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FARMERS UNION MUTUAL INSURANCE COMPANY *v.* WYMAN.

4-9860 251 S. W. 2d 819

Opinion delivered October 20, 1952.

Charles A. Wade, for appellant.

Etheridge & Sawyer, for appellee.

WARD, J. The two principal questions involved in this appeal are: Did appellant waive (a) the formal issuance of a vacancy permit, and (b) the filing of a formal proof of loss by appellee? These questions arise out of the fact situation set out below.

On October 30, 1950, appellant issued, on application obtained through its local agent, a fire insurance

policy to appellee. On May 10, 1951, the property was destroyed by fire about two months after appellee had vacated the premises without securing a written permit as provided in the policy. Appellee also failed to render to appellant a signed and verified proof of loss within 30 days [or at any time] as was required by the insurance policy.

(a)

In our opinion appellant waived the issuance of the vacancy permit. This question was submitted to the jury under proper instructions and we think the record shows substantial evidence to support the jury's verdict in favor of appellee. About the time appellee vacated the premises because of his wife's illness, he sent word to appellant's local agent that he was vacating, and later he talked to the agent who told him that he had notified the home office and that the home office gave its approval. Also, the local agent stated he did notify the home office and so informed appellee, and that he "presumed it [the permit] would be mailed to him" [appellee]." This action on the part of appellant's agent was certainly calculated to lead appellee to believe appellant had either issued the permit or had waived issuing it.

The conclusion above reached is in accord with our recent holding in the case of *Washington County Farmers Mutual Fire Insurance Company* v. *Reed,* 218 Ark. 522, 237 S. W. 2d 888. A similar question was raised and discussed in *National Surety Company of N. Y.* v. *Fox,* 174 Ark. 827, 296 S. W. 718, 54 A. L. R. 458, where the court, at page 833 made this statement:

"At any rate, the plaintiff swears that he notified the agent, and the agent does not dispute it, and the insurance company could not declare a forfeiture under such circumstances."

(b)

Very much the same situation exists in regard to the proof of loss. After the fire occurred appellant's assistant manager and adjuster, being informed of the

fire, visited appellee and discussed the loss. He took a list and valuation of the articles claimed to be destroyed or damaged, and questioned appellee about how much stuff he had moved and how much was left, etc. Appellee says they agreed on part of the loss, and the adjuster said he would consider part of it a total loss. Appellee also stated this was the same procedure they followed when another loss by fire was adjusted several months before. One difference, it appears, was that formerly appellee had signed something whereas this time he did not, but he was not asked to sign anything. Appellee admits the adjuster did not say he would pay him, but states that he did say he would make a report and that appellee would hear from the company [appellant] in a few days. All this constituted substantial evidence to support the jury's finding that appellant waived formal proof of loss.

If an agent pretends to have authority to make an adjustment the insured has a right to rely on it. See *Citizens Fire Insurance Co.* v. *Lord,* 100 Ark. 212, 139 S. W. 1114. In *German Insurance Co.* v. *Gibson,* 53 Ark. 494, 14 S. W. 672, the court, at page 500, said:

"In this case an adjuster was sent to the place where the dwelling was burned to adjust the loss of plaintiff. He was thereby vested with authority to ascertain the nature, cause and extent of the loss, and to agree with Gibson as to the amount that should be paid as an indemnity for the same."

Then the court, after detailing more facts, said:

"Under this state of facts the company was bound by the knowledge of the agent. . . ."

Also, it has been generally and uniformly held by our Court that forfeitures, such as here claimed by appellant, are not favored. This rule is well stated in *National Surety Company of N. Y.* v. *Fox, supra,* which quotes with approval from *German Insurance Company* v. *Gibson, supra,* as follows:

"Forfeitures are not favored in law, and any agreement, declaration or course of action on the part of an

insurance company which leads the insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the insurance company from insisting upon the forfeiture."

The above rule, consistently followed by this Court, was recently reaffirmed in *Washington County Farmers Mutual Fire Insurance Company* v. *Reed, supra.* Perhaps the strongest expression of aversion to forfeitures by this Court is found in *American Life Association* v. *Vaden,* 164 Ark. 75, 261 S. W. 320, where the Court, at page 88, approved the following language:

". . . waiver of a forfeiture, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture."

There is another point raised by appellant. It is contended that appellee can not take advantage of a waiver on the part of appellant because appellee did not plead it in his reply. The answer to this contention is that appellee was permitted to introduce evidence of a waiver without objections being made and saved. This being the case, the pleadings will be treated as amended. This is in accord with a well-established rule of this Court, announced in the early case of *Hanks* v. *Harris,* 29 Ark. 323, and reaffirmed in *Healey* v. *Conner,* 40 Ark. 352; *Sorrels* v. *Self,* 43 Ark. 451. The first headnote in the last citation reads:

"If a plaintiff fails to demur to an answer defectively stating a good defence, and the testimony which is admitted without objection, shows a good defence, the answer will be regarded as amended to correspond with it. And where there is no bill of exceptions this court will, in support of a judgment below, presume that the defects in the answer were cured by the proof at the trial."

For the reasons above set out, the cause is affirmed.

LION OIL COMPANY *v.* REEVES.

4-9756 254 S. W. 2d 450

Opinion delivered April 21, 1952.

Davis & Allen, for appellant.

Shackleford & Shackleford and *S. Hubert Mayes,* for appellee.

