given. The findings of the County Board of Education otherwise will be conclusive . . ." If an appeal is not taken to the Circuit Court from the findings of the Board on the ground that the requisite number of electors have not signed the petition, then the finding of the Board on that question is conclusive. There is no ambiguity in the language of the Statute, and there is no question about the constitutionality of the provision. No appeal was taken from the Board's finding that a majority of electors had signed the petition.

In the case of *Pharr* v. *Knox*, 145 Ark. 4, 223 S. W. 400, the complaint alleged "that the order of judgment of the said Lincoln County Court creating and establishing said road improvement district was procured by fraud, collusion, and mistake," and "that said county court was without jurisdiction, for the reason that said petition did not have a majority in numbers, acreage or value." Mr. Justice WOOD, speaking for this Court, said:

"The 4th ground [the one challenging the jurisdiction of the court on the ground that the petition did not have a majority in numbers, acreage or value] could not be made the basis for a suit in equity for setting aside the judgment of the county court creating the district. This ground constituted but a collateral attack upon the judgment of the county court creating the district, which is expressly forbidden by section 3 of the act under which the district was created . . . The appellants here are parties to the proceedings, and some of them signed the petition. The act itself, under which this district was created, furnished appellants a complete and adequate remedy at law."

In the instant case, the appellant, who was one of the signers of the original petition, further contends that the act of the County Board in creating the district is void because of fraudulent representations with respect to the funds on hand to be used in the construction of a new school building. But, the petition shows on its face "it is agreed and understood that the directors and officers of the new school district will erect a high school building in some suitable location between the town of Bigelow and the town of Houston, Arkansas, to be purchased as soon as the funds can be made available for the same."

In *Pharr* v. *Knox,* the Court said: "The false and fraudulent representations, set up by one of the affiants, upon which signatures to the petition are said to have been obtained, were not statements of past or existing facts and were not such fraudulent representations as entitled appellants to have the judgment creating the district declared invalid. The appellants had no right to rely upon

such representations." Likewise, in the case at bar, there is no evidence of false representations that would void the creation of the district.

The decree is correct and, therefore, affirmed.

HICKS *v.* STATE.

4664 243 S. W. 2d 372

Opinion delivered November 12, 1951.

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

ED. F. MCFADDIN, Justice. Appellant was convicted of incest with his daughter 14 years of age (see § 41-811, Ark. Stats.), and prosecutes this appeal. The original and supplemental motions for new trial present the matters herein discussed:

I. *Sufficiency of the Evidence.* The prosecuting witness testified unequivocally that the acts of intercourse had occurred at various intervals during a period of seventeen months. Her testimony made a case for the jury in view of our holding on the next point. See *Ragsdale* v. *State,* 132 Ark. 210, 200 S. W. 802.

II. *Lack of Corroboration.* The testimony of the prosecuting witness was not corroborated, but her age was only 14 years. Since she was under 16 years of age,

she could not have been an accomplice to the acts of incest, so her testimony did not have to be corroborated. See *Westbrooks* v. *State,* 179 Ark. 714, 17 S. W. 2d 868; and see, also, 27 Am. Jur., 299:

"Under this rule, a conviction of incest may be based upon the uncorroborated testimony of a prosecutrix who is by reason of minority incapable of consenting to defendant's act."

III. *Instructions.* Neither the State nor the defense requested any instructions; and all that were given were on the Court's own motion. They defined the statutory crime of incest (§ 41-811, Ark. Stats.), the statutory punishment (§ 41-812, *et seq.,* Ark. Stats.), the presumption of innocence, the definition of a reasonable doubt, and finally an instruction directly applying the law to the case at bar. The only objection was:

"To the giving of all of said instructions the defendant, at the time, objected and excepted."

A careful study of the instructions disclosed that they were correct as against the general objection registered.

IV. *Recantation.* In the supplemental motion for new trial, appellant alleged that the prosecuting witness had recanted her testimony. But when the prosecuting witness was brought into court for a hearing on such motion, she reaffirmed her original testimony and refused to retract any part of it. Therefore, there was an entire failure to show recantation. In each of the cases of *Sutton* v. *State,* 197 Ark. 686, 122 S. W. 2d 617, and *Doss* v. *State,* 203 Ark. 407, 157 S. W. 2d 499, there was a recantation by the prosecuting witness. We held that even in such a case the granting of a new trial was within the sound discretion of the trial court; and we found no abuse of discretion to have been committed in refusing a new trial in either of said cases. Certainly, in the case at bar, the trial court did not abuse its discretion in refusing to grant a new trial on the basis of recantation, since the prosecuting witness not only refused to recant but strongly affirmed her original testimony.

Finding no error, the judgment is affirmed.

JORDAN *v.* WASHINGTON NATIONAL INSURANCE COMPANY.

4-9592 243 S. W. 2d 367

Opinion delivered November 12, 1951.

Catlett & Henderson and *Donald S. Martz,* for appellant.

J. Phillip Carroll and *Rose, Meek, House, Barron & Nash,* for appellee.

PAUL WARD, J. On May 1st, 1912, the American National Insurance Company, a Texas corporation authorized to do business in Arkansas, issued a health and accident policy number BRS 67713 to Peach Jordan, Jr., the appellant. By the terms of the policy appellant was to pay $1.00 on the first day of each month. On June 30, 1931, all the business of the said insurance company, including the above policy, was assumed by appellee, the Washington National Insurance Company. All premium payments were made by appellant from the date of issuance of the policy up to and including December 1st, 1948.

On January 1st, 1949, appellant went to appellee's authorized agent in Little Rock, Arkansas, and made tender of the premium due on that day. The agent refused to accept said payment and stated to appellant that he had been instructed by the home office to refuse any further premiums and to allow the policy to expire under its terms.

After an exchange of letters between appellant and appellee relative to the matter, appellant filed suit, alleging a breach of contract, and asked to recover all pre-

miums theretofore paid, amounting to $440, together with interest at 6 per cent. on each premium from date of payment. Appellee answered and admitted the payment of premiums as above stated, but denied liability because of paragraph Number 4 of the Agreements and Conditions of the policy which provides that "the acceptance of any renewal premium shall be optional with the Company." From the judgment of the lower court dismissing the complaint this appeal is prosecuted.

No oral testimony was introduced and the case was tried on written stipulations which contain all the matters necessary to a decision. Set out below is a copy of the stipulations with the following exceptions: the designations "Provision A," etc., are our own for convenient reference; some portions relative to payments by appellee for sickness which are not material here are deleted; and "Provision E" has been added because it is cited by appellee as a provision of the policy and, by reference, is a part of the stipulation.

STIPULATION OF FACTS

"On May 12, 1912, the American National Insurance Company issued a policy of accident and health insurance to the plaintiff, Peach Jordan, Jr., said policy bearing number BRS 67713, whereby the American National Insurance Company, in consideration of advance monthly premiums of One Dollar ($1.00) each, paid and to be paid by the plaintiff, agreed and undertook to pay to the plaintiff weekly benefit payments upon the happening of certain stated contingencies as stated in the policy, a photostatic copy of said policy being filed with the complaint in this law-suit and marked thereon as Exhibit A, and said photostatic copy being made a part of this stipulation.

"Among the provisions of this policy are the following:

" '*Agreements and Conditions*

(Provision A)

" '(4) If the payment of any renewal premium shall be made after the expiration of this policy or the last re-

newal receipt, neither the Insured nor the Beneficiary will be entitled to recover for any accidental injury happening between the date of such expiration and 12:00 o'clock noon, Central Standard Time, of the day following the date of such renewal payment; nor for any illness originating before the expiration of 30 days after the date of such renewal payment. The acceptance of any renewal premium shall be optional with the Company.

(Provision B)

" '(6) The Company may cancel this policy at any time, without prejudice to the rights of the Insured to any claim then pending, by written notice or cancellation served upon or mailed to the address of the Insured as it appears of record with the Company, together with the Company's check for the unearned portion, if any, which check shall be sufficient tender.

(Provision C)

" 'An agent has no authority to change this policy nor to waive any of its conditions. Notice to or from any agent or knowledge acquired by him shall not be held to effect a change or waiver of this policy or any condition thereof. No assignment or change of this policy or waiver of its condition shall be valid unless agreed to in writing by the President or Secretary of the Company and endorsed thereon.

(Provision D)

" '*Schedule of Statements, Agreements and Warranties.*

" 'I hereby apply for a policy of insurance in the American National Insurance Company, of Galveston, Texas, to be based on the following statements, all of which I warrant to be complete and true; and in consideration of the Company accepting the premiums, I hereby waive all notice, whether required by statute or not, (1) to pay such premiums, (2) of default in payment thereof, and (3) of forfeiture of the policy for non-payment of such premium; and I agree, if any of the said statements material to this risk shall be untrue, or if said waiver of notice shall be inoperative, or if I shall fail to fulfill any

agreement herein made, then, in either case, said policy and insurance shall be null and void.

(Provision E)

"'. . . does hereby insure Peach Jordan, Jr., the person described in said Schedule, subject to all of the conditions herein contained and endorsed hereon, from twelve o'clock, Noon, Central Standard Time, of the day this contract is dated, until twelve o'clock, Noon, Central Standard Time, of the first day of May, 1912, and for such further periods, stated in the renewal receipts, as the payment of the premiums specified in said Schedule will maintain this policy of insurance in force against death or disability resulting directly and exclusively of all other causes from bodily injury sustained solely through external, violent and accidental means, said bodily injury being hereinafter referred to as "such injury," and against death and disability from bodily disease or illness, as follows: . . .

"On June 30, 1931, as of 12:00 o'clock midnight, the Washington National Insurance Company, of Chicago, Illinois, assumed the contract of insurance, policy No. BRS 67713, here in question . . . and thereafter collected and received all premiums becoming due and payable under the terms of said policy.

"Plaintiff at all times from May 1, 1912, up to the first day of January, 1949, paid the monthly premiums as they became due, and thereby kept the said policy in force for and during each and every month from May, 1912, up to and including the month of December, 1948; said premiums so paid by plaintiff being in the aggregate sum of Four Hundred Forty Dollars ($440.00).

"On November 29, 1949, a letter was written by the Claim Division of the Washington National Insurance Company to Mr. George B. Hays, the Little Rock agent of the said company, a copy of said letter being made a part of this stipulation, reporting that the above mentioned claim for disability payments had been paid and notifying Mr. Hays that the Underwriting Committee of the Insurance Company had decided they should post their

records for the non-renewal of the policy, effective with the next renewal date of January 1, 1949. The reason given for said action was the fact that the insured had diabetes and was unemployed at the time. The letter further instructed the said George B. Hays to post his records likewise and to accept no further premiums in consideration of the policy.

"Plaintiff, Peach Jordan, Jr., received no notice either written or oral of the Company's intention to cancel the policy or of its intention to refuse the premium due January 1, 1949, other than the statement made to him by George B. Hays on January 1, 1949, as hereinafter set forth.

"On or about January 1, 1949, the plaintiff, Peach Jordan, Jr., reported to the agent, George B. Hays, at his office at 1418 Commerce Street in Little Rock, Arkansas, and made timely tender of the monthly premium for January due in advance. He was informed by the said George B. Hays that the renewal premium would not be accepted for the reasons stated above, as per his instructions from the Claim Division of the Washington National Insurance Company.

"On February 15, 1949, the plaintiff, Peach Jordan, Jr., wrote the letter, a copy of which is made a part of this stipulation, to the home office of the Washington National Insurance Company, explaining that his advance premium for the month of January, 1949, had not been accepted by the agent, George B. Hays, and that the reason given by the said George B. Hays for the non-acceptance of the renewal premium was that the plaintiff was unemployed. The plaintiff made further reference to paragraph (9), Agreements and Conditions: (Provision C, *supra*).

"This letter was answered on February 28, 1949, by Marie Nellesen, of the Casualty Record Division of the Washington National Insurance Company, a copy of which letter is made a part of this stipulation, and which letter affirmed the termination of the policy No. BRS 67713 and pointed out that the Underwriting Committee

of the Washington National Insurance Company had requested that the policy be permitted to expire under its terms as of January 1, 1949."

(End of stipulations)

Appellant relies strongly on Provision B, contending this is the method chosen by the Company to cancel the policy and that it should be held to that method; and that since no letter was written by the company as required under this provision the contract was breached when the agent refused to accept the premium on January 1, 1949. It is insisted that this interpretation is sustained by Provision C which limits the authority of appellee's agent and also by Provision D, wherein it is contended the Company agreed to accept premiums in consideration of the assured's waiving certain notices. Appellant insists that the last sentence in Provision A applies only to the provisions of paragraph 4, but also insists that if this does conflict with Provision B the doubt should be resolved against the insurer because it wrote the contract, calling attention to the well established rule to that effect.

On the other hand appellee contends that the policy contains two methods of termination. One is by a letter of intention under the terms of provision B, as appellant points out, and the other is by refusing to accept premiums as set forth in the last sentence of Provision A, *viz*: "The acceptance of any renewal premium shall be optional with the Company." It is, of course, stipulated that the agent of appellee refused to accept appellant's premium on January 1, 1949. Appellee calls attention to the language in Provision E which says that appellant is insured ". . . for such further periods, stated in the renewal receipts, as the payment of the premium specified in said Schedule will maintain . . ."

The case of *Commercial Standard Insurance Company* v. *Waller,* 190 Ark. 636, 80 S. W. 2d 78, is cited by appellant to show that the company was obligated to give him a reasonable notice, but the facts are distinguishable. In the cited case the policy provided for written notice "stating when *thereafter* cancellation shall be effective" while here no such provision is included in the policy.

It must be kept in mind that the policy under consideration here is what is commonly called a term policy and must be renewed by each successive monthly payment. This feature was clearly set forth in *Prescott* v. *Mutual Benefit Health & Accident Insurance Assn.,* 133 Fla. 510, 183 So. 311, 119 A. L. R. 525, from which we quote:

" '(d) The copy of the application attached hereto is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Seventeen ($17.00) Dollars as first payment; and the payment in advance, and acceptance by the Association of Premiums of Twelve ($12.00) Dollars Quarterly thereafter, beginning with April 1st, 1933, is required to keep this policy in continuous effect.'

"So it is clear that the policy was not an unconditionally continuing contract, but was a contract for a stated term renewable for additional stated terms on conditions named in the policy. One of the conditions precedent to the renewal for a subsequent stated term was the payment in advance and acceptance by the insurer of the required $12.00 quarterly premium. Of course, the insurer could not avoid liability for a claim which had come into being under the terms of the policy by declining to accept renewal premiums tendered after the accrual of the claim."

Here appellee had the right to cancel the policy under the terms of Provision B if it had so desired. The majority of this court is of the opinion that appellee had another separate and distinct right under the terms of Provision A to refuse to accept premiums, as it did on January 1, 1949, and thereby allow the policy to expire.

The judgment of the lower court is affirmed.

MILLWEE, J., dissents.

GEORGE ROSE SMITH, J., not participating.

4-9578 243 S. W. 2d 569

Opinion delivered November 12, 1951.

Rhine, Rhine & Vickrey and *Howard Mayes,* for appellant.

E. G. Ward and *V. E. Upton,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellant, Ivan Wright, to quiet title to a rectangular tract of land in Phillips Addition to the town of Rector, the tract being 300 feet from east to west and 99 feet from north to south. The dispute centers upon the true location of Wright's northern boundary. The appellees, E. H. Clifford and Ina Gabler, own separate parcels that abut Wright's property on the north, Clifford's tract lying east of Mrs. Gabler's. Wright now contends that the true line should be fixed 14.9 feet north of the line established by the decree below. Thus the controversy involves a strip 300 by 14.9 feet lying along the north boundary of Wright's land.

At the outset it is suggested that the court reporter's transcribed testimony is not properly before us, for the reason that it has not been approved by the chancellor. This contention is unsound. When this testimony was filed on May 16, 1950, the governing statutes for the Twelfth Chancery District were Act 15 of 1947 and Act 4 of 1949. The former provides that the reporter's transcribed notes shall be treated as depositions and that no bill of exceptions shall be necessary. Hence the chancellor's approval was not needed. We may add that this testimony was transcribed and filed months before the passage of Act 139 of 1951, which undertakes to make the practice uniform throughout the State and requires that transcribed testimony be approved either by counsel or by the chancellor.

On the merits the parties differ in their theories of the case. The appellant relies solely upon adverse possession, taking the position that the descriptions in the various deeds are void for the reason that the plats of Phillips Addition do not show its location with reference to government surveys. The appellees contend, and the chancellor held, that the descriptions are valid. We need not explore this controversy, as the appellees do not claim any part of the land as to which the chancellor quieted the appellant's title, and the only dispute before us is whether the appellant has proved adverse possession of the 14.9-foot strip along his northern boundary.

Wright bought his land in 1946 from D. J. Phegley, who had bought it from George French in 1932. These men testified that each grantor had shown his grantee a northern boundary line lying where Wright now contends the line to be. But the record does not show this line to have been marked by a fence; instead, these witnesses identified it as beginning at a crack in the sidewalk on the east, running thence west to a forked tree, and thence along a ditch to the western boundary. Of course, such a subjective understanding of the boundary would not constitute notice to the abutting owners; so the question is whether Wright and his predecessors took such physical possession of the disputed strip as to put their neighbors

on notice of an adverse claim. As to this issue the litigation is really two cases that must be separately considered.

First, as between Wright and Clifford it is Wright's contention that for more than seven years a gravel driveway has been maintained upon Clifford's segment of the disputed strip. On this issue we think the weight of the evidence to be in appellant's favor. For many years there was a store in the extreme northeast corner of what the court below found to be Wright's property. The driveway in question ran along the north side of this store and was undoubtedly used as a parking place by whoever happened to be occupying the building. Phegley testified that the driveway was there when he bought the property in 1932. He leased the store to appellee Clifford in 1939, and Clifford used the driveway for years. According to Phegley, Clifford once obtained his permission to put additional gravel on the drive during a wet season. There was much other evidence about the driveway—so much that its existence cannot be doubted. As to the user being adverse when the adjoining land is occupied, see *Batson* v. *Harlow*, 215 Ark. 476, 221 S. W. 2d 17.

Clifford himself is the only witness whose testimony may be said to contradict the testimony we have mentioned. Clifford admits that he was Phegley's tenant, but he says that Phegley told him that the store bordered on his north boundary line. Clifford testified that it was he who built the drive, in 1941, and that he assumed the land to belong to George Wright (not the appellant), who then owned the land which Clifford later bought. Clifford admits, however, that he did not ask George Wright's permission to use his land, that he paid nothing for the privilege, and that the building on the land to the north has a driveway of its own. We conclude that the evidence preponderates in favor of the view that for many more than seven years the driveway was adversely used as an appurtenance to the store building on appellant's property. We cannot be certain, however, just what area was occupied by the driveway, and we think it best to remand the cause with directions that Wright's title be quieted

to such area as was devoted to the driveway, with additional proof on this question to be taken.

Second, as to Mrs. Gabler's segment of the disputed strip Wright bases his claim of adverse possession upon proof that he and his predecessors maintained a small outhouse on the property and that a drainage ditch was a visible boundary. On both points the evidence is pretty evenly balanced. We doubt if the mere maintenance of a small outhouse upon a long strip of land would, in the absence of color of title, amount to adverse possession of anything more than the ground actually occupied by the building, with perhaps an easement of ingress and egress. But the proof of adverse occupancy is sharply disputed. Mrs. Gabler testified that the structure was formerly south of the line fixed by the decree and that Wright moved it north onto her property after his purchase in 1946. In this she is corroborated by Eli Busby, who testified that he was employed by Wright to move the building north, and Busby described in detail the equipment that was used and the way in which the undertaking was carried out.

The proof about the drainage ditch is equally inconclusive. Mrs. Gabler testified that the ditch was originally on the south line of her land, but in about 1946 Wright filled in the old ditch and with her permission dug the present one on her property. She also testified that Wright had sought to buy her part of the disputed strip, and there is some corroboration of this statement. The appellant's testimony is to the contrary, and with the evidence about equally poised we do not feel justified in disturbing the chancellor's findings in the Wright-Gabler controversy. This part of the decree is affirmed.

PEEK *v.* ADAMS.

4-9584 243 S. W. 2d 562

Opinion delivered November 12, 1951.

Rehearing denied December 10, 1951.

John C. Sheffield, for appellant.

Cracraft & Cracraft and *Burke, Moore & Burke,* for appellee.

HOLT, J. This action was brought under the Workmen's Compensation Law, Act 319 of 1939.

Mrs. Winnie Peek, appellant, was the mother of E. C. Peek, Jr. August 5, 1948, young Peek was killed by the overturning of a tractor which he was driving. At the time, his average weekly earnings amounted to $30. He was sixteen years of age, and Mrs. Peek was dependent upon him for support. Mrs. Peek was a widow, her husband having died in 1945.

On a hearing, the Commission found: "(1) That E. C. Peek, Jr., at the time of his injury and death, was not an employee of John W. Adams. (2) That the New Amsterdam Casualty Company, as the insurer of John W. Adams, was not liable for the loss occasioned by the injuries and death of E. C. Peek, Jr. (3) That E. C. Peek, Jr., was the employee of the districts here involved, and the districts were liable to Mrs. Winnie Peek, dependent mother of the deceased, and that the districts are not excepted from the Workmen's Compensation Law as 'political subdivisions of the State of Arkansas within the meaning of the Act,' "—and awarded Mrs. Peek $7.50 weekly, "the same being 25 percent of the average weekly

wage of $30, said payments to continue subject to the provisions and limitations of the Workmen's Compensation Act, not to exceed in any event 450 weeks or $7,000."

Mrs. Peek appealed to the Circuit Court of Phillips County from that part of the holding of the Commission that Adams and the Insurance Company were not liable. The three districts have appealed from that part of the Commission's findings that young Peek was their employee and therefore they were liable to Mrs. Peek.

The Circuit Court held that the Commission correctly found that neither Adams nor the Insurance Company was liable but that the districts were political subdivisions of the State and not liable and the award against the districts was reversed and set aside.

The primary and decisive question presented is whether young Peek at the time of his injury, which resulted in his death, was an employee of Adams and covered by Adams' insurance carrier, New Amsterdam Casualty Company.

"'Employee' means any person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied." Section 81-1302 (b), Ark. Stats., 1947.

The record reflects that appellee, Adams, contracted with the three appellees, Improvement Districts, to develop what was called the Yellow Banks Canal Project. E. G. Green was the engineer for the Districts. Adams testified: "Q. What compensation were you to receive to do this work? A. I was to receive an hourly pay for the dragline and an hourly pay of the two bulldozers. Q. Whom did you hire to do this job for you? A. Well, your question is hard to answer. I had a dragline operator and two bulldozer operators. * * * We got a little behind on the clearing work which is necessary in order to come through and do the digging work, and Mr. Green (district engineer) offered to bring in two tractors he used in mowing on the levee and help to do the clearing,

which he did. At the time he brought the tractors in, we discussed whether there was any compensation insurance on the tractors, on the tractor drivers, and he said no. I told him I could cover them; that I had a blanket policy. Now, when I bought his policy, Mr. Hudson (general insurance agent for the insurance carrier) told me that all that was necessary for me to do to cover a man on the insurance was to put him on the payroll and it would cost me four percent of the payroll, and I paid the policy in advance. * * * I told Mr. Green I could and would cover him (Peek) and that is all the discussion we had at the time and I told him I could cover them (Peek and Nowell) by running the payroll through my payroll. I could pay them although I wouldn't physically receive the money. That is what I said. I paid the Social Security on these boys (Peek and Nowell) and also filled out the form W-2 and carried it on my payroll. The insurance company has audited by payroll twice and accepted the money. One of them covered being E. C. Peek, Jr. I have the book here with the auditor's signature on it twice."

Mr. Green's testimony corroborated Adams and "Q. Let me ask one question. I would like to ask you this: You say you think they (meaning young Peek and another) were employees of Mr. Adams. Do you think they were employees of Mr. Adams for the purpose of bookkeeping or actual employees? A. I think they were employees carried for their protection."

Mr. Hudson, a representative of the insurance company, testified that he issued the policy here in question to John W. Adams. We quote from his testimony when being questioned by Commissioner Caperton: "Q. Would you be so kind as to explain the terms under which that policy was issued? A. You mean as to coverage under that contract? Q. Yes, sir. A. It protected him against damages done to his employees in accordance with the Workmen's Compensation Act. Q. Did the policy specify who his employees were? A. Well, we had a classification under that policy as to the kind of work he was doing. Of course, we don't state the number of his employees or who they were. * * * Q. I will ask you to state to the

Commission if you told Mr. Adams any man he placed on the payroll would be included in the policy? A. I told him whoever was included on the payroll and went to the Company I considered him covered."

The insurance policy provided: (Statement by Commissioner Caperton) "Let the record show that this is a standard Workmen's Compensation employers' liability policy issued to John W. Adams by New Amsterdam Casualty Company as an individual, policy issued March 24, 1948, to expire March 24, 1949, for the purpose of irrigation and drainage system construction, including drivers, chauffeurs, and their helpers, pile driving, dredging, tunneling or dam and sewer construction to be separately rated. Policy Number 936364."

We are not unmindful of the rule that this court must sustain the award of the Commission if it is supported by substantial evidence, but we also recognize that this rule stems from a provision of the Workmen's Compensation Act [as noted in *Herron Lumber Company* v. *Neal*, 205 Ark. 1093, 172 S. W. 2d 252] which says the award of the Commission shall be reversed if this court finds "that there was not sufficient competent evidence in the record to warrant the making of the award by the Commission."

The admitted physical facts show that Adams was in charge of a large number of men working on the canal and that the deceased was physically present and working on that job, the three drainage districts, through their agent, Green, discussed the status of the deceased and to all purposes and effects they agreed that he would be considered an employee of Adams when they agreed to put him on Adams' payroll and carry him as such.

It is undisputed that Adams had a blanket employees' policy with the New Amsterdam Casualty Company and under this policy, all that was required of Adams in order to cover any and all of his employees was to list their names on his payroll and pay insurance premiums to the Insurance Company on the basis of four percent of his payroll. Adams did list young Peek on his payroll, along with all of his other employees, and paid the pre-

mium for his coverage. The Insurance Company audited Adams' payroll with Peek's name thereon, accepted the premiums and still retains them. Adams also paid the Social Security tax on young Peek and his other employees.

We hold that there was no substantial evidence to support the Commission's finding that young Peek was not an employee of Adams and not covered by Adams' insurance carrier at the time of his injury, which resulted in his death. In other words, we hold that young Peek was Adams' employee and covered in the above insurance policy and that the Circuit Court erred in holding otherwise.

Under § 81-1315, Ark. Stats. 1947, (c) (5), the Commission's finding as to the amount of the award to Mrs. Peek was correct. Accordingly, the judgment is reversed with directions to direct the Commission to make the above award to appellant against Adams and his insurance carrier in accordance with this opinion.

. . . . .

The Chief Justice would affirm as to Adams on the ground of estoppel, but not as to the insurance carrier.

The Chief Justice dissents in part. GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J., dissenting. I do not understand how it can be said that there is no substantial evidence supporting the Commission's finding that Peek was not an employee of Adams. On the contrary, a study of the record discloses that there is hardly any evidence to sustain the majority's declaration that Peek was Adams' employee.

Adams had a contract with the three districts by which he was to use a dragline and two bulldozers in cleaning out the drainage ditch. For this work he was paid an hourly rate for each piece of equipment; that was his only compensation. But underbrush, bushes, and trash could best be removed by tractors and common labor. Adams not being equipped for that type of work, the districts agreed in advance that they would do this preliminary

cleaning at their own expense. On that understanding the districts sent two tractors and some common laborers to do the work that Adams could not do and had not agreed to do.

Whether Peek thereby became an employee of Adams depends upon whether Peek's activities were under the control of Adams or of the districts. Testimony that is virtually undisputed shows that control lay with the districts. George Nowell, the other tractor driver, who had the same duties as Peek had, testified that he was working under Wilkes, the district's engineer, and took his orders from Wilkes. Nowell went to and from work in the districts' truck. He was paid by Wilkes, and it was Wilkes that he tried to please. Nowell testified that he had nothing to do with the dragline and bulldozers, and he did not even know that Adams was in charge of that equipment.

Adams testified that he did not pay the tractor drivers; all he did was to show them on his payroll for insurance purposes. He testified that the clearing of underbrush "was the job of the three districts, under Mr. Green's and Mr. Wilkes' supervision." There is not a word in Adams testimony to indicate that he ever supervised the tractor drivers or had the authority to do so.

E. O. Green, another engineer for the districts, testified that Peek was regularly employed by them. Adams had nothing to do with Peek's salary; the districts merely informed Adams of the amount each week and reimbursed Adams for insurance premiums, social security payments, etc. Green testified that there was no connection between Adams' contract and the two tractor drivers. He further testified that Adams' own men, on his dragline and bulldozers, were the only ones that Adams had control over.

The evidence of these three witnesses is not disputed and amply supports the Commission's finding that Peek was not Adams' employee. In disregarding all this testimony the majority stress only the fact that Adams had a blanket policy and went through the sham of carrying Peek on his payroll. Apart from the fact that the insurance agent testified that there was no agreement that the

policy would cover any one except Adams' own employees, it is evidently immaterial that the insurer accepted premiums and audited the account in ignorance of what was being done. For the insurer's liability is not primary; it is secondary or derivative. Under the compensation law the insurer is merely required to guarantee that the employer's primary liability will be satisfied. If the employer-employee relationship does not exist, as it did not here, then it is obvious that the very basis of the insurer's secondary liability is wanting. And the majority seem to concede this fact, since their conclusion is reached by finding that Peek was employed by Adams.

I regret that I cannot express more strongly my disagreement with the majority's action in this case. We know from this record and many earlier ones that the members of the Commission are conscientious and painstaking in the performance of their duties. I do not see how we can expect the commissioners to take their responsibility seriously if their carefully reached conclusions are to be so lightly overturned by this court.

JENKINS, ADMINISTRATOR *v.* JENKINS.

4-9603 243 S. W. 2d 646

Opinion delivered November 19, 1951.

Phillip H. Loh, for appellant.

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

GRIFFIN SMITH, Chief Justice. James Walter Jenkins was accidentally killed January 20, 1950, when struck by an automobile owned and driven by Bowdre Banks. Everett Jenkins and Burl Deavers were appointed administrators of the decedent's estate. They joined those mentioned as the heirs and widow in a suit against Banks for $46,000, of which $10,000 was for conscious pain and suffering. The entire demand was settled in a consent judgment for $10,000 in favor of the plaintiffs who were shown to have been two sons, three daughters, two grandsons, one granddaughter, a stepdaughter, and the widow.

A release was executed by the administrators and the widow March 8 following the intestate's death. A circuit court order of distribution mentions a family settlement under which each adult party would receive $1,043.50. Three of the plaintiffs were minors, but an order of the Scott probate court was recognized showing that Everett Jenkins was curator for these claimants. The order directed that the minors' portions be paid to the curator.[1]

The action before us does not involve proceeds of the judgment. Instead, it requires a construction of releases signed by Mrs. Jenkins and the two executors upon which distribution was based.

Jenkins was insured by the state highway department for $3,000 under a group coverage by Union Life Insurance Co. No beneficiary was named; but, by § 7 of

[1] Cost of collection and burial charges with incidental items were listed as $1,652, leaving $8,348 to be distributed among the ten claimants, three of whom, the grandchildren, took a single share.

the master policy, indemnity for loss of life as distinguished from specific benefits collectible by the insured would go to "the beneficiary if surviving the employe, and otherwise to the estate of the employe."

February 22, 1950, Union Life paid Mrs. Jenkins $3,000 believing that she, to the exclusion of the Jenkins heirs and the estate, was entitled to the money. But the insurance company, apprehending a controversy, brought an equitable action July 25th to impound the fund. In response to a writ of garnishment the First State Bank of Morrilton disclosed that its indebtedness to Mrs. Jenkins was $3,051.50. Her right to retain the insurance payment is the issue here.

The family settlement identified in the circuit court judgment was referable to a petition of January 27 listing the decedent's stepdaughter as a participant. Mrs. Jenkins agreed to accept an eighth of the Bowdre judgment and to wave her dower rights "or other claims as widow." The petition contained this sentence: "It is also understood that this agreement does not include a division of whatever payment may be made by the State of Arkansas." The final prayer was that the court accept the agreement . . . "for the division of whatever funds may be received from Bowdre Banks."

In the chancery court trial the circuit court complaint was offered in evidence and admitted without objection, but when the release heretofore referred to as having been executed March 8 was offered there was objection on the ground (a), that it was immaterial; (b), the paper tendered was a carbon copy with names of the administrators and Mrs. Jenkins written with a typewriter. The court rejected the copy under the best evidence rule, but held that if the original should be offered it would probably be competent. The copy was handed to the reporter for the record. Later a photostatic copy was sup-

plied, but whether that occurred during the trial is in doubt.[2]

Title of this document is Release of All Claims, but this paragraph gives concern: "The aforesaid payment of $10,000 does not embrace . . . $3,000 . . . [paid] to Dovie Jenkins by Union Life. . . . However, it is expressly understood . . . by the undersigned . . . that the total gross recovery of the undersigned against all parties herein released for any and all claims and causes of action . . . arising out of . . . the death . . . [of Jenkins] shall be $13,000—being the aforesaid $10,000 plus the aforesaid $3,000—no more and no less."

A contractual provision immediately preceding references to the items aggregating $13,000 is copied in the margin.[3]

As early as 1929—two years after the Martineau Road Law was adopted—the state recognized peculiar

[2] The reporter's note is: "Later Mr. Bailey supplied me with a photostatic copy. I submit both for inspection." There can be little doubt that the photostats are genuine, but there is doubt that the trial court saw them before rendering the decree. However, the bill of exceptions containing the copies was approved without objection from appellants.

[3] "[The administrators and Mrs. Jenkins] state that J. Walter Jenkins [was killed while in the line of duty as a highway employe] . . . and [we] are aware that Act 462 of 1949 gives . . . the widow a right to make claims against the state . . . for benefits . . . under Workmen's Compensation Law. However, because conditions attached to the settlement-payment of $10,000, aforesaid, [are] that all parties herein released shall be fully protected against and released from any possible subrogation claims by or in behalf of the State, or any agencies or divisions thereof, and because the undersigned . . . hereby acknowledge that after deducting the reasonable costs of collection and the widow's one-third from the aforesaid $10,000, under the provisions of § 40 of the Compensation Law the remaining two-thirds, upon which the State would claim a lien under said § 40, is more than the State would owe the widow in . . . compensation benefits, and therefore the undersigned cannot and shall not expect any . . . [such] benefits from the state, whose liability is hereby extinguished in consideration of the . . . payment of $10,000. . . . All of the undersigned hereby agree that no claim for pecuniary benefits of any kind shall be made against the State . . . or any agency or division thereof, by or in behalf of [us]. Furthermore, . . . should it subsequently be deemed necessary . . . by any of the parties herein released to obtain an adjudication through the . . . Compensation Commission extinguishing any liability of the State, . . . the undersigned agree to cooperate . . . to obtain said adjudication extinguishing any liability of the State . . . or any of its agencies."

hazards in building and maintaining highways. By Act 232 a Highway Employes Protection Fund was established from which death and injury benefits were payable. The legislation proved inadequate. In 1935 a more comprehensive program was adopted under which the Governor, State Comptroller, and Director of Highways were constituted a board to ascertain the best method of providing compensation. Power was conferred to contract with any surety, bonding, or insurance companies authorized to do business in the state whereby liability insurance for highway employes would extend to workers. An appropriation of $18,000 covering 1935 and 1936 was made, with a like amount for the next two years. See Act 115 of 1935. This was the basis for the State's contract with Union Life whereby a master policy paying $3,000 for death if the employe's salary should be $1,800 or over, and $2,000 where salaries were under $1,800, was issued. Irrespective of the number of employes involved in a common accident, the company's liability was $10,000, to be prorated. As to each salary group specific benefits were payable according to tabulated schedules.

The contract is captioned "Group Accident Policy for Employes [of] Arkansas State Highway Commission." It is stipulated that there was no individual application.

The next State undertaking to insure highway employes was Act 462 of 1949. By § 7 the Workmen's Compensation Commission is given exclusive jurisdiction of claims against the State and its several agencies, while other demands go to the Claims Commission created by the 1949 enactment[4]. Section 36 of the Compensation Law extends to a self-insurer (such as the State, in the instant case) the privilege of *securing* a part of the compensation liability under the Act as the self-insurer shall elect, ". . . by insuring such portions with a company approved by the Commission, and the liability of the company shall be limited to those features and liabilities of the Act as are expressly stated and none other."

[4] The appropriation to pay claims for state employes is in Act 459 of 1949, being a sum not in excess of $75,000 remaining from the principal appropriation of $1,238,901.13. (See Act 225 of 1951 for the current appropriation).

Should the insurance payment be treated as security of a self-insurer under § 36, then, Mrs. Jenkins alone could prevail if the State through the Compensation Commission were treated as the obligor to which the claimant could turn, there being no dependents. See § 15 (c) (1) (2), Act 319 of 1939 as amended by Act 121 of 1941 and Initiated Act No. 4 of 1948.

It is difficult to say just what the parties had in mind when the contract of March 8th was made. The subrogation features of § 40 of Act 319 of 1939 were considered, but the State was not represented. Section 40 was construed in *Barth* v. *Liberty Mutual Insurance Co.*, 212 Ark. 942, 208 S. W. 2d 455; *Gilbert, Adm'r,* v. *Missouri Pacific Railroad Co.*, 208 Ark. 1, 185 S. W. 2d 558. See *Anderson* v. *Sanderson & Porter,* 146 Fed. 2d 58. The issue is not before us at this time except to the extent that the releasors were cognizant of the law's existence.

Quite clearly the purpose of the March 8th contract was to acquit "all parties" to the extent of $13,000, but there are no reservations of individual rights respecting the insurance money. This had been received by Mrs. Jenkins and the payment was known to all who were interested. Whether the $3,000 be treated as *pro tanto* self-insurance by the State, payable to Mrs. Jenkins under the Compensation Law, or whether in consideration of the widow's release to the sons, daughters, stepdaughter and grandchildren of sums aggregating more than she was bound by law to surrender—in either event the trial court did not err in holding that the administrators were concluded by the release. It seems obvious that if the intent at that time had been to take from Mrs. Jenkins two-thirds of the $3,000 payment, something of a definite nature would have been included in the writing.

Affirmed.

Mr. Justice George Rose Smith dissents.

PUBLIC SERVICE COMMISSION *v.* LLOYD A. FRY ROOFING COMPANY.

4-9597 244 S. W. 2d 147

Opinion delivered November 19, 1951.

Rehearing denied January 7, 1952.

Bailey & Warren, for appellant.

James W. Wrape, Glenn M. Elliott and *Louis Tarlowski,* for appellee.

PAUL WARD, J. On November the 29th, 1949, the enforcement officers of appellant, Arkansas Public Service Commission, acting in accordance with their authority and duty, as they saw it under Act 367 of 1941, stopped a truck which bore a Tennessee license and was driven by one J. P. Boshers. The truck [and the trailer attached] had appellee's name on it and [presumably] contained merchandise belonging to or being delivered for appellee. Boshers informed the officers that he owned the truck

but he had leased it to one Frank Whittington who had in turn leased it to appellee and that appellee had employed him to drive it. Thereupon said officers arrested the driver for violation of the aforementioned Act in that neither he nor Whittington held a permit or Certificate of Convenience and Necessity from the Arkansas Public Service Commission. Twice on January 24th and May 2nd, 1950, respectively, three other truck drivers were arrested under the same facts and circumstances and in each instance bond was posted and there has been no trial. Then on June 2nd, 1950, upon application by appellee, the lower court issued a temporary order restraining appellant, its agents and employees from further so interfering with appellee, its drivers and agents. Following this, on June 26th and July 6th, 1950, respectively, two other truck drivers were stopped under the same facts and circumstances but no arrests were made because of the said court order.

After a full hearing on the issues a special chancellor rendered a decree, April 16, 1951, making the temporary order final, from which decree appellant prosecutes this appeal.

It is our view that if the truck drivers are required to have a certificate as stated above then the issuance of the restraining order was erroneous, otherwise it was proper and the case should be affirmed. Under this view and in this opinion we do not consider the status of Whittington in his relation to the provisions of said Act. Again, if the truck drivers are required to have a certificate then it is necessary for us to find that said drivers are *contract carriers* under the provisions of said Act 367. To determine this it becomes necessary to consider the appropriate language of the Act and also the testimony, with the exhibits, introduced in evidence.

Section 5 (a) (8) of said Act reads as follows:

"The term 'contract carrier by motor vehicle' means any person, not a common carrier included under Paragraph 7, Section 5 (a) of this Act, who or which, under individual contracts or agreements, and whether directly

or indirectly or by a lease of equipment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation."

A careful reading of the above language gives the impression that the drafters intended the definition of *contract carrier* to be all inclusive and to be proof against easy evasion.

Much of the testimony introduced at the hearing below need not be recounted or considered, under our view of the matter, because the lease agreements between the drivers and Whittington and the lease agreement between Whittington and appellee fairly well establish the relationship of each with the others, so these agreements or leases will be freely referred to hereinafter.

Appellee is a corporation domiciled in Memphis, Tennessee, and is engaged in the manufacture and sale of asphalt roofing products. From its plant in Memphis it sells and distributes its products to customers located in a number of points in Arkansas and other states. About a year previous to the first arrest mentioned above appellee adopted a new policy of delivering its products to customers by means of tractor-trailer equipment, which it leased from Whittington but which was to be driven by its own employees. Apparently Whittington was in the business of leasing tractors and trailers to concerns like appellee but insofar as it affects this case he owned seven tractors and eighteen trailers which he leased to appellee, but he also purported to lease to appellee five other tractors which were owned by the drivers mentioned above as having been arrested or stopped. It is these five owner-drivers that we are concerned with here.

Appellee says it has a right to lease transportation equipment and hire its own drivers and thereby become a private carrier just as it would, concededly, be if it owned said equipment outright, and, as a general proposition, we think this is true. On the other hand, appellant contends that the said lease agreements are not *bona fide* but are in effect a clever attempt to evade the provisions of said Act 367 which requires *contract carriers* to procure a permit from the Commission. The im-

plication of appellee, of course, is that if it is a private carrier then the owner-drivers could not be *contract carriers.*

The lease agreement between the owner-drivers and Whittington in force when the first two arrests were made contains among other provisions, the following:

Whittington (a) is engaged in business of leasing truck tractors and trailers to large industrial concerns; (b) the industrial concerns have their own products and furnish their own drivers and liability insurance; (c) shall have nothing to do with selection, direction or control of drivers; (d) is to lease truck to responsible concerns for long terms; (e) is to pay nine cents per mile as shown by speedometer. The owner-driver of the truck (a) shall be able to obtain and retain employment as driver of his own tractor with the concern to whom Whittington leases it; (b) must own tractor and have sufficient experience to be able to obtain and retain his job during life of lease; (c) must arrange to drive own truck or lease is cancelled immediately; (d) agrees his truck shall be operated in accordance with any written or *oral* agreement between Whittington and appellee; (e) agrees to pay for all gasoline, tires, replacements, repairs, licenses, road mileage tax, and registration fees, provide fire, theft and collision insurance, wash, clean and polish tractor, and paint it in any manner designated by Whittington; (f) agrees that this lease shall be governed to any agreement between Whittington and appellee. The lease agreement provides it shall remain in full force and effect for three years, but also provides *either party may cancel by giving the other five days' written notice.*

It appears that sometime later Whittington changed the form of the lease agreement to be used between himself and the tractor owners, and a copy is contained in the record. It is substantially the same as the one mentioned above except that it does not require the tractor owner to obtain and maintain a job with appellee to drive his own truck, and also the cancellation notice is changed from five to 30 days. Here we note that the name of appellee is not mentioned in any of these leases but we

used it for convenient reference to anyone to whom Whittington might lease the tractors.

In the lease agreement between Whittington and appellee, Whittington agrees to service the tractors in substantially all respects as is required of the owner in the leases mentioned above. This lease runs for a definite period of three years but gives Whittington the right to substitute vehicles and gives appellee the right to secure vehicles from other sources if Whittington cannot furnish them. Whittington testified that in every instance where he leased a tractor from the owner and released it to appellee, the owner was employed by appellee to drive the same. It also appears that Whittington would send the owner to appellee to secure such employment.

In the light of the above we are of the opinion that the driver-owners involved in this litigation were *contract carriers* as defined in the section of Act 367 of 1941 quoted above and that they were therefore required to have a Certificate of Necessity and Convenience from the Arkansas Public Service Commission. It seems to us that the arrangements made by appellee to deliver its own products as set forth above amount only to a clever plan to circumvent the letter and spirit of the law. We could not express this view in better language than was used in the case of *Georgia Truck System* v. *Interstate Commerce Commission,* 123 Fed. 2d 210, where the court in dealing with a similar situation said:

". . . It is true that the contracts, under cover of which the operations were conducted, are in most of their provisions carefully drawn to give color to appellant's claim of renting only, and if the operations had been conducted strictly within that form, there might have been some question whether the operations so conducted were transportation operations within the invoked act. When, however, the contracts are read in the light of the construction accorded them by the parties by the actual operations under them, it is clear that the scheme as a whole is a mere subterfuge, an unpermitted evasion, not a real avoidance of the provisions of the law."

It is apparent that appellee seeks to obtain all the obvious advantages of having its products delivered by trucks driven and maintained by the owners thereof without complying with the Arkansas law regulating contract carriers, but if this arrangement is approved and carried to its ultimate possibilities it could have the effect of destroying a sizable industry. The fact that Whittington is interposed between the tractor owners and appellee makes no difference because the two sets of lease agreements are too closely tied together to disguise the real purpose and intent, and because we must look to the status of the owner-drivers and to the nature of the service rendered by them. This view is sustained by *Interstate Commerce Commission* v. *F. & F. Truck Leasing Company,* 78 F. Supp. 13, from which the following is quoted:

"In the court and Commission cases the issue of whether a carrier status subject to regulation on the part of the lessor existed has been determined by how much service which goes with ordinary hauling for compensation was being furnished the shipper in addition to the leased vehicle. Also whether on the whole the dealings and arrangements between the parties indicate that a transportation service was being rendered by the lessor to the lessee rather than simply furnishing for private operation a vehicle to a shipper, and whether the vehicle was being operated by the shipper in the same manner as would normally obtain if he were the owner of the rented equipment."

Also in *United States* v. *La Tuff Transfer Service,* 95 F. Supp. 375, appears this language:

"Motor carrier operations must be *bona fide* and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the transportation will be of no avail for that purpose. Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by

execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier."

Other cases expressing similar views are: *Board of Railroad Commissioners* v. *Reed,* 102 Mont. 382, 58 P. 2d 271; and *Louisville Taxicab & Transfer Co.* v. *Blanton,* 305 Ky. 179, 202 S. W. 2d 433, 175 A. L. R. 1329.

Although appellant makes it clear it in no way contends that appellee is subject to said Act 367, yet appellee attempts to show that it is a *private carrier* and therefore it must follow that the owner-drivers, being its employees, could not be subject to the Act. In support of this it is pointed out that it carries said drivers as employees, pays social security taxes on them, extends to them vacation benefits, etc., and has absolute control over them. It is ably urged that the "Primary Business Test" is the proper rule by which appellee's status should be governed, and cites at length from rulings of the Interstate Commerce Commission which it says are not binding but should be persuasive to this court. Among such rulings is cited the case of *Lenoir Chair Co.-Contract Carrier Application,* 48 Motor Carrier Cases 259, and *Schenley Distiller's Corporation-Contract Carrier Application,* 48 Motor Carrier Cases 405. Without finding fault with the "Primary Business Test" rule as explained and applied in cited rulings we think such rule is not the one to apply here, and that said rulings do not control here for the obvious reason that the fact situation obtaining here did not exist there.

Considering alone the wording of the first mentioned lease agreement between the owner-drivers and Whittington it is perfectly clear that the tractors leased to Whittington [and later leased to appellee] were to be driven by the owners, and it is just as clear that the lease of the tractors to appellee was not *bona fide.* In fact it amounted to no effective lease at all because, first, the lease to Whittington terminated when and if the owners were unable to drive their own trucks and, second, the lease could be terminated without cause, on five days' notice. In either event the tractor could be withdrawn from

appellee. This negates the contention of appellee that it was operating under a *bona fide* lease for long periods of time. Little need be said about the second form of lease contract devised after the first arrests were made which eliminated the requirement that the owners should drive the tractors and extended the cancellation time from five to 30 days. In the first place the "thirty days" does not harmonize with appellee's contention of long term lease agreements, and more significant is the fact that in each instance involved here the owner was the driver. Also the fact that the lease form was changed at the time and under the circumstances is itself significant.

For the reasons set forth above the decree of the lower court is reversed, the injunction is dissolved and the cause of action dismissed.

HOLT and GEORGE ROSE SMITH, JJ., dissent.

GEORGE ROSE SMITH, J., dissenting. The case presents a question of fact, and I am not able to say that the chancellor was wrong in deciding it as he did. It is possible for the owner of a truck to lease it to another and then obtain employment as its driver without thereby becoming a contract carrier. If the arrangement is *bona fide,* as it was found to be in *Watson Mfg. Co., Inc.,* v. *Common Carrier Application,* 51 M. C. C. 223, there is no violation of the law.

In the case at bar the arrangements by which the driver-owners are employed by the appellee may or may not have been made in good faith, and I am not willing to say that the mere contracts themselves, without other evidence, amount to a subterfuge. If it were shown that the appellee does not in fact exercise the control over the driver-owners that it normally would exercise over an employee, or if it were shown that the amounts paid for the use of these tractors are such as to be fair compensation for the carriage of goods and not fair compensation for the lease of the equipment, or if some other showing were made to indicate bad faith, then I should agree with the majority. But on this record I think the appellee made

prima facie proof of a valid arrangement, and the Commission failed to sustain the burden of going forward with the evidence to show that the arrangement is in fact a sham. I would, however, modify the injunction to make it less broad in its terms.

GUYOT, EXECUTOR *v.* FLETCHER.

4-9594 } (consolidated) 243 S. W. 2d 639
4-9648 }

Opinion delivered November 19, 1951.

Culbert L. Pearce and *Ed E. Ashbaugh,* for appellant.

C. E. Yingling and *C. E. Yingling, Jr.,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellees, Carrie Fletcher and her husband, to restore

a lost deed that was executed in 1948 by Mrs. Fletcher's aunt, Olive Guyot. By the lost instrument Mrs. Guyot conveyed her homestead in the town of Beebe to Mrs. Fletcher, subject to a life estate reserved by the grantor. Mrs. Guyot died in June, 1950, and this suit was filed against her heirs at law. It was later shown, however, that Mrs. Guyot had left a will giving her property to two of these heirs, Walter and James Guyot—nephews who are the appellants here. Walter was appointed executor, and he and James defended the suit below. In addition to denying the execution of the deed they filed cross complaints asserting that Carrie Fletcher should be required to surrender certain personal property which she had wrongfully obtained from the decedent. The chancellor found for Mrs. Fletcher on both issues, restored the lost deed, and dismissed the cross complaints.

The execution and delivery of the deed were proved by clear and convincing testimony. For many years the closest ties of affection had existed between Mrs. Guyot and her niece. Mrs. Guyot employed an attorney to prepare the deed, and he described in detail its provisions, its execution, and its delivery. Other witnesses quoted Mrs. Guyot as having often said that she had deeded the property to Carrie Fletcher. Mrs. Fletcher's own testimony confirms that of the other witnesses, but it is objected to as involving a transaction with the decedent, in violation of § 2 of the schedule of the Arkansas Constitution. This section, known as the dead man's statute, is not applicable. The land is not needed to pay debts, and therefore the executor is merely a nominal party, having no interest in the outcome of the suit to restore the lost deed. In this situation the personal representative is not a party as the term is used in the statute. *Walden* v. *Blassingame,* 130 Ark. 448, 197 S. W. 1170; *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009. It is earnestly argued by the appellants, upon the authority of *Blackburn* v. *Thompson,* 127 Ark. 438, 193 S. W. 74, that the appellees should have objected below to the executor's presence in the suit, and that their failure to do so makes the dead man's statute applicable. But in the case at bar, unlike the *Blackburn* case, the executor was unquestionably the

proper person to file a cross complaint seeking to recover personal property for the estate; so there was no reason for the plaintiffs to complain of his action in intervening. There were still two separate controversies, and the executor was interested in only one. Mrs. Fletcher's testimony was accordingly admissible, and even without it the execution and delivery of the deed were convincingly proved.

Upon the executor's cross complaint a different situation exists. Here the testimony of Mrs. Fletcher and her husband, who were parties to the suit, cannot be considered in so far as it concerns transactions with Mrs. Guyot. The only serious question is whether the competent evidence is sufficient to sustain the chancellor's finding that Mrs. Guyot gave her furniture to her niece. We think that the decedent intended to make such a gift eventually, but we are unable to discover proof that it was completed.

For many years Mrs. Guyot maintained a home in Beebe, and there she kept the furniture now in dispute. In early February, 1950, Mrs. Guyot's health became somewhat impaired, and she was advised by her doctor to move into the home of the Fletchers, who had recently bought a house at Valley Springs, in Boone County. About three weeks after this move Mrs. Guyot arranged for part of her furniture to be carried by truck from Beebe to Valley Springs, and the appellees must rely almost entirely upon this fact to show delivery of the gift. But what little evidence there is in the record is decidedly against the theory of a gift.

For the appellees there is no direct evidence of a gift, other than the naked fact that the property was moved to Valley Springs at Mrs. Guyot's expense and was still there when she died about four months later. Mrs. Guyot's sister and her attorney both testified that Mrs. Guyot made statements showing an intention to make a gift in the future, but both these incidents occurred while the property was still at Beebe. Mrs. Fletcher testified that at the time of the trial the furniture belonged to her, but only two weeks ago, in *Cowan* v. *Powell, ante,* p. 498,

243 S. W. 2d 373, we held such a conclusion insufficient proof.

On the other hand, there is persuasive evidence to rebut the theory of a gift. After part of the furniture was moved to Valley Springs Mrs. Guyot bought other items of furniture in her own name. As late as April, 1950, she traded her refrigerator in upon a new one, and the receipt recites that the property belonged to her. Some of the furniture moved to Valley Springs was undoubtedly for Mrs. Guyot's personal convenience, such as a heater that she wanted because it was glass-lined. The situation is best summed up by the testimony of Eula Jungkind, a witness for the appellees, who said that at the time of the move to Valley Springs Mrs. Guyot told her: "I am moving everything I have got up there, and after I die it is Carrie's and Thomas'." We conclude that the intended gift is not shown to have been completed.

By a separate appeal, consolidated with the main case, the appellants contend that the chancellor erred in refusing to reopen the case upon the filing of a bill of review alleging newly-discovered evidence. Without setting out this matter in detail we think it enough to say that the evidence went largely to an issue of credibility and would probably not have affected the result in the case. *Killion* v. *Killion,* 98 Ark. 15, 135 S. W. 452. The chancellor did not abuse his discretion in refusing to act upon the bill of review.

That part of the decree relating to the furniture is reversed and the cause remanded with instructions that this property be surrendered to the executor; in all other respects the decree is affirmed.

WARD, J., dissents as to personal property.

HARRISON *v.* KNOTT.

4-9597 243 S. W. 2d 642

Opinion delivered November 19, 1951.

Eugene Coffelt, for appellant.

Claude Duty and *Vol T. Lindsey,* for appellee.

MINOR W. MILLWEE, Justice. Appellees, as owners of certain business properties in the City of Bentonville, Arkansas, brought this suit to enjoin Ben Moser and appellant, L. E. Harrison, from interfering with the use of an alleyway abutting appellees' buildings and to require them to remove all obstructions from said alley-

way. The City of Bentonville was originally joined as a party plaintiff, but subsequently withdrew from the suit.

After a lengthy hearing the chancellor entered a decree finding that appellees, their predecessors in title and the public generally had, through notorious, adverse and continuous usage for a period of more than fifty years, acquired an easement by prescription over the alleyway; that said easement should be continued for purposes of ingress and egress to and from the buildings abutting said alleyway and as a means of access to utility lines and for drainage over and under said lands; and that, since the filing of the suit, appellant L. E. Harrison obstructed the east end of the alleyway by placing a concrete building across it. The appellant L. E. Harrison was perpetually enjoined from interfering with the use of said alleyway and the court directed that a mandatory injunction issue requiring him to remove the concrete building within thirty days. L. E. Harrison has appealed and filed a *supersedeas* bond.

The alleyway in question is located between and behind two rows of store buildings facing north and south, respectively, in a business block which lies immediately south of, and adjacent to, the public square in the City of Bentonville. It is 19½ feet wide and runs from "A" Street on the east side of the block for a distance of 101 feet to the rear of a store building which faces west on Main Street. Appellant L. E. Harrison and his contractor, Ben Moser, commenced construction of a concrete block building, the north wall of which bordered the south line of the alleyway. When the building was nearing completion and after the filing of the instant suit, they extended the north wall of the building across the alleyway to another building on the north side of the block.

The great preponderance of the evidence supports the chancellor's finding that the alleyway in question has been used by the public generally and some of the owners and tenants of the abutting business houses and their predecessors for more than fifty years. Owners and tenants of the abutting business houses have for many years used the alleyway for the delivery of merchandise

and materials to and from their places of business. Sewer and other utility lines have also traversed the area for many years and gas meters have been installed thereon.

Appellant insists that such use as has been made of the alleyway in question has been permissive and not adverse. It is also contended that the alleyway is not a public way or alley because it does not extend through the block to Main Street. The same contentions were made by the appellant in *Robb & Rowley Theaters, Inc.* v. *Arnold,* 200 Ark. 110, 138 S. W. 2d 773. In that case, as here, there was involved the long usage of a blind alley over an area which had never been formally dedicated to the public use. Under facts similar to those in the instant case. the court there said: "We think appellant is in error in insisting that an easement beginning in permissive use cannot ripen into title thereto by long, open and continuous use. This court said in the case of *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, that: 'It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to establish an adverse use so as to ripen into title by limitation.' And it was also said in the McGill case that: 'The length of time and the circumstances under which the alley was open were sufficient to establish an adverse use so as to ripen into title by limitation.' " See, also, *Bond* v. *Stanton,* 182 Ark. 289, 31 S. W. 2d 409; *Kirby* v. *City of Harrison,* 202 Ark. 1, 148 S. W. 2d 666.

If the appellant, L. E. Harrison, and his contractor, Ben Moser, were the only necessary parties to this suit, we would readily affirm the decree, but such is not the case. Prior to the trial appellant filed a motion to have his name stricken as a party defendant alleging that he was not, and had never been, the owner of the property upon which he constructed the building. It does not appear that this motion was ever presented to the trial court but, if it had been, the undisputed facts show that

appellant was a proper party defendant regardless of actual ownership of the land. However, the undisputed evidence also discloses that appellant purchased the property in 1926 and had the title placed in the name of T. L. Harrison, his wife. The deed was placed of record on July 29, 1926. While appellant has since managed the property, obtaining a building permit in his name as owner, and contracted and paid for construction of the building in question, the title has remained in his wife's name. The rule is that where a husband purchases land and procures the deed to be made to his wife, the presumption is that he intended it as a gift, and a trust does not result in his favor. *Poole* v. *Oliver,* 89 Ark. 578, 117 S. W. 747. The evidence here does not present a state of facts existing before or contemporaneously with the conveyance sufficient to rebut the presumption of a gift. Thus we have the anomalous situation of one party being required to remove permanent fixtures from lands owned by another who is not a party to the suit.

It is true that injunction is an equitable remedy that is exercised *in personam* and not *in rem.* 28 Am. Jur., Injunctions, § 4. But it is also the rule that if the injunction is sought to protect an interest in lands, all persons who have a beneficial interest in the land which is the subject matter of the suit should be made parties. 43 C. J. S., Injunctions, § 173; 28 Am. Jur., Injunctions, § 273; 67 C. J. S., Parties, § 45. Ark. Stats., § 27-814, provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a determination of the controversy between the parties before the court can not be made without the presence of other parties, the court must order them to be brought in." The purpose of this 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. *Smith* v. *Moore,* 49 Ark. 100, 4 S. W. 282; *Thompson* v. *Grace,* 91 Ark. 52, 120 S. W. 397, 134 Am. St. Rep. 52.

Under the facts here presented, we conclude that the court could not have determined the controversy between the parties before it nor have required the removal of the obstruction to the alleyway in question without prejudice to the rights of T. L. Harrison, and that she is a necessary and indispensable party to the suit.

The decree is accordingly reversed, and the cause remanded with directions to make T. L. Harrison a party defendant, and for other proceedings.

WELBORN *v.* MORLEY, COMMISSIONER OF REVENUES.

4-9650 243 S. W. 2d 635

Opinion delivered November 19, 1951.

Ted Goldman, for appellant.

O. T. Ward, for appellee.

HOLT, J. This action involves the seizure and confiscation of fifty-two cases of intoxicating liquor in the town of Ft. Lynn, Miller County, Arkansas, while appellant was attempting to transport this liquor from Shreveport, Louisiana, to Seneca, Kansas.

It was stipulated: "That on February 12, 1951, John L. Welborn was arrested in Miller County, Arkansas, and charged under § 48-404 of the Arkansas Statutes of 1947 with transporting a cargo of liquor and wine into

and through the State of Arkansas without a legal permit so to do from the Arkansas Commissioner of Revenues; that John L. Welborn was tried and convicted in the municipal court of Texarkana, Arkansas, under said § 48-404 and fined $500; that the cargo of liquor taken from the possession of the said John L. Welborn was delivered by the sheriff's department of Miller County, Arkansas, to the Arkansas Revenue Commissioner and the cargo received by the Arkansas Revenue Commissioner consisted of 47 cases of whiskey and 5 cases of wine; that affixed to said whiskey and wine received by the Revenue Commissioner were the Federal Stamps and the Louisiana Export Stamps; that none of the liquor or wine had the Arkansas Tax Stamps affixed thereto; that the said John L. Welborn did not have a permit to transport liquor into and through Arkansas and never applied for such a permit; that at the time of his arrest 3 invoices were taken from his person by the Miller County sheriff's department; that John L. Welborn has made a part of his petition photostatic copies of said invoices and that they may be considered as evidence for the said John L. Welborn."

It also appears from the invoices of the liquor in evidence that public Highway No. 80 was the designated route over which the whiskey was to be transported and the drivers were listed as L. Lewis and John Lewis, but when appellant, Welborn, was apprehended by officers at Ft. Lynn in Miller County, he was driving (accompanied by his wife) on public Highway No. 71. Highway 80 out of Shreveport, Louisiana, runs through north Louisiana, east and west through Texas on to El Paso, and does not touch Arkansas or Kansas. It further appears that when appellant began his journey, he had sixty cases of liquor on the truck, but when arrested, he had only fifty-two cases in his possession. What became of the other eight cases was not disclosed.

As indicated, appellant was attempting to transport the liquor here involved into and through Arkansas to Kansas without proper permits in violation of law.

From a judgment of the Pulaski Circuit Court affirming the order of the State Revenue Commissioner, condemning and confiscating this liquor, comes this appeal.

Proceedings were had under § 48-404 [§ 5 (a), Act 109 of the 1935 Legislature] and §§ 48-925, 48-926 and 48-930, Ark. Stats., 1947.

For reversal, appellant contends that "(1) §§ 48-404 and 48-925 are invalid under the Commerce Clause (U.S.C.A., Const., Art. 1, § 8, Cl. 3) and the 21st Amendment (27 U.S.C.A.); (2) If the court upholds the validity of § 48-404 as applicable to the facts in this case, § 48-925 is invalid for the reason that confiscation, under facts of this case, is unreasonable and an undue burden on interstate commerce, and a denial of due process under the Constitution of Arkansas (Art. 2, § 8); and (3) By forfeiture and confiscation and failure and refusal to permit appellant to transport the cargo on to Kansas or back to Louisiana when he discovered necessity for the permit, the Commissioner overstepped and went beyond local police power of a State to regulate interstate liquor traffic."

We hold that all of the above contentions have been answered against appellant in our decisions.

The 21st Amendment of the Constitution of the United States provides: "Section 2. The transportation or importation into any State for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

It appears that Congress has enacted no laws governing the transportation of whiskey, but has left this question to the separate States. Arkansas, by the above permit law, § 48-404, has not sought to prohibit whiskey from being transported across its borders, but does seek to regulate same through a permit requirement. As to the validity of such a permit law, in the case of *Jones* v. *State,* 198 Ark. 354, 129 S. W. 2d 249, where the defendant while attempting to transport a cargo of whiskey

through Arkansas to Oklahoma, without a permit, was criminally charged, found guilty, and fined, we said: "It would serve no useful purpose to review all the authorities on the question of the right of the State to prohibit or condition the transportation of intoxicating liquors throughout the State.

"We think the case of *Dunn* v. *United States, supra,* [96 Fed. 2d 119, 117 A.L.R. 1302], and the Tennessee case above cited, [*Haumschilt* v. *State,* 142 Tenn. 520, 221 S. W. 196] settle this question. Arkansas had not undertaken to prohibit the transportation, but conditions it. That is, liquor may not be transported without a permit, as provided by law. Under the facts in this case there can be no question but that the appellant violated the law as stated in § 14177 of Pope's Digest, [§ 48-404, Ark. Stats., 1947] and that his conviction was proper."

We point out that at the time of our decision in this Jones case, the Arkansas law made no provision for the confiscation of whiskey being transported in violation of our permit statute above.

In the more recent case of *Duckworth* v. *State,* 201 Ark. 1123, 148 S. W. 2d 656, in which defendant, Duckworth, while transporting whiskey from Illinois to Mississippi, was arrested in Arkansas and charged with violation of the Arkansas law by transporting whiskey without a permit, we said: "Other than Act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the General Assembly intended to cover all requirements, and that the term 'into' as used in the act includes shipments entering the State, but consigned to points within or beyond. . . .

"The Commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the Legislature. . . .

"If we concede that some burden has been placed upon such commerce (by the permit requirement), the answer is that it may be done. . . . In the absence

of action by Congress there is no doubt of the right of a State to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other State facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the Commissioner of Revenues a permit conforming to regulations not inharmonious with Act 109 of 1935."

This Duckworth case was appealed to the Supreme Court of the United States and affirmed. 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294.

In the case of *Carter, et al.* v. *Virginia,* (1944), 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 569, affirming 181 Va. 306, 24 S. E. 2d 530, wherein appellants were transporting a cargo of liquor from Maryland through Virginia to North Carolina, without having first procured a Virginia permit, and where the laws of Virginia dealing with permit requirements for transportation of whiskey were almost identical with our Arkansas permit requirement, the United States Supreme Court, citing the Duckworth case, with approval, said: "We are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-first Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question. We have recognized that the several States in the absence of Federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws. *Duckworth* v. *Arkansas,* 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294. Thus this court has extended to this very field its recognition that regulation in interstate commerce by local authority in the absence of Congressional action is admissible to protect the State from injuries arising from that commerce. . . . The commerce power of Congress is not invaded by such police regulations as Virginia has here enforced. . . .

"We are therefore dealing with a case in which Virginia is attempting no more than the enforcement of her own laws; she is not seeking to inflict punishment for the violation of the laws of North Carolina. . . . (The

Supreme Court of Virginia said in this case): 'We cannot escape the conclusion that one who deliberately and intentionally violates the Federal Constitution and the law of his resident State, in the unlawful transportation of liquor would hardly hesitate to violate the laws of this State while passing through it if he thought he might profit thereby. We cannot shut our eyes to the possibilities of such a situation and the necessity of prevention.'

"But in the present case we need not consider the power of Virginia under the Twenty-first Amendment to regulate through shipments. It is enough that Virginia could conclude, in the absence of contrary Federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the laws of a neighboring State. By her ruling she has imposed no substantial clog on whatever cognate rights her sister States may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire."

Here, appellant not only had no permit in Arkansas, but according to the evidence, he had no permit to transport or carry his cargo of whiskey into Kansas, as required by the laws of that State, ("Kansas Liquor Control Act" of the 1949 session of the Kansas Assembly, chapter 242; General Statutes of Kansas, Annotated (1949), chapter 41, "Intoxicating Liquors and Beverages").

Appellant was asked but refused to answer the following question: "Q. Do you have any type of alcoholic beverage permit issued by the State of Kansas? Objection by Mr. Goldman on the ground that it is immaterial and possibly might be incriminating."

Finding no error, the judgment is affirmed.

MORRIS *v.* CROSSETT LUMBER COMPANY.

4-9588 243 S. W. 2d 764

Opinion delivered November 19, 1951.

Rehearing denied December 17, 1951.

Ovid T. Switzer and *W. P. Switzer,* for appellant.

Williamson & Williamson and *W. H. Howard,* for appellee.

HOLT, J. Appellant's claim arises under the Workmen's Compensation Act, 319 of 1939.

Appellant's husband, Claude Morris, on August 12, 1948, received an injury to his right eye (resulting in its loss) while employed by appellee and in the course of such employment. He died January 22, 1949. The Workmen's Compensation Commission denied appellant's claim for a compensation award and the Ashley Circuit Court, on appeal, affirmed.

Appellant's attorney says: "The contention of the claimant is that Claude Morris died as a result of the injury that he received on August 12, 1948, or as a result of a weakness of the heart caused by the injury."

Appellee's attorney stated its defense: "The contention of the respondent is he did not die by anything

arising out of and in the course of his employment. That gives you a clear cut issue."

Following a hearing, the full Commission summed up its conclusions, after hearing much testimony, as follows: "There seems to be no dispute as to the decedent's August 12, 1948, injury and ensuing disability nor that he lost the sight of his right eye as a result of that injury. It also seems clear that the decedent's widow was his only dependent. The doctor who first saw the claimant after his death was of the opinion he possibly died from coronary occlusions but he was not certain. According to the testimony, it is difficult and practically impossible to show with certainty the exact cause of decedent's death without an autopsy and none was performed. The testimony is to the effect that prior to August 12, 1948, the decedent worked regularly, was an efficient workman and was apparently in good health and had an excellent disposition; that after the injury in August, 1948, the decedent constantly complained of severe headaches and with his legs hurting. It also appears that the decedent was not in the same condition after his injury as he had been for a period of several years prior thereto.

"The only doctor who actually saw and examined the decedent after his death was Dr. M. E. McMillan, who was of the opinion the decedent died from a coronary occlusion which had no connection with the decedent's injury on August 12, 1948.

"It was the opinion of Dr. A. Scott Hamilton at the first hearing in May, 1949, and again in October, 1949, that the decedent's injury on August 12, 1948, was a contributory cause in the death of the decedent on January 22, 1949.

"Dr. Gardner H. Landers, Dr. L. G. Fincher, Dr. A. W. Norris, Dr. E. Lloyd Wilbur, Dr. J. N. Compton and Dr. Robert Watson were all of the opinion that there was no causal connection between the decedent's August, 1948, injury and his death in January, 1949. Dr. Raymond C. Cook found no injury except to the decedent's right eye and it was his opinion there had been no perforation to the right eye.

"It has been the contention of the claimant in this case that the decedent's death resulted from his injury on August 12, 1948; however, it is argued in the brief filed by the claimant's attorney after the hearing before the full Commission that the decedent's work, after returning to work for this employer on January 3, 1949, contributed to his death. In this connection, we are of the opinion that the claimant has failed to discharge the burden that is upon her to show that the decedent's death resulted from an accidental injury which arose out of his employment.

"As to the contention of the claimant that the death of the decedent resulted from his accidental injury of August 12, 1948, it appears we are dealing in probabilities. The question itself seems then to resolve itself down as to what were the most reasonable probabilities in this case. After a careful consideration of all the evidence, we are of the opinion that by far the greater weight of evidence in this case is that the decedent's death on January 22, 1949, had no causal connection between his injury on August 12, 1948. The claimant's claim for compensation as a result of the death of the decedent, therefore, is denied and dismissed."

On appeal here, our duty, as many times announced, is to determine whether there is substantial evidence to support the Commission's findings.

After a review of all of the testimony, much of which is in conflict, we are unable to say that there was no substantial evidence to support the Commission's denial of the claim. As we recently said in *H. C. Price Construction Company* v. *Southern,* 216 Ark. 113, 224 S. W. 2d 358: "The testimony cannot be reconciled. It is not, however, the function of the courts to weigh the evidence in compensation cases. *J. L. Williams & Sons, Inc.,* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82. The Legislature has entrusted to the Commission the power to speak the final word in controversies of fact, just as a jury must assume that responsibility in suits at common law. It is immaterial that we might reach a different conclusion if we were permitted to try the case anew. That authority has

not been given to us." So here, while we might not agree with the results reached by the Commission were we permitted to try the case *de novo,* however, we have no such authority.

Appellant also contends that a certain hypothetical question propounded to Dr. J. N. Compton and Dr. Robert Watson omitted certain undisputed material and necessary facts. In other words, that it did not embrace all of the facts, was therefore improper and prejudicial to appellant's rights. We think this contention untenable.

One of the doctors who had treated Morris for his original injury, and who examined him immediately after his death, and who signed the death certificate, was Dr. McMillan, who testified: "Q. Is there anything in this medical history and from your observation of this man that would, in any way, connect up the injury he had on August 12, 1948, and his death on January 22, 1949? In other words, are you of the opinion that the injury in August had anything to do with his death in January of 1949? A. I am not. I think there is no connection. That is my personal opinion."

Dr. Fincher, who had examined Mr. Morris on September 1, 1948, and saw him thereafter while Morris was in the El Dorado hospital, made this statement: "OPINION: I have reviewed the clinical records kept on Mr. Morris and the diagnosis, treatment and findings of Dr. Gardner H. Landers noted thereon, together with my own examination of Mr. Claude Morris. It is my opinion, therefore, that there is nothing about the injury to his eye, the resulting infection or the treatment given that could have caused his subsequent heart failure and death." Dr. A. W. Norris, who had examined and treated Mr. Morris in August, 1948, for his eye injury, gave the following opinion: "I have since learned that Mr. Morris is now dead and that his death was apparently due to a heart attack. It is my opinion that the injury to the right eye of Mr. Morris did not cause, or in any way contribute to, the heart stoppage causing his death."

In view of the testimony of these three doctors, McMillan, Fincher and Norris, we hold that their testimony

alone constituted sufficient substantial evidence to support the findings of the Commission to the effect that Morris' death did not arise out of, or in the course of his employment, and was not caused by or in any way connected with his eye injury.

Leaving out all consideration on the point relating to the hypothetical question propounded to Dr. Watson and Dr. Compton and the opinions of other doctors, the testimony of Doctors McMillian, Fincher and Norris, as indicated, was sufficient substantial evidence to support the Commission's findings.

Affirmed.

MILLWEE, WARD and ROBINSON, JJ., dissent.

COAL OPERATORS CASUALTY CO. *v.* F. S. NEELY CO.

4-9593 243 S. W. 2d 744

Opinion delivered November 19, 1951.

Harper, Harper & Young, for appellant.

L. C. Bryan and *Warner & Warner,* for appellee.

ROBINSON, J. The issue involved in this appeal is whether a policy of workmen's compensation insurance written to apply only to the State of Oklahoma should be reformed to apply to both Arkansas and Oklahoma.

The appellee, F. S. Neely Company, hereinafter referred to as Neely, is engaged in the coal mining business in Arkansas and Oklahoma. Pierce, Porter & Martin, hereinafter referred to as Pierce, are insurance agents and have been so engaged for many years in Tulsa, Oklahoma. In 1944, at the solicitation of Pierce, Neely purchased a workmen's compensation insurance policy which was carried for two years. Again, in 1947, Neely placed the insurance with Pierce and that firm had the policy written by appellant. The policy issued covered appellee Neely in both the States of Arkansas and Oklahoma for the year 1947. In 1948 the policy was renewed, again covering both States. In 1949 Neely authorized a renewal of the policy for that year. But, as written, the policy issued in 1949 applied only to the State of Oklahoma. In January, 1950, while the policy issued in 1949 was in full force and effect, one of Neely's employees was seriously injured in Arkansas. The Insurance Company denied liability on the ground that the policy did not protect the assured Neely in Arkansas. Neely filed suit for reformation of the policy claiming it was a mutual mistake that the policy was written to cover only Oklahoma, and that it was the intention of the parties at the time of the issuance of the policy that it should apply to both Oklahoma and Arkansas. After hearing the evidence the Chancellor found that there had been a mutual mistake and the policy should be reformed to cover both States. From a decree to that effect comes this appeal.

The evidence shows conclusively that it was Neely's intention the policy be renewed as originally written covering both Arkansas and Oklahoma, and it is proven beyond any doubt that it was the intention of Pierce that the policy be issued to cover both States. Mr. Morley of Pierce, Porter & Martin, testified:

"Q. The question was, Mr. Morley, what was your intention and understanding as to what the policy should cover?

"A. It was my intention that it would cover Mr. Neely's operations in Oklahoma and Arkansas."

On February 1, 1949, Mr. Morley wrote Neely as follows:

"I thought it would be well to advise that there is a little delay in getting the renewal workmen's compensation and public liability policies to you covering your operations in the States of Oklahoma and Arkansas. The policies, however, are being prepared and they will be sent to you just as soon as they are completed."

W. Van Stuck & Company of Oklahoma City are general agents for appellant in the State of Oklahoma. The policy in question was issued out of Van Stuck's office. Van Stuck had inquired of Pierce as to the location of Neely's operations, and in turn Pierce requested this information from Neely, who wrote to them as follows: "We have been and are at present only operating near Bokoshe, Oklahoma. We will advise of any change of location of any of our operating points." The Insurance Company says that it was upon this information that the policy was issued covering only the State of Oklahoma, that it did not intend to cover the State of Arkansas, and that there was no mistake.

Neely renewed operations in Arkansas in December, 1949, and sent in to Pierce the premium covering operations in this State. Upon an audit of its books, Pierce discovered that the policy had not been issued to cover Arkansas, and had Van Stuck attach a rider to the policy covering this State from December 1st. At the time of the request for the rider, the employee had been injured.

However, neither Pierce nor Van Stuck was aware of that fact, and the rider was not actually attached until subsequent to the expiration date of the policy. Neely did not know the policy had not been written so as to cover Arkansas until the claim for the injury had been denied.

The first question that presents itself is—was Pierce, who procured the application on which the policy was issued, a broker and acting as agent for Neely in purchasing the insurance, or was Pierce the local agent of the insurance company? The Statutes answer the question. Pierce was the agent of the appellant Insurance Company. Section 66-302, Ark. Stats., provides:

"Any person, who shall hereafter solicit insurance or procure applications, shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Title 36, § 197, Okla. Stats., provides: "Any person who shall solicit or procure an application for insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

Both the Arkansas and Oklahoma Statutes are to the same effect; hence it makes no difference which governs. Accordingly, Pierce was the agent of the appellant Insurance Company. The general rule in respect to the effect of statutes of this character is stated in 29 Am. Jur. 112, as follows:

"In some jurisdictions, statutes have been enacted providing that any person performing certain specific acts in reference to insurance, such as soliciting or taking applications for insurance, shall be regarded as the agent of the insurance company, and not of the insured. Such statutes do not violate the provision of the Federal Con-

stitution prohibiting the denial by one state of full faith and credit to the laws of another state, nor do they violate the privileges and immunities, due process, or equal protection clauses of the Fourteenth Amendment to the Federal Constitution. The term 'solicit' in a statute providing that any person who shall solicit an application for insurance shall be regarded as the agent of the corporation issuing the policy includes broadly any person who holds himself out as an insurance agent, and thus invites and receives insurance business, collecting and transmitting premiums, and delivering policies and receipts."