GRIFFIN SMITH, Chief Justice. R. L. Reeves, who for many years had been a Lion Oil Company employe, was injured February 11, 1949. His claim for permanent partial impairment of the left hand to the extent of 75% was admittedly compensable under the Workmen's Compensation Law. The appeal does not involve Reeves' right to payment during the healing period terminating January 9, 1950, while he was unemployed.

It is agreed that Reeves' weekly wage when he became incapacitated, computed under the formula supplied by the compensation law, was $56.80; hence the disabled worker was entitled to the maximum allowable of $25 per week, Ark. Stat's, § 81-1310(a).

But Lion Oil Company's policy was to pay its employes during temporary disability of the kind involved, and the amount so paid is measured by the wage or salary existing when the misfortune occurs, plus any increase applicable to the group of employes to which the particular worker belongs.

A class increase granted during Reeves' period of disability raised his weekly income from $56.80 to $70.13. The healing period continued for 47 2/7 weeks. During that time Reeves was paid an average of $60.22 per week, $35.22 of which was in the nature of a courtesy grant: that is, it exceeded the compensation requirement of $25 by the sum mentioned. This excess payment of $35.22, multiplied by the weeks and the fraction taken for healing, amounted to $1,665.06.

The Commission found that under § 13(c) of Initiated Act No. 4 of 1948, Ark. Stat's, § 81-1313, the employe should be paid for a specific injury, and that such payments must continue after healing until a maximum of 150 weeks had been accounted for. However, since the degree of impairment was but 75%, the top allowable of $25 per week would be three-fourths of 150 weeks (112½) multiplied by the monetary factor, or $2,812.50. These figures would not be disputed if the Commission's construction is correct. The oil company does not contend that additional payments may not become due at a later date. On the contrary it takes the position that, because Reeves' income during the healing period and at all times since has been greater than any weekly sum legally allowable by the Commission, nothing more in the nature of compensation can be awarded until the claimant's wages fall below $25 per week. *Sallee Brothers* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956; *Conatser* v. *D. W. Hoskins Truck Service,* 210 Ark. 141, 194 S. W. 2d 680.

In addition to its finding that the specific injury was compensable *per se,* the Commission concluded that when the oil company made the supplementary weekly payments of $35.22 a gratuity was intended; but, regardless of what the motivation was, this total of $1,665.06 could not be allowed as partial offset against the award of $2,812.50.

On appeal to circuit court the Commission's finding that the injury was compensable specifically was upheld, but its refusal to permit the oil company to take credit for the $35.22 paid weekly as supplement during the healing period was reversed.

In the Sallee Bros.-Thompson case the Commission ruled that a claimant was entitled to compensation upon a showing that he had sustained a permanent partial disability to his body as a whole, even though the worker may be employed at a higher wage than was paid before the injury, "if he can show that as a result of the injury he is forced to compete in the open labor market as a handicapped worker." This Court reversed, but in doing so we were construing the Act of 1939.

Section 81-1313(c-23), considered in the Sallee appeal, referred to "all other cases"—being those cases not enumerated in the preceding subsections. This non-specified class of disability was compensable at 65% of the difference between the worker's average weekly wage "and his earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability," etc.

In the Initiated Act "other cases" are treated in § 81-1313(d) and the language is: "A permanent partial disability not scheduled in subsection (*c*) hereof shall be apportioned to the body as a whole, which shall have a value of 450 weeks, and there shall be paid compensation to the injured employe for the proportionate loss of use of the body as a whole resulting from the injury." The words, "and his earning capacity thereafter in the same employment or otherwise" have not been brought forward in the new measure.

Divisions (21) and (22) of subsection (c) treat total loss of use of enumerated parts of the body, and (22) deals with partial loss or partial loss of use. For permanent partial impairment of a member, the compensation provided is for the "proportionate loss or loss of use of the member."

In view of the change in language found in the Initiated Act, and in obedience to the universal policy of courts to construe compensation measures in a manner reasonably calculated to effectuate the legislative intent (or, as in the case of an initiated amendment, to carry out the presumptive intention of those who framed the measure and the people who adopted it), we are unable to say that the Commission was in error when it determined that payment for permanent partial disability in the circumstances of this case was not the plan, and that compensation must be made whether the subject is employed or unemployed, and this is true irrespective of what his wages may be. The Circuit Court correctly affirmed this phase of the appeal.

We have not overlooked appellant's contention that the new law, subdivision (*e*) of § 81-1302, defines disability as "incapacity because of injury to earn, in the same or any other employment, the wages which the employe was receiving at the time of the injury." It is quite likely that when the initiated measure was written its framers had in mind the Commission's expression that a worker who had sustained partial permanent disability "was forced to compete in the open market as a handicapped worker." In any event the amendment should be considered as a whole.

On the second issue we agree with the Circuit Court in its holding that payments by the oil company in excess of $25 per week should in the circumstances of this case, be credited against the full award.

Section 81-1319(*m*) is: "If the employer has made advance payments of compensation he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. If the injured employee shall receive full wages during disability he shall not be entitled to compensation during such period." The old Act § 81-1319(*k*), begins like the current measure, but the second sentence reads: "If the injured employe receives wages during disability, the amount of such wages shall be deducted," etc. Difference is that the Act of 1939 said

"wages," while the current measure speaks of "full wages." Otherwise the two provisions are in effect the same.

Reeves' attorneys maintain that the supplemental weekly payments, being $25 short of "full wages," could in no sense come within the protection of subdivision (*m*) —this for the reason that the added sums of $35.22 were not advance payments on compensation; (2) the claimant was entitled to statutory benefits during the healing period because full wages were not being paid.

No controversy involving this carefully argued distinction has been before us and construction is necessarily a matter of first impression.

Lion Oil Company is a self-insurer. Its policy to pay an injured employe the prevailing wage scale while inactive during a healing period is in line with modern conceptions of employer-employe relationships. A corporation that is shown to have pioneered or willingly adopted this practice should be commended and encouraged rather than penalized.

This is the first case construing the initiated measure in a way permitting specific compensation to workers who have suffered permanent partial disability, and holding that earning capacity equal to or in excess of statutory payments does not suspend the employer's obligation to pay. Perhaps the oil company could have protected itself within the letter of the law by paying full wages and allowing compulsory compensation to await Commission determination. But seemingly neither party had in mind the peculiar words of the statute. The transaction was being dealt with in a practical, common sense manner. Our feeling is that in the absence of judicial construction the mutual interests of Reeves and Lion Oil Company were being satisfactorily served when payments aggregating "full wages" were made, and that neither party at that time had the slightest idea any advantage would be asserted. It is highly improbable that Reeves thought the excess payments he received were gratuities, and certainly the oil company was endeavoring to provide for the worker's current needs.

The judgment of the Circuit Court is affirmed.

Mr. Justice McFaddin, Mr. Justice Millwee, and Mr. Justice George Rose Smith agree to that part of the opinion holding that the claimant was entitled to compensation for a specific permanent partial disability, but they dissent from the finding that credit should be allowed Lion Oil Company for the excess payments, their position being that the Commission correctly held that these were gratuities.

Raney *v.* Gunn.

4-9805 253 S. W. 2d 559

Opinion delivered June 23, 1952.

Arthur Sneed, for appellant.

E. G. Ward, for appellee.

Griffin Smith, Chief Justice. Plaintiffs and defendants each own eighty acres, forty having a common boundary. A road, constructed over half a century ago, entered defendants' property from a country road on defendants' south boundary describing an arc across defendants' property and passing a dwelling on plaintiffs' land.

In August, 1951, defendants closed gates on the road and attempted to extinguish it. Plaintiffs sought injunctive relief as members of the public entitled to benefits of prescriptive right to the road. The Chancellor denied the petition, finding that the public had abandoned.

Appellants contend that Act 666, 1923, (Ark. Stat's 37-109, 110) prevents private control or possession of a public thoroughfare from ripening into title.

Witnesses testified that the road had been in public use prior to 1926, for an indeterminate period. At that time defendants' property was owned by a predecessor.

There was evidence that the road was laid out more than 62 years ago, and that it was formerly used as a mail route.

In 1928 two gates were erected on the portion of the road crossing defendants' land. These were maintained by defendants or their predecessors. The wife of a former owner,—an owner who erected the gates—testified that they were built to exclude stock from a pasture. Plaintiff likewise testified that the gates were used for the purpose of keeping cattle and stock from "mixing up."

There is no dispute that the gates have been maintained since 1928 and that they restricted the hitherto permissive right of the public to use the road. The question is whether Act 666 made it legally impossible for the prescriptive right to be lost by abandonment.

Our decisions adhere to the view that such rights can be lost by non-use, and that the owner of the fee may reënter and acquire the fee after lapse of the statutory period for adverse possession. Whether this rule is changed, in circumstances here present, by Act 666, is the issue. This Act has not been construed.

Appellant argues that abandonment, if present here, resulted in nothing but adverse possession by defendants, which under Act 666 could not effect a reinvestiture of title.

It should be noted that Act 666 prevents acquisition of title to a public thoroughfare by adverse occupancy. Being in derogation of the common-law rule, a strict construction is required. Applying this exactitude of construction, we are not able to say it was the intention of the General Assembly to prevent title to an abandoned

thoroughfare, created by prescription, from reverting to the owner of the fee after lapse of the statutory period.

The public's use of this road was based on its passage over the property, not by dedication through a governmental or quasi-governmental agency. When the landowner restricted such use by erecting gates in 1928 and maintaining them subsequently, members of the general public ceased to use the road. This constituted an abandonment. Appellees' rights were not dependent upon affirmatively establishing adverse possession. Instead, appellants had the burden of proving that a prescriptive right to use the road still existed, and they failed.

Appellants urge that presence of the gates was not evidence of public abandonment, but was rather an invitation to the public to use the road with an implied understanding that the gates would be closed.

After the gates were erected public use of the road became permissive. Prescription ceased and no move was made to preserve it. Acquiescence became abandonment and the public right expired.

Affirmed.

ED. F. MCFADDIN, Justice (dissenting). My dissent is because I am unable to find any way to keep from applying Act No. 666 of 1923. That Act was captioned: "An Act to Prohibit the Acquiring of Public Property by Adverse Possession, and for Other Purposes"; and, as now found in § 37-109, *et seq.*, Ark. Stats., reads in part:

"Hereafter no title or right of possession to any public thoroughfare, road, highway or public park, or any portion thereof, shall or can be acquired by adverse possession or adverse occupancy thereof, and the right of the public or of the proper authorities of any county to open or have opened any such public thoroughfare, road, highway or park, or parts thereof, shall not be defeated in any action or proceeding by reason of or because of adverse possession or adverse occupancy of any such public thoroughfare, road, highway or park, or

any portion thereof, where such adverse possession or occupancy commenced or began after the passage of this act."