It being established that Pierce was the agent of the appellant Insurance Company and, as such, dealt with Neely with reference to the issuance of the policy, and it being the intention of both Pierce and Neely, as shown by a preponderance of the evidence, that the policy should cover both Arkansas and Oklahoma, it cannot be said that it was not the intention of the appellant Insurance Company that the policy cover both States. It is true that when the Insurance Company inquired of Neely as to the location of his present operation he was only operating at Bokoshe, Oklahoma. But, it is also true that from time to time he operated in both States and he had authorized the renewal of the policy covering both States. Furthermore, the Insurance Company, through its agent, Pierce, had written to him that his policy was being "renewed covering your operations in the States of Oklahoma and Arkansas." Pierce procured the application and the policy was issued on such application. A great preponderance of the evidence shows that Neely thought he was getting a policy covering his operations in both Arkansas and Oklahoma. The appellant Insurance Company, through its agent Pierce, also intended that such a policy be issued. Neely paid and Pierce received the premium covering both States just as soon as it became due.

Even if the Insurance Company, through its agent, had not written to the effect that the 1949 policy was being renewed covering both States, Neely had authorized the renewal of the policy then in existence. The Insur-

ance Company, other than by the terms of the new policy itself, gave Neely no notice that the new policy did not cover Arkansas as did the old policy.

In the case of *Aetna Insurance Company* v. *Short,* 124 Ark. 505, 187 S. W. 657, it is said: "A renewal of a policy is, unless otherwise expressed, on the same terms and conditions as were contained in the original policy."

In 29 Am. Jur. 244, the rule is stated as follows: "Upon like principle, where an insured applies for a renewal of a fire insurance policy and it is expressly or impliedly understood that the renewal shall be upon the same terms as the earlier policy, it is held that the insured may rely upon receiving such a policy, and is not precluded from asking for a reformation because of a variance, although he did not examine the policy delivered and discovered the discrepancy."

In *Crowell* v. *New Hampshire Ins. Co.,* 147 So. 762, it is held: "When the insurance agency issued the contract on June 17, 1930, it was legally bound to issue a policy containing the same terms and conditions as the original policy. By the renewal or extension, unless there is a special agreement for different terms, the original policy is continued under the original stipulations, and the only change is in the time of its expiration. Under such circumstances, if there is a change in the condition or terms of the policy, it is the duty of the insurer to call attention to the change, otherwise the change can be no part of the contract, and the renewal contract is subject to reformation by the courts of equity to make it conform to the original contract, unless there has been an amendment of the contract by enactment of a statute by the legislature."

In the case of *American Alliance Ins. Co.* v. *Paul,* 173 Ark. 960, 294 S. W. 58, this Court said: "In the case of *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139, this court went thoroughly into the question of reformation of written instruments, and there held that a court of equity will reform written instruments either where there is a mutual mistake or where there has been a mistake of one party accompanied by fraud or inequitable conduct of

the other party, and quoted Pomeroy, Eq. Jur. (3 Ed.), vol. 4, par. 1376, as follows:

" 'Equity has jurisdiction to reform written instruments in but two well defined cases: (1) Where there is a mutual mistake—that is, where there has been a meeting of minds—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished.' "

The evidence sustains the Chancellor's finding that the policy should be reformed.

The Chancery Court allowed the appellee's attorneys a fee of $500. Appellant contends that no fee should have been allowed saying that the Statute authorizing the assessment of attorney's fee and penalty does not apply to the situation here presented. Appellee seeks additional attorney's fee covering the appeal to this Court. Section 66-514, Ark. Stats., providing for the assessment of attorney's fee and penalty, specifically includes "casualty" insurance. In the case of *Liverpool & London & Globe Ins. Co., Ltd.,* v. *Jones,* 207 Ark. 237, 180 S. W. 2d 519, it was held that the legislation providing for attorney's fee and penalty must be construed in connection with Act 493 of 1921, now § 66-201 Ark. Stats. Subdivision 5 thereof expressly mentions workmen's compensation insurance. Hence, the allowance of attorney's fee was proper.

The majority of the court is of the opinion that the $500 fee allowed by the Chancellor is sufficient in this instance to cover the entire case.

Affirmed.

4-9587 243 S. W. 2d 747

Opinion delivered November 19, 1951.

[redacted]

D. B. Bartlett, for appellant.

J. H. Brock, for appellee.

ED. F. MCFADDIN, Justice. The appellant, as a taxpayer, seeks to recover into the public treasury moneys which he claims appellee, Harris, received in violation of law. This is the third appearance of some of the phases of the litigation, and is the second appeal of the case.

1. *Logan* v. *Harris,* 213 Ark. 37, 210 S. W. 2d 301, was an attempt by a private citizen, in an action in the circuit court, to challenge appellee Harris' right to hold the office of municipal judge of Clarksville. We held that only the Attorney General or the prosecuting attorney could bring such action at law,[1] under the usurpation statute. The effect of our holding in the case was to leave Harris in office as municipal judge, but we stated in that opinion: "No judgment was entered as to the competency of appellee to serve as municipal judge."

[1] A case with similar facts and holdings is *Scott* v. *McCoy,* 212 Ark. 574, 206 S. W. 2d 440.

The opinion in *Logan* v. *Harris, supra,* was delivered by this court on March 8, 1948.

2. On September 6, 1949, appellant Revis, as a citizen and taxpayer, filed suit against appellee Harris, in the chancery court, seeking to recover into the public treasury moneys alleged to have been unlawfully received by Harris. The chancery court sustained a demurrer to the complaint and Revis appealed. Our opinion in that case was delivered on April 3, 1950, see *Revis* v. *Harris,* 217 Ark. 25, 228 S. W. 2d 624. In reversing the chancery court, and in holding that Revis could bring such a suit in equity, we said:

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

3. We remanded *Revis* v. *Harris* to the chancery court, and this present appeal reflects the further proceedings in the chancery court. In his answer, Harris admitted that while he was mayor he received money for services as municipal judge, and for services as a laborer for the water and light department of Clarksville; but he claimed that none of such payments was illegal. In effect there was a plea of *quantum meruit.* The case was submitted to the chancery court on an agreed statement of facts and resulted in a decree enjoining Harris "from further contracting and accepting employment from the Clarksville Light & Water Company and from performing services in any capacity for the Clarksville municipality, outside of his duties as mayor, so long as he continues in office as mayor of said City of Clarksville, Arkansas." But the decree dismissed "for want of equity" all that part of Revis' suit which sought "judgment against the defendant, Sam Harris, to repay the City of Clarksville and Johnson County for services rendered while acting as municipal judge and for services performed by contract and job work for the Clarksville Light & Water Company." From the last portion of

the decree—*i. e.,* failure of the chancery court to require Harris to repay the moneys he had received—Revis prosecutes this appeal.

The learned chancellor rendered a written opinion which has proved helpful to this Court. In the said opinion the chancellor after quoting § 19-909, Ark. Stats.,[2] said:

"Under this section it was illegal for the defendant, who was mayor, to act as municipal judge, accept employment from the city-owned and controlled Light and Water District, or make contracts therewith. The agreed statement of facts shows that he was the mayor of the City of Clarksville and that he acted as municipal judge. . . . The agreed statement of facts further shows that he made a contract with the Light and Water Commission to construct a certain water line and was paid therefor the sum of $1,787.91, and that he was an employee of the Light and Water District for a part of three years and received a total remuneration of $3,878.05 for his services so rendered. The fact is not made plain, but it appears that one-half of his salary of $200 per month as municipal judge was paid by Johnson County. . . . Plaintiff has proceeded on the theory that if the mayor's employment in any of the capacities above enumerated was illegal, then recovery would be had as a matter of course. An examination of the decisions of the Supreme Court of Arkansas discloses that this may not be true."

In reliance on *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800, 34 L. R. A. N. S. 129, and *Gantt* v. *Ark. Power & Light Co.,* 189 Ark. 449, 74 S. W. 2d 232, the chancellor held that no money received by Harris could be recovered, saying:

[2] This § 19-909 reads:

"No Alderman or member of any Council, shall during the term for which he shall have been elected, or one year thereafter, be appointed to any municipal office which was created, or the emoluments of which shall have been increased, during the time for which he shall have been elected. No such Alderman or member shall be appointed to any municipal office, except in cases provided for in this act, during the time for which he may have been elected; nor shall any Alderman or member be interested, directly or indirectly, in the profits of any contract or job, for work or services to be performed for the corporation."

"To require the defendant to repay the City of Clarksville and Johnson County money received for services rendered while acting in good faith would be unjust and inequitable."

I. *Money Received by Harris for Services as Municipal Judge.* The agreed statement shows that Harris received from the City of Clarksville and from Johnson County, for services as municipal judge, a total of $1,733.33; and all of this was received while he was mayor of the City of Clarksville. We held in the previous appeal of this case, that Harris could not legally occupy the office of municipal judge at the time he was mayor of the city. So it follows that he was not the *de jure* judge; and the learned chancellor failed to apply and follow our holding in *Sitton* v. *Burnett,* 216 Ark. 574, 226 S. W. 2d 544. In that case, a citizen and taxpayer brought suit to recover for the public treasury, salary paid Sitton for services as *de facto* marshal. Sitton was not a *de jure* officer. In allowing recovery of such moneys into the public treasury in a taxpayer's suit we said:

"Appellant next argues that since he was concededly a *de facto* officer, had performed the duties of the office of marshal in good faith, and there was no adverse claimant, or *de jure* officer claiming the salary, he, appellant, was entitled to said salary and could not be required to make refund.

"We cannot agree.

"Appellant would be correct in this contention but for the fact that we have a statute denying him the right claimed—§ 7371, Sandels and Hill's Digest; § 14331, Pope's Digest, and now Ark. Stats., (1947), § 34-2208, which provides: '*Recovery of fees received by usurper.* Where the usurper has received fees and emoluments arising from the office or franchise. he shall be liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office or franchise, or in a separate action. If no one be entitled to the office or franchise, the same may be recovered by the State and paid into the public treasury.' "

In the case at bar Harris was only *de facto* municipal judge. He could not be a *de jure* municipal judge, because for one reason, he was mayor of the city when the office of municipal judge was created. So the money he received from the City of Clarksville and the County of Johnson should be recovered to the respective treasuries under the authority of *Sitton* v. *Burnett, supra.* To that extent we reverse the decree and remand the cause to the chancery court to enter judgment in favor of the respective governmental agencies for the amounts each paid to Harris for services as municipal judge and for further proceedings not inconsistent with this opinion.

II. *Moneys Received by Harris for Services Rendered to the Municipal Water and Light Plant of Clarksville.* The stipulated facts showed that Harris worked as a laborer for the Water and Light Plant of the City of Clarksville at the rate of $1 per hour and received a total of $3,878.05 during the years 1948 to 1950; and, also, that he received $1,787.91 for constructing and installing a water line to a school. The chancellor was correct in refusing Revis the prayed relief for the recovery of these amounts. The statute which appellant claims Harris violated is § 19-909, Ark. Stats., and this Court has held that the payee may retain the *quantum meruit* value received for services rendered even when there is a violation of the said section. In *Gantt* v. *Ark. Power & Light Company,*[3] 189 Ark. 449, 74 S. W. 2d 232, in discussing this statute Chief Justice JOHNSON said:

"The prohibitory statute here involved does not, in terms, declare the contract to be 'null and void.' The rule seems to be that, in the absence of the prohibitory words 'null and void' and where the contract has been performed by the parties in good faith, compensation may be retained measured by the reasonable value thereof. Such recovery, however, is not because of the con-

[3] In *Vick School Dist.* v. *New,* 208 Ark. 874, 187 S. W. 2d 948; *Gantt* v. *Ark. Power & Light Co.,* 189 Ark. 449, 74 S. W. 2d 232, was included in a list of cases in which we said *quantum meruit* had been refused. Obviously the case should not have been included in the list of those cited.

tract, but is grounded squarely upon the proposition that valuable services having been rendered which have been accepted by the parties, it would be inequitable and unjust to permit one party to substantially gain under the contract to the great and irreparable damage of the other."

Likewise, in the second appeal of *Gantt* v. *Ark. Power & Light Co.*, 194 Ark. 925, 109 S. W. 2d 1251, the late and beloved Mr. Justice HUMPHREYS, speaking for this Court, reversed the trial court judgment and remanded the cause with directions:

". . . to reinstate the complaint and to state an account between these parties taking as a basis therefor the amount they have received in operating the plant, and deducting therefrom a reasonable compensation for operating same. . . ."

At first glance, the distinction between the money that Harris received as municipal judge and the money he received for services as a laborer may not seem vital, but it is a distinction recognized by our cases. The money, paid Harris for serving as municipal judge, was paid to him for services *"as an officer,"* and these sums are recoverable under *Sitton* v. *Burnett, supra.* The money, paid Harris for services as a laborer and for the construction of a pipe line to the school, was not paid to him for services as an officer. It was wrong for Harris to receive any of these sums because he was mayor of the City of Clarksville; but the Legislature has not made such payments to be null and void, so Harris may keep the *quantum meruit* value of his services rendered to the water and light plant as laborer and for constructing the pipe line. There is no claim made that he received more than fair value for services as day laborer, or that the amount paid him for laying the pipe line was more than the value on the *quantum meruit* basis. So it follows that the chancellor was correct in refusing to decree that Harris should return the moneys he received from the water and light plant either for services as a laborer or for laying the pipe line; and as to these items the decree is affirmed.

But as to the moneys received by Harris as municipal judge the decree is reversed and the cause is remanded for further proceedings as herein stated.

TAYLOR *v.* MILAM.

4-9602 243 S. W. 2d 644

Opinion delivered November 26, 1951.

Wood & Chesnutt, for appellant.

W. A. Blair, D. McK. Winter and *Wootton, Land & Matthews,* for appellee.

ROBINSON, J. Appellants contend that they entered into an oral contract with Robert Alden Milam on the 5th day of July, 1943, whereby it was agreed that Milam, at his death, would leave his property to appellants, who are nieces and nephews of Milam's deceased wife. Milam died on the 23rd day of November, 1949, intestate. Appellants filed this suit to enforce the alleged contract, and the Chancellor held that the evidence was not sufficient to prove that a contract had ever been made between the parties.

Evidence was introduced to the effect that some of the appellants and their mother, on the 5th day of July, 1943, along with Milam went to a cemetery to select a

grave as Mrs. Milam was at the point of death; that while at the cemetery, Milam made the proposal that if the appellants would look after his welfare the rest of his life, help him in his business when he needed it, and care for the cemetery lot after his death, he would leave what he had to appellants; that they accepted this offer, making it a binding contract. On the other hand, the keeper of the cemetery testified that he was present during the entire time the group was there seeing about the grave and no such agreement was made.

A great volume of evidence was introduced for the purpose of showing the likelihood of Milam entering into the alleged agreement. To refute such evidence, a large amount of testimony was introduced for the purpose of proving the improbability of his entering into such an agreement. At the time of making the alleged contract it was not probable that Milam would ever need any financial assistance from anybody.

The record is voluminous and it would serve no useful purpose to abstract here the evidence in the case. It appears from the evidence that Milam, subsequent to his wife's death, lived in his home alone, that he did not depend on anyone to look after him or his interests. The evidence further shows that the appellants, who lived nearby, extended to Milam acts of courtesy and kindness such as one good neighbor would to another, occasionally cleaning his house, cooking a meal for him, and things of that kind, but, it appears that this was done due to affection and friendship, and not by way of carrying out the provisions of a contract.

The rule has been many times announced by this court that, in order to establish title to and ownership of land on an oral contract, the burden is on the person seeking to establish the contract to show execution thereof by a higher degree of proof than a mere preponderance of the testimony. To establish such a contract the evidence of its execution must be clear, cogent and decisive. It must be so strong as to be substantially beyond a reasonable doubt. *Tucker* v. *Peacock,* 216 Ark. 598, 227 S. W. 2d 929.

"The rule of law applicable in such cases is that, before a court of equity may grant specific performance of a parol contract to convey lands, the evidence of such agreement must be clear, satisfactory and convincing." *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310.

The Chancellor did not find in the case at bar that the evidence tending to establish the alleged contract came up to the standard required in such cases. After a careful review of the entire record, we agree with the Chancellor.

The decree is affirmed.

WALKER *v.* ELDRIDGE.

4-9608 243 S. W. 2d 638

Opinion delivered November 26, 1951.

Robert J. Brown, for appellant.

GEORGE ROSE SMITH, J. This is a petition by the appellee to obtain custody of his eight-year-old daughter, Sharon. When the parties were divorced in 1944 the child's custody was awarded to the appellant, who has since remarried. After a hearing upon the appellee's petition the chancellor entered an order on May 23, 1951, which directs that the appellee have custody of the child until the end of the school vacation. The order then

recites: "This order is only temporary, and subject to the court's further orders. The court will determine by his own investigation of the surroundings where said child shall be." The chancellor refused to grant an appeal, upon the ground that the order is temporary, and the appellant then asked this court for a writ of certiorari. We elected to treat the application for certiorari as an appeal and took jurisdiction of the cause.

We think the order to be appealable. This is not a mere temporary award of custody pending a trial of the case upon its merits. As far as we can determine from the record, the parties had completed their proof and submitted the matter to the court. On this evidence the chancellor concluded that the appellee should have the child, but the court attempted to condition his decision upon the outcome of an investigation to be made by the chancellor himself. This procedure was erroneous. Not only would it deprive the parties of their right to hear the evidence, to cross-examine the witnesses, and to adduce testimony in rebuttal, but it would also prevent us from reviewing the case upon the same evidence as that considered by the chancellor. As we said in *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450: "The personal knowledge of the chancellor is not judicial knowledge of the court, for there is no way of testing the accuracy of knowledge which rests entirely within the breast of the court." Since the conditional nature of the order cannot be sustained we treat the order as being subject to appeal.

On its merits the court's decision is correct. It does not affirmatively appear that the appellant has ever given her daughter personal care since the divorce in 1944. After that decree Sharon was placed in the home of a couple living in Hot Spring County, the appellee making payments for her upkeep. It next appears that in 1950 Sharon was, with the assistance of a public welfare agency in Pulaski County, placed in a convent in Little Rock. The appellant failed to pay for Sharon's board and room there, even though the appellee was making monthly payments to the appellant for the child's

maintenance. When the superintendent of the convent declined to keep the child any longer the welfare agency arranged for her to be admitted to the Working Mothers' Home, a charitable institution in Little Rock. This was the situation at the time of the trial. The appellant and her present husband were then living in a Little Rock hotel, but neither testified below.

The chancellor was right in concluding that the home of the child's father will be a better environment than the Working Mothers' Home. The appellee has also remarried, and he and his wife have a home in Little Rock. They are both active church workers, and while their house is small we think it a better place for a child than a charitable institution would be. In view of the appellee's limited means he is directed to pay $35 toward the cost of the appellant's brief, but the appellant's motion for an additional attorney's fee and costs is denied. See *Coltharp* v. *Coltharp,* 218 Ark. 215, 235 S. W. 2d 884.

Mr. Justice Robinson not participating.

Burnside, Kay and Honeycutt *v.* State.

4671 243 S. W. 2d 736

Opinion delivered November 26, 1951.

Sam Montgomery, for appellants.

Ike Murry, Attorney General and *Dowell Anders,* Assistant Attorney General, for appellee.

HOLT, J. A jury found appellants guilty of "keeping a gaming device under § 41-2003," Ark. Stats. (1947), and assessed a fine of $100 against each appellant. From the judgment is this appeal.

For reversal, appellants make but one contention, and that is that the evidence was not substantial and sufficient to support the jury's verdict and the judgment rendered. We hold that appellants are correct in this contention.

The charge here being a misdemeanor, appellants in electing to argue but the one point have waived all other assignments of errors in their motion for a new trial. *Branton* v. *State,* 214 Ark. 861, 218 S. W. 2d 690.

The essential facts appear not to be in dispute.

On the night of March 10, 1951, appellants, Kay and Honeycutt, were arrested by Little Rock Police and says the State: "At the same time and place, Lieutenant Kerr confiscated from the car of one George Foster, certain electrical equipment, to-wit: a tape recorder, a ticker or teletype machine and a radio transmitter.

"The following day, appellant, James Burnside, was arrested by Captain Albert Haynie of the Little Rock Police Department and Deputy Prosecuting Attorney, John Bailey, at the Colonial Tourist Court, and was also placed in the City Jail. At this time, the officers discovered in appellant Honeycutt's car, which was parked at the Colonial Courts, a set of pole climbers, wire and an extra set of license plates. . . . Only one of the appellants, James Burnside, chose to take the stand in his defense and he denied that the equipment was to be used for gambling purposes or that it was ever in his possession."

John Bailey testified: "Q. What statement did he make? A. I don't recall whether I was riding in the back or the front seat of the car, but I turned to Burnside and asked him if he was a radio technician and the radio technician in this job and he said yes he was. We returned to headquarters and I didn't question Burnside further. . . . A. I talked to Honeycutt. Q. What statement did he make at that time? A. We were in the back room of the detective headquarters, and I was talking to Honeycutt about his association with this particular job and this equipment and he again stated that he didn't know anything about the equipment himself or how it was used. He stated that he was the man that was to go in the bookie joint and place the bets and that Burnside was the radio technician and that Kay was the electrician in the matter. Q. Did he state to you he would receive the information? A. He said he didn't know exactly how they hooked all this up, but that he was to enter the bookie joint with the microphone receiver here (indicating) and in that way get the advance bets on the bookies."

Officer Haynie testified: "We brought Burnside to headquarters and he admitted to us that he knew how to work this equipment and that it had been in his possession. . . . A. His part was supposed to try to get to this ticker wire, the way I understand it—I am not clear on that—and get the racing results and then this recorder would play it back. When he hooked on to this wire, it automatically cut it off in the building when it was coming through from the track," and Officer Potts testified: "Q. What did Burnside state to you? . . . A. Yes, his explanation to me was that they would take this equipment and cut in on the public address system or transmission wire that was carrying racing results back to the place where their man was supposed to be stationed and that they would cut in on this information as it was broadcast from (to) the bookie joint and in some way they would delay this message a few seconds and they had a portable transmitter and they would transmit to their man in the bookie joint and tell him which horse

came in and he would place the bet and by delayed action they would send this information in." The record clearly shows that Officer Potts' testimony relates to an intended use rather than a past use.

It is conceded that the equipment here involved was not a gaming device *per se,* but the State earnestly argues that "it is not necessary that the illegal use be actually undertaken but that it is sufficient if it is shown that gambling was intended to be carried on with the equipment, . . ." that it "was intended to be used for an illegal purpose and thus falls within the statute."

In support, the prosecution relies especially on the case of *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426, and *Bell and Swan* v. *State,* 212 Ark. 337, 205 S. W. 2d 714. These cases are distinguishable on the facts. In the Albright-Muncrief case, the equipment, teletype machines, not only had been used but were being used as gambling devices at the time of the arrest. Here, there is no evidence at all that the equipment here involved had ever been used for gambling purposes. We held in the Albright-Muncrief case that the above gambling statute is "aimed at the use" to which the teletype machines were appropriated. We there said: "The use to which these machines were knowingly put by appellee, for pay, was the principal factor in the present, most modern operation of the various gambling houses to which he furnished the service."

We decline to extend our holding in the Albright-Muncrief case to make it a crime to have in possession equipment,—not *per se* a gambling device, merely intended to be used in gambling. Intent, alone, is not enough. It is the use to which the equipment, not *per se* a gambling device, is appropriated that governs. In the Bell case, slot machines, conceded to be gaming devices *per se,* were involved and it was there held that the possession or the keeping of such machines alone is made a misdemeanor and outlawed under the above statute.

In the *Cascio* v. *State* case, 213 Ark. 418, 210 S. W. 2d 897, equipment not *per se,* burglary tools, was shown

to have been used in an attempt to commit burglary. Here, as indicated, there is no showing that the equipment was ever used as a gambling device.

Finding no substantial evidence to support the jury's verdict, the judgment must be, and is reversed, and the cause dismissed.

GRIFFIN SMITH, C. J. (dissenting). I agree that the judgments should be reversed, but dissent from the order of dismissal. The majority opinion contains this quotation from the testimony of Officer Potts: "[Burnside's] explanation to me was that they would take this equipment and cut in on the public address system or transmission wire that was carrying racing results back to the place where *their* man was supposed to be stationed and that they would cut in on this information as it was broadcast[ed] from the bookie joints and in some way they would delay this message a few seconds; and they had a portable transmitter and they would transmit to their man in the bookie joint and tell him which horse came in, and he would place the bet, and by delaying action they would send this information in."

It will be observed that the word "would" was used by Mr. Potts. Whether he intended to say that the effect of Burnside's admission was that the equipment *was* being used, or *had* been used, or *would* be used for illegal purposes is not certain. The jury could have believed the former, and in that event there was substantial evidence to support the verdict. Because of the ambiguity, however, I would reverse and remand for a new trial. I therefore dissent from the order of dismissal.

WILLIAMS *v.* RACZKOWSKI.

4-9596 244 S. W. 2d 154

Opinion delivered November 26, 1951.

Rehearing denied January 7, 1952.

John F. Park, for appellant.

Barber, Henry & Thurman, for appellee.

GRIFFIN SMITH, Chief Justice. Lots 12, 13 and 14, block 6, Casinelli's Addition to North Little Rock, are each 48 x 150-ft. and face east on Willow street. For building convenience strips fifty feet wide extending north and south across the three lots were sold. By this arrangement a lot fifty feet in width facing West Sixteenth street was established, with a depth of 144-ft. south, with Willow street as the eastern boundary.

This corner lot is owned by Mrs. H. L. Williams who purchased the property in October, 1938, and immediately occupied it. In like manner building lots were established west of the corner lot. In 1944 Mrs. Rosie Raczkowski purchased fifty feet adjoining the Williams property. The two proprietors disagreed in respect of the true boundary between their holdings. A fence of long standing, but recently rebuilt, separates the two properties beginning at the rear at point zero and extending approximately two-thirds of their north-south length. The fence varies slightly west of a true line and connects with an east-west fence near Mrs. Williams' garage on land admittedly belonging to Mrs. Raczkowski. From this intersection to West Sixteenth street there are open lawns. The fence-line divergence cuts into the Raczkowski property by gradual encroachment when consideration is given to the true survey. If this line should be projected across the open space to West Sixteenth street Mrs. Williams would gain at the north termination and Mrs. Raczkowski would lose accordingly. The difference

in gain and loss at the fence intersection is eighteen inches.

Mrs. Williams claims the disputed v-shaped strip by adverse possession and has shown that she and her predecessors in title occupied the premises for more than seven years under claim of right. The only doubt in weighing the testimony goes to the question of notice as distinguished from existence of the fence itself, which was built by Mrs. Raczkowski's predecessors, but repaired by her not long before the controversy arose.

Mrs. Williams' hostile claim meets the requirements as to the line intersecting the east-west fence—that is, the line beginning at point zero fifty feet west of the southeast corner of the Williams property and extending north by west to the beginning of an unfenced area where the lawns of the two owners merge. *Caney Creek Lumber Co.* v. *Stevens,* 212 Ark. 759, 207 S. W. 2d 731. But from this fence corner north a distance mentioned in appellant's brief as 54 feet there are no landmarks or monuments unless significance attaches to an iron water meter box not far from the north or front end of the two lots. The box is flush with the ground surface.

There is testimony that Mrs. Raczkowski's two sons kept her lawn grass cut and sometimes mowed Mrs. Williams' yard, but no line of defined character looked upon by either party as a boundary has been shown. Mrs. Williams thought the box was "even with the extended fence". Underground connections from it eastward served her and those extending west accommodated the Raczkowski needs. A blueprint of drawings representing a survey by C. T. Brandt, civil engineer, was introduced, but it does not inject a controversial issue into the suit. The Chancellor accepted it as the basis of a decree awarding Mrs. Raczkowski the middle fifty feet. Mrs. Williams was restrained from interfering with any of the property west of the true dividing line as it existed when the block was platted.

The evidence preponderates in favor of Mrs. Williams' adverse claim covering the small strip extending

to the fence intersection. However, support is lacking for the elements essential to show open, hostile, and adverse conduct regarding that part of the open area from the fence intersection north to West Sixteenth street. With this modification the decree is affirmed.

Mr. Justice SAM ROBINSON disqualified and did not participate.

Mr. Justice HOLT dissents from the order of modification.

Mr. Justice WARD dissents.

WARD, J., dissenting. In my judgment the opinion of the majority, as it relates to the narrow strip of ground east of the fence, cannot be justified. The value involved is inconsequential but the principle is important. For possession to be effective it must be adverse, *i. e.* there must be something to give notice. If land is entirely enclosed by a fence that fact supplies the notice but where there is a partial fence on one side, as here, the notice must be supplied by evidence. There was none here. If the fence had been built by appellant that fact would have supplied the notice but, here, the fence was built by appellee and her predecessors in title.

The fallacy and harshness of the majority holding is demonstrated by a simple illustration. A property owner certainly has the right to build a fence anywhere he wants to on his own property. If he does so however, under the majority holding, he is liable to awaken to the shocking realization that his good friend and unsuspecting neighbor owns part of his property.

I am authorized to state Justice HOLT concurs in this dissent.

BATESVILLE TRUCK LINE, INC., *v.* MARTIN.

4-9591 243 S. W. 2d 729

Opinion delivered November 26, 1951.

Charles F. Cole and *Ed E. Ashbaugh,* for appellant.

W. D. Murphy, Jr., and *M. F. Highsmith,* for appellee.

MINOR W. MILLWEE, Justice. Appellee Clay Martin brought this suit to require appellant Gilbert F. Tugwell to specifically perform a contract to transfer to Martin fifty per cent of the corporate stock of Batesville Truck Line, Inc. The corporation and its stockholders, including Tugwell, were made parties defendant.

Trial resulted in a decree in appellees' favor which directed Tugwell and his wife to transfer the stock to Clay Martin and wife in accordance with the alleged agreement.

The evidence tends to establish the following facts. For several years Clay Martin has owned and operated a motor truck freight line between Beebe and Little Rock, Arkansas, under a permit from the Arkansas Public Service Commission. In 1947 Martin, in addition to the Beebe line, also began operating between Little Rock and Batesville, Arkansas, under some arrangement with the Local Truck Line. Gilbert F. Tugwell, whose employment at Batesville with another freight line had recently been terminated, was employed by Martin to handle the Batesville end of the new operation.

Martin's operation between Batesville and Little Rock was stopped in a proceeding instituted by a competing truck line, but the nature of such proceeding is not disclosed by the evidence. Martin then employed counsel and filed application for a certificate of convenience and necessity to operate as a common carrier of general commodities between Little Rock and Batesville. After conferring with a member of the commission, Martin's attorney concluded that it would be inadvisable to press for immediate action on the application on account of Martin's previous connection with the operations of the Local Truck Line and the application was withdrawn. Tugwell was then consulted and, upon the advice of counsel, Martin and Tugwell agreed to form a corporation and file a new application in the name of said corporation. The Batesville Truck Line, Inc., was organized with 100 shares of no par value stock issued as follows: 95 shares to Tugwell, 3 shares to his wife, and 1 share each to Tugwell's brother and Harvey Sheffield. Martin paid the initial expenses incurred in organizing the corporation and in filing the application which was denied by the commission on December 30, 1947.

On appeal to the Pulaski Circuit Court the order of the commission was reversed in a judgment directing

issuance of a permit to the corporation, which was done on July 26, 1948. The circuit court judgment was appealed and affirmed by this court on January 24, 1949, in *Ark. Motor Freight Lines, Inc.* v. *Batesville Truck Line, Inc.,* 214 Ark. 448, 216 S. W. 2d 857. In that case we upheld the circuit court's determination that the service then being rendered by another line was inadequate and that the service proposed by Batesville Truck Line, Inc., was needed.

Although there is some testimony relative to an agreement as to future ownership of the stock at the time the corporation was formed, the evidence is insufficient to establish any definite contract between the parties at that time. It is clear, however, that Martin remained in the background while Tugwell prosecuted the appeal to circuit court resulting in reversal of the order of the commission, and that both contributed to the payment of expenses in connection with the appeal.

Clay Martin and wife testified that immeditely after issuance of the permit Tugwell and Martin entered into an oral agreement under which Tugwell and his wife were to handle the Batesville end of the operation and be paid weekly at the rate of 10c per cwt. for all freight picked up and delivered, while the Martins would be paid a like sum for handling the Little Rock end of the operation. It was also agreed that any profits that remained after payment of operating expenses and the cost of obtaining the permit would be divided equally between the parties. According to the Martins, it was further agreed that they would own fifty per cent of the corporate stock which the Tugwells would hold in trust for the Martins. The attorney who represented both parties throughout the proceedings testified that shortly after issuance of the permit, Martin and Tugwell informed him that they had agreed to operate on a "50-50 basis." On the other hand, Mr. and Mrs. Tugwell denied making the agreement or that Martin had any interest in the corporation other than as an employee-truck driver. The actions and conduct of the parties subsequent to the granting of the permit strongly support the testimony of

the Martins as to the agreement and tend to refute the contentions of the Tugwells.

Upon issuance of the permit it became necessary to procure insurance and hauling equipment in order for the corporation to qualify under its permit. After contacting an insurance agency at Cabot, Arkansas, Martin and Tugwell together negotiated the purchase of insurance from a general agent at Little Rock. This agent testified that Martin and Tugwell represented themselves as co-owners of the corporation, but did not want Martin's name used because of some circumstance existing with the commission. Martin paid the insurance premiums in the amount of $452.

Tugwell and Martin then arranged for the purchase of a tractor and trailer. Martin owned a used trailer which was accepted by the seller for one-half the down payment of $1,160, and both parties signed the conditional sales contract. Although the Tugwells testified that most of the monthly installments, totaling $2,750 and representing the balance of the purchase price, were paid from their own personal funds, this testimony was refuted by company records kept by Mrs. Tugwell and the weekly reports she made to the Martins. These reports show that all monthly installments were paid from company assets and that Martin and Tugwell were paid the same amount as drayage each week for freight handled. When insufficient funds were on hand to make the monthly payments due on the truck and trailer, equal amounts were deducted and withheld from the drayage due each party to make up the deficit.

In September, 1948, Martin discharged the driver employed to drive the company truck between Little Rock and Batesville and his right to do so was never questioned. It was then agreed that Martin should operate the truck and receive the same salary formerly paid the discharged employee in addition to the 10c per cwt. drayage. When the company tractor broke down in January, 1949, it was agreed that Martin would use his own tractor to pull the company trailer for $25 per trip until the

company tractor was repaired. After it was determined that the tractor could not be repaired, it was agreed that Martin should continue to use his tractor, pay all expenses in connection therewith, and receive 30c per cwt. for all freight hauled in addition to the 10c per cwt. for freight picked up and delivered in Little Rock. This arrangement was still in effect at the time this suit was filed and the chancellor ordered it continued until a final order was made. Including the $580 trade-in allowance on the truck and trailer, the Martins paid out $1,391.74 to defray costs of obtaining the permit and starting operations which amount was in excess of that contributed by the Tugwells. There are other circumstances which show that the parties regarded and held each other out as equal owners in the business.

After this court affirmed the judgment of the circuit court granting the permit, Tugwell refused to furnish Martin with copies of the weekly reports and to comply with other terms of the agreement under which they had operated for several months. He also refused to transfer the stock and the instant suit was brought on February 18, 1949.

This court is committed to the rule that the statute of frauds does not extend to trusts of personal property and that such trusts may be created and proved by parol. This rule was applied to a trust of corporate stock in *Oliver* v. *Oliver,* 182 Ark. 1025, 34 S. W. 2d 226, where it was said that the evidence to establish the trust must be clear and convincing. We conclude that the proof on behalf of appellees is sufficient to meet the requirements of the rule in the instant case and that the trust in favor of the Martins in fifty per cent of the stock in Batesville Truck Line, Inc., was established by clear and convincing evidence.

For reversal of the decree appellants earnestly contend that Martin is precluded from maintaining this suit under the equitable maxim: "He who comes into equity must come with clean hands." It is argued that Martin and his attorney entered into a conspiracy to perpetrate

a fraud on the Public Service Commission prior to formation of the corporation and the filing of the application for a permit in the corporate name. We do not decide the point. Any fraud that might have been perpetrated on the commission was fully participated in by Tugwell. Assuming, without deciding, that Martin and Tugwell jointly perpetrated a fraud on the commission in obtaining the permit, this would not necessarily preclude the maintenance of the instant suit by Martin.

The principle involved in the "clean hands" maxim is that equity will not intervene on behalf of a plaintiff whose own conduct in connection with the same matter or transaction has been unconscientious or unjust. The rule has been applied in many cases where a complainant is seeking to take advantage of his own wrong in connection with the matter before the court. Although the principle is broad in its operation, it has its limitations and does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. Pomeroy's Equity Jurisprudence (5th Ed.) Vol. 2, § 399. In 19 Am. Jur., Equity, § 475, it is said: "The wrong which may be invoked to defeat the suit must have an 'immediate and necessary relation' to the equity which the complainant seeks to enforce against the defendant or it must 'in some measure effect the equitable relations between the parties in respect of something brought before the court for adjudication.' If the wrong is shown to be merely collateral to the complainant's cause of action, it does not constitute matter of defense."

It is also held that the maxim may not be successfully invoked if the alleged wrongful conduct of the plaintiff appears not to have injured or prejudiced the defendant. Hence the party to a suit complaining of a wrong must have been injured thereby in order to justify the application of the principle of "unclean hands" to the case of his opponent. 19 Am. Jur., Equity, § 474; Anno. 4 A. L. R. 58.

The Washington court in *Langley* v. *Devlin,* 95 Wash. 171, 163 Pac. 395, 4 A. L. R. 32, held that a complainant

who had a cause of action against a defendant is not precluded from recovering by reason of the fact that both of them were parties to a wrong which was practiced upon a third person. We followed this holding in *Sliman* v. *Moore,* 198 Ark. 734, 131 S. W. 2d 1. In that case the parties entered into a scheme to defraud Moore's creditors. There was no consideration for notes and a deed of trust to real estate executed by Moore to Sliman. After bankruptcy proceedings against Moore, the trustee in the deed of trust proceeded to advertise the lands for sale under a power of sale in the instrument. Moore filed suit in equity against Sliman and the trustee to enjoin the sale and cancel the deed of trust. Sliman challenged Moore's right to maintain the suit under the "clean hands" doctrine. In sustaining Moore's right to maintain the suit, the court said: "The maxim: 'He who comes into equity must come with clean hands' means no more than that he who has defrauded his adversary to his injury in the subject matter of the action, will not be heard to assert a right in equity. While courts will not, as a rule, measure equities between wrongdoers, they are quite as careful to deny to any man the advantage of his own wrong." The court also said: "The purpose of the maxim is to secure justice and equity, and not to aid one in an effort to acquire property to which he has no right."

We think the principles applied in *Sliman* v. *Moore, supra,* are controlling here. The evidence does not warrant a finding that Martin perpetrated a fraud on Tugwell or that Tugwell has been injured by any wrong perpetrated by their collusion, unless Tugwell's right to take property that does not belong to him could be classified as an injury. To hold that a court of equity cannot examine a contract between the parties that is neither proscribed nor contrary to good morals because of a collateral wrong by both affecting a third party, would lead to the absurd consequence that a defendant in a suit would take a decree equivalent in its legal force to affirmative relief under the plea of corrupt participation. *Langley* v. *Devlin, supra.* To apply the maxim relied on to the facts in this case would defeat its purpose. We

conclude that Martin is not barred by the maxim from maintaining this suit.

The decree is affirmed.

PAUL WARD, J., disqualified and not participating.

SMITH *v.* THE BOARD OF APPORTIONMENT.*

4-9607 243 S. W. 2d 755

Opinion delivered December 3, 1951.

* See *Pickens* v. *Board of Apportionment*, 220 Ark. ....., 243 S. W. 2nd 755.

Goodwin & Riffel, for petitioners.

Ike Murry, Attorney General, and *Cleveland Holland,* Assistant Attorney General, for respondent.

Bailey & Warren, for interveners.

GRIFFIN SMITH, Chief Justice. This is an original proceeding under Amendment No. 23 to the Constitution. See *Bailey, Lieutenant Governor,* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, 149 S. W. 2d 573; *Shaw, Autry and Shofner* v. *Adkins, Governor,* 202 Ark. 856, 153 S. W. 2d 415; *Butler* v. *Democratic State Committee,* 204 Ark. 14, 160 S. W. 2d 494. Only the House of Representatives was involved in the Shaw case.

Clyde E. Smith and Floyd H. Fulkerson, Jr., are citizens and taxpayers of Pulaski county. Their contention is that the Thirteenth senatorial district, composed of Pulaski county alone, is discriminated against in that it has but two senators. The Federal census for 1950 gives a population total of 196,685, an increase of 40,600 since 1940, or 26.01%. For the state as a whole the population is 1,909,511—a loss of 39,876 during the decennial period. Before the official figures for 1950 had been certified a citizen-taxpayer suit was brought against the Board, but this court held that the action was premature. *Carpenter* v. *Board of Apportionment,* 218 Ark. 404, 236 S. W. 2d 582.

In the controversy now before us two members of the Board—the Attorney General and the Secretary of State—felt that when all difficulties incidental to reapportionment were considered, such as territorial area of counties, convenience of electors when a grouping for district purposes is made, etc., no fairer plan than the present setup could be devised. The Governor as a mem-

ber of the Board took the position that present population extremes were too great to justify inaction, hence the equalities contemplated by the Constitution, as amended, were of a nature overriding the secondary considerations his co-members had in mind. The Governor's suggested rearrangement was not satisfactory to the majority, therefore redistricting as an accomplished fact, but without change of any kind, was certified.

This procedure had the effect of leaving the Thirteenth district under-represented from a numerical standpoint by a percentage equation of 80.26. Inequalities in other districts will be referred to.

The decisions construing Amendment No. 23 to which attention has been called mention the political reasons underlying popular action in adopting the Amendment.

The comprehensive measure affecting senatorial districts prior to 1937 was Act 129 of 1901, p. 201. Under the reorganization there effectuated the First district included Clay, Greene, and Craighead counties.[1] Section 2 of Art. 8 of the Constitution of 1874 was a mandate to the legislature to divide the state into convenient districts from time to time in such manner that the senate would be based upon the state's adult population, each senator as nearly as practical to represent an equal number of male inhabitants.[2] The districts were created, temporarily as it was then thought, until the population of counties as reflected by the Federal census of 1880 should become available as the basis of a better plan.

Amendment No. 23 imposes upon the Apportionment Board the *imperative duty* of making assignments of senators to districts as created. Section 3 fixes membership of the senate at 35. Districts shall consist of contiguous territory, but a county must not be divided. With these limitations upon the one hand and affirmative mandates upon the other, the state is to be divided into convenient districts ". . . in such manner that the

[1] Through misprision Craighead county appears in the printed Acts of 1901 as Crawford county.

[2] The first Federal census was taken in 1790.

senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof, [and] each district shall have at least one senator." It will be noted that some of the language of the Amendment is so harmonious with certain expressions in § 2 of Art. 8 of the Constitution of 1874 as to suggest that the phrasing was copied.

When the reapportionment Act of 1901 was adopted the state's population was 1,311,564. Pulaski and Perry counties were combined as the Tenth district and given two senators. The result was that there were 34 districts with 35 senators. Had it been possible to arrange the districts on an equal population basis, each would have included 37,473, minus; but, then as now, exact apportionment was impossible without dividing counties.

From 1901 until after the adoption of Amendment No. 23 in 1936,[3] nothing effective looking to equal senatorial representation was done; but, with the Amendment as a current mandate from the people, and with a population increase of 542,918 during the thirty years from 1900 to 1930,[4] the reapportionment as it existed in 1941 when the Bailey-Abington decision was handed down was the subject of legislative controversy and judicial determination—that is, the senatorial reapportionment of 1937 based on the 1930 Federal census was permitted to stand, irrespective of changes shown by the 1940 enumeration.

In the reshuffle of 1937 District No. 1 was created by combining Benton and Carroll counties in the northwestern corner of the state, as distinguished from District No. 1 established in 1901 by joining Clay, Greene and Craighead counties in the northeastern area. The 1901 and 1950 districts, with the population of each, are shown in comparative parallel columns:

[3] The Amendment was voted on at the November, 1936, election and declared adopted by the speaker of the house of representatives January 12, 1937.

[4] Difference between 1,311,564 and 1,854,482.

1901 Dist. No.	Counties	Population
1.	Greene, Clay, Craighead	52,370
2.	Randolph, Lawrence, Sharp	45,846
3.	Marion, Boone, Newton	40,311
4.	Johnson, Pope	39,163
5.	Washington alone	34,256
6.	Independence, Stone	30,657
7.	Cross, Woodruff	27,355
8.	Yell, Logan	43,313
9.	Saline, Hot Spring, Grant	33,541
10.	Pulaski, Perry	70,473
11.	Jefferson alone	40,972
12.	Lonoke, Prairie	34,419
13.	Arkansas, Monroe	29,789
14.	Lee, Phillips	45,970
15.	Ashley, Chicot	34,262
16.	Lincoln, Cleveland, Dallas	36,527
17.	Drew, Desha	30,962
18.	Bradley, Union	32,146
19.	Calhoun, Ouachita	29,431
20.	Hempstead, Nevada	40,710
21.	Columbia, Lafayette, Miller	50,229
22.	Little River, Sevier, Howard	44,146
23.	Fulton, Izard, Baxter	35,721
24.	Carroll, Madison	38,712
25.	Crawford, Franklin	38,665
26.	Searcy, Cleburne, Van Buren, Conway	52,608
27.	White, Faulkner	45,644
28.	Sebastian alone	36,935
29.	Poinsett, Jackson, Mississippi	41,792
30.	Clark, Pike	31,590
31.	Garland, Montgomery	28,217
32.	Crittenden, St. Francis	31,686
33.	Scott, Polk	31,535
34.	Benton alone	31,611

1950 Dist. No.	Counties	Population
1.	Benton, Carroll	51,320
2.	Washington, Madison	61,713
3.	Crawford, Franklin, Johnson	51,223
4.	Sebastian alone	64,202
5.	Scott, Polk, Logan	44,499
6.	Howard, Sevier, Little River	37,325
7.	Boone, Marion, Baxter, Newton, Searcy	55,661
8.	Pope, Yell	37,348
9.	Hempstead, Pike, Montgomery	41,792
10.	Miller, Lafayette	45,817
11.	Fulton, Izard, Stone, Van Buren, Cleburne	47,976
12.	Faulkner, Conway, Perry	49,404
13.	Pulaski alone	196,685
14.	Garland, Saline	70,918
15.	Hot Spring, Clark, Grant	54,203
16.	Ouachita, Dallas, Cleveland	54,423
17.	Nevada, Columbia	43,551
18.	Union alone	49,686
19.	Randolph, Sharp, Lawrence	46,284
20.	Independence, Jackson	49,400
21.	White, Woodruff	56,997
22.	Lonoke, Prairie	41,046
23.	Jefferson alone	76,075
24.	Arkansas, Monroe	43,905
25.	Desha, Lincoln	42,234
26.	Calhoun, Bradley, Drew	41,078
27.	Ashley, Chicot	47,966
28.	Clay, Greene	55,823
29.	Craighead alone	50,613
30.	Mississippi alone	82,375
31.	Poinsett, Cross	64,068
32.	Crittenden alone	47,184
33.	St. Francis, Lee	61,163
34.	Phillips alone	46,254

Although the petitioners are citizens of Pulaski county and the Thirteenth senatorial district, the objections they offer to the Board's plan of reapportionment without change is in a sense state-wide. The basis for apportionment is a district, but the senator [or senators]

from that district represents all of the people. If this were not true block voting responsive to area interests would militate against the welfare of the commonwealth as a whole.

The census for 1950 shows that equal representation could be attained only if each senator's assigned population were 1/35th of 1,909,511—that is, 54,557. Some of the districts, notably the 15th and 16th, are affected by mathematical inequalities of less than one percent. Thus, the 15th district (Hot Spring, Clark, and Grant counties) has a population of 54,203, a deviation of 354 from the standard, or .65%. The 16th district (Ouachita, Dallas, and Cleveland) is even closer, the differential being one-fourth of one percent.

The 7th district (Boone, Marion, Baxter, Newton, and Searcy) comes next and is within 2.02% of the standard. It is followed by the 28th (Greene and Clay), with a variant of 2.32%. Next is the 1st (Benton and Carroll) with 5.93%, followed by the 3d (Crawford, Franklin, and Johnson), with 6.11%; the 21st (White and Woodruff) with 4.47%; the 29th (Craighead county alone) with 7.23%; the 12th (Faulkner, Conway, and Perry) with 9.45%, and the 20th (Independence and Jackson), also with 9.45%. Some of the other districts showing over or under variants of more than 20% are: The 30th (Mississippi county alone), under-represented by 50.99%; the 23d (Jefferson county alone), under-represented 39.44%; the 14th (Garland and Saline) under-represented 29.99%; the 6th (Howard, Sevier, Little River), over-represented 31.59%; the 8th (Pope and Yell) over-represented 31.54%. Other districts over-represented more than twenty percent are: The 22d (Lonoke and Prairie), 24.76%; the 26th (Calhoun, Drew, and Bradley), 24.71%; the 9th (Hempstead, Pike, Montgomery), 23.40%; the 25th (Desha and Lincoln), 22.59%; the 24th (Arkansas and Monroe), 20.81%, and the 17th (Nevada and Columbia), 20.17%.

In the Butler case Mr. Justice Frank G. Smith recognized what is now argued by the respondents—that the Amendment does not require geographical changes

after each census; but, says the opinion, the people's mandate does compel redistricting with rearrangements ". . . if shifting population makes that action necessary [in order] to afford *just, equitable, and equal representation.*" The primary reason given by the Board's majority for not recognizing Pulaski county's claim to a third senator, if it is to remain a separate district, is that shift in population alone during the preceding decade did not warrant disarrangement of other districts.

An examination of this argument from a population standpoint gives this result: In 1940 Pulaski's population was 156,085. The census gave the state 1,949,387, hence the nearest possible basis for a thirty-fifth representation would be 55,697. It follows that at that time the two senators were assigned to a district with 44,691 more people than the mathematical equity suggested, and that each had an overburden of 22,346 if the matter should be considered from a personnel standpoint. Now this non-representation has grown to 87,571, or 43,786 per senator. But this is not all. Three times the mathematical average of 54,557 would account for a population of but 163,671. So, if a third senator is added there will still be 33,014 above the mathematical standard, or 65,561 per senator.

The contention that other considerations contemplated by Amendment No. 23 outweigh the population factor is one that can always be made, and this argument, if conclusive, might forever defeat the clear intention of those who framed the Amendment and the people who adopted it. If an under-representation of eighty percent does not supply the factor emphasized in Butler's case, then ninety percent, or even a hundred percent, could with reason as relatively applicable be urged in derogation of redistricting.

We conclude that the citizens' petition is meritorious and that the Thirteenth district must be assigned a third senator.

The final question is whether the work should be done by this court or the Board. Section 4 of the Amendment directs the Board to reapportion following each

Federal census. Section 5 authorizes mandamus to compel the Board to act. Quite clearly this court has the power (in view of the holding in the Butler case that there could be reapportionment without change) to perform the work necessary to revision; but the Board, acting both administratively and legislatively, is primarily charged with that duty. We therefore reverse and remand, with directions to the Board to make an apportionment allowing Pulaski county—or the district of which it is made a part—at least three senators. In accomplishing this end the Board has, of course, the right to make such other changes as an equitable distribution into correctly-created districts may demand.

It is further directed that reapportionment be completed on or before February 1, 1952.

Mr. Justice McFaddin and Mr. Justice Millwee dissent.

Ed. F. McFaddin, Justice (Dissenting). The majority is holding (I) that the petition for senatorial redistricting should be granted; and (II) that the cause should be remanded to the Board of Apportionment to accomplish such redistricting. I dissent from each holding and give my reasons as follows:

I. *The Petition Should Not Be Granted For At Least Two Reasons.*

(A) Petitioners filed in this court their pleading which (1) set up the 1950 census figures of the various counties in Arkansas; (2) stated that the Board of Apportionment had failed, in the face of such figures, to redistrict senatorial districts of the State so as to give Pulaski County three senators; and (3) alleged that the Board of Apportionment "arbitrarily declined and refused" to change the senatorial districts as now constituted. The Board of Apportionment in its response to the petition said:

"They deny that in making such apportionment they acted arbitrary or abused the discretion vested in them by the Constitution, but on the contrary that they acted in good faith and to the best of their ability they discharged

the duty placed upon them by the Constitution in making such apportionment."

Thus the issue was framed as to whether the Board of Apportionment had acted arbitrarily in refusing to give Pulaski County three senators because of its population increase. What is the meaning of the word "arbitrarily"? It is the adverb of the adjective "arbitrary", which adjective Webster defines as "Despotic; absolute in power; bound by no law; fixed or arrived at through an exercise of will or by caprice without consideration or adjustment with reference to principles, circumstances, or significance; decisive but unreasoned; . . ." In the light of these definitions, to say, that the action of the Board of Apportionment is arbitrary, is certainly a serious charge leveled by the petitioners against the Governor, Attorney General and the Secretary of State, who compose the Board of Apportionment. Certainly this court should require definite proof of such a charge before solemnly sustaining it.

And what is the only proof submitted? It is the 1950 census figures of the counties in Arkansas. So on the basis of population, alone, petitioners say they should win their case. Should they? Constitutional Amendment No. 23 here involved says regarding senatorial reapportionment:

"The Senate shall consist of thirty-five members. Senatorial districts shall at all times consist of contiguous territory, and no county shall be divided in the formation of such districts. 'The Board of Apportionment' hereby created shall, from time to time, divide the State into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the State, each Senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one Senator."

As I read the quoted language there are at least six factors necessarily entering into consideration when the

Board of Apportionment is considering the redistricting of senatorial districts. These six factors are:

1. There must be 35 senators.

2. Districts must be composed of contiguous territories.

3. No county may be divided among different districts.

4. The board must provide for "convenient" districts.

5. Representation should be based on equal population as far as practical.

6. Each district must have at least one senator.

Only one of these requirements—*i. e.* number 5—relates to population, yet, the majority of this court is holding that the one factor of population is sufficient to override the Board's discretion on all other factors. The majority is making "arbitrary" any results reached by the Board of Apportionment which failed to use *population* as the main criterion in senatorial redistricting. I submit that the majority opinion is in error because it fails to give consideration to any factor except population. That is the only point on which the petitioners presented their case. They are in effect saying that Pulaski County is entitled to three senators regardless of the havoc that may be wrought in the other seventy-four counties in Arkansas.

(B) Another reason the petition should not be granted is because the petitioners have failed to meet the burden of offering a proposed plan of redistricting better than the existing plan. The Board of Apportionment in its resolution of May 16, 1951, offering the present plan of redistricting said:

"The Board in submitting this Reapportionment Report, after giving the matter careful consideration, was of the opinion that the above was the most satisfactory solution and that it complies with the provisions of Amendment No. 23 to the Constitution of the State of Arkansas."

The record before us discloses that one member of the Board—the Secretary of State—made the following explanation, which was concurred in by the Attorney General:

". . . that the matter of making an apportionment of the State for Senatorial Districts presents many more problems, and that it was a mathematical impossibility to make a completely equitable apportionment, that is to say, an apportionment in which each Senator would represent the same number of individuals, giving as an illustration that no two or more contiguous counties have a total population, based on the 1950 Federal Census, that equals the average district population of 54,557; (c) that he knew it to be a fact that certain changes could be made in existing districts to reduce the variations from the average, but that after giving due consideration to the problem, he did not believe there had been a large enough shift in population during the 1940-50 decade to warrant making any changes at this time in existing Senatorial District boundaries."

The Governor offered a proposed plan of redistricting which was not accepted by the Board of Apportionment. In the record before us (and we try this case on the record and the evidence before us and not on extraneous matters), the only plan offered was the one offered by the Governor. The Board considered such plan and then made its report. No one has offered into the evidence in this case any other plan. I maintain that the petitioners should have offered to this court a plan which they would have been willing to defend or else should have defended the plan that the Governor offered, which is the only plan before us except the present apportionment.

But do the petitioners do this? No. They content themselves with the bald proposition that if Pulaski County gets three senators then the petitioners are satisfied regardless of the confusion and inequality that will result to the other seventy-four counties. Until a plan is offered by the petitioners and demonstrated to be better for the entire state than the existing apportionment then I submit that the petitioners have not made out a case; and

I further submit that the court has acted in error in granting the petition with no definite plan offered.

II. *The Cause Should NOT Be REMANDED To the Board of Apportionment.* If, in spite of all that has been said, the majority continues to hold that there should be a reapportionment of the senatorial districts so as to give Pulaski County three senators, then I submit that this court should here and now make the apportionment and certify such results to the Secretary of State. Here is the language of Art. V of Amendment 23 to the Constitution:

"Original jurisdiction (to be exercised on application of any citizens and taxpayer) is hereby vested in the Supreme Court of the State (a) to compel (by mandamus or otherwise) The Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by The Board in making any such apportionment; provided any such application for revision shall be filed with said Court within thirty days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board."

The Board of Apportionment acted on May 16, 1951, as disclosed by its report in the record before us, and the Board certified to the Secretary of State the apportionment that it made. The petitioners have convinced a majority of this court that the Board acted arbitrarily. I maintain that our only duty in such a situation is for a "revision"; and the amendment says that such "revision" shall be certified by the court to the Secretary of State.

I see no authority in the amendment for the court to require the Board of Apportionment to undertake a further reapportionment. The Board has acted. The majority has found that the Board has acted arbitrarily. It is now up to the court to make a revision. Suppose the Board of Apportionment reports to this court that it can

do no better than it has done. What will the court do then? I wait to see.

Finally, viewed from any angle this is a most important case. By its action today the Supreme Court is in effect requiring that in 1952 there must be an election in every one of the State's senatorial districts, whereas, except for this opinion only one-half of the senatorial districts would have elections.

Respectfully but most vigorously I dissent from the majority.

DAVIS *v.* DAVIS.

4-9610 243 S. W. 2d 739

Opinion delivered December 3, 1951.

Bedwell & Bedwell, for appellant.

J. M. Smallwood and *George O. Patterson,* for appellee.

George Rose Smith, J. This is a suit by the widow and the adopted son of Homer Davis, Sr., to establish their interest in certain land in Johnson County. The chancellor dismissed the complaint for want of equity.

All the facts are stipulated. Both the appellants and the appellees trace their claims of title back to R. S. Davis, who was the father of Homer Davis, Sr. In 1922 R. S. Davis divided this and other land among his seven children by conveying it to them for their lives and then to their bodily heirs. The effect of this deed is to convey a separate tract to each child, and the land now in controversy is that so conveyed to Homer Davis, Sr., for life and then to the heirs of his body. R. S. Davis died intestate in 1934. His son, Homer Davis, Sr., had no children of his own, but in 1942 he adopted Homer Davis, Jr., the principal appellant. After Homer, Sr., died intestate in 1947, his widow and adopted son brought this suit. The defendants are the living brothers and sisters of Homer Davis, Sr., and the bodily heirs of those who are dead.

Homer, Jr., first contends that our present adoption statute, Ark. Stats. 1947, Title 56, and the statutes which preceded it, had the effect of making an adopted child a bodily heir of his adoptive parents. We are unable to accept this view. It is true that § 56-109 provides in substance that an adopted child shall have the same rights of inheritance as a natural child. But on this phase of the case the question is not one of inheritance. Instead, it is whether Homer, Jr., by reason of his adoption, became a grantee in the deed to Homer, Sr., and the heirs of his body. In other words, when R. S. Davis chose the phrase "heirs of the body," did he intend to include adopted children? We think it plain that he did not. Terms such as bodily heirs, issue, etc., have long been defined in the law, and the definition does not include adopted children. Rest., Property, § 265. A foster child, being a stranger to the blood, is the antithesis of an heir of the body. Regardless of the effect of the adoption laws upon the right of an adopted child to inherit from his foster parents, these laws were not intended to modify

the established meaning of terms used in deeds executed by third persons.

In the alternative Homer, Jr., contends that he inherited an undivided one-seventh interest in the property upon the death of Homer, Sr. In this contention he is correct. A reversionary interest remained in R. S. Davis when he conveyed this land to Homer Davis, Sr., for life and then to his bodily heirs. *Dempsey* v. *Davis,* 98 Ark. 570, 136 S. W. 975; Rest., Property, § 154; Simes, Future Interests, § 44. It is appropriate to point out that in *LeSieur* v. *Spikes,* 117 Ark. 366, 175 S. W. 413, we inadvertently remarked that such an interest is a possibility of reverter (instead of a reversion) and that it is not disposable.

Such a reversionary interest may pass by inheritance. Simes, *supra,* § 723; Core, "Transmissibility of Certain Contingent Future Interests," 5 Ark. L. Rev. 111, 121. Hence upon the death of R. S. Davis the reversion descended to his seven children, and in like manner upon the death of Homer, Sr., his one-seventh interest passed to Homer, Jr., who inherited from his adoptive father by reason of the adoption statute. Since the reversion became a fee simple estate upon the death of Homer, Sr., without bodily heirs the chancellor erred in failing to grant the alternative relief prayed by Homer, Jr.

The other appellant, the widow of Homer, Sr., seeks dower in this one-seventh interest in the land. This claim must be denied for the reason that the reversion was not a possessory estate during the life of Homer, Sr. Even the holder of a vested reversion or remainder is not seized of an estate in possession, and consequently his widow is not entitled to dower if his death occurs before the termination of the preceding life estate. *McGuire* v. *Cook,* 98 Ark. 118, 135 S. W. 840; *Field* v. *Tyner,* 163 Ark. 373, 261 S. W. 35. Here the reversionary interest of Homer Davis, Sr., could not have become a possessory estate until his own death without heirs of his body; so it was impossible for him to acquire seizin during his lifetime.

Reversed and remanded for the entry of a decree in accordance with this opinion.

HOLT, J., dissenting. I cannot agree with the majority view in this case.

Our present adoption statutes [Ark. Stats. 1947, §§ 56-101 - 56-109, *et seq.*] and those preceding, have clearly, in my opinion, made an adopted child the same as the bodily heir of adopting parents. In the present case, the adoption law in effect at the time R. S. Davis (father of Homer G. Davis, Sr., the adopting parent of Homer G. Davis, Jr.) executed the deed here, provided: "The Court shall make an order that such child be adopted, and from and after the adoption of such child it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopted father or mother by descent or otherwise, that such child would do if the natural heir of such adopted father or mother," (then C. & M. Digest, § 254).

The adoption law in effect at the time Homer G. Davis, Sr. adopted Homer, Jr. was § 262, Pope's Digest, par. 3, (Act 137 of 1935) and provided: "The child shall be invested with every legal right, privilege, obligation, and relation in respect to education, maintenance, and the right of inheritance to real estate or the distribution of personal estate on the death of the adopting parents as if *born to them in legal wedlock.*"

The adoption law in effect now, and when Homer G. Davis, Sr. died, appears as § 56-109, *supra,* and provides: "The person adopted shall have every legal right, privilege, and obligation and relation in respect to education, maintenance, and the rights of inheritance to real estate or the distribution of personal estate on the death of the adopting parents as if *born to them in legal wedlock.*"

It seems obvious to me that the clear intent of the lawmakers by the above legislation was to eliminate completely any possible distinction between legally adopted, and natural children. The last two statutes, above, use the identical words in making an adopted child the same as a natural child, "born to them in legal wedlock." How

could legislative intent be made plainer. There was no provision in the deed here specifically denying the adopted Homer, Jr. the right to inherit from his adopted father as a natural child.

Our decisions following the above legislation, I think, clearly sustained my views. In *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359, we held: (Headnote 4) "A child adopted in 1911 which was three years after the adopting parents had made a will stands in the position of a natular child born subsequent to the execution of a will and, under the statutes, inherits accordingly. Crawford & Moses' Dig., §§ 254, 10506 and 10507." (Ark. Stats. 1947, § 60-119 and § 60-120), and in *Sanders* v. *Taylor,* 193 Ark. 1095, 104 S. W. 2d 797, we said: "We think that the effect of our late decisions, previous to the passage of Act No. 137, *supra,* places the legal status of adopted children exactly as those born in wedlock. Both classes are to be deemed children within the spirit and meaning of our law, but on this question there can now be no doubt. Act No. 137, *supra,* provides (by § 8) that the child adopted * * * 'shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the right of inheritance to real estate, or the distribution of personal estate on the death of the adopting parents as if born to them in legal wedlock.' In the recent case of *Grimes* v. *Jones,* 193 Ark. 858, 103 S. W. 2d 359, we had occasion to construe the statute relating to the execution of wills with reference to the rights of an adopted child. The statute provided that where a child is born to the testator after the making of a will and shall die leaving such child unprovided for in any settlement or in the will and unmentioned therein, the child shall succeed to that portion of the testator's estate to which it would have been entitled under the law regardless of the will. We there said, in substance, that where a testator, subsequent to the execution of a will adopts a child which is not provided for by settlement or mentioned in the will, such child is entitled to inherit as a natural child. Under the plain provisions of Act No. 137, *supra,* and the authority of *Grimes* v. *Jones, supra,* the trial court correctly declared

the law to be that adopted children are in the same class as natural children."

So we have positively proclaimed in language that needs no judicial construction that the legal status of adopted children shall be "exactly" the same as those born in wedlock. Why, now, in effect, attempt to place an entirely different meaning on what we have said.

I would reverse and hold that Homer, Jr. here is in the identical position as a natural child or bodily heir and should take under the deed here involved accordingly.

HUNT'S DRY GOODS COMPANY, INC., *v.* RIDENOUR.

4-9611 243 S. W. 2d 742

Opinion delivered December 3, 1951.

Daily & Woods, for appellant.

Gutensohn & Ragon and *Lyman Mikel,* for appellee.

ROBINSON, J. The question involved here is whether there was an abuse of discretion by the trial court in

overruling a motion for a new trial which alleged newly discovered evidence. The appellee, Mrs. Ridenour, recovered a judgment against the appellant, Hunt's Dry Goods Company, Inc., in a case wherein Mrs. Ridenour claimed she was injured by falling down some steps in appellant's store. It was alleged that she fell as a result of appellant's negligence in maintaining a pipe at the steps, causing Mrs. Ridenour to trip and fall.

No alleged error occurring during the trial is urged as a ground for reversal. But, subsequent to the judgment herein, appellee's husband filed suit for loss of services on the part of his wife, and, during the investigation of the husband's claim, those interested in defense of the case interviewed Mrs. Hazel McClain, who had testified in appellee's behalf at the trial in Circuit Court. Mrs. Ridenour had stayed at Mrs. McClain's home for some days after the alleged injury occurred. Mrs. McClain testified as to Mrs. Ridenour having suffered pain and did not testify on any other point.

In the interview with Mrs. McClain, during investigation of the husband's claim, she detailed an alleged conversation had with Mrs. Ridenour a short time following the alleged injury, and, according to Mrs. McClain, Mrs. Ridenour had given a different version of how the injury occurred to that given in her testimony at the trial. Mrs. McClain quoted Mrs. Ridenour as having said she fell at the bottom step in a manner that would not constitute negligence on the part of the defendant. Mrs. McClain gave an affidavit as to what she claimed Mrs. Ridenour had said about how the accident happened, and this affidavit was made the basis of a motion for a new trial on the ground of newly discovered evidence. After a hearing on the motion and after listening to argument of counsel, the trial court overruled the motion. Such action of the trial court is urged here as error calling for the granting of a new trial.

To a large extent appellant relies on the case of *Arkansas Power & Light Company* v. *Mason,* 191 Ark. 804, 87 S. W. 2d 988. However, there is quite a distinction between that case and the case at bar. The motion for

a new trial on the ground of newly discovered evidence in the Mason case went off on a demurrer, the court having sustained a demurrer to the motion. On appeal this court held that the allegations in the motion were sufficient to call for a hearing on its merits, and sent the case back for that purpose. Hence, the only point decided in the Mason case by this court was that the allegations in the motion for a new trial were sufficient to call for a hearing of the motion on its merits; that the allegations in the motion were good as against a demurrer.

The situation is different in the case at bar. Here no demurrer was filed and the motion was heard on its merits. The court had an opportunity to observe Mrs. McClain at the trial of the case in chief. Furthermore, the court was aware of the opportunity the appellant had to interview Mrs. McClain at the time of the trial. Also, the trial court considered the probable effect of the newly discovered evidence would have in another trial.

In the case of *Camden Fire Ins. Ass'n* v. *Reynolds*, 190 Ark. 390, 79 S. W. 2d 54, Mr. Justice BUTLER, speaking for the court, said: "The trial court heard testimony on this motion, and found that this evidence was discovered after the trial which could not have been discovered by the defendants prior thereto; that due diligence had been used in trying to discover this evidence; that it was relevant and material, and not cumulative to the evidence adduced, but not of such character and cogency as might probably change the result if a new trial were granted. This motion was addressed to the sound discretion of the trial judge, and it is only where the discretion is abused that we will review his actions."

In 39 Am. Jur. 172, § 165, the rule is stated as follows: "To constitute sufficient ground for a new trial, newly discovered evidence must not only be relevant and material to the principal issues in the case, but must be sufficiently strong to make it probable that a different result would be obtained in another trial. The new evidence must be of a decisive and conclusive character, or at least such as to render a different result reasonably certain. Newly discovered evidence, in order to justify

the granting of a new trial, must be such as might reasonably be expected to change the result, and an applicant for a new trial upon this ground must show that the evidence upon which he relies is of such a character as to give a reasonable assurance that it will work a different result upon a retrial. A dispute as to whether the new evidence has this probative effect is to be determined primarily by the trial court in its discretion. Nor will a reversal be ordered unless an abuse of discretion is disclosed."

The motion was addressed to the sound discretion of the trial court and this court will not reverse unless there has been an abuse of that discretion. We cannot say that there was an abuse of discretion by the court in overruling the motion.

Affirmed.

MASON *v.* HATCHETT.

4-9606 243 S. W. 2d 733

Opinion delivered December 3, 1951.

[redacted]

W. E. Phipps, for appellant.

Byron Bogard and *Bobbie Jean Gladden,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellees, Frank Hatchett and wife, Rosie Hatchett, to set aside a foreclosure decree rendered against them at a prior term of court in favor of appellant, John Mason. John Mason's wife, Rescie, was also made a party defendant. The case was tried on appellee's amended complaint which was based on the seventh subdivision of Ark. Stats., § 29-506, and alleged an unavoidable casualty preventing Frank Hatchett from appearing and defending the foreclosure suit due to lack of proper service of summons or other notice.

Appellees owned a home as an estate by the entirety and described as Lots 13 and 14, Block 11, Military Heights Addition to North Little Rock, Arkansas. On January 15, 1949, appellees executed a note for $300 to John Mason payable in monthly installments and secured by a mortgage on their home. Default was made in the monthly payments and Mason instituted the original foreclosure suit on July 6, 1949. At the time of the execution of the note and mortgage and the filing of the foreclosure suit, Frank Hatchett was in Detroit, Michigan, where he had been working for several years while his wife Rosie resided on the property in controversy.

In the original foreclosure suit personal service was had on Rosie Hatchett in Pulaski County while out-of-state service was attempted to be had on Frank Hatchett under the provisions of Ark. Stats., § 27-339. On Sep-

tember 1, 1949, a default decree was rendered against appellees for $420 which included the $300 note, $100 additional which Mason claimed that appellees borrowed subsequent to execution of the mortgage and $20 interest. Mason purchased the property at the foreclosure sale held October 18, 1949, for the amount of the judgment and received a commissioner's deed to the property.

After his purchase at the foreclosure sale, Mason discovered that Manie Schuman had obtained a clerk's deed to Lot 13 in December, 1948, under his purchase at the 1946 delinquent tax sale. On May 2, 1950, Mason paid Schuman $75 for a quitclaim deed to the lot. When Mason served notice on Rosie Hatchett to vacate the property in July, 1950, appellees instituted the instant suit to set aside the foreclosure decree entered September 1, 1949, and to cancel the commissioner's deed to Mason.

The chancellor found that appellee Frank Hatchett was not properly served with summons in the original foreclosure suit and that appellees had a meritorious defense to the suit in that the default decree was excessive by $100. The original foreclosure decree of September 1, 1949, was ordered vacated and the commissioner's deed to Mason cancelled. The court further found that appellants were entitled to judgment for the mortgage indebtedness of $300 with interest and other sums expended by appellants in connection with the property including the payment of $75 to Manie Schuman, which the court treated as a redemption from the tax sale for the benefit of appellees. A lien in the amount of the judgment was declared against the lands and a sale ordered if the judgment was not paid in thirty days.

For reversal appellants first contend that the complaint in the instant suit was not properly verified as required by Ark. Stats., § 29-508. The original complaint was not verified, but the amended complaint, upon which the case was tried, was verified by appellee Rosie Hatchett. When the suit was instituted Frank Hatchett still resided in Michigan. It is insisted that this verification

is defective under Ark. Stats., § 27-1106, which provides that where there are several plaintiffs, the verification may be made by any of them, if he has personal knowledge of the facts set forth in the complaint. The affidavit of Rosie Hatchett is in the general form prescribed for verification of pleadings in § 27-1105. The record reflects no objection by appellants to the form of the affidavit. It is true that we have held the requirement that the complaint be verified to be jurisdictional and one that must be complied with. *Merriott* v. *Kilgore,* 200 Ark. 394, 139 S. W. 2d 387. There was a substantial compliance with this requirement here. The statute (§ 27-1106) does not specify that the verification contain the statement that affiant has personal knowledge of the facts set forth, but merely says that a plaintiff having such knowledge may make the verification. If appellants considered the form of the verification defective or that Rosie Hatchett was not qualified to make it, they should have made proper objections in the trial court. Their objection for the first time in this court comes too late. *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. 2d 1088.

It is next argued that the court erred in holding that Frank Hatchett was not properly served with summons in the original foreclosure suit. At the time of the institution of the suit Hatchett had been living in Detroit, Michigan, about five years. A summons and a copy of the complaint were sent to the sheriff of Wayne County, Michigan, for service on Hatchett under § 27-339, *supra.* The deputy sheriff to whom the papers were assigned testified that Frank Hatchett was not personally known to him and that he served the summons on someone at the address furnished who represented himself as being Frank Hatchett. A photostatic copy of the original summons and the return of the deputy sheriff thereon is attached to his deposition. The affidavit of service with the words in italics crossed out is as follows: "I, Bert Williams, do solemnly swear *that I personally know the defendant and* that I have served a copy of the within summons and certified copy of complaint, issued out of the Pulaski Chancery Court of Pulaski County, Arkan-

sas, upon the said Frank Hatchett on the 13th day of July, 1949, by delivering a copy thereof to him in the City of Detroit." Section 27-339, *supra,* provides in part: "Proof of the delivery shall be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated."

In *Swartz* v. *Drinker,* 192 Ark. 193, 90 S. W. 2d 483, we held that a strict compliance with this requirement of the statute is essential and that in the absence thereof no action is pending against the party attempted to be served. While the deputy sheriff testified that he did not remember whether the words in italics were crossed out at the time of service, he later stated that the photostatic copy correctly reflected the return as made by him. In this connection Hatchett denied that he was ever served with summons or that he had any knowledge of the foreclosure suit prior to July, 1950, when his wife was notified to vacate the property. The chancellor correctly held there was lack of proper service on Frank Hatchett.

It is next argued that the court erred in finding that appellees had a meritorious defense to the original foreclosure suit. John Mason testified that he let appellees have an additional $100 after execution of the note and mortgage for $300 in September, 1949. The testimony is in sharp dispute as to the additional $100 loan, but we think the preponderance of the evidence sustains the chancellor's finding that such loan was never in fact made. Moreover, Mason admitted that the loan was not included in the mortgage. It follows that the original foreclosure decree was excessive by $100. We have held that where a defendant did not owe all the debt for which the mortgage was foreclosed, a meritorious defense exists for the purpose of setting it aside. *Hirsch* v. *Perkins,* 211 Ark. 388, 200 S. W. 2d 796; *Jermany* v. *Hartsell,* 214 Ark. 407, 216 S. W. 2d 381.

It is finally insisted that the chancellor erred in holding the purchase of Lot 13 by Mason from Schuman to

amount to a redemption for the benefit of appellees. It is argued that the period of redemption had expired at the time of Schuman's purchase and that appellees thereby lost all title and interest in the lands. Appellants also argue that there is no right of redemption in the instant case since the tax title purchase by Mason was subsequent to the foreclosure decree. We have consistently held that the purchase by a mortgagee of the mortgagor's right of redemption at a tax sale does not extinguish the mortgagor's right of redemption, but that such purchase should be treated and considered as a redemption from the tax sale for the benefit of all interested parties. *Cole* v. *Swift,* 190 Ark. 499, 79 S. W. 2d 426; *Rouse* v. *Tetter,* 214 Ark. 488, 216 S. W. 2d 869; Hughes, Arkansas Mortgages, § 308. We have also held that the purchaser at an invalid foreclosure sale is incapacitated to acquire a tax title to the mortgaged property. *Wade* v. *Goza,* 99 Ark. 543, 139 S. W. 639. Appellants would be correct in their contentions if the foreclosure decree and sale under it had been valid. It is clear that in making the tax title purchase of Lot 13 from Schuman, Mason was endeavoring to protect his security under the mortgage and the title which he thought he acquired under the invalid foreclosure decree. Since the foreclosure sale to Mason was invalid, his position was still that of mortgagee at the time of his purchase of the unconfirmed tax title from Schuman and the trial court correctly treated the transaction as a redemption for appellees' benefit with the right to reimbursement in favor of appellants.

The decree is affirmed.

TIMMONS *v.* BRANNAN.

4-9619 244 S. W. 2d 136

Opinion delivered December 3, 1951.

Rehearing denied January 7, 1952.

John G. Moore, for appellant.

Phillip H. Loh, for appellee.

PAUL WARD, J. The parties hereto, being adjacent landowners in and/or near the town of Lewisburg, found themselves involved in a dispute over the common boundary line soon after appellant, plaintiff below, bought his land in 1947. It is not surprising that there was some uncertainty as to the true boundary when the two descriptions are examined. Although appellants land is small in area it is set forth in four separate calls by long and involved metes and bounds descriptions. Parts of the descriptions refer to blocks, parts to section 20, township 6 north, range 16 west, and parts to other peoples lands which are not described. The same thing is true of the description of the lands belonging to appellee. An old fence stood on or near the boundary line, but, as will appear later, it was not considered by the parties themselves as the true or accepted line.

From the evidence it appears that about two years before appellant bought his property, lying to the east, appellee tore down the old fence and replaced it with a new one, and the first intimation of a dispute arose in 1948 when appellant tore down the new fence and erected another one a short distance to the west. After appellee called appellant's attention to the fact that the last fence was on his [appellee's] land, appellant moved the fence back. Later appellant built another fence on land claimed by appellee. In an effort to settle the matter peaceably the parties entered into a contract on May 8, 1950, establishing a definite boundary line, but twelve days later appellant rescinded this agreement on the ground of lack of consideration. Thereupon the parties again entered into a written contract dated May 20, 1950, definitely fixing a mutual boundary line, which contract reads as follows:

"For and in consideration and premises set out, it is hereby agreed by and between E. H. Timmons, San

Francisco, California, hereinafter called party of the first part, and George Brannan, Morrilton, Arkansas, hereinafter called party of the second part, WITNESSED:

"That the party of the first part and the party of the second part have been in disagreement as to the true boundary line that exists between their adjacent property and for the purpose of determining once and for all the true boundary line, they are entering into this agreement:

"It is hereby mutually agreed that the iron stake as now located at the southwest corner of the property of the party of the first part is hereby established as the true boundary line between the southwest corner of the property of the party of the first part and the southeast corner of the property of the party of the second part.

"It is hereby agreed that the party of the first part shall remove, at his own expense, the fence now located on said line between the parties hereto and said party of the first part agrees to immediately reconstruct and set back, at his own expense, the fence and place the same on the true boundary line herein agreed to by said parties.

"It is hereby agreed that said line shall run directly or due north of the iron stake hereinabove mentioned to the northwest corner of the property of the party of the first part to the now placed post in said northwest corner of the property of the party of the first part.

"The party of the first part agrees and by these presents does pay to the party of the second part the sum of Sixty-seven Dollars ($67.00), and the party of the second part agrees and by these presents does accept the amount of Sixty-seven Dollars ($67.00), in settlement of the dispute as to the boundary line between adjacent properties.

"It is hereby agreed by and between the parties that the above described fence shall be and is a partnership fence and the maintenance and repair of the same is to be shared jointly.

"It is hereby agreed that this contract revokes any or all agreements existing heretofore.

"This contract signed this day in duplicate.

"WITNESS our hands this 20th day of May, 1950.

s/ E. H. Timmons
E. H. Timmons
s/ George Brannan
George Brannan

"Filed this 11 day of August, 1950.
R. W. Morgan, Jr."

On June 30, 1950, appellant filed suit in chancery court alleging ownership of the property mentioned above, that appellee was interfering with his possession by erecting markers, posts, and other obstructions upon his land, and praying that appellee be enjoined from so doing. Appellee, after denying the above allegations, claimed ownership of his own lands, described in detail, and pleaded the contract set out above. Appellant replied that he was induced to sign said contract through fraud and misrepresentation. After an adverse holding by the chancellor appellant was allowed to introduce further testimony on a new allegation of mutual mistake. Once more the holding was against appellant and he prosecutes this appeal.

The testimony is voluminous and difficult to correlate and it would serve no useful purpose to attempt to set it out in detail. It is sufficient to refer to a few portions and to state that we find nothing to justify disturbing the finding of the chancellor against fraud or mutual mistake. In a letter written by appellant [to appellee] some days after the contract in question was signed he stated that he was rescinding because of lack of consideration but nothing was said about the reasons relied on here. Appellant contends that appellee agreed to quitclaim to him another parcel of land and failed to do so, and it is true that the chancellor ordered appellee to make said conveyance or repay the $67.00, and that appellee paid the money. This is of no avail to appellant

here for two reasons. In the first place there is no clear testimony sustaining such contention and in the second place, even if there were, there is nothing to show it was made a conditional part of the boundary line agreement entered into on May 20, 1950. Since the execution of the contract is admitted by appellant and we find no evidence of fraud or mutual mistake sufficient to warrant a rescission, the contract is effective to establish the boundary line.

No error appearing the decree of the lower court is affirmed.

CALL, COMMISSIONER OF LABOR *v.* LUTEN.

4-9605 244 S. W. 2d 130

Opinion delivered December 3, 1951.

Rehearing denied January 7, 1952.

Luke Arnett, for appellant.

Linwood L. Brickhouse, for appellee.

ED. F. MCFADDIN, Justice. This is a controversy between the appellants (Commissioner of Labor and the Administrator of the Employment Security Division) and the appellee (a taxpayer) as to the proper interpretation of, and procedure under, the Arkansas Employment Security Act, which, with its various amendments,[1] is now § 81-1101 *et seq.* Ark. Stats. (1947). Specifically, the question is whether the appellants acted erroneously in charging against the appellee's Contribution Experience Account the sum of $288 paid by the appellants to a former employee of appellee.

Dr. Luten, a Little Rock dentist, employed Miss Kight as an assistant from January, 1948, to March, 1949, and regularly paid the employment compensation tax due on her salary. In March, 1949, Miss Kight voluntarily left the employment of Dr. Luten, although he urged her to continue to work for him. After remaining in Little Rock a short time, she returned to her home in Malvern and lived with her parents. In May, 1949, she applied to the appellants' Malvern office for unemployment compensation. The agent in charge of the office wrote Dr. Luten, who, replying under date of May 13, 1949, said of Miss Kight:

[1] The most recent amendment is Act No. 155 of 1949 which became effective July 1, 1949. Some of our cases involving various questions arising under the said Employment Security Act are: *McCain* v. *Hammock,* 204 Ark. 163, 161 S. W. 2d 192; *Lion Oil Co.* v. *McCain,* 204 Ark. 995, 166 S. W. 2d 249; *McCain* v. *Crossett Lbr. Co.,* 206 Ark. 51, 174 S. W. 2d 114; *Hickenbottom* v. *McCain,* 207 Ark. 485, 181 S. W. 2d 226.

"She visited our office two weeks ago and stated she did not intend to go back to work because her parents still did not want her to work as they were well fixed and it was not necessary for her to work. If she would work we have her old job waiting for her and would gladly give her employment. A copy of this letter goes to the Little Rock office of the Employment Security Division."

Because of § 81-1106, Ark. Stats., the appellants' Malvern office denied Miss Kight any compensation for a five weeks period.[2] Then in July, 1949, and without any further notice of any kind to Dr. Luten, the appellants' Malvern office began paying Miss Kight unemployment benefits, because no suitable work was available for her in Malvern and because she did not desire to return to Little Rock to work for Dr. Luten or anyone else. The amount so paid Miss Kight totaled $288 and was charged against Dr. Luten's Contribution Experience Account, with the result that Dr. Luten's tax rate (fixed by § 81-1108(c), Ark. Stats.) was increased and he was required to make greater percentage payments to maintain a cushion fund for the benefit of his other employees.

Thereupon Dr. Luten filed this suit[3] in the Pulaski Chancery Court, praying that the appellants (Commissioner of Labor and Administrator of the Employment Security Division) be enjoined from charging the sum of $288 against Dr. Luten's Contribution Experience Account, and be enjoined from increasing the percentage schedule of his tax payments because of such $288 item. The appellants, offering no objection to the jurisdiction, filed a response denying that the $288 had been illegally paid to Miss Kight,[4] and claiming that the said item was legally chargeable against Dr. Luten's Contribution Experience Account. A trial in the Chancery Court resulted in a decree granting Dr. Luten the prayed relief and the appellants challenge the correctness of that decree.

[2] In May, 1949, Act 155 of 1949 had not become effective.

[3] The filing date was August 3, 1950.

[4] Sometime before the case was heard in the Chancery Court, Miss Kight married and was Mrs. Carolan when she testified.

I. *The Right of the Taxpayer to Be Heard.* Although other questions are presented, the determinative one is the failure of the appellants, under the facts in this case, to notify the taxpayer before making any determination that caused any part of the $288 to be charged against his Contribution Experience Account. Section 81-1106(a), Ark. Stats., says that if the Commissioner finds that the individual "has left work voluntarily without good cause"[5] such person is disqualified from receiving benefits for approximately five weeks. When Miss Kight applied for benefits in May, 1949, the appellants' Malvern office notified Dr. Luten, as provided by § 81-1107(c)(4), Ark. Stats. Dr. Luten replied as previously quoted, and thereupon the claim of Miss Kight was denied. But in July, 1949, the appellants' Malvern office determined to pay benefits to Miss Kight without giving Dr. Luten any notice: with the result that all of the $288 was paid to Miss Kight before Dr. Luten knew anything about it.

We hold that Dr. Luten was entitled to notice under § 81-1107(c)(4), Ark. Stats., before the determination in July, just as he was entitled to notice prior to determination in May, 1949. Section 81-1107(c)(3) provides: "Notice of any such redetermination shall be promptly given to the parties entitled to notice of the original determination . . ." Section 7 of Act 155 of 1949 provides: "Notice of a redetermination . . . or the reversal of a disqualification for benefits shall be promptly given to . . . such last employing unit . . . who responded to the request for information concerning a claimant's status . . ." Under either of these provisions Dr. Luten was certainly entitled to notice before the July redetermination was made. The appellants' Malvern office acted beyond statutory powers in making a determination adverse to Dr. Luten's Contribution Experience Account without giving him prior notice of such determination. He could not pursue any administrative remedies because he was not informed of

[5] The 1949 amendment uses these words: "If he voluntarily and without good cause left his last employment." Also, in some instances the waiting period is increased to ten weeks.

the determination until long after the appellants had acted, and until long after all rights of administrative appeal had expired.

II. *Power of the Appellants.* In support of their argument that they had power to charge the $288 against Dr. Luten's Contribution Experience Account, appellants cite two provisions of § 81-1108(c)(1), Ark. Stats. The first provision reads: "Benefits paid to any *eligible individual* shall be charged . . . against the account . . . of the employer . . ." (Italics our own.) The other provision—found in subdivision (c)(3) of the same section—reads: "The Commissioner shall . . . classify employers in accordance with their actual experience . . . with respect to *benefits charged* against their accounts . . ." (Italics our own.)

As regards the first provision we hold Miss Kight was not an "eligible individual" to receive benefits when the appellants' Malvern office paid her; and the appellants had no right to determine she was an "eligible individual" until notice had been given to Dr. Luten. As regards the other quoted provision, we hold that the appellants have the right to classify employers with respect to benefits *correctly and legally* charged, but not with respect to benefits *erroneously* charged; and we hold that the $288 was erroneously charged against Dr. Luten's account.

III. *Wording of the Decree.* Finally, appellants complain that the decree, as worded by the Chancery Court, is too broad. This is a technical point, and undoubtedly the Chancery Court would have revised the language if the contention had been presented. The effect of the Chancery decree was to hold that the appellants had acted erroneously in charging the $288 against Dr. Luten's Contribution Experience Account and to direct that the rate that Dr. Luten was to pay should be calculated as though no $288 payment had ever been made. In other words, Dr. Luten was not to be adversely affected in any way by the erroneous determination made

by appellants. With such understanding the decree was correct, and is affirmed. Dr. Luten is entitled to recover all of his costs.

SCHUMAN *v.* LUNNIE, ADMINISTRATRIX.

4-9629 243 S. W. 2d 937

Opinion delivered December 10, 1951.

U. A. Gentry, for appellant.

Frances D. Holtzendorff, Max Howell and *Ed E. Ashbaugh,* for appellee.

ROBINSON, J. The State of Arkansas, by the Attorney General, filed suit in the Pulaski Chancery Court to confirm title to lands which had forfeited due to nonpayment of taxes. Included in the lands involved in the suit to confirm title is lot 5, block 8, Watson's Addition to the City of Little Rock. Dudley Thomas and his wife Mary, owners of lot 5 at the time of the forfeiture, intervened alleging that the forfeiture and sale to the State were void, and that the deed to the State constituted a cloud on their title. Thomas had bought the property from one Jeter in 1938, and Jeter paid the taxes thereon up to 1942 inclusive.

Subsequent to the filing of the intervention, Mary Thomas died, and subsequent to the trial in Chancery Court, Dudley Thomas died. The appeal was revived in the name of appellee herein, Johnietta E. Lunnie, as sole

heir of Dudley Thomas and administratrix of his estate. The appellant, Florence Schuman, who had purchased the property from the State on the 2nd day of January, 1947, filed an answer to the intervention in which she seeks to sustain the tax sale. The Chancellor held:

"The court finds that the interveners, Dudley Thomas and Mary Thomas, his wife, purchased lot 5, block 8, Watson's Addition to the City of Little Rock, Arkansas, in 1938; that they paid the taxes for the years 1938, -39, -40, -41, and -42; that the intervener, Dudley Thomas, made a tender of the money at the collector's office for the year 1944 for the taxes of 1943 and was advised by the collector that no taxes were due; that the said Dudley Thomas appeared in 1945 to pay the taxes of 1944 and 1946 to pay the taxes of 1945, at which times he was advised by the county collector that no taxes were due; that the said Dudley Thomas paid the taxes for 1947, -48, -49; that he did not know said property was sold for non-payment of taxes; that the intervener has made a tender of all taxes, penalty and cost due in his pleadings; that the sale of said land for delinquent taxes was void because of the tender of taxes made by intervener, and the conveyance of said property by the State to Florence Schuman, the respondent, is void."

If Thomas attempted to pay the taxes on the property and failed to do so by reason of the negligence, oversight or mistake of the collector, then the sale for non-payment of the taxes is void.

In the case of *Schuman* v. *Person,* 216 Ark. 732, 227 S. W. 2d 160, this court quoted Mr. Justice HART, speaking for the court in *Robinson* v. *Johnson,* 124 Ark. 405, 187 S. W. 439, where it is said: "It is the settled rule in this State that an attempt to pay taxes made in good faith by the landowner or his agent, and frustrated by the mistake, negligence or other fault on the part of the collector renders the subsequent sale of the land for the non-payment of taxes void." A long list of cases to the same effect is cited therein.

The Chancellor based his finding to the effect that a *bona fide* attempt was made to pay the taxes on the testi-

mony of Dudley Thomas, who was an illiterate, aged Negro with very poor eyesight, and the testimony of Jeff Nash, who testified that he was present when Thomas attempted to pay the taxes for the year the property was forfeited. On the one hand we have the direct evidence of Thomas and the witness Nash to the effect that Thomas attempted to pay the taxes, and on the other hand we have the circumstantial evidence to the effect it is improbable that the deputy collector would make the mistake of not accepting payment, and the improbability that Thomas would continue to attempt to pay the taxes for the years 1944, -45, and -46. He did pay the taxes for 1947, -48, -49.

But, when dealing with circumstances and probabilities, we should likewise take into consideration the improbability of a person buying a home, finally paying it out, then going to the collector's office and offering to pay taxes on personal property but making no effort to pay taxes on his home, thereby allowing it to forfeit to the State, when the taxes thereon amount to only $8.30.

The evidence is conflicting. The direct evidence is to the effect that the attempt to pay the taxes was made, the circumstantial evidence being to the contrary. We cannot say that the Chancellor's finding was contrary to the preponderance of the evidence.

Affirmed.

George Rose Smith, J., dissents.

Brown *v.* State.

4670 243 S. W. 2d 939

Opinion delivered December 10, 1951.

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

George Rose Smith, J. The appellant, Millard F. Brown, was convicted below of first degree murder as a result of his having shot his next-door neighbor, Leo Williams. The verdict and judgment imposed the penalty of life imprisonment.

On the day of the shooting the two men had quarreled about a debt owed by Williams to Brown. During the afternoon Williams entered Brown's house with a pistol, but he soon went back home. The police were called, but Brown refused to swear out a warrant, though he said he would kill Williams if he came back.

After the police had gone Brown seated himself with an automatic rifle in a room from which he could watch Williams' house through a glass pane in the door. About twenty minutes later Williams, armed with a rifle, left his house and started toward the Brown home. Brown began firing through the pane just after Williams stepped over a low boundary wall about forty feet from Brown's door. The first two shots, though not fatal, caused Williams to turn back and fall helpless across the wall. Brown continued to fire, and at least six shots entered Williams' back before the rifle jammed. Wil-

liams was dead when the officers arrived within a few minutes.

Most of the assignments in the motion for a new trial are directed against the court's refusal to instruct a verdict for the accused. The appellant has not filed a brief in this court. The only arguments that could be made to support an instructed verdict of not guilty are (a) that the State failed to prove its case, (b) that Brown acted in self-defense, and (c) that the proof establishes the plea of insanity. On all three questions the State's testimony strongly preponderated and certainly presented issues for the jury's determination.

There was no error in the introduction of the clothing worn by Williams, as the location of the shots in the back was relevant to the issue of self-defense. Nor was the court required to give an instruction defining involuntary manslaughter. Even if we assume that such a charge would not have been abstract, the fact that the jury found the accused guilty of first degree murder rather than of second degree murder or of voluntary manslaughter, all of which were covered by the instructions, shows that the appellant was not prejudiced by the court's failure to submit the still lesser offense of involuntary manslaughter. *Newsome* v. *State,* 214 Ark. 48, 214 S. W. 2d 778.

A new trial was also sought on the ground that the appellant discovered after the verdict that one of the jurors was insane. The only proof of this juror's incompetency is a showing that the probate court made an adjudication of his insanity about two years before the trial below. Such an adjudication is merely *prima facie* evidence and may be rebutted. *Cook* v. *Jeffett,* 169 Ark. 62, 272 S. W. 873; *Federal Land Bank of St. Louis* v. *Lewis,* 199 Ark. 120, 132 S. W. 2d 810. In the case at bar the State proved that the challenged juror was discharged from the State Hospital within three months after his commitment, which raised a presumption of restored sanity. *Bank* v. *Lewis, supra.* In addition several witnesses who knew the man testified that he had conducted his business affairs and had otherwise acted in a normal manner since his discharge from the State Hospital. This

evidence completely overcame the presumption of insanity that arose from the adjudication two years earlier.

Affirmed.

THORNTON *v.* TEXARKANA COTTON OIL COMPANY.

4-9627 243 S. W. 2d 940

Opinion delivered December 10, 1951.

Chas. C. Wine, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

WARD, J. Appellant, Joe W. Thornton, was denied recovery by the Arkansas Workmen's Compensation Commission and by the circuit court, and now prosecutes this appeal.

The pertinent facts, which are undisputed, are as set out below.

Thornton was an employee of the Texarkana Cotton Oil Corporation and was also a stockholder in the company. The United States Fidelity & Guaranty Company is the corporation's insurer. Appellant, Thornton, was a superintendent of the appellee corporation and his regular work hours at the plant were from around 7:00 a. m. to around 7:00 p. m. He had an assistant who was on the job the remainder of the day. Thornton possessed superior technical knowledge about the operation of the plant

and it was understood by employer and employee that said assistant could and would call him at any hour of the night if anything went wrong that required his help. In fact this arrangement was a part of his over-all employment for which he received $250 per month. In case of an emergency appellant was subject to call not only by his night man but by anyone in authority. On numerous occasions he had answered such emergency calls, and it was his custom to leave word of his whereabouts when he was away from home at night. He lived about three and one-half miles from the plant and his regular means of transportation back and forth was a motorcycle which he owned and serviced, although it was understood he could use a company car any time his own conveyance was out of commission. Appellant has been thus employed since August 29, 1929.

On January 13, 1945, appellant left the plant at the end of his day's work, around 6:30 p. m., and while riding on his motorcycle along the usual route to his home, and when at a distance of approximately one and one-half miles from the plant, he collided with a truck and was injured. He was not answering any emergency call at the time and was not anticipating any such call but was on his way home to spend the night. After medical treatment and hospitalization, for which appellant incurred bills amounting to $1,211.35, he returned to work on April 1, 1945, in a recuperative condition but with the hope of full recovery in about four months. During his absence from work the Oil Company paid his regular salary.

Under the above state of facts appellant ably argues that, at the time of his injury, he was within the scope of his employment, that the injury arose out of his employment, and therefore the Oil Company should be held liable. In presenting his argument appellant concedes the general rule to be, as stated in *Bales, Administratrix* v. *Service Club No. 1, Camp Chaffee,* 208 Ark. 692, 187 S. W. 2d 321, "that injuries sustained by employees when going to and returning from their regular places of work are not deemed to arise out of and in the course of their employment." The same rule was also announced by this

court in *Penny et al.* v. *Hudson Dairy et al.,* 218 Ark. 594, 237 S. W. 2d 893, and in *O'Meara* v. *Beasley,* 215 Ark. 665, 221 S. W. 2d 882. To like effect, appellant also agrees with the statement of the law announced by the Commission in these words: "We think it is a well settled principle of law that no compensation will be allowed in cases of injury or death arising from a *street risk* [accident] where the public at large is exposed to the same perils as the employee, . . ." However, as is pointed out by appellant, there are exceptions to the two general rules announced in the above quotations, and a fuller quote would have disclosed this fact. The exceptions in both instances are similar and are all based on the same fundamental reasoning, *viz.*: the relationship between the accident and the employment. One exception relates to where the transportation is furnished by the employer as recognized in *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579. Another exception relates to where the injured employee is on a mission for his employer. Still another but perhaps less clear exception is where the accident occurs in close proximity to the employer's place of business as recognized in the *Bales* case, *supra.*

Appellant readily admits, with the qualification mentioned below, that none of the above exceptions squarely cover the facts in this case, but uses them to emphasize the fact that our court has departed from the general rule against recovery in "going and coming" cases. From this premise and to substantiate his contention that appellant is not barred here he cites a large number of cases from other jurisdictions allowing recovery where the injured employee was either going to or coming from his place of employment. These cases are: *Kyle* v. *Greene High School,* 208 Iowa 1037, 226 N. W. 71; *Reisinger-Siehler Co.* v. *Perry,* 165 Md. 191, 167 A. 51; *Judd* v. *Metropolitan Life Ins. Co.,* 111 Conn. 532, 150 A. 514; *Merriman* v. *Manning, Maxwell and Moore,* 251 Mich. 318, 232 N. W. 409; and *Wilhelm* v. *Angell, Wilhelm and Shreve,* 252 Mich. 648, 234 N. W. 433. In all of these cited cases the employee was, at the time of the injury, on some kind of special mission or "emergency call" for his employer. For example: in the first case a janitor was

making a special trip to the school building in response to a call by the principal; in the second case the employee was called in the late night to close the doors and turn out the lights at his place of employment; etc. It appears that appellant recognizes this fact situation but still insists that it does not bar him from recovery because it was understood and was a part of his employment that he was subject to "emergency calls" at all times. It is true that he was subject to such calls and that he had, before his injury, responded on many occasions, and it is also true that he and his wife made arrangements for his availability at all times. It is also true that on the occasion of appellant's injury he was in fact not on any such emergency call and that he was expecting none at that time. To extend the exceptions to the general rule against recovery in "going and coming" and "emergency call" cases to include appellant's fact situation here would be going beyond what our court and, so far as we find, other courts have held, and also beyond sound reasoning. In other words, there would seem to be no logical limit to the situations posing recovery under appellant's theory. Although it seems our court has not passed directly on the point raised by appellant the Nebraska court has done so. From *Richtarik* v. *Bors*, 142 Neb. 226, 5 N. W. 2d 199, 142 A. L. R. 881, we quote the following:

"When an employee has finished his work and is on his way home, a mission of his own, and is injured at the place where he is not required to be by his employment, he is not within the provisions of the Compensation Law. And in this respect it makes no difference whether he works regular hours or is subject to call by the employer."

As intimated earlier in this opinion, appellant makes the contention that he should come within the exception [to the general rule] which allows recovery in cases where the employer furnishes the conveyance. This contention is based on the fact that the Oil Company would furnish appellant a car for transportation to and from home when his own conveyance was not usable. We think there is no merit in this contention because appellant was

at the time of the accident using his own means of conveyance and this fact eliminates all reason for the exception which he invokes.

No error appearing, the judgment of the lower court is affirmed.

JEFFRIES *v.* MERIDETH.

4-9631 243 S. W. 2d 942

Opinion delivered December 10, 1951.

John B. Driver, for appellant.

Ben B. Williamson, for appellee.

GRIFFIN SMITH, Chief Justice. John Wesley Jeffries died intestate in February, 1946, leaving miscellaneous household effects estimated to be worth slightly less than

$375 and a home on four and a half acres of land appraised at $600. He was survived by five daughters and three sons. One of the sons, Floyd, is the appellant here and his sister, Delia Merideth, is appellee. These values were set out in an affidavit filed by Floyd Jeffries in Probate court, Ark. Stat's, § 62-2127. In the affidavit it was stated that there were no estate debts other than a hospital bill for which the affiant had assumed personal responsibility. Floyd acquired all outstanding interests except that of Delia.

Delia Merideth filed in the Chancery court what was termed an answer and cross-complaint, although at that time the administration was in Probate court. This irregularity was subsequently corrected by stipulation. Delia denied that Floyd had any interest in the property. On the contrary she alleged equitable ownership because of a contract entered into when her father communicated with her at Dayton, Ohio, where she lived with her husband. Both were working at the time Delia's father asked her to come to the little community of Pleasant Grove, Ark., and give personal services in return for the property. It is not clear whether the promise made by Wesley Jeffries to his daughter was oral or through letter. On direct examination the questions and answers are such as to leave the impression that the promise was made after Delia and her husband reached Pleasant Grove, but on redirect examination there was an affirmative answer to the question directed to Delia, "And you left your jobs to come here and take care of your father and stepmother, . . . relying on his statement that you could have the property." There is no suggestion that father and daughter communicated by telephone, nor was there an objection to the question as asked. The rule requiring that testimony necessary to establish a parol contract to convey land must be clear, cogent, satisfactory and convincing was stated in *Crowell* v. *Parks,* 209 Ark. 803, 193 S. W. 2d 483.

Appellant testified that before entering the armed forces of World War II he owned a team of horses worth $200, two cows, five or six hundred bushels of corn, two

hogs, some oats, and perhaps some incidental feedstuff. His father sold the team for $140, then bought it back, and one horse died. The live horse was returned to appellant. However, throughout his testimony appellant insisted that he had the army authorities deduct $50 per month from his salary. This, he said, was sent to his father for a period "close to three years." Because his father had always been a renter Floyd felt that the time was opportune to acquire a home "for them," but he stoutly maintained that the money was not an allotment. On cross-examination Floyd admitted that he was making his father a gift.

A small place on Dodd Mountain was first purchased, but Floyd's father wrote that he wanted to sell it and buy another, to which no objection was made. The homesite embracing the four and a half acres now in question appears to have been purchased at least in part with money realized from sale of the Dodd Mountain property. But Floyd did not assert that there was an agreement regarding ownership. Rather, his statement was that the old gentleman wanted to buy a place and he (Floyd) told him it could be done now. Question: "Did you and your father decide jointly upon a place to buy?" A. "No. He always wanted a place on top of Dodd Mountain and when I was in the army he wrote [to that effect, and I replied] 'Buy that place on top of Dodd Mountain.' " The father decided he wanted to sell, and that was agreed to. Appellant was positive his father told him on several occasions that the second place was *his*.

A brother who claimed to have seen his father open Floyd's letters testified that sometimes Floyd would send $75 a month and occasionally a twenty-dollar bill would be included in addition to the $75—"making $90 or $95 a month."

The trial court no doubt thought this testimony—contradicting appellant—was too improbable for belief. All reasonable inferences to be drawn from Floyd's testimony are that the deductions were made from his government pay and sent direct, hence the improbability that

the government paymaster would include $20 bills for Floyd's accommodation.

The only contradiction of Delia's claim that her father promised to leave her the property in return for services comes from witnesses who say they heard Wesley remark on several occasions that the place was Floyd's or that it would be Floyd's. But there is testimony that Wesley asked Fred Merideth (Delia's father-in-law) to write and ask Delia and her husband to come and help around the place. Wesley's wife (Delia's stepmother) was ill. The day Delia arrived Mrs. Jeffries suffered a paralytic stroke and thereafter was not able to leave her bed. Fred Merideth's explanation was that immediately after Delia and her husband arrived by car from Ohio he (Fred) talked with Wesley, who said he was going to make Delia and her husband a deed to the place.

There can be little doubt that Delia rendered valuable services. She responded to her father's request early in 1946 and from the day following her arrival until her stepmother died in August, 1948, administered to her and looked after the household affairs. Lloyd, Delia's husband, was also there, and while there is testimony that he habitually drank and that he was more of a nuisance than a benefit, yet others testified to the contrary. One of the brothers, in purely opinion testimony not objected to, said he thought Delia would be entitled to the homesite but for her husband's conduct.

We are not dealing with Lloyd's legal status. He does not claim the place or any interest in it. Delia cared for her father until his death early in 1949. Appellant admits that his father repaid $500 of the money sent from army checks, and he used this as part of a $1,500 payment on a $2,000 farm he bought. Appellant's father lived five years after appellant's services with the armed forces had terminated, yet during that period nothing was done to impress the property with the trust he now seeks to establish. Certainly Floyd's own statement that the money he sent his father was a gift destroys any theory of trusteeship, leaving only a naked hope upon

appellant's part that his father would remember him by deed or will.

We have held that performance such as Delia has established in the instant case removes the transaction from the statute of frauds. *Fred* v. *Asbury,* 105 Ark. 494, 153 S. W. 155. Mr. Justice HART, who wrote the Fred-Asbury opinion, remarked that the parol contract was definite and certain, both in terms and as to the subject-matter, and that it had been clearly proved. When consideration is given appellant's statement that the money sent to his father was a gift and not a loan, the remaining question is whether Delia was truthful regarding her father's promise.

Our conclusion is that Floyd disproved his own attempt to establish a trust; and, having waited until his father had passed away, he must abide the facts of his sister's abandonment of employment in Ohio, her long period of services to stepmother and father, the unequivocal assertion of the contract, and the attending circumstances that inferentially lend credence.

Affirmed.

TENNISON *v.* CARROLL.

4-9625 243 S. W. 2d 944

Opinion delivered December 10, 1951.

Byron Bogard, Edward Luter and *Bobbie Jean Gladden,* for appellant.

MINOR W. MILLWEE, Justice. This suit involves the partition of an eighty-acre tract of land in Pulaski County. The cause was submitted to the trial court upon the pleadings and a stipulation by the parties which reflect the following facts.

In 1907, Eugene Byers acquired title to the eighty acres in question and a few days later deeded to his wife, Rebecca Byers, an undivided one-half interest in the land. Eugene Byers died intestate in September, 1914, survived by his widow, Rebecca, and the appellants, two nieces and a nephew, who are his sole heirs at law.

On November 26, 1914, Byer's widow, Rebecca, married F. A. VanDenBerg to whom she deeded an undivided one-half interest in the eighty-acre tract on January 26, 1916. On February 24, 1926, the VanDenBergs executed a deed of trust covering the eighty-acre tract to the Peoples Savings Bank as security for a loan of $400, and this instrument was satisfied of record November 5, 1930.

Rebecca Byers VanDenBerg was judicially declared insane on January 11, 1938. F. A. VanDenBerg died testate and without issue on May 17, 1943. Under the terms of his will, VanDenBerg devised all his property to his sister, Ann V. Glavin. In proceedings to probate the will, Rebecca Byers VanDenBerg, through her guardian, renounced the will insofar as it affected her rights as widow and elected to take under the law.

The Pulaski Probate Court entered an order June 21, 1944, giving effect to the will of F. A. VanDenBerg except as it affected the widow. In the order admitting the will to probate the court found that at the time of his death, F. A. VanDenBerg owned an undivided one-half interest in the eighty acres which should go to the widow, Rebecca, or her guardian for her use and benefit, "for her natural life as and for her dower and homestead rights." The court also found that said widow also owned another undivided one-fourth interest in the land in addition to the interest belonging to the estate of F. A. VanDenBerg, deceased. The order further recites: "And the Court finds that the parties hereto have reached an equitable agreement as to the proper division of the real estate upon the death of the said Mrs. Rebecca VanDenBerg, which provides that at her death one-half of the undivided one-half interest of the said F. A. VanDenBerg, deceased, at his death, should go to the said Mrs. Ann V. Glavin or her heirs or assigns under the will, and that the other one-half interest of the said F. A. VanDenBergs' undivided one-half interest in said eighty acres should go to the heirs or assigns of the said Mrs. Rebecca VanDenBerg, provided it shall not have previously been disposed of under the orders of the Court. This would give Mrs. Ann V. Glavin an undivided one-fourth interest in said eighty acres and it would give the heirs or assigns of the said Mrs. Rebecca VanDenBerg two-fourths including the one-fourth she already owned. And if it should develop that the other undivided one-fourth interest in said eighty acres is not successfully claimed by some one else and that if it falls to these parties by reason of adverse possession, then it is agreed that an undivided two-thirds interest in said eighty acres is to go

to the heirs or assigns of said Mrs. Rebecca VanDenBerg, and the other undivided one-third interest in said eighty acres is to go to the said Mrs. Ann V. Glavin, or her heirs or assigns.'' The court then ordered distribution of the several interests in accordance with said findings. Appellants were not parties to the probate proceedings or the agreement mentioned in the court's order.

Rebecca Byers VanDenBerg died intestate in May, 1950. After the death of Eugene Byers in 1914, general taxes on the land were paid by Rebecca Byers VanDenBerg and F. A. VanDenBerg who also held possession of the land until their deaths in May, 1943, and May, 1950, respectively.

Appellants, as the heirs of Eugene Byers, deceased, and Ann V. Glavin, sister and sole heir of F. A. VanDenBerg, deceased, were plaintiffs in the instant partition suit against appellees, who are the sole heirs of Rebecca Byers VanDenBerg, deceased. The trial court found that appellants, as the heirs of Eugene Byers, deceased, had no interest in the land and dismissed the complaint as to them. The court further found that Ann V. Glavin was the owner of a one-fourth interest in said lands as a tenant in common with the appellees who were declared to be the owners of the remaining three-fourths interest. In accordance with an agreement of the parties, the court held that said land was not susceptible of division in kind. A sale was ordered with directions to divide the proceeds according to the respective interests of the parties fixed in the decree.

In dismissing the complaint as to the appellants, the chancellor made no specific findings and the appellees have not favored us with a brief. Under the facts as stipulated, we think appellants correctly contend that they are entitled to an undivided one-fourth interest in the land in question. Upon the death of Eugene Byers intestate and without issue in 1914, his widow was entitled to dower of one-half in fee of the undivided one-half interest in the lands retained by her husband under Kirby's Digest, § 2709. Appellants, as heirs of Eugene

Byers, deceased, had a vested remainder of one-fourth in fee (one-half of the undivided one-half interest) in the land subject to the homestead rights of the widow, Rebecca Byers. The widow had a right to remain in possession of the homestead and this right did not cease upon her marriage to F. A. VanDenBerg. *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A 999. The widow, Rebecca Byers VanDenBerg, occupied the lands without the assignment of dower until made by order of the probate court in 1944. In that order the court clearly recognized the outstanding one-fourth interest now claimed by appellants who were not parties to that proceeding. Although she became insane in 1938, the widow's right of occupancy continued to be claimed by her guardian for her benefit until her death in May, 1950. Appellants, as heirs of the deceased owner of the homestead, had no right of action for possession of the land in controversy until the termination of the widow's homestead estate. It follows that appellants are owners of a one-fourth interest in the land unless such interest was acquired by adverse possession of the widow, Rebecca Byers VanDenBerg.

The general rule is that the statute of limitations does not commence to run against a remainderman or reversioner until the death of the life tenant. In *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, the court said: "Now, the possession of the widow is not hostile to the title of the heir. The widow is entitled to the possession of the land as her homestead during her life; she holds the life estate and the heir the reversion; the possession of the widow is therefore not adverse to the heir. The general rule is that the statute of limitation does not run against the reversioner until the death of the tenant for life. *Padgett* v. *Norman,* 44 Ark. 490; *Banks* v. *Green,* 35 Ark. 84; *Moore* v. *Childress,* 58 Ark. 510, 25 S. W. 833; *Ogden* v. *Ogden,* 60 Ark. 70, 28 S. W. 796." In reference to the widow's claim of adverse possession in that case, the court also said: "It is true that her claim and possession might have been of such a nature as to amount to an entire disseizin of the heir and an entire denial of his rights, so as to result in an acquisition of the title by adverse posses-

sion; but, before her possession could become adverse, it was necessary for her to first repudiate the title [of her husband] and to disavow any claim thereto as his widow; and it was also essential that notice of such disavowal by her of title as widow should be brought home to the heir."

Even if a widow disavows her homestead and claims as a tenant in common, her possession and occupancy is presumed to be permissive and not hostile to her co-tenants unless the fact of hostility affirmatively appears. *Brinkley* v. *Taylor,* 111 Ark. 305, 163 S. W. 521; *Boyd* v. *Epperson,* 149 Ark. 527, 232 S. W. 939. In *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958, the court said: "The reason that the possession of one tenant in common is *prima facie* the possession of all, and that the sole enjoyment of the rents and profits by him does not necessarily amount to a disseizin, is because his acts are susceptible of explanation consistently with the true title. In order, therefore, for the possession of one tenant in common to be adverse to that of his co-tenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed." See, also, *Cameron* v. *Westbrook,* 178 Ark. 625, 11 S. W. 2d 440; *Zachary* v. *Warmack,* 213 Ark. 808, 212 S. W. 2d 706.

In *Mills* v. *Pennington,* 213 Ark. 43, 209 S. W. 2d 281, we held that the action of a widow in executing oil leases and mineral deeds and in selling standing timber did not alone amount to a renunciation of her homestead and dower interests and, *ipso facto,* start the statute of limitations against the deceased husband's heirs. It appears from the stipulation in the case at bar that the widow, Rebecca Byers VanDenBerg, remained in possession of the homestead personally and through her guardian from the date of the death of her first husband in 1914 until her own death in 1950. The execution of the deed of trust in 1926 by Rebecca and F. A. VanDenBerg did not set the statute of limitations in motion against the appellants. The widow's possession was not disturbed by execution of the mortgage which was satisfied of record in 1930. Neither a co-tenant nor a remainderman should be ex-

pected to check the records constantly to determine whether mortgages have been executed by the life tenant or co-tenant. The continued possession and payment of taxes by Rebecca Byers VanDenBerg following the death of Eugene Byers in 1914 were in conformity with her homestead rights as widow as well as the interests of appellants as the heirs of her deceased husband, and not in opposition to the latter's interests. We conclude that the widow's possession was not adverse so as to invest her with title to appellants' inheritance of an undivided one-fourth interest in the lands in controversy.

The decree is reversed and the cause remanded with directions to declare ownership of the respective undivided interests in the lands, and the distribution of sale proceeds, as follows: One-fourth to Ann V. Glavin; one-fourth to appellants; and one-half to appellees.

ROBBINS *v.* STATE.

4666 244 S. W. 2d 156

Opinion delivered December 17, 1951.

Gordon B. Carlton and *M. M. Martin,* for appellant.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal questions the penalty assessed for selling liquor in dry territory. The indictment charged that Jack Robbins sold a pint of Hill & Hill liquor "in a prohibited territory, Polk county," etc. The jury's verdict of guilty assessed a fine of $500 with six months in jail, but recommended

that the jail sentence be suspended. The trial court did not think justification had been shown for leniency and assessed both fine and imprisonment. The motion for a new trial alleges that the verdict and judgment are contrary to the law and the evidence.

Appellant's contention is that effect of the verdict and judgment was to treat the proceedings as having been brought under § 48-912, Ark. Stat's, whereas the wording of the indictment and instructions make it clear that the intent was to proceed under § 48-803, Ark. Stat's, this being Initiated Act No. 1 of 1942, p. 998 of the Acts of 1943. The measure was discussed in *Robbins* v. *State,* 242 S. W. 2d 640, *ante,* p. 376. The appellant was the appellant in the cited case.

We are of the view that error is apparent on the face of the record, agreeing with counsel for the appellant that the Initiated Act provides the remedy intended by the electors to apply in the circumstances of this case —this for the reason that some of the language of the indictment is identical with wording in the Initiated Measure. For this reason the judgment will be modified through avoidance of the jail sentence, but affirmed as to the fine. It is so ordered.

HOUSTON *v.* CARSON.

4-9634 244 S. W. 2d 151

Opinion delivered December 17, 1951.

Ernest Briner, for appellant.

McDaniel & Crow, for appellee.

MINOR W. MILLWEE, Justice. On November 10, 1937, appellees, Sam D. Carson and wife, executed a note for $900 to W. E. Carson and wife, Alice Carson, payable one year after date and bearing ten per cent interest after maturity. On the same date appellees also executed a mortgage on certain lands in Saline County as security for payment of the note.

W. E. Carson died in November, 1941, and his widow, Alice Carson, died testate in September, 1948. Appellants are the three children and sole heirs of W. E. and Alice Carson, deceased, and two of them are also executors of the Alice Carson estate. On October 21, 1948, they instituted this suit, both as executors and heirs, against appellees to foreclose the 1937 mortgage alleging a past due indebtedness of $848.95.

In their answer, appellees admitted execution of the note and mortgage, but denied the indebtedness and pleaded full payment. After most of the proof had been taken on depositions, appellees filed a cross-complaint alleging overpayment of the indebtedness and asking judgment for any excess payments disclosed by the testimony. Appellants' reply denied these allegations and also pleaded the statute of non-claim. Trial by depositions resulted in a decree dismissing the complaint and cross-complaint for want of equity.

Appellants presented documentary proof showing eight payments endorsed on the note and mortgage record by W. E. Carson and wife, Alice Carson, from December 15, 1938, to March 24, 1945. There is no dispute as to the correctness of any of these credits except the second payment on April 20, 1939, which appellants claim was in the sum of $250 as shown by endorsements

on the note and mortgage record, while appellees contend they should have been credited with a payment of $600 on said date. If appellees are correct in their contention, they overpaid the indebtedness by $24.07 when they made the last payment of $100 on March 24, 1945. If, on the other hand, proper credit was given for the April, 1939, payment, appellants are entitled to judgment as prayed.

Since the execution of the note and mortgage was admitted by appellees, the burden of establishing their affirmative defense of payment rested upon them. *McDonald* v. *The Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325. The only question on this appeal is whether the chancellor's finding that appellees discharged this burden is contrary to the preponderance of the evidence.

The parties to the suit and most of the witnesses on both sides are closely related and the testimony as to the amount of the April, 1939, credit is sharply conflicting. Appellees were operating a farm in March, 1939, when Sam D. Carson accepted a position with the State Welfare Department. A son and a daughter of appellees testified that W. E. Carson came to their home in his automobile about the first of April, 1939, and had a conversation with their father in which an agreement was made whereby the latter would turn over to the former his team of mules, wagon and a small amount of other farm equipment and receive a credit of $600 on the note; and that the only persons present when the conversation took place were appellees, their son and daughter and W. E. Carson who was not accompanied by his wife, Alice Carson. When asked to relate the agreement in her own way, the daughter of appellees first testified that W. E. Carson agreed to take the farm equipment, sell it, "and give my father credit for whatever he got for it on the note Uncle Will had of my father's." She later stated that the agreement was for a credit of $600 and that W. E. Carson came and got the equipment about two days later.

A Benton livestock dealer testified on behalf of appellees that he lived near them in 1939; that the mules were then about nine or ten years old and worth about

$225 to $250; and that all the farming equipment, including the mules, was then worth about $500 or $600. Another livestock dealer who had no knowledge of the specific property testified generally as to the 1939 market value of the equipment as described and fixed by the first dealer. Appellees say these were the only witnesses testifying to any material facts in the case who were not related to the parties; and that the testimony of appellees' children as to the agreement to credit the note with a $600 payment in April, 1939, is wholly uncontradicted. We cannot agree with either contention.

Insofar as the evidence discloses, there was no dispute as to the correctness of the $250 credit endorsed on the note and mortgage record until after the death of Alice Carson in 1948. Appellees made six payments on the note after April, 1939, and it is not shown that there was any objection to the credits shown when they made the last payment of $100 on March 24, 1945, which payment they now contend overpaid the debt. The evidence discloses that W. E. Carson and wife carefully kept their business records and were very indulgent in dealing with their relatives. In addition to the credit endorsements on the note and mortgage record, appellants introduced other evidence which strongly contradicts the testimony adduced by appellees as to the alleged agreement by W. E. Carson to credit the note with a $600 payment in April, 1939.

There was considerable testimony showing that W. E. Carson was in bad health from 1938 until his death, that he did not drive an automobile during that time, and that his wife assisted him in all his business transactions. Pinky Franklin, a Negro, was employed by W. E. Carson from 1938 to 1940 and lived on Carson's place. He testified that he did all the driving for W. E. Carson during that period and that he never drove him to appellees' farm. There was other evidence by witnesses who were thoroughly familiar with the team and other equipment surrendered by Sam D. Carson in April, 1939, which shows the value of such property to have been considerably less than the $250 credit endorsed on the note by W. E. Carson and on the mortgage record by Alice Car-

son. Some of these witnesses were related to the parties on both sides while some of them were unrelated to any of the parties. These witnesses testified that the two mules were more than twenty years old in 1939 and were not worth more than $100. Leon Ramsey testified one of the mules was three years old when he purchased it in 1918 and that he sold it to appellee, Sam D. Carson, in 1927. There was other testimony showing the other mule was equally as old. Alice Carson sold the two mules, harness and wagon for $115 in February, 1942. The purchaser testified that one of the mules died that fall and the other shortly thereafter. There was other evidence tending to show that appellee, Sam D. Carson, delivered the farm equipment to W. E. Carson in April, 1939, when he accepted employment with the Welfare Department, and that appellees were to receive a credit of $250 as endorsed on the note and mortgage record.

After the above evidence was adduced by appellants, appellees' son and daughter gave further depositions in which they somewhat modified their former testimony by stating that a Negro drove W. E. Carson to appellees' farm in April, 1939, and was present when the agreement as to the $600 credit was made. They further stated that their younger sister was also present, after the latter testified that she also heard the agreement. Although they could not identify the driver of the car, they stated that they had observed him and another Negro, who they stated came and got the team and equipment, working in and around the W. E. Carson store in Benton.

Evidence on behalf of appellants was to the effect that W. E. Carson operated a store in Benton for many years prior to September, 1938, when the business was incorporated and J. W. Johnson took over as manager. Johnson and Thelma Ramsey, who had been employed in the store since 1929, testified that no Negroes were employed at the store, that appellees' family did not trade there, and that W. E. Carson was very feeble and did not work at the store after September, 1938.

In making their proof, both sides were somewhat handicapped by the rule embodied in § 2 of the schedule

of the Arkansas Constitution, often referred to as the dead man's statute. Appellees say the statute prevented them from testifying in the case and that it also rendered incompetent the entire testimony of appellant, Lorene Houston, an executrix of the estate of Alice Carson, deceased. But the statute does not go so far as to render a party within its terms absolutely incompetent as a witness. A party may testify so long as he does not testify against the other "as to any transaction with or statements of the testator, intestate or ward. . . ." *Chipman* v. *Perdue,* 135 Ark. 559, 205 S. W. 892; *Webster* v. *Telle,* 176 Ark. 1149, 6 S. W. 2d 28. Appellants contend that since Lorene Houston sued in the dual capacity of executrix and heir, her testimony as an heir is in no manner restricted by operation of the statute. Appellants would be correct in this contention if Lorene Houston, as executrix, was only a nominal party to the suit. But we have held that the administrator or executor of a deceased mortgagee's estate is a proper party to bring a foreclosure suit. *Swinton* v. *Cuffman,* 139 Ark. 121, 213 S. W. 409. Even though the statute is applicable to Lorene Houston, much of her testimony was, nevertheless, competent while some of it was inadmissible on grounds other than the disqualification imposed by the statute. After disregarding those statements by W. E. Carson and Alice Carson to Lorene Houston and other witnesses which were in the nature of self-serving declarations, we are still of the opinion that appellees have not discharged the burden of proving the alleged $600 payment by a preponderance of the evidence.

The decree is accordingly reversed and the cause remanded with directions to enter judgment for appellants and for such further proceedings as may be necessary.

4-9613 244 S. W. 2d 138

Opinion delivered December 17, 1951.

Mullis & McCain and *Smith & Smith,* for appellant.

Jim Merritt, for appellee.

Holt, J. Appellee, J. A. Jones, sued appellants, C. R. McKennon and his son, Joe Lee McKennon, individually, and as a partnership, (in tort) to recover damages for loss of honey bees and honey, alleged to have resulted, on July 1, 1947, while appellants were dusting, by airplane, a cotton crop, (owned by appellants, C. R. McKennon and son) with a poisonous and dangerous substance. Appellee, Reasor-Hill Corporation, manufacturers of the poison used, and Kern McClendon, who was employed by the McKennons to spread the poison on their cotton fields, were made third party defendants, on motion of the McKennons under the "Uniform Contributions Among Tortfeasors Act," 315 of 1941, (now Ark. Stats. 1947, §§ 34-1001—34-1009).

Appellants, in separate answers, made general denials. A jury trial resulted in the following verdict for appellee: "We, the jury, find for the plaintiff, J. A. Jones, and assess his damages in the total sum of $1,500; as against C. R. McKennon and Joe Lee McKennon, doing business as C. R. McKennon & Son in the sum of $1,250

of said sum, and Kern McClendon in the sum of $250 of said sum. We, the jury, find for the defendant, Reasor-Hill Corporation." From the judgment, in conformity with the verdict, is this appeal.

There was no contention that the verdict was excessive.

—(1)—

For reversal, appellants first argue that the evidence was not sufficient to support the verdict. We cannot agree. The record reflects that appellants, McKennon and son, employed appellant, Kern McClendon, to dust their cotton in a field near appellee's property and apiary, with a poison called "R-H Dust" to rid the cotton field of boll weevils. Kern used an airplane in spreading the poison and there is evidence that he flew over appellee's apiary and dusted his bees and bee hives with the poisonous dust, which caused the destruction of the bees, together with a large quantity of honey.

Appellee, Jones, testified: "Q. Did you see planes dusting July 1st? A. Yes, sir, I watched from the time it started until the end. Q. Which dusting killed your bees? A. Both of them. It came in until you couldn't hardly get your breath. You could stand 150 yards from the bees and you couldn't hardly see the bee hives there for it. * * * Q. What did you testify before as to how near Mr. McKennon's land is to you? A. How far is his land? Q. Yes. A. He has got land that runs up,—I will say it is,—I don't believe it is two hundred yards from mine. * * * Q. You mean to tell the jury now that that airplane was poisoning that field two mornings in succession? A. It poisoned the 30th and the 1st. The 30th of June." There was other testimony tending to corroborate appellee.

Appellant, Joe L. McKennon, testified that his firm bought cotton poison from the firm of Henley & Johnson Purina Feed Company, and employed the third party defendant, Kern McClendon, to dust their cotton.

J. T. Henley testified: "Q. Did your firm, Henley & Johnson, sell considerable cotton poison to Mr. C. R. McKennon or C. R. McKennon & Son for his Watson operation? A. Yes, sir. Q. What was the name, if you know, of the cotton poison? A. R-H Cotton Dust."

J. H. Davis, State Apiarist, on being asked whether he saw any white substance there on top or around the bee hives and its color, answered: "It looked a whole lot like lime,—something like a lime," and further answered: "Q. During your inspection of this yard and based on your experience, what would you say was the cause of the death of these bees? A. There is no doubt about it,—it was contact poison that had killed the bees. Evidence was in the hive itself to know that that was true."

Considering the evidence in its most favorable light to appellee, as we must, we think it substantial and sufficient to support the verdict.

—(2)—

Appellants, the McKennons, also argue that Kern McClendon, the third party defendant, was an independent contractor and therefore they were not responsible for his acts, in the circumstances. This contention is with-
his acts, in the circumstances. This contention is with-
out merit. While it is true that as a general rule, the employer would not be liable for the negligence of an independent contractor, there are exceptions to this rule. One exception is that where the work to be performed is inherently dangerous, as here, the employer will not be permitted to escape liability for negligent injury to the property of another, by an employee, to whom the employer has delegated, or contracted, the performance of the work.

In the case of *The Hammond Ranch Corporation* v. *Dodson,* 199 Ark. 846, 136 S. W. 2d 484, wherein we quoted with approval from an Arizona case, where the facts disclosed were, in effect, the same as those here, we said: "In that case one of the defenses interposed

was that the Hawks Crop Dusting Company was an independent contractor, and that, therefore, defendant was not liable for any damage suffered by the plaintiff. On that question the court said:

" 'As a general rule the employer is not liable for the negligence of an independent contractor. There are, however, certain exceptions to this general rule. One of such exceptions is that the law will not allow one who has a piece of work to be done that is necessarily or inherently dangerous to escape liability to persons or property negligently injured in its performance by another to whom he has contracted such work. This is especially true where the agency or means employed to do the work, if not confined and carefully guarded, is liable to invade adjacent property, or the property of others, and destroy or damage it. The defendant was within its legal rights in depositing the insecticide on its lettuce field for the purpose of ridding it of the worms with which it was infested, and it could do this work itself or it could contract it, but, because of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, it could not delegate this work to an independent contractor, and thus avoid liability. 39 C. J. 1331, § 1540; 14 R. C. L. 87, § 24; *Medley* v. *Trenton Inv. Co.*, 205 Wis. 30, 236 N. W. 713, 76 A. L. R. 1250; *St. Louis & S. F. R. Co.* v. *Madden,* 77 Kan. 80, 93 P. 586, 17 L. R. A., N. S., 788. We conclude that the facts bring this case within the named exception, and that, because of the dangerous character of the agency employed, the work was not delegable.' " See, also, *Giem* v. *Williams, Administratrix,* 215 Ark. 705, 222 S. W. 2d 800, and *Kennedy* v. *Clayton,* 216 Ark. 851, 227 S. W. 2d 934.

—(3)—

Appellants also contend that there was error in giving (over their general exceptions) the following in-

struction (No. 20): "You are instructed that the insecticide sold by Reasor-Hill Corporation to the defendants would be injurious to any insects which come in contact with it. In this connection, you are told that the defendants had a right to place such insecticide upon their cotton and they would not be liable for the death of any of plaintiff's bees which were killed by coming in contact with said poison in the cotton field after said cotton was sprayed."

As we read the record, it appears to be undisputed that the spray dust or insecticide used was an insect poison that was not only injurious to, but would kill, any insects, such as boll weevils and honey bees, on contact. There was no evidence to the contrary.

Webster defines "bee:" "Orig., the honey-producing insect Apis mellifera (syn. mellifica), usually disting. as honeybee; now, broadly, any of numerous membranous-winged, noncarnivorous insects."

It was not error to give an instruction which assumes an undisputed fact. *Wisconsin & Arkansas Lumber Company* v. *Brady,* 157 Ark. 449, 248 S. W. 278.

Other instructions were objected to by appellants, but it suffices to say that we have reviewed them all and find no error.

The judgment is affirmed.

EBRITE *v.* BROOKHYSER.

4-9577 244 S. W. 2d 625

Opinion delivered October 22, 1951.

Rehearing denied November 26, 1951

Ulys A. Lovell and *Price Dickson,* for appellant.

Rex W. Perkins and *E. J. Ball,* for appellee.

HOLT, J. George Brookhyser died intestate November 22, 1949, leaving as survivors, his widow, Susie, and his brothers and sisters, appellants here. George had been twice married, his first wife having died May 25, 1949. He married Susie August 25, 1949. On November 4, 1949, George (then 70 years of age) attempted to convey real property ("The Gem Tourist Court" in Springdale) from himself to Susie and himself as tenants by the entirety.

At the time of his death, George also owned a 1941 Dodge automobile and certain household goods. Susie traded the car for another, receiving credit for $295. She sold the tourist court, residence and furnishings to appellees, Arthur and Elsie Boone, husband and wife, for $10,000.

The present suit was filed June 20, 1950, in which appellants alleged, in effect, "that the deed from George to himself and Susie, as tenants by the entirety or as an estate of survivorship was a nullity; that it was procured by fraud, coercion and undue influence; that the deed was not, in fact, acknowledged and that it should be stricken from the records; and that the title to the lands should be vested in appellants, subject only to the widow's homestead and dower and payment of the debts of the estate."

Appellees answered with a general denial, and Susie alleged that she owned the fee by virtue of the above deed of November 4, 1949, and pleaded estoppel. Elsie and Arthur Boone alleged that they were innocent purchasers for a valuable consideration.

The trial court found that the deed above from George to George and Susie "created an estate by the entirety subject to the rights of survivorship belonging to said estate, and that it was the intention of the deceased, George Brookhyser, to create an estate by the entirety with the survivor to take the fee.

"The Court finds further that on said date the deceased, George Brookhyser, delivered said deed to Susie W. Brookhyser and that she accepted said deed and remained in possession of said lands and real estate as aforesaid.

"The Court further finds that her husband, George Brookhyser, would have been estopped in his lifetime, he having died November 22, 1949, in Washington County, Arkansas, to question her rights as an owner of said estate by the entirety, and that the plaintiffs, and each of them, as his heirs are likewise so estopped to claim any right, title or interest in and to the above described real estate and lands."

The Court also found that Susie had converted personal property to her own use and its reasonable value was $975, for which amount decree was entered against Susie. This appeal followed.

The deed above contained the following recital: "That we, George Brookhyser and Susie W. Brookhyser, his wife, for and in the consideration of the sum of One Dollar and other Value Considerations, to us paid by George Brookhyser and Susie W. Brookhyser, Husband and Wife, do hereby grant, bargain and sell unto the said George Brookhyser and Susie W. Brookhyser, Husband and Wife, or the survivor in the Entirety, and unto their heirs and assigns, the following described land, situate in Washington County, State of Arkansas, to-wit: (describing it).

"TO HAVE AND TO HOLD the said lands and appurtenances thereunto belonging unto the said George Brookhyser and Susie W. Brookhyser, Husband and Wife, with right of survivorship and unto their heirs and assigns, forever. And we, the said George Brookhyser and Susie W. Brookhyser, hereby covenant that we are lawfully seized of said land and premises; that the same is unincumbered, and we will forever warrant and defend the title to the said lands against all legal claims whatever.

"And I, the said Susie W. Brookhyser, wife of George Brookhyser, in consideration of said sum of money, do hereby release and relinquish unto the said George Brookhyser and Susie W. Brookhyser, Husband and Wife, with the right of survivorship or the survivor in the entirety, all my interest, right, title and dower and convey my homestead in and to said lands.

"WITNESS hand and seal on this 4th day of Nov., 1949. (Signed) George Brookhyser (Seal) Survivor Susie (Seal)." The deed was recorded and there was evidence that it was delivered to Susie.

1.

We consider first appellants' contention that George lacked mental capacity to execute the deed. We cannot agree. There was evidence that while George was bedfast and was practically helpless physically, he was mentally alert, at the time he signed the deed. Before its execution, George made several requests for his friend,

L. E. Wiggins, a real estate dealer in Springdale, to come to his home and prepare the deed. When Wiggins came, George gave him an old deed from which to copy the description and other relevant information. Wiggins then returned to his office and prepared the deed. After a few days, Wiggins returned, George signed the deed and directed Wiggins to record it. A few days later, Wiggins recorded the deed and returned it to George who delivered it to Susie. Of some significance is the fact that George signed the deed "Survivor Susie" as indicating that he realized what he was doing, that he was perhaps near death, that Susie would probably survive him, and he wanted her to have this real estate.

While appellants offered testimony tending to contradict appellees, we cannot say, when all the evidence is considered, that the findings of the trial court were against the preponderance thereof.

On this issue of mental capacity, the governing rule has been many times announced by this court. In the comparatively recent case of *McKindley* v. *Humphrey,* 204 Ark. 333, 161 S. W. 2d 962, we said: "If the maker of a deed, will or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interests in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness whether produced by old age or through physical infirmities will not invalidate an instrument executed by him. (Citing cases.)"

2.

Next, appellants say that the acknowledgment on the deed is void and that the deed was of no effect and should be stricken from the deed records of Washington County. The answer to this contention is the well settled

rule that an unacknowledged deed is good between the parties. We said in *McSwain* v. *Criswell,* 213 Ark. 775, 213 S. W. 2d 383: "An unacknowledged deed is good between the parties. *Jackson* v. *Allen,* 30 Ark. 110. Hence, the allegation and testimony as to the irregularity of the acknowledgment are not of importance except as they may shed light on the real issue in the case, which is: Did M. O. McSwain, being of sound mind, execute the deed and bill of sale?"

3.

Appellants argue with considerable force that the deed here in question from George to George and Susie did not create an estate by the entirety and was in fact a nullity. We think this contention also untenable.

Act 86 of 1935 (Ark. Stats., 1947, § 50-413) provides that a deed executed by a married man directly to his wife shall be construed as conveying "the interest specified in the deed." The question is whether this statute permits a husband, already the owner of land, to create a tenancy by the entirety by a conveyance to himself and his wife.

In arguing that the statute does not permit this result the appellants rely principally upon *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125; *Weir* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435, and *Pegg* v. *Pegg,* 165 Mich. 228, 130 N. W. 617, 33 L. R. A., N. S. 166, which was cited in both these Arkansas cases. It is insisted that the language in the Stewart and Weir cases compels us to hold that here the effort to create an estate by the entirety must fail. We cannot agree.

In all three of these cases the husband undertook to create a tenancy by the entirety by conveying to his wife an undivided one-half interest in land already owned by him. Such a conveyance is evidently at complete variance with the common law conception of an estate by the entirety, since at common law the theory was that each spouse owned the entire estate and not a mere moiety. Indeed, the Michigan court stressed this point in the Pegg

case, and we quoted its language with approval. Thus this factor alone is sufficient to support the conclusion reached in these three cases.

But, say the appellants, the earlier cases also emphasized the common law requirement of the four unities of interest, time, title, and possession. All the unities were patently not present in the three cases under review, since the wife's undivided half interest could in no way be said to have been acquired at the same time as the half interest retained by her husband. By analogy it is now argued that here the unity of time is also lacking, for the reason that the husband cannot convey to himself and so could have acquired no new title by virtue of his own deed.

We cannot agree with this reasoning. A complete answer is given in what is now the leading case of In re *Klatzl's Estate,* 216 N. Y. 83, 110 N. E. 181. There a majority of the judges, BARTLETT, COLLIN, HISCOCK, and CARDOZO, agreed that under modern married women's property acts a husband may create a tenancy by the entirety by a conveyance to himself and his wife. The same argument as to the unity of time was presented there as here, but Judge COLLIN answered: "The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another."

The modern view taken by the New York cases has spread rapidly to other jurisdictions. See annotations in 62 A.L.R. 518, and 137 A.L.R. 350. Among the many favorable comments from leading students in the field is this excerpt from Tiffany on Real Property, (3d Ed.), § 432: "The view that a tenancy by the entirety may be created by the direct conveyance of the husband and wife of property owned by one of them to themselves as tenants by the entirety appeals as being logical and just. An estate by the entirety is one recognized by law and upheld with all its incidents, and ordinarly a conveyance to husband and wife creates such an estate. It is the policy of the law to accord to each spouse absolute free-

dom in dealing with separately owned property, and this freedom entails no interruption of the unity arising from marriage. Nevertheless, as a property owner the spouse is a legal person apart and distinct from the legal entity composed of husband and wife. If it were otherwise, a husband and his wife could not take as tenants in common. To permit the creation of the estate carries out the intention expressed in the conveyance, while to construe it as conveying the property to one spouse as sole grantee, or to both as joint tenants or as tenants in common, would be a judicial conveyance of the property contrary to the owner's expressed intention." We are in complete agreement with this reasoning and see no reason why the parties should not be able to do directly that which they could undoubtedly do indirectly through the device of a straw man.

Affirmed.

Mr. Justice McFaddin dissents.

Ed. F. McFaddin, Justice (Dissenting). My dissent goes to that portion of the majority opinion which holds that a husband, already owning the property, can create an entirety estate in such property by direct conveyance to himself and wife. In so holding, this Court has done violence to all of our previous cases on the subject; and these previous cases have become rules of property.

Those interested in the reasons for and incidents of estates by entirety may consult the following cases of this Court: *Robinson* v. *Eagle,* 29 Ark. 202; *Branch* v. *Polk,* 61 Ark. 388, 33 S. W. 424, 30 L. R. A. 324; *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690; *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; *Ryan* v. *Roop,* 214 Ark. 699, 217 S. W. 2d 916; *Weir* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435. There are other cases which are collected in West's Arkansas Digest, "Husband and Wife," § 14.

As essential to the creation of an estate by the entirety we have always held—until this present opinion—that "there must co-exist four unities, (1) unity of interest. (2) unity of title. (3) unity of time and (4) unity of possession." In *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125, we listed these unities and quoted further from 33 C. J. 907: " 'That is, each of the owners must have one and the same interest conveyed by the same act or instrument, to vest at one and the same time . . . and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole.' "

We have repeatedly held that the four unities—interest, title, time and possession—must be present before an estate by entirety could be created. Thus in *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618, we held that where a co-tenant owned an interest in the land and had all the other co-tenants convey the land to him and his wife, such conveyance by the other co-tenants did not create an estate by the entirety because there were not present the four unities essential to create such an estate.

Again in *Stewart* v. *Tucker,* 208 Ark. 616, 188 S. W. 2d 125, we held that an estate by entirety did not result from an agreement between a wife and her husband to the effect that the husband would continue to make payments on a contract made with his wife, and that the survivor as between the husband and wife would get the fee.

Finally, in the recent case of *Wier* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435, we held that the execution by husband and wife of a deed to themselves of land owned by the husband could not create an estate by entirety since the four essential unities, of interest, time, title and possession, were not present. Thus in a series of cases, we have held that an estate by entirety could not be created except when the title came to husband and wife by deed from a third person. Now—in the present case the majority is holding that the estate may be created by the husband—already the owner—conveying

to himself and his wife. Such holding overrules our previous cases.

In an attempt to avoid or explain away these previous cases, the majority opinion offers two arguments: first, the majority says that Act 86 of 1935 (now § 50-413 Ark. Stats.) allows the husband to convey directly to the wife, and that such act is applicable here. Act 86 of 1935 reads:

"Any deed of conveyance of real property located in this State, executed after the passage of this act, by a married man directly to his wife or by a married woman directly to her husband, shall be construed as conveying to the grantee named in such deed the entire interest of the grantor in the property conveyed, or the interest specified in the deed, as fully and to all intents and purposes as if the marital relation did not exist between the parties to such deed."

This Act, in allowing a husband to convey directly to his wife, does not change the *essentials* for the creation of an estate by the entirety, which essentials are the four unities. These do not exist when the conveyance is made direct from the husband, as owner, to himself and wife.

The same argument now used by the majority was stated and answered in the case of *Wier* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435, wherein this Court, without recorded dissent, said:

"In the briefs attention is called to Act 86 of 1935, now found in Sec. 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, 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."

Therefore, the argument of the majority based on Act 86 of 1935 was answered in *Wier* v. *Brigham.*

Secondly, the majority after trying to distinguish the case at bar from *Stewart* v. *Tucker, supra,* and *Wier* v. *Brigham, supra,* finally admits that this Court wants to take "the modern view." Here is the language of the opinion:

"The modern view taken by the New York cases has spread rapidly to other jurisdictions. (See Ann. 62 A. L. R. 518 and 137 A. L. R. 350.) Among the many favorable comments from leading students in the field is this excerpt from Tiffany on Real Property . . ."

Now this taking of "the modern view" fills me with great apprehension: for this Court is deliberately leaving our old holdings—*McGraw* v. *Berry, Stewart* v. *Tucker* and *Wier* v. *Brigham*—for "the modern view" taken by the New York cases. Our holdings—on the necessity of the existence of the four essentials to create an estate by the entirety—have become a rule of property in this state; and lawyers and laymen have conducted their dealings on the justified expectation that this rule of property would not be changed retrospectively. 54 C. J. 1110 defines a rule of property:

"A settled legal principle governing the ownership and devolution of property; the decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title. In the plural, those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto."

If the public should become dissatisfied with our rules of property and should want to adopt "the modern view", then the legislature can pass an Act stating that

from the effective date of such act, a conveyance direct from the husband to the husband and wife shall create an estate by entirety. Should the legislature enact such a law it would operate prospectively only. But when the Court overrules its previous holdings on property rights and adopts a "modern view", the effect is to change the law retrospectively. The effect of the new holding is to say that all the previous holdings were not the law, but mere heresies.

A classic example of the terrific injustices which can be done real estate titles by this Court changing rules of property is mirrored in *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215. Briefly that case involved this situation: for many years this Court held as reflected in *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, that if a reservation appeared in the *habendum* clause of the deed and was in conflict with the granting clause, then such reservation was void. But in *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, the Court overruled *Cole* v. *Collie* and the older cases and gave effect to a reservation which appeared only in the *habendum* clause of the deed even though in conflict with the granting clause. In other words, in *Beasley* v. *Shinn* the Court overruled the rule of property that had existed in *Cole* v. *Collie.*

Before the decision in *Beasley* v. *Shinn,* one of the most thorough title lawyers of this State examined an abstract in which was a deed that had a reservation only in the *habendum* clause; and the lawyer, in reliance on the opinion of this Court, wrote on the page of the abstract: "Under the authority of *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, our opinion is that the reservation is void." But in *Carter Oil Company* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215, we held that when in *Beasley* v. *Shinn* we overruled *Cole* v. *Collie,* then the old holdings became a mere heresy and we quoted from Blackstone's Commentaries:

"For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad* law, but that it *was not law*: that is,

that it is not the established custom of the realm, as has been previously determined."

Thus the opinion of a lawyer who had relied on our own cases became wrong through no fault of his. Such a situation is not one of which any court should boast. Yet the majority is doing the same thing in the case at bar. In *Wier* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435, we said:

"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, 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."

Now less than one year later, the majority in the case at bar is in effect overruling *Wier* v. *Brigham, Stewart* v. *Tucker* and all the previous cases on the point, and is adopting "the modern view". In the case of *Smith* v. *Allwright,* 321 U. S. 649, 88 L. Ed. 987, 64 S. Ct. 757, Mr. Justice Roberts in dissenting from a holding which overruled previous cases used this language, which is worthy of repetition:

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this

day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not be shortly repudiated and overruled by justices who deem they have new light on the subject. . . .

"It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."

If we make a habit of changing our rules of property with retrospective effect, then the quoted language may some day be applied to this Court. Heaven forbid! I feel so seriously on this matter of overruling cases involving rules of property that I register this dissent.

EADES *v.* JOSLIN.

4-9583 244 S. W. 2d 623

Opinion delivered November 26, 1951.

Rehearing denied January 21, 1952

A. R. Cheatham and *A. A. Thomason,* for appellant.

Keith & Clegg, for appellee.

ED. F. MCFADDIN, Justice. Appellee, as plaintiff, alleged that she was the owner and in possession of the 140 acres involved, and sought to have her title quieted. W. T. Eades was the common source of title and appellee claimed by purchase from his estate and his widow. The defendants were the heirs of W. T. Eades and, the grantees from such heirs. A trial in the Chancery Court resulted in a decree quieting the plaintiff's title and defendants (appellants) challenge the correctness of that decree.

I. *Equity Jurisdiction.* The appellants insist that the case should have been transferred to the law court. They claim that the plaintiff was not in possession when she filed the suit to quiet her title; and they cite and strongly rely on our cases which hold that a plaintiff may not maintain a suit in equity to quiet title against a defendant who is in possession of the property. Among such cases are: *Simmons* v. *Turner,* 171 Ark. 96, 283 S. W. 47; *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175; *Chaplin* v. *Holmes,* 27 Ark. 414; *Jackson* v. *Frazier,* 175 Ark. 421, 299 S. W. 738.

The general statement of law as announced in the cited cases is entirely correct; but a study of the pleadings and procedure in the case at bar shows that the aforementioned rule is not applicable. Here is the situation:

1. The complaint alleged that the plaintiff "is the owner and in possession" of the lands involved. Against that complaint the defendants twice filed a motion asserting that the defendants were in possession and that the cause should be transferred to law and treated as an action in ejectment. These motions were treated as demurrers; and the Chancery Court was correct in denying them at the stage of the proceedings and in the condition of the record, then existing. In *Earle* v. *Chatfield,* 81 Ark. 296, 99 S. W. 84, the complaint alleged that the plaintiff was in possession; the defendants by motion denied plaintiffs' possession and moved to transfer to law; the Chancery Court denied the motion to transfer; and this court on appeal said:

"The court did not err in overruling the motion to transfer to law. The complaint stated that plaintiff was in possession of the land, set up his title, and asked to have same quieted. This gave the chancery court jurisdiction. *Lawrence* v. *Zimpleman,* 37 Ark. 645. The court must look to the allegations of the complaint, *in limine,* to ascertain whether it had jurisdiction. The complaint did not affirmatively show that the defendants were in possession, as alleged in the motion to transfer. The chancery court did not lose its jurisdiction because defendants moved to transfer to law, alleging that they were in possession."

2. After the said motion to transfer had been overruled the defendants jointly filed a "Substituted and Amended Answer" in which they (a) denied the allegations of the complaint, (b) pleaded limitations under § 37-101, Ark. Stats., (c) pleaded the one year nonsuit statute under § 37-222, Ark. Stats., and (d) pleaded laches and estoppel. Not only was there no mention in the pleading that the case should be transferred to law: on the contrary, the plea of laches presented a defense cognizable only in equity. See *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. 2d 847, and *Waits* v. *Moore,* 89 Ark. 19, 115 S. W. 931. Thus, the defendants waived any right to trial at law because they failed to make such claim in

a seasonable manner, and also because they pleaded defenses exclusively equitable.

II. *Adverse Possession.* The legal title was in the plaintiff. The defendants relied strongly on their claim of seven years adverse possession—*i. e.,* § 37-101, Ark. Stats. This suit was filed on July 28, 1949, and it was shown that the plaintiff rented the land to Hosea Dread and that he occupied it as tenant of the plaintiff for the year 1942. Such occupancy by plaintiff's tenant in 1942 prevented the defendants from having had seven years possession prior to the filing of the suit. The Chancellor, in his opinion, thus stated the issue:

"The proof shows that the record title to the lands involved is in the plaintiff. The defendants' claim of title to the lands involved in the suit is based almost entirely upon a claim of adverse possession. To sustain the claim of adverse possession the burden of proving adverse possession rests with the defendants, and the court is of the opinion and finds that the defendants have not discharged this burden."

A careful study of the record fails to disclose that the Chancellor's finding is against the preponderance of the evidence on this issue of adverse possession.

III. *Laches.* The defendants claim that the plaintiff should have brought this suit before the land became valuable for oil. The Chancery Court disposed of the plea of laches in this language:

"In order to attempt to defeat the claim of plaintiff to the lands in controversy, the defendants also raise the question of laches against the plaintiff's claim. The court is of the opinion and finds that the defense of laches has no application to the facts in this case."

Without reviewing the evidence in detail it is sufficient to say that we agree with the Chancery Court: the plaintiff's title was of record; the Eades were depending on adverse possession; until their possession had ripened into title they had no title to lease or sell. We

find no facts sufficient to make laches applicable as a defense in this case.

IV. *Nonsuit Statute.* In 1939 the appellee brought suit to quiet her title to one 40-acre tract; took a voluntary nonsuit in 1940; and filed no suit thereafter until the present one, in 1949. Based on these facts, appellants plead the one year nonsuit statute (§ 37-222, Ark. Stats.) as a bar to the present suit. The case of *Mitchell* v. *Fed. Land Bank,* 206 Ark. 253, 174 S. W. 2d 671, decides this question against the appellants; because they are here seeking to invoke the one year nonsuit statute to shorten the plaintiff's rights, and such is not its purpose. The plaintiff could have brought suit to quiet title at any time before the defendants acquired title by adverse possession. In *Love* v. *Cahn,* 93 Ark. 215, 124 S. W. 259 we said of our nonsuit statute:

"But the statute (Kirby's[1] Digest, § 5083) which tolls the statute of limitation for one year where the plaintiff suffers a nonsuit does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitation applicable to such claim. This provision of the statute only applies to those causes of action which, under the general statute of limitation applicable to such cause of action, would otherwise be barred before the running of one year from the time of taking such nonsuit. The statute, instead of shortening the period of limitation, really extends the period provided by the general statute of limitation applicable to the cause of action."

Finding no error the decree of the Chancery Court is in all things affirmed.

[1] This is now § 37-222 Ark. Stats.

HOUSTON *v.* FIRST BAPTIST CHURCH OF CLARKSVILLE.

4-9618 242 S. W. 2d 966

Opinion delivered December 3, 1951.

Linus A. Williams, for appellant.

G. O. Patterson, J. H. Brock and *Hays, Williams & Gardner,* for appellee.

HOLT, J. Appellee, First Baptist Church, by its trustees, brought this action to quiet alleged title to a small parcel of land in Clarksville, Arkansas, deeded to it by Mrs. S. E. C. Rogers on May 30, 1894. Mrs. Rogers died many years ago and appellants "are, so far as known," her "sole and only heirs."

The material facts appear not to be in dispute.

The above deed contained the following provisions: "This deed made and executed at the town of Clarksville, Johnson County, Arkansas, on this 30th day of May, 1894, by and between S. E. C. Rogers, of the first part and A. M. Sharyer, T. J. Lax and A. M. McLane, Trustees of the Baptist Church of Clarksville, Arkansas, aforesaid of the second part: WITNESSETH: That the said S. E. C. Rogers, party of the first part, for and in consideration of the sum of five dollars cash in hand paid by the parties of the second part and in further consideration of

her desire to promote the upbuilding and welfare of the Baptist Church at Clarksville, hath given, granted, bargained, and sold, and doth hereby give, grant, bargain, sell and convey unto the said A. M. Sharyer, T. J. Lax and A. M. McLane, Trustees of said Church and their successors the following real property situate in said town of Clarksville: Whereon to erect a church edifice, to-wit: (Describing it).

"To have and to hold the same to the use and behalf of the said A. M. Sharyer, T. J. Lax and A. M. McLane, Trustees of the said Baptist Church at Clarksville and their successors, so long as the same may be used by said church for the location of a church edifice or for other church purposes, and no longer, and in the event said church becomes disorganized or fails to use said property for strictly church purposes as above stated, the same to revert to and revert in the said S. E. C. Rogers and her heirs."

It is conceded that appellee erected a church on the deeded land and used it for church purposes for about fifty years, and that it now seeks to sell and dispose of the property and use the proceeds from the sale in procuring property at a more desirable location.

The trial court found that appellee, Church, had good title to the property by virtue of the above deed and should have title thereto quieted and established, and entered a decree accordingly. This appeal followed.

Appellee says: "We shall present appellee's argument on the basis of the intention of the parties and shall not seek to have it declared a fee simple on condition precedent or condition subsequent, nor yet, a determinable fee, arguing merely that the church has long ago fulfilled and satisfied the covenant entered into and the condition imposed by the deed and that the property decribed in the original deed should now be declared the absolute property of the First Baptist Church of Clarksville so that either the property or the proceeds from a sale of the property might be used by that Church in advancing the purpose expressed in the deed of the orig-

inal grantor—that of promoting the up-building and the welfare of the First Baptist Church of Clarksville."

The decree recited in part: "The court further finds that in the erection and continuous and present use and maintenance of the church building on said lands for more than fifty years the fee simple title to the land described in said deed is vested in the Plaintiff, First Baptist Church of Clarksville, Arkansas, and that the said church is entitled to have its title thereto quieted against defendants and all other persons as provided by law. * * *

"It is therefore by the Court considered, ordered, adjudged and decreed that the First Baptist Church of Clarksville, Arkansas, and its trustees and their successors in office are the owners in fee simple of the following described land situated in the town of Clarksville, Arkansas, Johnson County, to-wit:

" 'A lot or parcel of ground described as follows: Beginning at a point ascertained by commencing at a cedar cased post in the center of alley running north from the public square in said town at the southwest corner of the SW¼ of the SE¼ of section 32, in Twp. 10 North, Range 23 West, and running north 48 feet and three inches and thence east ten feet and bounded by line running from that point north sixty feet thence east forty feet, thence south sixty feet and from thence west forty feet to the point of beginning,' and that the title of the plaintiffs, the said land and every part thereof, is confirmed and quieted in said plaintiffs.