Apparently this Act has been overlooked until the present time. Certainly it was not referred to in any of the following cases: *Stoker* v. *Gross,* 216 Ark. 939, 228 S. W. 2d 638; *Kennedy* v. *Crouse,* 214 Ark. 830, 218 S. W. 2d 375; *Mount* v. *Dillon,* 200 Ark. 153, 138 S. W. 2d 59, and *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393. Yet the plain language of the Act—as I read it—says that when a road has become a public road, its public nature cannot be lost by adverse possession or adverse occupancy. In the case at bar, the trial court held that the road in question was a public road in 1926 and that it was not until 1928 that gates were first placed across the road. Under said Act No. 666 of 1923, the only way a public road can cease to be a public road is by something other than mere abandonment or adverse possession.

Act No. 666 of 1923 is strikingly similar to Act No. 426 of 1907, as now found in § 19-3831, Ark. Stats., which relates to streets in cities and towns. Prior to the said Act No. 426 of 1907, this Court held, in *El Dorado* v. *Ritchie,* 84 Ark. 52, 104 S. W. 549, that there could be adverse possession of a street in an incorporated town. To overcome that holding, the Legislature passed Act No. 426 of 1907; and in *Madison* v. *Bond,* 133 Ark. 527, 202 S. W. 721, this Court recognized that if the street had been an open street in 1907, then it remained an open street.

In the case at bar, the road here involved was an open road in 1926 and there was no attempt to close it until 1928. I think it still remains an open road, and that the way to close a public road is by order of the County Court, as contained in § 76-918, *et seq.,* Ark. Stats. I regard it as unfortunate that Act No. 666 of 1923 was not called to the attention of the Court in earlier cases, but I cannot "get around" the plain wording of the Act; and, to me, it means once a public road, always a public road, until closed by proper order.

Therefore, I respectfully dissent from the majority holding.

4695 251 S. W. 2d 1021

Opinion delivered October 13, 1952.

Rehearing denied November 27, 1952.

[redacted]

Ted Goldman, for appellant.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellants Grigson and Gibson, two white men, were jointly charged and tried for the homicide of Emma Williams. Both men were

convicted of second degree murder, and each filed his separate motion for new trial.

The evidence established that Emma Williams was a Negro woman, 75 or 80 years of age. She lived in one room of a two-room hovel, the other room being occupied by another Negro woman, with the door locked between the two rooms. There were no windows in Emma's room, and only a door to the outside provided light and air. Emma's room was dark and littered with trash and otherwise indescribably filthy. On the afternoon of *Monday, December 10,* 1951, Grigson and Gibson were drinking together and going from place to place in Gibson's truck. About eight o'clock that night, they parked the truck one-half block from Emma's room. The door of Emma's room remained open all day Tuesday, December 11th, but no one investigated. On the morning of *Wednesday, December 12,* inquiring persons found Emma's body in her room. She had been severely beaten, and medical evidence established that her death resulted from the beating. The State insisted that Gibson and Grigson went to Emma's room Monday night and killed her.

I. *The Case Against Gibson.* It is clearly shown that he went to Emma's room Monday night and left it early Tuesday morning, with only a coat around him. Most of his clothes, and some of them bloody, were later found in Emma's room. He admitted leaving Emma's room Tuesday morning in a semi-nude condition, and admitted that he saw her body in the room before he left. All these facts, with others in the record, clearly made a jury question as to Gibson's guilt. His defense of intoxication and mental "blackout" were matters for the jury.

The Court told the jury that if it found the defendant guilty, and could not agree on the punishment, then the Court would fix the punishment. This instruction was correct. See *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304; *Knighten* v. *State,* 210 Ark. 248, 195 S. W. 2d 47. We have carefully examined all of the twelve assignments in Gibson's motion for new trial, and find them without merit, so Gibson's conviction is **affirmed.**

II. *The Case Against Grigson.* Grigson has nineteen assignments in his motion for new trial, and many of them are different from those contained in Gibson's motion, but we find it necessary on this appeal to consider only the assignments relating to the sufficiency of the evidence to take the case to the jury as against Grigson. He did not testify in the Circuit Court. Those who heard his testimony in the examining court told the trial jury of his statements in the examining Court. Here is Officer Tackett's testimony as to what Grigson said in the examining court:

"Mr. Grigson said that they first went to Red's house and called him but he couldn't get in; that they went then down to Emma Williams' house and that Gibson went inside and that he went down and bought a bottle of wine and then he brought this bottle of wine back and gave it to Gibson and that he went back and bought a second bottle of wine and came back and gave that to Gibson and upon one of these trips he went to a restaurant in Sand Flat and got two sandwiches. I believe he said that he got there at Emma Williams' house at about eight-thirty and that he left in the early part of the night, some time around eleven o'clock. I don't believe Mr. Grigson ever stated he went inside the house at any time. 'Q. Now do you recall if he testified who was there at the time he said he left at Emma Williams' house? A. Mr. Gibson and Emma Williams.' "

No witness testified that Grigson ever entered Emma Williams' room. His witnesses testified that he reached his home not later than 11:30 Monday night, and his movements from then until the time of his arrest were carefully detailed. Willie B. Ray, a witness for the State, testified that she lived less than twenty feet away from Emma's room, and that she heard screams from Emma's room about nine o'clock Monday night. This is the witness' testimony:

"It was about nine o'clock at night and then I went to bed and at eleven o'clock I heard screaming again, and I got up and went to the door and I asked 'Emma, is

anyone bothering you', and I didn't hear anything and I went back to bed and about twelve o'clock I heard the same noise and I asked was anyone bothering her and I didn't hear anything, and then I heard a voice—a man—say 'get up and put on your shoes, we may be in Kansas City for all we know', and then I heard vomiting and a woman groan and I went back to bed."