"It is further by the Court considered, ordered, adjudged and decreed that any and all rights, claim or interest the defendants or either of them may or might have or claim as heirs at law of S. E. C. Rogers, deceased, are cut off and forever barred."

The court erred.

When we construe the provisions of the deed here from its four corners, as we must, to determine the inten-

tion of the parties, from the language used, and giving effect to that intention, we hold that a determinable fee estate was created. In other words, there was obviously, we think, no intention to convey title in fee, but only to grant a specific use of the property involved just so long as it was used for church purposes and no longer. When such use ceased, as here, the deed twice directed in no uncertain terms that the property would revert to the grantor or her heirs.

We said in the recent case of *Coffelt* v. *Decatur School District No. 17,* 212 Ark. 743, 208 S. W. 2d 1, in a similar situation: "There was no intention to convey the fee title, but only to grant a particular or specific use of the property, forever possibly, but forever in the event only that it continued to be used for school purposes and was granted only for the period of time it was so used."

We think it would be difficult to employ clearer language than was used in the deed here to express the intention of the parties. In the granting clause, the grantor "doth hereby give, grant, bargain, sell and convey unto the said * * *, Trustees of said Church, and their successors," the property, not forever, but "to have and to hold the same to the use and behalf of the said * * * Trustees * * * and their successors so long as the same may be used by said church, for the location of a church edifice or for other church purposes, and no longer, and in the event said church * * * fails to use said property for strictly church purposes as above stated, the same to revert to, and revert in, the said S. E. C. Rogers and her heirs."

We also said in the Coffelt-Decatur School District case above, quoting with approval from Tiffany on Real Property, 3rd Ed., Vol. 1, § 220 (p. 745): "So when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purpose only, and that, on the cessation of such use, the estate shall end, without any reëntry by the grantor, an

estate of the kind now under consideration (determinable fee) is created."

Accordingly, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

LOGAN *v.* MOODY.

4-9628 244 S. W. 2d 499

Opinion delivered December 10, 1951.

Rehearing denied January 14, 1952

Ponder & Lingo, Cunningham & Cunningham and *S. M. Bone,* for appellant.

Hout & Thaxton and *Ben B. Williamson,* for appellee.

Ed. F. McFaddin, Justice. This is the second appeal in this case, which is a contest over the Democratic nomination for County Judge of Lawrence County. For the opinion on the first appeal, see *Moody* v. *Logan,* 217 Ark. 859, 233 S. W. 2d 548. Upon the remand of the cause there was a second trial, which resulted in a finding and judgment that Moody received a majority of 21 votes. Logan now appeals, and Moody has cross-appealed. Presented, *inter alia,* are the assignments herein discussed.

I. *Appellant's Effort to Introduce Testimony After the Case Had Been Closed.* On the second trial the Circuit Judge conducted a most thorough trial. The contestant was permitted to add other names to his list of challenges. The contestee filed a cross-complaint, alleging irregularities and listing challenged votes. Then both sides were fully informed as to the trial Court's rules of procedure. With hundreds of votes challenged on each side and with more than two hundred witnesses actually testifying, the trial was naturally quite extended. It commenced on January 15, 1951; frequent recesses were taken for the convenience of the litigants and attorneys; and the trial was not concluded until February 22, 1951.

Even with such extended hearings, the appellant now insists that he should have been allowed to offer some further rebuttal testimony. But a study of the 800-page transcript and the scores of exhibits, convinces us that each side had ample time to develop the case. At all events, we cannot say that the trial Court abused sound judicial discretion in finally bringing the hearing to a conclusion.

II. *Absentee Ballots.* Several hundred persons voted absentee ballots; and Moody moved the Court to exclude all of these ballots. The motion was not granted entirely, but was granted as to 147 of the absentee ballots; and this ruling of the Court, in excluding the ballots, presents a most serious question. Act 325 of 1949 prescribes the procedure in absentee voting. In the case at bar the application form, as prescribed by the statute, was used by persons desiring absentee ballots; and such ballots were returned and counted. But the County Clerk failed to mark, on 147 of such applications, the date each was received by the Clerk; and because of such failure the Circuit Court refused to count any of the 147 ballots so cast. In ruling on this point, the Circuit Judge stated:

"These applications are a part of the record and are exhibits in the case. There is no filing mark on any of these 147 applications; and there is no way whatsoever to show when the applications were executed and returned to the county clerk. This might not seem to be important if it were not for the fact that paragraph 'C' of Section 1 of Act 325 placed a time limit on the delivery of said applications to the county clerk. It says the application must be delivered to the office of the county clerk not later than 1:30 p. m. on the day of the election; and the provision is made that if it is mailed in it must be in the office of the county clerk at least one day before the election. Certainly time is of the essence of this section. The Court believes it to be the law that when a certain thing is required to be done within a given time, that time becomes of the essence of the transaction. It is obvious from the reading of this section of Act 325 that the intention of the Legislature was to fix an absolute

time limit upon a voter making application for absentee ballots. It is incumbent upon the county clerk; in fact, it is made his duty under this law to file these applications and to keep an accurate record of the filing of the applications showing both the time of day that it was filed as well as the day of the month. Of course, it might be argued that this is not any omission on the part of the voter casting his ballot; but certainly we must know what time these applications were filed, because without this knowledge there would be no way of determining whether or not the Act had been complied with. If this provision of Act 325 means anything, it means that they must be filed within the time prescribed by law. The Court cannot assume that these applications were filed by 1:30 on the day of the election for those people who voted in person; neither can the Court assume that those that were sent in by mail were filed within the time required by law. It is impossible to ascertain when any of these 147 applications in question were filed. It is impossible to determine whether any of them were filed either in person by 1:30 on the day of the election, or one day before the election in cases of those that were mailed in. The Court believes that if there is not some way to fix the time of filing applications, that absentee voting would be thrown open to a great number of irregularities and fraud which Act 325 seeks to prevent. . . . For the reasons set out, the Court believes that the ballots cast which were procured through these 147 applications should be thrown out and disregarded and the vote established in other ways as provided by law.'"[1]

Act 325 of 1949 has not been before this court in any previous case, and the trial Court was therefore without any holding to serve as a guide in construing the Act. But a careful study convinces us that the trial Court erred in the ruling here involved. The only defect here

[1] After the court's ruling as above quoted Logan's attorney had the record show the following: "If permitted to do so, Frank Andrews, who was the duly qualified and acting county clerk of Lawrence County, Arkansas, during the year 1950, is present and would testify that he accepted the applications, which have been filed here, for the absentee voters, in his office, by himself and his deputy, Gertrude Bush; that none of these applications were received more than 15 days

claimed, in the entire procedure of obtaining and returning the absentee ballot, was the failure of the Clerk to place on the application for the ballot the date such application was received in the Clerk's office. It is true that such date should have been placed on the application in order that it would affirmatively appear that Act 325 had been obeyed.

But, should the failure of the Clerk to perform his duty in this one particular result in the disfranchisement of the voter? In *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257, in upholding the validity of a poll tax receipt issued by an officer who did not comply with the then existing requirement that the receipt be written in ink, we said:

"To hold that one who had complied with the law by regular payment of the tax, but who becomes the victim of a careless, a designing, or an uninformed collector or deputy, would have the effect of completely disregarding the primary qualification of an elector, which, as has been shown, is the *actual timely payment of the tax.*"

In *Blackard* v. *Kolb,* 212 Ark. 332, 205 S. W. 2d 857, the Sheriff had failed to stamp on the back of the poll tax receipt certain language required by the statute there involved. Even so we held the poll tax receipt to be valid saying: ". . . such omission by the officer could not defeat the elector's right of suffrage." The underlying reasoning of these cases is applicable here. After the election, the voter, if otherwise qualified, should not be disfranchised merely because of the failure of the County Clerk to have placed on the application for absentee ballot the date such application was filed in his office. This one omission of the County Clerk, in the absence of any

before August 8, 1950, and none of them later than 1:30 p. m. on August 8, 1950; that he accepted the applications and listed them as required by Act 325 of 1949; and that none of these by mail were accepted later than 1:30 p. m. on the date prior to the date of the primary; that he made a list and kept all the applications so left with him; that he would further state that some were stamped filed and others were not marked filed simply by oversight. That would be the testimony of Mr. Frank Andrews if permitted to testify." The foregoing was a portion of the rebuttal testimony which was excluded by the court as referred to in Topic I, *supra.* We mention this excluded testimony for information purposes only.

other claim seeking to invalidate the ballot, is not sufficient to disfranchise the voter.

So we reverse the ruling of the Circuit Court on this matter of the 147 absentee ballots. In one place in the record it appears that 147 ballots were involved; in another place the figure 144 is used. Elsewhere in the record it appears that some of the 147 voters were challenged on other grounds in addition to the one here discussed. In some instances, the other grounds of challenge were not developed because of the ruling excluding the absentee ballots. So this angle of the case—that is regarding each of the 147 absentee ballots held illegal because of the application irregularities just discussed—is remanded to the Circuit Court to give each party an opportunity to prove any other heretofore alleged invalidity on any of the 147 ballots. The Circuit Court will then tabulate the result as may be affected by the proof so developed.

III. *Ruling on Other Voters Who Used Absentee Ballots.* We affirm the ruling of the trial court in excluding the ballots of W. R. Cunningham, Frieda Cunningham, Mrs. R. B. Warner, Frank Zalaker and Charles Ratliff. The trial court held as a fact that none of these persons made application for absentee ballot prior to voting. The determination of this factual question is affirmed under the authority of *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024, and the other cases[2] which hold that in an election contest the findings of fact of the Circuit Court on conflicting evidence are as conclusive as a jury verdict. The trial Court found, as a fact, that none of these persons complied with the provisions of Act 325 of 1949.

IV. *Maiden Voters and Voters Who Paid Poll Tax in Another County.* The ballots of four maiden voters[3] should have been excluded because no affidavit was attached to each ballot showing such voter to be a maiden voter. By the same token, the Court was in error in

[2] These cases are collected in West's Arkansas Digest "Elections," key number 305.

[3] These were Bill Crabtree, Mrs. Rhea Starr, Dwight Creech and Mrs. Fred Dobbs.

holding as legal the ballots of 13 voters,[4] each of whom had paid a poll tax in some other county, and then moved to Lawrence County and resided there for at least six months prior to the election. Obviously, the name of none of these 13 voters was on the official list of voters of Lawrence County. Yet each was permitted to vote without filing with the election judges the original or certified copy of the poll tax receipt of such voter. In the main the procedure was that when each such voter appeared at the polls the election judges, being personally acquainted with the voter's qualifications, allowed such person to vote without requiring compliance with the law.

Section 3-227, Ark. Stats., comes to us from Initiated Act No. 1 of 1916 known as the Brundidge Primary Law. This section says in part:

"In any contest arising upon any election held under this Act, it shall be a ground of rejection of any ballot cast by an elector, whose name (a) does not appear upon the certified list of poll tax payers; or (b) who has not filed with the judges of election his original or certified copy of poll tax receipt, or written affidavit of the attainment of his majority; or (c) if such original or certified copy of such poll tax receipt or written affidavit has not been returned by the judges of election; or (d) the name of such person listed separately and certified as required by this Act."

This same quoted provision was a part of § 3777, C. & M. Digest, and was before this court in the case of *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74, which case has become a landmark in election contest matters. Mr. Justice McHaney, speaking for the court in that case, said:

"It is next contended that the court erred in holding five voters from other counties not qualified because they failed to file with the judges of election their poll tax

[4] They were Boyd Holloway, Mrs. M. J. Hill, J. C. Dawson, Tom Hutson, John Jones, Frank Weslouski, I. E. Sneed, Mrs. I. E. Sneed. Joe Robinson, Mrs. Clifford Rorex, Nolen Caldwell, Charles Post and Marvin Jean.

receipts, or certified copies thereof, or that the judges of election failed to return such evidence of qualification with the ballots. It was agreed that these persons had all the qualifications of electors in the counties from which they moved, and in Little River County, and in the precinct where they resided. But, having paid their poll tax in other counties, they did not appear on the official printed list of taxpayers, and it therefore became necessary for them to follow the provisions of the statute in order to be entitled to vote. Section 3777, C. & M. Digest. Since the same rules of law would apply to such voters as would to persons who had become twenty-one years of age since the last assessing time at which they could have assessed and been on the list, after twenty-one, raised by appellants' assignment No. 9, we will discuss the two together. Twenty-one votes for Taaffe and 17 for Collins were thrown out by the court, of persons voting who had become twenty-one years of age within such time. We hold that there was no error in so doing, as the exact question is decided adversely to appellants' contention in *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686; *Craig* v. *Sims,* 160 Ark. 267, 255 S. W. 1; *Storey* v. *Looney,* 165 Ark. 455, 265 S. W. 51; *Wilson* v. *Danley,* 165 Ark. 565, 265 S. W. 358; and in the three CarlLee cases."

Appellee says that certain language in the case of *Wilson* v. *Luck,* 203 Ark. 377, 156 S. W. 2d 795, in effect overruled the quoted language from *Taaffe* v. *Sanderson.* The language from *Wilson* v. *Luck* so relied upon by the appellee, is:

"We know, as a practical matter, that very few electors actually exhibit their poll tax receipts when they vote. When the elector is otherwise qualified, and has paid his poll tax, he has the right to presume that his name appears on the published list, and if his right to vote is not questioned he will not be required to attach his poll tax receipt to his ballot. If his right to vote is questioned, and it may be if his name does not appear on the printed list, then he must comply with the statute and furnish the evidence of his right to vote required by law." But a study of *Wilson* v. *Luck* shows that such quoted

language has no application to maiden voters or to voters who paid poll tax in other counties. In *Wilson* v. *Luck* the court was dealing with a situation where a voter, all the time a resident of Hempstead County, had paid his poll tax in that county, but his name did not appear on the official list. The court said that in such instances the voter "had the right to presume that his name appears on the published list, and if his right to vote is not questioned he will not be required to attach his poll tax receipt to his ballot." Nothing in *Wilson* v. *Luck* changed the holding of *Taaffe* v. *Sanderson* as quoted herein.

Under the authority of *Taaffe* v. *Sanderson,* and the cases cited therein, we hold that the trial court erred in including as valid the ballots of 13 voters, each of whom had paid a poll tax in some other county and who did not comply with the previously quoted provisions of § 3-227, Ark. Stats., by attaching to his ballot the original or certified copy of his poll tax receipt from such other county. Without meticulously checking all the transcript, we are not positive for which of the parties each of the 13 voters cast his ballot; but, since the cause is remanded on other points, then the trial court will exclude these 13 ballots in recasting the results.

V. *Other Rulings Challenged by Appellant.* (a) Appellant challenges the ballots of 7[5] voters held good by the Court. In each instance the challenged voter had a Lawrence County poll tax receipt and the Court found from the evidence that the voter was a resident of Lawrence County although temporarily working or visiting in another county, or in a township other than the one of his residence. In each instance a fact situation was presented as to the intention of the voter to maintain the home and voting place he claimed. We cannot say that the Court was in error on the factual findings regarding such voters, so the ruling is affirmed on each of the 7.

[5] These seven are W. A. Guthrie, Mrs. W. A. Guthrie, Oscar Haney, E. I. Sneed, Mrs. E. I. Sneed, J. C. Padgett, Staton Shockley.

(b) The ruling of the Court, holding certain other votes[6] to be legal, is challenged by appellant for various reasons. To give the details about each challenged vote would unduly prolong this opinion. The Court's ruling on each of these votes involved a factual finding on conflicting evidence. From the record we cannot say that there was no substantial evidence to sustain the Court's ruling, so we affirm as to each of such votes under the holding of *Williams* v. *Buchanan, supra.*

VI. *Boas Township.* Section 3-801, Ark. Stats., comes to us from § 6 of Act 30 of 1891. Under the authority of that Act the Lawrence County Board of Election Commissioners by order of July 10, 1926, duly divided Boas Township in Lawrence County into two distinct and separate voting *precincts,* to be known respectively as "Boas-North" and "Boas-South." The division order contained a definite designation of boundaries and of voting places, and was duly filed with the Clerk of the County Court and recorded as required by law. Thus, since 1926 two separate and distinct precincts have existed being "Boas-North" and "Boas-South." Notwithstanding this fact, some of the voters in Boas-North voted in Boas-South, and *vice versa.*

Ballots of twenty-five voters, challenged by the appellant as having voted in the wrong precinct, were held good by the Circuit Court. This holding was on the theory that over a long period of time the voters had considered the two voting precincts to be in effect but one precinct containing two voting boxes, merely for the convenience of the voters. In effect the Court held that custom and usage were sufficient to override the clear wording of the said order of 1926 which established two distinct precincts. In appellee's brief it is claimed that under the authority of § 3-232, Ark. Stats., the Democratic County Central Committee had power to set up additional boxes in a precinct, and that the two precincts

[6] Some of those casting votes were Mrs. J. N. Parks, Alfred Waggoner, Kenneth Guthrie, Joe Robinson, E. E. Wheat, Sloan Rainwater, Jr., William Rainwater, Mr. T. W. Bennett, Mrs. T. W. Bennett, and Dutch Green.

here involved might easily be considered as being two boxes in one precinct.

Notwithstanding all such argument, the fact remains that the County Election Commissioners of Lawrence County, by order of July 10, 1926, established two distinct and separate precincts and these precincts continue because the order is not shown to have been changed. Continued violation of the order does not change it. In *Wilson* v. *Luck,* 203 Ark. 377, 156 S. W. 2d 795, there was presented the question of voters voting in the wrong township, and Mr. Justice FRANK G. SMITH, after referring to Art. 3, § 1 of the Constitution, said:

"This requirement, as to residence, is, of course, mandatory, and requires the elector to vote in the precinct or ward in which he had resided for one month next preceding the election, and not elsewhere. No consideration of the convenience of the elector or any practice in which he may have been permitted to indulge can abrogate and render nugatory this mandatory provision of the Constitution."

The quoted language is clearly in point, and requires a holding that no voter in Boas-North could vote in Boas-South, or *vice-versa.* Therefore the ruling of the trial Court on this point is reversed; and on remand the Court will allow either side to introduce evidence on any voters heretofore challenged in either of these two precincts for voting in the wrong precinct. The Circuit Court will then tabulate the result after making the findings from the evidence presented.

VII. *Appellee's Cross-Complaint.* The trial Court made several rulings with which the appellee did not agree, but no motion for new trial was filed by appellee in the trial court. After the appellant had filed his appeal in this court, the appellee prayed a cross-appeal, which was granted under authority of § 27-2137, Ark. Stats.; and appellee now urges certain matters in such cross-appeal. One point relates to the conduct of the judges and clerks in counting the absentee ballots; another relates to the conduct of one of the judges in Ward 3 of

Campbell Township; another relates to the ruling of the Court on certain challenged votes; and the final points relate to the rulings of the Court in regard to filing of pleadings during the course of the trial. We hold against appellee on his cross-appeal. Some of the Justices making this opinion hold that the points in the cross-appeal cannot be considered because appellee failed to file a Motion for New Trial in the Circuit Court. Such Justices reason: (a) that none of appellee's assignments relates to matters that appear on the face of the record; and (b) that in a law case, as here, unless an appellee files a motion for new trial in the lower court, then his cross-appeal presents for consideration only those matters that appear on the face of the record. *St. L. S. W. Rd. Co.* v. *Alverson,* 168 Ark. 662, 271 S. W. 27; *Stacy* v. *Edwards,* 178 Ark. 911, 12 S. W. 2d 901; *Equitable L. A. Soc.* v. *Barton,* 192 Ark. 984, 96 S. W. 2d 480; *Aetna L. I. Co.* v. *Martin,* 192 Ark. 860, 96 S. W. 2d 327, and *School Dist.* v. *School Dist.,* 214 Ark. 514, 216 S. W. 2d 882. Other Justices making this opinion have studied the assignments in appellee's cross-appeal and find them to be without merit. The result of such composite views is, that the court holds against appellee on all matters urged in his cross-appeal.

Conclusion. Because of the ruling of the Court on the application for absentee ballots, as discussed in Topic II, *supra;* because of the ruling of the Court on voters moving into Lawrence County, who paid poll tax in other counties as discussed in Topic IV, *supra;* and because of the ruling of the Court on the Boas voters, as discussed in Topic VI, *supra;* the judgment of the Circuit Court is reversed, and the cause is remanded for further trial on these matters only. The Circuit Court will then recast the results in the light of the previous trial and the limited trial on these three points. The costs of this appeal will be taxed by the trial Court against the losing party as finally determined.

Mr. Justice WARD not participating

OZAN LUMBER COMPANY *v.* PRICE.

4-9624 244 S. W. 2d 486

Opinion delivered December 10, 1951.

Rehearing denied January 14, 1952

Tompkins, McKenzie & McRae, for appellant.

P. L. Smith, for appellee.

HOLT, J. Appellee, Charlie Price, brought this suit against appellant in the Pike Circuit Court. He alleged in his complaint "that on the 1st day of August, 1948, the plaintiff entered into a verbal agreement with the Ozan Lumber Company by which they sold him all of their hardwood timber on lands in Pike County, north of Highway 26, beginning at the Antoine River Bridge at Antoine, Arkansas, going with the north and east side of Highway 26 to where the Shawmutt Road intersects the said Highway 26 at a point near Delight, Arkansas, and thence up the Shawmutt Road to the Antoine River at Shawmutt, Arkansas, thence down the said river to the said point of beginning; * * * that under the terms of

the said agreement, the plaintiff was to pay the defendant, the Ozan Lumber Company, a price of $5.00 per thousand, payable as he cut and sold the said timber."

He further alleged, in effect, that he performed his part of the oral contract until July 24, 1950, when appellant refused to permit him to cut any more of the timber and thereby breached the contract. Appellee sought damages.

Appellant answered with a general denial. A jury trial resulted in a verdict for appellee in the amount of $1,000, and from the judgment is this appeal.

For reversal, appellant earnestly contends that "the alleged contract upon which this suit is based is within the statute of frauds (Ark. Stats. 1947, § 38-101) and unenforceable, and that this is especially true where, as here, the action is one at law for damages for breach of contract."

Appellee, on the other hand, argues that appellant failed to plead the statute of frauds as a defense and therefore waived it, and further that there was sufficient part performance to take the case out of the statute. He says: "We think that the statute of frauds must be pleaded and since appellant does not plead the statute, it has no right to rely upon it. Even if appellant had plead the statute of frauds, we think this case is taken out of the statute by the taking of possession, and immediately beginning the performance of the contract."

The record shows that the timber land involved here, —7,600 acres,—is scattered over an area approximately nine miles long and five miles wide, or about forty-five square miles. A large number of these tracts do not touch any other tract. Appellee was equipped with a wagon and team, a cross-cut saw and two helpers, his son and a nephew. He testified that on August 1, 1948, he entered into an oral contract with appellant to purchase all of the hardwood timber on this land for $5.00 per thousand feet, to be paid as the timber was cut. No dimensions were specified and no time limit fixed between the above date

and July 24, 1950. Appellee cut and removed 243,053 feet of the timber from 1,100 acres of the area and paid $5.00 per thousand as it was cut. He did not do any cutting on the remaining 6,500 acres. During this time, appellee was absent from Arkansas for about two months and made a crop each year. At the time of the alleged contract, appellee did not know the number of acres appellant owned in the area nor the number of acres upon which he purchased timber.

In the circumstances, we hold that the oral contract here falls within the statute of frauds, is unenforceable, and that the statute, while not affirmatively pleaded, was sufficiently pleaded. As indicated, appellee alleged an oral contract for the sale of timber and sought damages for alleged breach. The answer was a general denial which, in effect, denied the existence of the contract and the burden then fell on appellee to prove a valid contract.

This court said in *O'Bryan* v. *Zuber,* 168 Ark. 613, 271 S. W. 347: "In *Standford* v. *Sager,* 141 Ark. 458, 217 S. W. 458, we said: 'Where a defendant in his answer denies making the contract which plaintiff declares on and seeks to have specifically performed, it is not necessary in such case for the defendant to specifically plead the statute of frauds, for the reason that it devolved upon the plaintiff to show that he had a valid contract as alleged.' We cited the cases of *Wynne* v. *Garland,* 19 Ark. 23, and *Trapnall's Admr.* v. *Brown,* 19 Ark. 39. In the latter case we held, quoting syllabus: 'Where the defendant denies the agreement or contract relative to the real estate alleged in the bill, it is not necessary for him to insist in his answer upon the statute of frauds as a bar.' "

This holding appears to be in accord with the great weight of authority. "According to the weight of authority, a defendant who pleads a general denial to a complaint or petition based on a contract within the statute of frauds may avail himself of the benefit of the statute by insisting upon its protection at the trial. A general denial is, in other words, sufficient to raise the issue of the statute of frauds. This indeed is probably the most

frequent method in this country of raising the defense of the statute." 49 Am. Jur., § 608, p. 915.

It is generally well established that part performance is an equitable defense and may be shown only in equity, or in a law case, as a license for possession. This court said in *Anthony* v. *Hunt,* 31 Ark. 481: "The fact that possession was taken under the alleged contract did not alter the case, so that such parol evidence might have been admitted, because such part performance can only be shown in equity, or at law, as a license for entry, etc."

Also our rule is well established that it is necessary that the part performance relied upon be referable to the contract. In the recent case of *Rolfe* v. *Johnson,* 217 Ark. 14, 228 S. W. 2d 482, we said: "We have also held that before delivery of possession of the land to the vendee under an oral contract of purchase will take the contract out of the operation of the statute, such possession must be taken under the contract and pursuant to its provisions. *Moore* v. *Gordon,* 44 Ark. 334; *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 164, 9 Ann. Cas. 131. See, also, article in 1 Ark. Law Review 269."

We have also held that in order to take the contract out of the statute, the purchaser must "have the exclusive, open and visible possession of the land on which the timber was situated," *Carnahan* v. *Terrall Brothers,* 137 Ark. 407, 209 S. W. 64 (headnote 3).

In the present case, the part performance relied on is not referable to the contract here in question. Appellee's entry on, and cutting of timber over a period of about two years, on only 1,100 acres of a 7,600-acre area of scattered tracts, does not show that the actual contract was for the purchase of 7,600 acres of timber.

Accordingly, the judgment is reversed and the cause dismissed.

MILLWEE, J., dissents.

4-9617 244 S. W. 2d 141

Opinion delivered December 17, 1951.

Gaughan, McClellan & Gaughan, for appellant.

Guy B. Reeves and *Royce Weisenberger,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a decree that certain corporation assets should be subjected to the payment of debts pro rata in contradistinction from pleas by the lenders of money that their mortgage on certain property created a priority.

Until a receiver was appointed in the cases presently to be discussed, L. Earl Powell, Jr., conducted an automobile agency at Hope. He also maintained a shop for repairs and kept a supplies department. Although incorporated in 1948 with a minimum of three shareholders, the business was—with but few exceptions—treated by Powell as though he personally owned it. Of an authorized 500 shares of stock 101 were issued. Powell took 99 shares, his wife received one, and a third certificate went to a non-active owner who does not feature in the litigation.

In August, 1949, W. W. Yeager and his wife, Mary B., loaned Powell $5,500, payable October 15th of that year with interest at ten percent from maturity. To secure the debt Powell executed a mortgage pledging "the entire parts stock and accessories of the Powell Nash Motors." The mortgage, written by Mrs. Yeager, was not filed in Hempstead county until February 24, 1950—nearly four months after due date of the note; and then it was not recorded. Other than mention of Powell Nash Motors there was nothing to indicate that either the note or the mortgage was a corporation obligation. Prior to September, 1948, the business had been a partnership and was operated under the same name.

On March 15, 1950, the Yeagers sued Powell and the corporation, charging that none of the principal or interest had been paid. They alleged that the money advanced was for use of the business headed by Powell. There was an averment that the nature of the mortgaged property was such that it might easily be lost, destroyed, or stolen, hence the plaintiffs petitioned that a receiver be appointed to take charge of the parts and accessories. Office equipment, shop machinery, and other things of value not included in the mortgage were in the same building with the parts and accessories, and the mortgagees no doubt felt that without a receiver their interests would be insecure.

Although the foreclosure complaint and petition for a receiver were filed in Hempstead Chancery Court during vacation, Powell immediately accompanied W. W.

Yeager to Prescott in Nevada county, entered his appearance, consented that a judgment on the note should be rendered, with decree of foreclosure, and understood that Talbot Field, Jr., had been appointed receiver.

It is admitted that before the August loan of $5,500 was made, Powell had borrowed $1,000 from the Yeagers and had executed a mortgage on a 1948 Nash wrecker as security. The mortgage was not filed of record when the transaction occurred, but it had been paid in full with interest when the larger loan became an issue; and yet, in spite of the fact that it had been satisfied, the Yeagers caused it to be filed Feb. 24, 1950.

On March 7—eight days before Powell confessed judgment in a neighboring county—General Contract Purchase Corporation had sued the corporation and its bondsman for $37,000. This circuit court action had been pending but five days when Greening Insurance Agency brought suit on an account, as did several others. Before going to Prescott Powell had conferred with Field to ascertain if he would accept the receivership.

On March 22 Field was appointed receiver for beneficiaries under mortgages covering shop equipment, and later he was designated as general receiver for the entire business. March 31 Powell and his father intervened, claiming back salaries, and later there were interventions in favor of the State, acting through its Commissioner of Revenues, and in favor of the public acting through the collector of taxes for Hempstead county.

The Chancellor found (a) that automobile parts as they were dealt with by the corporation were merchandise falling within the classification covered by the Bulk Sales Law, requiring notice to creditors; (b) that without authority from the corporation's board of directors Powell, as president, was without authority to mortgage the parts; (c) that Powell and the corporation were insolvent when the mortgage was filed and probably so when it was made, and that these claimants were like common creditors.

Since appellants' only contention in the appeal is that the court erred in not directing full payment of their note, with interest, collateral matters will not be discussed except to the extent that they may serve to clarify the main issue.

First.—Circumstances Attending Execution of the Mortgage.—The third stockholder who held one share is shown by the charter to have been acting as trustee for an unrevealed person. Powell testified that the issue to this party was merely a qualifying interest. On direct examination Powell was asked by his attorney what inducements were made to the Yeagers when the loan was procured. Exact phraseology of the question was: "Did you, Mr. Powell, represent to Mr. and Mrs. Yeager that you had authority to mortgage *this property of the corporation?*" A. "Yes, sir."

W. W. Yeager had testified that he did not know that Powell Nash Motors was a corporation. On this phase of the examination he was carefully interrogated by the Court, and all of his answers were that he had no such information, did not regard it as of any importance, and merely expected the money to go into the business. Mrs. Yeager was not certain. She thought "maybe she knew something about it," and she asked Powell (when the mortgage was being prepared) if it wouldn't be better to have it executed by Powell Nash Motors. Powell explained that he had authority to do everything the company could do, and it didn't make any difference how the obligation read.

The form used was not the kind employed by corporations, nor was the acknowledgment anything but the assent, at least *prima facie,* of Powell—that is, his personal act. In *Fidelity & Deposit Company of Maryland* v. *Rieff,* 181 Ark. 798, 27 S. W. 2d 1008, an acknowledgment not reciting authority of the president and secretary of a corporation was upheld, but on the ground that the corporation seal was evidence, *prima facie,* that the officers were not acting in excess of their power. Judge HART's comment was that an examination of the certifi-

cate of acknowledgment showed that the mortgage was executed by a corporation.

No satisfactory reason was given by Yeager for causing the paid mortgage securing $1,000 to be filed at the time the larger obligation was handed to the circuit clerk. Appellees intimate that its payment was effectuated through consolidation with the item of $5,500, but proof is lacking. Proceeds of the August note, said Powell, were turned over to him in the form of a check for $2,500 and $3,000 in cash. He testified that $5,000 was deposited in his bank the following day.

Second.—Bulk Sales Law.—Members of this court are not in agreement regarding effect of the note and mortgage—that is, whether the transactions were personal obligations of Powell, or whether the corporation was bound; but this is not important in view of a controlling view that the Bulk Sales Law was applicable, Ark. Stats., § 68-1501. The statute forbids mortgaging in bulk of any part or the whole of a stock of merchandise unless the mortgagor shall make a detailed inventory and supply the mortgagee with a list of creditors. It is the duty of the mortgagee to give notice for ten days, as set out in the Act, either personally or by registered mail.

It is argued that the ten-day period referred to runs from the time the mortgagee takes possession and that in the case at bar the receiver took charge of the parts and supplies.

It is in evidence through Powell's testimony that he was solvent when the $5,500 mortgage was executed; also that only five per cent of parts sold from the general stock went out across the counter. The remainder, said Powell, entered his own repair shop. It appears, however, that more non-Nash parts and supplies were carried than parts manufactured by Nash. A number of witnesses testified regarding the extent of purchases independently made. We think the evidence preponderates in favor of the conclusion that these parts and supplies were merchandise within the meaning of the Bulk Sales Law, and that failure to make and preserve an inventory and to

secure a list of creditors as the Act contemplates brought the transaction within the statute.

On the question of insolvency, and when it occurred, the testimony took a wide range. Our conclusion is that the Chancellor was justified in believing that on any fair appraisement neither Powell nor the corporation could have paid his or its debts when the mortgage was executed. The agency's affairs—whether examined from a personal or a corporation point of view—grew progressively worse, hence the mortgage if valid would be preferential in circumstances where other creditors did not have an opportunity to challenge it.

Third.—The Court's Power to Invalidate the Mortgage.—Appellant's final contention is that the court, at a term subsequent to that at which the foreclosure decree was rendered, was without power to set the judgment aside, therefore appellant's demurrer to the interventions ought to have been sustained. The weakness of this argument lies in the fact that when the receiver was appointed and when orders were made from time to time, the proceedings were continuing court actions.

Affirmed.

Mr. Justice George Rose Smith concurs.

Brooks *v.* McSpadden.

4-9589 244 S. W. 2d 144

Opinion delivered December 17, 1951.

Bernard Whetstone, for appellants.

Davis & Allen, W. B. Wagner, H. W. Varner, Williamson & Williamson, W. H. Howard, and *Walter L. Brown,* for appellees.

GRIFFIN SMITH, Chief Justice. Brooks & Jean Lumber & Supply Company is a partnership composed of Reuben Brooks and Grady Jean. In December, 1949, the partners sued Claude R. McSpadden, Ed Watt, Charles Eberle, and Superior Oil Company, asking $2,576.32 for cement, drilling mud, and other merchandise supplied in connection with operations McSpadden was engaged in on property in Ashley county in respect of which Superior had acquired rights known as Bradley Lumber Company-Sporat Oil and Gas Leases. Some of these interests relate to contracts executed by H. C. Miller and his wife in 1946.

At the conclusion of plaintiffs' testimony the court found that as to Watt and Eberle a *prima facie* case had not been established, Ark. Stats., § 27-1729, but rendered judgment against McSpadden personally, and decreed a lien on McSpadden's equity, if any, in the oil, gas, and mineral lands, whatever that interest might be, Ark. Stats., § 51-701.

The theory upon which appellant seeks to subject Superior to liability is that its ownership through assignment of the leases was such that the right to contract for drilling was unquestioned, hence the agreements it did make—letter authority to McSpadden dated June 7, 1949, as amended by letter of July 15, 1949—constituted McSpadden a contractor within the meaning of the lien statute; so, irrespective of any intention by Superior to

relieve itself of responsibility for materials sold to McSpadden the purpose must necessarily fail when the terms of the statute are considered.

Appellants' evidence shows that Watt's status was that of a professional contractor who owned his own rigs and drilled wells when satisfactory arrangements could be made. He had formerly done business with McSpadden and was asked to move an outfit to the Ashley county lease and drill the well in question for $21,000, "plus an interest, probably a fourth," in the production. The quoted words are from appellant's brief. Eberle, a Bradley Lumber Company employe, was alleged to have supplied $19,500 to procure the drilling operations. In return he was to receive a fourth of the oil and gas produced.

The Chancellor's determination against a joint enterprise participated in by either Watt or Eberle with McSpadden or Superior must be sustained. Nothing of a substantial character impairing Watt's contention that his transactions with McSpadden were *bona fide* has been shown. Preliminary measures were taken to attach the drilling machinery and other equipment, but it is undisputed that the papers were not served. The record does not disclose any property Watt has in the state. He resides at Arp, Texas, and has effectively—but at a loss, as he claims—closed the unfortunate drilling chapter in Ashley county. Eberle is not shown to have been a party to any joint undertaking and cannot be penalized on suspicion.

As to Superior it is insisted that the litigation is companion to the circuit court action of H. A. Etheridge in consequence of which he successfully established McSpadden's status as a contractor, *The Superior Oil Co.* v. *Etheridge,* ante, p. 289, 242 S. W. 2d 718. Appellants say that the theory on which joint enterprise was claimed against Superior was the *letter agreement,* "with which this court is familiar."

It is true that the opinion of July 9th mentions a letter written by Superior to McSpadden, but the date of the letter is not shown. Only the first paragraph is

copied. It discloses Superior's authorization for McSpadden to begin drilling operations on or before August 1, 1949. A footnote says that by subsequent exchange of letters the date was changed to August 21, "and other provisions were added to . . . paragraph 1." The June 7th letter copied in the bill of exceptions in the present appeal contains nine section paragraphs. Like the *letter contract* discussed in the Etheridge case, McSpadden acknowledged execution June 14, but in the current controversy Superior amended the June 7th authorizations and reservations by adding substantial matter. In the second letter the first communication is referred to as a "farm-out" agreement covering Lease A-207—Bradley Lumber Co., *et al.* The substituted conditions and reservations were acknowledged by McSpadden July 19.

The opinion in the Etheridge case makes no reference to the amended contract other than to say that the time for drilling to begin had been extended, and that other provisions were added to the first paragraph. In the instant case the sketchy abstract of these *letter contracts* is not sufficient to permit members of this court to determine what the relative rights and obligations were without turning to the transcript—an independent research we are not required to perform. Rule 9 requires that there be set forth the material parts of the pleadings, facts, and documents upon which appellant relies, together with other matters from the record necessary to an understanding of all questions presented for decision. It is possible, of course, for the transcripts to be passed from one judge to another for an examination of the exhibits in *Etheridge* v. *Superior,* and in *Brooks & Jean* v. *McSpadden, et als.,* but inasmuch as the Etheridge case was in circuit court and the instant case is in chancery, there are possibilities that equities peculiar to the current litigation could have influenced the Chancellor in his decision.

There is a ten-line abstract of W. H. Varner's testimony correctly showing that Superior paid the delay rentals necessary to keep the Bradley Lumber Company

lease alive; that Bradley wells No's 1, 2, and 3 were part of one leasehold; that it is a "consideration" for an oil company to increase the production from an existing well; and, in conclusion, that McSpadden's act in drilling the additional well "was part of the purchase price—part of a contract; it was a purchase price that he would have paid to have gotten the assignment."

Varner was asked whether the "whole field" referred to as Bradley 1, 2 and 3, was part of the lease "that we are referring to as the Bradley lease." The reply was that "they are all located upon various sections of the Bradley Company lease." Question: "The Bradley lease we are referring to is just one lease?" A. "No. There are in fact two leases." [Here the reporter apparently missed part of the answer, but seemingly Mr. Varner said: "The Bradley lease covers one-half of it, and the other lease *covered* by a gentleman named Sprook covers the other half."[1] Continuing, the witness said: "Each of these leases embraces the 3,300 acres, and originally embraced an additional 3,000 or more, but all of them covered these three wells we have discussed."]

The discussion then turned to Bradley No. 1, a well that had yielded on a non-profitable basis. Question: "When Superior had this producer on its hands it was vitally interested in getting an offset well drilled to it as part of the obligation under the lease—was that right?" A. "Not at all. . . . It *is* a consideration [beneficial to] any oil company to get more production from any lease it holds. This is the reason we drilled Bradley No. 2. It is not a direct offset to No. 1. You don't offset wells on your own lease; you offset wells on adjoining leases." Q. "Well, was, or wasn't it, a consideration to Superior to have these additional wells drilled that McSpadden put down?" A. "No, it was a purchase price—part of a contract. It was a purchase price that he would have paid to have gotten the assignment. . . . It was a definite detriment to Superior to have McSpadden drill a dry hole."

[1] Very likely "conveyed" was the word used by Varner instead of *covered*.

Pursuing the same line of inquiry the next question put to Varner was: "What I mean [is this]: The *drilling*, one way or another (whether it was going to be dry or not) was a consideration?" A. "That was a consideration in the agreement we made with McSpadden. The agreement, had he completely performed it, would have given him the entire title of the entire lease, subject to various over-riding royalties. . . . We gave [McSpadden] an agreement under the terms of which if he elected to do certain things (which included among others drilling the No. 3 well)—if he drilled that well to a certain depth, and if he did other things that were provided in that contract, we would then assign to him the entire premises; subject, however, to an oil payment and an over-riding royalty interest."

From this testimony, not abstracted, it will be seen that the Chancellor in dismissing as to Superior predicated his decree upon the agreements that are not set out. Assuming that the contracts are those mentioned in the Etheridge opinion, this court, notwithstanding such presumption, is entitled under Rule 9 to have the material portions abstracted in the case at bar. The testimony before the Chancellor is not the same that was heard in circuit court; and while it is true that equity follows the law where imperative statutory mandates require the doing of certain things, or that a particular subject of legislation receive the treatment affirmatively prescribed, yet experience has shown that equities may flow from conduct engaged in by parties who gave but slight attention to the details of procedure.

We are unwilling to say that the Chancellor was wrong on the face of the record as abstracted. It follows that the decree must be affirmed.

DUNN *v.* DUNN.

4-9636 244 S. W. 2d 133

Opinion delivered December 17, 1951.

[redacted]

J. Allen Eades, for appellant.

WARD, J. On January 18, 1951, appellant, plaintiff below, filed suit for divorce alleging general indignities and adultery, and prayed for custody of their three minor children, Chester, Jerry Ray, and June, whose ages were 17, 14, and 10 respectively. It was also alleged they owned by the entirety a home in Ft. Smith. Appellee filed an answer denying the allegations for divorce and prayed for separate maintenance, possession of the home, custody of the children, attorney's fees, and court costs.

On final hearing the chancellor dismissed the complaint for want of equity, gave the wife possession of the family home and furniture, granted custody of the youngest child, June, to appellee, ordered appellant to pay $20 per week for support of appellee and child, allowed the two boys to choose with whom they would live, and ordered the plaintiff to pay all costs of the action. The decree noted that the oldest boy, Chester, was then living with appellee and the other boy, Jerry Ray, was then living with the appellant. The decree also noted that it failed to provide for payment of monthly installments on the home, but continued that question for further orders

if necessary. The home place which was purchased for $5,250 is subject to a mortgage for some amount between $1,500 and $2,000, and the monthly payments are $32.

To reverse that part of the decree of the lower court which dismissed his petition for a divorce appellant urges this court to find from the evidence that he is entitled to a divorce either on the ground of indignities or on the ground of adultery.

Except for the admission of appellee to immoral relations with another man as will be discussed below, there is practically no testimony to justify a divorce on the ground of indignities. The son, Jerry Ray, who lives with appellant testified to some "fussing" and quarreling, but admitted on cross-examination that his father had promised him a motor bike shortly before the trial. The other son said they had some fights but not real bad ones, and he also said, "Dad has done some things he should not have done". In addition to this appellant said he would not have left her [appellee] had it not been for the "admission" mentioned above.

This leads us to a consideration of the "admission" of appellee as an "indignity" and, for brevity, we will at the same time consider it as a cause for divorce on the ground of adultery. First, however, it is necessary to give the background as developed at the trial.

Appellee has filed no brief and appellant's brief fails to set out much of the testimony and exhibits, making it necessary to rely largely on the transcript. Although it was not insisted at the time of the trial that appellee was insane or *non compos mentis,* yet the undisputed evidence of two or three doctors establishes the fact that appellee was in a bad mental and emotional state shortly before the suit was filed and at the time appellee made the "admission" to her husband and to her neighbor. Although the doctors recommended psychiatric treatment and two or three months hospitalization for appellee it seems that appellant was not convinced of the need. It was at this time and under these conditions that appellee confessed she had had immoral relations with a certain man. At the hearing held on

March 20, 1951, appellee, to the apparent surprise of her own attorney, made the same admission. The chancellor was evidently impressed with appellee's condition because he suggested a plea of insanity would be in order. No such defense was interposed, but the hearing was continued until April 22, 1951. At this hearing a competent doctor testified that she seemed to be mentally sound and, judging from an examination made about three weeks after she made the "admission" he thought the "admission" was a responsible statement. The doctor, however, stated that appellee was "having nervous symptoms due to her menopause, accentuated by her family trouble."

In our opinion, whether we consider appellee's mental condition and her "admission" in connection with "indignities" or "adultery", the evidence is not sufficient to disturb the findings of the chancellor who had the advantage of observation which we do not have. It was shown by competent doctors that Mrs. Dunn was suffering from a nervous disorder and suitable treatment therefor had been recommended. The "other man" testified that the two families had always been friends and that there had never been any improper relationship between appellee and himself. There was testimony by relatives and friends that appellant's conduct was such as might have contributed to appellee's mental and nervous disorder. Under all these facts we agree with the conclusion reached by the chancellor.

Moreover, regardless of appellee's mental condition her "admission" alone was not sufficient. This rule is well stated in *Goodlett* v. *Goodlett,* 206 Ark. 1048, 178 S. W. 2d 666, and in *Owen* v. *Owen,* 208 Ark. 23, 184 S. W. 2d 808, in this language:

". . . The rule is well settled in this state that a decree of divorce will not be granted on the uncorroborated testimony of the plaintiff alone, even though the alleged ground be conceded by the defendant, but such testimony must be corroborated by other evidence to establish the truth of the charge."

The only corroborating testimony in this connection here was that appellee had been in the car with the man in question on a few occasions but in no instance does it appear that there were any suspicious circumstances. In fact it appears from appellant's own testimony that these instances would not have been taken seriously by him had it not been for the later "admission".

When all the testimony relative to indignities and adultery is considered in connection with appellee's undisputed nervous condition which so impressed the chancellor we are unwilling to say he committed any error.

Affirmed.

HOLT, J., not participating.

GEORGE ROSE SMITH, J., dissents.

PARDUE *v.* BRYANT.

4-9633 244 S. W. 2d 135

Opinion delivered December 17, 1951.

Jesse A. Pardue and *Kincannon & Kincannon,* for appellant.

Shaw & Spencer, for appellee.

GEORGE ROSE SMITH, J. This was originally a suit in unlawful detainer brought by the appellant, but the

case was transferred to equity and became in substance a suit to cancel a lease for non-payment of rent. The chancellor refused to cancel the lease.

On June 7, 1940, the appellant leased a small unimproved tract to R. L. Ward for a term of forty years at a rental of $10 a year. The written lease permits the lessee to make and to remove improvements. It provides that the property shall revert to the lessor if the rent is not paid when due, but there is no provision restricting the tenant's power to assign his interest.

Ward took possession of the property, made improvements worth about $1,000, and paid the annual rent to and including the payment due June 7, 1947. In August of that year Ward undertook to assign the lease to one of the appellees, W. T. Bryant, but the assignment was executed in Ward's name by his wife. Bryant failed to tender the next installment of rent on June 7, 1948, because his wife's funeral was held on that day. Not more than two days later Bryant did offer to pay the rent, but the appellant refused to accept the tender. Bryant at once mailed the appellant a money order for the rent, but she returned it. Bryant continued in possession, and in 1949 he mailed another money order for the rent due on June 7 of that year. The appellant retained this money order without cashing it, and on July 11, 1949, she filed this suit. Bryant later assigned his interest to appellee Loraine Miller, who mailed a money order for the 1950 rent. The appellant also retained this money order without cashing it.

Two principal arguments are made for reversal. First, it is said that Ward's assignment to Bryant was void under the statute of frauds for the reason that Mrs. Ward did not have written authority to act for her husband. Ark. Stats. 1947, § 38-105. The appellant, however, was not a party to the assignment, and a third person cannot complain because a contract does not meet the requirements of the statute. Williston on Contracts, § 530; Rest., Contracts, § 218. Second, it is argued that Bryant's 48-hour delay in tendering the 1948 rent worked a forfeiture by the terms of the lease. We have recog-

nized equity's power to relieve against a forfeiture for nonpayment of rent, since the rent is the primary object of the parties and the forfeiture is merely an incident intended to secure its payment. *Pierce* v. *Kennedy,* 205 Ark. 419, 168 S. W. 2d 1115. In the case at bar the tenants had made valuable improvements, the slight delay in tendering the rent was attributable to a good reason, the landlord permitted the tenant to remain in possession for more than a year before filing suit, subsequent tenders of rent were not returned, and the lease does not make time of the essence of the contract. In view of all these circumstances the chancellor was fully justified in refusing to cancel the lease.

Affirmed.

THE PRUDENTIAL INSURANCE COMPANY *v.* RUBY, TRUSTEE.

4-9626 244 S. W. 2d 491

Opinion delivered December 17, 1951.

Rose, Meek, House, Barron & Nash, for appellant.

Carlos B. Hill, C. D. Atkinson and *Chas. W. Atkinson,* for appellee.

ED. F. MCFADDIN, Justice. In this appeal we are asked to construe, under the laws of the State of Utah, a clause in a life insurance policy which reads: "This policy shall be incontestable, except for default in payment of premium for more than thirty-one days, after it has been in force during the lifetime of the insured for two years from date of issue hereof."

On October 21, 1947, the appellant, Prudential Life Insurance Company, hereinafter called "Insurance Company", issued to the insured, Freeda L. McLain, in Salt Lake City, Utah, a life insurance policy which contained the above quoted clause referred to herein as "the incontestable clause". The beneficiaries named in the said policy are the appellees in this appeal. The insured died in Salt Lake City, Utah, on December 29, 1947. Some of the beneficiaries live in Washington County, Arkansas; and on February 23, 1951, all of the beneficiaries as plaintiffs, filed the present action seeking to recover on the policy.

The Insurance Company, in paragraphs three to seven, inclusive, of its answer, alleged in detail that in her application for the policy, the insured made certain material answers in regard to her health, etc., which answers were known by the insured to be false, willful, fraudulent and material; that the Insurance Company would not have issued the policy if it had known the truth; that with due diligence the truth was not learned until after the death of the insured; and that the return of all premiums had been tendered to the plaintiffs on March 30, 1948. The plaintiffs demurred to the said paragraphs three to seven, inclusive, of the defendant's answer, and moved that the said paragraphs be stricken, because of the said incontestable clause previously copied. The Trial Court granted the motion over defendant's

objection; and likewise upon trial the Court refused the defendant the right to introduce evidence in support of the matters stated in the said paragraphs three to seven of the answer. From a judgment for the plaintiff-beneficiaries the Insurance Company brings this appeal.

Both sides agree that the insurance contract is to be construed according to the laws of the State of Utah, because the contract was made in that State. In *Howcott* v. *Kilbourn,* 44 Ark. 213, we said: "Matters bearing upon the execution, the interpretation and validity of the contract are to be determined by the law of the place where it is made." In *J. R. Watkins Medical Co.* v. *Johnson,* 129 Ark. 384, 196 S. W. 465, after quoting the language from *Howcott* v. *Kilbourn* we added: "It is to be noticed that the rule extends to the interpretation of the contract, as well as to other questions relating to its enforcement, and that the interpretation placed upon the contract by the courts of the State where it is made will be accepted in other States for the purpose of testing its validity and of affording remedy for its enforcement." See, also, Leflar on Conflict of Laws, § 94. Thus we conclude that the rights of the parties are to be measured by the laws of Utah; and if there be a ruling of the courts of that State on such issue we will follow such ruling.

The chronology of these dates is important.

The policy issued, October 21, 1947;

Insured died, December 29, 1947;

This action filed, February 23, 1951.

Thus, the insured lived less than three months after the issuance of the policy, but the suit was not filed until more than three years after the issuance of the policy or the death of the insured. The appellant insists that under the incontestable clause here involved the policy became incontestable *only* if the insured lived and kept the policy in force for a period of two years; and appellant cites and relies on such cases as *Lance* v. *Prudential Ins. Co. of America,* (N.J.) 22 Atl. 2d 3; *Carpentieri* v.

Met. Life Ins. Co., 138 Pa. Supr. Ct. 1, 10 Atl. 2d 37; *Sun Life Assur. Co.* v. *Allen,* 270 Mich. 372, 259 N. W. 281; *Chicago Nat. Life Ins. Co.* v. *Carbaugh,* 337 Ill. 483, 169 N. E. 218; *Nat. Life and Acc. Ins. Co.* v. *Preston,* 94 Ga. 483, 22 S. E. 2d 157; *Equitable Life Ins. Co.* v. *Mann,* 229 Ia. 945, 295 N. W. 461 and *Greenbaum* v. *Columbian Natl. Life Ins. Co.,* (C.C.A. 2) 62 Fed. 2d 56.

The appellees insist, and the trial court apparently held, that the incontestable clause, here involved, means that the policy will be incontestable two years from date of its issuance, and that the language in the clause, "in force during the lifetime of the insured", has no direct bearing on the case. In support of their position appellees cite and strongly rely on the case of *Tracy Loan & Trust Co.* v. *Mutual Life Ins. Co.,* decided by the Supreme Court of Utah on January 25, 1932, and reported in 79 Utah 33, 7 Pac. 2d 279, and hereinafter referred to as the "Tracy case". If that cited case supports the appellees' contention then they are entitled to win, so we examine it in considerable detail.

In the said Tracy case the incontestable clause read: "This policy shall be incontestable after two years from its date of issue except for non-payment of premiums." The two policies in that case were issued March 16, 1925. The death of the insured is not given; but action on the policy was filed in the State Court on April 27, 1926. The answer of the Insurance Company—alleging fraud by the insured—was not filed in the State Court until November 20, 1928, which is obviously more than two years after the date of the issuance of the policy. Upon such facts the Supreme Court of Utah held that the defense of the insurance company was too late. In urging that the effect of the holding of the Supreme Court of Utah in the Tracy case necessitates an affirmance in the case at bar, the appellees cite § 43-3-24 of the Utah Code of 1943 which provides:

"It shall be unlawful for any insurance company to issue or deliver in this state any life insurance policy unless the same shall contain . . . (3) a provision that the policy shall be incontestable after it shall have been

in force during the lifetime of the insured for a period of two years from its date, except for nonpayment of premiums . . ."

Appellees argue that the effect of the Utah statute as above quoted was one of the matters that necessarily entered into the decision in the Tracy case. But the appellees' argument, about the Statutes of Utah, loses all force in the light of the following:

1. In the Tracy case the Supreme Court of Utah, in discussing the statutes of that State regarding incontestable clauses, made reference to § 1154, sub-division 2 of the Compiled Laws of Utah of 1917; and such statute reads:

". . . it shall be unlawful for any . . . insurance company to issue or deliver in this state any life insurance policy unless the same shall contain the following provision . . . (2) A provision that the policy shall be incontestable after two years from its date, except for nonpayment of premiums . . ."

Thus the Supreme Court of Utah decided the Tracy case when the Utah statute was entirely different from the present Utah statute.

2. It was not until the Revised Statute of 1933 that the Legislature of Utah changed § 1154, sub-division 2 of the Compiled Laws of Utah of 1917 to read as found in Title 43-3-24 of the present Code of 1943, and as previously copied.[1]

Thus in the Tracy case the Utah Supreme Court (a) was construing an incontestable clause which did not have in it the words, "in force during the lifetime of the insured"; and (b) was referring to a statute of Utah

[1] It is interesting to note that the Utah Revised Statutes of 1933 were not a mere *compilation* but were an entire *revision*. This fact is set out on Page V in the preface to the 1933 Revised Statutes of Utah; and Title 88 of the 1933 Revision of the Statutes of Utah repealed all clauses in conflict with such revision (with exceptions not here involved). The 1943 Code of Utah is not a revision but a mere compilation, and it follows, verbatim, the 1933 revision regarding the statute here involved. Furthermore the 1947 Legislature of Utah, by Chapter 63, revised all of Title 43 of the Utah Code of 1943; but in § 43-22-1 of Chapter 63 of the Acts of the 1947 Legislature of Utah, the language of § 43-3-24 of the 1943 Code of Utah is reinstated.

which did not have such words in it. So the Tracy case gives the appellees no support and we must look further to determine the law of Utah involving an incontestable clause like the one in the case at bar.

Neither side has cited us to, and we have been unable to find, any case decided by the Supreme Court of Utah, (a) involving an incontestable clause like the one in the case at bar, or (b) involving the 1943 Utah law concerning incontestable clauses. In the absence of a decision of the Utah courts on the point involved, we must therefore apply general legal principles. Such is the rule of comity. *Norris* v. *Dunn,* 184 Ark. 511, 43 S. W. 2d 77. In *Am. Ry. Express* v. *Davis,* 152 Ark. 258, 238 S. W. 50, 52, 1063, we said: ". . . therefore the case must be determined according to general principles of law as declared in the adjudicated cases in this and other states." See 50 Am. Jur. 316. See, also, American Law Institute's Restatement of the Law on "Conflict of Laws", § 621, wherein this language appears: "If, however, the courts of the enacting state have not interpreted the statute, the court at the forum will make its own construction". The rule is: that in interpreting a contract, the *lex loci contractus* governs; but if there be no decision on the point by the courts of the *lex loci contractus* then the court of the forum interprets and construes the contract by determining the *lex loci contractus* through general principles of law including applicable adjudications of the law of the forum. This we now proceed to do.

As far as we can ascertain all jurisdictions which have passed on the question recognize the important distinctions that necessarily arise from the wording of incontestable clauses. In *Jefferson Standard Life Ins. Co.* v. *Smith,* 157 Ark. 499, 248 S. W. 897 the incontestable clause read: "After this policy shall be in force for one year from date hereof, it shall be incontestable for any cause except for the nonpayment of premiums"; and we held that the *death of the insured* fixed the rights and liabilities of the parties rather than the *one year from date of issuance.* In *Missouri State Life* v. *Cran-*

ford, 161 Ark. 602, 257 S. W. 66, 31 A. L. R. 93, the incontestable clause read: "This policy . . . shall be incontestable after one year if the premiums are duly paid, . . ."; and we held that the expiration of one year from the date of issuance—rather than the death of the insured—ended the company's right to contest.

In *American National Life Ins. Co.* v. *Stutchman,* 208 Ark. 1023, 185 S. W. 2d 284, we discussed the effect of the difference in the wording of incontestable clauses:

"Many decisions have noted the difference between the type of incontestable clause found in the case of *Jefferson Standard Life Ins. Co.* v. *Smith, supra,* which provides that after a policy shall have been 'in force' for a specified time it shall become incontestable, and the type which merely provides that after a certain definite time the policy shall become incontestable, as in the instant case. In the first type the death of the insured within the contestable period puts an end to the incontestable clause on the theory that the words 'in force' contemplate that the insured shall remain alive during the contestable period. In the case of policies involving the second type, the death of the insured within the contestable period does not affect the incontestable clause, but same continues in operation for the benefit of the beneficiary. The distinction between the two clauses has been pointed out by the courts in a number of cases including *Mutual Life Insurance Co.* v. *Hurni Packing Co.,* 263 U. S. 167, 68 L. Ed. 235, 44 S. Ct. 90, 31 A. L. R. 102; *Monahan* v. *Metropolitan Life Insurance Co.,* 283 Ill. 136, L. R. A. 1918D, 1196, 119 N. E. 68; *Humpston* v. *State Mutual Life Assur. Co.,* 148 Tenn. 439, 256 S. W. 438, 31 A. L. R. 78; and *Priest* v. *Kansas City L. Ins. Co.,* 119 Kan. 23, 237 Pac. 938, 41 A. L. R. 1100."

Thus the Arkansas Supreme Court and other courts generally throughout the land have recognized that where the contestable clause merely says a given time "from date of the policy" then such time governs rather than the death of the insured, but where the incontestable clause provides that the policy must remain *in force* for a given time, the policy does not become incontestable

unless such policy remains *in force* for the stated time. In the case at bar the incontestable clause provided not only (a) that the policy must be *in force* for two years; but (b) that the insured *must live* two years from the date of the policy. Certainly under our holding in *Jefferson Standard Life Ins. Co.* v. *Smith, supra,* as reaffirmed in *American National Life Ins. Co.* v. *Stutchman, supra,* the death of the insured within the contestable period did not, after the lapse of two years, prevent the insurance company from setting up the defenses as urged in the case at bar. This holding finds support in the many cases from other jurisdictions as relied on by appellant and heretofore cited in this opinion.

We therefore, conclude that the trial court was in error, (a) in sustaining the plaintiffs' demurrer and motion to strike paragraphs three to seven of the answer of defendant; and also (b) in refusing to allow the defendant to introduce evidence in support of the matters contained in the said paragraphs. Therefore the judgment is reversed and the cause is remanded.

Mr. Justice GEORGE ROSE SMITH not participating.

KENDRICK *v.* RANKIN.

4-9623 244 S. W. 2d 495

Opinion delivered December 17, 1951.

John B. Gulley, for appellant.

R. C. Limerick, Jr., for appellee.

GRIFFIN SMITH, Chief Justice. Although the error thought by appellant to be sufficiently erroneous and prejudicial to justify a reversal is Instruction No. 7, it is necessary to show the essential facts in order to understand the instruction.

Ocus Rankin, with his wife and three children and a friend, were traveling in a general southernly direction toward Pine Bluff when Ocus, who was driving, observed a bus near the south end of the Biddle bridge. The bridge is a two-lane structure approximately 235 feet long and 18 feet wide. A center traffic line was marked on the bridge surface. Lawrence Kendrick was coming to Little Rock and testified that he followed the bus at a safe distance. The bus stopped approximately eight feet from the south end of the bridge, but Kendrick says that by that time he was within ten feet of it. In the meantime, however, he had undertaken to apply his brakes, but found that when the pedal was depressed it touched the floorboard without appreciable response. It was then that he realized the awkward situation he was in and concluded to cut around the bus, thinking he could clear it and get back to his own side of the highway—the east lane. He had seen a car approaching, but did not think it was close enough to interfere with the maneuver seemingly necessary to his safety. The water under the bridge was at a high level and any attempt to turn from the road would have been impracticable.

Kendrick testified that he was not going at an excessive rate of speed, and he thought the oncoming car was traveling at about the same rate. Rankin, whose car was struck in the left front, testified that when he saw Kendrick's car he (Rankin) was proceeding at about twenty miles an hour and that he slowed as quickly as mechanical equipment and physical reaction would permit. The jury found that Kendrick was at fault, that

Rankin was not contributorily negligent, and that damages to the Rankin car and personal injuries suffered by husband and wife were $1,158.16.

Instruction No. 7 told the jury that a motorist has the right to assume that the driver of another automobile will obey traffic laws and exercise due care for his own safety and the safety of others; and, if the motorist acts upon this assumption there is an absence of contributory negligence. "Therefore," says the instruction, "if you find from a preponderance of the evidence that Rankin was driving his car across the Biddle bridge in a lawful and proper manner, facing a bus which had stopped to allow his passage, and there was nothing in the situation then present to warn him as a reasonably prudent person of imminent danger, he could assume that his traffic lane would remain clear, and he would not be guilty of contributory negligence under such circumstances, in acting on such assumption."

It is argued, first, that the instruction is ambiguous and abstract, and secondly that it is an incorrect statement of the law.

The first contention is untenable for want of a specific objection. The second almost trespasses the borderline to fall within that class of cases where an instruction has been held to be inherently wrong, requiring nothing more than a general objection. In his brief appellant says that the instruction is in two paragraphs and inferentially permits the jury to attach undue importance to the closing expression regarding contributory negligence. Perhaps the original manuscript was paragraphically disconnected, but the bill of exceptions does not show this. There are separate sentences, but only one paragraph.

However, this would not be controlling. The instruction contains a number of *ifs* in the concluding statements complained of. It must be remembered that Kendrick testified in effect that Rankin's speed was not excessive, hence, under the second subdivision of the instruction the jury was permitted (a) to determine

whether Rankin was driving in a lawful manner, (b) whether anything in the physical situation with which he was faced was of a character to warn a reasonably prudent person of *impending* danger, and (c) if none of these elements was present Rankin would be justified in assuming that the traffic lane would remain clear.

The phase giving some concern is what might be termed the indefinite nature of this assumption—how long, as a matter of law, could a prudent person entertain this presumption? The instruction told the jury that Rankin would not be guilty of contributory negligence *under such circumstances* in believing he was safe.

We have often said that violation of a traffic safety statute or ordinance, such as the action of Kendrick in passing the bus, is evidence of negligence, and not negligence *per se.* Plaintiffs' Instruction No. 4 correctly states the law on this point. Instruction No. 5, given at the defendant's request, informed the jury that the plaintiff[s] could not recover because of Kendrick's negligence if it should also find that Rankin was negligent, provided such negligence by Rankin proximately contributed in any degree, however slight, to the happening of the accident and injuries.

For a discussion of analogous principles see *Hearn* v. *East Texas Motor Freight Lines,* ante, p. 297, 241 S. W. 2d 259. In *Rexer* v. *Carter,* 208 Ark. 342, we quoted from an Illinois case where it was held that the driver of an automobile has the right to assume that another driver (a collision being involved) will obey an ordinance prohibiting any vehicle from being driven onto any boulevard without first bringing such vehicle to a full stop, "and he is not guilty of contributory negligence in acting upon such assumption."

The phraseology in Instruction No. 7 is almost identical with wording we approved in the Rexer-Carter case. See, also, *Kirby* v. *Swift & Co.,* 199 Ark. 442, 134 S. W. 2d 865; *Coca Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *Arkansas Power & Light Co.* v. *Boyd,* 188 Ark. 254, 65 S. W. 2d 919.

Conceding as an abstract question of law that in giving an instruction it is best not to specifically mention physical objects, such as "facing a bus which had stopped to allow [Rankin's] passage," yet when all of the circumstances are considered it is inconceivable that the jury was misled regarding the degree of care Rankin was required to exercise, hence there could have been no prejudice.

Affirmed.

Mr. Justice HOLT dissents.

HOLT, J., (dissenting). I think the trial court erred in giving Instruction No. 7 (over appellant's objection and exceptions) as follows: "You are instructed that a motorist has the right to assume that the driver of another automobile will obey traffic laws and signals and exercise due care for his own safety and the safety of others and acting on such assumption is not contributory negligence.

"Therefore, if you find from a preponderance of the evidence that Ocus Rankin was driving his car across the Biddle Bridge in a lawful and proper manner, facing a bus which had stopped to allow his passage and there was nothing in the situation then present to warn him as a reasonable prudent person of impending danger, he could assume that his traffic lane would remain clear and he would not be guilty of contributory negligence under such circumstances, in acting on such assumption."

It appears that the court, prior to the giving of this instruction, had correctly defined negligence and contributory negligence in separate, proper instructions.

I think this instruction inherently erroneous and in effect was, on the weight of the evidence, an invasion of the jury's province, and a binding instruction by concluding paragraph 1 with "and such assumption is not contributory negligence," and in concluding the second paragraph with "he would not be guilty of contributory negligence under such circumstances, in acting on such assumption."

As I view it, this instruction clearly denied the jury the right to take into account *any* contributory negligence of appellees which would prevent recovery. Contributory negligence is always a question for the jury.

In *Arkansas Power & Light Company* v. *Boyd,* 188 Ark. 254, 65 S. W. 2d 919, this court held the following instruction to be a correct declaration of law: "You are instructed that the motorman in operating the street car, seeing the truck approaching the intersection, had the right to assume that the driver of the truck would recognize the paramount right-of-way of the street car and would operate his truck with ordinary care to protect himself, and would not attempt to cross the track at said intersection immediately in front of the approaching street car; *and the motorman had the right to go on with his street car with that presumption in his mind until he saw, or, in the exercise of ordinary care, could have seen the driver of the truck do something or his failure to do something which would indicate a contrary intention upon his part, and it then became his duty to stop his street car* if he could do so in time to avoid the accident, (*or to remain stopped* if he had not yet started to cross said street intersection)."

There, the late Justice FRANK SMITH pointed out that "the essence of this instruction is that one obeying the traffic rules has the right to assume that others will also obey them, and to proceed upon that assumption until he knows, or, in the exercise of ordinary care, should know, that the other party will not observe the traffic regulations."

In *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, we held that the giving of an instruction similar in effect to that here involved was error; "(Headnote 2) AUTOMOBILES — VIOLATION OF TRAFFIC LAW — INSTRUCTION.—An instruction, in an action for damages received in a collision, that if defendant was operating his automobile in a residential district at a speed greater than twenty miles per hour, and such speed was the proximate cause of the collision and damages, the jury should return a verdict for plaintiff, *held* erroneous as making

the violation of the traffic law negligence *per se,* instead of leaving to the jury to consider such violation with the other facts and circumstances in determining whether defendant was negligent.

"(Headnote 3) TRIAL—CONFLICTING INSTRUCTIONS.—Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole.

"(Headnote 4) TRIAL—INSTRUCTION IGNORING ISSUE.—An instruction which ignores a material issue in the case, about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge."

We said in *White County* v. *J. E. Thompson Motor Express Co.,* 182 Ark. 71, 29 S. W. 2d 674, [citing and reaffirming the Bollinger case above]: "It is finally insisted that the court erred in refusing to give its requested instruction No. 5, which would have told the jury that if its truck was being driven at a lawful rate of speed and that it was the first truck to enter the intersection, its truck had the right of way 'and it was negligence on the part of plaintiff's driver to drive into the intersection in front of the defendant's truck.' The court correctly refused this instruction. It was inherently wrong in telling the jury that, if appellant's truck reached the intersection first, it was negligence for the driver of the other truck to attempt to pass in front of him, without taking into consideration the other facts and circumstances in the case." See, also, *Sutton* v. *Webb,* 183 Ark. 865; 39 S. W. 2d 314; *Hammond* v. *Hamby,* 191 Ark. 780, 87 S. W. 2d 1000; *Pye* v. *Chicago, Rock Island & Pacific Ry. Co., et al.,* 193 Ark. 388, 100 S. W. 2d 254; and *Shipp* v. *Missouri Pacific Transportation Co.,* 197 Ark. 104, 122 S. W. 2d 593.

In the latter case, *Shipp* v. *Missouri Pacific,* in an opinion, written by the writer of the majority opinion

here, we find this language: "It is insisted that *White Company* v. *E. J. Thompson Motor Express Company,* 182 Ark. 71, 29 S. W. 2d 674, is conclusive of appellant's position. In that case, however, the court told the jury that if [the truck] was being driven at a lawful rate of speed, and it was the first [of the two motor vehicles involved] to enter the street intersection where the accident occurred, the truck had the right-of-way, 'and it was negligence on the part of plaintiff's driver to drive into the intersection in front of the defendant's truck.' It will be observed that the judge told the jury that the particular act constituted negligence. The instant case is different in that the court did not tell the jury that violation of the ordinance was negligence *per se.*" Again, the Bollinger case was cited and approved.

In view of the above authorities, it seems to me that a proper instruction would have been as follows: You are instructed that a motorist has the right to assume that the driver of another automobile will obey traffic laws and signals and exercise due care for his own safety and the safety of others and to proceed on that assumption until he knows, or, in the exercise of ordinary care, should know, that the other party will not observe the traffic regulations. Therefore, if you find from a preponderance of the evidence that Ocus Rankin was driving his car across the Biddle Bridge in a lawful and proper manner facing a bus which had stopped to allow his passage and there was nothing in the situation then present to warn him as a reasonable prudent person of impending danger, he could assume that his traffic lane would remain clear and proceed on that assumption until he knows, or, in the exercise of ordinary care, should know, that the other party will not observe the traffic regulations.

I would reverse and remand for a new trial.

4-9620 244 S. W. 2d 488

Opinion delivered December 17, 1951.

[redacted]

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

J. M. Smallwood, for appellee.

ROBINSON, J. The appellee herein, Commercial Standard Insurance Company, is the insurer in a policy of liability insurance issued to Guy and Bill Bowen, covering taxicabs owned and operated by the said Bowens. Such policy was in full force and effect on the 4th day of December, 1948, at which time Guy Bowen, while operating one of the taxicabs covered by the policy, collided with a car driven by appellant herein, Ed O. Warren. As a result of said collision, Warren obtained judgment against the Bowens in the sum of $250. Prior to the judgment no notice whatever was given to the Insurance Company as to the occurrence of the accident or the pendency of the suit. Warren was unable to collect his judgment against the Bowens and filed suit against the appellee Insurance Company to collect on said judgment.

There is no dispute between parties as to the facts, the case having been submitted on a stipulation in that respect. The trial court, after considering the agreed

statement of facts, entered a judgment in favor of the Insurance Company, the court holding that the Insurance Company was not liable on the policy because no notice of the accident or of the pendency of the suit was given to the Company prior to the judgment. The policy provides:

"Notice of Accident — When an accident occurs, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

"Notice of claim or suit; Coverages A and B—If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

Appellant contends that, since he did not know what company had issued a policy to the Bowens—in fact, did not know, the Bowens had a policy of liability insurance, and therefore could not notify the insurance company—he should not now be deprived of collecting from the insurance company because the policy holder failed to notify the company of the occurrence of the collision and the pendency of the suit. Appellant relies to some extent on § 66-526, Ark. Stat., which provides in effect, among other things, that insolvency or bankruptcy on the part of the policy holder is no defense to the insurer in a suit brought by an injured third party.

However, appellant's contention in that respect is untenable for the reason that the insurance company is not seeking to avoid liability on the ground that the policy holder is insolvent or bankrupt, but on the ground that the company had a right to be notified of the occurrence of the accident and the pendency of the suit, so that it could take whatever steps it deemed necessary in defense of the case. Also, appellant relies on the case of *Maryland Casualty Company* v. *Waggoner,* 193 Ark. 550,

101 S. W. 2d 451, but, in that case the insurance company was given notice of the claim and had an opportunity to defend the case if it had cared to do so. Here, the Insurance Company did not receive notice until after the rendition of the judgment against the policy holder.

The appellee herein contends that the terms of the policy provide for notice to the insurance company so that the company could take whatever action appeared advisable in the circumstances, and since it received no notice, the policy holder himself could not recover on the policy, and a third party who had suffered damages had no greater rights than did the person to whom the policy was issued. This was the effect of the holding of the trial court.

In the case of *Home Life & Accident Ins. Co.* v. *Beckner,* 168 Ark. 283, 270 S. W. 529, this court said: "We do, however, fully agree with the counsel for appellant in his contention that there must be at least a *bona fide* compliance on the part of the assured with these provisions of the contract before he is entitled to a recovery. The assured, in other words, cannot wholly ignore the requirements of the policy as to notice of the occurrence of the accident and as to the claim of the assured on account thereof, and likewise the provision requiring notice of any suit brought by the injured party against the assured for damages on account of the accident. These provisions in an insurance policy are valid. They are intended for the protection of the insurer, in order that he may investigate the circumstances of the injury and determine the course that he will pursue with reference to any claim that may be asserted against the assured by reason of such injury, either before or after suit. Even though not a condition precedent and not a ground for forfeiture of the policy, the insurer has the right to insist that the insured comply with the obligations of his contract."

With regard to the rights of the injured third party to recover against the insurer in circumstances of this kind, the weight of authority is as stated in 46 C. J. S. 122, as follows:

"Ordinarily, unless otherwise provided by statute, the injured person cannot recover against insurer if insured breaches material terms of the policy by reason of which insurer would be released from liability to insured, such as where insured fails to give insurer the required notice of the accident or injury, notice of the claim against insured, notice of litigation against insured, or fails to co-operate with insurer in defense of liability." In support of the text, cases are cited from numerous States.

Section 75-203, Ark. Stats., (being Act 385, 1947, in effect when the collision occurred between the Warren and Bowen vehicles), requires that the owner of a taxicab have ". . . liability contract of insurance . . . substantially in the form of the standard automobile liability insurance policy, in customary use, to be approved by the Commissioner of Insurance[1] . . .". But, there is no claim made in the case at bar that the clause heretofore quoted (notice of claim or suit) is different from such clause in any "standard automobile liability policy in customary use." Therefore, the policy of insurance issued to Bowen, for all that appears in this record, fully complies with the terms of the Statute. Our Statute does not require that the insurance policy issued under it be a policy on which anyone may bring an action at any time. On the contrary, our Statute requires that the policy of insurance be a policy in customary use. Attention is called to the case of *Hynding* v. *Home Accident Ins. Co.*, 214 Cal. 743, 7 Pac. 2d 999, 85 A. L. R. 13, wherein is discussed liability of insurance companies under statutes which require, or policies which provide for recovery by the injured party against the insurance company regardless of the acts of the assured.

In many States there are statutes providing that nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, shall relieve the company from liability under the policy or from payment of a judgment in favor of an injured third party. Of course, where there is a

[1] Act 485 of 1949 substitutes the Commissioner of Revenue for the Commissioner of Insurance.

statute which so provides, the failure of the insured to give notice is no defense against an injured third party. However, we do not have such a statute in this State applicable to the parties involved here.

Affirmed.

Mr. Justice WARD dissents.

NICHOLAS *v.* BINGAMON.

4-9637 244 S. W. 2d 782

Opinion delivered January 7, 1952.

Gordon & Gordon, for appellant.

Carroll W. Johnston, for appellee.

ROBINSON, J. The appellee herein, M. D. Bingamon, filed suit in the Conway Circuit Court against appellants, Tom Buck Nicholas and Logan County Farmers' Association, Inc., alleging that while appellee was driving a pick-up truck with his house-trailer attached in a westerly direction on highway 64, Tom Buck Nicholas, acting

as agent of the Logan County Farmers' Association and while driving a heavily loaded truck in the same direction Bingamon was traveling, attempted to pass Bingamon on a bridge and negligently ran the truck he was driving into Bingamon's house-trailer, thereby damaging it to the extent of $3,000. The trial resulted in a verdict for appellee, Bingamon, in the sum of $1,234.85.

Appellants contend that the evidence is not sufficient to sustain the verdict, that the trial court committed error in the giving of an instruction dealing with one attempting to pass another within 100 feet of a bridge, and that the court erred in the instruction given on the measure of damages.

In determining the sufficiency of the evidence, it must be viewed in the light most favorable to appellee. *East Texas Motor Freight Lines, Inc.* v. *Buck,* 213 Ark. 640, 212 S. W. 2d 13; *Schubach* v. *Traicoff,* 214 Ark. 375, 216 S. W. 2d 395. When this is done, it appears that appellee was driving on his side of the road in a proper and lawful manner, and the appellant, Tom Buck Nicholas, while driving a large two-ton truck heavily loaded, attempted to pass appellee without giving any warning, and in doing so caused the truck to strike the house-trailer. Realizing that he had collided with the house-trailer, Nicholas then slowed up, causing the truck to rake the house-trailer on the side almost its entire length, resulting in considerable damage to the trailer. The evidence thus viewed was sufficient to take the case to the jury on the allegations of negligence set out in the complaint charging that the truck was being operated at an excessive rate of speed, failure of the driver of the truck to keep a proper lookout, and failure to give any warning of the attempt to pass.

Next, appellant says the court erred in giving appellee's instruction No. 9, which is as follows: "Operators of motor vehicles upon public highways are required to exercise ordinary care in keeping a lookout for persons and vehicles also using the highway. They must keep such motor vehicles under such reasonable control as would enable them to avoid accidents by the exercise of

ordinary care where danger is apparent or reasonably anticipated. The degree of care being commensurate with the danger to be anticipated, the traffic to be encountered, and the use of the way. The law provides that no vehicle in overtaking and passing another vehicle or at any other time be driven to the left side of the road-way when approaching within 100 feet of any bridge." Appellants complain of that part of the instruction which tells the jury what the law is with regard to one vehicle overtaking and attempting to pass another within 100 feet of a bridge. Ark. Stats., § 75-611, provides:

"No vehicle shall be driven to the left side of the center of the road-way in overtaking and passing another vehicle proceeding in the same direction * * * when approaching within 100 feet of any bridge * * *." There was evidence to the effect that the collision occurred on a bridge. In fact, the collision might not have occurred except for the attempt to pass on the bridge or within 100 feet thereof. Therefore, the instruction was not error, the allegations of negligence being broad enough to cover the situation.

Lastly, appellant assigns as error the giving of appellee's instruction No. 14 by the trial court, which is as follows: "You are instructed that if you find that the plaintiff is entitled to recover in this action, then in considering the damages to be awarded for damages to plaintiff's house-trailer, if any, the measure of damages would be the difference in the fair market value of the house-trailer at the time and place of the collision, immediately before and immediately after the accident complained of. Consider all the evidence held admissible in the trial of the case and if you find that the plaintiff is entitled to recover herein, then award him such a sum, under the instructions of the court as will fairly compensate him therefor. You may consider evidence of the cost of repairs to the house-trailer in determining the extent of damages, if any." The undisputed evidence is that it would cost $1,234.85 to repair the damage to the trailer. There was no other evidence as to the value of the trailer immediately before and after the collision. This Court has said:

"In the absence of other competent proof of market value, we have held that the difference in market value before and after the collision may be established by a showing of the amount paid in good faith for the repairs necessitated by the collision." *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14.

In the case of *Payne* v. *Moseley,* 204 Ark. 510, 162 S. W. 2d 889, the Court held: "Appellant also contends that the court instructed that the measure of damages would be the difference between the market value of the automobile before and the market value after the collision. It is argued by appellant that there is no evidence in the record as to the market value of the automobile before and after the collision, but we think the jury was warranted in finding the cost of the repairs represented the difference between the market value of the car before and after the collision."

Finding no error, the judgment is affirmed.

SMITH, ADMINISTRATRIX *v.* CLARK.

4-9645 244 S. W. 2d 776

Opinion delivered January 7, 1952.

Lee Ward, for appellant.

Barrett, Wheatley & Smith, for appellee.

MINOR W. MILLWEE, Justice. Francis Cline Clark died intestate in Craighead County on July 2, 1949, survived by appellant, Frances Jeanette Smith, his daughter, and by appellee, Fred Clark, a brother. Appellant brought this suit as administratrix of her father's estate to recover $2,800, which sum she alleged belonged to her as heir and was fraudulently withdrawn from her father's bank account by appellee and converted to his own use.

Appellant attached to her complaint certain interrogatories which she asked that appellee be required to answer under oath. Five of the six questions propounded related to circumstances surrounding the issuance and delivery to appellee of a check by the deceased covering the funds in controversy.

The answer of appellee contained a general denial and further alleged a gift to him by his brother of the balance of the $2,800 remaining after payment of funeral and other expenses incident to his brother's last illness in the approximate sum of $1,465. Answers to the interrogatories were attached to appellee's answer signed by his solicitors. In response to appellant's motion for summary judgment because appellee had failed to answer the interrogatories under oath, appellee refiled the answers under oath.

Appellant filed a demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense and also filed a reply denying generally the allegations of the answer.

After trial on oral testimony, the cause was taken under advisement. A decree was subsequently entered dismissing appellant's complaint and finding that the evidence established a gift *causa mortis* to appellee from his brother of the funds in controversy.

There is no dispute in the evidence which is to the following effect. Francis Cline Clark and his wife separated about 1930 and were divorced in 1931 or 1932. Appellant, who is their only child, lived with her maternal grandparents for several years following the separation and until she married. After the separation, Francis Cline Clark lived with appellee and his family. Although he visited appellant after her marriage, Clark continued to make his home with appellee for more than fifteen years and until his death in July, 1949. Clark became afflicted with cancer and in May, 1949, entered a Jonesboro hospital where he was confined for eight weeks before his death. Several days prior to June 25, 1949, and after he had undergone two operations, Clark delivered to appellee his signed check in blank on the Security Bank & Trust Company of Paragould, Arkansas. He directed appellee to withdraw his deposit of approximately $2,800 in the bank, pay all medical expenses and other debts owed by him (Francis Cline Clark), and that appellee keep for himself any balance remaining in the event of his brother's death. Appellee took the signed blank check to the bank on June 25, 1949, where a teller filled in the date and amount of the check payable to "cash" for $2,800, as directed by appellee. Appellee endorsed the check and received the $2,800. He paid the hospital, medical and other bills incurred on account of his brother's last illness in the amount of approximately $1,400.

Two nurses who attended Clark while confined in the hospital testified to conversations in which he told them that he would never get well, that appellee and his

family had done more for him than anybody, that he intended to sign a check for appellee to draw his money out of the bank and wanted appellee to have the money remaining after payment of his hospital bills and other debts. Clark later told them that he had signed such a check. Similar testimony was given by appellee's daughter. It was shown that decedent customarily signed checks in blank with directions to the payee to fill in the blanks. It was also shown that he was devoted to appellee and his family. An automobile owned by Francis Cline Clark was turned over to appellant as administratrix and there was some evidence that he had a $1,000 life insurance policy payable to appellant.

Appellant first contends that the answer of appellee did not state facts sufficient to constitute a defense to the complaint and that her demurrer to the answer should now be sustained. Although the record does not show that the demurrer was ever presented to the trial court, appellant says the question is still before this court by virtue of Ark. Stats., § 27-1140. This statute provides that unless the demurrer is presented to the court before calling a cause for trial, it shall be regarded as waived as to all points except the jurisdiction of the court, and that the pleading demurred to does not state facts sufficient to constitute a cause of action, or defense.

We think appellant's contention is untenable. The answer of appellee, after admitting that Francis Cline Clark died intestate and that appellant was administratrix of his estate, denied "each and every other material allegation contained in the complaint". Thus we have a general demurrer to an answer containing a general denial of the facts alleged in the complaint. The authorities generally hold that a denial is not subject to demurrer where it presents an issue on material allegations. In 71 C. J. S., Pleading, § 241b, it is said: "It has been held that an answer which contains a general denial coupled with, or contained in, allegations and statements of fact purporting to constitute an affirmative defense is not subject to successful attack by demurrer, although the new matter by itself does not constitute a defense."

The demurrer to appellee's answer admitted the truth of its allegations for the purpose of the demurrer. Since the answer contained a general denial of the allegations of the complaint, it stated a good defense and the demurrer could properly have been overruled for this reason. But the answer also set up additional allegations which, if true, were sufficient in our opinion to establish a gift *causa mortis*. We deem it unnecessary to set out these rather lengthy allegations which are in substantial conformity with the proof adduced by appellee as hereinbefore set out.

So we consider appellant's contention that the allegations of the answer are insufficient to establish a gift *causa mortis* in connection with her further contention that the evidence is insufficient to prove such gift. It is well settled that gifts *causa mortis* as well as gifts *inter vivos* must be established by clear and convincing testimony. *Bennett* v. *Miles, Administrator,* 212 Ark. 273, 205 S. W. 2d 451. There is considerable conflict in the authorities as to whether the donor's own check may be the subject of a gift *causa mortis*. Many courts hold that a gift of the donor's own check made in expectation of death is not the subject of a gift, either *inter vivos* or *causa mortis,* where such check is not accepted or paid by the bank before the donor's death. 38 C. J. S., Gifts, § 106; Anno. 20 A. L. R. 177; 44 A. L. R. 625; 53 A. L. R. 1119. But this court is committed to the so-called minority rule which holds that one's check or draft may be the subject of a valid gift by the maker although it is not presented for payment until after the death of the donor.

In the leading case of *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65, Judge HART stated the rule as follows: "It is earnestly insisted by counsel for appellants that a check can not be made the basis of a gift *causa mortis*. There is some conflict and confusion in the authorities on this question. But we think that the better reasoning and the trend of our own authorities, where the rights of creditors are not involved, is that when the delivery of the check is coupled with an intent to transfer a present

interest in the money, and no revocation is attempted, the intent of the donor should be given effect, and that the donee has the right to the payment of the check after the death of the drawer as well as before."

In that case the court also approved the following statement by the New York Court in *Ridden* v. *Thrall,* 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684: "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. In the case of gifts *inter vivos,* the moment the gift is thus consummated it becomes absolute and irrevocable. But in the case of gifts *causa mortis* more is needed. The gift must be made under the apprehension of death from some present disease, or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor. It is not needful that the gift be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor, when there was abundant time and opportunity for him to have made a will. These are the main features of a valid gift *causa mortis,* as they are set forth in many textbooks and reported cases." See, also, *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030.

This court is also committed to the rule that when a negotiable instrument is intrusted by one who signs it to the custody of another with blanks left therein, the instrument carries an implied authority to fill up the blanks. *White-Wilson-Drew Co.* v. *Egelhoff,* 96 Ark. 105, 131 S. W. 208. In that case, as here, the person receiving the instrument requested a third party to do the mechanical act of filling in the blanks. See, also, *Saxon* v. *McGill,* 179 Ark. 415, 16 S. W. 2d 987.

Appellant earnestly insists that a valid gift was not proved because the check was delivered to appellee in blank. It is also argued that there was no surrender to appellee of possession and dominion over the funds in-

volved as required by the tests laid down in the Carter case and by Ark. Stats., § 68-1304, which provides: "Every gift of goods, and chattels and all other conveyances of the same not on consideration deemed good in law, shall be void as against all creditors and purchasers, and all such gifts, grants and conveyances, shall be void even against the grantor, unless possession really and *bona fide* accompany such gift or conveyance."

The rights of creditors and purchasers are not involved in the case at bar and the check received by appellee was paid by the bank prior to the donor's death. The evidence clearly shows that decedent delivered the check to appellee with the intent of transferring the deposit to him and thereafter ratified this action by telling his nurse that he had signed the check and wanted his brother to have what was left after all bills were paid. It is also undisputed that at the time the check was given the donor was under apprehension of death from a serious illness from which he died without any intervening recovery and without any revocation of the gift. The signed check was filled in, cashed and the proceeds applied as directed by the donor and we find no merit in appellant's contention that no gift was consummated because the check was signed in blank. On the whole case, we conclude that the evidence was sufficient to establish a gift *causa mortis* under the tests laid down by our decisions.

It is next argued that the chancellor erred in permitting the two nurses and appellee's daughter to relate the conversations with deceased relative to the issuance and delivery of the check to appellee. It is insisted that this testimony was admitted in violation of the rule against hearsay evidence. One of the exceptions to the hearsay rule is that whenever a party claims under or in the interest or right of another, the declarations of such other person pertaining to the subject of the claim are admissible against him. Hence, the disserving admissions and declarations of an ancestor are admissible against those claiming under him as his heirs at law. 20 Am. Jur., Evidence, § 604. In *Jefferson* v. *Souter,* 150

Ark. 55, 233 S. W. 804, we held that declarations against interest are admissible against all who succeed to the declarant's interest, or who claim under him. See, also, *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456; *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501. The declarations of deceased in the case at bar were not self-serving, but were in the nature of declarations against his interests and the interests of appellee who claims under him. The chancellor correctly held such testimony admissible.

Appellant also contends that the chancellor erred in admitting the testimony of appellee relative to the transactions with deceased in reference to the check and insists that the testimony was inadmissible under Schedule § 2 of the Arkansas Constitution, which is commonly referred to as the "dead man's statute". This statute provides that where an administrator is a party to the suit, neither party may testify as to transactions with or statements of the intestate unless called to testify thereto by the opposite party. Appellant is correct in her contention unless the filing and use of the interrogatories propounded to appellee, and his answers thereto, amounted to calling him as witness within the meaning of the statute. These interrogatories required appellee to state how many checks were delivered to him by deceased, the persons present when the checks were given and other facts in connection with filling in of the blanks and payment of the check. The interrogatories were attached to the complaint and the answers given thereto were attached to appellee's answer. The questions and answers, although never formally introduced, were called to the attention of the chancellor at the hearing and appellee was cross-examined at length relative to the answers given. Appellant insists that since the interrogatories and answers are to be treated as a deposition under Ark. Stats., § 28-401, and were never formally introduced, they were completely abandoned and could have no further bearing upon the litigation.

The weight of authority supports the rule that the taking of the deposition of the adverse party with respect

to transactions or conversations with the deceased amounts to a waiver of the incompetency imposed by the statute as to such matters. It has been held in many cases that the taking of the adverse party's deposition amounts to calling him as a witness whether the deposition is introduced in evidence or not. Some of these cases were reviewed by the Oklahoma Court in *Cox* v. *Gettys,* 53 Okla. 58, 156 Pac. 892. The court held that the incompetency of testimony imposed by the dead man's statute was waived even though the deposition was never actually filed, saying: "Any other construction of the statute would enable one party to search the conscience of his adversary, drag to light his private papers and other evidence, and then repudiate the result, if the experiment proved unsatisfactory." The court also approved the following language by the Missouri court in *Rice* v. *Waddill,* 168 Mo. 99, 67 S. W. 605: "Can it differ in principle that, in this case, defendants took plaintiff's deposition, had it duly certified and thereby, in the language of counsel, 'heard what she said and that was all he wanted to know,' and then suppress the deposition; whereas, in the cases cited, the deposition was similarly taken and filed, but not used by the party taking it? Can a party thus trifle with the machinery of the law and avail himself of it if it suits his purposes, and reject it if it does not, and yet escape all the consequences of his acts? We hold he cannot."

A similar result was reached by the Texas court in *Allen* v. *Pollard,* 109 Tex. 536, 212 S. W. 468, where Allen's deposition was taken by the adverse party (executor) and the court said: "The taking of the deposition was for the purpose of obtaining Allen's testimony in respect to the matters inquired about. It was effective for the purpose. By its means the testimony was developed. Allen was made to disclose the facts. He was compelled 'to testify' regarding them. The method was one which the law furnished the adverse party and of which he availed himself, just as he might have called Allen to the stand. Allen's testimony was made subject to his use. It was not within Allen's power to prevent its use. He could not recall it. It stood adduced as a

part of the record of the proceeding. With his testimony compelled under oath and obtained at the instance of the adverse party through the force of the law, with it available for the free use of the adverse party and at his disposal, with it of record and constituting an integral part of the trial, we think it is evident that within the full intendment of the statute Allen must be regarded as having been called by his adversary to testify concerning the transaction with the decedent, and as competent, therefore, to give evidence in his own behalf in relation to it. Regardless of any use of the deposition, Allen had thereby been required to give the testimony in a way sanctioned by the law as only another and equivalent method to placing him upon the stand. The purpose of his adversary in seeking the testimony had been accomplished. It had been attained as fully as though Allen had been called to the stand, since the testimony was as effectually developed and rendered as freely available. The trial court made the proper ruling. *Gilkey* v. *Peeler,* 22 Tex. 663." Other cases to the same effect are: *McCoy* v. *Ferguson,* 249 Ky. 334, 60 S. W. 2d 931, 90 A. L. R. 891; *Thomas* v. *Irvin, Adm'r.,* 90 Tenn. 512, 16 S. W. 1045; *Barrett* v. *Cady,* 78 N. H. 60, 96 A. 325; *Hodge* v. *St. Louis Union Trust Co.* (Mo. Sup.) 261 S. W. 67; *Andrews* v. *Smith,* 198 N. C. 34, 150 S. E. 670; *Golder* v. *Golder,* 102 Kan. 486, 170 Pac. 803; *McClenahan* v. *Keyes,* 188 Cal. 574, 206 Pac. 454. See, also, Anno. 64 A. L. R. 1165, 159 A. L. R. 422.

Appellant relies principally on the cases of *Prince* v. *Abersold,* 123 Ohio St. 464, 175 N. E. 862, and *Clayton* v. *Ogden State Bank,* 82 Utah 564, 26 Pac. 2d 545. As to these cases, we concur in the following views expressed by the Washington court in *American Fruit Growers* v. *Calvert,* 186 Wash. 29, 56 Pac. 2d 1307: "In the Prince case, *supra,* the Supreme Court of Ohio cited not a single authority. They simply declare, *ipse dixit,* that: 'After a careful examination of these decisions of other states, a majority of the court is of the opinion that the better and safer rule is that the mere filing of a deposition taken of an adverse party does not waive the inhibition of the

statute against the testimony of the party whose deposition has been so taken.'

"The Clayton Case, *supra,* was a case where the parties had stipulated that the depositions might be taken subject to any exception that might be interposed if the witness were present and testified at the trial. That court cited and quoted many of the conflicting cases upon the question of waiver, but then rested its decision upon the above stipulation, which it said 'puts an end to the argument,' as it should. Those cases are not persuasive."

The rule as to waiver of the incompetency of the adverse party has also been applied where the examination, as here, was by means of interrogatories. *Nolty* v. *Fultz,* 277 Ky. 49, 125 S. W. 2d 749; *Jones* v. *Jones,* 245 Ala. 613, 18 So. 2d 365; *Woodyard* v. *Sayre,* 90 W. Va. 547, 111 S. E. 313. In *Tenny* v. *Porter,* 61 Ark. 329, 33 S. W. 211, this court held that an examination of the adverse parties by interrogatories had the effect of calling them to testify within the meaning of the statute. The opinion in that case recites that the interrogatories and answers thereto were filed, but does not state whether they were formally introduced in evidence. We think the rule recognized by most of the cases on the question is supported by reason and common fairness. It would be palpably unjust for one party to force his adversary to disclose matters of defense under oath and then deny him the right to further explain the circumstances of the transactions thus disclosed. It is our conclusion that appellant waived the appellee's incompentency as a witness under the statute by use of the interrogatories although they were not introduced in evidence, and that the chancellor correctly so held.

The decree is affirmed.

GARNER *v.* HORNE.

4-9580 245 S. W. 2d 229

Opinion delivered January 7, 1952.

Rehearing denied February 11, 1952

Brockman & Brockman and *Wright, Harrison, Lindsey & Upton,* for appellant.

Max Smith and *Reinberger & Eilbott,* for appellee.

ED. F. MCFADDIN, Justice. Appellants, as plaintiffs, sought specific performance or damages for failure of the C. W. Horne heirs to convey to appellants a tract of 160 acres on which there was valuable timber. From a decree refusing relief, there is this appeal.

C. W. Horne died intestate, many years ago; and at the time of the matters herein, his heirs were (1) W. D. Horne, a son; (2) Mrs. White, a daughter; (3) Mrs. Odum, a daughter; and (4) Mrs. Seale, (5) John Sinclair, and (6) Norman Sinclair—the last three named being children of Mrs. Sinclair, a daughter of C. W. Horne. As tenants in common, these 6 numbered persons owned the 160-acre tract here involved, and are the

defendants (appellees) along with Van Sadler, whose interest in the litigation will be subsequently discussed.

In the early spring of 1947, C. L. Garner and H. R. Garner, lumbermen trading under the partnership name of C. L. Garner & Son (and hereinafter called "Garner"), undertook to purchase the 160-acre tract owned by the Horne heirs. W. D. Horne lived in California; and after some correspondence he agreed to sell to Garner the land, (which of course included the timber thereon), less one thirty second of the minerals, for the sum of $5,000. W. D. Horne, in writing that he had authority to act for all of his co-tenants, used this language: ". . . I say this because I have the authority as I am administrator of said land".

W. D. Horne did not know the address of his niece and two nephews, who were the three children of his deceased sister, Mrs. Sinclair; and Garner undertook to obtain such addresses from Mrs. White, who lived near Hot Springs, Arkansas. In so doing Garner discovered that Mrs. Odum lived in Florida and that the 3 Sinclair children lived, respectively, in Louisiana, Arizona and Florida. Finally, on May 22, 1947, Garner prepared a deed and sent it to W. D. Horne understanding that all the C. W. Horne heirs would execute the same deed. Garner had a Pine Bluff bank advise W. D. Horne, under date of May 21, 1947:

"You are advised that this bank holds the sum of $5,000 for the purpose of paying the consideration of sale of certain lands in Cleveland County by you, Norman C. Sinclair, John C. Sinclair and wife, Mary Mayfield Sinclair, Alice Sinclair Seale, Grace Odum and Mae White. The deed by them to be properly executed and acknowledged to which you may attach draft in the above sum and forward same to this bank. The purchasers, C. L. Garner, and H. R. Garner, will be promptly notified of the receipt of the deed and upon their advice as to execution by proper parties, check or draft will be forwarded according to said instructions."

W. D. Horne apparently understood that he was to be the last grantor to execute the deed. Accordingly he

forwarded it to Mrs. White, who signed and acknowledged it and returned it to *Garner,* who then sent the deed to Mrs. Seale in Louisiana for execution. What happened to the deed thereafter is a matter of some uncertainty. At all events on June 26, 1947, Mrs. White advised Garner by letter:

"It seems that one of the heirs is holding up the deed to the place. And this morning we had a raise on your bid for the place. Am writing Dossie in this mail; am sorry the delay, but do not have the power to make them."

Mrs. Odum (one of the C. W. Horne heirs) was then visiting in Hot Springs; and both C. L. Garner and H. R. Garner went to Hot Springs, and, on July 3, 1947, had one or more conferences with Mrs. Odum and Mrs. White. The testimony of the participants is in conflict as to what transpired at the conferences. But, at all events, the Garners then received confirmation of the fact that Van Sadler had offered the C. W. Horne heirs a larger sum of money for the land. Sadler, a relative of the Horne heirs, is a lumberman and a competitor of Garner. When Mrs. Seale received the deed sent her by Garner, as aforesaid, she informed her brother, John Sinclair of Florida, about the proposed sale to Garner. John Sinclair immediately wired Garner's attorney for details, who replied under date of June 21, 1947:

"You are advised that Mr. William Dorsey Horne, 1824 East Fourth Street, Apt. 33, Long Beach 4, California, negotiated the sale of the property to C. L. and H. R. Garner, of Rison, Cleveland County, Arkansas, for a consideration of $5,000 cash.

"The agreement to sell provides for deposit of $5,000 with the National Bank of Commerce, of Pine Bluff, Arkansas, to be held by the bank until the deed conveying the lands is properly signed and acknowledged by the owners.

"I have not been advised what pro rata part each heir is to receive of the $5,000, but it is understood, and I have advised the purchasers, that the deed is not to be

delivered until an agreement is reached and signed between the sellers showing the amount each heir, or seller, is to receive.

"I made that requirement, to the end that the purchasers will then be protected, because they will know that the bank forwarded to each interested person the amount agreed upon to be paid to such person.

"If you sign and acknowledge the deed as provided in the deed I would suggest that you immediately take the matter up with Mr. Horne so that the amount coming to you from the sale will be definitely stated.

"I assume that the sellers are willing to accept $5,000 provided each seller receives his pro rata part."

John Sinclair also immediately contacted Van Sadler whom he knew to be interested in purchasing the land. Sadler first "raised the bid" of Garner to $5,250; and finally offered $5,500 for the land and timber with the Horne heirs reserving one-half of the mineral rights instead of one thirty-second as in the proposed Garner transaction. It is clear that when the conferences occurred in Hot Springs in July with Mrs. White and Mrs. Odum, the Garners had already learned that Sadler was trying to purchase the land, because the Garners admit that they then offered the Horne heirs a "bonus of $250" in addition to the $5,000. The Garners learned in those conferences, if they did not already know: (a) that W. D. Horne had never been "Administrator of said land" as he had claimed, and (b) that W. D. Horne was not authorized to act for the other Horne heirs. It is clear that Mrs. Odum and the Sinclair heirs were not on very friendly terms with W. D. Horne. At all events, in the Hot Springs conferences and at all times thereafter, Mrs. Odum disaffirmed all authority of W. D. Horne to speak for her; and Mrs. Odum never signed any deed to the Garners or agreed to sell to them.

Shortly after the Hot Springs conferences the Garners realized that the one-fourth interest in the land owned by the Sinclair heirs could not be acquired by the Garners, so they prepared a deed for the remaining three-fourths interest,—*i. e.* the interests belonging to W. D.

Horne, Mrs. White and Mrs. Odum,—and forwarded such deed to some one of the three for execution. As to what happened to that deed, the record is silent; and no copy of the deed is in the transcript. It is clear that Sadler knew all along that he was buying lands which the Garners were trying to buy.

At all events the duly executed deed of all of the C. W. Horne heirs was delivered to Sadler November 14, 1947, and duly placed of record and payment made direct to each of the six C. W. Horne heirs. On November 24, 1947, after the said deed had been recorded, Garner filed this suit against the C. W. Horne heirs and Van Sadler. The complaint was styled "Complaint for Specific Performance", and prayed, *inter alia*:

". . . that the defendants and each of them be enjoined from disposing of said property; that the deed, made, executed and delivered to Van Sadler by his co-defendants be cancelled, set aside and held for naught, and that said defendants be required by this Court to accept said purchase money and to execute and deliver to plaintiff a conveyance of said property in accordance with the contract heretofore entered into. That in case the Court does not enjoin the defendants from cutting and disposing of said timber that they and the said Van Sadler be required to respond in damages to the plaintiffs to the amount of three times the market value of all timber cut and removed from said land."

While the suit was pending Sadler cut and removed the timber from the land; and on April 17, 1950, the Garners filed an amendment to the complaint setting up such fact and praying, *inter alia*:

"That upon final hearing, the plaintiffs have judgment as prayed in the original complaint, or if the court should determine that the defendants have placed themselves in position that they cannot carry out the terms of said contract of sale, then that these plaintiffs have judgment for damages for all sums as shown by the proof, and for other general and proper relief."

All defendants have entered their appearance except W. D. Horne, Mrs. Seale and Norman Sinclair; and each

of these has been served by warning order. The Chancery Court refused the Garners all relief, and they now prosecute this appeal.

I. *The Sinclair Interest.* As to the one-fourth interest of the three Sinclair heirs, appellants frankly concede that they are entitled to no relief. So we forego any discussion of that interest; and affirm as to it.

II. *Mrs. Odum's Interest.* As to Mrs. Odum's one-fourth interest, little need be said. She did not agree to sell her interest to the Garners and did not sign any papers to them, and she disavowed any power of W. D. Horne to act for her. In the record in this case we cannot find facts sufficient to support any application of "agency by estoppel", as urged by appellants; so we affirm as to Mrs. Odum's interest.

III. *Mrs. White's Interest.* As to the one-fourth interest of Mrs. White the case is not so easy, but turns on the collective effect of three points; (1) the indivisibility of the Garner contract; (2) Mrs. White's intentions and understandings; and (3) the failure of the Garners to pay her for the deed she sent them. When we consider the letter the bank wrote W. D. Horne, and the letter Garner's attorney wrote John Sinclair (both heretofore copied), it is reasonably clear that the Garners started out in the spring of 1947 to purchase the entire 160-acre tract, and not merely the interest of some of the heirs. Such was undoubtedly the situation until after the Hot Springs conferences of July 3, 1947. Thus, what Mrs. White signed was a deed dependent upon *all* the other co-tenants signing. Mrs. White executed and acknowledged the deed and returned it to the Garners. They did not send her the one-fourth of the $5,000 to which she was entitled: rather they sent the deed to another one of the heirs for execution. Evidently, *at that time,* the Garners believed that the contract of conveyance was indivisible.

The Garners received the deed from Mrs. White on approximately May 30, 1947. She wrote them on June 26, 1947, that she could not force the others to sign. Then

at the conferences in Hot Springs on July 3rd, regardless of the conflict in versions, the fact remains that the Garners did not offer Mrs. White her one-fourth of the $5,000 consideration for the deed that she had signed purporting to convey her one-fourth interest. She had done all she could do:—that is, she had executed and acknowledged the deed and sent it to the Garners in June. They did not offer her payment for her one-fourth interest. She was not required to wait indefinitely to get the deed executed by the others. She was only required to wait a reasonable time. In 26 C. J. S. 489 the rule is stated:

"*Where time is not specified.* If a deed is silent as to the time of performance, the law will imply that performance must be within a reasonable time. What constitutes a reasonable time depends on the subject matter, the nature of the act to be performed, and the situation of the parties."

The deed from the C. W. Horne heirs to Van Sadler is in the transcript and discloses that it was not until October 13, 1947, that Mrs. White executed and acknowledged the deed to Van Sadler. This was after she had learned that Mrs. Odum and the Sinclair heirs would not sell to Garner. Mrs. White honestly believed, as she at all times stated, that the deed to Garner was to be of no force until *all* of the C. W. Horne heirs executed the deed. In view of all the facts, we think it would be against sound equitable rules for the Garners to recover against Mrs. White, who was the only one of the C. W. Horne heirs who actually signed and acknowledged the deed. She exemplified a willingness to sell, but the Garners did not deliver to her the portion of the money to which she was entitled. As to her, the Garners have acted without equity; and the decree is affirmed as to her interest.

IV. *W. D. Horne's Interest.* As to the one-fourth interest of W. D. Horne the case is most difficult. Appellants urge with great force that W. D. Horne positively agreed to sell; that he is bound by his promise; and that even though the others would not sell still as against W. D. Horne the appellants are entitled to specific per-

formance with abatement. Appellants cite, *inter alia*: *Meek* v. *Walthall,* 20 Ark. 648; *Osborne* v. *Fairley,* 138 Ark. 433, 211 S. W. 917; *Sebold* v. *Williamson,* 203 Ark. 741, 158 S. W. 2d 667; also Am. Jur. 123; 58 C. J. 901; and the annotation in 154 A. L. R. 767, entitled "Contract to sell land not signed by all of co-owners as operative to cover interest of the signers". To these might be added: *Bonner* v. *Little,* 38 Ark. 397; *Moore* v. *Gariglietti,* 228 Ill. 143, 81 N. E. 826, 10 A. & E. Ann. Cas. 560, with note following case in last cited volume; *Villarreal* v. *De-Montalvo* (Tex. Civ. App.) 231 S. W. 2d 964; and *Eppstein* v. *Kuhn,* 225 Ill. 115, 80 N. E. 80, 10 L. R. A., N. S. 117, and case note following case in last cited volume. Appellants further insist, under authority of *Meek* v. *Walthall* (*supra*), that since Van Sadler purchased the W. D. Horne interest, with notice, the appellants are entitled to full relief from Van Sadler against the one-fourth interest of W. D. Horne even though the latter be a non-resident.

In *Meek* v. *Walthall,* 20 Ark. 648, a tract of land was owned by the Fogle heirs; and certain of them entered into a written contract with Walthall to convey the land to him for $700. One of the heirs so signing with Walthall was a minor owning a one-seventh interest, who promptly disaffirmed the contract. Another heir owning one-seventh interest refused to sign the contract with Walthall. Thereupon, the other Fogle heirs who had signed with Walthall, claiming that such disaffirmance by the minor and refusal by the other heir released all Fogle heirs from the Walthall contract, conveyed the lands to Meek, "who purchased with full notice". Walthall sued the adult Fogle heirs who had signed with him, and also Meek, for specific performance with abatement. The lower Court held that Walthall upon tendering five-sevenths of the total consideration of $700 was entitled to receive, direct from Meek, the title he had received of the five-sevenths interest of those adult Fogle heirs who had contracted with Walthall. In affirming the lower Court we said:

"Here the appellee asked the performance of the entire contract, and not a part of it. It is true that he

sought to recover the whole of the land, and failed as to the seventh part, owned by Nancy Fogle, because she was an infant when she signed the contract; and as to the seventh part owned by *Gillis and wife,* because they were not bound by the contract; but this was no good reason why he should not recover the five-sevenths of the land owned by Battice Fogle and John Fogle, upon whom the contract for the conveyance was binding. As to them he sought and obtained the enforcement of the entire contract, and not a part of it. They were the owners of five-sevenths of the land. They contracted to sell and convey their interest in the land to him. They afterwards sold and conveyed it to appellant, who had notice of their contract with appellee. As against them, and the appellant who purchased with notice, the appellee was clearly entitled to a specific performance of the contract."

The doctrine of "indivisibility of contract" affords no support to W. D. Horne because he represented to Garner that he had power to speak for all of the heirs. His letter of April 26, 1947, to Garner said:

"If you are willing to accept the offer as I have above mentioned, you may go ahead and have the deed made out and send same to me so that my sisters and I may sign it, as they hold an interest in the property. Then when the bank in Rison, Arkansas, notifys me that they have the draft for $5,000 made out to my credit, I will release the signed deeds to them. After you have done this I will give you permission to go ahead and cut the timber, until I can send deed to my sisters in Florida and Arkansas for their signatures, I say this because I have the authority as I am administrator of said land."

We have an abiding feeling that W. D. Horne's representation—"I am administrator of said land"—was the primary cause of this entire litigation; because that statement lulled Garner into false security as to the enforceability of the contract, and the knowledge of W. D. Horne's overstatement of his authority was not brought home to Garner until Sadler—Garner's competitor—had obtained substantial advantages. The difference in re-

sults, as between Mrs. White and W. D. Horne, is because of the difference in the representations, conduct and understanding of the two persons. W. D. Horne represented that he had authority to act for all; Mrs. White frankly advised Garner by letter that she could not compel the others to act. Mrs. White tendered to Garner a deed which was not intended to pass title until it was executed by all of the C. W. Horne heirs. Thereafter she waited what was under the circumstances, more than a reasonable time before conveying to Sadler. W. D. Horne did not offer any deed to Garner to carry out the contract. Even when Garner prepared and sent to W. D. Horne the deed for the three-fourths interest as requested by Horne, neverthless Horne failed to execute such deed or return it to Garner. Instead: Horne, on October 25, 1947, executed and acknowledged the deed to Van Sadler. Garner tried every reasonable way to get W. D. Horne to execute a deed to him in accordance with W. D. Horne's contract. All of this Horne failed to do.

Even though Horne is a non-resident and is brought into this case by constructive service only, nevertheless the interest of W. D. Horne now owned by Van Sadler, is subject to the full power of this court under the authority of *Meek* v. *Walthall* as previously discussed.

The holding in *Meek* v. *Walthall* fits the case at bar and results in Garner acquiring W. D. Horne's one-fourth interest in the land (less one one hundred twenty eighth mineral interest) by delivering to Van Sadler $1,250, and Sadler then being compelled by the court to execute a deed to Garner for the W. D. Horne interest. Sadler, having purchased with knowledge, is obligated to respond in actual damages to Garner for one-fourth of the value of the timber cut and removed from the land. For the determination of such amount and for the carrying out of this decree the cause is remanded to the Chancery Court. The costs of this appeal are divided three-fourths against Garner and one-fourth against Van Sadler.

George Rose Smith and Robinson, JJ., dissent as to reversal.

ROBINSON, J., dissenting. I do not believe the preponderance of the evidence proves that Garner agreed to accept anything less than the whole. The evidence is not sufficient to show that Horne ever received any notice to the effect that Garner would accept a deed conveying only Horne's one-fourth interest in the land. In fact, Horne had every reason to believe that Garner would not accept a deed from only Horne. Mr. Hogg, vice-president of the National Bank of Commerce in Pine Bluff, had written Horne as follows:

"You are advised that this bank holds the sum of $5,000 for the purpose of paying the consideration of sale of certain lands in Cleveland County by you, Norman C. Sinclair, John C. Sinclair and wife, Mary Mayfield Sinclair, Alice Sinclair Seale, Grace Odum and Mae White. The deed by them to be properly executed and acknowledged to which you may attach draft in the above sum and forward same to this bank.

"The purchasers, C. L. Garner and H. R. Garner will be promptly notified of the receipt of the deed and upon their advice as to execution by proper parties, check or draft will be forwarded according to said instructions."

On August 14th Mr. Horne wrote to Garner's attorney as follows:

"Yours of July 16, 1947, was awaiting me when I returned to Long Beach this week. There was also a letter from John A. Sinclair of Jacksonville, Florida.

"Mr. Sinclair seems to be the one who is holding up the deal negotiated between Mr. Garner, my sisters Mrs. S. C. White and Mrs. Grace Odum, and myself. It seems that when the deed that Mr. Garner had drawn up, was sent to Mr. Sinclair for his signature that he refused to sign because he had been made an offer of $250 more than Mr. Garner & Son had offered. Mr. Sinclair is holding the deed now, so my sister writes me.

"Just what steps should I take to clear the matter? I am willing to keep my agreement with Mr. Garner but

can do nothing without Sinclair's signature as he is a nephew and he and his sister and brother are entitled to their deceased mother's (my sister's) share of the land which would be, one-fourth of same. Their one-fourth interest would have to be divided between the three of them. The other three-fourths would be equally divided between my two sisters and myself as the land was left us by our father, so please let me know if I can close the matter without the signatures of my nephews and niece. If it can be closed this way we can get the deal settled right away as I am willing to sign the deed over to Mr. Garner. My sisters, Mrs. White and Odum have all ready signed it."

It is claimed that after it was ascertained that a deed could not be obtained from the Sinclair heirs, a deed was mailed to Horne, Mrs. White and Mrs. Odum to sign, conveying their interest to Garner, but the evidence on this point is not convincing. The record does not contain copy of any letter accompanying such deed. Garner's testimony on that point is too indefinite for a finding to be made that a second deed was mailed. Following is Garner's testimony in that respect:

Q. Did you forward him a deed to have he and his two sisters sign leaving the Sinclairs out?

A. As I recall we did.

Q. When was that?

A. I don't recall the date of that. It was sometime after August I presume because that letter is dated August 14th.

Q. Did you instruct the bank that since the deed hadn't been paid that upon receipt of a deed signed by Mr. Horne and his two sisters to remit to them their pro rata share of the $5,000?

A. As I recall we instructed the bank to do that. I didn't write them, if I instructed them to do that it was a verbal instruction.

Q. You don't have a copy of that letter in your file that you wrote Mr. Horne in response to his letter that you just read do you?

A. Mr. Brockman has a letter, — I don't know whether he has a copy or not.

MR. REINBERGER: Have you got a copy of the letter in your files?

MR. BROCKMAN: I don't seem to have it here. It may be in Mr. Garner's files.

Q. (Mr. Reinberger, continuing) Is there anything in your files, Mr. Garner, indicating Mr. Horne ever received any such deed?

A. I will have to refer to my files.

* * * * *

Garner does not unequivocally testify that a second deed was ever mailed. But, even so, it required the signatures of Mrs. White and Mrs. Odom in addition to that of Horne. Horne had offered to convey his part on August 14th. Since he had received no request for a deed to his part, he had every right to believe that, because the Garners could not get a deed to the whole, they did not want a deed for just his part. It was not until November that Horne conveyed to Van Sadler. Of course, Horne was not in a position to force Garner to buy Horne's one-fourth interest. The Complaint shows that, at the time of the filing thereof, Garner was contending for the whole. There was no alternative prayer asking that the individuals, as such, be compelled to convey their interest.

Therefore, I respectfully dissent from that part of the majority opinion reversing the Chancellor.

4-9639 244 S. W. 2d 774

Opinion delivered January 7, 1952.

Carlton Currie, for appellant.

Hendrix Rowell, for appellee.

HOLT, J. Appellant sued appellees alleging "that on the 5th day of April, 1950, plaintiff and defendants entered into an agreement under which agreement plaintiff agreed to place advertisements in two foreign papers for six days each, advertising machinery that the defendants had for sale. That defendants agreed to pay for this service the sum of $1,800; that plaintiff placed the advertisements in foreign newspapers as agreed, and has in every way performed its part of the agreement; that defendants have paid $600 to the plaintiff by check dated April 5, 1950, but have failed, refused, and neglected to pay the balance due under the agreement."

Appellees answered admitting payment of $600, denied other allegations and further alleged that "none of said equipment was sold and no benefit whatsoever inured to the defendants as a result of plaintiff's efforts, if any, to advertise and promote the sale of their equipment and accordingly in view of the agreement existing

between the parties, the plaintiff has been paid in full, etc.''

A trial resulted in a decree in favor of appellees. This appeal followed.

The primary and decisive question presented is the one of fact. Appellant's contention is that the contract here in question was solely for advertising appellees' property, whereas appellees contended that its primary purpose was to effectuate a sale of their property, especially by advertising it for sale in foreign or overseas newspapers in countries where the demand was especially heavy.

The record reflects that on April 3, 1950, appellees wrote appellant as follows: ''Mr. R. A. Kern of Kern-Limerick Tractor Company, Little Rock, Arkansas, gave us the name of your firm as being exporters of Used Construction Equipment.

''Due to financial reverses we are forced to sacrifice our equipment to raise some money.

''I have penciled in the very lowest figure that we can take for our equipment. If there is any commission charged for selling this equipment, it will be necessary for you to add it to the Selling Price.

''We will pay for any advertising and would like a fairly large coverage as time is of the essence of this deal.

''Our equipment is in the very best of condition and you are free to inspect it or us in any way you deem necessary.

''We would appreciate hearing from you concerning the above mentioned equipment at your earliest convenience.''

Immediately following receipt of this letter, appellant telephoned appellee, N. M. Graves, on April 5th and Graves gave his version of this conversation: ''A. I attached a list of the equipment to my letter and I had penciled in the figures. I thought that if he wanted to

show it to somebody he could write in what he wanted to charge. He called me and said our prices were ridiculously low, and I told him that was about all we could get in this country. He said they wanted it for export. He said Greece had about twenty million dollars under the Marshall Plan, and had about six weeks more or they lost their credit. I asked him how much he could get, and he said 'I know you can get as much as 10% more.' Q. What did he tell you he was going to do? A. He said he had contacts. I didn't know that he had just gone into business, and had no agents. Q. Where? A. In foreign countries that might be here buying and also in the foreign countries, and that he was going to run an ad in two foreign newspapers. * * * A. In the foreign countries themselves; he said foreign newspapers. He mentioned Greece and Arabia. Q. That knew him? A. Yes; that he had been doing business with and had sold equipment; that all he had to do was run an ad and he could sell equipment right off. * * * Q. You understood he was to advertise in foreign countries, across the ocean, and that Charles' name would be used? A. Yes. Q. And he, Charles, would sell the equipment subject to inspection? A. Yes, sir. * * * Q. At that time (meaning April 5th) did he tell you the Arabian and Finnish publications would be published and circulated in foreign countries? A. I still thought they would be published and circulated in foreign countries. Q. Did he tell you that? A. Yes, he did. * * * Q. And you have not received any benefit at all out of the arrangement? A. None whatever."

Appellee, W. L. Graves, corroborated the testimony of his brother, N. M.

In this conversation, appellant did not explain that he was not an exporter, but led appellees to believe that their equipment could be sold abroad because of the heavy foreign demand in nations deriving benefits under the Marshall Plan and that advertisements would be placed in two foreign (overseas) newspapers for six days each.

On the same date of this telephone conversation, April 5th, appellees again wrote appellant as follows:

"Am enclosing check for $600 as per our telephone conversation of this morning.

"I understand this is for first payment on advertising to amount to approximately $1,800, ads to be placed in two foreign papers for six (6) days each.

"If possible send us copies of papers in which the ads are placed. Also, we would appreciate very much if you could give me an idea as to the top cash price we will be able to move the different pieces of equipment for in the export trade; assuming our equipment to be in tip-top condition, which it is.

"Thanking you very much and hoping to hear from you as soon as possible, we remain."

Following the telephone conversation of April 5th, appellant wrote Graves Brothers on this same date, in part, as follows: "Thank you for your order placed per our telephone conversation above date. The advertising placed with us consists of six insertions in each of two newspapers that have been securing excellent prices for many accounts who have advertised.

"Your advertisement will be 10 inches across 3 columns or what totals 30 inches in each newspaper, The Finnish and Arabic.

"The rate of advertising is $5.00 per inch per insertion, or a total of One Hundred and Fifty Dollars ($150) per paper per insertion for six insertions. This amount is therefore $1,800 for the complete advertising program as per scheduled. * * *

"In our conversation, Mr. Graves, you may recall I spoke to you about one-third payment ($600) as a binding payment. This is customary on all advertising schedules where the amount is in excess of $1,000. We would also appreciate a note or trade acceptance for the balance, payable in a 30 to 90 day period in installments or in total, as suits your position at this time. The terms you may decide.

"I am in sincere belief that this equipment is in the best possible journals for its disposal and I will do all in my power to help you in every way possible."

It appears undisputed that appellant did not advertise in any foreign (overseas) newspaper, but in fact advertised in two three-page foreign language papers (Finnish and Arabic) published in New York City.

We think, in the circumstances, considering the written and oral evidence, that the parties entered into a contract which required appellant to advertise in two foreign (overseas) newspapers, where the demand was heavy and that appellant's failure to so advertise constituted a breach of the contract by appellant.

While appellant's testimony tends to contradict appellees' version of the contract, we are unable, after carefully considering all of the evidence, to say that the Chancellor's findings were against the preponderance thereof.

Accordingly, the decree must be, and is affirmed.

WHITAKER *v.* MITCHELL MANUFACTURING COMPANY.

4-9641 244 S. W. 2d 965

Opinion delivered January 7, 1952.

E. J. Butler and *Mann & McCulloch,* for appellant.

Norton & Norton, for appellee.

WARD, J. This is an appeal from a judgment of the lower court in the sum of $492.89 in favor of appellee against appellant. A jury was waived, the facts stipulated, and only one question is raised in the motion for a new trial.

Suit was filed February 12, 1951, by appellee for recovery on merchandise sold in July and August of 1950 to appellant, Frank E. Doggrell, Jr., and W. B. Konz who were engaged in business in St. Francis County under the firm name of Forrest City Wood Products, Inc. The complaint alleged that the named defendants were partners and asked for judgment against each as individuals and against the partnership. Since only appellant was served with summons judgment was against him and against Forrest City Wood Products, Inc., a partnership, and the cause was continued as to the other partners.

The only defense interposed by appellant, on motion and by answer, was that the Forrest City Wood Products, Inc., was a corporation and not a partnership, and that, therefore, appellant was not liable as an individual.

It is stipulated that Articles of Incorporation of Forrest City Wood Products, Inc., were filed with the Secretary of State on April 30, 1948, showing the above named defendants as the only shareholders, and that said Articles were filed with the County Clerk of St. Francis County on March 19, 1951. The latter date is also the date on which the cause was heard and judgment rendered.

It is frankly admitted by appellant that his only hope for relief in this court is to distinguish this case on the facts from the case of *Gazette Publishing Company* v. *Brady,* 204 Ark. 396, 162 S. W. 2d 494, or for us to overrule the *Gazette* case. The only factual difference be-

tween the two cases is, in this case, the Articles of Incorporation were filed [with the county clerk] on the day of trial while, in the *Gazette* case, they were never so filed. This difference is of no avail to appellant for the reason that if he was liable individually when the obligation was incurred in 1950 he could not later, without the consent of appellee, do anything to escape such legal liability.

Appellant ably argues that we should overrule the *Gazette* case, *supra,* and the reasons assigned therefore will not be discussed.

His contentions may conveniently be considered from two standpoints: first, the court [in the *Gazette* case] incorrectly construed the applicable statute; and second, its holding was not in harmony with prior decisions of this court.

The *Gazette* case construed § 3 of Act 255 of 1931 [Ark. Stats. § 64-103] and to understand appellant's contention it will be helpful to first consider similar statutes in force prior to 1931. Act 92 of 1869 § 9 [§ 1334 of Sand. & H. Digest] provides that before any corporation shall *commence business* the Articles of Incorporation shall be filed with the Secretary of State and a copy filed with the county clerk [in the county where it is to transact business]. This Act was amended in 1903 [C. & M. Digest § 1711] wherein the place of filing was reversed as to time but still required both filings before the corporation could *commence business.* Arkansas Stats. § 64-103, referred to above, differs from the last mentioned statutes in that it provides the "corporate existence shall begin" upon filing the Articles with the Secretary of State. The next sentence states: "Provided, however, a set of the Articles of Incorporation . . . shall be filed for record with the County Clerk . . ."

In view of the above it must be conceded there is some foundation for appellant's contention that, in the instant case, the corporate existence began when the Articles were filed with the Secretary of State on April 30, 1948. This contention, however, was considered in

the *Gazette* case and disposed of by saying that prior to the 1931 statute a long line of decisions, beginning with *Garnett* v. *Richardson,* 35 Ark. 144, had held the Articles must be filed with both the Secretary of State and the County Clerk and that the same construction was applicable to the 1931 statute. Appellant, however, challenges the soundness of the conclusion reached in the *Gazette* case and in support quotes from several decisions of this court prior to the passage of the 1931 act. These cases, it is contended, show that the *Garnett* case [upon which the *Gazette* case was bottomed] had been impaired if not overruled prior to 1931. It is our opinion that a careful consideration of these prior cases does not justify appellant's contention that we should now overrule the *Gazette* case.

The *Garnett* case, *supra,* decided in 1879, is short and simply holds that where a purported corporation had not filed its Articles with both the Secretary of State and the County Clerk the individuals [attempting to form the corporation] were liable for a contracted debt. In the last paragraph it was stated that "Appellants could not do business as a corporation until the articles of association were filed in the office of the secretary of state . . ." This language gives rise to appellant's contention that the *Garnett* case held the attempted incorporation did not constitute even a *de facto* corporation and therefore could be no authority for the decision in the *Gazette* case, since, in the latter case, it was expressly stated that the organization was a *de facto* corporation. Our answer to this contention is that the above quote was not essential to the decision reached in the *Garnett* case and therefore may be treated as dictum, and also it must be treated in the light of later opinions which will be referred to hereinafter.

In *Whipple* v. *Tuxworth,* 81 Ark. 391, 99 S. W. 86, decided in 1907, where an improvement district had not fully complied with the organization statute it was held that it was, never the less, a *de facto* corporation and that a *de facto* corporation could sue and be sued and, as a general rule, do whatever a *de jure* corporation can do.

This language, however, was not germane to the decision because, as stated by the court, the real issue was not properly before it. Also in this connection it is well to note that to say a *de facto* corporation can sue and be sued is not to say, necessarily, that the individuals might not be held liable in certain instances. It is not necessarily inconsistent to say a *de facto* corporation may sue and be sued and at the same time say the individuals who attempt incorporation [but fail to comply with the statute] shall be estopped from taking advantage of their own mistakes to escape liability.

The decision in *Bank of Midland* v. *Harris,* 114 Ark. 344, 170 S. W. 67, decided in 1914, referred to the *Garnett* case and used the following language which is quoted by appellant: "That decision seems to be against the weight of modern authority and the doctrine of it should not be extended any further." Following the above, however, is this language: "It does not follow that the corporation itself would not also be liable as a *de facto* corporation, nor that statutory liability of incorporators would be unenforceable." This was a case where the county treasurer had deposited county funds in the bank and sought to recover from the stockholders under a statute making them liable. A defense was interposed that the bank had not completed its organization in that the articles had not been filed with the Secretary of State. It was in this connection that the court, holding the stockholders liable, referred to the *Garnett* case and used the language first quoted. We think the decision was sound and that the *Garnett* case should not have been extended to relieve the stockholders of liability. Note also that this was a case where the incorporators were seeking to take advantage of their own carelessness to escape liability, and that the *Garnett* case was not overruled.

It is next contended that the *Garnett* case was circumscribed in *Breitzke* v. *Tucker,* 129 Ark. 401, 196 S. W. 462, decided in 1917. Here appellee brought suit for an injury occurring on February 18 against certain individuals who had signed articles of incorporation dated Feb-

ruary 9 and duly filed on March 4. The decision in the *Garnett* case was relied on by appellee to hold the defendants liable because they made an abortive attempt to incorporate on the 9th. The court held that appellants had a right to show that the date "February 9" was inserted by mistake and that the date intended was later than the 18th [the date of the injury] and the court also stated that "the evidence [is] insufficient to support a verdict that appellants were partners." It was in this connection that the court said: "This liability is said to exist under the authority of the case of *Garnett* v. *Richardson* . . . It has been stated, in subsequent cases, that the above cited case, which is here relied on, was apparently against the weight of authority, and, *while it has not been overruled or qualified,* we have expressly declined to extend the doctrine of that case."

Finally it is insisted that the *Garnett* case was in effect overruled by *Wesco Supply Co.* v. *Smith,* 134 Ark. 23, 203 S. W. 6, decided in 1918. There appellant sought to hold Smith personally liable for merchandise sold to a purported corporation which had failed to file its articles with the Secretary of State and this court held Smith was not individually liable. In reaching this conclusion, however, the court refused to overrule the *Garnett* case, but distinguished it on the facts. In the opinion it was pointed out that Smith had bought stock in the corporation *after* the attempted organization and knew nothing of the omitted filing, and also that appellant had dealt with the corporation as such and not with any individual. We can readily understand appellant's assertion that the *Garnett* case was, in effect, overruled, but the fact remains that it was not so considered by the court. If we were free to do so we might agree with the dissenting opinion of Chief Justice McCulloch in which he stated it would be better to overrule the decision in the *Garnett* case rather than try to distinguish it.

Regardless of what our views might be were this question of first impression, the issue presented here was squarely passed on in the *Gazette* case, *supra,* and we find no compelling reasons for disturbing that decision.

We have examined the briefs in the *Gazette* case and find that the decisions discussed above were there presented and considered.

Affirmed.

ED. F. MCFADDIN, Justice (Concurring). I have always thought that the Court was in error in its decision in the case of *Gazette Publishing Co.* v. *Brady,* 204 Ark. 396, 162 S. W. 2d 494; and I am still of that opinion. Nevertheless I am unwilling to overrule that case at this time because of the reasons herein mentioned.

The first reason is that *Gazette* v. *Brady,* was decided in 1942; and the Arkansas Legislature has met several times since that year, and has never amended the corporation statute to overcome the holding in *Gazette* v. *Brady.* The correct way to have the law changed is by act of the Legislature, rather than by judicial overruling of previous opinions. This matter was discussed in some detail in my dissenting opinion in *Ebrite* v. *Brookhyser, ante,* p. 676, 244 S. W. 2d 625. In the case at bar, there is not involved a "rule of property," as was involved in *Ebrite* v. *Brookhyser;* but even in the absence of a "rule of property," decisions should not be lightly overruled. The second reason is that we have never indicated, in any opinion until now, that there was any error in *Gazette* v. *Brady;* and I maintain that the lawyers and laymen of the State are entitled to some notice or caveat by the Court before it embarks on a career of overruling previous opinions.

There is no need to engage in a discussion of the stare decisis rule and the arguments for and against it. Those interested will find lengthy discussions and many cases cited in 15 C. J. 915 *et seq.;* 21 C. J. S. 297 *et seq.;* and 14 Am. Jur. 283 *et seq.*[1] One side will always argue that unless erroneous holdings are corrected, then wrong becomes perpetuated. The other side will always argue that unless previous holdings are followed, no protection is afforded by decided cases. These same arguments were made in the case at bar.

[1] Justice CARDOZA, in "The Nature of the Judicial Process," says: "Stare decisis is at least the everyday working rule of our law."

As a way out of the difficulty posed by the aforesaid arguments, at least three courses have been suggested by law book writers: the first course is by Legislative Action. That is the ideal and best way for the law to be clarified because such legislation operates only prospectively. The second course is by Overruling with Future Effect Only. This method is discussed in the Annotation in 85 A. L. R. 262, entitled, "Right of Court in Overruling Earlier Precedent to Apply New Rule Prospectively and Adhere to Old One as Regards Past Transactions." The defect with this second course is that it affords the successful litigant no relief. The third course out of the difficulty is for the Court to overrule a case only after having given notice or caveat that such course was in contemplation. Certainly this third course is far less harmful than overruling a prior case without previous notice.

As an example of giving notice that former holdings were to be questioned on their merits, I call attention to the case of *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585. In that case we overruled the earlier case of *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281. But in *Cassen* v. *Cassen,* we pointed out a series of cases in which we had repeatedly stated that the case of *Squire* v. *Squire* should be modified, was a questionable decision, and was under reconsideration. So when we finally overruled *Squire* v. *Squire,* lawyers and litigants generally had been put on notice that such a step was in contemplation and they could have regulated their conduct and litigation in the light of such judicial caveat.

We have never, until now, indicated any intention to re-examine the holding in *Gazette* v. *Brady,* so I think we should follow it until this notice is given. Even though the holding is not a "rule of property," nevertheless it should not be overruled without previous notice.

4-9646 244 S. W. 2d 945

Opinion delivered January 7, 1952.

Rehearing denied February 4, 1952.

[redacted]

Alonzo D. Camp, for appellant.

Arnold Adams, for appellee.

GRIFFIN SMITH, Chief Justice. Bertrand William Willson died intestate and without issue October 17, 1950, survived by his widow, a brother and sister, and his mother, Janie Willson Gardner. The brother, H. B. Willson, was appointed administrator October 18th. The litigation resulting in this appeal began with a complaint by H. B. and his sister, Florine Willson, asking specific performance of a contract executed November 14, 1950, by the terms of which the decedent's mother and the brother and sister were to share equally in the estate, subject to the widow's rights.

An examination of the deposit box, rented in the name of Frank F. Simmons at Union National Bank, Little Rock, revealed $5,000 in postal savings certificates, title to realty valued at $500, and prime securities worth $12,100—a total of $17,600.

January 11, 1951, Carl Langston was appointed by the probate court as attorney for the administrator. In the same order the so-called family settlement was approved and disbursements authorized according to its terms. Four days later Mrs. Gardner alleged in probate court that her assent to the agreement had been procured through misrepresentations. The suit for specific performance followed.

Although it is stated in the memorandum agreement of November 14th that it was Bertrand Willson's intent to leave his widow dower "and allowances made by law," a preceding sentence is to the effect that Willson wanted his wife "to have her own money which was in the lockbox."

In 1944 Bertrand wrote from Chicago to his brother, H. B., explaining that he had accumulated considerable money, that his health was poor, and that in the event of his death H. B. was to receive the estate, subject to a moral obligation to care for mother and sister. At that

time Bertrand was being sued for divorce. Shortly after the decree became final he married Beatrice Nowicki and they lived together in Chicago until about a year before the fatal illness occurred in 1950. Bertrand was taken to St. Vincent Hospital and for several days was fed intravenously, and oxygen was supplied through a tube.

On October 16th, H. B. wrote out and caused his dying brother to sign the following: "I do this day sign my safe deposit box No. 104 at the Union National Bank to my brother H. B. Willson. I have talked to him in my right mind and have explained to him just what I want done in case I don't pull through my operation. I have faith and trust in my brother and know that he will carry out my plans. *Frank F. Semmons.*"

It was conceded by H. B. that he guided Bertrand's hand while the latter signed the paper; but it is contended that the assignment was made during the morning and that the sick man did not lapse into a comatose condition until five hours before death the following day. The signature is a mere scrawl and because "Simmons" was spelled with an "e" the bank declined to honor the paper.

As grounds for estoppel H. B. and his sister contend that shortly after the family agreement was completed H. B. drove to his mother's home. He was on bad terms with Gardner, his stepfather, whom he had physically chastised a short time before. For this reason, said H. B., he called his mother to the car to discuss affairs connected with Bertrand's estate. Because his mother was worrying over a shortage of funds, he advanced her $100 from the estate assets. This was evidenced by a check drawn on Union National Bank November 15, 1951, and signed personally "H. B. Willson." On the 24th of the same month a second check was written in Mrs. Gardner's favor, the amount being $64. Mrs. Gardner testified that it was understood at the time the check for $100 was given that H. B. was to get back $25, and that sum was refunded. The administrator undertook to show by stubs that the checks were written against his official

account, but the checks proper are negative in that respect.

When Bertrand was taken to St. Vincent's, H. B. told their mother that her son was in the Veteran's Hospital at Hot Springs. This was admitted on cross-examination, with the explanation that Bertrand did not want to be bothered and that he had formerly made a similar request when in the City Hospital. The witness emphasized his faith in the Lord that "everything would turn out right," and for this reason he did not entertain serious apprehension regarding his brother's recovery. That was the reason he did not try to induce the execution of a will. It appears, however, that Langston was taken to the hospital for the express purpose of writing Bertrand's will. In the memorandum agreement, written by Langston, it is said that the attorney ascertained that Bertrand was not in a condition to so act, hence no further steps along this line were taken.

When H. B. was asked whether Langston, who had been his attorney for twelve or fifteen years, prepared a warranty deed the preceding August reciting that Mrs. Gardner conveyed to H. B. a certain piece of property, the witness replied, "Yes, she signed it." Counsel for the defendant explained to the court that his purpose in introducing this transaction was to show that H. B. exercised controlling influence. Some of the questions and answers that followed were: Question: "After your mother threatened to get a lawyer and see what she had signed, tell the court whether you called upon her . . . and said, "Mamma, that paper you signed was to put my house in your name so my wife can't get it: I am going to get married pretty soon [and] don't want my wife to get my house." A. "My mother knew all about that. She suggested that I do that, and she willingly signed those papers to help me out. Being my mother, she didn't want me to lose my property—she knew all the time."

In respect of the family settlement, H. B. testified that he told his mother that in order "to settle this thing and settle it peacefully—if she wanted to do that with-

out spending all the money for attorneys, [the thing to do would be] to go down and talk to Carl [Langston], and he would explain to her the necessary steps to take to have a peaceful settlement." After denying, then admitting, that he talked with Langston before sending his mother to the attorney, there was this colloquy:

Question by counsel for Mrs. Gardner: "You did talk to Carl Langston about the transaction, and what was to be done?" The Court: "The agreement shows Mr. Langston went to the hospital and talked [with Bertrand] before he died. The agreement shows that,—that is true, isn't it, Mr. Willson?" A. "Yes, sir." The Court: "He understood the situation?" A. "He understood it: when he went out to the hospital and talked to my brother, he knew." The Court: "He knew your brother's desires?" A. "Yes."

The witness was then asked if he explained clearly to his mother what she was signing:—"Did you tell her she was giving away two-thirds of what was hers under the law?" A. "I told her exactly how it was, what she was to get after [the widow] was paid: that my brother's will was for it to be equally divided—it was [my brother's] desire." Q. "[Was she] aware of the nature and consequences of her acts in signing the instrument in suit—the same as when she signed the deed?" A. "Yes, sir."

Testifying further as to circumstances attending Bertrand's last illness, H. B. said that he went by his brother's home, found no one, then traced Bertrand and his wife to the hospital where Mrs. Willson had taken the patient. Thereafter he did not see his mother until she came to the hospital. He didn't remember having seen his mother (seemingly) between the time Bertrand was taken from his home until Mrs. Gardner called on her sick son at the hospital. (It is significant that H. B. had not seen his mother, yet he had told her that Bertrand was in the Veterans Hospital at Hot Springs).

The clear inference to be drawn from H. B.'s testimony is that after Langston had determined Bertrand

was not competent to make a will, the paper purporting to assign contents of the lockbox was prepared and executed, although it is difficult to determine from the record the precise time the transaction occurred.

Florene Willson, the sister and one of the appellees who was a plaintiff below, testified that Bertrand, while in the hospital, asked H. B. to take care of "B", (the sick man's wife) because she had been good to him; "and", said she, "the rest of the money he wanted divided: wanted everything carried out peacefully and no lawsuits." The statement was then made by the witness that some time after Bertrand died she met her mother in front of a down-town bank. Mrs. Gardner told her they were going to get equal shares of Bertrand's money, "and when we went to Langston's office Mother and H. B. had signed papers—I was the last one." The agreement, as she understood it, was that "they" were going to get equal shares of the estate, "and that 'B.' was going to be taken care of."

In his testimony Langston conceded that in addition to his personal representation of H. B. Willson, he was attorney for the estate. He thought the family agreement was drawn on a day succeeding a visit from H. B., his mother, and Florene. He was told, inferentially during this first visit, that Bertrand wanted to make a will, but for one reason or another hadn't done so. According to statements by the three, they wanted to "split" the estate three ways after the widow's allowances had been deducted. This, they said, was the dead man's wishes, "So I read to them the statute of descent and distribution and advised [Mrs. Gardner] what her rights were —told her she would be entitled to this estate; that she was giving away money to her children. That brought [on the discussion that Bertrand had tried to give the property] to H. B. through the lockbox: make a gift to him, and they had some papers there his brother had signed which would open the door to litigation. [Mrs. Gardner] said litigation was what she wanted to avoid; . . . she didn't want any more family troubles—wanted a peaceful settlement of this thing."

According to Langston several days elapsed before the agreement was drawn: more than a week, perhaps, and during that time Mrs. Gardner was in the office every day. When the agreement was finally put into written form Langston's secretary had gone home, so his wife, who is a court reporter, took the dictation and Mrs. Gardner from time to time made suggestions. The attorney was sure Mrs. Gardner understood what she was doing. The document was acknowledged before Carl J. Muerer, a notary public with offices near Langston's. Mrs. Gardner explained the agreement to Muerer after Langston had undertaken to do so. Later, said Langston, Mrs. Gardner consulted him regarding a new will she was thinking of making. Muerer testified that Langston told Mrs. Gardner briefly what the document was, and that Mrs. Gardner remarked that the wishes of her dead son were being carried out.

Mrs. Gardner, 67 years of age, testified that she was in poor health with hypertensity of 200, and that she suffered from spasms of glands and muscles, in addition to sciatic nerve troubles and toxemia. Bertrand's death disturbed her greatly. Shortly after the funeral H. B. came to her home and called from the street, asking her to come out to his parked car. He said, "Mamma, we have inherited some money. Carl Langston wants you to come to his office and sign legal papers." She asked him how much money Bertrand had in his lockbox,[1] the reply being that there wasn't time to tell. He then added: "I am giving you $100 now and I am going to give you $2,000. When I do that I want you to give it back to me and let me put it in my lockbox and dish it out to you as you need it—I don't want you to let Paul Gardner know you have inherited anything."

Reëmphasizing this conversation, Mrs. Gardner said H. B. told her he wanted $25 back when she cashed the $100 check. He did not mention the amount of money anticipated from the estate. The principal comment was that he was *giving* her $2,000. The same day she went

[1] Mrs. Gardner added, "I told him to get the lockbox and put his money in it." Inferentially "he" identifies Bertrand, as there was no testimony that she had ever discussed the lockbox with H. B.

to Langston's office, told him H. B. had directed that she sign some papers. Langston said, "Now, Mrs. Gardner, you know that your son could not make a will, the courts would not have it this way." The following is quoted from the testimony: "I said [to Langston], 'I know now my two brothers and I had to make my mother's will: she messed it up and we had to make it. . . . That is what I am doing now—making my son's will like I made my mother's', and [Langston] said, 'Yes, that is what you are doing.' So I was under the impression that I was making Bertrand's will."

The witness insisted that she didn't know she was being asked to sign away two-thirds of an estate to which she was entitled by law:—"I didn't know it because I didn't know what Bertrand had." She denied that Langston had explained to her what, under the law of descent and distribution, she would have:—"He didn't tell me anything like that or make any explanation at all."

Mrs. Gardner admitted that she was in probate court when the order of January 11th was made, but she thought she was agreeing "to the will she had signed," and did not, in fact, know what was taking place. She did not become suspicious until after the papers were signed, until Attorney Langston said, "Judge Williams, Mrs. Gardner does not think she is going to live long and she wants to give her children their shares now." Mrs. Gardner said she wondered what their share was, "Because Carl Langston had just made my will and these children were provided for in it."

With this doubt in mind Mrs. Gardner left the courtroom and went to see a lawyer. When she undertook, in this suit, to repeat what the lawyer told her, the advice he gave, there was an objection from adverse counsel on the ground that the testimony would be hearsay. By the Court: "Oh, no! But it shows she is familiar with court procedure. She went around to see a circuit judge and other lawyers. It shows she isn't a dumb bell. It shows she knows her way about. Go ahead." The advice so given was then explained by the witness.

On cross-examination Mrs. Gardner admitted that H. B. told her he was giving her the hundred-dollar check out of Bertrand's estate, but she didn't know where money to pay the second check came from. She first stated that Judge Williams read the agreement to her before the order of January 11th was made, then qualified this by saying she didn't remember whether he read it in its entirety. When asked whether the Judge explained the agreement and order to her, Mrs. Gardner replied, "All I remember is that you read it." She denied that Langston explained it in detail, and also denied, in response to Judge Williams' question, that she went into an ante-room with him. However, she did not make a protest when the order was signed. Judge Williams commented: "I certainly wanted you to understand it and I thought you did. If I hadn't thought you understood it I wouldn't have approved it." By Mrs. Gardner: "I hope God strikes me dead before I get out of this seat that I didn't understand that. You just read the document."

Paul J. Lochbaum, clerk of the court, testified that he remembered hearing Judge Williams ask Mrs. Gardner if she understood the "purport" of the document. Mrs. Gardner didn't understand the term, so the Judge said, "In other words, do you know what this means?", and there was an affirmative answer.

First—The Court's Explanation.—The evidence is convincingly clear that the document was read to Mrs. Gardner by Judge Williams and that he had reason to assume that she understood; but the fact cannot be denied that the living son whose influence brought about the consummation was wanting in candor and frankness. In undertaking to denude himself of realty just before marriage, a constructive fraud was practiced. *Barnett* v. *Barnett,* 209 Ark. 973, 193 S. W. 2d 319. As urged by appellate counsel, this went to the question of credibility in the trial court, but it is also a matter for our consideration *de novo.*

Second—The Evidence.—It is admitted by H. B. that Bertrand, in money affairs if not otherwise, used the

unexplained alias of Simmons; and, while H. B. testified that he told his mother how much money the lockbox contained, the abstract does not reflect that he told her *what* this amount was. This appellee protested consideration for his mother, explaining that he had dinner with her every Sunday; but, in dealing with the fund in question, instinctive self-serving elements of a character countervailing the mother's rights are definitely disclosed unless his own version and the explanations made by Florene regarding Bertrand's wishes are to be accepted at face value. It is noteworthy that the widow did not testify orally or by deposition, nor were interrogatories propounded.

The letter of 1944, would, of course, indicate Bertrand's intent at that time to make H. B. the beneficiary of the estate, but it must be remembered that the writer was later divorced and married another. H. B. testified that Bertrand, during his last illness, mentioned that Mrs. Willson had been attentive—"good to me," were the quoted words. Nor were the purposes expressed in the letter carried out through procurement of a lockbox with two keys, with the agreed right of each to enter and for H. B. to take all in the event of Bertrand's death. The failure to execute the ends discussed in 1944 was presumptively intentional on Bertrand's part.

Third—Signature of Frank F. Simmons.—The record in this specific performance suit does not sustain appellees' claim that the note written by H. B., who guided his brother's hand in signing, was the free and voluntary act of a person with disposing mind and memory. Langston's testimony that he went to the hospital for the purpose of having Bertrand execute a will, but thought him incapable of doing so, is highly persuasive of the proposition that when the name "Semmons" was scrawled on H. B.'s prepared paper Bertrand must have had but limited comprehension of what was being done.

It should be noted that the attempted assignment of October 16th does not include any members of Bertrand's family—not even his wife—by any express terms. Every-

thing is left to H. B. with the expression in H. B.'s handwriting that the dying brother has faith in him. Perhaps so; but the policy of the law is to throw every practicable safeguard around those who are not in a position to think clearly. It has been said that if a witness should affirm the testator's insanity, but gives as a basis for such opinion facts which do not justify it, the evidence on this point is worthless. *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695. Of course the converse is true: the testimony of a witness that one who executed a beneficence in his or her favor was fully rational must be examined in the light of attending facts.

Fourth—Family Settlement.—Appellees correctly state the rule to be that family settlements are favored. *Stark* v. *Stark,* 201 Ark. 133, 143 S. W. 2d 875; *Martin* v. *Martin,* 98 Ark. 93, 135 S. W. 348; but equity will grant relief to one yielding to the coercive influence of relatives; and this is invariably true where there is a confidential relationship respecting an inheritance or distributive shares of an estate. *Outlaw* v. *Finney,* 175 Ark. 502, 1 S. W. 2d 38. Appellees cite *Mooney* v. *Rowland,* 64 Ark. 19, 40 S. W. 259, but that case is distinguishable from the litigation at bar by the headnote summation which says: "A parol agreement by an heir relinquishing his share in his ancestor's land in consideration of the release of his indebtedness to the estate and to his co-heirs will be specifically enforced where such agreement has been acquiesced in for 25 years, and valuable improvements have been made upon the strength of it."

Here the only suggested considerations moving to Mrs. Gardner were two checks, one for $100 and another for $64, called "advances from the estate." It is conceded she was entitled to $2,000. It is hard to rationalize that the principles of estoppel should be applied against one receiving an insignificant portion of her own money.

Fifth—Confused Representation.—Without undertaking to assay the motives actuating H. B. Willson and his personal attorney, it is sufficient to say that the son lulled his mother into a situation where she was without

the advice of counsel not obligated to other clients whose interests were antagonistic to her, and irrespective of any purpose to promote harmony in the family, information came primarily from H. B. Willson. These were circumstances that did not necessarily come to the attention of the probate court, but they involved complications with results that should not bind appellant.

Sixth—Conclusions.—This record does not show who represented the widow, what amount has been paid to her, or how her interests were dispatched. In view of our findings and the lack of any showing regarding probate proceedings other than the orders mentioned and Mrs. Gardner's action to annul the family settlement, we shall assume, with binding force, that neither the chancery nor probate court will permit disbursements responsive to the contract here invalidated.

Reversed, with directions to dismiss the action for specific performance.

HOLT *v.* GREGORY.

4-9632 244 S. W. 2d 951

Opinion delivered January 7, 1952.

Rehearing denied February 4, 1952.

[redacted]

Bon McCourtney, Claude B. Brinton and *E. D. McGowan,* for appellant.

W. H. Howard, for appellee.

HOLT, J. January 23, 1948, L. M. Simmons, operator of a cafe, gave his note to the Citizens Bank of Jonesboro for a loan of $2,400, with his sister-in-law, Lois Cain, and appellant, Holt, as sureties thereon. On the same day, he also executed, as additional security, a chattel mortgage covering the fixtures of the cafe, which contained these recitals: "For the purpose of securing payment of debt and the note evidencing the same, and all renewals and extensions thereof, and all additional loans and advances which may hereafter be made by the mortgagee, its successors or assigns to the mortgagor, whether made before or after the maturity of the note described herein and during the life of this mortgage, whether evidenced by note or notes, and any and all other present or future liability of the mortgagor to the mortgagee, its successors and assigns, does hereby sell, assign, transfer and etc. the following described personal property:

"2 Floor Vannado fans, 1720, 1703 (and other personal property) 'including all tools and equipment on said premises, or to be placed thereon, during the life of this mortgage, together with all the natural increase of any and all live stock herein conveyed up to the foreclosure of this instrument and the produce therefrom, together with all personal property of like nature and description acquired by the mortgagor during the life of this mortgage.' * * *

"Now if the mortgagor shall well and truly pay the mortgagee the sum hereinbefore mentioned, when due,

and all other indebtedness which may be due the mortgagee at any time before or at date of foreclosure hereof, together with the cost of this trust, then this conveyance shall be void, etc.''

On March 8, 1949, the bank duly assigned the note, without recourse, to W. B. Howard, who in turn assigned to appellee, Gregory. January 29, 1949, and subsequent to the making and due date of the above $2,400 note described in the mortgage,—but within the life of the note and mortgage,—L. M. Simmons executed another note, a new obligation to the bank, in the amount of $700, with Lois Cain Gregory signing as surety, and on March 8, 1949, the bank assigned this note to W. B. Howard.

The $2,400 note became due January 23, 1949. Simmons was unable to pay this note when due, turned the cafe over to appellee, Mode Gregory, Lois' husband, to operate, but this proved unsatisfactory and a sale of the mortgaged property was had on April 7, 1949, about one month after the $700 note became due. The balance due on the $2,400 note, when the sale was had, amounted to $1,450 and Holt, appellant, bid this amount, paying the money to appellee, Gregory, who first applied this $1,450 in payment of the $700 note, instead of applying the full amount on the $1,450 note on which Holt was surety for Simmons, as Holt contends he should have done.

The record also reflects that the two floor fans covered by the mortgage and part of the cafe equipment had been exchanged for two suction window fans and these suction fans were removed from the cafe prior to the above sale and are now claimed by, and in the possession of, Gregory and valued at more than $200.

The present suit was filed by appellee, Mode Gregory, against appellant, Holt, alleging ownership of the above $2,400 note, (L. M. Simmons being the maker and Holt and Lois Cain as sureties thereon), that it was due and unpaid, sought to recover an alleged unpaid amount of $847.82 and interest, a total of $1,160.72. On Holt's motion, Simmons and Lois (Cain) Gregory, were made defendants and Holt filed a cross-complaint against Sim-

mons and Lois in which he prayed: "If the plaintiff recovers judgment against the defendant, J. E. Holt, in any amount, he prays the court that he have judgment against the defendants, L. M. Simmons and Lois Cain Gregory in the amount of said judgment."

All defendants answered with general denials.

On a trial, a jury having been waived, the court dismissed, without prejudice, Holt's cross-complaint against Simmons and Lois Cain Gregory as premature, entered judgment against Holt in favor of appellee, Gregory, for $1,262.71, with interest from February 14, 1951.

This appeal followed.

For reversal, appellant says: (1) "The court erred in overruling the Motion of the defendant to transfer to equity." (2) "The Court erred in ruling that the mortgage covered the note for $700," and that this note "in so far as the assignee of the mortgage was concerned it was a debt antecedent to the mortgage" and "in so far as the Bank or the Mortgagee was concerned, it was a debt subsequent to the mortgage," and (3) "The Court erred in ruling that this mortgage did not cover all the stock, fixtures and equipment of the business identified in the mortgage."

—(1)—

There was no error in the trial court's failure to transfer to equity. The record does not show that the court made any ruling on appellant's motion to transfer, or was asked for a ruling thereon, and further since appellant, subsequent to filing his motion to transfer, filed an amended answer, he waived his motion to transfer. We so held in *Kaplan* v. *Scherer,* 205 Ark. 554, 169 S. W. 2d 660.

—(2) and (3)—

We hold that the court correctly held that the mortgage here secured the $700 note in addition to the $2,400 note. As indicated, this $700 note was executed subsequent to the execution and due date of the $2,400 note,

but within the life of the chattel mortgage here involved. The securing clause here covered all additional advances and loans and specifically provided "whether made before or after the maturity of the note described herein and during the life of this mortgage."

On this point, our holding in *State National Bank* v. *Temple Cotton Oil Company,* 185 Ark. 1011, 50 S. W. 2d 980, is controlling. In that case, the instrument contained a clause (the same in effect as the one here involved) securing "all future advances during the life of this trust" and wherein notes were executed at various times ranging from six months to four years and four months after the maturity of the last note described in the mortgage, we said: "The notes to the oil company covering advances, as herein stated, were all taken before the $4,903.96 note, specifically described in the deed of trust, was barred. The trust created by that instrument had not therefore been discharged when the notes here involved were taken, and they were therefore advances made within the life of the trust."

We hold, in the circumstances here, where there was no agreement to the contrary, that appellee had the right to apply the $1,450 (proceeds from the sale, *supra*) first to the $700 note and the balance on the $2,400 note. The assignee of the bank stood in the shoes of the bank.

The rule is well established that where, as here, collateral is sold, the creditor has the right to apply the proceeds to the unendorsed part (the $700 note here) of the debt. Such is the effect of our holding in *The White River Production Credit Association* v. *Griffin,* 198 Ark. 249, 128 S. W. 2d 701, where we said: " 'The creditor may, in the absence of a special pledge to a particular debt, apply the proceeds of collateral to debts of the principal on which the surety or guarantor is not bound, in preference to debts on which he is bound, assuming that both classes of debts are covered by the collateral.' As stated above, there was no 'special pledge to a particular debt' in said mortgage. The $1,000 note stood on a parity with the other advances. . . .