The fact that Grigson reached home not later than 11:30 Monday night, was not denied by the State. The testimony of the State's witness, Willie B. Ray, was to the effect that Emma was alive and screaming at *midnight,* which was thirty minutes after Grigson was at home. The evidence, tending to show that Grigson ever entered Emma's room, was entirely circumstantial and mostly speculative.

In *Trotter* v. *State,* 189 Ark. 1117, 76 S. W. 2d 102, Kleir had killed a man. Trotter was indicted on the theory that he and Kleir had conspired to commit robbery and then Kleir committed murder in the act of robbery, and that Trotter was guilty, although not present at the time of the murder. Trotter was convicted and appealed to this Court. Judge BUTLER reviewed the evidence in detail and said it was not substantial. The conviction was reversed and the cause was remanded.

In *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936, the defendant was convicted of first degree murder. On appeal, this Court reviewed the evidence at considerable length, and said:

"We conclude that the testimony adduced was not sufficient to establish the guilt of appellant with the certainty that the law requires in cases of this kind. We cannot say that the circumstances shown could not be reasonably explained except upon the hypothesis of appellant's guilt. . . . The judgment of the lower court is, therefore, reversed and the cause remanded for a new trial."

In *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, the defendants were convicted of grand larceny and on appeal the sole question was sufficiency of the evidence to

sustain the conviction. Judge FRAUENTHAL, speaking for this Court, reviewed the evidence and held it insufficient, and said:

"It may be that these defendants are guilty of this crime, but, after a careful examination of all the evidence adduced upon the trial and after drawing from it every inference that is rightfully deducible therefrom, we do not think that it was sufficient to warrant the defendants' conviction of this crime. *France* v. *State,* 68 Ark. 529, 60 S. W. 236. It may be that on future trial additional evidence may be introduced showing their guilt. The evidence that was introduced upon the trial below we think too slight to justify a conviction."

In each of the three cases just cited, this Court reversed the conviction because of the insufficiency of the evidence, and remanded the case for a new trial. Under § 27-2144, the Supreme Court may make such disposition of a case "as it may in its discretion deem just . . .": so in some criminal cases, when this Court, from a study of the record, has concluded that the case has not been fully developed and that stronger evidence can be obtained on a new trial, this Court has remanded the case for such new trial, even though the sole ground of reversal was the insufficiency of the evidence. Such is the situation in the case at bar. It is admitted that there was a transcript of the defendant's testimony in the examining trial and it is stated that this transcript contained many damaging statements. Furthermore, the defendant in his brief, now asks us to give him the opportunity to testify. In view of these matters, we believe this case should be remanded for a new trial. The other assignments in the motion for new trial need not now be discussed, because, as to Grigson, the judgment is reversed and the cause remanded for a new trial.

Opinion delivered October 20, 1952.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a judgment finding the defendant guilty of rape and fixing his punishment at life in the penitentiary.

The details are too sordid and revolting to warrant extended comment. It is sufficient to say that there was substantial evidence to sustain the jury's verdict, challenged in the motion for a new trial.

Other matters raised by the motion were: (a) The court erred in permitting the sheriff to select bystanders for service on the jury after the regular panel had been exhausted; Ark. Stat's, § 39-220. (b) Instructions 1 and 2 given at the State's request were erroneous; (c) the defendant's requested instructions Nos. 2, 5, and 6 should have been given.

The objection relating to selection of the jury is not properly before us. The record does not disclose the irregularities complained of, hence there is a presumption the law was followed. Certainly an objection was a prerequisite to this court's duty of review. *Burrow* v. *State,* 177 Ark. 1121, 7 S. W. 2d 28.

The defendant has not filed a brief, therefore his grounds for objecting to instructions given or refused

must be deduced from the motion for a new trial. Again we are met with the defendant's failure to object to some of the instructions as given or as modified, and in making only a general objection in other instances. General objections reach only inherently erroneous matters.

The defendant sought to have the jury instructed that a verdict of guilty would not be proper unless the assaulted female failed to resist or make an outcry through fear of death. As modified the instruction was that fear of great bodily harm was sufficient. Such an instruction has long been approved. *Boyd* v. *State,* 207 Ark. 830, 182 S. W. 2d 937.

No error brought to the court's attention by the record is disclosed and the judgment must be affirmed.

HAILEY *v.* CARTER.

Series 5-4 251 S. W. 2d 826

Opinion delivered October 20, 1952.

H. G. Leathers, for appellant.

Festus O. Butt, for appellee.

ED. F. MCFADDIN, Justice. This appeal concerns the legal sufficiency of an attempted initiated county measure.