"It is perfectly manifest that it was the purpose of all parties, appellant and appellees, that Koettel and Heffington should indorse said $1,000 so as to give appellant additional security for said note over and above the property covered by the mortgage. Such being the purpose of the indorsement, it would be frustrated and rendered valueless to require the application of the proceeds of the mortgaged property first to the discharge of the indorsed note, for if all or a substantial part of such proceeds should be required to discharge the indorsed note, leaving some of the unindorsed notes unpaid, the creditor would have no security for their payment. The Supreme Court of Florida expressed the same view in *Consolidated Naval Stores Co.* v. *Wilson,* 82 Fla. 396, 90 So. 461, 21 A. L. R. 681, as follows:

" 'If it was the purpose of the creditor to take additional security in the form of an indorsement of some of the notes, and the indorser met the creditor upon that proposition, it would be inequitable and manifestly unjust to require the application of the proceeds of the mortgaged property to be applied first to the indorsed notes, for the whole purpose of the additional security would be destroyed by such application.'

"Appellees Koettel and Heffington, having indorsed said note for the purpose of giving appellant security in addition to the mortgaged property, cannot be permitted to destroy the very purpose of their indorsement and escape the consequences of their own voluntary act."

We think, however, that the two window suction fans, for which the two floor fans described in the mortgage had been exchanged, and which were attached to the cafe, came within the mortgage description and were covered. As indicated, the mortgage specifically included "the following described personal property: 2 floor Vannado fans, 1720, 1703 . . . together with all personal property of like nature and description acquired by the mortgagor during the life of this mortgage." Appellant was therefore entitled to a lien on these fans, or their value,—the proceeds to be applied on the judgment that appellee obtained against appellant.

Accordingly, the judgment is reversed and the cause remanded.

BUFFINGTON *v.* CARSON.

4-9609 244 S. W. 2d 954

Opinion delivered January 14, 1952.

W. A. Waddell, for appellant.

McDaniel & Crow, for appellee.

GEORGE ROSE SMITH, *J.* The main question in this case is whether a contest of a county road tax election must be filed within twenty days after the election. This contest was begun almost four months after the election, and the circuit court dismissed the suit upon the ground that it was brought too late.

At the general election held on November 7, 1950, the road tax was submitted to the electorate of Saline County. On the following day the county election commissioners certified that the tax had been defeated. In March, 1951, the appellant Buffington, as a taxpayer, brought this suit against the election commissioners, alleging in some detail that a correct count of the votes would show that the tax had been adopted. The commissioners filed an answer admitting the allegations of the complaint. The appellee intervened, however, and

succeeded in having the contest dismissed upon the ground that we have mentioned.

It is first suggested that the appellee should not have been permitted to intervene, but we think the circuit court acted correctly. Buffington brought his suit as a taxpayer, but the case was unlike most taxpayers' suits in that the complaint asked that the plaintiff be subjected to a tax instead of being relieved from one. The defendants admitted the truth of the complaint, so that the suit was not really an adversary proceeding. Since other taxpayers might well have been bound by the judgment, *Howard-Sevier Road Imp. Dist. No. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517, the trial court properly permitted another taxpayer to interpose defenses that the original defendants had failed to raise.

Turning to the merits, we have two statutes fixing the time for bringing an election contest. Section 3-1202, Ark. Stats. 1947, fixes a limitation of one year for contesting the election of supreme court justices and six months for other officers. But a later statute, § 3-1203, provides that "all actions to contest the election of a person to any county, city or township office shall be commenced within twenty days . . ." By their terms these statutes apply to the election of "officers" or "persons," and it might be argued that they were not intended to apply to a vote on the county road tax. But, before the later act was passed, we held the earlier one to apply to a stock law election, upon the reasoning that otherwise there would be no applicable rule. *Alexander* v. *Stuckey,* 159 Ark. 692, 253 S. W. 9. Hence one or the other of the present statutes is controlling, and our problem is merely to determine which one.

We think it plain that the twenty-day limitation should apply. A vote upon a county road tax is certainly more like an election for a county officer than one for a State officer. No doubt the shorter period for county contests was adopted because it is easier to prepare a case involving the vote in only one county than it is to prepare a state-wide contest. This reasoning applies with equal force to the contest of a road-tax vote.

There is also a strong practical reason for preferring the shorter period. The road tax must be voted upon at the general election in November. Ark. Const., Amendment 3; *Merwin* v. *Fussell,* 93 Ark. 336, 124 S. W. 1021. Collection of the tax, if levied, begins in the following February—less than four months later. Ark. Stats., § 84-913. It is evidently desirable that the validity of the tax be established before the property owners are compelled to pay it, but that would be impossible if the contest could be delayed until after collections had begun. For these reasons we conclude that the legislature intended for the twenty-day period to control.

Affirmed.

WARD, J., dissents.

PHILLIPS *v.* GRAVES.

4-9651 245 S. W. 2d 394

Opinion delivered January 14, 1952.

Rehearing denied February 18, 1952.

Martin K. Fulk and *John H. Wright,* for appellant.

G. W. Lookadoo, J. H. Lookadoo, O. A. Graves, Travis Mathis and *McMillan & McMillan,* for appellee.

HOLT, J. This suit was originally brought by Ed Graves, appellee, against David Terrell, Jr. and appellant, George E. Phillips, for balance of $756.31 due on the purchase price of furniture which was destroyed by fire in Terrell's home. The Northwestern Mutual Fire Association and its agent, James Shaw, were joined as defendants on the allegation by Graves that the furniture on which Graves had retained a lien was covered by a policy of insurance issued by the insurance company through its agent, Shaw, and that both the company, and Shaw personally, were liable.

Terrell answered alleging that he was entitled to any protection that the insurance offered and that Graves had so agreed, and in a cross-complaint against Phillips, Terrell alleged that Billy Mormon, an employee of Phillips, while installing a gas stove in his (Terrell's) residence negligently caused a fire which destroyed his furniture and in addition, clothing and other personal property belonging to him and his wife, in the amount of $1,222.31, and that his equity in the furniture amounted to $100, his down payment to Graves. He prayed for total damages in the amount of $1,322.31. Both Terrell and Graves alleged that the fire in question was caused through the negligence of Mormon, appellant's employee.

Appellant denied any liability. A trial resulted in a decree containing these recitals: "The Court finds that the house belonging to David Terrell, Jr. and the furniture (which David Terrell, Jr. had purchased from the plaintiff, Ed Graves) and the other personal property in the house of a value of $1,222.31 was destroyed by fire, which fire was due to the negligence on the part of the agents and servants of George Phillips in the manner in which they installed a heater in the house and that as a result of said negligence the defendant George Phillips is liable to the defendant David Terrell, Jr. in the sum of $100, being the equity which David Terrell Jr. had in the furniture purchased from plaintiff Ed Graves, and is liable to David Terrell, Jr. an additional sum of $1,222.31 for other property belonging to David Terrell, Jr. which was destroyed by said fire; and is liable to

the plaintiff Ed Graves in the sum of $756.31 being the amount of interest of Ed Graves in said furniture destroyed. 5. The Court further finds that the defendant James Shaw is entitled to be subrogated to the rights of the plaintiff Ed Graves and the defendant David Terrell, Jr. against George Phillips to the extent of $756.31 and costs for which Shaw is liable to Graves and Terrell."

The cause against the insurance company was dismissed with prejudice and a decree was entered accordingly.

Appellant, Phillips, alone has appealed.

For reversal, appellant contends that the court's finding that Mormon, an employee of appellant, was acting within the scope of his employment while installing the stove in Terrell's home was against the preponderance of the evidence, that there was not sufficient proof of Mormon's negligence, and "that the decree is excessive and not supported by proper evidence as to value of the personal property described."

The evidence discloses that Billy Mormon and Winston Harrison were employees in a store of appellant in Arkadelphia, that appellee, Terrell, purchased the gas stove in question from Harrison for $7.20 and that Billy Mormon attempted to install it in Terrell's home and while in the act of installing, gas escaped, ignited, and a fire resulted, destroying the house, furniture, clothing and personal property above mentioned. Appellant's store in Arkadelphia was in charge of Harrison. Various kinds of household equipment, such as stoves, refrigerators, etc., were sold. Appellant also owned a store in Hot Springs where he spent most of his time. D. L. Ervey did all installations at appellant's Hot Springs store and some in Arkadelphia.

Terrell testified that it was agreed that the stove was to be installed. Harrison denied this.

Mormon testified: "Q. Are you sure that you had not installed heaters at private homes sold from Phillips' store? A. Not any that I sold. Q. You installed heaters

sold out of store previous to this occasion here? A. Yes. * * * How come you to go out there and install heater. A. There was really no one that sent me out. Cap came and asked me if I would do it. Q. Who is Cap? A. David Terrell. * * * Q. What happened when you went out to install heater, what was the procedure? A. I went out, and almost any plumber will tell you, and was going to put the heater in, the cap on the pipe was loose enough to unscrew with your finger. When I took cap off, pipe fell under the floor. Q. Did you go around and see if all fires were off? A. No, I did not. Q. You did not check water heater? A. No. Q. The pipe, you say, fell below the surface of the floor? A. Your brother was with me at the time and I got him to stop gas on pipe to see if I could get under the house and push pipe up. Q. Was a cap there over pipe? A. Yes. Q. You came back in and took cap off? A. Yes. Q. And the house burned down? A. Yes. * * * Q. Mr. Harrison did not send you out to install this stove? A. No. Q. Was it your duty to install stoves? A. Mr. Phillips has never mentioned it to me about going and installing stoves. Q. You heard Mr. Terrell say you agreed to install this stove? A. That was between Mr. Terrell and me. Q. How did he get you to do it? A. He asked me to put up stove, that he was working. Q. Did you do it just on account of your personal acquaintance? A. Yes. He said he did not have time, was working and did not have time. Q. Who were you considering you were helping out? A. Thought I was doing favor to Cap Terrell. * * * Q. What was said about the transportation out there? A. Mr. Harrison came to me and said we had no way to go out there and said he could not install the stove. Q. But Mr. Terrell came up about that time and said he would get you some transportation? A. Yes. Q. What about the connection? A. To best of my knowledge, it came from Clark County Supply Company. Q. Who went and got it? A. Mr. Terrell. * * * Q. All conversation with Mr. Harrison was that you could not install it? A. Yes. Q. When you went out to Terrell's house did Harrison know you were going out there? A. Yes. Q. Did you take tools with you? A. Yes—they were tools we had

there in the store. * * * Q. And you had a truck for that purpose to carry stoves and install out to premises? A. Yes. * * * Q. You had installed at least one stove before that and you got your equipment at this time at the store? A. Yes. Q. And the store manager knew what you were going to do? A. I told him I was going. Q. And got equipment from the store? A. Yes. * * * Q. But you did install stoves that you sold? A. Yes. Q. And you used store's tools? A. Yes. Q. And you would have used store's car if it had been there? A. I could not say what the situation would have been. Q. You had it available to deliver stoves? A. Yes. Q. But at this particular moment it was gone from place of business? A. I really think it was at Hot Springs. * * * Q. You had the same authority to go do what was necessary to carry out a sale, if it was installing stoves, refrigerators, hooking it up, you had just as much authority as Mr. Harrison? A. I did not have to have authority from anyone if it is part of transaction in carrying out work. Q. You were supposed to do that? A. Maybe I went out against orders, I don't know, I did not get orders to go. Q. Mr. Harrison did not object to your going out? A. No. Q. And he knew you were going? A. Yes. Q. And you two only ones in store? A. Yes. Q. The sale was already completed and over with when Mr. Terrell came and talked to you about going out? A. Yes."

Winston Harrison testified: "Q. It is customary that you install stoves that you sell? A. We will install all we can, if we have something else to do we cannot take off. * * * Q. Bill was in the employ of Phillips, whose duty it was to install stoves that you sold? A. Yes. Q. That is service you offered your customers? A. If we sold a cheap stove we could not bring a man from Hot Springs to do it. Q. You had a man to make installations for you? A. Yes. Q. At your expense. A. Yes. Q. Ervey and truck were not there? A. That is right. Q. And apparently Mr. Terrell was in a hurry to get stove installed? A. Yes. Q. If Mr. Terrell had been willing to wait until Ervey had come over to Arkadelphia to do it in his regular routine, you would have installed the stove for Mr. Terrell? A. Mr. Ervey would. Q. The

reason it was handled this way was that Terrell was in a hurry? A. Yes. Q. You did not have a truck? A. No. Q. Terrell provided transportation and got Mormon to go out? A. Yes. Q. You do install stoves. A. Yes. Q. You have installed stoves at Arkadelphia? A. Yes."

In short, the evidence tends to show that Terrell bought the stove in question from Harrison for $7.20 and that as part of the consideration, Mormon, appellant's employee, was to install it rather than call Ervey from Hot Springs with appellant's truck to make the installation in this small sale, and that installation was a part of the general services to customers. Mormon drew his full week's pay of $27 and installed the stove in Terrell's home at about 10:15 A. M., during working hours.

In these circumstances, our rule is well established that the principal, Phillips here, would be bound by the acts of his agent or employee, Mormon, which were within the real or apparent scope of Mormon's authority, whether they had been authorized or not. We said in *A. J. Chestnut Company* v. *Hargrave,* 177 Ark. 683, 7 S. W. 2d 800, "the principal is bound by the acts of his agent which are within the real or apparent scope of his authority. (Citing many cases)," and in *Oil City Iron Works* v. *Bradley,* 171 Ark. 45, 283 S. W. 362, we said: "The general rule is that a principal is bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not. *Security Life Ins. Co.* v. *Bates,* 144 Ark. 345, 222 S. W. 740; *Battle* v. *Draper,* 149 Ark. 55, 231 S. W. 869, and *Bartlett* v. *Yochum,* 155 Ark. 626, 245 S. W. 27."

While appellant, as indicated, stoutly contended that Mormon was acting entirely without authority and had stepped aside on a mission of his own to render a personal favor to Terrell in installing the stove, after a careful review of all of the evidence, we are unable to say that the Chancellor's findings against appellant's contentions were against the preponderance of the testimony.

As to the excessiveness of the amount of the recovery. We cannot agree that it was excessive in the light of the testimony. An itemized list (other than the furniture) was introduced by Mr. and Mrs. Terrell, who testified that they knew the present fair value of their property from its cost. Appellant offered no testimony to show that the values placed upon the various pieces of property were not the fair values thereof.

The text writer in 32 C. J. S., page 315, section 545 (3) says: "It is generally held that one is competent to testify to the value of personal property which he owns. The mere fact of ownership of personal property is usually regarded as sufficient to qualify one to state his estimate of its value, at least in the case of common classes of personal property or commodities in general daily use. The chattels or kinds of personal property whose value the owner has been held qualified to testify to include * * * clothing, * * * household furniture, * * * personal belongings, * * *. The competency of the owner is not affected by the fact that his knowledge is recently acquired, and is based in part on the result of inquiries made of experts and others," and in a note (9) on page 314: "Chattels in common use. Rules of evidence are not so technical as to require expert witnesses to prove the reasonable or market value of chattels such as household furniture in common use, where it is apparent that the value of the articles is within the knowledge of persons of ordinary intelligence and experience."

In our own case of *Kimball* v. *Goldman,* 117 Ark. 446, 174 S. W. 1185, this court said: "The ruling of the court on the measure of damages was correct. The doctrine on this subject is accurately stated in 6 Cyc. 677, as follows: 'The value of personal baggage is to be determined by what it is worth to its owner and not what it would bring on the market.' "

Finding no error, the decree is affirmed.

STILLEY *v.* STILLEY.

4-9652 244 S. W. 2d 958

Opinion delivered January 14, 1952.

Milham & Weid, for appellant.

ED. F. MCFADDIN, Justice. Appellant questions the correctness of a Chancery decree which sustained a demurrer and dismissed both her original complaint and amended complaint against appellee. For convenience we will refer to the parties as they were styled in the trial Court.

On March 21, 1951, Myrtle Stilley, as plaintiff, filed her "Complaint in Equity" in the Carroll Chancery Court against McClory Stilley, as defendant, alleging: (a) that on December 15, 1950, plaintiff obtained a divorce decree from McClory Stilley in the District Court of Cowley County, Kansas; (b) that in said decree plaintiff was awarded the custody of five minor children of

the parties; (c) that in said decree McClory Stilley was ordered to pay plaintiff $50 per month for the support of the children; (d) that since January 4, 1951, plaintiff and the five children had resided in Carroll County, Arkansas; and (e) that McClory Stilley was in arrears in the sum of $175 on the said monthly support payments. A copy of the Kansas decree was exhibited; and the prayer of the complaint in the Carroll Chancery Court was:

"WHEREFORE, plaintiff prays that a citation be issued by this court against the defendant, to appear and show cause why, if any he has, that he is not in contempt of court for failure to pay said sums of money to plaintiff for support of said minor children."

While the said complaint was pending in the Carroll Chancery Court, the plaintiff, Myrtle Stilley, on April 9, 1951, also filed in the same cause a pleading entitled "Amended Complaint" which made no reference to the original complaint but stated:

"That plaintiff and defendant were unlawfully married in Eureka Springs, Arkansas, on the 17th day of May, 1941, and lived together as husband and wife until the ..... day of November, 1950, at which time they separated; that during said time there were born to plaintiff the following children: Floyd, a boy, 8 years old; Thelma, 6 years old; Dortha, 4 years old; Shirley, 3 years old; and Donnie, 2 years old.

"That on the date of said marriage plaintiff was under the age of fifteen years, and that said alleged marriage was illegal and absolutely void, and plaintiff desires that said marriage and all proceedings therein be by the court held to be void, annulled and of no effect.

"Wherefore, plaintiff prays that the alleged marriage be declared absolutely void, cancelled and forever held for naught, and that plaintiff be awarded the custody of the above named minor children. For any and all general and proper relief that in equity she may be entitled to."

On May 1, 1951, there was a hearing on the defendant's motion to quash service and also on defendant's

demurrer; and, at the conclusion of the hearing, the Carroll Chancery Court entered a decree dismissing both of plaintiff's complaints. Since no evidence was offered going to the merits of either of the complaints, we must necessarily conclude that the Chancery Court (a) treated the defendant's demurrer as going to both complaints and (b) dismissed them when plaintiff refused to plead further. We hold that the trial court was correct in so doing, because the original complaint, as well as the amended complaint considered with it, failed to state a cause of action for the consideration of the Carroll Chancery Court. We elucidate on this conclusion:

I. The Original Complaint merely prayed that the Carroll Chancery Court punish the defendant, McClory Stilley for the contempt that he was alleged to have committed against the Kansas District Court. The courts of one state do not punish for contempt committed against the courts of another state. In 17 C. J. S. 65, cases from many jurisdictions are cited to sustain these general rules:

"It is a well established rule that the power to judge a contempt rests exclusively with the court contemned, and that no court is authorized to punish a contempt against another."

Plaintiff could have filed suit in the Carroll Chancery Court on the Kansas judgment, as was done in *Tolley* v. *Tolley,* 210 Ark. 144, 194 S. W. 2d 687; but the plaintiff could not have the Carroll Chancery Court punish the defendant for contempt for failing to obey the orders of the Kansas court. Therefore, the original complaint, in praying that McClory Stilley be punished for contempt, failed to pray for relief affordable by the Carroll Chancery Court.

II. The "Amended Complaint" also failed to state a cause of action because it asked that the marriage between Myrtle Stilley and McClory Stilley be annulled, whereas the Kansas divorce decree showed that at all events the marriage of the parties had been ratified in that State.

Plaintiff relies on our case of *Ragan* v. *Cox,* 210 Ark. 152, 194 S. W. 2d 681 wherein we held that a marriage of a female under sixteen years of age and a male under eighteen years of age was "absolutely void". From that holding plaintiff argues that the marriage of Myrtle Stilley and McClory Stilley was "absolutely void" and could not be ratified by the participants even after a lapse of nine years and after five children had been born to the marriage. Such argument is evidently based on the refusal of the Arkansas courts to recognize a common-law marriage to be valid if performed within this State. Whether plaintiff would be correct in her argument if the parties had all the time continued to live in Arkansas and never obtained a divorce, is a question we need not consider because other matters in the record make such consideration unnecessary. The pleadings, filed by the plaintiff, in this case show that the parties lived together as husband and wife in the State of Kansas, and that plaintiff obtained a divorce from the defendant in Kansas. Such divorce decree, dated December 15, 1950, recites that the plaintiff was then a resident of Kansas, and was thereby freed from "the bonds of matrimony" between herself and McClory Stilley. That a marriage, voidable because of infancy, can be ratified, was held in *Kibler* v. *Kibler,* 180 Ark. 1152, 24 S. W. 2d 867.

A common-law marriage is valid in Kansas. In *Smith* v. *Smith,* 161 Kans. 1, 165 Pac. 2d 593, the Supreme Court of Kansas, in an opinion of February 6, 1946, said:

"Under the provisions of our statute relating to domestic relations (G. S. 1935, 23-101 *et seq.*) common-law marriages in this state are not void, and marital rights acquired under such a marriage have been recognized in a variety of circumstances."

Arkansas recognizes common-law marriages that are valid in the State where the parties lived. Section 55-110 Ark. Stats. says:

"All marriages contracted without this State which would be valid by the law of the state or country in

which the same are consummated, and the parties then actually resided, shall be valid in all the courts of this state."

See *Darling* v. *Dent,* 82 Ark. 76, 100 S. W. 747; and see also Leflar "Conflict of Laws," § 131. When the parties lived together as husband and wife in Kansas they thereby contracted a common-law marriage in that State, even if the previous Arkansas marriage was void. In 55 C. J. S. 879, the cases are summarized in this language:

"As a general rule, continued cohabitation after the removal of an impediment to an invalid marriage which the parties contracted in good faith creates a valid informal or common-law marriage in jurisdictions which recognize such marriages."

Therefore it appeared on the face of the plaintiff's pleadings that she was not entitled to claim any annulment of her marriage with the defendant since they had by ratification and by common law become lawfully married in the State of Kansas.

Conclusion: We affirm the Chancery decree in dismissing both of the plaintiff's complaints, but all of this is without prejudice to the plaintiff's right, if she so desires, to seek a money judgment for the arrearage of support, just as was done in *Tolley* v. *Tolley,* 210 Ark. 144, 194 S. W. 2d 687.

Mr. Justice Robinson not participating.

George Rose Smith, J., dissenting. The original complaint stated a cause of action. Pleadings are to be construed liberally on demurrer, but the majority are taking a very narrow view of the appellant's complaint. Her allegation that a certain amount of back alimony is due states a cause of action, and that should conclude our inquiry. It is true that the prayer asks that the defendant be punished for contempt, but this is civil contempt and is therefore remedial rather than punitive. What the plaintiff wants is payment of the debt, not the pleasure of seeing her former husband in jail. For that matter, the court could have held the defendant in con-

tempt by first entering a judgment of its own for the amount due; so the prayer was not altogether irrelevant. Finally, we have often held that it is the statement of facts and not the prayer for relief that governs; the court may grant whatever relief the facts warrant. *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S. W. 2d 633. Since this complaint states a cause of action, the badly worded prayer should be treated as surplusage.

W. B. BYNUM COOPERAGE COMPANY *v.* COULTER.

4-9595 244 S. W. 2d 955

Opinion delivered January 14, 1952.

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

Gibson & Gibson, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from verdicts in favor of four plaintiffs whose causes were

consolidated for trial. Each alleged damage to crops caused by W. B. Bynum Cooperage Company through its negligent use of plane-sprayed 2, 4-D, July 8th and 9th, 1949, when the corporation sought to protect 400 acres of rice planted on its 2,200 acre plantation seven miles from Dermott.[1]

A wooded area and bayou separate the riceland from any of the tracts as to which the cotton and lespedeza damages were claimed. The Midkiff planting is farthest from the corporation's operations—about a mile and three-quarters. Harold and W. B. Bynum, Jr., brothers and stockholders in the defendant company, testified that severe cotton damage occurred in their area of operations in 1949, but it was due to excessive rains. In addition to the rice crop, 400 acres were in cotton, producing 43 bales. The same acreage[2] in 1948 yielded 365 bales.

W. B. Bynum, Jr., a licensed pilot with more than 700 flying hours to his credit, testified that he was present when the rice was sprayed by an aviator who used a commercial plane. Directions were given—and, as the witness believed, were followed—to fly low, close control valves on the chemical tank before reaching the borderline of planting, and not to attain elevation for the purpose of turning while it was possible for any of the poison to escape. The witness thought that most of the flying was at an elevation of six to eight feet above the rice, and was certain that the plane did not get off of the property the corporation owned. Between 75 and 100 "runs" were probably made. When asked whether the pressure tank containing the liquid was equipped with a cutoff valve, Bynum replied, "Yes, to the best of my knowledge, because we checked the plane entirely to see that nothing was wrong with the plane."

To guard against overshooting the marginal areas, a flagman was placed 150 feet from the end of the rice

[1] R. H. Coulter claimed that damage to 12 acres amounted to $1,080, and he recovered $715. Edward Midkiff planted 18 acres to cotton and 20 acres to lespedeza. He sued for $2,300 and recovered $1,040. Joe C. McDaniel planted 13½ acres to cotton and sued for $2,100; but Earl Kincade had rented 7.28 acres of the 13½. McDaniel was awarded $552.50 and Kincade $487.50.

[2] The record does not show that the land was identical. It only shows that acreage was the same.

growth. The aviator was instructed to stop spraying when he reached the flag; for, said Bynum, an area of 600 feet would then remain within which to make the turn without getting off of the property.

County Agent Waters testified regarding the effect of 2, 4-D. What he said in this respect does not vary materially from facts in *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820. See, also, *Burns* v. *Vaughan,* 216 Ark. 128, 224 S. W. 2d 365, 12 A. L. R. 2d 433. In the last two cases "dusting" was employed, as distinguished from application in liquid form.

Waters had received many samples of cotton damaged by the poison in question. He identified cotton plants taken from plaintiffs' fields and testified that the deterioration of leaves, squares, and roots was typical of the effects produced by 2, 4-D. Specimens had been sent to the University of Arkansas, College of Agriculture. Letters written by the head of the department of plant pathology or an assistant expressed opinions that the specimens definitely disclosed injury by 2, 4-D. In some of the letters the words "typical of" were used in referring to the cause of deterioration.

Assistant County Agent Holbrook had been called to inspect some of the crops as to which injury was alleged. He made notations August 5th and when testifying read from the memoranda. Such expressions as "Leaf injury slight," "squares showing some injury," "leaf damage and squares are affected," "slight leaf damage," "leaves showing injury," etc., were read. The crops on appellees' farms had been well cultivated,—they had been chopped out, were clean, and well cared for. Matter contained in a 1948 bulletin issued by the U. S. Department of Agriculture was brought to the jury's attention, emphasis having been placed on a table showing that 2, 4-D would kill cotton in certain circumstances. The Department warned against distributing from an airplane, adding that the dust might drift for miles, "killing or damaging susceptible crops on a neighbor's farm as well as your own." Proper nozzles on the distributing system,

accurately adjusted, [says the bulletin] "are the key to safe, thorough spraying."

The evidence is that there are at least two forms of 2, 4-D in general use: one having an ester base, the other an amine base. It was shown in the case at bar that the amine-base solution was used: that is, the powdered or crystal chemical was dissolved in water when put into the plane tank. The department of agriculture regards the ester-base poison as the more dangerous of the two.

According to William Oliver who resided in the immediate area, the plane flew above treetops in making its turns. He also testified that the wind was "right out of the northwest, coming southeast." This was sufficient to support a jury's finding that the air currents were toward the crops claimed to have been damaged, although there was other testimony in direct contradiction. Oliver said the breeze was sufficient to be felt on one's hand. It was also in evidence that Bynum (Cooperage Company) lands were lower than appellees' cultivated tracts, and therefore would be more readily affected by wet weather. On behalf of appellees it was shown that their lands drained into or were drained by the bayou. Harold Bynum admitted that excessive rains in June and July affected the company's cotton to such an extent that in July, when the rice was sprayed, he and those in interest with him had entirely abandoned the cotton.

By referring to W. B. Bynum's testimony it will be observed that he did not unqualifiedly say that the chemical tank used on the airplane was equipped with a cutoff valve. He checked "entirely" to see that nothing was wrong with the plane, and the pressure tank was equipped with a cutoff valve "to the best of his knowledge." Defense attorneys explained that they had been unable to procure attendance of the flyer.

Objection is made to the method applied by the court in determining the measure of damages. Instruction No. 2 permitted the jury to find the actual value of the crop at the time it was damaged, to consider its probable

value at maturity, less the difference between cost of production based on a full or probable crop, and to take from such production its cost, etc. The formula was not, in principle, substantially at variance from the rule sustained in *Harrington* v. *Blohm,* 136 Ark. 231, 206 S. W. 316. The jury, in respect of each plaintiff in the instant case, materially reduced the amounts claimed. We are not able to say that the court erred in giving the instruction.

The final contention is that Instruction No. 4 was binding and omitted an essential element of defense. It was objected to generally and specifically. Substance of the instruction was that if the jury should find that agents of the corporation, as reasonable men, ought to have anticipated that the poison, when used in the manner shown, might drift to appellees' property and cause damage, and if it also found that the damage occurred through negligent failure to act prudently, there should be findings for the plaintiffs.

Appellant thinks the instruction is fatally defective in that it omitted mention of essential elements of defense such as deterioration of the cotton because of defense such as deterioration of the cotton because of excessive rains and boll weevil. The court's construction of the law is not open to that objection. As worded, the instruction required, as a prerequisite to judgments, that there be a finding that 2, 4-D caused the damage.

Affirmed.

PINKERT *v.* REAGAN.

4-9630 244 S. W. 2d 961

Opinion delivered January 14, 1952.

U. A. Gentry, for appellant.

Osborne W. Garvin, for appellee.

ROBINSON, J. This appeal presents the issue of setting aside a decree after expiration of the term and the issue of the failure of petitioners to verify the petition to set aside the decree. The appellees, G. W. Reagan and his wife, Lessie Mae Reagan, on the 31st day of March, 1925, acquired by warranty deed lot 2, block 17, Midland Hills Addition to Little Rock, Arkansas, which is located within the boundaries of Sewer Improvement District No. 94. The property at the present time has a value of between $15,000 and $20,000. An assessment due the district in the sum of 70 cents for the year 1926 was not paid, and the property thereby became delinquent. A suit was filed by the District in 1927 to foreclose on certain delinquent property. In 1931, by an amendment to the original complaint, the appellees' property was brought into the proceedings. On November 23, 1937, the court rendered a decree of foreclosure and ordered the property sold. On April 12, 1938, the decree of foreclosure was confirmed.

By deeds of conveyance, appellants claim title to the property. On the 27th day of August, 1948, G. W. Reagan and Lessie Mae Reagan filed in the original case that which they termed an "intervention." The so-called intervention alleges, among other things, "that upon inquiry by the interveners, and their agents and attorneys, in the office of the Chancery Clerk, that the interveners, their agents and attorneys were advised by the said clerk and his deputy that all assessments against said property in said plaintiff district were fully paid." The district, having bought the property at the foreclosure sale, filed

a response admitting the judgment should be vacated and tendering to appellants, Ed Pinkert, Manie Schuman and Florence Schuman, the amount of $5.50, which it had received in payment for the property. The appellants filed a motion to dismiss the intervention and, after a hearing thereon, the court entered an order finding that the intervention was in effect a suit to set aside the decree rendered in November, 1937, in favor of the plaintiff improvement district, and that the pleadings designated by the appellees herein as an "intervention" should be treated as an independent suit to set aside the decree. The motion to dismiss filed by appellants did not mention the fact that the petition to vacate the judgment was not verified. After hearing all the evidence in the case the court held:

"That the plaintiffs G. W. Reagan and Lessie Mae Reagan are the owners of lot 2, block 17, Midland Hills Addition to the City of Little Rock, Arkansas, and that the sale of the said property under the decree of the Pulaski Chancery Court entered in proceedings wherein said Sewer Improvement District No. 94, was plaintiff and S. R. Thomas, et al., were defendants in Case No. 31771, is void and that the deed executed by the Commissioner in Chancery by virtue of said decree and sale, and all subsequent deeds, are void and constitute a cloud upon the title of said lot."

The effect of the Chancellor's decree is to vacate the 1937 decree with respect to appellees' property involved in this case. By reason of the allegation in the "intervention" to the effect that appellees attempted to pay all assessments due at the Chancery Clerk's office, where such improvement district assessments were collected, and that they were informed by the deputy Chancery Clerk that there were no past due assessments unpaid, the intervention should have been treated as a motion to vacate the judgment on the ground of "unavoidable casualty or misfortune preventing the party from appearing or defending" which is the seventh ground named for vacating a judgment in § 29-506, Ark. Stats.

The undisputed evidence in the case at bar is that the property also went delinquent for the year 1935, and that when this 1935 delinquent assessment was paid to the Chancery Clerk in 1937, an attempt was made by the property owners at that time to pay all unpaid assessments. The evidence of this fact is overwhelming, the plaintiffs' testimony in that respect being corroborated by the Deputy Chancery Clerk and the receipt for the 1935 delinquent assessment, which was paid in 1937. The attempt to pay the taxes or assessments was made after the suit was filed by the improvement district, but before a decree was taken. It was the practice of the district to permit the Clerk to accept payment of the assessments on which a foreclosure suit had been filed, and for the Clerk to make a notation on the papers in the proceedings to the effect that the assessment had been paid and the suit be dismissed as to that particular property.

The appellees went to the Chancery Clerk's office, the proper place to go for the purpose of paying all delinquent assessments in Sewer Improvement District No. 94. This was done prior to the rendition of the decree. The Deputy Clerk accepted payment for the delinquent taxes due for the year 1935, and informed the appellees that no other assessments were due, when, as a matter of fact, an assessment for the year 1926 was still unpaid, according to the records in the office of the Chancery Clerk, but this fact was overlooked by the Deputy. Appellants contend that, assuming this evidence to be true and giving it its strongest probative force, it would simply mean that legally the taxes were paid, and that this in itself is not sufficient to vacate a judgment on statutory grounds. To sustain this contention, appellant cites the case of *Davis* v. *Bank of Atkins,* 205 Ark. 144, 167 S. W. 2d 876, to the effect that a judgment will not be vacated unless there is a valid defense to the action in which the judgment was rendered. But, here, a valid defense is alleged and proved.

Under the facts and circumstances in this case, appellees are in the same position as they would have been had the Deputy Clerk correctly informed them as to the

1926 assessment being due and appellees had paid said assessment. Appellants further say that "the judgment was not rendered until November 23, 1937, and they [appellees] are in exactly the same position as one who had paid a debt." The case of *Wilder* v. *Harris,* 205 Ark. 341, 168 S. W. 2d 804, is controlling. There, the court said:

"It was a misfortune or casualty that the clerk erroneously included the appellants' property in the list of the delinquent assessments. Likewise, it was unavoidable, as far as the appellants were concerned. They had paid their tax, they could not be expected to sit at the courthouse and look over the shoulder of the official to see that he made no mistake. As far as the appellants were concerned, the decree of foreclosure was unavoidable, and it was certainly a misfortune or casualty. The appellants, by their tenant, were holding up the flag of possession all the time. By the receipt, they had been lulled into a feeling of security that their taxes were paid. They certainly had a right to rely upon the integrity of the elected official. He was only human, and he made a mistake just as we all do. But it would be a hard court of equity that would penalize an innocent person for the innocent and unintentional omission of an officer as in the case at bar. Mr. Justice Wood, speaking for this court in the case of *Thweatt* v. *Grand Temple, etc., Knights and Daughters of Tabor,* 128 Ark. 269, 193 S. W. 508, said: 'An act of the court shall prejudice no man, is a maxim founded upon justice and good sense.' "

It is true that in *Wilder* v. *Harris,* there was a publication of a warning order whereas in the case at bar, in addition to the publication of the warning order, there was personal service. This distinction is immaterial, however, and the case did not turn on that point. But, in that case the motion to vacate the judgment was verified whereas in the present case there was no verification of appellees' pleading. On this point appellants contend that verification is a jurisdictional requirement and rely on *Merriott* v. *Kilgore,* 200 Ark. 394, 139 S. W. 2d 387; *Pattillo* v. *Toler,* 210 Ark. 231, 196 S. W. 2d 224;

Raymond v. *Young,* 211 Ark. 577, 201 S. W. 2d 583; and *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575. But, these cases do not overrule *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. 2d 1088, which controls here.

It seems that the Statute's purpose in requiring verification is to prevent a judgment from being taken on an unverified pleading alone, without any evidence being introduced. In *Merriott* v. *Kilgore, supra,* the plaintiff did not make any showing at all, but the trial court set aside the former decree on the motion and response. This Court said:

"In the instant case the statute was not complied with, the motion was not verified, and no evidence was heard, although the response denied every material allegation in the motion." The Court quoted from *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575, as follows:

"It is a very significant fact in this record that none of the appellees testified that they did not know that the action was pending and of the proceedings had therein. Their verified complaint was denied, and therefore its allegations are not testimony and cannot be accepted as facts proved, even if it had been therein stated that the appellees did not know of the pendency of the action." The clear implication is that if appellees had testified on the point involved, their testimony would have been considered and might have been sufficient, although the complaint was not verified. In *Pattillo* v. *Toler, supra,* a verified petition to vacate the decree was filed. A demurrer to the petition and a motion to dismiss were filed and sustained. Subsequently, an amendment to the complaint was filed, which substantially re-stated the allegations of the original petition, with the additional allegation that the defendant was not served with summons. This Court said the pleading could be disposed of upon the ground that it was not filed until the original petition was dismissed, and it was not shown that the petition was re-instated, and, second, it was not verified.

It does not appear that any testimony was taken on the amended petition.

In *Raymond* v. *Young, supra,* the court cited *Merriott* v. *Kilgore* and *Pattillo* v. *Toler* as authority for the requirement that the complaint be verified has been held to be jurisdictional and one that must be complied with. But, the court went on to say: "However, if we treat that requirement as one that could be waived, the allegations of the motion to vacate do not set up any of the grounds specified in the statute."

In *Miller* v. *Miller,* 209 Ark. 505, 190 S. W. 2d 991, the court granted an unverified motion modifying the decree without taking any testimony. This Court, in passing on the case, cited the applicable statute pertaining to vacating or modifying judgments, which is now Ark. Stats., § 29-506, and, in reversing the Chancery Court, said: "Since the motion filed on March 26, 1945, was not verified, and since no notice was issued and no proof taken, it follows that the order of March 26, 1945, granting the motion was contrary to the statute." The inference is that even though the motion was not verified, if the adverse party had been given notice and proof had been taken, lack of verification would have been of no consequence.

In the *First National Bank* v. *Dalsheimer* case, *supra,* the Court said: "Their verified complaint was denied, and therefore its allegations are not testimony and cannot be accepted as facts proved."

Ark. Stats., § 27-1110 provides: "No objection shall be taken after judgment to any pleading for want of, or defect in, the verification."

In *Randall* v. *Sanders,* 71 Ark. 609, 77 S. W. 56, the court said: "The complaint was not verified. But the statute provides that 'no objection shall be taken after judgment to any pleadings for the want of, or defect in, the verification.' "

"This answer was not sworn to, as required by our code of practice, and for this defect might have been stricken out, but as no exceptions were taken to it for

this cause, it is too late after replication and trial before a jury, and final judgment, to raise the objection, for the first time, in this court." *Payne, Huntington & Co.* v. *Flournoy,* 29 Ark. 500.

In *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. 2d 1088, a pleading to vacate a judgment was filed. Mr. Justice FRANK SMITH speaking for the court said: "It appears that the pleading was not verified as the statute requires; but that question does not appear to have been raised in the court below. We have a statute, (§ 1246, Crawford & Moses' Digest) [now Ark. Stats., § 27-1110], which provides that no objection shall be taken after judgment rendered to a lack of verification of the pleading upon which the judgment was rendered. However, the petition was heard on the sworn testimony of numerous witnesses, and the judgment was not rendered by default upon an unverified pleading. The purpose of the statute was to prevent this from being done, and it was not done."

Likewise, in the case at bar, the decree was rendered on the sworn testimony of witnesses and exhibits to the witnesses' testimony, and not on an unverified petition. No objection was made in the trial court to the petition on the ground that it was not verified.

The decree of the Chancery Court is correct, and is therefore affirmed.

The Chief Justice concurs.

SMITH *v.* STATE.

4675 245 S. W. 2d 226

Opinion delivered January 14, 1952.

Rehearing denied February 11, 1952.

Fred M. Pickens and *George H. Steimel,* for appellant.

Ike Murry, Attorney General and *Dowell Anders,* Assistant Attorney General, for appellee.

WARD, J. On or about August 1, 1949, appellant became an employee of Smith & Spencer Motors [at Pocahontas], a partnership composed of Elwood Smith (a nephew of appellant) and R. L. Spencer, which partnership was engaged in operating a garage and in buying and selling new and used cars. Appellant's duties were to keep records, handle cash, pay bills, etc., and he, as well as the two partners, was authorized to sign checks on the company. Sometime prior to March 9, 1951, when appellant left the employment of the company, his nephew, Elwood Smith, discovered what appeared to be irregularities in the books and Paul Johnston, a certified public accountant, was employed to make a cash audit of the partnership's books. This audit revealed a shortage of $7,714.57 and on June 15, 1951, information was filed charging appellant with the embezzlement of said amount and also charging him [under Ark. Stats. § 41-3927] with grand larceny by embezzlement on fourteen separate counts setting out as many separate offenses dating from February 14, 1950, to January 31, 1951.

Trial was had on July 19, 1951, and appellant was found guilty of grand larceny by embezzlement, as charged in the information, and was sentenced to three years in the penitentiary, hence this appeal.

For a reversal appellant first insists the lower court committed reversible error in refusing to grant a continuance. The transcript contains the motion for a continuance, the material part of which is as follows: "The defendant is unable at this time to prepare his defense because all of the books, papers and evidence have been and are yet in the hands of the prosecuting witnesses, and it is impossible for this defendant to prepare his defense until said records have been made available for his use so that a complete audit can be made." The motion contains no filing date, but it was verified on July 14, 1951, which date we find to be a Saturday. We assume, in view of the court's language quoted below, it was first presented to the court on the following Monday. Since the court's statement, in overruling the motion, appears to be in accord with the facts, and since we agree with the conclusion and reasons therein mentioned it is herein copied as follows:

"This charge was filed on June 15th, 1951, and the defendant was arrested immediately thereafter. We had a pre-trial session of this court on date of July 2nd, 1951, at which time the whole docket was called, and steps taken in several cases, and, likewise, on July 7th, we had another pre-trial session, at which a similar proceeding was followed; not until the first day of the regular July term of the court, on July 16th, was a motion for continuance filed, and, it was, at that time, overruled. On that day the defendant did file a motion for a subpoena *duces tecum* for the records and papers in the custody of the firm of Smith & Spencer Motors, and that motion for subpoena *duces tecum* was granted. The court, now, on this date of July 19th, the defendant having renewed this motion for a continuance, the Court thinks, under all the circumstances, the motion should be overruled." To the above ruling of the court the defendant further objected, in open court, that he *thought,* on July 2nd, this

case would not be tried at that time, but he set out no facts [and there are none in the record] to warrant that impression. Moreover, in the same statement, he admitted that on July 7th the case was set for trial on the 19th. He further stated, however, that a civil action (a suit by Smith & Spencer Motors against him which involved the same accounting) was, on July 7th, set for trial on July 17th and that when he moved to transfer it to equity the plaintiffs took a nonsuit without prejudice. By all this, says appellant, he has been misled into a state of unpreparedness. We cannot agree that appellant's contention is warranted under the facts and circumstances set out above. The matter of granting or refusing a continuance lies within the sound discretion of the trial court. In *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409, Judge RIDDICK, speaking for the court, said: "It has often been decided that whether a case should be continued or not is generally a matter within the sound discretion of the trial court. Its refusal to grant a continuance is never a ground for a new trial unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice." Numerous later decisions of this court have affirmed this rule. Also, as held in *Jones* v. *State,* 205 Ark. 806, 171 S. W. 2d 298, there was a duty on appellant to show due diligence which the court had a right to consider in the proper exercise of its discretion.

The only other contention for a reversal is that there is a general insufficiency of evidence to sustain the verdict of the jury. The rules by which this contention must be considered are well established by many decisions of this court. The verdict of the jury must stand if it is supported by substantial evidence. *Spears* v. *State,* 173 Ark. 1071, 294 S. W. 66; *Bird* v. *State,* 175 Ark. 1169, 299 S. W. 40. The jury is the sole and exclusive judge of the credibility of witnesses and the weight of their testimony. *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351; *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813. The evidence will be viewed by this court in the light most favorable to sustain a conviction. *Cook* v. *State,*

196 Ark. 1133, 121 S. W. 2d 87; *Ahart* v. *State*, 200 Ark. 1082, 143 S. W. 2d 23.

Viewed in the light of the above announced rules it is our opinion that there is substantial evidence to sustain the verdict of the jury. The testimony, somewhat voluminous, on the part of the state was given principally by the two partners, R. L. Spencer and Elwood Smith, and by Paul Johnston, C. P. A. Johnston testified that he made a cash audit of the books of the partnership from the date the defendant started his employment until he quit; that it charged defendant with all money shown to have come into his hands and credited him with all money he deposited in the bank to the credit of Smith & Spencer Motors; and that it showed a shortage, or a charge to defendant, of $7,714.57, *i. e.*, the defendant had taken in that amount in excess of what he had deposited in the bank. The testimony further showed several instances where defendant had cashed checks, over and above his salary checks, on the partnership and apparently kept the money or used it to pay personal debts. In most instances defendant's only explanation was that he had personally loaned money to the firm and was merely repaying himself, although he made no book entries showing any such personal loans to the partnership. Both partners stated they knew nothing about such loans by defendant and he admitted they never called on him for any of his personal money. On one occasion a check for $500 which defendant cashed was not honored by the bank for lack of funds. In adjusting the matter the partners and the bank cashier said defendant claimed the check had been forged by his brother-in-law, although the cashier stated the signature appeared to be that of defendant. Defendant denied the alleged statement involving his brother-in-law, but made the check good. The partners testified that although they had a good business during the employment of defendant they continually had financial troubles, but that it was different after he left. They also stated that defendant, during this time, was engaged in the used car business in another town, but they did not know it. No particular part of the testimony is called to our attention in appellant's

brief and we have only referred to so much as, in our opinion, is sufficient to support the verdict of the jury.

Appellant calls attention to *Fleener* v. *State,* 58 Ark. 98, 23 S. W. 1, contending it calls for a reversal of this case. There a conviction for embezzlement was reversed because the lower court refused defendant's instruction which stated, in effect, that the mere failure to pay over money at the proper time would not, of itself, constitute embezzlement, and that it must appear that the defendant retained the money by attempting in some way to conceal it, or by falsely and fraudulently keeping his accounts, etc. Defendant cannot take full advantage of the *Fleener* case here for the reason that no such instruction was requested and, in fact, no exceptions were saved to any instructions. Had the situation been otherwise we still think there is here sufficient evidence for the jury to find it met the requirements of the instruction mentioned above.

Finally appellant insists it is essential to the crime of embezzlement that there be a fraudulent intent on the part of a fiduciary to convert the property to his own use, and that no such intent is shown here. It is true that *intent* is an essential part of the crime of embezzlement, but, as stated in *Gurley* v. *State,* 157 Ark. 413, 417, 248 S. W. 902, 904, *intent* may be inferred [by the jury] from the act of wrongful conversion. To the same effect is *Heath* v. *State,* 207 Ark. 425, 181 S. W. 2d 231.

Affirmed.

FRANKLIN LIFE INSURANCE COMPANY *v.* BURGESS.

4-9654 245 S. W. 2d 210

Opinion delivered January 14, 1952.

Surrey E. Gilliam and *Melvin E. Mayfield*, for appellant.

Mahony & Yocum, for appellee.

MINOR W. MILLWEE, Justice. Appellee, John P. Burgess, recovered a verdict and judgment against appellant, Franklin Life Insurance Company, in the sum of $1,100 for eleven months total disability under a health and accident insurance policy, together with twelve per cent penalty and attorneys' fees.

The policy was issued in 1946 pursuant to an application stating appellee's occupation as "Mgr. Burgess & Son Dry Goods and Groceries" and his exact duties as "Managerial & Clerical". At that time appellee was a clerk in the Burgess store at Strong, Arkansas. The store handled groceries, dry goods, feed, fertilizer, hardware and other items usually carried by a general store in a small town. As a general clerk appellee worked in all departments of the store. In assembling and selling merchandise he was required to load and unload such articles as farm implements, fertilizer, feed and other heavy items.

Appellee moved with his family to Conway, Arkansas, in November, 1948, and put in a neighborhood

grocery store. While visiting relatives near Strong on January 22, 1949, appellee received injuries to his left foot by the accidental discharge of a shotgun necessitating the amputation of the limb nine inches below the knee. Phlebitis, an interference in circulation of the blood, developed in the limb resulting in complications which existed at the time of the trial in July, 1951. Physicians described the limb as cold, tender, swollen and stated that it pits on pressure as the result of fluid in the soft tissue. The entire area of the stump is painful on pressure. The stump is stiff and drawn backwards in a fixed position at an angle of ninety degrees to the thigh, and any attempt at manipulation is very painful. Appellee cannot wear an artificial limb. The results of an attempt to prepare the injured limb for an artificial limb by amputation at the knee would be doubtful and dangerous on account of the phlebitis. Doctors have advised appellee against the operation.

Prior to his injury appellee did practically all of the work in connection with the operation of the store except the bookkeeping which was done by his wife. The store building is 22 x 40 feet and adjoins a six-room dwelling occupied by appellee and his family. Merchandise is kept in shelves which extend up eight and one-half feet from the floor on one wall and six feet on the opposite wall. A ladder is used in removing articles from the higher shelves. Appellee handled a general line of groceries, bottled drinks and other articles usually carried in such stores. The canned goods and other items such as sugar, potatoes and flour were delivered to the store in cases, cartons and sacks weighing up to one hundred pounds. These were handled by appellee in distributing the merchandise to the shelves and other places about the store where it was kept for sale. Appellee opened the store at six a. m. He did all the janitor work, buying, most of the selling and all the heavy work, including the transfer of cases of bottled drinks to and from a storage room.

Following his injury, appellee resumed such light duties as he was able to perform around the store about

June 1, 1949. He cannot walk without crutches and the arch of his right foot is broken down. He can watch the store when his wife and other clerks are out, make change and accept payments for merchandise. He can sell small items such as a cold drink or package of cigarettes, but cannot wait on customers generally. He can no longer handle merchandise delivered in case lots or large sacks, make sales of heavy articles, place and remove merchandise from the higher shelves, or do any of the work of cleaning up the premises. His wife has opened the store since his injury and, with the assistance of her nephew and sister, has performed the major portion of the duties formerly performed by appellee. According to the medical testimony, appellee, while sitting in a chair, could perform such duties as answering the phone or using the cash register and adding machine for only short periods of time without suffering intense pain.

Dr. F. L. Irby testified on behalf of appellee as follows: "Q. We have enumerated to you, doctor, what he did before and after his injury, and you have told about the things you thought he could perform; would you say there are any substantial part of his duties that he can perform in the usual and ordinary way that he performed them before he lost his leg? A. No, sir, the regular duties that he performed in the grocery business before that, he can't do it now; there are some little things that he might be able to do, but the regular duties, he is unable to do them today. Q. I am talking about, now, doctor, the things that he can do now, can he do those in the usual and ordinary way that he did them before he got hurt? A. No, sir."

On cross-examination the doctor testified: "Q. In general, he could do any kind of work about that store that didn't involve manual labor, lifting heavy articles, that didn't require him to be engaged in it for any extended length of time? A. He could do anything that he didn't have to walk and use his hands to do; if it was something that he could show, or tell them what to do he

could do it, but if he had to use his hands, or walk and get something, or handle things, and move them he is not able to do it."

Upon being asked to give his opinion as to appellee's disability, Dr. L. G. Fincher stated: "We assume that when a man can't do the usual duties of his occupation he becomes disabled. Now, you specifically mention—you specify certain things he did—I have worked in the same kind of store that he has, and I know exactly what his duties are, and he can't do the work in that store. I could admit right quickly that he might have it done, but he can't do it, and that's why I assume that he is disabled. I just feel that he can't do his work as he did it before his injury."

At the outset appellant recognizes the rule followed by this court in numerous cases as stated in *AEtna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310: "Total disability is generally regarded as a relative matter which depends largely upon the occupation and employment in which the party insured is engaged. This court has held that provisions in insurance policies for indemnity in case the insured is totally disabled from prosecuting his business do not require that he shall be absolutely helpless, but such a disability is meant which renders him unable to perform all the substantial and material acts of his business or the execution of them in the usual and customary way. *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N.S.) 635, 21 Ann. Cas. 1029; *Brotherhood of Locomotive Firemen & Enginemen* v. *Aday,* 97 Ark. 425, 134 S. W. 928; and *AEtna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335. . . .

"The object to be accomplished was to indemnify the insured for loss of time for being wholly disabled from prosecuting his business. It has been well said that, if the language used was to be construed literally, the insurer would be liable in no case unless the insured should lose his life or his mind. Of course, as long as he is in possession of his mental faculties, he is capable of transacting some part of his business; but, as we have

already seen, he was not able to prosecute his business within the meaning of the policy unless he was able to do all the substantial acts necessary to be done in its prosecution."

However, appellant contends the policy here involved is not one where total disability is insured against so that the courts are free to define the nature and extent of the disability. It is argued that appellee was insured against disability resulting in total loss of time, that the language of the policy must be construed literally and that appellee is precluded from recovering unless he was wholly and continuously disabled to perform each and every duty pertaining to his business or occupation.

The policy provides: " 'MONTHLY DISABILITY INDEMNITY' PART I. If injury or illness as before described shall wholly, necessarily and continuously disable the Insured and prevent him for a period of ninety days from performing each and every duty pertaining to his occupation, the company will allow the monthly indemnity for the period the Insured shall thereafter be so disabled but not exceeding twelve consecutive months. The first payment of such indemnity shall be made one month following the ninety-first day of such disability and succeeding payments shall be made each month thereafter during such period.

"After the payment of monthly indemnity for the period of twelve consecutive months, as aforesaid, the company will continue the payment of the monthly indemnity of the same amount so long as the insured shall be wholly, necessarily and continuously disabled and prevented by such injury or illness from engaging in any occupation or employment for wage or profit.

"Indemnity is not payable for the first ninety days of any period of disability as defined in Part I." In Part II, which follows, the disability for which indemnity is payable in Part I is referred to as "total disability".

The Spencer case, *supra,* involved facts and a disability clause somewhat similar to those in the instant case. There are many other decisions to the same ef-

fect. A few of these are: *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. 2d 433; *Metropolitan Life Ins. Co.* v. *Weathersby,* 190 Ark. 1050, 82 S. W. 2d 527; *AEtna Life Ins. Co.* v. *Martin,* 192 Ark. 860, 96 S. W. 2d 327; *North American Accident Ins. Co.* v. *Branscum,* 209 Ark. 579, 191 S. W. 2d 597.

Appellant relies on such cases as *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. 2d 600; *AEtna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. 2d 1007; *Metropolitan Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681; and *Mutual Life Ins. Co. of New York* v. *Phillips,* 202 Ark. 30, 149 S. W. 2d 940. While the risks insured against in some of these cases are slightly different from those involved in the instant case, the company was relieved from liability because, under the particular facts, it was shown that the insured continued his occupation after the alleged disability by performing the substantial and material acts and duties of his occupation in the usual and customary manner.

We hold that appellant insured appellee against "total disability" as defined by this court in the cases cited, that the question of appellee's ability to perform the duties of his occupation was properly one for the jury under evidence that is substantial and sufficient to support the verdict.

Error is assigned in the giving of appellee's requested Instruction No. 1. After quoting the pertinent provisions of the policy, this instruction concludes: "The provisions of the policy that I have quoted relating to disability does not mean a state of absolute helplessness. But it means that if there was any substantial part of the material acts necessary to be done pertaining to his occupation, that he could not perform in the usual and customary way, he would be disabled within the meaning of the policy." The interpretation placed on the policy by the trial court in giving this instruction is in conformity with the rule laid down in the cases previously cited. It would unduly prolong this opinion to set out the factual differences in the numerous cases cited by appellant and those in evidence here. In its

argument against the giving of this and other instructions, appellant contends the policy is a special one of limited liability, that appellee was rated as a preferred risk and the policy issued at a reduced premium because of the statement in the application as to occupation and duties. There was no contention that fraud was practiced on appellant in the execution of the application. There is no proof that appellee's occupation did not entitle him to be rated as a preferred risk nor is there any evidence that the premium would have been higher had he not been so rated. So we find no merit in these contentions.

Error is also assigned in the giving of appellee's requested Instruction No. 5, which reads: "The definition of the word 'clerical' includes, 'CLERK: An assistant in a shop or store; a salesman or saleswoman, especially in a retail store.' " Also, in the refusal to give appellant's requested Instruction No. 19, which reads: "The jury are instructed that the word 'clerical' is a word having a number of meanings, one of which is the doing of paper work, copying and keeping records and doing office work of that nature." The court also instructed on the meaning of "managerial". We think the jury was entitled to know whether appellee's duties as a clerk at the time of the issuance of the policy were included in the "clerical" duties as specified in the application. While it would have been proper to give appellant's requested Instruction No. 19, we find no prejudicial error in refusing it in the circumstances. It is undisputed that appellee did none of the work included in the definition requested—so the instruction really had no bearing on the issues in the absence of a plea of fraud.

The trial court refused to give numerous instructions requested by appellant which would have barred recovery unless the jury found appellee to be disabled in accordance with the literal terms of the policy. The requested instructions were in conflict with other instructions given on this issue and were properly refused. The court also properly modified several instructions

given at the request of appellant so as to correctly define the terms, "totally disabled", "total disability", "continuous disability" and "continuously disabled" in accordance with the meaning of such terms as set out in appellee's requested Instruction No. 1.

Appellant also insists that the question of appellee's disability to perform his occupation was submitted to the jury on the wrong theory in that appellee had two separate occupations instead of one. Appellee's occupation was listed in his application as manager of a general store, but he was then only a clerk. At the time of his injury he was the operator of a grocery store. Since his duties were listed as managerial and clerical in the application, appellant argues that appellee's occupation was dual since he was both manager and clerk of his store and that the undisputed evidence shows that he could perform all managerial duties. Appellant relies on *AEtna Life Insurance Co.* v. *Orr,* 205 Ark. 566, 169 S. W. 2d 651, where the insured's occupation was stated as physician and surgeon and there was testimony showing that he could perform his duties as a physician in the usual manner, but could not perform his duties as a surgeon. In reversing the case on another point and remanding for a new trial, we held that insured was engaged in dual professions and that he could not be held to be totally disabled unless he was disabled both as a physician and as a surgeon. Appellee had only one occupation, either at the time the policy was written or at the time of his injury, although his duties were many. We do not agree that the evidence conclusively shows that appellee could perform the material and substantial duties of a store manager in the usual and customary way. The doctrine of dual occupations or vocations announced in the Orr case is inapplicable here.

Appellant also argues that the attorneys' fee assessed by the court is shockingly excessive, while appellee says an additional fee should be allowed for services rendered on this appeal. The evidence on this issue shows that there were two trials of the case, that two members of the firm representing appellee spent two

days in the first trial and that three members of the firm participated in the last trial which lasted three days. It was also shown that two of the attorneys spent two or three days' office work in preparation for trial. Several attorneys testified that in their opinion a fee of $1,500 to $2,000 would be fair and proper. In fixing the amount, most of them took into account the assertion that a recovery in the instant case had established appellee's right to recover future disability payments for life or, at least, a potential right to such final recovery.

In arriving at a fee of $1,625 the court stated: "As I understand the testimony from the attorneys testifying here, they fixed $1,500 as the minimum. I think it would be the better policy here to take into consideration the time spent in the preparation of the case and the trial of the case, and I am going to calculate that on the basis of thirteen days spent and on the basis of $125 a day, and that would make the sum of $1,625; and that will be the fee fixed by the court for the plaintiff's attorneys —$1,625. By that means I am getting away from any speculation as to that future right there under the policy."

We have held that the object of the statute (Ark. Stats. § 66-514) is to allow plaintiff a reasonable sum for a competent attorney, or firm of attorneys, and does not contemplate a fee for two attorneys, or two firms of attorneys. *The Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720. We have also said that the amount should not be fixed on the basis that the fee was contingent. *AEtna Life Ins. Co.* v. *Taylor,* 128 Ark. 155, 193 S. W. 540. In discussing the fee to be allowed, the court said in *John Hancock Mutual Life Ins. Co.* v. *Magers,* 199 Ark. 104, 132 S. W. 2d 841: "It should not only be commensurate with time and amount of work required, but also with the ability present and necessary to take care of or meet the issues that arise. The fee is not fixed for, nor by the attorney, but for the insured and by the court. To be reasonable, it should not be so small or low, that well prepared attorneys would avoid that class of litigation or fail in the employment of suf-

ficient time for thorough preparation, but should be for the purpose of compensating the insured in engaging counsel thoroughly competent to protect his interests."

We have allowed fees in excess of the amount of recovery in cases where the determination of the questions involved also determined the liability of the company for future disability payments under the policy. *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366; *Pacific Mutual Life Ins. Co.* v. *McCombs,* 188 Ark. 52, 64 S. W. 2d 333. It is noted that the second paragraph of Part I of the policy provides for payment of monthly indemnity after the twelve-month period provided in paragraph one on certain conditions and uses language somewhat different from that employed in the first paragraph. It is true that a recovery in the present suit preserves appellee's right to seek further recovery for future installments under paragraph two, but it does not establish a right to future payments after the twelve-month period or determine appellant's liability therefor.

In fixing the fee on a *per diem* basis, the trial court calculated on a basis of 13 man-days spent in preparation and trial while the testimony is that 17 or 18 man-days were thus involved. In view of our former decisions, we do not think it sound to fix the fee solely on such basis—particularly where several members of a firm are involved, as here. Certainly the skill, work and time spent are to be considered along with the amount of recovery and the fact that a right to seek future recovery has been preserved. Upon consideration of all the circumstances, we have concluded that the fee allowed is somewhat excessive and should be reduced to $1,000.

The judgment is accordingly modified by reducing the attorneys' fee to $1,000. In all other respects the judgment is affirmed.

ROBINSON, J., dissents to modification.

ROBINSON, J. This case was tried twice. It required two days in the first trial and three days the second time. Several of the witnesses lived at Conway and other places, although the case was tried at El

Dorado. It necessarily required time, effort and expense to contact these witnesses and interview them with regard to their testimony. It is not a case where the lawyer could just tell his client to be at the court house on the day of trial with his witnesses. It required considerable time to work up all the law that might be involved and prepare the instructions. It required additional time, effort and ability to present the matter properly to this court. The insured had lost a leg. If his attorneys had lost the case, not only would there have been no recovery at the present time, but there could have been no hope of recovery for future disability.

Last but not least, the appellee proved by several lawyers that a fee of some $1,500 to $2,000 would be reasonable and proper in this case, and their testimony stands uncontradicted.

For these reasons, I respectfully dissent from that part of the majority opinion reducing the attorney's fee.

POWELL *v.* SOUTH BEND PLANTATION, INC.

4-9661 245 S. W. 2d 562

Opinion delivered January 21, 1952.

Rehearing denied February 25, 1952.

[redacted]

W. A. Leach, for appellant.

DuVal L. Purkins, for appellee.

ROBINSON, J. The principal issue involved here is the construction of a written rental contract between appellants, H. E. Powell, Carl O. Powell and Clifton M. Powell, partners, on the one hand, and Neely Bowen and Homer Albro, on the other. Bowen and Albro assigned their interest in the contract to South Bend Plantation. Hence, that Company was plaintiff, is now appellee, and is hereinafter called "South Bend." The Powells, hereinafter called "Powell," along with the Rice Growers' Bank, are appellants.

South Bend gave the Rice Growers' Bank authority to endorse checks made payable to South Bend during 1948 and pay the same to Powell. South Bend contends that the Rice Growers' Bank exceeded its authority by handling the 1949 checks in the same manner. We agree with the appellee and hold that the Bank is liable to South Bend to the extent that the Powells are herein held to be liable.

Bowen and Albro owned farm lands in Chicot County which had been used principally in growing cotton. They wanted to convert the use of these lands to growing rice, an expensive undertaking, but they did not have the necessary money. Neither of them was experienced in raising rice. They contacted Powell, who was an experienced rice-grower, and entered into an agreement with him to put the land in rice. A contract was prepared in South Bend's office in Memphis, where it was signed by the parties. The contract is as follows:

"Mr. Horace Powell
Wheatley, Arkansas

"Dear Horace:

"Neely Bowen and I have agreed to rent you for three years 300 acres more or less of the Rogers place in Chicot County, according to the survey of Tom Fricke,

which you are to put in rice, plus 150 acres on the west side of Bayou Macon and are to pay us one-sixth of the rice each year as rent, and we are to pay one-sixth of the hauling and drying; you are to put in the canals, the pipes, pumps, and installations of the motors, etc.; to remove stumps that have to be removed. We are to assign to you the AAA money. From the 1948 rent we are to reimburse you for all pipes, pumps and installations of the motors and costs of removing stumps. Any new ground which you may clear or remove the stumps from you are to have rent free for three years; but this privilege does not extend beyond the life of this agreement. In case we have an offer to sell the property, you are to have the refusal at the same price and terms as are offered. We are to pay all costs of bean poisoning, canals and road ditch.

"We have agreed to rent you the property known as Ditch Bayou and to get as rent for the oat land one-half of the oats and are to pay for one-half of the fertilizer and one-half of the hauling. In addition to the oat land you are to put in approximately 200 acres of soy beans and as rent for this we are to get one-fourth of the beans less 10% to you for supervising the crop.

"I have sent $500 for the first payment on stock in the McGehee Drying Association and will send the other $500 when it is requested. We will pay for the surveying of the rice land and staking of the canals.

"The purchase contract covering the above lands has been signed; the abstracts are ordered, but deeds have not passed. As soon as this transaction is completed we will draw a formal agreement with you and sign it. In the meantime this letter will give you the authority you need to go on the land and do the necessary work. If you will let us know when you want Fricke to complete the work, we will advise him to get in touch with you and make a date to meet you on the property.

"/s/ Neely Bowen

"/s/ Homer Albro."

Powell spent, under the terms of the agreement, $13,001.98 in 1948, and $841.97 in 1949. However, in-

cluded in this sum were a few items authorized by South Bend and not included in the written contract. Powell contends that he was to be repaid the entire amount he spent on the improvements even if it took all of the rent money for the three years duration of the agreement. South Bend contends that Powell was to receive only the amount of the first year's rent as payment in full for the improvements.

The Chancellor made a finding that Powell had spent $13,001.98 on the improvements in 1948, but, of that amount, the cost of equipment and canals totaling $10,289.99 was off-set in full by the rents amounting to $8,065.91, leaving South Bend owing Powell only $2,711.99 at the end of 1948, less $200 for water Powell used on rice on 40 acres, known as the Williams place, adjoining the South Bend property, on which Powell also raised rice. (One-sixth of the rice raised on the Williams place in 1949 was allowed South Bend for water furnished in 1949). The Chancellor allowed Powell $841.97 for improvements in 1949. South Bend was paid in cash $1,405.84. When figured this way, it adds up to Powell owing South Bend $2,790.16. A decree was rendered for that amount. We cannot agree with that part of the decree which entirely off-sets $10,289.99 of the money spent by Powell in 1948 with rents amounting to only $8,065.91.

According to the agreement, South Bend was to pay for all pipes, pumps, installations of motors, cost of removing stumps, cost of bean poisoning, canals, road ditch, surveying of rice land and staking of canals. The property was rented for three years. Nothing was said in the agreement as to when South Bend would reimburse Powell for the money he would spend on these improvements, with the exception of the pipes, pumps, installations of motors, and cost of removing stumps. It was specifically provided that these items would be paid out of the 1948 rent. The cost of the things mentioned to be paid out of the 1948 rent came to $187 for the stumps and $6,558.49 for pipes, pumps and installations of motors, making a total of $6,745.49. The rent

for 1948, one-sixth of the rice, amounted to $8,065.91. Hence, the 1948 rent was suffiicent to pay for the items that the contract provides should be paid for out of the rent for that year, and, when the entire 1948 rent is credited against the $13,001.98 spent by Powell for improvements, and South Bend is given credit for $200 for water used on the Williams place, it leaves South Bend owing Powell $4,735.51 at the end of 1948.

The Chancellor found there was $841.97 spent by Powell in 1949 for improvements and South Bend was paid $1,405.84 in cash. These two items, when properly charged against South Bend and added to $4,736.07, which South Bend owed at the end of 1948, make a total of $6,983.88 owed by South Bend to Powell at the end of 1949. The rents owed by Powell to South Bend for 1949 amount to $7,549.96, and when the $6,983.88 is deducted from the $7,549.96, it leaves a balance of $566.04 South Bend is entitled to recover. Without abstracting the evidence, which including the exhibits is voluminous, we mention some salient points sustaining the view that the parties did not intend that the 1948 rent alone should pay for the equipment and canals, as found by the Chancellor, or should pay for the entire cost of the improvements as contended by appellee.

South Bend alleges that Powell is insolvent. However, no evidence was introduced on that point, but, be that as it may, Powell is certainly experienced in growing rice, having been so engaged since 1919. At the time he rented the South Bend place, he was already working land in the immediate vicinity. He was bound to have known the approximate cost of making the improvements he agreed to make. Also, he must have known what he could expect the land to yield. It is not likely he would agree to put in improvements for one year's rent that would cost almost twice as much as the value of the rent.

The agreement between the parties provided that should South Bend decide to sell the property, Powell would have the option of buying it at the best price offered from any other source. South Bend did decide to sell and offered the property to Powell at the price

that they had been offered. Powell turned it down. The price received by South Bend was about $20 per acre including all the improvements put in by Powell. The value of the place sheds some light on the matter. The record does not show the number of acres in the place, but Powell put in about 450 acres of rice, from which South Bend received as rent for two years $13,843.95 in permanent improvements, $1,405.84 in cash, and is owed a balance of $566.08, making a total of $15,815.87 for two years' rent. In view of the value of the land, it is not likely they expected to get more.

Lastly, the contract itself plainly sets out certain specifically named items that are to be paid out of the 1948 rent. It does not provide that the 1948 rent shall be payment in full for all of the improvements, or payment in full for the equipment and canals.

The decree is reversed with directions to render a decree for the appellee in the sum of $566.08 with interest from January 1, 1950.

The Chief Justice would affirm the decree; Mr. Justice WARD concurs.

THE STATE PRESS COMPANY, INC., *v.* WILLETT.

4-9640 245 S. W. 2d 403

Opinion delivered January 21, 1952.

Rehearing denied February 18, 1952.

[redacted]

J. R. Booker and *John A. Hibbler,* for appellant.

Kenneth C. Coffelt and *Frances D. Holtzendorff,* for appellee.

George Rose Smith, J. The appellee, a clergyman, brought this libel suit against the appellant, a newspaper publisher. Upon this appeal the main question is whether the trial judge was justified in giving what amounted to a peremptory instruction for the plaintiff upon the issue of the defendant's liability for compensatory damages. The court also told the jury that the plaintiff was entitled to punitive damages if the libelous matter was published with actual malice. The jury returned a verdict for $100 compensatory damages and $1,400 punitive damages, and a judgment was entered upon the verdict.

The plaintiff is a Negro clergyman who was formerly the pastor of a church in Little Rock. For some years before the alleged libel was published the plaintiff had been conducting weekly radio programs which originated in his church and were paid for by various sponsors. Other Negro ministers became dissatisfied with the tenor of the sermons broadcast by the plaintiff on his programs, and complaints were made to the editor of the defendant's newspaper. This paper is read principally by Negroes. On February 24, 1950, the paper published the article now complained of, which read in part:

"It Stinks to the High Heavens

"The odor from a cesspool that has been exposed to the sun from the morning of creation down to the present moment could not be any more offensive to the sense of smell than the Reverend M. D. Willett's radio program that takes to the air every Sunday night by remote control from St. Paul church.

"The Willett ranting has become so nauseating that it doesn't only affect the sense of hearing, but every sense known to the human being.

"We are cognizant of the fact that it is our privilege, thus far, to listen to the program or not listen to it. But, on the other hand, a program of this kind that is so detrimental to the welfare of the race cannot be ignored. We further agree, that criticism of the parson's program will in no way change him from his routine of ranting. Trying to improve his conduct over air would be like administering medicine to the dead. This criticism will only add to his listeners and give more people a chance to see how ridiculous he is.

"However, Willett is not to be censured too much, for he is like most parasites, distinguished from the most venomous reptile by his ability to walk. His white supporters are more or less the ones to be censured. They show very poor judgment in their selection of Willett's type to vilify the Negro. There are many men known to the white man, and the Negro, who will vilify the Negro for a price with a certain amount of dignity.

* * *

"Every Negro who advocates decency should protest to the radio station he comes over, and to the white people who are supporting his program on the air and let them know how the Negro resents the doctrine and idiotic clowning of the Reverend Mister M. D. Willett."

After the publication of this article the plaintiff brought the present suit. His proof tended to show that as a result of the article he had been shunned by other Negroes, his church membership had declined from about three hundred to fifteen, and the sponsors of his programs had withdrawn their support. The defendant admits the publication, but its contention is that since Willett's programs were a matter of public interest the editor's comments were privileged under the doctrine of fair comment. On this theory the appellant argues that the court's first instruction was erroneous in that it disregarded the defense that was offered. This is the instruction: "You are instructed that the article published by the defendant on February 12, 1950, and set out in the complaint, is actionable in itself, that it was not privileged, and the plaintiff is entitled to recover such

compensatory damages as will fully and adequately compensate him by reason of the publication of the defamatory article, not in excess of the amount sued for."

A similar instruction was approved in *Murray* v. *Galbraith,* 95 Ark. 199, 128 S. W. 1047, and in the case at bar the instruction was correctly given. The gist of the defendant's article is that Willett accepted money in return for maligning his own people. This charge implies a want of honesty, is necessarily injurious to a clergyman in his profession, and is therefore actionable *per se. Studdard* v. *Trucks,* 31 Ark. 726; Rest., Torts, § 569, Comment *g*. Nor was the matter privileged under the rule of fair comment. Under this doctrine the statements would have been privileged had the charge been true and had the comment been made without malice. Rest., § 606. But the defendant made no attempt to prove any arrangement between Willett and his sponsors, by which he was to be paid to vilify his race. The doctrine of fair comment does not permit a newspaper to publish false and libelous statements even though a matter of public concern is involved. And the jury found by its verdict for punitive damages that the publication was motivated by actual malice, which also makes the doctrine inapplicable.

It is also contended that the punitive damages are excessive, but this is largely a matter for the jury's determination, and we think the evidence sufficient to support the jury's conclusion.

Affirmed.

SAGE *v.* SAGE.

4-9664 245 S. W. 2d 398

Opinion delivered January 21, 1952.

Rehearing denied February 18, 1952.

Love & Love, for appellant.

Stein & Stein, for appellee.

WARD, J. This is an appeal from a decree of the lower court which modified a former decree in that it took the custody of two minor children from appellant and gave it to appellee, and also relieved appellee of the obligation of paying $450 accumulated support money. In order to understand the issues, the rulings of the court, and appellant's objections, it is necessary to review briefly the proceedings leading up to the decree appealed from.

On March 11, 1950, appellant procured a decree of divorce which gave to her the custody of the two children, ages three and four, and required appellee to pay for their support $45 per month, allowing him the right to visit the children at "reasonable and seasonable times". At this time the parties resided near El Dorado. About five weeks later the father, appellee, filed a motion alleging he was not being allowed visiting privileges and asked to have custody changed or his visiting privileges enforced. Before this motion was heard he filed a motion to set aside the decree of March 11th as it related to custody. The matter was continued to the next term of court. On July 3, 1950, there was another continuance to September 6th, when a demurrer to the motion to set aside the former decree was sustained. On September 12, 1950, appellee filed another motion for custody in which he alleged; a change in conditions in that both

parties had married; that he had a good home for the children and his present wife wanted them; that appellant had taken the children from this state and the jurisdiction of the court, and was living with them in Virginia; and that the step-father was profane and an alcoholic, and the children were not being properly cared for. The hearing was set for November 20, 1950, but continued to March 27, 1951, when it was reset for June 18th. On the latter date it was set for July 9th when the decree appealed from was rendered. Previously appellant had filed a motion for judgment against appellee for $450 for accumulated unpaid monthly allowances for the children.

At the beginning of the hearing appellant made an oral motion, in open court, for a continuance and in support filed two letters from Dr. Aubrey L. Shelton of Virginia who lived in the same town where appellant resided. The first letter was dated June 6, 1951, and stated that appellant had given birth to a child by normal obstetric delivery on May 2, 1951, and, in his opinion, would be unable to travel to Arkansas before August 1st. The second letter, dated July 7th, was to the same effect except it extended the date she could make the trip to no sooner than November 2nd.

The court overruled the motion for a continuance and proceeded to hear the testimony of appellee and his present wife, who were the only witnesses. Their testimony was substantially the allegations mentioned above. The court rendered a decree for appellee, giving him custody of the two children, relieving him from making any future payments for the children, and also absolving him from the obligation of paying the accumulated payments which amounted to $450. Timely objections were made to all the above rulings and findings of the court.

For a reversal, it is urged the lower court committed three errors, to-wit: One, not allowing a continuance; two, awarding custody of the children to appellee, and, three, relieving appellee of paying the $450.

1.

The matter of a continuance lies within the sound discretion of the court. *McMorella* v. *Greer,* 211 Ark. 417, 200 S. W. 2d 974; *Morgan* v. *Austin,* 206 Ark. 235, 174 S. W. 2d 562. We think the court did not abuse its discretion. The doctor was not consistent. At first he thought appellant would be able to make the trip to Arkansas by August 1st, but less than three weeks later he changed the date to November 2nd. His reason in both instances was that appellant had given birth to a child on May 2nd. This alone justified the chancellor in using his discretion and using his own common sense and knowledge. He also had a right to consider the fact that no other diligence was shown, no effort to take appellant's deposition, no showing that her presence was needed other than to testify, and that the case had been continued several times. It was shown that her attorney had given her ample and imperitive notice. Numerous continuances are not generally looked upon with favor, as stated in Vol. 17 C. J. S. at page 277, § 112. The case of *Ashworth* v. *Brickey,* 129 Ark. 295, 195 S. W. 682, relied on by appellant can be distinguished. In that case there was a written motion in compliance with the statute which set forth in some detail the physical condition of the witness, and it further stated that the witness was needed not only to testify but to advise with counsel about matters within his knowledge. The matter of a continuance is always governed by the facts and circumstances of the particular case in which it arises and rarely can we say that any case is controlled by another.

2.