Appellants Hailey, *et al.,* filed in the County Clerk's office on August 15, 1952, a petition for a proposed initiated act to be submitted to the electors of all of Carroll County at the General Election in November, 1952. The nature and purpose of this proposed act will be subsequently discussed. On August 20, 1952, the County Clerk approved the sufficiency of the appellants' petition and notified the election commissioners to place the question on the ballot. Thereafter, on September 2, 1952, appellees filed suit in the Carroll Chancery Court (Eastern District) to review the action of the County Clerk and to prohibit the proposed initiated measure from being placed on the ballot. Appellants appeared in the Chancery Court and demurred to the petition. On September 22, 1952, the Chancery Court granted the appellees' petition and declared void all actions of the County Clerk in regard to the initiated petition. From that decree appellants bring this appeal; and because the time element makes a decision urgent, we have advanced the case and both sides have cooperated for an early decision on the two questions here argued.

I. *Sufficiency of Notice in the Lower Court.* Appellants claim that they did not have sufficient notice of the hearing in the lower court; but we reject that contention. Notice of the hearing of September 9th was served on the County Clerk on September 2nd, and he immediately notified the appellants of the hearing. They appeared in the Chancery Court on September 9th and filed a demurrer; and the Court then gave them until

September 22nd to present the case. Under these facts, we hold that all questions have been waived as to the sufficiency of the notice.

II. *Sufficiency of the Initiated Petition.* By Act No. 74 of 1883, the Legislature of Arkansas divided Carroll County into two judicial districts called the Eastern District and the Western District, and the Act made the provisions usually found in such acts as to holding of court, keeping of records, etc. etc. The desire of the appellants is to repeal this Act and have only one county seat in Carroll County. The petition which they filed with the County Clerk—omitting only signatures and verification—was as follows:

"INITIATED ACT No. 1 OF CARROLL COUNTY
TO BE VOTED UPON AT THE GENERAL ELECTION

NOVEMBER 4, 1952

BALLOT TITLE

"An Act to Consolidate the Two Judicial Districts of Carroll County, Arkansas, by Abolishment of the Western District Thereof and by Transferring All County Business and Affairs Now Authorized and Conducted and Carried on at Eureka Springs in Said Western District to the County Seat at Berryville.

"Proposed Initiated Act No. 1 (Initiated by Petition of the People)

"For Repeal of Original Act Establishing the Court—Act 74 of 1883 Legislature

"A General County Act

For Initiated Act No. 1:

Against Initiated Act No. 1:

"An Act to abolish the Western District of Carroll County and remove all records thereof from Eureka Springs to Berryville, the County Seat.

"And by this, our petition, we order that the same be submitted to the people of said Carroll County to the

end that the same may be adopted or rejected by a vote of the legal voters of said county at the regular general election to be held in said county on the 4th day of November, 1952; and each of us for himself says: I have personally signed this petition; I am a legal voter of said Carroll County, Arkansas, and my residence, post office address and voting precinct are correctly written after my name."

We emphasize that this was the entire petition, as well as the entire proposed initiated act. It will be observed that there was no enacting clause anywhere in this petition, and this is not only the petition but is also the proposed law.

Section 5[1] of Amendment No. 7 to the Arkansas Constitution makes a county a legislative unit as to initiative powers, and provides:

"General laws shall be enacted providing for the exercise of the initiative and referendum as to counties." Under that constitutional mandate, the Legislature enacted Act No. 4 of 1935, as now found in § 2-301, *et seq.* Ark. Stats.; and that Act provides, in § 2-311 Ark. Stats., for the chancery review here involved, so the Chancery Court had the authority to review the action of the County Clerk in sustaining the sufficiency of the petition.

Was the petition legally sufficient? We must answer that question in the negative just as the Chancery Court so answered, and for the same reason as given by the Chancery Court.

Section 21 of said Constitution Amendment No. 7, says:

"Enacting Clause—The style of all the bills initiated and submitted under the provisions of this section shall be, 'Be It Enacted by the People of the State of Arkansas' (municipality, or county as the case may be.) . . ." This constitutional requirement, that the measure sought

[1] In the dissenting opinion to *Dixon* v. *Hall*, 210 Ark. 891, 198 S. W. 2d 1002, there was an identifying of the paragraphs of Amendment No. 7 by assigning section numbers to such paragraphs. We use in the present opinion the said section numbers.

to be initiated shall have an enacting clause, is mandatory. There is absolutely no enacting clause in the measure here involved; and therefore, the petition is not legally sufficient. The absence of the enacting clause [2] is a fatal defect; and the decree of the Chancery Court so holding is in all things affirmed.

III. *Reserved Questions.* We think it not amiss to mention two matters:

(1) That by this opinion we are not holding that a county initiated act can repeal an act of the Legislature fixing places for holding court in the affected county.

(2) That by this opinion we are not holding that a county initiated act such as was here attempted is the proper procedure in a case like this one. It may be that the county courthouse removal statute (as contained in §§ 17-201 *et seq.*, Ark. Stats.) prescribes the applicable procedure. These two points are not argued in the case at bar. If either had been, it might have presented a serious question.

Affirmed.

Justices HOLT, WARD and ROBINSON concur.

HOLT, J., concurring. I concur in the result.

I think, however, that part: "III. Reserved Questions, . . . (1) and (2)," should be omitted from the opinion for the reason that it tends to becloud possible issues that were not presented or argued here. The language used, "These two points are not argued in the case at bar. If either had been, it might have presented a serious question," obviously suggests much doubt as to the right of the people of Carroll County (or any other county) to proceed under an initiated act that is in proper form or that meets all requirements. If the imaginary issues are so serious, then certainly in justice and fairness the people of Carroll County are entitled to have this court decide those issues now, in view of probable efforts of the electors of that county to consolidate the two county seats by an initiated act as they have attempted to do here.

[2] A bill passed by the Legislature is void if there is no enacting clause. See *Palmer* v. *State*, 137 Ark. 160, 208 S. W. 436.

4-9747 251 S. W. 2d 809

Opinion delivered October 20, 1952.

Edgar E. Bethell and *Fred M. Pickens,* for petitioner.

Ike Murry, Attorney General and *Cleveland Holland, W. R. Thrasher* and *Wm. M. Moorhead,* Assistant Attorneys General, for respondent.

GRIFFIN SMITH, Chief Justice. The litigation, necessitating a determination of controversial Act 242 of 1951, was begun when Ellis and Davidson filed an original proceeding in this court November 17, 1951, challenging sufficiency of the petition to refer. See *Ellis* v. *Hall, Secretary of State,* 219 Ark. 869, 245 S. W. 2d 223.

This is the first action reaching this court under Amendment No. 7 to the Constitution, involving a statewide petition, where nature of the issues and character of the proof reasonably necessary to an understanding of factual transactions clearly indicated from the inception that large expenditures for witness fees, court costs of a miscellaneous nature, compensation of a commis-

sioner should one be appointed, and items of like nature, would inevitably attach.

Unfortunately the probability of comprehensive litigation such as we have been dealing with did not occur to the General Assembly; or, if so, it did not make provision for the payment of costs. The inference deducible from Amendment No. 7 is that when counterpart petitions are filed with the Secretary of State containing in the aggregate names sufficient to set the State's machinery in motion, the question at issue is a public one and may not be controlled by the persons primarily interested in initiating or referring a measure. It therefore seems logical that the cost of litigation is removed from the realm of private interest and becomes an obligation of the State; and, as we have seen, the policy-making department has not provided an appropriation to meet such necessary expenses.

Faced with this dilemma the court had no recourse but to require the plaintiffs to execute a cost bond. Its sufficiency is conceded, but the plaintiffs have at all times contended that expenses necessary to the defendant's proof should not be taxed against the bond. The argument was not without persuasive phases and the court, when motions were made from time to time, was reluctant to enter a general order broad enough to permit the Attorney General as the State's counsel to indiscriminately incur obligations that the plaintiffs' bondsmen would have to pay, hence the trial did not proceed as expeditiously as would have been the case if unrestricted recourse to the bond had been authorized.

In an initial effort to minimize expenses, at least two members of the court voted that the judges sit in divisions or individually in relays as time permitted. The majority believed, and perhaps correctly, that routine appellate work would suffer if this method should be adopted. It was also pointed out that a constant shift in the presiding authority would interrupt continuity, since much that was heard would depend upon memory or written memoranda. The final consensus was that a commis-

sioner should be designated, invested with authority to conduct hearings, compel the attendance of witnesses, pass upon legal issues, and then report to the court. For this work Mr. Wayne Upton of the Little Rock bar was selected and it is a matter of gratification to the court that not a single complaint was made regarding his methods, nor have there been any informal suggestions that his official conduct has been other than that meeting the highest judicial test.

During the protracted period following announcement of procedural policy, numerous motions were filed directly with the court, and at times the Commissioner asked for directions. The subject-matter was sometimes thought by the judges to be of a nature not germane to the principal issue; or, if germane, of a kind that would be resolved without prejudice to either side if the litigants were permitted to proceed in the absence of specific detemination at that time. This course by the court may have prolonged the trial.

Before its summer adjournment July 7th an order was entered whereby the court could reconvene upon call of the Chief Justice during the recess period, but due to a misunderstanding (explained from the bench last Tuesday afternoon when the plaintiffs asked for judgment on the Commissioner's findings) this meeting was not held.

Some of the responsibility for not having the interim session rests upon the writer of this opinion; none is attributable to the other judges. It is obvious, however, that the litigation could not have been completed in time for judgment before certification of the ballot if the court had met.

The Commissioner's report, being tentative as to results and containing *prima facie* findings only, meant nothing more than that the evidence offered by plaintiffs showed the petition to be approximately 1,400 short of the required number of signers, *provided* the defendants could not reclaim an equal number from the more than 8,000 signatures *prima facie* invalid. When the plaintiffs rested June 19th the announcement was coupled with a

statement that the right was reserved, "if necessary," to take testimony out in the state, for [said the attorney] "We have about 3,800 names in addition to those that have been testified to here."

The Commissioner's report was filed September 29th.

Some of the members of the court believe that *Beene v. Hutto,* 192 Ark. 848, 96 S. W. 2d 485, is authority to enter an order at any time before the election finding that a measure to be voted upon is not properly on the ballot, hence a certificate by election commissioners that the measure had been adopted would be nugatory. In view of our conclusion that the issues cannot be determined before the election November 4th, it is not necessary to construe the Amendment or Judge MEHAFFY's opinion in the Beene case.

The result is that we are unwilling for a public matter to be withheld from the electorate on a *prima facie* showing alone, and since the remaining time is insufficient for completion of the proof the injunction is denied and the cause dismissed.

Mr. Upton is authorized to collect under the bond such sums as may be necessary to pay costs. The Commissioner's fee, being a similar charge, will be fixed by the court if the parties are unable to reach an agreement.