Did the court err in giving custody of the children to appellee? It is well established by numerous decisions of our court that before a change in custody is justified the moving party must show a change in conditions [since the initial award] and it must appear to be for the best interest of the children. These two prerequisites do not stand out [as having been shown by the testimony] in this case as they usually do in other cases where the same result was reached, but this is not the usual case and

should be considered in the light of disclosed facts and circumstances. When so considered it shows, we think, justification for the court's action. The record discloses that the chancellor [in a statement preliminary to entering a decree] recognized he faced a perplexing problem, that there was no set rule to follow, but that the prime consideration was the welfare of the children. He further stated that if and when appellant, with the children, returned to the jurisdiction of the court her request for restoration of the children would be heard. By removing the children from the state without permission appellant not only deprived the father of his natural and legal rights of visitation, but she thereby removed them from the jurisdiction of the court and its protecting power. The chancellor knew [from the evidence] they would be given a good home and proper care if entrusted to their father and that they would then be under his jurisdiction and supervision. It was not possible, however, for him to know [because no such evidence was introduced] that the children were being properly cared for in Virginia. The chancellor recognized the difficulties facing the father in any attempt to visit with or guard the welfare of his children in Virginia, or to remove them therefrom, and we agree with his decision that their welfare would best be served by returning them [at least pending further orders] to their father.

3.

The court was in error in relieving appellee of the obligation to pay the past due monthly installments amounting to $450. Neither side was able to find any decision of our court denying or affirming the above conclusion and our own search has disclosed none, but the greater weight of other decisions and text writers affirms it. In our opinion the rule that courts have no power to remit accumulated payments under the circumstances here is a sound one and we adopt that view. Many states adopting this rule are noted in 94 A. L. R. at page 332. In Vol. 27 C. J. S. at page 1239 appears the following:

"Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively, unless some reservation is made in the decree itself; the modifying decree relates to the future only and from the time of its entry."

There are a few states which hold that accrued installments may be remitted or modified. One such state is Minnesota from which appellee cites *Eberhart* v. *Eberhart,* 153 Minn. 66, 189 N. W. 592. In this case, however, we understand the holding to be that payment of accrued installments was only suspended until the child was returned to the jurisdiction of the court. We agree with this conclusion as we understand it. The case of *Weinbaum* v. *Weinbaum,* 153 A. 303 (R. I.) is also cited, but this case only holds that the person failing to pay accrued installments [under certain circumstances] would not be punished for contempt. We likewise agree with this conclusion and so stated in *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439.

The decree of the lower court is affirmed as to items One and Two, mentioned above, and reversed as to item Three.

The Chief Justice, Mr. Justice George Rose Smith and Mr. Justice Robinson would not have changed the original order of custody.

Taylor *v.* Crouch.

4-9653 245 S. W. 2d 217

Opinion delivered January 21, 1952.

Wiley W. Bean, for appellant.

J. H. Brock, for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates a consideration of § 51-409 Ark. Stats., relating to the procedure essential to perfect a lien on a motor vehicle which has passed out of the possession of the repairman.

Appellees, Crouch and Corley, are partners, trading under the firm name of Crouch Equipment Company, and engaged in the motor vehicle repair business in Ft. Smith. On February 18, 1950, L. G. Markle, then the owner of an International Truck, had the appellees perform work on the truck; and the charges for such labor and parts were $216.70. After delivering the truck to Markle, in February, 1950, appellees did no further work on it; but at various times from February to June, Markle purchased truck parts from appellee. Whether such parts were ever installed on the said truck, was a disputed question, but for purposes of this opinion, we may conclude that they were.

Sometime in July or August, 1950, Markle left the truck near his home in Clarksville and went to the State of Colorado, where he now lives. Armil Taylor took possession of the abandoned truck under some sort of claim, and sold it at a "public sale," and Houston Taylor acquired the said truck from Armil Taylor.[1]

[1] The witness Keller testified as to the truck and the ownership of it by appellant, Houston Taylor: "It was picked up by Armil Taylor and traded to Houston Taylor at a later date. It came to Armil Taylor

On August 21, 1950, appellees filed with the Clerk of the Johnson Circuit Court a verified statement which, omitting verification, was as follows:

"AUTOMOBILE REPAIRMAN'S LIEN

"Crouch Equipment Company has and claims a lien in the sum of $302.07 on a certain KB-6 International Truck Serial No. 28295, said automobile being the property of L. G. Markle of Mulberry, Arkansas, and said lien being had and claimed by virtue of labor performed and materials and parts furnished for the repair of said automobile under a contract with the said owner of date of May, 1950, that the last of said labor was performed and the last of said materials and parts were furnished within a period of 90 days last past.

"That a just and true itemized statement of said labor performed and said materials and parts furnished is attached hereto, marked 'Exhibit A' and made a part hereof."

The "just and true itemized statement" mentioned in the foregoing contained only the following:

"Date 1950 Statement Rendered		Charges	Credit	Balance
February 18	2.13 ft[2]	216.70		216.70*
March 15	38.67	7.04		223.74*
March 24	41.07		19.52	204.22*
April 1	45.42	23.83		228.05*
April 7	46.29	2.72		230.77*
April 15	47.21	3.10		233.87*
April 17	49.96	1.28		235.15*
April 29	42.06	14.19		249.34*
May 3	39.28	12.19		261.53*
May 6	46.76	7.25		268.78*
May 26	57.46	12.44		281.22*
June 2	1.24	12.04		293.26*
June 7	2.49	8.81		302.07*"

after public sale. I don't know if he bought it or had some one to bid it in for him. It came into Armil Taylor's possession after the sale."

[2] It was testified at the trial that the figures after each date refer to the number of the invoice, and the letters "ft" were code letters meaning "invoice"; but it was admitted that no invoices were attached to the statement filed with the Circuit Clerk.

On December 18, 1950, appellees filed this suit against appellant, Houston Taylor, seeking to subject the said International Truck to the appellees' alleged lien claim of $302.07. The Chancery Court awarded appellees a lien for only $33.29, which was the total of the three invoices (May 26, June 2 and June 7) that were the only purchases within 90 days of August 21st—the date of the filing of the lien notice with the Circuit Clerk. Appellant has appealed from so much of the decree as awarded appellees a lien for any amount; and appellees have appealed from so much of the decree as refused them a lien for the full claim of $302.07.

Decisive of the case is the fact, presented by the appellant in the trial court and renewed here, that the appellees did not comply with the essential requirements of § 51-409 Ark. Stats. Among other things, this section requires that the person seeking to enforce the lien shall file with the Clerk of the Circuit Court *"a just and true itemized account."* The account filed by the appellees has been previously copied; and contains only the date, invoice number and amount of each purchase. Since no invoices were attached, the statement was not *itemized.*

In *Brooks* v. *International Shoe Co.,* 132 Ark. 386, 200 S. W. 1027, we held that a statement, which merely listed the date and amount of each invoice, was *not* an itemized statement. We there quoted with approval the California Supreme Court:

"The items must in all cases be set forth with as much particularity as the nature of the case will admit; . . ."

We also quoted to the same effect from Sutherland on Code Pleading:

" 'The items of the account furnished must be set forth with as much particularity as the nature of the case admits of. . . .' "

Webster's New International Dictionary says: "Itemized" is "to state in items, or by particulars; as, to

itemize costs, charges." The same publication says an "item" is "an article; a separate particular in an enumeration, account, or total; a detail; as, the *items* in a bill." In 48 C. J. S. 788, the text says of "Itemize":

"To set down by items; state or describe by particulars, as to demand an itemized bill; to state in items or by particulars."

Tested by our own case of *Brooks* v. *International Shoe Co. (supra)* and the other authorities cited, it is clear that the statement, filed by the appellees with the Circuit Court on August 21, 1950, was not an *itemized* statement. The statute here involved requires that a "just and true itemized statement" be filed in order for the claimant to perfect his lien. Since no such statement was filed, it necessarily follows that the appellees have no lien. In *Umstead Auto Co.* v. *Edwards,* 159 Ark. 327, 251 S. W. 878, we held that the statute, giving an automobile repairman a lien, required strict compliance. In failing to file a "just and true itemized statement," the appellees failed to comply with the statute, so they have no lien.

Appellees cite us to *Standard Lumber Co.* v. *Wilson,* 173 Ark. 1024, 296 S. W. 27, and *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801, as cases holding that an *itemized* statement need not be filed by one seeking to enforce a lien. But these cited cases involved the materialmen's lien statute (§ 51-613 Ark. Stats.) which requires that only a "just and true account" be filed. The said § 51-613 Ark. Stats. does not require that an itemized statement" be filed, so the cases cited by the appellant under the materialmen's lien statute are not applicable to the case at bar.

The decree awarding the appellees a lien is reversed and the cause is remanded, with directions to dismiss the appellees' complaint against appellant and the truck herein.

UNIVERSAL LIFE & ACCIDENT INSURANCE COMPANY *v.* STUART.

4-9658 245 S. W. 2d 219

Opinion delivered January 21, 1952.

Ted Goldman, for appellant.

Louis Josephs and *T. B. Vance,* for appellee.

HOLT, J. Appellee, Flossie Stuart, was the beneficiary in a life insurance policy in the amount of $525, issued to her father, J. C. Johnson, June 27, 1949. Fol-

lowing her father's death on November 23, 1949, she sued appellant (upon its refusal to pay) to recover the amount specified in the policy. There was a jury verdict in her favor, and from the judgment for the full amount, plus penalty, an attorney's fee of $250 and costs, comes this appeal.

Appellant denied all liability and defended below and defends here on two primary grounds: (1) That insured was afflicted with chronic nephritis when he applied for the insurance and falsely represented that he was not so afflicted, and that he knew at the time he was afflicted with nephritis and that nephritis caused his death. (2) That appellee, as beneficiary, had executed and delivered to the company her full release from all liability under the policy.

— (1) —

As to appellant's first contention. The policy contained provisions pertinent here, as follows: "This policy constitutes the entire agreement between the company and the insured or owner thereof. . . . All statements made by the applicant or on his behalf for this policy, in the absence of fraud, will be deemed representations and not warranties. . . . 3. NO OBLIGATION IS ASSUMED BY THE COMPANY PRIOR TO THE DATE HEREOF, nor unless on said date the insured is alive and in sound health. Should the insured not be alive or not be in sound health on the date hereof, any amount paid to the company will be returned."

No medical examination was required of the insured. He made application for the policy on June 14, 1949.

Appellee testified that appellant's agent, Broadus, solicited the insurance on her father while he was "chopping cotton" and that Broadus told her her father seemed to be in pretty good health. She further testified that her father had had no sickness from the date of the policy to his death, that he not only chopped cotton but worked for the Texarkana Iron & Metal Company, that during the week of his death, he picked cotton for J. T. Parks. She saw him practically every day and in so far as she knew

he was never sick. She further testified that Dr. G. U. Jamison told her that her father died from a heart attack and did not mention anything about nephritis, that the only time that the doctor visited him prior to his death was when he received an ankle injury caused by a runaway team of mules.

The insured had been married twice. His former wife and his present wife testified, in effect, that he was in good sound health, doing manual labor practically every day up to the time of his death and that he died suddenly of heart trouble.

Dr. Jamison testified by deposition "that he concluded that the deceased died from nephritis was because heart trouble always accompanies nephritis." There was admitted in evidence the "physician's statement" (death proof) dated November 28, 1949, by Dr. Jamison, and quoting from his statement: "Q. Date of your first visit in last illness? A. No visit, sudden death. Q. Date of your last visit? A. November 10, 1947. . . . Q. Was deceased afflicted with any deformity or chronic disease? A. No." The record reflects that a line was drawn through "1947"at some subsequent date, obviously with newer ink, and there was added in place of "1947," "1949 G. U. J." In a deposition of Dr. Jamison, he was asked: "Q. Were you present at the death of deceased, J. C. Johnson? A. I was not. Q. How did you know that he suffered with heart attacks? A. Well, chronic nephritis always as a rule, involves the heart and blood vessels. Q. How long had he had chronic nephritis? A. That is indefinite, at least more than six months. . . . Q. Your conclusion that the deceased died of heart attack is solely based on your knowledge that heart attacks accompany nephritis? A. Accompanies nephritis that is true and the sudden death as represented to me."

Appellant's agent, Mr. Broadus, testified, in effect, that he talked to the insured and closely observed him for thirty minutes when he took the application; that he recommended him as a good risk and that he then made further investigation of the insured from neighbors and friends.

We have many times announced the rule of law applicable to similar facts and policy provisions, as presented here, to be, that an insurance company is liable unless there were fraudulent representations made by the applicant to the company that induced the issuance of the policy. We said in *Guardian Life Insurance Company* v. *Johnson,* 186 Ark. 1019, 57 S. W. 2d 555: "No fraud was shown on the part of appellee in procuring the policies, so his statement that he was in good health in his applications for the policies was a representation only, and, if made in good faith, will not avoid the policies. (Citing cases.) These policies themselves provide that, in the absence of fraud, all statements of the insured shall be deemed representations and not warranties."

This question was properly submitted to the jury under correct instructions. As indicated, the policy here provided that in the absence of fraud, all statements of the insured should be deemed representations and not warranties, and the jury's verdict is binding on appellant.

The court, on request of appellee, instructed the jury: "If you find from a preponderance of the evidence that the deceased insured was not in sound health at the time he applied for and received the policy of insurance sued on herein, but if you further find that he did not know at the time his health was unsound and did not fraudulently conceal his condition, then you are told in this connection that his representation as to health, if untrue, would not be a valid defense to the plaintiff's action herein. The burden of proof is on the insurance company to show from the testimony that the insured's health was unsound and that he falsely and fraudulently represented the same to be unsound at the time he applied therefor."

But, says appellant, the trial court erred in giving to the jury, the following instruction: "You are instructed that if you find from a preponderance of the evidence that the deceased, J. C. Johnson, was afflicted with *serious* heart or kidney trouble on the date of application for the policy, June 27, 1949, and that he was not then in sound health, *and knew he was not in sound health,* you will find for the defendant."

Appellant specifically objected to the action of the court in including in the instruction the italicized words "serious" and "and knew he was not in sound health." We think in the circumstances that a fair meaning and construction of the word "serious" as used, was to tell the jury that the disease must be more than a mere, temporary, trifling or unimportant affliction, and that no prejudice could have resulted to appellant.

Under the above authorities, the addition of the words "and knew he was not in sound health" was proper. There was sufficient substantial testimony from the lay witnesses alone to take the case to the jury.

In *National Life & Accident Insurance Co.* v. *Davis,* 179 Ark. 621, 17 S. W. 2d 312, this court said: "In the case of *Missouri State Life Insurance Co.* v. *Witt,* 161 Ark. 148, 256 S. W. 46, where the testimony of lay witnesses was in conflict with the opinion of physicians relative to the good health of the insured, this court rules that the evidence presented a conflict in the testimony for determination by the jury," and in *American National Insurance Company* v. *Chavey,* 185 Ark. 865, 50 S. W. 2d 245, we said: "In an action by the beneficiary to recover on a life insurance policy, nonexpert witnesses may state their opinions as to the physical condition of deceased on the day when he took the fraternal insurance certificate and stated that his health was good."

— (2) —

As to the release. It appears that appellant's agent, Broadus, after securing an alleged release from appellee (who had paid all premiums for her father) delivered to her a check for $16.50 (total amount of premiums paid) which appellant claimed was in full settlement of the policy. On this issue, Flossie (a Negro girl) testified, in effect, that when, following her father's death, Broadus came to see her about the policy, the first thing he told her was "our company pays off" and led her to believe that she was going to receive full payment on the policy after she signed a release or receipt tendered by Broadus. She further testified that she did not see the check or discover its amount until she had signed the release, that

she never accepted it in settlement, and when she discovered what it contained she took it to her attorney the following morning and directed suit be filed. She further testified, in effect, that when she signed the papers she thought she was getting the face of the policy, that Broadus did not explain to her the contents of the alleged waiver and release.

We hold that the above testimony and policy provisions were sufficient to take the case to the jury. On this issue the court, among other proper instructions, told the jury at appellant's request: "You are instructed that if you find from a preponderance of the evidence that the plaintiff, Flossie Johnson Stuart, accepted the check issued to her by the defendant insurance company in settlement of her claim under the policy, then you will find for the defendant.

"As to the assertion of the plaintiff that she signed the release as a result of the fraud or misrepresentation practiced on her by defendant's agent, E. W. Broadus, you are instructed that the burden is on the plaintiff to prove by a preponderance of the evidence that the said agent misrepresented to plaintiff present or past facts which he knew at the time to be untrue, and that the plaintiff acted upon said untruthful representations to her own detriment, and you are further instructed in that regard that the law imposed upon the plaintiff the duty to make a reasonable investigation of the truth or falsity of any representations made to her by the said agent."

The effect of the jury's verdict for appellee was a finding that the release in question had been induced and procured through misrepresentation or fraud. We said in *Union Life Insurance Company* v. *Johnson,* 199 Ark. 241, 133 S. W. 2d 841: "The effect of the release would, ordinarily, be to bar the prosecution of this suit, as it was executed for a valuable consideration, and, upon its face, appears to be a settlement of a pending controversy as to the insurer's liability; but it was alleged, and the jury has found, under testimony supporting that allegation, that its execution was procured by fraud and duress."

Other alleged errors in admitting certain evidence and exhibits have been considered and found untenable. Appellant's contention that the attorney's fee was excessive is also without merit. Section 66-514, Ark Stats., 1947, provides for reasonable attorney's fee to be taxed by the court as part of the costs. We cannot say that the fee allowed was excessive or that the court abused its discretion in allowing it. *Commercial Casualty Insurance Company* v. *McCulley,* 185 Ark. 468, 48 S. W. 2d 225.

Affirmed.

ELLIS *v.* HALL, SECRETARY OF STATE.

4-9747 245 S. W. 2d 223

Per Curiam Interim Opinion delivered January 21, 1952.

Edgar E. Bethell and *Fred M. Pickins,* for petitioner.

Ike Murry, Attorney General, and *Cleveland Holland* and *W. R. Thrasher,* Assistant Attorneys General, for respondent.

PER CURIAM. The petitioners, as citizens and taxpayers, brought this original action questioning the valid-

ity of a referendum petition filed after the passage of Act 242 of 1951. The complaint in this court specifies various irregularities and frauds that are said to have occurred in connection with the signatures appearing upon the referendum petition. At a pre-trial conference held on January 4 certain issues that had been raised were withdrawn, and the attorneys were requested to file briefs upon three questions that should be decided before the taking of proof begins. This interim opinion sets forth the court's view upon these three issues.

First: Was the respondent, as Secretary of State, authorized to grant the sponsors of the petition a 30-day extension of time in which to obtain and file additional signatures? When the petition was originally filed on June 6, 1951, it was found by the Secretary of State to contain 19,269 signatures, which was more than the required 19,025. On June 7 the Secretary of State declared the petition sufficient, but on June 19 he notified the sponsors that 268 signatures had been found to be disqualified and that a 30-day period would be allowed for the filing of additional counterparts. Within this period the sponsors filed petitions bearing enough names to make the total again *prima facie* in excess of the required number of signatures.

We find the extension of time to have been authorized. When the original counterpart petitions were filed they apparently contained a sufficient number of signers. The petition was therefore *prima facie* sufficient, which distinguishes this case from *Dixon* v. *Hall,* 210 Ark. 891, 198 S. W. 2d 1002, relied on by the present contestants. Amendment 7 to the constitution provides: "If the Secretary of State . . . shall decide any petition to be insufficient, he shall without delay notify the sponsors of such petition, and permit at least thirty days from the date of such notification . . . for correction or amendment." An enabling act provides that after the notice of insufficiency the sponsors shall have thirty days in which "to solicit and obtain additional signatures." Ark. Stats. 1947, § 2-210.

These contestants argue that the thirty days of grace are intended only for the correction of typographical errors and other matters within the control of the sponsors and that the enabling act is invalid in attempting to permit amendments involving the filing of new signatures. This interpretation requires an unduly narrow view of the language of Amendment 7. The Amendment does not say that time shall be allowed for correction only, nor does it condition the granting of an extension upon a finding that the petition is insufficient as to form alone. Instead, the Amendment states that if the petition is found to be insufficient, time must be allowed for correction *or* amendment. An amendment is more than a mere correction and often adds something to the document amended, just as Amendment 7 itself added something to the constitution. Here the respondent found a *prima facie* valid petition to be insufficient for want of qualified signers and allowed further time for amendment. This procedure is well within the intention of the constitution.

Second: Must the referendum petitions be rejected because the sponsors failed to file a certified list of poll tax payers for each county in which a petition was circulated? Amendment 7 does not mention these lists, but the requirement is contained in an Enabling Act. Ark. Stats., § 2-206. In *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72, we upheld the statute, but did not decide whether failure to file the lists is fatal to the attempted referendum when the petitions are challenged for want of enough qualified signers.

The Secretary of State, in passing upon the sufficiency of initiative and referendum petitions, acts in a manner somewhat analogous to the conduct of election officials in tabulating the ballots. It is a familiar rule of law that a provision of the election laws may be mandatory if enforcement is sought before the election in a proceeding brought for that purpose, but after the election the provision may be regarded as directory. *Whitaker* v. *Mitchell,* 179 Ark. 993, 18 S. W. 2d 1026. Had the Secretary of State demanded the lists as a condition to

passing upon the sufficiency of the petition, or had opponents of the referendum brought an action to compel the production of the lists, then the statute would have been mandatory. But no one made a timely objection to the sponsors' failure to file the poll books. The Secretary of State, without the aid of these lists, considered himself able to pass upon the sufficiency of the petitions. It is now too late for these contestants, having speculated upon the possibility that without the lists the petitions would be declared insufficient, to say that the result might have been different had the Secretary of State insisted that the lists be produced.

Third: What is the effect of actual fraud on the part of a canvasser who circulates part of a referendum petition? The contestants insist that proof of such fraud vitiates that part of the petition, so that not even the signatures of those who signed that particular sheet in good faith can be counted in determining the sufficiency of the petition as a whole. For the respondent it is contended that proof of such fraud destroys the *prima facie* verity of the sheet in question and shifts to the proponent the burden of proving the validity of each signature.

We have not passed upon this exact question. In *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547, we held that where the canvasser knowingly executes a false affidavit the names upon that part of the petition must be rejected, but the opinion points out that the proponents offered no rebutting proof: "No attempt was made to show nor was time asked in which to show that there were valid signatures on the petitions to which the false affidavits were attached." In the next case, *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884, it was held that where there was no willful violation of law that the entire sheet should not be rejected. This case was followed in the *Pafford* case, *supra,* but again the proponents did not go forward with the evidence in the rare instances in which willful misconduct had occurred.

In the first *Sturdy* case we cited with approval a case from Oregon, *State ex rel. McNary* v. *Olcott,* 62 Ore.

277, 125 P. 303. There the court passed directly upon the question now at issue and said that where fraud on the canvassers' part is shown "the *prima facie* case made by the affidavit of these circulators in favor of the genuineness of these petitions is overcome, putting the burden of proof upon the defendant to establish the genuineness of each signature." We think this to be the better rule. The first forty names on a sheet of fifty may have been signed in good faith by qualified electors, and the canvasser may have forged the last ten names to complete the sheet. In this situation the forty honest voters ought not to be disfranchised by conduct of which they were ignorant and in which they did not participate. The ten spurious names must be rejected and the willfully false affidavit gives no *prima facie* verity to the rest of the petition, but the proponents should be permitted to assume the burden of proving the validity of genuine signatures.

WARD, J., dissenting. In *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547 the court discussed at length the far-reaching implications of the power conferred by Initiative and Referendum Amendment No. 7 and seemingly indicated that we should be cautious about reading more into the enactment than clearly appears therein to give it effect. The concluding thought is expressed in these words:

"It appears, therefore, that a very small per cent. of our population may, at each general election, assemble the electorate into both a general assembly, and a constitutional convention. The law must, therefore, be, and is, that if a power so great may be exercised by a number so small, a substantial compliance with the provisions of the Constitution conferring these powers should be required."

In my opinion the above pronouncement portrays sound and practical reasoning, and it should not be ignored when considering the three issues decided by the majority. I am unable to bring myself in accord with either of the three conclusions, as indicated below.

1. The words "for correction and amendment" should not be interpreted to confer the right to add additional names to referendum petitions after they have been declared "insufficient" [for the lack of sufficient names]. (a) If the authors of Amendment No. 7, being zealous as they manifestly were to extend and protect these rights to the people, had intended to give the sponsors a second chance to secure needed signatures they would have made that intention known in no uncertain language. Since the language does leave a serious doubt as to the extent of its meaning it should, it seems to me, be resolved against the respondents in this case. (b) Our own court has already placed its interpretation on the language here under consideration in the case of *Dixon* v. *Hall,* 210 Ark. 891, 198 S. W. 2d 1002. There the same amendment was involved and the court, in refusing to allow additional names to be added, used this language: "*Correction* and *amendment* go to *form* and *error.*" I can not conceive how it can be logically insisted that the addition of new names to a petition would come under either *form* or *error.* In the absence of any good reason to the contrary suggested or occurring to me I prefer to follow the path so clearly indicated by our own former decision.

2. With the majority holding that a failure to file certified poll lists with the petitions is not fatal, I also do not agree. It may be conceded that such a defect could be remedied under *form* or *error* on the first filing, but where no additional time can be extended, as in this case, a very different situation presents itself. Act 195 of 1943, § 3, provides: ". . . when a part is delivered to the Secretary of State, the sponsors shall also deliver a duly certified list of poll tax-payers of the county in which the particular part [petition] was circulated." We said in *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72, this act was constitutional and valid, and in the *Sturdy* case, *supra,* we said there must be a *substantial* compliance. Here there was absolutely no compliance.

3. Likewise I cannot agree with the majority holding that a fraudulent affidavit [regardless of how cor-

rupt or to what extent it reaches] merely shifts the burden to the respondents to establish valid signatures. Such an affidavit invalidates the entire petition and leaves no remedy to the respondents, as, in my judgment, this court has already indicated in three separate cases, viz: *Sturdy* v. *Hall, supra; Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884; and *Pafford* v. *Hall, supra.* The second *Sturdy* case in no way relaxed the rule announced in the first one, but clearly distinguished it on the facts. The rule followed by the majority here may be referred to as the "Oregon Rule." In this the majority may be sustained by plausible reasoning, but the fact is that this very rule was considered and rejected in both the *Sturdy* cases. About this there can be little doubt because, in the first the court, after carefully considering and posing the question, it has said:

"The cases which have considered the question, as will presently appear, are to the effect that petitions verified by an affidavit shown to be false are treated as petitions having no affidavit. In other words, the false affidavit is no affidavit."

Then the opinion leaves no doubt about the fate of a petition with no affidavit for it further states: "No one would contend that names should be counted which appear upon petitions containing no verifying affidavit."

Thus, it seems to me, the court has clearly indicated what our decision should be on this issue. No peculiar facts or circumstances have been suggested in this case to warrant a departure from a course so clearly defined, and it would appear to me to be a strained conclusion that disregards the clear pronouncements of our own court to follow a foreign rule which we have heretobefore refused to accept.

4-9660 245 S. W. 2d 207

Opinion delivered January 21, 1952.

[redacted]

H. A. Tucker and *Roy S. Dunn,* for appellant.

Jeptha A. Evans, for appellee.

MINOR W. MILLWEE, Justice. The chancellor found that appellee was a resident of the Southern District of Logan County, Arkansas, within the meaning of Ark. Stats., § 34-1204 at the time she instituted the instant suit for divorce against appellant. The sole question presented is whether such finding is against the preponderance of the evidence.

The parties were married at Hot Springs, Garland County, Arkansas, in 1928. They were living in Saline County in 1940 when appellee contracted pulmonary tuberculosis and entered the State Sanatorium at Booneville in the Southern District of Logan County. After remaining in the sanatorium for two years, appellee returned home for four and one-half years. The parties were living at Hot Springs in 1947 when appellee returned to the sanatorium where she has since been a patient. Appellee has been permitted to return to Hot Springs for short visits. On such occasions appellant would drive to Booneville and return appellee to Hot Springs where she would remain until the expiration of her leave of absence at which time appellant would take her back to the sanatorium.

Appellee obtained a ninety-day leave of absence and returned to Hot Springs with appellant on April 7, 1951, where she remained until May 8, 1951, when appellant brought her back to the sanatorium. The next day appellee moved to a hotel in Booneville and filed the instant divorce suit.

The evidence is in sharp dispute as to the facts and circumstances surrounding the last visit to Hot Springs and appellee's purpose in making the trip. The effect of her testimony is that she was then afflicted with tuberculosis of the bone and had been advised by her doctor to stay near the sanatorium. She so informed appellant and made the last trip in an effort to persuade him to buy a place near Booneville. They looked at some places near Booneville and appellant said he would return to Booneville later and try to find a suitable place. Instead, appellant insisted on buying a farm fifteen miles from Hot Springs which was without gas or water. On account of the condition of her health, appellee felt that she could not move to the Garland County farm. A quarrel resulted when she refused to join in a mortgage on two dwellings in Hot Springs which they owned jointly in order to finance the purchase of the Garland County farm. They also quarreled over rentals received from their Hot Springs property on the last visit.

Appellee also testified to previous trouble growing out of appellant's alleged attentions to other women over a period of years and stated that the question of divorce had been discussed for more than a year. She also testified that she intended to remain in Logan County permanently so that she could be near the sanatorium, but she could not say definitely whether she would remain at the hotel, or just where she would stay, until some provision was made for her maintenance. The State paid her expenses while she was in the sanatorium.

Appellant denied any knowledge of appellee's desire or intent to remain near the sanatorium. He admitted that they looked at places around Booneville and stated that appellee wanted to buy a farm, but did not specify any certain location. He also denied there had been any

discussion about a divorce and stated that the service of the summons in this suit was his first notice of appellee's intentions. On the last return trip to Booneville appellee took only such personal effects as she usually carried on such trips. She denied telling appellant that she would probably call him to bring her back to Hot Springs on the following Sunday.

The statute (§ 34-1204, *supra*) fixes the venue of an action for divorce "in the county where the complainant resides." We have uniformly construed the residence requirements of the statute to mean domicile. *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *McLaughlin* v. *McLaughlin,* 193 Ark. 207, 99 S. W. 2d 571; *Hillman* v. *Hillman,* 200 Ark. 340, 138 S. W. 2d 1051; *Feldman* v. *Feldman,* 205 Ark. 544, 169 S. W. 2d 866. In the McLaughlin case we said: "No certain length of time is necessary to fix the residence contemplated by the statute, but that residence must be such with the attendant circumstances surrounding its acquirement as to manifest a *bona fide* intention of making it a fixed and permanent place of abode."

In the Feldman case we held residence to be a question of intention and fact. There the parties married in Pulaski County where plaintiff then lived. They had lived together in Phillips County for six years when plaintiff returned to Pulaski County and, on the next day, filed suit for divorce in the Pulaski Chancery Court. We upheld the chancellor's finding that plaintiff was a resident of Pulaski County within the meaning of the statute. A different result was reached in the McLaughlin and Hillman cases where the evidence was held insufficient to show an intention on the part of the plaintiff to remain permanently in the county chosen as a forum.

A close question is presented as to whether appellee in good faith intended to abandon Hot Springs as her place of abode and make the Southern District of Logan County her permanent home. In cases where the testimony is conflicting and evenly balanced, and the chancellor hears and observes the witnesses, we treat his findings on questions of fact as persuasive. Tested by this

rule, we cannot say that the chancellor's finding is against the greater weight of the evidence.

Affirmed.

PIGG *v.* STATE.

4676 245 S. W. 2d 209

Opinion delivered January 21, 1952.

John W. Wright, for appellant.

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

ROBINSON, J. The appellant, Clarence Pigg, was convicted in the Clark Circuit Court on a charge of grand larceny, it being alleged that Pigg stole eight head of cattle, the property of Richard Gaston, on the 21st day of November, 1950. On appeal, appellant says that, exclusive of an extrajudicial confession, there is no evidence to establish the *corpus delicti.* Also urged as error is the refusal of the trial court to give one of appellant's requested instructions.

As to the evidence, it was shown that eight of Gaston's cattle disappeared shortly before Thanksgiving Day, 1950; that Pigg formerly worked for Gaston; that

Johnnie Walters lived in the vicinity where the cattle usually ranged; that on the 22nd day of November, 1950, a man, who gave his name as Ray Smith, sold at the South Memphis stockyards, Memphis, Tennessee, eight head of cattle; that the person who sold these cattle was driving a truck with Arkansas license No. B-7384; that late in the day on November 22nd Johnnie Walters was arrested near Brinkley for driving while drunk; that he was in a truck with Arkansas license No. B-7384. Appellant Pigg was in the truck with Walters; however, Pigg was not drunk and was not arrested.

It was further shown that the license on the truck was issued to John L. Walters, who gave his address as Arkadelphia, Clark County. When Walters was arrested he had between $1,000 and $1,100 in his pocket and a sales slip from the Memphis stockyard. Appellant waited at the jail until Walters was released by putting up a bond of $116 which he forfeited.

Appellant testified in his own behalf and stated that he and Walters had been to eastern Arkansas together with reference to seeing about some land to work, and denied that they had been to Memphis. On cross-examination his testimony was such that a jury would be justified in not believing what he had to say in that respect on direct examination. In addition there was introduced in evidence appellant's confession made to the Sheriff of Clark County, in which he confessed to helping Walters load the cattle, knowing that the cattle belonged to Mr. Gaston, and helped in the transportation of the cattle to the stockyard at Memphis, and that he received $50 from Walters for his services in that connection.

The defendant repudiated the confession, but it does not appear that any third degree methods were used in obtaining the confession. A conviction cannot be based on an extrajudicial confession standing alone. There must be other evidence going to establish the *corpus delicti,* but when such evidence does exist and is introduced at the trial, the confession can then be used for

the purpose of being coupled with other evidence in establishing the *corpus delicti.*

In the case of *Harshaw* v. *State,* 94 Ark. 343, 127 S. W. 745, this court said: "It is not essential that the *corpus delicti* be established by evidence entirely independent of the confession, before the confession can be admitted and given probative force. The confession may be considered in connection with other evidence tending to establish the guilt of the defendant. But, if there is no other evidence of the *corpus delicti* than the confession of the accused, then he shall not be convicted alone upon his confession." This principle of law is cited with approval in *Mouser* v. *State,* 215 Ark. 131, 219 S. W. 2d 611, and in *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32. The evidence in this case along with the confession is sufficient to sustain the conviction.

The court refused to give appellant's requested instruction No. 5, which is as fallows: "Gentlemen of the jury, you are instructed that if the State has failed to prove beyond a reasonable doubt that the cattle defendant is alleged to have stolen is the property of Richard Gaston, as alleged in the indictment, it is your duty to acquit the defendant."

Appellant's instruction No. 2 which was given by the court is as follows: "You are instructed, gentlemen of the jury, that ownership of the property is a necessary allegation in the indictment and must be proved as alleged. The burden of proof of ownership is on the State and in this case you are instructed that unless you find that the State has proven beyond a reasonable doubt that the defendant stole the cattle as alleged in the information and that the cattle were owned by J. R. Gaston, then it is your duty to acquit the defendant."

Thus, the principle of law covered by appellant's requested instruction No. 5, and refused by the court, was fully covered in appellant's requested instruction No. 2 given by the court.

The judgment is affirmed.

WORTHEN BANK & TRUST COMPANY *v.* KELLEY-NELSON CONSTRUCTION COMPANY.

4-9615 245 S. W. 2d 405

Opinion delivered January 28, 1952.

Wright, Harrison, Lindsey & Upton, for appellant.

Pat Mehaffy and *John F. Park,* for appellee.

SHIELDS M. GOODWIN, Special Justice. On April 1, 1948, G. Larry Kelley and Louis C. Nelson became partners in the construction business in Little Rock under the firm name of Kelley-Nelson Construction Company (hereinafter called the company), plaintiff in the court below and appellee here. The company engages in the construction of commercial buildings in the $25,000.00-$75,000.00 price range. During the year ending April 1, 1950, it did approximately 30 jobs, and, at the time of the trial, had six buildings under construction.

Throughout the relevant period, (the eleven-month period beginning May 12, 1949), the company maintained an account in the Worthen Bank & Trust Company, of Little Rock (hereinafter referred to as the bank), defendant in the court below and appellant here. The partners were the only persons authorized to sign checks against this account. Over the period in question, Mrs. Katheryn Eldridge, who was employed by the company as a part-time bookkeeper, forged Nelson's name to 24 checks in the amount of $400.00 each and to one check for $200.00 against the company's account. She had no confederates, either in the bank or in the company, who assisted her in perpetrating the fraud. The bank, after applying the usual protective measures, paid the checks and charged them to the company's account, believing them to be genuine.

In accordance with its custom with all its depositors, the bank mailed the company on or about the last day of every month all cancelled checks against the company's account which had been paid during that month and a statement which showed the company's balance at the beginning of the month, all debits against, and credits to, the account during the month, and the company's balance at the end of every day during the month on which there was a debit or credit. The partners examined the cancelled checks and statements in a manner that will be more fully described later, but did not find the 25 unauthorized charges (about two each month) which the bank made to the company's account (As will be seen later, the original forged checks had been removed by Mrs. Eldridge). The forgeries were discovered for the first time by a firm of certified public accountants which, in April, 1950, in due course, audited the company's books for its fiscal year, which ended March 31 of that year.

Promptly after the accountants reported the forgeries to the company, it made demand upon the bank for repayment to it of the total amount of the forged checks. The bank declined to make restitution, taking the position that the loss must fall upon the company

by reason of its failure for eleven months to examine the cancelled checks and bank statements with sufficient particularity to discover the fraud; whereupon the company sued the bank for $9,800.

The trial court overruled the bank's motion for a directed verdict in its favor. At the close of the trial, the court instructed the jury upon the law of the case. By a nine to three verdict, the jury found for the company. While the bank objected to the court's rulings on several of the instructions offered by each party, it does not seriously contend, and, in its belief, does not even argue, that the court's rulings on any of the instructions given or refused were erroneous, except, of course, that it does strenuously maintain that there was not sufficient testimony to take the case to the jury and that the court below erred in not giving the peremptory instruction in favor of the bank.

The sole question on this appeal, therefore, is whether the court erred in refusing to grant the bank's motion for a directed verdict.

At this point, reference is made to the audit and to the manner in which the forgeries were discovered. It was not until the third day that the accountants suspected that anything was wrong with the company's books. At that time, they found the record of a payroll check for $22.15 which was still outstanding, although it had been drawn several months before. They then checked the bank statement for the month in which the charge appeared and found that a check for *$122.15* against the account had been paid in that month. Through the courtesy of the bank, the accountants and Kelley then looked at the picture machine in the bank and saw the check for $122.15, payable to the order of Katheryn Eldridge. Kelley thereupon advised the accountants that the company had never paid her that much on any payroll check. This led to a sweeping and searching investigation of all of the company's checks that had been paid since March 31, 1949, and a comparison of these checks against the monthly bank statements as

well as against the company's books. The result was the discovery that she had forged the 25 checks sued on.

The forgeries were very skillfully accomplished. In fact, the bank first denied that the checks had been forged. One of its tellers testified that it is possible that they were traced, adding that he conscientiously believed at the time he passed them that they were Nelson's signatures; and the bank's vice-president and cashier said that he would have passed them as genuine (As is pointed out later, the good faith of the bank in paying the checks is not, under the circumstances of this case, material). The bank later conceded that the checks sued on were forgeries.

The accountants also discovered four additional checks (including the one for $122.15 described above), each of which was in the amount of approximately $122.15 and had been raised by $100. Mrs. Eldridge was the payee and endorser on these as well as on the checks upon which this suit was brought. The company did not sue on the checks which Mrs. Eldridge had raised for the reason that one of the partners signed at least one of them before the words containing the amount had been written in, thereby making it possible for her to raise it.

Mrs. Eldridge, of course, made no entries on the journal or on the check stubs reflecting any of the checks which she had forged. Moreover, when the audit was made in April, 1950, the 29 original cancelled checks which had been forged or raised were not found among the checks which the bank had returned to the company, Mrs. Eldridge evidently having destroyed them as soon as she was able to abstract them from the monthly statements in which they were enclosed. The record, however, contains photostatic copies of these checks which were made from the bank's records.

The record also contains eight original cancelled checks, *which were apparently but not actually genuine.* All of them were drawn on the appellant bank. They ranged in amounts from $234.65 to $1,044.30, and totaled

$5,609. The payees were concerns with which the company did business. The checks bore the forged signature (as maker) of Nelson; and the endorsements of the payees were likewise not genuine. The checks were never delivered to the payees and, according to the undisputed testimony of a vice-president of the Union National Bank of Little Rock, whose endorsement appears on their reverse side, the stamped endorsement of that bank on the checks was not genuine. Moreover, according to the uncontradicted testimony of the vice-president and cashier of the appellant bank, the "paid" perforation cancellation of these eight checks was likewise not genuine. In other words, they were entirely fabricated by Mrs. Eldridge, and are described in the record as "fictitious facsimiles." Her evident purpose in "getting up" these checks was not only to "throw off" the accountants as well as the company but also to make it appear to Kelley and Nelson that the company had, in the regular course of business, paid out these substantial amounts, thus depleting the company's balance in the bank and correspondingly reducing the amount of the shortage occasioned by her fraud. While these checks have no direct bearing on the issues, we mention them to show how "clever" Mrs. Eldridge was and the lengths to which she went in accomplishing her oblique and nefarious purpose and in concealing her fraud.

We come now to a consideration of the law of the case. Notice should first be taken of certain evidence offered by the bank. Three of its officers and employees explained in great detail how meticulously the bank was in sight-posting and machine-posting these checks, always with the signatures of Kelley and Nelson before them. This evidence establishes beyond any question that the bank exercised a high degree of care in examining Nelson's signature to the checks before it cashed them and charged them to the company's account. And yet we are met by the stubborn fact that, entirely apart from the bank's good faith in the premises, it honored the forged checks sued on. For these errors on its part, *the bank is liable unless,* as was said by this court in *Bank of Black Rock* v. *B. Johnson and Son Tie Company,* 148 Ark.

11, 14, 229 S. W. 1, *the depositor "is precluded from setting up the forgery or want of authority."* There, the court set out § 23 of the Negotiable Instruments Law (then § 7789, Crawford & Moses' Digest, now § 68-123, Ark. Stats. 1947), as follows:

"When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such a right, is precluded from setting up the forgery or want of authority." Construing this statute, the court said (148 Ark. 14):

"Under this section payment upon a forged check by a bank upon whom it is drawn is made at the bank's peril, and it is not justified in charging it against the depositor's account unless the latter is precluded from setting up the forgery or want of authority."

In *Union Tool Co.* v. *Farmers and Merchants' National Bank,* 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417, 1421, the Supreme Court of California stated the rule as follows:

"It is a well-settled general rule that as between a bank and its depositor the bank is only warranted in paying out money of the depositor on his genuine order and in accordance therewith. If payments be made on a forged check, with no attendant circumstances sufficient to create an equitable estoppel as against the depositor, or there has been no prior negligence by the depositor contributory to the payment of the check, no degree of care on the part of the bank will excuse it from liability" (citing cases).

And, in *Critten* v. *Chemical National Bank,* 171 N. Y. 219, 63 N. E. 969, 970, the Court of Appeals of New York said:

"Therefore, when the fraudulent alteration of the checks was proved, the liability of the bank for their amount was made out, and it was incumbent upon the defendant to establish affirmatively negligence on the

plaintiffs' part to relieve it from the consequences of its fault or misfortune in paying forged orders."

It follows, therefore, that, even if a bank has employed every known means, device and test in an effort to avoid the payment of a forged check and has thereby exercised the highest degree of care in protecting its depositor, it will, if the check is forged, be liable to him unless the depositor "is precluded from setting up the forgery or want of authority"; and "no degree of care on the part of the bank will excuse it from liability." In other words, although the forgery is a "perfect" one, the bank is liable unless the depositor is precluded.

We have not outlined the large amount of evidence which the bank offered on the question of the care which it exercised, this for the reason that this testimony relates to the *bank's negligence,* or rather freedom from negligence, which matter is not a proper subject of inquiry. The one material issue in this case is: Was it proper for the trial court to submit to the jury the question whether the *depositor* (the company) exercised ordinary care in its monthly examination of the cancelled checks and bank statements which the bank mailed to it? *

In cases involving facts similar to those in the case at bar on the question whether a depositor has exercised the degree of care which the law imposes on him in detecting a forgery, there are three lines of authorities: (1) Those courts which hold the bank liable for forgery, even though the depositor never examined the monthly bank statements or his cancelled checks; (2) those courts which hold that the depositor is liable as a matter of law for failure to examine the monthly bank statement and cancelled checks with sufficient particularity to discover the forgery; and (3) those courts which hold that it is a question for the jury to determine whether the depositor exercised ordinary care in examining the monthly bank statement and cancelled checks, even though the examination was not made with sufficient particularity to discover the forgery.

It would unduly lengthen this opinion to analyze or even to refer briefly to all the authorities, which are nu-

merous. We have examined all the authorities referred to in the briefs and have also made an independent investigation. In the discussion that follows, we refer only to selected cases which are typical of the three views.

The early (1854) case of *Weisser's Adm'rs* v. *Denison,* 10 N. Y. 68, 61 Am. Dec. 731, goes all the way in absolving a depositor of the charge of negligence in not discovering that a bank has charged forged checks to his account, holding that a depositor is under no duty to examine his cancelled checks or the bank book. There, the Court of Appeals of New York said (61 Am. Dec. 738):

"Whatever loss the bank sustained, it has suffered from its own negligence or want of skill in a manner as to which, in the first instance, it and it only was bound to exercise skill and diligence. To this loss no act of Weisser (the depositor) has contributed. He was guilty of no bad faith. He has violated no duty which he owed to the bank, and is in no way responsible (citing cases). * * * He was under no contract with the bank to examine with diligence his returned checks and bankbook. In contemplation of law, the book was balanced and the checks returned for his protection, not for theirs; and, when he failed to examine it, the whole consequence was that the burden of proof was shifted. He became bound to show that the account was wrongfully stated. This right was preserved so long as his claim was not barred by the statute of limitations."

We reject this view, since we are of the opinion that the depositor does owe a duty to the bank where, as there and here, the bank returns to him monthly his cancelled checks and a statement of his account. The extent of that duty will be considered later in this opinion.

A typical case under the second line of authorities above referred to is *Critten, et al.* v. *Chemical National Bank* (1902), *supra.* There, the depositors had in their employ a faithless clerk named Davis, who over a 25-month period, raised 24 of his employers' checks, most

of them by $100. They customarily entrusted to him the verification of their bank balance, and he, of course, withheld from them knowledge of his fraud. The forgeries were discovered by one to whom, in Davis' absence, the verification of the bank balance was committed.

The referee found for the depositors; but, on appeal, that judgment was reversed, the court holding substantially that the depositors were negligent as a matter of law in the examination of their pass book and cancelled vouchers, by reason of which negligence they were precluded from recovery. The court said (63 N. E. 973):

"In the present case Davis falsified the additions or totals at the foot of the pages in the check book. But with a few exceptions he did not alter the amounts expressed in the stubs. In no case did he change in the stubs the name of the payee of the check. It is clear, therefore, that at all times a comparison of the returned checks with the stubs in the check book would have exposed the alterations made in the checks."

It would not have been so easy to detect Mrs. Eldridge's forgeries for the reason that she did *not* fill in the stubs of the checks.

Thus it will be observed that the New York court in this case repudiated the doctrine of the *Weisser's Adm'rs* case, as reflected by the above quotation from the opinion in that case. As stated above, we reject the extreme view of that case; but we are also of the opinion that, in the *Critten* case, the court went too far in the other direction in holding, as a matter of law, that the depositor did not exercise ordinary care.

Frank v. *Chemical National Bank,* 84 N. Y. 200, 38 Am. Rep. 501, was decided in 1881, after the *Weisser's Adm'rs* case and before the *Critten* case. There, as will be seen under our discussion of the third line of authorities, the New York court, in affirming a judgment for the depositor, adopted what we hold to be the correct view when, after saying that it is proper "to exact from

the latter (the depositor) some attention to the account when it is made up," hastened to add (38 Am. Rep. 503):

"But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that will necessarily lead to the discovery of the fraud."

The third line of authorities adheres to the rule which we have adopted in the *Bank of Black Rock* case, *supra*. There, the depositor kept a forged check seven days without complaining that it had been forged, and permitted the bank to charge the check to its account. The question was whether the depositor was "precluded from setting up the forgery." The trial court directed a verdict in favor of the depositor. This court reversed that judgment, holding that "it became its (the depositor's) duty to examine the checks which were returned to it and exercise reasonable care to see whether any of them had been forged and, if so, to notify the bank of that fact," adding (148 Ark. 17):

"Under the circumstances, we think the court erred in directing a verdict for appellee, and that it should have submitted to the jury the question of whether or not appellee had exercised ordinary care in examining the checks and discovering the forgery and reporting it to the bank."

The bank urges us to reverse this judgment on the authority of *Bank of Hatfield* v. *Clayton,* 158 Ark. 119, 250 S. W. 347. But the facts there are clearly distinguishable from those in the case at bar. There, the appellee, a depositor in appellant bank, was advised by the bank's vice-president, by letter dated June 11, 1921, that he had loaned $1,000 of her money on deposit in the bank at 10%. Although it was not known by the depositor at that time, it later developed that the vice-president had loaned the money to himself. It was not until October 1, 1921, that the depositor requested that the $1,000 be placed back to her credit. In her suit against the bank, this court denied recovery because she waited more than

three months after she was formally advised that her money had been withdrawn. Here, the bank concedes that the company notified it of Mrs. Eldridge's defalcations as soon as it learned of them; and we hold that it was for the jury to determine whether the company exercised ordinary care in not discovering the forgeries more promptly.

Farmers' Bank & Trust Company v. *Boshears,* 148 Ark. 589, 231 S. W. 10, 15 A. L. R. 426, *Bank of Hatfield* v. *Chatham,* 160 Ark. 530, 255 S. W. 31, and other Arkansas cases are relied upon by the company. While the facts in these cases are not entirely analogous to those in the case now before the court, they tend to support the rule for which the company contends. None of them, at least, is at variance with that rule. The doctrine of the *Bank of Black Rock* case has never been overruled or modified by this court, and we now re-affirm it.

We consider now three cases from other jurisdictions which have also adopted this view. The first of these is *First National Bank of Richmond* v. *Richmond Electric Company,* 106 Va. 347, 56 S. E. 152, 7 L. R. A. N. S. 744. There, one Woodall, a clerk of the depositor (the electric company), over a period of 18 months raised 26 of its payroll checks by the sum of $100 each. The bank contended that the depositor should not be permitted to recover for the reason that it had not exercised the degree of care which the law cast upon it in the matter of the examination of its pass book and vouchers. In the lower court, the depositor recovered. That judgment was reversed on account of the error in a certain instruction.

On appeal, the court, after conceding "that the fraud could have been instantly discovered by verifying the additions made by Woodall on the stubs of the check book, or by the president looking at both the pass book and the check book on any one of the occasions when the examination was made by Woodall and himself together" (56 S. E. 152), held firmly that the question whether the depositor exercised reasonable care and diligence in the premises was for the jury. It said (56 S. E. 153) (italics supplied):

"In the case at bar there was evidence tending to show that the plaintiff did not examine its pass book and the vouchers returned therewith with reasonable care and diligence, and did not exercise reasonable care and diligence in supervising the conduct of its agent while the latter was examining such pass book and vouchers. *Whether he did so exercise reasonable care and diligence was, under proper instructions, a question to be determined by the jury.*"

In *Brown* v. *Lynchburg National Bank,* 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119, the employees of the appellee bank embezzled its funds, fraudulently making numerous unauthorized debits against appellant depositor's (Brown's) account. Brown did not keep a pass book, but relied solely upon monthly statements which the bank rendered to him when it returned to him his cancelled checks. Included with the statements and cancelled checks was a machine-made slip which purported to, but did not, contain a complete list of all debits. Assuming that the list corresponded with his cancelled checks, Brown did not compare the checks against the list, with the result that the bank's employees falsely charged his account with a total of $3,066.20 not represented by Brown's cancelled checks. He did not make a "critical examination" until the deceitful practice had systematically been continued for a period of 40 months.

On these facts, the trial court sustained the bank's demurrer to the evidence, evidently taking the view that the depositor's examination of his account was perfunctory only, that he had not taken the precaution which a person of ordinary prudence should have taken and that, if he had done so, the fraud would have been discovered promptly. On appeal, the Virginia court pointed out "that the fraud was perpetrated in this case in a very crude and simple manner" and that it was discovered as soon as the depositor made a thorough examination; but it reversed the judgment of the trial court, *holding that the sufficiency of the depositor's examination was a question for the jury to determine under proper instruc-*

tions, not a question for the court. The court said (64 S. E. 951):

"It is difficult to conceive of a fraud more easy of detection than the one under investigation. As soon as a comparison was made by plaintiff in error between the machine-made slip and the checks which he had drawn, the fraud was discovered, and yet plaintiff in error had for three years accepted the bank's statements without question. If upon this evidence the case had been submitted to the jury, and it had found a verdict for the defendant, it could not have been disturbed."

If it should be contended by the bank in the case at bar that the *Brown* case is a false entry case rather than a forgery case and is therefore not a precedent for the view we take of the case at bar, the answer is that a bank's duty to refuse to pay a forged check on a depositor's account is certainly no less than its duty to prevent an unauthorized debit against his account.

Leather Manufacturers' National Bank v. *Morgan,* 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657, is the leading case in this country on the question under consideration, and has been repeatedly cited with approval by this and other courts. In that case, the depositor's clerk committed forgery in raising the amounts of certain checks. Despite due care on the part of the officers of the bank, the checks were paid and charged to the depositor's account. In a suit against it by the depositor, the bank defended on the ground that he did not exercise the degree of care required of him to discover the fraud perpetrated by his clerk. The trial court directed a verdict in favor of the depositor. On appeal, that judgment was reversed, the Supreme Court of the United States holding that a depositor in a bank is bound, personally or by an authorized agent, to examine with due diligence his pass book and vouchers and to report to the bank, without unreasonable delay, any errors which he may discover, and that, if he fails to do so and if the bank is thereby misled to its prejudice, he cannot afterward dispute the evidence of the balance shown by the pass book.

The court took occasion to observe that there was evidence tending to prove that, with one exception, the depositor gave practically no attention to the account rendered by the bank and that "very slight diligence" would have revealed the fraud; but it was careful to say (117 U. S. 116): "We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him." The court concluded that *the question whether the depositor exercised the diligence required of him was for the jury, not for the court,* and that the trial court should have submitted to the jury the question whether the depositor omitted, to the injury of the bank, the due care and prudence required of him in the matter of the examination of his pass book and vouchers. We approve this clear statement of the rule.

We come now to consider the evidence as to the nature of the examination of the bank statements and cancelled checks made by the company in the case at bar, together with the related question whether this court can say, *as a matter of law,* that the examination so made fell short of ordinary care. If reasonable minds might conclude that the company exercised ordinary care in the premises, then the court below properly refused the peremptory instruction and submitted the case to the jury.

On May 12, 1949, the first of the 25 checks in question was forged, paid and charged to the company's account. The bank contended—and it cannot be successfully gainsaid—that an exhaustive examination by the depositor would have revealed the fraud as early as June 1, 1949, on which day the company received from the bank the May statement and cancelled checks paid during that month. But such an examination would likewise have promptly revealed the forgeries in the *First National Bank of Richmond, Brown* and *Leather Manufacturers' National Bank* cases. In fact, "the fraud could have been instantly discovered" in the first of these cases; in the second, "the fraud was perpetrated" "in a very crude

and simple manner," and it was "difficult to conceive of a fraud more easy of detection than the one under investigation"; and, in the third, "very slight diligence" would have revealed the forgeries. And yet it was held in all three of those cases that the question was one for the jury. We conclude, therefore, that the fact that the fraud *could* have been discovered upon a thorough examination of any one of the eleven bank statements and the cancelled checks enclosed therewith is not decisive of the issue. We must examine the evidence further in order to ascertain whether the company's examination was so perfunctory as to require the trial court to instruct a verdict for the bank.

The bank deems it significant that a considerable number of check stubs were altogether blank or were marked "void." This circumstance is insufficient to put the company on notice that there might be forgeries against its account. While Mrs. Eldridge prepared most of the checks for signature by one of the partners, the partners frequently prepared the checks. They testified that, by reason of there being so many deductions, withholdings, etc., to be computed, they would frequently make mistakes in preparing checks and would "void" the first check so prepared and also its stub; and it can easily be seen that Mrs. Eldridge might honestly make similar errors, and that both she and they might sometimes leave the check stubs (of voided checks) blank.

The bank stresses the testimony to the effect that Mrs. Eldridge was not living with her husband and that she had three children, two of whom were living with her; that two writs of garnishment in the amounts of $67.50 and $274.53, issued pursuant to judgments against her, were served on the company; and that, on April 5, 1949, she borrowed $600 from the appellant bank on a note endorsed by one of the partners. The bank contended that these circumstances should have put the company on notice that Mrs. Eldridge was under a heavy expense and in straitened financial circumstances and that it should have been particularly on guard against

forgery. The record showed that she was making payments on the note out of her salary from the company at the rate of $12.50 per week, and that the company knew this. These circumstances do not entitle the bank to a directed verdict.

There are many circumstances which, taken together, support the view of the trial court that a case for the jury was made. Mrs. Eldridge was recommended to the partners as a highly competent bookkeeper. One of them had known her in high school. Neither of them had any reason to believe that she would prove to be a faithless employee. Her employment commenced on August 1, 1948—eight months before the first audit of the company's books was made for its fiscal year ending March 31, 1949. That audit showed that the books were in balance. It doubtless served to make the partners believe that Mrs. Eldridge would not betray her trust.

The bank statement and cancelled checks were mailed to the company at a Post Office box, to which only the partners had access. This made it impossible initially for Mrs. Eldridge to abstract the checks which she had forged or the bank statement. The custom was that the partner who happened to get the statement and cancelled checks from the box would take them to the company's office and, on the afternoon of that day or the next day, open the envelope and examine the checks, of which there were 400 or 500 each month, and the statement. Two employees of a concern which, throughout the relevant period, shared a 15′ x 20′ office with appellee, testified that, on numerous occasions, they saw both Kelley and Nelson "looking through their cancelled checks when they were returned at the end of the month."

The partners sometimes sorted the checks themselves, each partner looking through the checks and examining particularly the ones which he had signed, having in mind the jobs to which the several checks were referable. They frequently examined the accounts of the various jobs to see how their total expenditures thereon compared with the prices at which they

bid them in. It was not possible for the check stubs to show the balance in the company's account at the bank for the reason that the company kept two check books, one for the payroll and one for other persons and concerns to whom it owed money.

The partners testified that they called on the persons or concerns for whom they were constructing buildings for payments on the jobs as the work progressed, adding that they were fortunate in doing work for people who paid them on time. In this way, they were usually enabled to "operate a job on someone else's money" because the company's bills did not become due until the tenth day of the month. The company's bank balance ranged from $16,000 to $35,000. Under a rigid cross-examination, the partners testified that it was not until they were informed of the shortage by the accountants in April, 1950, that they knew, or had any reason to believe, that the company's balance in the bank was less than it should have been, that there had been any forgeries against the company's account or that its books were otherwise out of balance. It will be remembered that the eight "fictitious facsimiles" which, at first, even the accountants believed to be genuine, accounted for $5,609 of the $9,800 shortage.

There remains for consideration only the question whether the company is precluded from recovering its loss because it did not object within a reasonable time to the monthly statements which it received from the bank, near the end of all of which statements was the sentence: "If no error is reported in 10 days the account will be considered correct." The bank's position is that the company thereby acquiesced in the correctness of the statements, which thereby became accounts stated and included the debits of the forged checks upon which this suit was brought.

In *Brown* v. *Southern Grocery Company,* 168 Ark. 547, 552, 271 S. W. 342, 40 A. L. R. 383, an account stated was defined as "an account balanced and rendered, with an assent to the balance, express or implied." We fully

appreciate the efficacy of this doctrine, in a proper case, as working an estoppel in the nature of an implied admission, by the person to whom the account is rendered, of its accuracy; but where the question is, as we have held it to be in this case, whether a depositor has exercised ordinary care in examining his cancelled checks and bank statements, the doctrine of account stated cannot be employed to foreclose an inquiry into the question whether such care has been exercised. That question having been resolved, by the verdict of the jury, in favor of the depositor, there is no room for the application of the doctrine for which the bank contends.

We, therefore, conclude that, the forgery of the checks sued on having been established, the bank is liable unless the depositor is precluded from setting up the forgery; that, under the facts in this case, the depositor was not precluded unless it failed to exercise ordinary care in examining monthly its cancelled checks and the statements which it received from the bank; that the trial court properly submitted to the jury the question whether the depositor exercised ordinary care in the premises; and that there was substantial evidence to support the verdict.

Accordingly, the judgment is affirmed.

Mr. Justice SAM ROBINSON disqualified and not participating.

HEEB *v.* PRYSOCK, ET AL.

4-9675 245 S. W. 2d 577

Opinion delivered January 28, 1952.

J. Brinkerhoff and *DuVal L. Purkins,* for appellant.

Gibson & Gibson, for appellee.

WARD, J. Appellant, Heeb, who was the defendant below, had about 210 acres of rice, and each of the appellees, Prysock, Underwood, Blanton and Stough had acreage planted in cotton which was either adjacent to or near said rice land. In July of 1949, Heeb employed the Terry Aircraft Company to spray his rice with 2,4-D in liquid form. While the spray was being applied to the rice appellees' cotton crops were damaged, as it is alleged, because of appellant's negligence in that the airplane flew over their crops, allowing the poison to escape and "settle" on their cotton, in that said poison drifted from appellant's field onto their cotton when appellant knew or should have known it would do so, and in failing to properly prepare the poison for distribution. Appellees, in separate complaints [later consolidated], alleged damages in specific amounts, and in each instance, after a jury trial, were awarded judgments in lesser amounts than sued for. From said judgments appellant properly prosecutes this appeal.

Appellant advances several reasons why he thinks the lower court should be reversed, as will presently appear, but apparently the reason which is urged most forcefully is that there is no substantial evidence to show negligence on his part. It is stressed that appellant, knowing of the possible danger to his neighbors, was careful to select a competent aviator with approved equipment, that the aviator took pains to view the situation beforehand, that he gave due regard to the proper time of day and wind conditions, that he flew at a proper and careful altitude, that the 2,4-D which was used contained the kind of base recommended by the U. S. Department of Agriculture, and that it is undisputed that the spray he used does not travel but goes to the ground. It is then pointed out that the sale, without liability, of 2,4-D by manufacturers has been approved by our own and federal decisions. Based on the above factual situation appellant argues that, to hold him liable would amount to making him an insurer.

We cannot agree with the above nor with the contention that there was no evidence of negligence to make a jury question. In the first place evidence was introduced to show that 2,4-D in liquid form would drift or spread. Farmers Bulletin No. 2005 of the U. S. Department of Agriculture was introduced in evidence and shows that, with a wind of five to seven miles per hour, it will drift 1,350 feet when released at a height of 20 feet and 550 feet when released at a height of 10 feet. Moreover, appellant was liable, of course, for any negligence on the part of the aviator if he was appellant's employee. If the aviator was an independent contractor appellant would likewise be liable for his negligence under the holding in *McKennon* v. *Jones, ante,* p. 671, 244 S. W. 2d 138. Without reviewing at length the testimony regarding negligence it suffices to say we find enough to make a question for the jury. Mrs. Underwood stated the spray from the plane was just like a fog at her house, that she closed the windows and door, that it made her sick and even the water in the bucket tasted bad, and that she saw the plane come over her place. It is admitted the plane passed over part of Prysock's farm, and that there

is some evidence to show it passed over Underwood and Stough's places. Mrs. Blanton, wife of the other appellee, stated she saw the plane over or near their place, that she did see it circling over Stough's place which joined theirs, and that their cotton was damaged.

In this same connection appellant also contends the proof was not sufficient to establish damages, particularly under the court's instruction No. 2, and that the court erred in refusing his requested instruction No. 5.

In each case the damage was calculated by comparing the yield on the damaged crops with the yield on lands in the vicinity and [in each case] on land cultivated by the plaintiffs, after a showing that the compared lands were essentially the same and were fertilized and cultivated in the same manner. Instruction No. 2 required that, in arriving at the extent of damages, consideration be given to the difference between the cost of producing the damaged crop and what it would have cost had there been no damage. The difference in cost of picking, hauling, ginning, etc., was shown, but appellant contends there is no evidence to show a difference in cost of cultivation. In support, the case of *Gibson* v. *Lee Wilson & Co.*, 211 Ark. 300, 200 S. W. 2d 497, where such factor was recognized, is cited. The cited case is not applicable here because it involved a failure to furnish water for a rice crop. Here there was no showing it would cost less to cultivate a cotton crop which had been damaged by 2,4-D than to cultivate one which had not been damaged. It appears reasonable to us that both damaged and undamaged crops would require the same kind and amount of cultivation.

By offering instruction No. 5, which was refused, appellant asked the court to limit Underwood's recovery to three-fourths of any damage proven. This instruction was requested because Underwood was a tenant and had to pay one-fourth of the cotton to his landlord. This instruction was properly refused. The reason will appear as we now consider the contention of appellant that this case should be reversed and dismissed as to Underwood

because, being a renter, he was not the party in interest and therefore had no right to maintain the action. He cites in support *Burns* v. *Vaughn,* 216 Ark. 128, 224 S. W. 2d 365. This case lacks authority here because a different relationship existed between landlord and tenant. The rule applicable here is the one announced in *Barnhardt* v. *State,* 169 Ark. 567, 275 S. W. 909:

"If the share-cropper raises a crop for the landlord, and is to receive a part of the crop from the landlord as wages for his work, the title to the crop grown vests in the landlord, and the share-cropper has a lien thereon for his labor. If the share-cropper is to pay one-half the crop for the use of the land, with the tools and team and feed therefor, then the title to the crop is in the tenant, and the landlord has a lien thereon. . . ."

The distinction seems to be, if the landlord pays the tenant for his work the title vests in the former, but if the tenant pays the landlord, as in this case, title vests in the tenant.

Appellant specifically objected to the court's general instruction No. 4 on the ground it did not take into consideration the damage that was done to appellees' crops because of rain and boll weevils. The instruction as given was correct because appellees' proof of damages was made after taking into consideration all damage done by rain and boll weevils. The foregoing also answers appellant's objection to the exclusion of testimony which was offered to show damage of the same nature.

We find no prejudicial error in the court's refusal to exclude the testimony of certain witnesses about conversations with appellant. On the one occasion when appellant was quoted as being willing to compromise, any possible error was cured by the court's cautionary admonition to the jury.

Finally, the jurisdiction of the court is challenged. The question arises this way. The damaged crops are located in Chicot County and that is where all the plaintiffs reside and where this action was commenced and tried. Service was had on appellant in Poinsett County. Originally Mrs. Carey Clark [appellant's landlady] was

made a co-defendant. Before the trial appellees took a non-suit as to Mrs. Clark. By this action, it is insisted, the court lost jurisdiction because there was no valid service on appellant. We do not so hold. It is provided in § 27-618 Ark. Stats. that where an action is local and not transitory and must be brought in a particular county, service may be had in any county. It is further provided in § 27-601 that actions for injury to real property must be brought in the county where the subject of the action [land] is situated. Therefore service on appellant in Poinsett County was good if injury to the growing crops was an injury to real property. Our court has so held. *Missouri Pacific Railroad Co.* v. *Henry,* 188 Ark. 530, 66 S. W. 2d 636; *Western Union Telegraph Co.* v. *Bush,* 191 Ark. 1085, 89 S. W. 2d 723, 103 A. L. R. 367.

Affirmed.

Mr. Justice McFaddin concurs.

HILL *v.* JONES.

4-9665 245 S. W. 2d 573

Opinion delivered January 28, 1952.

Rehearing denied February 25, 1952.

William E. Beloate, J. Troy Foster and *Hugh W. Trantham,* for appellant.

Smith & Ponder, for appellee.

HOLT, J. Appellees brought this suit against Boyce Hill to cancel and set aside a deed from Juanita Wells to Hill as being a cloud on their title. The deed was executed September 24, 1948, to certain property here involved. They alleged, in effect, that Juanita had no title or interest in the property to convey to Hill.

Appellant filed answer and cross complaint denying all material allegations and further alleged that Clay Sloan deeded to "Juanita Wells his title to the lands described in the complaint filed herein by his deed to her, and that Juanita Wells conveyed same to this cross complainant by the deed which the plaintiffs are seeking to cancel."

At the trial, appellant relied primarily upon the deed from Clay Sloan to Juanita Wells alleged to have been executed "in the late forties," never recorded and lost.

The Chancellor found "that the prayer of the plaintiffs is well taken and sustained that the deed from Juanita Wells to the defendant, Boyce Hill, is void, and is hereby cancelled, set aside and held for naught and is removed as a cloud upon the title to the lands herein described; that the cross complaint of the defendant, Boyce Hill, is dismissed for want of equity, and that the defendant failed to establish by clear, convincing and cogent evidence the existence of the unrecorded lost deed from Clay Sloan to Juanita Wells to the lands here involved."

From the decree is this appeal.

The property involved here has been the source of much litigation resulting from its sale in 1939 for the 1938 taxes due the Village Creek Drainage District. The present appeal is the fourth attack here on this tax sale, *Shinault* v. *Wells,* 208 Ark. 198, 186 S. W. 2d 26, *Wells*

v. *Golden,* 209 Ark. 378, 191 S. W. 2d 251 and *Hill* v. *Village Creek Drainage District,* 215 Ark. 1, 219 S. W. 2d 635. Another attack was also made in Federal Court, *Mitchell* v. *Village Creek Drainage District,* 158 Fed. 2d 475 (C. C. A. 8), and all failed.

Appellant is the brother of Mrs. Fairbelle Mitchell, Juanita Wells is his niece and the daughter of Mrs. Mitchell.

For reversal, appellant contends that the trial court erred in holding that he had failed to establish the lost deed in question. Our rule is well established that the burden is on one who would establish a lost deed to show its execution by clear, cogent and convincing testimony.

In *Erwin* v. *Kerrin,* 169 Ark. 183, 274 S. W. 2, we said: "The rule is well established in this State, as well as by the authorities generally, that the burden is upon one who claims title under the alleged lost instrument to establish the execution, contents, and loss of such instrument by the clearest, most conclusive and satisfactory proof." (Citing a number of cases.)

We agree with the court that appellant failed to sustain the burden of proof required. Juanita's testimony relative to the deed in question was, in effect, that Clay Sloan gave her a quitclaim deed to the property "in the late forties," (or late in 1940), that the deed was never recorded and was lost, along with a cancelled check in payment, out of a moving van which was carrying her household goods to California. Certain correspondence between Juanita and Clay Sloan in 1936 and 1937, relating to the proposed purchase of this property by Juanita was in evidence. This correspondence shows that a check for $208 in part payment on Juanita's offer to purchase failed to clear, and further strongly tended to show that the alleged purchase was never consummated. A period of about ten years appears to have elapsed (according to Juanita's own testimony) from the date of the last correspondence in 1937 until the time,—in the late forties, —when she claimed Sloan executed the deed to her. As indicated, we hold that the Chancellor correctly held that she had failed to establish the alleged lost deed.

Appellant's contention that Juanita was a necessary party to the suit is without merit for the reason that she had no interest whatever in the property involved or any rights to protect and therefore was not a necessary party. See the previous decisions of this court and that of the Federal court above.

Finding no error, the decree is affirmed.

WARD, J., not participating.

PAPAN *v.* RESOLUTE INSURANCE COMPANY.

4-9663 245 S. W. 2d 565

Opinion delivered January 28, 1952.

Kenneth C. Coffelt, for appellant.

Owens, Ehrman & McHaney, for appellee.

GRIFFIN SMITH, Chief Justice. The appellant who was plaintiff below sustained slight personal injuries and his truck was damaged when a collision occurred with a Checker Cab Company vehicle at a point on Highway 67-70 where the thoroughfare is intersected by the Boyle Park road west of Little Rock. Papan was insured by the Resolute Company. It indemnified—subject to a deduction of $50—for any loss he might sustain if the truck should be damaged by a third party. The mishap occurred June 27, 1950, and Papan personally reported to

the insurance company that day, with the result that emergency repairs were made in order that the owner might drive to his home at Benton, in Saline county. The insurance carrier requested Papan to procure and submit to it three estimates of property damage. There was no suggestion that responsibility should be shifted; and, of course, the request for estimates with knowledge of the damage was an implied admission of liability.

The following day Papan employed Kenneth C. Coffelt to represent him. The written contract called for fifty percent of any amount collected from the cab company, "or other responsible parties."

On behalf of the insurance company, adduced through cross-examination, there was testimony that its representatives went to appellant's home to discuss an adjustment, but the claimant was not to be found. Mrs. Papan was asked to inform her husband of the visit and to have him call again at the Little Rock office.

On August 4th Papan released the cab company for an unapportioned payment of $600. Through Coffelt he then sued Resolute for $148.66 and for a twelve percent penalty. This was upon the theory that $347.32 of the sum received represented actual damages to the truck. By deducting $50 as provided by the policy the remainder would be $297.32; and, since the attorney was paid half of this remainder, the actual loss was the difference sued for.

The trial court (a jury having been waived) found that Papan had deprived the insurer of its contractual right of subrogation, since the release could be pleaded in any action it might bring. There were further findings (a) that the attorney was employed before an opportunity to pay had been given under the policy terms, and (b) the company at all times had been willing to discharge its obligations under the language and within the spirit of the contract. It was not denied that $500 had been demanded. In a letter written by Papan's attorney June 30th to Murdock Acceptance Corporation as agent for Resolute, it is stated that ". . . the differ-

ence [apparently] between the value of Papan's truck before and after the collision amounts to about $500."

Appellant claims that $347.32 was the low of three estimates he received. He also testified that five or six efforts to get a settlement were made. When Coffelt asked his client during the trial if copies of the estimates were turned over to Resolute the witness replied that he thought he gave them to Coffelt, but added that the insurance company received the information. The physical injury (not covered by the policy in question) was in the nature of a back wrench. In answering Coffelt's questions Papan said that he had supplied Resolute with proof "of that fact."

Papan was somewhat hazy regarding the nature of his cause of action and the amounts apportionable to personal injury and to property damage, but he testified that in settling with the taxicab company he collected "240 and some odd dollars" for damage to the truck. His attorney corrected the witness with the statement that it was $300. Papan later stated that he understood that the settlement was made on the basis of Crawford Motor Company's estimate of $347.32.

When asked whether, on June 27th, the insurance company requested that repair estimates be procured and given to it, Papan replied that he did not comply with this request, but instead went to Coffelt. Appellant admitted that a finance corporation held a lien on the truck for more than a thousand dollars. His desire was to dispose of the truck without having it repaired—that his real purpose was to trade for a new unit. This specific question was asked: "You did not want this insurance company to repair your truck, but you wanted to trade it off—is that correct?" Answer: "I tried to get them to pay them off so I could trade this truck in." We are unable to say whether, when Papan repeated the word "them," the trial judge took the answer to mean that the insured had endeavored to get Resolute to discharge the lien; and this is true notwithstanding a supplemental answer that the finance company wanted to collect carrying charges for two years.

When the truck was traded to Sadler-Ross Motor Company the buyer very shortly ascertained that the lien was outstanding. The new truck was repossessed and the old one returned. Appellee states in its argument that during this interim period the truck was repaired, but there is no testimony directly sustaining this contention, and Papan testified that he later spent $186 on it. This outlay, said appellant, did not restore the property to its former status.

When asked what he was suing for Papan replied, "Damages to the truck and myself." Question: "[Your claim, then] is for personal injuries and the damage to your truck?" Answer, "Yes." These same elements, he said, were covered in the taxicab company settlement; but, when asked how much of the $600 payment was for personal injuries the witness replied, "Well, about fifty dollars of it." The cross-examination was objected to as irrelevant because the complaint set out the legal claim. After a short colloquy with amplifying statements by counsel, the cross-examining attorney asked: "Have Mr. Coffelt's comments helped you in your testimony?—can you now state the amount of your personal injuries?" Answer: "About $50, . . . and my understanding was that $550 was for the truck damage."

In his brief appellant stresses a rule that his measure of damage was the fair market value before and after collision, and that the difference would necessarily be the loss he had sustained. This, of course, is one of the standards applicable and it may be invoked where the circumstances warrant a before-and-after determination. If the insurance company had declined, expressly or by inference, to abide the terms of its policy, there might be ground for saying that such refusal fully justified the methods suggested for loss appraisal. It is true that appellant testified that he tried repeatedly to effectuate a settlement, but his own admission that he did not want the truck repaired was sufficient to justify the trial court in believing that the $500 demand was never unconditionally receded from and that the company was under no compulsion to pay more than the cost of complete restoration.

Policy Condition No. 3 permits the insurer to pay for the loss in money, "or it may repair or replace the automobile." There is a provision for arbitration in the event an agreement can not be reached, but such an arrangement is contrary to this state's public policy, Ark. Stat's, § 66-509, *Insurance Company of North America* v. *Kempner,* 132 Ark. 215, 200 S. W. 986. But (*National Automobile Ins. Co.* v. *Dalton,* 214 Ark. 120, 214 S. W. 2d 507), it has not been held that when the insurer, in an undertaking concurred in by the insured, attempts in good faith to ascertain what the actual damage is and to either pay that sum or have the property completely restored, nevertheless the insured may hold out for a cash settlement substantially in excess of reasonable compensation until litigation or an adjustment with a third party on his own terms has been completed, then require the insurance company to pay an attorney's fee and submit to a penalty because the result was not what had originally been hoped for.

In substantiation of appellee's contention that the trial court had substantial evidence upon which to rest the judgment, appellant's inconsistent statements were properly reviewable in determining the intentions of the parties. Coffelt testified that in his settlement with the taxicab company he treated $347.32 as truck damage and the difference of $252.68 as personal injury compensation. Half of $347.32 would be $173.66; but, according to the attorney, Papan "received out of said sum the balance of $148.66, which was his one-half due under the contract."

But Papan says that "about fifty dollars" would compensate his personal injuries, so $550 must have been for damage to the car. If he received half of this sum the recovery for property damage was $275,—just $22.32 short of $347.32 used by the plaintiff as a basis for the attorney's fee after $50 corresponding with the so-called "deductible" is subtracted.

Section 66-514, Ark. Stat's, has not been construed as authority for the proposition that an insured who chooses to pursue the party whose negligence is alleged to have

caused the injury or damage may hold in abeyance his claim against an insurance carrier (or make excessive demands as the trial judge here was justified in finding), then collect from the tortfeasor under acceptable terms and finally complete the cycle by returning to the insurance company with a demand that an attorney's fee be paid and that the company be penalized for delay.

The circuit court properly dismissed. Judgment affirmed.

RUBLY *v.* ARKANSAS-LOUISIANA GAS COMPANY.

4-9649 245 S. W. 2d 401

Opinion delivered January 28, 1952.

H. B. Means, Jr., and *J. C. Cole,* for appellant.

Henry C. Walker, Jr., and *Moore, Burrow, Chowning & Mitchell,* for appellee.

ROBINSON, J. In October, 1948, the appellants, Grant R. Rubly and Lucille A. Rubly, bought eighty acres of land in Hot Spring County. In the fall of 1949, a pipe line was laid across the property. In fact, a pipe line was there at the time of the purchase, the new line being an addition to, or replacement of, the old line.

Appellants claim that their property was damaged by the construction of the new line and sued the Arkansas-Louisiana Gas Company, appellee herein, for damages, alleging that the defendant Gas Company, by its agents, servants and employees, constructed the pipe line. The defendant Company specifically denied it constructed the line and pleaded that the work was done by an independent contractor. After appellants completed the introduction of their evidence, the Gas Company moved for a directed verdict, which was granted.

Two issues are presented: First, is there any evidence going to show that the appellee Gas Company owned the line in question? Next, is there any competent evidence in the record to the effect that appellants have suffered any damage other than nominal damages by reason of the work done on the pipe line?

Although the answer denies that the Gas Company constructed the pipe line, it is alleged therein that the pipe line was constructed by Latex Corporation while acting as an independent contractor. However, it is not stated in the answer that the defendant engaged the Latex Corporation as an independent contractor. The principal reason upon which we base our opinion that the evidence on this point is sufficient to cast upon the defendant Gas Company the burden of proceeding as to the independent contractor feature of the case is the following question propounded, on cross-examination, to Rubly, the property owner, and his answer thereto:

"Q. Mr. Rubly, what was the condition of the right-of-way of the Arkansas Louisiana Gas Company across your property with reference to its surface, whether it was rough, or fairly smooth prior to the installation of this last line in 1949? A. Well, the right-of-way line was smooth and across this other portion also was smooth. There were no rough breaks."

The plain permissible inference to be drawn from this evidence is that the right-of-way, where the pipe line was laid, was that of the Arkansas-Louisiana Gas Company. In its answer the defendant Gas Company had alleged that the pipe line was laid by an independent

contractor without direction or control of the defendant in the manner or method of doing the work. Hence, after taking into consideration the pleadings in the case and the evidence heretofore mentioned, it became the duty of the defendant to prove its allegation with reference to the work having been done by an independent contractor.

In 27 Am. Jur. 538, the rule is stated as follows: "Thus, if the employer claims that a workman is an independent contractor for whose acts he is not responsible, the burden is on him to show the workman's independence. It has been held that in an action against an employer for injuries, a presumption arises that a person working on the defendant's premises and performing work for the benefit of the defendant is a mere servant, and if the defendant seeks to avoid liability on the ground that such person is an independent contractor, the burden is upon him to show the independence of the employee."

In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Davenport,* 80 Ark. 244, 96 S. W. 994, Chief Justice McCulloch, speaking for the court, said: "The relations between the railway company and the contractors were not drawn out in the evidence, but it is shown that the damage was inflicted by those engaged in the construction of the railroad for the company, and it devolved upon the latter to show that the same was done by an independent contractor for whose conduct the company was not responsible."

In *Warren, Administratrix,* v. *Hale,* 203 Ark. 608, 158 S. W. 2d 51, Justice McHaney said: "It is generally held by the courts, including our own, that if the employer claims that an employee is an independent contractor for whose acts he is not responsible, the burden is upon him to show that fact."

Also, we think the evidence was sufficient to carry the case to the jury on the question of damages. The plaintiff Rubly testified that he bought the property in 1948; that he was the owner of the land when the gas line

was laid across it in 1949; that when he took over the land, it was gently rolling to level and the portion east of the road was a smooth slope of land with a heavy cover of grass and on the western side of the highway was all grass land; that there was heavy Bermuda and other types of grass all over the place; that there were several streams of water, and as a result of the work done by the defendant Gas Company, the drainage has been impaired; that a concrete abutment was left partly damming one of the creeks; that the remains of a timber bridge were left in another creek, obstructing the flow of water; that the Bermuda grass has been drowned out and marsh grass has sprung up in its place; that mud puddles and marshly conditions now exist; that some of the grass is gone entirely, leaving bare, rocky soil; that the topsoil has been caused to wash away. Pictures were introduced showing the condition of the place before and after laying of the pipe line. Objection was made to the introduction of these pictures because they did not show enough detail, but the pictures are not objectionable for that reason.

Mr. Tom Ross Young testified that he had lived in Malvern 38 years, and is engaged in the real estate and loan business; that he is familiar with the market value of real estate in the general vicinity of Malvern; that he is familiar with the place where the Rublys live about one mile from the City limits on Highway No. 9; that he sold the property to Rubly for Raymond Scott; that he has been over the property and examined the damage done by reason of the laying of the pipe line, and he estimated the damage at $1,500. This witness' testimony is admissible for the purpose for which it was introduced.

Reversed and remanded for new trial.

4-9655 245 S. W. 2d 385

Opinion delivered January 28, 1952.

[redacted]

Smith & Smith, for appellant.

Eli Leflar, for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by the appellee for breach of a contract for the purchase of chickens. The appellant, as defendant below, admitted having agreed to buy the chickens, but he contended that some of the birds had contracted colds before delivery and that by a trade usage in the industry the buyer is not required to accept diseased fowl. The trial court refused to permit the defendant to prove this trade usage, and upon the other evidence there was a verdict for the plaintiff for the difference between the price the defend-

ant agreed to pay and the price at which the plaintiff later sold the poultry to some one else.

On Monday, March 27, 1950, the defendant examined the chickens at the plaintiff's farm and agreed to buy the flock and to pick up the chickens during the week. Part of the flock, then in good health, was picked up the next day. But the defendant's wife testified that when she brought the truck back two or three days later to load the remaining birds she found that they had taken cold; so she refused to accept them. The defendant offered several witnesses to prove the trade usage we have mentioned, but the court held that the proffered testimony was inadmissible as tending to impeach the testimony of defendant and another of his witnesses.

Apart from the question of impeachment, the trade usage was relevant. If the usage was known to both parties or so widespread in the industry that the contract would be presumed to have been made with reference to it, it became part of the agreement. *Ben F. Levis, Inc.,* v. *Collins,* 215 Ark. 172, 219 S. W. 2d 762; Rest., Contracts, § 246, Illustration 11. Of course a trade usage cannot change a rule of law, Rest., § 249, but there is nothing in the law of sales to prevent the parties from incorporating the present trade usage in their contract. By the Sales Act the goods remain at the seller's risk until the property therein is transferred to the buyer. Ark. Stats. 1947, § 68-1422. The time when title passes is a matter of intention, and the statute expressly provides that for the purpose of ascertaining such intention regard shall be had to usages of trade. § 68-1418.

On the matter of impeachment the court was in error. The defendant had testified that diseased chickens were not salable in the markets in which he intended to resell this poultry, but that such fowl could be sold in some other markets. One of his witnesses had testified to the same effect. The trial court seems to have concluded that proof of the trade usage would contradict the admission that diseased fowl could be sold in some markets at least.

We gather from the record that the defendant and his witness were talking about resale markets in other States and not about contracts made with chicken growers in northwest Arkansas; so there may have actually been no inconsistency in the testimony. But in any event the rule relied upon by the trial court does not apply to this situation. By offering a witness a party impliedly vouches for his credibility and cannot later impeach him by showing that his reputation for truth is bad. But this does not mean that if a witness has been false or mistaken in his testimony the party is forever precluded from proving the truth by other witnesses. On the contrary, a witness may be contradicted as to any fact about which he has given evidence. *Midland Valley R. Co.* v. *Lemoyne,* 104 Ark. 327, 148 S. W. 654. Hence the proffered testimony should have been received.

The defendant also pleaded the statute of frauds, but since some of the chickens were accepted and received by the purchaser the contract was taken out of the statute. Ark. Stats., § 68-1404.

Reversed and remanded.

HORTON, GUARDIAN *v.* SMITH.

4-9671 245 S. W. 2d 387

Opinion delivered January 28, 1952.

Green & Green and *Oscar E. Ellis,* for appellant.

Northcutt & Northcutt, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Z. N. Smith, recovered a verdict and judgment against appellant, Loyd Horton, as guardian *ad litem* of Charles Sherman, a minor, in the sum of $1,250 for personal injuries and property damage resulting from a collision between two motor trucks owned and being operated by appellee and Charles Sherman.

John and Granville Sherman, parents of Charles Sherman, were also made parties defendant, but a verdict was directed in their favor at the conclusion of the testimony on behalf of appellee. Appellee's cross-appeal against John Sherman was dismissed on motion of the appellant by order of this court entered December 3, 1951.

During the course of his examination as a witness, appellee was asked, and answered, as follows: "Q. Do you know whether he (Charles Sherman) is a careful or reckless driver? A. I know that he is a reckless driver." The first assignment in the motion for new trial is that the court erred in permitting appellee to answer the question, in refusing to exclude the answer, and in failing to instruct the jury not to consider it. The record reflects an objection by appellant after the question was answered. In sustaining appellant's objection, the trial court said: "Yes, gentlemen, that is incompetent, and you will not consider the last answer of the witness. It is taken from you." There was no further objection nor was a mistrial requested. In these circumstances, any

prejudice arising from the excluded testimony was removed by the action of the trial court.

It is next insisted that the evidence is insufficient to support the verdict. The testimony on behalf of appellee is that he was driving his truck slowly up a hill at night during a rain and on his righthand side of the road when the truck being driven by young Sherman in the opposite direction, at a fast rate of speed, suddenly shot or skidded across the road and into appellee's truck. Although disputed, this evidence was sufficient to sustain the charge of negligence against the minor defendant and to support the verdict.

Appellant also argues that appellee was guilty of contributory negligence as a matter of law in that he was going around a car parked on the highway at the time of the collision. The evidence on this point is also in dispute. According to the testimony on behalf of appellee, he had already passed the car in question, which was parked off the highway, when the collision occurred. The question of contributory negligence was, therefore, properly submitted to the jury under instructions which are not objected to.

It is also argued that the verdict and judgment are excessive. The least estimate of damage to appellee's truck was $625. Appellee lost six teeth, suffered a broken arm and several cuts and bruises as a result of the collision. He was confined to a hospital twenty-seven days and was unable to work for several months. We cannot say the verdict is excessive nor do we agree with appellant's contention that the jury resorted to speculation and conjecture in fixing damages.

It is finally argued that the complaint failed to state a cause of action and that the court, therefore, erred in overruling appellant's demurrer on that ground. Appellant has not abstracted the complaint nor does he point out any deficiency in its allegations. We find no merit in this contention.

The judgment is affirmed.

TUCKER *v.* ATKINSON.

4-9659 245 S. W. 2d 388

Opinion delivered January 28, 1952.

Osborne W. Garvin, for appellant.

Rose, Meek, House, Barron & Nash, for appellee.

ED. F. MCFADDIN, Justice. The questions presented relate to agency, limitations, and the effectiveness of

marginal endorsements made in alleged compliance with § 51-1103 Ark. Stats.

On March 6, 1940, Mrs. Lidie Atkinson executed her four notes to O. D. Tucker, Sr., totalling $1,500, all due March 6, 1943; and as security for said notes, Mrs. Atkinson executed to O. D. Tucker, Sr., a mortgage on a house and lot in Little Rock. Mrs. Atkinson lived in Conway, and the Little Rock house was then (and had been since 1913) occupied by her step-son, Sherman Atkinson, who handled the entire loan transaction with Tucker. All Mrs. Atkinson did was to sign the papers and deliver them to Sherman Atkinson for consummation of the loan, the proceeds of which went to improve the mortgaged property. Sherman Atkinson made payments on the principal and interest of the mortgage indebtedness, on dates and in amounts as follows:

March 6, 1940	$250.00
Sept. 6, 1940	37.50
Mar. 6, 1941	37.50
Dec. 5, 1941	56.25
Apr. 3, 1942	37.50
Sept. 25, 1942	37.50
Oct. 7, 1948	25.00

The mortgagee, O. D. Tucker, Sr., died testate, and the appellants are his executors. Appellant, Oren D. Tucker, in his capacity as one of the executors of his father's estate, on February 17, 1950, made, on the margin of the record where the Atkinson-Tucker mortgage was recorded, the endorsement showing the said payment of October 7, 1948. It will be observed that the notes were due on March 6, 1943, and so they would be barred by the 5-year Statute of Limitation, even as to Mrs. Atkinson, unless the aforesaid payment of $25, made by Sherman Atkinson, on October 7, 1948, was made by him as the authorized agent of his stepmother. Sherman Atkinson died Apr. 15, 1950; and Mrs. Atkinson, in her answer filed July 14, 1950, and also in her deposition in this case, denied all such agency of Sherman Atkinson to act for her in making such payment. This denial poses the first point to be hereinafter discussed.

On February 18, 1950, (one day after said marginal endorsement) there was executed a conveyance of the property herein, from Mrs. Lidie Atkinson, to her son, Paul Atkinson, Trustee.[1] Paul Atkinson claims that he is a "third party" within the purview of the statute (§ 51-1103 Ark. Stats.), and that as to him, the Tucker mortgage is barred, even if not barred as to his mother. This contention of Paul Atkinson, Trustee, is the second point to be hereinafter discussed.

Paul Atkinson, Trustee, mortgaged the property to Peoples Building & Loan Association of Little Rock, (hereinafter called "Peoples"); and the mortgage was recorded on February 23, 1950. Peoples claims that it is, at all events, a "third party", within the purview of the statute (§ 51-1103 Ark. Stats.); and that as to it, the Atkinson-Tucker mortgage is barred, even if not barred as to the other parties. This contention of Peoples is the third point to be hereinafter discussed.

This litigation was initiated by the appellants, as the executors of the estate of O. D. Tucker, filing foreclosure proceedings on March 29, 1950, and naming Mrs. Atkinson, Paul Atkinson, Trustee, and the Peoples Building & Loan Association, as defendants. The Chancery Court sustained defendants' contentions as heretofore stated, and entered a decree in their favor. The plaintiffs have appealed.

I. *Agency of Sherman Atkinson to Make Payments for Mrs. Atkinson.* Mrs. Atkinson has pleaded the 5-year Statute of Limitation (§ 37-209 Ark. Stats.) against the Tucker claim; and the effectiveness of her plea depends on whether Sherman Atkinson was her agent to make the payment of $25 on October 7, 1948. The notes would be barred by limitations even as to Mrs. Atkinson, unless the said payment of October 7, 1948, is binding on her. An authorized payment, if made even after limitation has run, renews the note as between the parties. *McNeill* v. *Rowland,* 198 Ark. 1094, 132 S. W. 2d 370; *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899. Furthermore, payments by an authorized agent bind the

[1] This conveyance was recorded on Feb. 23, 1950

principal. *Schaefer* v. *Baker,* 181 Ark. 620, 27 S. W. 2d 83. It is beyond contradiction that Sherman Atkinson actually made the $25 payment on October 7, 1948. Mrs. Atkinson's counsel thus states the point:

"The payment could revive the debt only if Sherman Atkinson was the agent of Lidie P. Atkinson, in making the payment. . . . It is readily admitted that *if* Sherman Atkinson was the agent of Lidie P. Atkinson, by express appointment, by apparent authority, or by estoppel, the payment was sufficient to revive the debt."

We come then to the consideration of Sherman Atkinson's agency for his stepmother. At all times after 1913, Mrs. Atkinson (now 89 years of age), lived in Conway and owned the house and lot in Little Rock occupied by her step-son, Sherman Atkinson, until his death in 1950. In 1940, Mrs. Atkinson signed the notes and mortgage, and delivered them to Sherman Atkinson. He conducted all the negotiations, delivered the notes and mortgage to O. D. Tucker, obtained the proceeds of the loan, and used same to pay for repairs of the house. Sherman Atkinson continued to occupy the house, pay the taxes, keep up the insurance, remit rent to his step-mother, and do everything that was done in connection with the Tucker loan on the property. Mrs. Atkinson testified in her deposition that she visited the property only once or twice in the ten years from 1940 to 1950.

Despite the repeated statements in her deposition to the effect that Sherman Atkinson was not authorized by her to make the $25 payment in October, 1948, nevertheless the fact remains that in reference to the Tucker notes and mortgage, the following questions and answers appear in her testimony:

". . . will you state in what manner the mortgage deed and the notes were transmitted to O. D. Tucker, Sr., doing business as The Tucker Company, Agent? A. I do not know. I signed them and turned them over to Sherman. I do not know what he did with them. . . . I signed whatever papers Sherman gave me at that time and turned them over to him. . . . Q. Is it not true

that all details for arranging this loan and for the repayment of same were left up to Sherman Atkinson?[2] A. Yes."

So the record abundantly discloses that Mrs. Atkinson executed the notes and mortgage in question, and delivered the papers to Sherman Atkinson, as her agent. He neither signed the mortgage, nor endorsed the notes, so the only position he occupied was that of agent of Mrs. Atkinson, his stepmother. She clothed him with authority to deliver the papers and receive the proceeds of the loan from Tucker, and the mortgage which she signed obligated her to keep the property insured for the benefit of Tucker. Most of the cases deal with the extent of the apparent authority of the agent to *receive,* rather than *make,* payments. Thus, in 2 Am. Jur. 128, the rule is stated:

"If an agent who negotiated a loan is allowed by the principal to retain in his possession the securities thereby obtained after a payment of interest or principal is due, the owner of the securities will not be permitted to deny that the agent possessed the authority, which the presence of the securities indicated that he had, if

[2] As further evidence of Sherman Atkinson's complete handling of the Tucker loan for Mrs. Atkinson, and also of the taxes, insurance policies, and upkeep of the property here involved, we quote the following from Mrs. Atkinson's deposition:

"Sherman H. Atkinson occupied the premises from about June 1, 1913, until about February 1, 1950. He paid me monthly rent for the same.

"Q. Did he pay taxes for any years from 1913 to the time of his death? If so, for what years?

"A. I do not know, but I suppose that Sherman paid all the taxes through 1947.

"Q. Did you personally attend to the maintenance of the property, and if not, who attended to these details? Explain fully.

"A. I did not personally attend to any maintenance. . . .

"Q. Was Sherman credited with the payment on his rent account when he paid general and special taxes on the property; if not, was Sherman Atkinson reimbursed by you for such expenditures?

"A. There were no credits or reimbursements. He never asked for any and I never made any.

"Q. Was Sherman Atkinson credited with the payment on his rent account when he paid insurance premiums on the property; if not, was Sherman Atkinson reimbursed by you for such expenditures?

"A. There were no credits or reimbursements. He never asked for any and I never made any."

the debtor or obligor, relying upon the possession of the securities and the apparent authority thus afforded to collect or receive payment, makes payment thereon. This rule applies where a mortgagee permits an agent who negotiates a loan to retain in his possession the bond and mortgage after the principal is due, and the mortgagor with knowledge of that fact, and relying on the apparent authority thus afforded, makes a payment to him."[3]

The rule of the above quotation applies where the agent makes a loan for the principal and retains his securities. In that event, the law is that the agent, in receiving payments, does so within the implied or apparent scope of his authority and the principal is estopped to deny such authority of the agent. By all logic, the same rule—of apparent authority of the agent to *make* payment on the indebtedness and estoppel of the principal to deny such authority—applies when the agent negotiates the loan for the principal, retains in his possession the property, remits the rents, and is allowed over the years, to pay the taxes and insurance premiums that are specified in the mortgage. The apparent authority of the agent is as clear in one situation as in the other. In the case at bar, Sherman Atkinson retained possession of the premises, expended the proceeds of the loan, paid the taxes, kept the property insured, and remitted the rents to his stepmother. In the light of the evidence detailed, and other evidence in the record, we therefore hold that in making the payment of October 7, 1948, Sherman Atkinson acted within the implied or apparent scope of his authority, and that Mrs. Atkinson is estopped to deny such authority.

In the brief filed for Mrs. Atkinson in this Court the following appears:

". . . even though the conduct of Sherman Atkinson and Lidie P. Atkinson might justify the position that for a time he was her agent, still the payment of October 7, 1948, cannot be imputed to Sherman Atkinson as the agent of Lidie P. Atkinson. . . . Whatever agency

[3] To the same general effect, see American Law Institute's Restatement of Agency, § 71 *et seq.*

might have existed between Lidie P. Atkinson and Sherman Atkinson terminated."

Under the facts in this case, we hold that the agency continued until Mrs. Atkinson—either acting personally or by an authorized agent—gave the mortgagee notice of revocation of Sherman Atkinson's agency. It is claimed that Paul Atkinson told one of the appellants in July, 1948, that Sherman Atkinson was not the authorized agent of Mrs. Atkinson. This statement was not made by Mrs. Atkinson to the appellant until December, 1948; there is no evidence whatsoever that any of the appellants knew or suspected that Paul Atkinson had any authority to act for his mother in July, 1948; and in fact no such agency is shown. So, we hold that Mrs. Atkinson cannot successfully plead the 5-year Statute of Limitation against the obligation sued on.

II. *Plea of Limitation made by Paul Atkinson, Trustee.* As previously stated, Mrs. Atkinson conveyed the property herein to Paul Atkinson, Trustee, by a deed dated February 18, 1950, and recorded on February 23, 1950; and he claims that he is a "third party" within the purview of § 51-1103 Ark. Stats. In discussing the rights of the Peoples Building & Loan Association in the subsequent section of this opinion, we will have occasion to discuss § 51-1103 Ark. Stats. in somewhat greater detail. It is sufficient now to consider only whether Paul Atkinson, Trustee, is a "third party" within the purview of the statute.

In the deed, which covered not only the property here involved, but also other property, Mrs. Atkinson stated that as "settlor" she desired "to relieve herself of the care of her estate by establishing a trust upon the following terms and conditions, and for the following uses:"

" '(a) The Trustee shall collect and receive the rents', (and after paying taxes, insurance premiums, repairs, etc.) 'shall pay the residue over from time to time to the Settlor, so long as she shall live. . .".'

(c) After the death of the Settlor, the property would be sold, and the proceeds invested by the Trustee,

with the interest to go to the Settlor's daughter, Louise P. Atkinson, for her life.

(d) After the death of Louise P. Atkinson, the *corpus* would be divided between the Settlor's two named children, or their heirs, *per stirpes.*

It is evident that Mrs. Atkinson's purpose was to so arrange her affairs that she would receive all of the net rents and revenues of her property during her lifetime, just as she had received them during the period of time that Sherman Atkinson occupied the property, from 1913 up until the time of his death. By the trust deed, Paul Atkinson became his mother's trustee by legal document, whereas Sherman Atkinson had been his stepmother's agent in actuality. Both Paul Atkinson and his mother testified that she executed the trust without any consideration except love and affection, and to relieve herself of the management of the property, and to make certain that her daughter, Louise, would be cared for after Mrs. Atkinson passed away.

In the light of the foregoing detailed facts, and others which appear in the record, we conclude that Paul Atkinson, Trustee, was not a "third party" within the purview of § 51-1103 Ark. Stats. This holding is in accord with our previous cases regarding a "third party" under such statute. Some of these previous cases are: *Kansas City Life Ins. Co.* v. *Marsh,* 196 Ark. 1121, 121 S. W. 2d 81; *Denham* v. *Lack,* 200 Ark. 455, 139 S. W. 2d 243; *Tyler* v. *Niven,* 194 Ark. 538, 108 S. W. 2d 893; *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; and *Citizens' Bank* v. *Garrott,* 192 Ark. 599, 93 S. W. 2d 319. In *Kansas City Life* v. *Marsh, supra,* we held that one holding under a voluntary conveyance was not a "third party" within the purview of the statute. In that case, the widow conveyed the property to the wife of her attorney, and the latter, to another friend, all for the purpose of being able to invoke the statute. We held that none of the parties was a "third party." In *Denham* v. *Lack, supra,* the father conveyed to the son in an attempt to defeat the mortgage indebtedness, and we held that the son was not a "third party" within the

purview of the statute. In *Tyler* v. *Niven, supra,* we held that the wife of a tenant was not a "third party." In *Armstrong* v. *Armstrong, supra,* we held that the brothers and sisters of the mortgagor were not "third parties." In *Citizens' Bank* v. *Garrett, supra,* we held that a judgment creditor could not invoke the statute. These cases buttress the conclusion that we have here stated.

III. *Plea of Limitation Made by Peoples Building & Loan Association.* Peoples, a corporation engaged in making loans on improved real estate, contracted to make a loan on this property to Paul Atkinson, Trustee. The mortgage to Peoples was dated February 20, 1950, and actually recorded on February 23, 1950; and Peoples claims that even though Mrs. Atkinson and Paul Atkinson, Trustee, are unsuccessful in their contentions, nevertheless Peoples is entitled to the benefits of § 51-1103 Ark. Stats. because it is undoubtedly a "third party" within the purview of that statute, the germane portions of which read:

". . . Provided, when any payment is made on any such existing indebtedness, . . . such payment shall not operate to . . . extend . . . the statute of limitation . . . so far as the same affects rights of . . . *third parties,* unless the mortgagee . . . shall, *prior to the expiration of the period of the statute of limitation,* endorse a memorandum of such payment . . . on the margin of the record." (Italics our own).

In *Kansas City Life Ins. Co.* v. *Marsh,* 196 Ark. 1121, 121 S. W. 2d 81, Mr. Justice McHaney, in discussing this statute, said:

"We have many times held that where no marginal endorsements of payments on the record within the statutory period are made, the instrument becomes in effect an unrecorded mortgage, and is binding as between the parties. . . .

"It, therefore, follows that the mortgage in question, by reason of the failure to make indorsements of payments on the margin of the record, became an un-

recorded mortgage, and like an unrecorded mortgage, was good between the parties if payments were made that would keep it alive. . . . To be availing as against third parties, such payments would have to be made within the period of the statute and indorsed on the record within the period, ...''

From what we have said in discussing the contentions of Paul Atkinson, Trustee, it is apparent that under the plain wording of the statute, no endorsement of the October 7, 1948, partial payment was made on the margin of the record where the Tucker mortgage was recorded, until long after the mortgage was apparently barred as to third parties. Therefore, such marginal endorsement when later made, did not revive the lien of the Tucker mortgage as to third parties. That Peoples is such a ''third party'' admits of no serious controversy.[4]

By the terms of the mortgage, Peoples agreed to loan Paul Atkinson, Trustee, an amount up to $5,000. Prior to the trial, from whence comes this appeal, Peoples, in reliance on its mortgage, actually loaned $3,752.66 to Paul Atkinson, Trustee. Appellants argue that Peoples had paid out only $300 when Peoples received actual knowledge of appellants' claim; and appellants argue that Peoples is entitled to a prior lien for only $300 instead of $3,752.66. We refuse such argument of appellants. Peoples' actual knowledge of appellants' claim was no more effective than actual knowledge of an unrecorded mortgage. Peoples had a right to continue to make advances under its mortgage until restrained, or, by litigation, recordation, or *lis pendens,* given legal notice of appellants' claim. Until such legal eventuality, appellants' status was nothing more than that of one holding an unrecorded mortgage. In *Clark* v. *Shockley,* 205 Ark. 507, 169 S. W. 2d 635, we quoted *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78, concerning the statute which is now (with amendments not important to this case) § 51-1103:

'' 'The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage

[4] In 62 C. J. 920 Arkansas cases are collected which construe the words "third party."

is apparently barred by limitation, and no payments which would stay the limitation are indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage.' "[5]

We hold that People's mortgage, to the extent of said amount of $3,752.66, is prior to any claim of the appellants; and the authority for our conclusion may be found in our holdings in the following cases: *Johnson* v. *Lowman,* 193 Ark. 8, 97 S. W. 2d 86; *Matthews* v. *Mullins,* 201 Ark. 579, 145 S. W. 2d 718; *Bank of Mulberry* v. *Sprague,* 185 Ark. 410, 47 S. W. 2d 601; and *Clark* v. *Shockley,* 205 Ark. 507, 169 S. W. 2d 635.

In all other respects, except as to Peoples' mortgage, the decree is reversed and the cause remanded with directions to (1) enter a decree for appellants against Mrs. Lidie P. Atkinson for the balance of principal and interest due on the Tucker indebtedness; (2) adjudge such amount superior to any claim of Mrs. Atkinson and/or Paul Atkinson, Trustee; (3) fix a reasonable time for the payment of such amount, and if not paid, then foreclose the lien of appellants, subject to the mortgage of the Peoples Building & Loan Association for its debt of $3,752.66 and interest. Peoples will recover all its costs against appellants; and appellants will recover all costs against Mrs. Lidie P. Atkinson and the title of Paul Atkinson, Trustee.

Mr. Justice George Rose Smith not participating.

[5] Section 51-1002 Ark. Stats. is the section concerning recordation of mortgages.

EAST CENTRAL ARKANSAS REGIONAL HOUSING AUTHORITY
v. MOORE.

4-9573 246 S. W. 2d 115

Opinion delivered October 29, 1951.

[redacted]

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

J. B. Reed, for appellee.

PAUL WARD, J. This suit poses the task of interpreting the contractual relations between appellant and a large number of property owners, and applying thereto voluminous testimony which itself contains all the intricacies and details of bookkeeping. The problem is to try and determine what would be the right price for appellant to charge each property owner should he decide to exercise his right to purchase. For a proper understanding of the issue it is necessary to give a brief preliminary history. In explaining the contractual relations we will not copy in full the instruments upon which they rest because they are lengthy and involved, but will give our own interpretation of the same.

The East Central Arkansas Regional Housing Authority, hereafter referred to as the Authority, was created pursuant to Act 298 of 1937 of Arkansas, as amended by Act 352 of 1941. It was organized October 28, 1941, to include fourteen counties, one of which was Lonoke County, where the property involved is located. The purpose of the Authority was to provide safe and

sanitary dwellings to persons of low income at rents they could afford to pay. The method of procedure was for the landowner to convey to the Authority by warranty deed one acre of land upon which the Authority was to build a house and make other improvements, but the deed contained a reservation or option giving the landowner a right to repurchase. The land not deeded to the Authority was designated "Parcel A" and the one acre was designated "Parcel B." The option to repurchase did not specify the price to be charged by the Authority, but it designated three elements to be considered, *viz*: (a) the price should be the *fair value* of Parcel B including the improvements constructed thereon [by the Authority], but (b) it was not to be more than the capital cost of acquiring and developing Parcel B, and (c) it was not to be less than the unpaid balance due on each Parcel B, *i. e.,* the proportionate balance. Certain obligations were imposed on the landowner, such as to use Parcel A for agriculture purposes and to insure that the occupant of Parcel B worked on the farm, but these matters are not material here.

Appellant introduced what appears to be a complete set of books, explaining them by testimony, and thereby showed, we think, that the average cost of developing each Parcel B was either $2,316.17 or $2,744.43 depending on whether we hold the accounting period should end June 1, 1942, when the last house was constructed or September 30, 1946, when plans for further acquisition and development were abandoned. So far as the figures themselves are concerned appellees do not question the correctness of the above cost totals.

In determining the issue we think it is right to choose the smaller figure of $2,316.17 as the average cost per Parcel B which was fixed by appellant as of June 1, 1942, when the last house was built. If we accept the larger figure, calculated as of September 30, 1946, we must add to the total cost the sum of $66,456.91. This would not seem equitable in view of the statement in appellant's brief that, "Since June 1, 1942, the Authority has spent $66,456.91 for cost of acquisition and development—he

has no breakdown for other costs after this date. No property, real or personal, has been acquired by the Authority since the completion of the last unit, June 1, 1942. No house has been built or new units developed since then.'' In selecting the smaller sum certainly it is not intended to impute any bad faith to appellant, but it must be realized that it and not appellees were in complete control of operations and it is difficult to justify the placing upon appellees an additional burden of more than $66,000 with nothing to show for it. No doubt the war situation entered into the picture, but June, 1942, was late enough to afford a forecast of things to come.

According to appellant's statement the unamortized [average] amount due on each Parcel B was $2,257.12 as of June 1, 1942. As was heretofore explained this *fair value* that appellees were to pay could not therefore be less than $2,257.12.

The chancellor held that the *fair* value of each Parcel B was $2,000 and fixed that as the amount at which the landowners could repurchase, but he assigned no reason for disregarding the minimum figure of $2,257.12 mentioned above and we know of no such reason. There is no point in discussing the *fair value* here except to show it exceeds the last mentioned figure, and this we are unable to do under the testimony. The testimony on the question was in sharp conflict. Appellant's testimony tended to show the houses were worth at this time over $3,000. On the other hand appellees offered testimony to show that a house like this could be built now [considering higher costs] for around $2,300 and that the houses would depreciate 10% each year. It was also shown that some of the houses are now in poor condition. The most we can say is that the fair value does not exceed $2,257.12. Here it should be stated that all 75 houses were built exactly alike and that while there may now be a difference in value, both parties treat the average house as a basis of determining the cost, the unamortized balance, and the fair value, and so do we.

There is no way for this court to fix the repurchase price at less than $2,257.12 without finding that this fig-

ure is greater than the balance due or, perhaps to the same effect, by finding that the construction costs are excessive. We have examined the mass of figures which show the many different items of cost of construction, but are unable to say which, if any, are excessive, and no light on this point has been furnished us. Appellees were unable to point out any specific instance of bad faith or bad judgment.

The decree of the lower court is reversed and the chancellor is directed to enter an order consistent with this opinion.

The Chief Justice thinks the Authority's failure to build the number of houses contemplated when this court affirmed validity of Act 298 of 1937 was a breach of an implied contract. See *Kerr* v. *East Central Arkansas Regional Housing Authority,* 208 Ark. 625, 187 S. W. 2d 189. Because of the breach only the actual cost of production based on the maximum construction program or inducement should be charged the home-owner. This appears to have been less than $2,000.

WHITE RIVER LEVEE DISTRICT *v.* BEEMAN.

4-9642 245 S. W. 2d 807

Opinion delivered January 28, 1952.

Sharp & Sharp, for appellant.

John D. Eldridge, Jr., and *J. Ford Smith,* for appellee.

GEORGE ROSE SMITH, J. This suit was brought by the appellee, Burl Beeman, to recover damages for injuries inflicted upon his land by the appellant, White River Levee District. It is the plaintiff's theory that the District wrongfully removed an old levee and thereby exposed the plaintiff's land to overflow from the White River. The District contends that under our decisions the landowner cannot recover for the withdrawal of levee protection and that in any event Beeman accepted a payment of $400 in 1946 as a settlement of all his claims for damages. The trial judge allowed the case to go to the jury, which returned a verdict for the plaintiff in the amount of $2,450.

Beeman's land lies along the river and for many years was protected by the District's original levee. In 1946 the District decided to supplement part of the old levee with a setback levee, so situated that Beeman's land lies between the old levee and the new one just below the point at which the upstream end of the setback levee joins the original levee. The plans for the setback levee were made a matter of public record and showed that the old levee would be left intact down to a point on the river far below Beeman's land.

The upper end of the setback levee was to cross Beeman's property; so the parties negotiated the matter of a right-of-way and damages. On May 22, 1946, Beeman wrote the District that he would accept $2,000 and certain quitclaim deeds in return for the necessary right-of-way for the new levee, that the District should at its own expense move Beeman's houses and barns to the land side of the new levee, that the District should pay

for crops growing on the right-of-way for the new levee, and that Beeman would accept $400 for incidental damages. The District accepted this offer, and deeds were accordingly exchanged. Beeman's conveyance of the right-of-way recites that he releases the District from any claims "resulting from the building" of the new levee. The District's conveyance included land occupied by the old levee.

The setback levee was completed in 1948. A flood occurred in 1949, and after a study of its effects the District decided that the old levee which was still protecting Beeman's land should be removed in order to widen the river's potential channel. About half the old levee had been removed by the District when Beeman discovered what was being done, stopped the workmen, and brought this suit. There was testimony to prove that the partial removal of the old levee had damaged Beeman's land by permitting flood waters to race across it, cutting gullies, preventing the cultivation of the land, etc.

The District first contends that it is not liable for damages resulting from the withdrawal of levee protection. Typical of the cases relied upon is *City Oil Works* v. *Helena Imp. Dist. No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296. In that case a mill which had been protected by the old levee was left exposed to floods when a setback levee was constructed. We followed the common law in holding that the owner was not entitled to damages because his property was left outside the levee. We have other decisions to the same effect.

But the appellant overlooks the fact that the rather harsh common law rule has been modified by Act 14 of 1932, Ark. Stats. 1947, § 21-636. In the preamble to that statute the legislature recognized the undesirability of denying damages to one who constructs improvements upon the assumption that an existing levee will continue to protect him and who is later exposed to overflow by a setback levee. The body of the statute permits levee districts to agree to pay damages resulting from the construction of setback levees, including damages for the

withdrawal of levee protection. The emergency clause declared that the law was needed to enable levee districts to construct setback levees without vexatious litigation. We held the statute valid in *Howington* v. *Friend,* 187 Ark. 411, 61 S. W. 2d 62; see also *Crain* v. *St. Francis Levee Dist.,* 190 Ark. 305, 79 S. W. 2d 87.

The record does not affirmatively show that the District's commissioners had this statute in mind when they agreed to pay Beeman's damages in 1946, but neither is there suggested any other theory by which the commissioners expended the District's funds to pay claims for which the District may not have been liable apart from the statute. In this situation it is clear that the District brought itself within the purview of the statute when it agreed to pay the cost of removing houses and the value of crops, both of which are specifically mentioned in the statute.

When those payments were made neither party contemplated the complete withdrawal of levee protection. The District's plans showed that the old levee was to be left undisturbed. Beeman testified that he would not have made the settlement had he known that the existing levee, which he could maintain at slight expense, was to be removed. The District cannot be permitted to take advantage of the statute in settling some items of damage in 1946, thereby avoiding the vexatious litigation mentioned in the emergency clause, and then to ignore the statute when an additional item of damage arises three years later.

The trial court let the case go to the jury upon the theory that the District would be liable for using Beeman's land as a channel for floods, thus imposing an additional servitude upon the land. See *Garland Levee Dist.* v. *Hutt,* 207 Ark. 784, 183 S. W. 2d 296. The imposition of such a servitude would be merely one factor in the complete withdrawal of levee protection, and therefore the District cannot complain of the court's action in submitting to the jury a theory that was more favorable to the District than it need have been.

The District also contends that the release contained in Beeman's deed to the District extinguished his present claim. At that time it was not understood by either party that the old levee would be removed; so the release could not have been meant to include the demand now asserted. Beeman released the District from all liability for constructing the new levee, which made access to Beeman's land more difficult, but there is nothing in the written agreement to indicate that a claim for the withdrawal of levee protection was being settled.

Affirmed.

BLAYLOCK *v.* HERRINGTON.

4-9672 245 S. W. 2d 576

Opinion delivered February 4, 1952.

J. M. Smallwood, for appellant.

Bob Bailey and *Caviness & George,* for appellee.

GEORGE ROSE SMITH, J. The appellee, Ernestine Brown Herrington, brought this suit in replevin to recover possession of a Chevrolet sedan. It is her contention that her husband wrongfully sold the car, which belonged to her, to Jackson & Lemley, automobile dealers in the city of Russellville. The appellant later bought the car and contends that he thereby acquired title or that the appellee is estopped to assert her title. The

trial court, sitting without a jury, awarded the car to Mrs. Herrington.

There is not much dispute about the facts. Mrs. Herrington, who was then Mrs. Brown, formerly lived in Kentucky and was the owner of the Chevrolet. She joined what she calls a friendship club and in that way met Eljewell Herrington, apparently by correspondence. On April 8, 1950, she drove to Ola, Arkansas, and married Herrington the next day. Two or three days later she returned to Kentucky to get her belongings, and while she was settling her affairs there Eljewell drove to Kentucky in a truck. The truck broke down, and Mrs. Herrington permitted her husband to return alone to Arkansas in her Chevrolet.

On April 21 Eljewell traded the Chevrolet to Jackson & Lemley in part payment upon a Buick car. He had registered the Chevrolet in Arkansas in Mrs. Herrington's name, and he delivered the informal evidence of registration (called a pink slip) to Jackson & Lemley. Two days later Eljewell drove the Buick to Kentucky and brought his wife back to Ola. The formal certificate of title was issued in Mrs. Herrington's name on May 6, but she says that she never saw it. Eljewell forged his wife's indorsement to the certificate and sent the document to Jackson & Lemley. They, having sold the Chevrolet to the appellant, transferred the forged instrument to him. Eljewell absconded with the Buick on May 28 and has not been heard of since.

The appellant urges two grounds for reversal. First, he says that he acquired title to the Chevrolet by the transfer of the formal certificate of title issued under our automobile title registration law. Ark. Stats. 1947, Title 75, Ch. 1. But there is nothing in this statute that purports to make the certificate of title a negotiable instrument or to permit title to be passed by a forged instrument. What the statute does is to make motor vehicle titles and encumbrances a matter of public record, somewhat like the record of real estate deeds and mortgages. A forged deed does not convey title, *Wil-*

liams v. *Warren,* 214 Ark. 506, 216 S. W. 2d 879, and this statute does not lay down a different rule as to automobile titles.

Second, it is contended that Mrs. Herrington knew that the Chevrolet had been traded for the Buick, that she accepted the benefit of the exchange, and that she is now estopped to attack the transaction. This reasoning depends upon whether Mrs. Herrington knew about the sale of the Chevrolet. At the trial she attempted to relate what Eljewell had told her about the matter, but the appellant succeeded in keeping this testimony out of the record. She was permitted to say, however, that she had understood that the Chevrolet was in Russellville "subject to my orders." She first said that she learned about the trade when Eljewell came to Kentucky in the Buick, but she later corrected herself to say that she did not learn of the Chevrolet's disposal until after her husband deserted her. She admitted having canceled the insurance on the Chevrolet, as they weren't using it.

Whether Mrs. Herrington knew of the exchange before her husband left her is, on this record, a matter of inference. Had the Herringtons been an average married couple one would naturally suppose that Eljewell told her at once how the Buick was acquired. But when we remember that their courtship was of a day or two's duration, that Herrington forged her name to the certificate of title at a time when she was in Arkansas and could have signed it herself, and that Herrington took the Buick and deserted his bride about a month after they established a home in Arkansas, it is not hard to believe that Herrington concealed the truth as part of a deliberate scheme to defraud his wife. To say the least, the trier of the facts may have taken that view of the case, and it is not our place to say that he was mistaken.

Affirmed.

4-9662 245 S. W. 2d 575

Opinion delivered February 4, 1952.

[redacted]

Osborne W. Garvin, for appellant.

Wood & Smith, for appellee.

GEORGE ROSE SMITH, J. This is a petition by the appellee for back alimony in the sum of $630. The appellant admits that he has not paid the last twenty-one installments of $30 a month, but he contends that he and the appellee agreed that the appellant's contributions to their daughter's college education should be treated as prepayments of alimony due the appellee. The chancellor found against the existence of such an agreement and entered a decree for the petitioner.

The divorce decree of 1937 approved a property settlement by which the appellant agreed to pay his former wife $30 a month and to pay a like amount for the support of their daughter until she reached her majority in 1948. The appellant testified below that he and the appellee later agreed that he would contribute additional sums toward their daughter's education upon the understanding that such contributions were to be credited as prepayments of future alimony. He produced canceled checks to show payments totaling $2,329.77. His mother and his sister testified that the appellee had told them that this agreement existed.

This testimony was contradicted by the appellee, who says that she has not talked to the appellant since their

divorce, that all their communications have been through their daughter, and that she neither made the alleged agreement nor ever told any one that it had been made, The daughter corroborates her mother, testifying that her father wrote to her suggesting such an arrangement, but she did not communicate the offer to Mrs. Wood. Instead she wrote her father that her mother needed the alimony and that she would quit school rather than have the payments discontinued.

The appellant had the burden of proving the defense offered, not only because proof of nonpayment of the installments made a *prima facie* case but also because it is primarily the father's duty to educate his child. With the evidence about evenly balanced the version given by the parties' daughter is especially persuasive, as even the appellant says that she was present when the agreement was made. We agree with the chancellor's conclusion that the making of the agreement has not been proved by a preponderance of the testimony.

Affirmed. The deposit of $150 heretofore made by the appellant with the clerk of this court will be disbursed upon a proper showing of expenses and attorney's fees incurred by the appellee.

GRIFFIN SMITH, C. J., and WARD, J., not participating.

SANDEFER *v.* SANDEFER.

4-9683 245 S. W. 2d 568

Opinion delivered February 4, 1952.

Collins, Garner & Collins, for appellant.

Gordon B. Carlton, for appellee.

HOLT, J. Appellee is the widow of J. W. Sandefer, who died August 1, 1950, and appellant was his brother. Mrs. Sandefer brought this action against appellant to cancel and set aside a deed to sixty acres of land in Sevier County. She alleged, in effect, that she purchased the property (consisting of a twenty acre tract and a forty acre tract) December 6, 1943, that appellant, a few days after her husband's death "told her he wanted to make a deal with her for a part of her lands, the 37½ acre tract and the 2½ acre tract. At that time and continuously since that time plaintiff has been very nervous, is in poor health and practically helpless and the defendant was well aware of these facts. But despite this, the defendant falsely and fraudulently represented to the plaintiff that if she would deed him the forty acres described herein, he would pay her ten dollars cash per acre for said lands and would pay all her living expenses for the remainder of her lifetime and pay her burial expenses when she died;" that by fraud, misrepresentations and undue influence, she was induced to execute the deed in question which she later learned called for sixty acres instead of forty acres as she thought. She further alleged that appellant refused to carry out his agreement with her and prayed that the deed be cancelled and title to the sixty acres quieted in her.

Appellant answered with a general denial and "further alleged that in October, 1943, J. W. Sandefer and appellant entered into an oral agreement whereby appellant would furnish the purchase price of certain lands and farm animals and J. W. agreed to hold same in the name of, and for the use of, appellant; appellant actually

furnished $1,000 pursuant to said agreement; J. W. furnished $300 of his own money and purchased the lands described in the complaint; 9 head of cattle and 4 horses went with the lands; J. W. fraudulently and falsely required the lands to be conveyed as an attempted estate by the entirety," that J. W. Sandefer's actions gave rise to a resulting trust in appellant's favor and prayed that appellee's complaint be dismissed and title quieted in him, or in the alternative, that he have judgment for damages and betterments.

Trial resulted in a decree for appellee, which contained this recital: "There was never any agreement or contract as to the twenty acre tract * * * that tract was included in said deed through the unlawful design of the defendant and for the fraudulent purpose of obtaining title to all of the lands from plaintiff without consideration. That the defendant was guilty of fraud and misrepresentation in obtaining the deed for the lands or for any part thereof, and the court finds that he has paid to plaintiff no consideration, and intends paying nothing for said land, and now repudiates the contract so made and entered into with plaintiff in so far as the payment for said land is concerned.

"The court further finds that the deed should be cancelled and held for naught for lack of consideration paid and because of fraud practiced by defendant on the plaintiff in the obtaining of said deed."

This appeal followed.

—(1)—

Appellant first strenuously contends that appellee has failed to sustain the burden imposed on her to show by clear, cogent and convincing evidence that fraud or undue influence was used by appellant in procuring the deed in question from her. We cannot agree.

Most of the testimony appears to be in irreconcilable conflict. On behalf of appellee, it was shown that in early 1943, she and her husband went to Port Arthur, Texas, where he worked in a munition plant and earned

approximately $2,400 before they returned to Sevier County in October, 1943, that while in Port Arthur, appellee also earned $7.00 per week. It is undisputed that they deposited $1,900 in a bank in Horatio immediately following their return and gave a check on this account for $1,300 for the purchase price of certain livestock and the sixty acre farm here involved. Appellant was not known in this transaction and Mr. Brinkley, who sold the land to appellee, did not know appellant. Appellee further testified that none of appellant's money went into the purchase or was sent to them for any purpose, that there had been no correspondence between appellant and her husband during the twenty years prior to appellant's return to Sevier County from California in 1948, about five years after the purchase of the tract of land, that appellant made no claim of any interest in the property until shortly after her husband's death, August 1, 1950. She further testified that after her husband's death appellant came to see her and offered to buy forty acres of the property for $10 an acre and in addition provide her a home and living expenses as long as she lived, that she signed the deed, went home, and later asked appellant for the purchase money and he refused to pay her anything and said to her "to hell with you, I ain't going to give you nothing." He never furnished groceries, or living expenses.

Witness, Griffin, testified that about three weeks after J. W. Sandefer died, appellant told him that "he was hardly able to but thought he would buy it (the property from the widow, appellee) if he could make the arrangements," and that appellant made no claim to any interest in the land.

Appellant testified that he sent a check for $1,000 to his brother in Port Arthur with the understanding and agreement that J. W. Sandefer was to purchase a farm in the name of, and for the use of, appellant. Appellant did not produce the cancelled check for $1,000, or any record or evidence from the California bank to show that any charge had been made against his account in this amount, nor did he produce any letter or correspondence

from his brother during his twenty years' absence from Arkansas. Appellant admitted that he had not seen his brother or appellee for twenty years until he came to Arkansas in 1948, five years after the land in question was purchased and deed delivered to appellee. His excuse was that the check and all correspondence had been lost in a fire. It further appears that he made no inquiry whatever at any time after he claimed to have sent the check to his brother, about any farm purchase, or as to expense, upkeep, taxes, etc., that might have accrued.

There was testimony for appellant, of a corroborative nature, that his brother admitted in the presence of a "welfare woman" that appellant had an interest in the property and witness, Sam Barrick, testified that he was present when J. W. Sandefer was talking to the "welfare woman" and "heard J. W. Sandefer admit that appellant had $1,000 in the place."

There was other evidence tending to corroborate appellee's testimony, but we do not attempt to summarize more. It suffices to say that when all of the testimony is considered, we are unable to say that it does not support the Chancellor's finding that appellee had met the burden imposed on her and the test required.

As we said in the recent case of *Gerlach* v. *Cooper,* 217 Ark. 596, 232 S. W. 2d 458, "the test in an effort to set aside a deed for fraud in its execution is whether there is 'a preponderance of the evidence which is clear and convincing.' "

—(2)—

What we have said above applies with equal force to appellant's contention that a resulting trust arose from J. W. Sandefer's actions. To support this claim, the evidence also must be clear, cogent and convincing.

In *Nelson* v. *Wood,* 199 Ark. 1019, 137 S. W. 2d 929, we said: "The general rule, as well as the established rule in this state, seems to be well settled that in order for one to establish by parol either a resulting or constructive trust, the evidence must be 'full, clear and convincing,' 'full, clear and conclusive,' 'of so positive a

character as to leave no doubt of the fact,' and 'of such clearness and certainty of purpose as to leave no well founded doubt upon the subject.' These requirements run through a long line of cases from this court." *Tillar* v. *Henry,* 75 Ark. 446, 88 S. W. 573; *Crittenden* v. *Woodruff,* 11 Ark. 82; *Trapnall's Administratrix* v. *Brown,* 19 Ark. 39; *Johnson* v. *Richardson,* 44 Ark. 365; *Richardson* v. *Taylor,* 45 Ark. 472; *Robinson* v. *Robinson,* 45 Ark. 481; *Crow* v. *Watkins,* 48 Ark. 169, 2 S. W. 659; *Camden* v. *Bennett,* 64 Ark. 155, 41 S. W. 854; 1 Perry on Trusts, § 137.

We think appellant has failed to meet the burden imposed.

—(3)—

On the record presented, appellant was not entitled to damages or betterments for the reason that his alleged purchase from appellee was fraudulent and in bad faith as the trial court found.

We said in *Reeder* v. *Meredith,* 78 Ark. 111, 93 S. W. 555: "If appellant's purchase was in bad faith, as the court's findings show and the proof warrants, he would not be entitled to any compensation for improvements."

Accordingly, the decree is affirmed.

DAVIS *v.* COLLINS.

4-9678 245 S. W. 2d 571

Opinion delivered February 4, 1952.

A. R. Cheatham and *Harry C. Steinberg,* for appellant.

Melvin T. Chambers, for appellee.

WARD, J. On March 31st, 1923, appellants, J. L. and Mary A. Jolley, executed and delivered to appellee, S. A. Collins, a warranty deed conveying the west half of the northeast quarter of section 32, township 19 south, range 18 west, containing 80 acres more or less. The deed was regular in every way except that immediately after the description appeared the following which, for convenience, we designate paragraph A:

"It is agreed and understood by the parties herein that the grantors herein have leased the Northwest Quarter of the Northeast Quarter of the above described land for oil and gas purposes to Hosey and McDonald and in said lease to said Hosey and McDonald grantors have reserved the usual one eighth royalty of all mineral

rights in and to the Northwest Quarter of the Northeast Quarter, and grantors hereby convey unto Grantee herein one half of the royalty reserved by grantors in their leases to the said Hosey and McDonald, the same being one sixteenth interest in all the oil, gas and minerals, of whatsoever nature that may be produced from the above described Northwest Quarter of the Northeast Quarter of Section 32, Township 19 South, Range 18 West."

Immediately after the above appears the following which we designate paragraph B:

"And it is further agreed and understood between the grantors and grantee herein that the grantors reserve a one sixteenth interest of all oil, gas and other mineral rights in and to the above described Southwest Quarter of the Northeast Quarter."

On May 8, 1929, the grantors in the deed mentioned above executed to Ruth Gibson [now Ruth Gibson Davis], one of the appellants, a mineral deed, containing warranties, in which, for a consideration of $200, they conveyed an undivided one-half interest in and to all of the oil, gas and other minerals in and under the northwest quarter of the northeast quarter of said section. On April 10, 1930, Mrs. Davis executed a similar deed to appellants, J. E. and Mamie Coleman, conveying an undivided one thirty-second part of all oil, gas and other minerals in and under the same forty acres.

On August 5, 1929, Mr. and Mrs. Jolley executed to appellant, Harry C. Steinberg, a mineral deed similar to the one made to Ruth Gibson conveying an undivided one-eighth interest in the oil, gas and other minerals in and under the same forty acres.

This suit was filed in January, 1950, by appellee to cancel the above mentioned mineral deeds as a cloud on his title. Ruth Gibson Davis asked that plaintiff's complaint be dismissed or, in the event the said mineral deeds were cancelled, that she be given judgment against Mr. and Mrs. Jolley on the warranty contained in her deed. The decree of the lower court cancelled the mineral deeds and gave judgment to Mrs. Davis.

It is appellants' contention that paragraph A of the deed, copied above, from Mr. and Mrs. Jolley to appellee constituted a reservation in the grantors of one-half of the royalty interest in the oil, gas and other minerals, and that, consequently, they [Jolley and Jolley] had the right to execute the mineral deeds to appellants as set out above. In support of this contention, Jones on Titles [page 231] is cited for the rule that in the construction of a deed, like any other contract, it is the duty of the court to ascertain, if possible, the intention of the parties, and to try to make all parts harmonize. This is substantially the rule as it has been announced by our court many times, beginning with *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710. The above rule, however, is operative only when there is some conflict between the granting clause and some other portion in a deed, or at least where ambiguity exists.

Here it is difficult to see how any actual conflict exists between the granting clause and paragraph A when it is carefully read. It states three things: (a) that Jolley and Jolley had [formerly] executed an oil and gas lease to Hosey and McDonald; (b) that they [Jolley and Jolley] had in said lease reserved the usual one-eighth royalty; and (c) that they [Jolley and Jolley] convey unto the grantee therein [S. A. Collins] one-half of the said reserved royalty. Thus it is seen that Jolley and Jolley actually reserved no minerals or mineral rights but merely reserved [if it can be said that they reserved anything] the right to collect one-half of the one-eighth of any oil, gas or minerals that might be produced under the lease to Hosey and McDonald. As held in *Gearhart* v. *McAlester Fuel Company,* 199 Ark. 981, 136 S. W. 2d 679, the lease to Hosey and McDonald conveyed no fee but merely the *right* to produce oil, gas and minerals during the life of the lease. Consequently the warranty deed from Jolley and Jolley to appellee conveyed all oil, gas and minerals subject only to the grantors *right* to collect a one-eighth royalty. Here the said oil and gas lease had expired and likewise the Jolleys' right [to collect royalties] had expired, so this left the fee [to all oil, gas and minerals] in appellee.

If, however, it be conceded that some ambiguity exists when the granting clause is read in connection with paragraph A then we must apply the rule announced above and consider the deed from all four corners. In doing this we must of course consider paragraph B although it does not pertain to land involved in this suit. Paragraph B uses appropriate language whereby Jolley and Jolley did reserve a one-sixteenth interest in all oil, gas and other minerals in the land therein mentioned. The only conclusion we can draw from this is that the grantors [Jolley and Jolley] knew how to use appropriate language to effect a valid reservation but knowingly failed to do so. The language in paragraph B is in striking contrast with that used in paragraph A which refers to *royalty* rights, except that in the very last phrase these words are employed: ". . . the same being one-sixteenth interest in all the oil, gas and minerals of whatsoever nature that *may be produced* from the above described Northwest Quarter of the Northeast Quarter. . . ." The latter language could only refer to royalty rights.

As indicated above, Jolley and Jolley actually did not, in express words, *reserve* anything in paragraph A but if it be conceded they meant, by conveying "one half of the royalty" to reserve a one-half, it still would avail them nothing because all royalty rights expired when the lease itself expired. As held in *Longino et al.* v. *Machen et ux.*, 217 Ark. 641, 232 S. W. 2d 826, a conveyance of a royalty right is not a conveyance in fee. It must follow of course that a reservation of a royalty right is not a reservation of a fee.

The decree of the lower court cancelling the mineral deeds as clouds on appellee's title and giving appellant, Ruth Gibson Davis, judgment against J. L. Jolley and Mary A. Jolley, is affirmed.

VARNER *v.* COUNTY BOARD OF EDUCATION, MILLER COUNTY.

4-9681 245 S. W. 2d 561

Opinion delivered February 4, 1952.

Preston E. Dowd and *Lookadoo & Lookadoo,* for appellant.

Shaver, Stewart & Jones, for appellee.

ROBINSON, J. Acting on a petition purportedly signed by a majority of the qualified electors of North Heights School District No. 2 of Miller County, the County Board of Education consolidated the District with Texarkana Special School District No. 7. An appeal from the order of consolidation was taken to the Circuit Court, where, after a hearing, the order of consolidation was affirmed. Those contesting the consolidation have appealed to this Court.

Two questions are presented. First, should 78 names through which a line had been drawn, and which appeared on the petition to consolidate, be counted? Next, were appellants' rights prejudiced by reason of the fact that A. P. Cox is a member of the School Board of District No. 2 and is, also, Chairman of the County Board of Education, and presided at the meeting of the Board when consolidation was effected?

If the 78 names in question should be counted, then, according to the undisputed evidence, the petition contains signatures of the requisite number of qualified

electors. At some time between filing of the petition for consolidation with the County Board of Education and the hearing in Circuit Court, a line was drawn through 78 signatures on the petition. Just why this was done is somewhat of a mystery. There is no showing that the signatures are not genuine, nor that the signers had asked that their names be stricken from the petition, nor that any of them are not qualified electors of the District. The contestants, appellants, filed a motion asking the trial court to strike from the petition to consolidate all the names that had a line drawn through the signatures. After a hearing, the motion was overruled by the court. Contestants, by their attorney, then asked permission to amend their motion so as to specifically challenge the individual signers who had a line drawn through their names. The court granted permission to amend the motion as requested. Then, the request to amend was withdrawn. In passing on the motion to strike the signatures through which a line had been drawn, the trial court correctly held that the question before the court was whether a majority of the qualified electors in the District had signed the petition. The mere fact that some member of the Board, or other person, may have drawn a line through a person's name does not disqualify that person. If a petition signed by a majority of the qualified electors of a School District asking for consolidation could be so easily nullified by somebody merely drawing a line through some of the signatures, it is doubtful that there ever would be a consolidation.

A. P. Cox is Chairman of the County Board of Education and is, also, a member of the School Board of District No. 2; furthermore, he signed the petition to consolidate. Appellants contend that Cox was disqualified in his capacity as Chairman of the County Board by reason of being a member of the Board of District No. 2 and having signed the petition to consolidate. We fail to see how this would in any manner prejudice the contestants' cause in Circuit Court whence comes this appeal.

Appellees have raised the question of whether the law, applicable to the bond for appeal from the County Board of Education to the Circuit Court, was complied with, but, since we are affirming the action of the Circuit Court in sustaining the consolidation, it is not necessary to pass on the question of the bond.

Affirmed.

BYARS *v.* GREGORY.

4-9670 245 S. W. 2d 803

Opinion delivered February 4, 1952.

Barber, Henry & Thurman, for appellant.

Bailey & Warren, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Jerre Byars, owned a lot abutting on Palisades Drive, a resi-

dential street adjacent to and west of the City of Little Rock, Arkansas, which was paved in 1949 by appellee, Artie Gregory, a Little Rock contractor. This appeal is from a verdict and judgment against appellant for $278 as his proportionate part of the cost of the paving project.

Ellis M. Fagan completed and moved into a home on Palisades Drive in the summer of 1948. According to the testimony on behalf of appellee, several residents and property owners on the street discussed its condition with Fagan and asked him to do something about getting it paved. Some of the property owners suggested that Fagan might be influential in getting some governmental agency to participate in the project. Fagan discussed the matter with the Pulaski County Judge, the mayors of Little Rock and Cammack Village and members of the State Highway Commission, all of whom refused to participate in the project for various reasons.

In February, 1949, Fagan discussed the paving proposal with Appellee Gregory. The two inspected the street and Gregory estimated the cost of the proposed project. In connection with the agreement then reached between Fagan and appellee, the latter testified: ". . . I knew all the property owners on that street and it was off season in construction work which was at a minimum at that time. I told him [Fagan] I would be glad to do it for them at cost of labor and material and add no profit to it. . . . Q. What was your understanding of the terms of the contract? A. Mr. Fagan instructed me if I would go ahead and do that job he would get the property owners together on that street and work out on a pro-rata basis when the job was completed and would pay on a pro-rata basis, the property owners would. However, he said should any of them fail to he would contact them and would agree I would lose no money in the deal. Q. Was any time limit set in the agreement as to when Mr. Fagan would get the property owners together? A. Within a reasonable time, thirty days after the job was completed and I rendered him a statement as to the cost."

Appellee proceeded immediately with the paving job which was completed early in April, 1949, and notified Fagan of the labor and material costs. On April 11, 1949, Fagan wrote appellant and the other property owners on the street the following letter: "Your one-man 'self appointed commissioner' of Mortgage Row Improvement District No. 1, who took upon himself the responsibility for blacktopping Palisades Drive is now ready to make his report on this activity and requests the pleasure of having you as Mrs. Fagan's and his guest at No. 6 Palisades Drive at 6:00 p. m., Wednesday, April 13th for refreshments, food and to hear his report. I trust it will be possible for you to be present. Cordially yours, Ellis M. Fagan."

In response to the invitations, appellant and twelve other property owners along the street assembled at the Fagan home on the appointed date. As to what transpired at the meeting Fagan testified: "We had dinner, after dinner we met down in the basement, I explained to them what I had done in their behalf; that I was ready now to tell them what it cost and to urge their coöperation in settling the account. I told them who did the work, approximately what it had cost, I told them why I hadn't bothered to go into it with each one in detail, I had in mind the cost of an improvement district, the legal fees, interest, selling bonds and the delay and I told them I felt I knew them all well enough to feel I could represent them; that I had acted in good faith and got the job at very nominal cost and here was what the cost was." Fagan also testified that in the negotiations with appellee he explained that he had no authority "to commit any district." Before any action was taken at the April meeting he also told the property owners that none of them could be forced to pay for the improvement. After some discussion of Fagan's report, Alfred G. Kahn, one of the property owners, made a motion that Fagan's action be ratified and that the several owners accept their respective shares of the cost of the project. After a second to the motion it was put to a vote by Mr. Kahn resulting in "a sprinkling of 'ayes' " and no votes in the

negative. Fagan testified that appellant indicated his approval of the motion by nodding his head in the affirmative, but this was denied by appellant.

A motion was then adopted without dissent designating Fagan and Mr. Peterson as a committee to engage the services of Warren Baldwin, a Little Rock realtor, to establish the proportion of the cost of the improvement to each property owner. Vernon Jackson, another property owner, then related a discussion he had previously had with the superintendent of the paving crew in which the latter stated that the road would be greatly improved and more nearly permanent if another coat of asphalt was applied. Upon Jackson's recommendation and motion the group, by the same informal action, approved the proposal for the additional coat of asphalt. Appellee was notified of the action taken at the meeting and put down the additional coat of asphalt. Baldwin made the apportionment to each property owner and his report was furnished to appellee who rendered statements to each property owner for his proportionate part of said costs.

The total cost of the project amounted to $6,696.94 of which amount $800 represented the cost of the additional coat of asphalt. Appellee testified that the cost of material alone for the additional work was $1,100 but only $800 was charged because his superintendent had made an estimate in that amount to Mr. Jackson.

Appellant first testified that he did not remember any motion being brought up at the meeting, but later stated that he remembered the motion made by Mr. Kahn. He also stated that he merely remained quiet throughout the meeting except that he told Fagan that he had no intention of building on his lot which was on the corner and the pavement at that point would be worn out before any of the rest. Appellant also stated that he did not know the work had been done until he drove on the street on his way to the meeting at Fagan's home. Fagan had never discussed the paving project with appellant prior to the April meeting.

This action was brought and tried on the theory of appellant's alleged ratification of the unauthorized acts of Fagan in contracting with appellee while purporting or assuming to act as agent for appellant and the other property owners on Palisades Drive. In instructing the jury the trial judge followed the rules approved by this court in such cases as, *Creson* v. *Ward,* 66 Ark. 209, 49 S. W. 827; *Runyan* v. *Community Fund of Little Rock,* 182 Ark. 441, 31 S. W. 2d 743; *Kirkpatrick Finance Co.* v. *Stotts,* 185 Ark. 1089, 51 S. W. 2d 512; *General Contract Purchase Corp.* v. *Row,* 208 Ark. 951, 188 S. W. 2d 507. Although fourteen assignments of error are set out in the motion for new trial, appellant sums up his contentions for reversal as follows: "There was no testimony upon which the court could submit the case to the jury on the plaintiff's theory of ratification by Byars of a contract made by Fagan assuming to act as Byars' agent." It is argued that the testimony conclusively shows that, in making the contract with appellee, Fagan did not assume to be acting as agent for appellant, but was acting solely on his own account and that appellee dealt with Fagan on that basis. Thus the sole question is whether there is any substantial evidence to support the jury's finding that Fagan purported, or assumed, to be acting for appellant, and the other property owners, in making the contract with appellee.

Appellant relies on the Runyan case, *supra,* where the court approved the following statement from Page on Contracts, § 1768: "The doctrine of ratification in agency applies only to the contract of one who is an agent or who claims to act as an agent. A contract made by one who is not an agent and does not claim to act as an agent cannot be ratified. To permit ratification under such circumstances would be to permit a person to whom an offer was not made to force a contract upon a party who did not mean to deal with him." Of course, where one in the execution of a contract did not assume to act for or on account of another, and there was no suggestion in the contract that he was acting for anyone other than himself, such other could not ratify the contract. *Stanton*

v. *Granger,* 125 App. Div. 174, 109 N. Y. S. 134 (affirmed without opinion in 193 N. Y. 656, 87 N. E. 1127).

The rule is more broadly stated by the annotator in 124 A. L. R. 893, as follows: "The doctrine is well settled that in order that an act or contract may be the subject of ratification by one other than the one who performed the act or entered into the contract, the latter must have, at the time of performing the act or of entering into the contract, professed, represented, purported, assumed, or undertaken to be acting as agent for, or on behalf of, the one alleged to have subsequently ratified the act or contract." See, also, 2 C. J. S., Agency, § 41; 2 Am. Jur., Agency, § 222.

The following comment on the rule in 1 Restatement, Agency, § 85(1) c, is pertinent: "Purporting to act on account of another does not necessarily mean that the agent represents to the third person that the principal has authorized him to act on his account in the transaction. A person purports to act on account of another if he undertakes to act on his behalf and to make the other a party to the transaction, although the person acting may also manifest to the third person that he does not know whether or not he is authorized, or even that he is not authorized. This situation should be distinguished from that in which one purports merely to undertake to transmit an offer to another. Whether in a particular situation there is an intent to make a present agreement subject to ratification or a mere offer which may be accepted depends upon the understanding of the parties."

It must be conceded that a difficult question is presented in determining whether Fagan, in making the contract with appellee, purported to act for the appellant and the other property owners, and intended to make a present agreement for them subject to their ratification. Here we have a street more than 2,000 feet long and the paving of which would inure to the benefit of fifteen abutting property owners, all of whom appellee knew personally. The very nature of the contract suggests the

improbability that Fagan assumed to act solely on his own account in the negotiations with appellee. Fagan had been asked by property owners, other than the appellant, to do something about getting the street paved. It is true that he acted without actual authority in making the contract, but it does not necessarily follow that he did not assume to act for all those property owners, including the appellant, who would agree to pay their proportionate part of the costs of the improvement. When the evidence is considered in the light most favorable to appellee, we think the jury was warranted in concluding that Fagan purported to act for appellant in making a contract which the latter ratified with full knowledge of all the material facts connected with the transaction.

Appellant argues that he is not liable, in any event, for any part of the cost of the additional coat of asphalt put down after the meeting on April 13, 1949. We cannot agree that there was no substantial evidence to show that appellant sanctioned this part of the project. Moreover, appellant made no objection to an instruction which told the jury to render a verdict for appellee in the sum of $278 if they found he was entitled to recover. It was also stipulated at the beginning of the trial that if appellant owed appellee anything, he owed $278.

We find no prejudicial error and the judgment is affirmed.

Mr. Justice George Rose Smith dissents.

George Rose Smith, J. (dissenting). I concede that a difficult question is presented, but I am inclined to think it should be decided the other way. The doctrine of ratification means that the agent and the third person must have entered into a contract that by its terms purported to be an agreement between the third person and the principal, needing only the principal's approval to make it a binding contract. As the Restatement, cited by the majority, put it: "A person purports to act an account of another if he undertakes to act on his behalf *and to make the other a party to the transaction.*" Another good state-

ment of the rule appears in *Minnich* v. *Darling,* 8 Ind. App. 539, 36 N. E. 173: "The person who acts as agent must purport to be the agent of the principal, and the contract must be made upon the faith and credit of the principal. 'Ratification' means adoption of that which was done for and in the name of another. Hence, the contract, at its inception, must purport to be the contract of the principal. It is not sufficient to constitute ratification that the contract may have inured to the benefit of a person sought to be charged as principal."

I do not think it can be said that when Fagan and Gregory concluded their first discussion they had purported to make a contract between Gregory and Fagan's neighbors. On the contrary, Fagan himself had made a contract with Gregory and had merely indicated a hope that the neighbors would share in the expense. The best indication that there was no initial contract between Gregory and the landowners is the admitted fact that it had not yet been decided on what basis the landowners were to contribute—whether by front footage, comparative values (the method later adopted), or some other arrangement.

Hence, I do not think this contract was subject to ratification. The further question then arises: Was Byars bound by his expression of assent at the neighborhood meeting, thereby creating a new contract of which Gregory is the beneficiary? The answer must be that Byars was not bound as to the work already done, as the consideration was entirely in the past. *McFarland* v. *Mathis,* 10 Ark. 560; Williston on Contracts, § 148. I agree, however, that the jury might find Byars liable for his share of the cost of the second coat of asphalt, on the theory that by his silence he acquiesced in and became a party to the agreement to do additional work in the future.

VAUGHAN *v.* DOSS.

4-9667 245 S. W. 2d 826

Opinion delivered February 4, 1952.

Rehearing denied March 3, 1952.

McKay, McKay & Anderson, for appellant.

Jack Machen, for appellee.

ED. F. MCFADDIN, Justice. On petition of the Landowner-Lessors, the Chancery Court cancelled an oil and gas lease for failure of the Lessees to pay the delay rentals at the time and place designated in the lease; and to reverse the Chancery decree, the Lessees bring this appeal. For convenience, we shall refer to the parties as "Lessors" and "Lessees."

The facts were stipulated. Lessors, being the owners of 200 acres, executed an oil and gas lease to Lessees on March 8, 1947. The lease provided, *inter alia*:

"If no well be commenced on said land on or before the 8th day of March, 1948, this lease shall terminate as

to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit in the First National Bank of Magnolia, Magnolia, Arkansas, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of Two Hundred and no/100 ($200.00) Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods in the same number of months successively."

No well was commenced on the lands, and the Lessees regularly paid delay rentals on or before March 8th in each of the years 1948, 1949 and 1950. But the delay rental payment due March 8, 1951, was not made at the designated bank (First National Bank of Magnolia) until March 27, 1951. The events leading up to the payment, even on that late date, were as follows:

a) On February 26, 1951, Lessees enclosed in a letter a check payable to the First National Bank of Magnolia (hereinafter called "Magnolia Bank") for *$200.50,* with instructions to use $200 to pay this delay rental that would be due March 8, 1951. *But, by Lessee's mistake,* the letter containing such check was addressed to First National Bank at *El Dorado, Arkansas* (hereinafter called "El Dorado Bank").

b) The El Dorado Bank, upon receiving the letter, failed to notice that the check was made payable to the Magnolia Bank. The El Dorado Bank endorsed the check and made deposit to the Lessors' credit in the El Dorado Bank, and so notified the Lessees on March 1, 1951, *who again failed to detect any mistake.*

c) On March 15, 1951, (seven days after the delay rental was due) Lessors were informed by the Magnolia Bank that no delay rental had been deposited to the Lessors' credit; and, thereupon, Lessors demanded of Lessees that the lease be cancelled of record.

d) The Lessees even then insisted that the delay rental had been paid on time, and it was not until March 27, 1951, that they, after having ascertained the mistake, sent the $200 delay rental to the Magnolia Bank. The Lessors refused to accept the rental at such a late date, and filed this suit for cancellation, on April 2, 1951.

As aforesaid, the Chancery Court cancelled the lease, and the Lessees have appealed. At the outset, it is well that we review some of our cases, each involving an "unless" lease similar in essential respects to the one in this case, because our prior cases have become a rule of property.

In *Epperson* v. *Helbron,* 145 Ark. 566, 225 S. W. 345, 15 A. L. R. 597, the basic question was the time when the delay rental was required to be paid, and we said:

"Under a lease of this kind the lessee, so long as he pays the rentals in the manner provided, has an option to continue the lease in force to the end of the term. The lessee may also terminate the lease at will by a mere failure to pay the stipulated rent at the time due. The lessor has no right to terminate the lease as long as the lessee complies with its terms, but he may declare a forfeiture if the lessee fails to pay the annual rental when due. . . .

"Hence we think that time is of the essence of the contract. It was contemplated that the lessee should do the affirmative act of paying the annual rental in advance in order to prevent the lease from being declared forfeited by the lessor."

In *Harrell* v. *Saline Oil & Gas Co.,* 153 Ark. 104, 239 S. W. 731, the delay rental was due January 19th: it was not tendered until January 29th. In holding the lease cancelled for nonpayment of rental on the due date, we said:

"We have decided that the time specified for performance in a contract similar to the one now under consideration is of the essence of the contract. *Epperson* v. *Helbron,* 145 Ark. 566, 225 S. W. 345, 15 A. L. R. 597. * * *.

"According to the great weight of authority, notice of forfeiture is not necessary under a contract similar or identical with the one now under consideration, in order to terminate the contract. The authorities on the subject are to the effect that where the parties state that the contract shall be terminated unless certain acts are performed within a certain time, the contract comes to an end without further action unless notice is provided in the contract itself."

The *Epperson-Helbron* case was decided by this Court on November 1, 1920, and the *Harrell-Saline* case was decided on April 10, 1922. The Arkansas Legislature of 1921 enacted Act 192, designed to aid a landowner in having cancelled of record a lease that had expired. Then the 1923 Legislature, by Act 170, amended the 1921 Act and definitely recognized that when the land was not developed and the delay rental not paid, the landowner had a right to have the lease cancelled of record. Section 3 of Act 170 of 1923 is now § 53-314 Ark. Stats., and uses language, which reflects the rule of property established by the *Epperson-Helbron* and *Harrell-Saline* cases, to-wit:

"If any installment of rental due under any such lease is not paid when due according to the terms of the original lease, thus causing a forfeiture and termination of the lease, the then owner of the fee," etc. etc. etc.

So from these cases and Legislative enactment, we point out that the holding, that the lease terminated upon failure of the lessee to make prompt payment of delay rental, has become a rule of property in this state; and our adjudicated cases, along with a majority of those from the other oil producing states, provide the foundation for the textual statement found in Summers on Oil & Gas, Permanent Edition, Sec. 452:

"But where the 'unless' drilling clause is used a failure of the lessee to drill or pay a stipulated sum of money *ipso facto* terminates the lease without the necessity of re-entry, action, or their equivalents by the lessor. . . . The lease of the 'unless' type provides that the

lessee's privilege shall terminate unless he drills or pays at a certain time. Or, putting it another way, the lease continues as long as he pays the stipulated sums of money, limited, of course, by the length of the definite term. . . ."

Appellants argue that "equity abhors a forfeiture" and that the equity court should relieve the Lessees against the forfeiture in this case. But the record shows (a) that the Lessees made the mistakes, (b) the Lessors made no mistakes, and (c) the Lessors did nothing to mislead the Lessees. It is true that (a) we have refused cancellation in a case in which a lessor received and retained the delay rental tendered after due date (see *Cordell* v. *Enis,* 162 Ark. 41, 257 S. W. 375), and (b) we have refused cancellation in a case wherein the lessee was anxious to pay, but the mineral ownership was in dispute and the confusion arose through fault of the lessor. See *Kouns* v. *Southwood Oil Company,* 203 Ark. 469, 158 S. W. 2d 37.[1] But these cases only emphasize the rule that where the lessee is at fault and the lessor does nothing to mislead him, and refuses to accept the delay rental, then cancellation must follow. In 5 A. L. R. 2d 993, there is an annotation entitled:

"Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time."

A careful study of that annotation confirms us in our holding in the case at bar.

In our early case of *Epperson* v. *Helbron, (supra),* we discussed this matter of forfeiture in this language:

"It is true that, in general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee under a lease for exploring for oil and gas. The reason is that a small tract of land could be nearly or entirely drained by wells on adjoining lands, and it is common that leases contain cove-

[1] Even in the *Kouns-Southwood* case, we were careful to recognize the general rule in this language: "It is our view that a failure to pay the rentals within apt time in accordance with the terms of the leases, would operate to forfeit the leases . . ."

nants for diligent operation and for forfeiture in case of suspension."

Oil and gas are such fugitive substances, that the rule has grown up that equity demands of the lessee strict compliance, and favors "forfeiture" in order to accomplish justice for the lessor. Summers on Oil & Gas, in § 437, states the holding:

"It will likewise be found that it is in cases where leases have terminated automatically under the express limitations of the 'unless' drilling clause or the *habendum* clause, or where cancellation of the lease is sought on grounds of inadequacy of legal remedy or abandonment of the lease by the lessee, the courts are most emphatic in their statements that equity favors the forfeiture of oil and gas leases."

The case at bar is vastly different from that of *Griffin* v. *J. E. Spear Lumber Co.*, 219 Ark. 1, 239 S. W. 2d 587. That was a timber case, and the trial court found that the extension money was actually mailed at the correct time. Here, the fault was that of the Lessees in sending the check to the wrong bank, and there was no fault, or waiver, by the Lessors. Equity should not, under the guise of "abhorring a forfeiture," essay to step in and create a new contract for the parties. If the lease requirement to deposit money in the First National Bank of Magnolia could be satisfied by depositing the money in the First National Bank of El Dorado, then the requirement, of deposit, could, by the same token, be fulfilled by depositing the money in Dallas, Chicago, or New York. The result would be that after the delay rental became due, the lessor would have to notify the lessee and then wait to see if the latter claimed a deposit to have been made anywhere. In the meantime, oil development might abate and the landowner might suffer complete loss while the lessee gambled on Court action, on the theory that "equity abhors a forfeiture." We conclude that equity is best served by requiring oil and gas lessees to live up to their contracts.

The Chancery Court clearly followed our cases and statutes which have become a rule of property. Affirmed.

GRIFFIN SMITH, C. J., dissents.