ED. F. MCFADDIN, Justice (concurring). I concur in the result reached in this case—i. e., that the litigation should be dismissed. But my reasons for such conclusion are far different from those contained in the opinion written by the Chief Justice; and I now state my reasons:

I urged this Court to dismiss this case on April 4, 1952. At the hearing on that day facts, generally known, were stated and admitted in open court: (a) it was conceded that State employees, while drawing salaries from the State for their time, spent weeks going over the State checking to see if the names on the referral petitions were genuine; and (b) one of the plaintiffs' attorneys stated: "The real style of this case should be 'The Governor of the State of Arkansas v. John F. Wells'."

Thus, on April 4th, it became a matter of record that this case was not being prosecuted as a bona fide suit by the taxpayers, Ellis and Davidson, to determine the number of genuine signatures on the referral petitions: rather this case was being prosecuted by the State's Chief Executive at the taxpayers' expense in an effort by one partisan group to smear another partisan group, and at the same time to get matters so arranged that some State purchases could be made without having to have any competitive bidding.

When the aforesaid admissions and declarations were made in open court, I reached the conclusion that this Court should not lend itself to any such campaign as was here attempted in the names of the plaintiffs. The Judicial Department should not allow itself to be used by the Executive Department in any such manner. I stated in open court on April 4th that it was evident to me that the case was not being prosecuted in the name of the real parties in interest, and that the case should be dismissed. I so voted at the consultation on April 4th; and I have all the time stood on that vote. Therefore I concur in the dismissal of this case.

WARD, J., dissenting. In dissenting to the majority opinion, I agree with and hereby adopt the dissenting opinion written by Judge ROBINSON, but feeling that his dissent did not go far enough, I herewith submit the following.

Every opinion by this court, of course, sets out the reasons upon which the decision rests, otherwise the opinion could not be evaluated. The underlying reason, as I understand it, why the majority dismissed plaintiffs' suit was that the case could not be fully developed. As I see it this could only mean that the defendant could not develop his side of the case because it is conceded plaintiffs did develop their side. I shall attempt to analyze some of the reasons, as best I can gather them from the majority opinion, given which prevented the defendant from having the opportunity to rebut the *prima facie* case made out by the plaintiffs. Before doing so and in view of the fact that plaintiffs were required to pay all costs let

me say it appears significant that in no way are the plaintiffs charged with any delay or fault.

(a) It is said that the Legislature made no provisions for the payment of costs; that therefore the only remedy was to make the plaintiffs pay; and that the court was loathe to provide the defendant with ample sinews of war and so may have delayed the defendant. It seems to me this "reason" ignores all undisputed facts. The defendant had, as pointed out by Judge ROBINSON, from June 19 to October but made no move and no complaint about lack of funds. The blanket bond which plaintiffs gave has never been questioned. In requiring plaintiffs to make such a bond this court went contrary to all former precedents. With all due respect to the statement in the majority opinion to the contrary the same question involved here regarding bond and costs has been before this court previously.

In *Dixon* v. *Hall, Sec'y of State,* 210 Ark. 891, 198 S. W. 2d 1002, an original action involving the same amendment 7, the plaintiff Dixon was not required to make a bond. Moreover, Dixon [corresponding to the plaintiffs here] won the case and recovered his costs. In book C-41 of this courts proceedings at page 159 appears the following: "It is further ordered that said petitioner [Dixon] recover of said respondent [Hall] and his costs in this cause expended."

In *Withee* v. *Hall, Sec'y of State,* 217 Ark. 644, 232 S. W. 2d 827, an original action involving the same amendment 7 and in which the record appears to be as expensive as here, Withee [corresponding to the plaintiffs here] was not required to put up a bond for costs. Moreover, Withee won his case and recovered his costs. In book D-2 of this court's proceedings at page 224 appears the following: "It is further considered that said petitioner [Withee] recover of said respondent [Hall] and his costs in this court in this cause expended."

(b) The impression is left that this court and particularly the Chief Justice in some way by its and his neglect caused the defendant to be delayed. I cannot pos-

sibly see any merit in this. The main reason why I say this is that the defendant, in all events, had from June 18 to the middle of August to proceed with his case and neglected or refused to do so. At any rate this reason which the majority seized upon is not one which the defendant had ever complained about. It is admirable in the Chief Justice to assume all the blame but in my honest opinion he is in no way to be blamed. Regardless of any oversight on his part his actions in no way prejudiced the defendant.

(c) It is stated in the majority opinion that some of the court thought *Beene* v. *Hutto* was authority for giving the defendant additional time up to November 4th. Since the proceedings of the conference table have been exposed I feel at liberty to give my version. It was my distinct understanding that all the judges, except one, thought the *Beene* case limited the hearings to October 15th. Further, it was my understanding that had it been possible to do so a majority of the judges would have been willing to extend the time for defendant.

Robinson, J., dissenting. This is a history-making case, for it is, so far as I have been able to ascertain, the first case that has ever occurred where the complaint states a cause of action, and substantial evidence—in fact, overwhelming evidence—is introduced proving the allegations and making a *prima facie* case, yet the cause is dismissed without the defendant having introduced any evidence whatever.

On the 21st day of January, 1952, this court appointed a Commissioner to take evidence in the case. Plaintiff's attorneys diligently proceeded to introduce before the Commissioner evidence to prove the allegations set out in the complaint. Plaintiffs' undertaking was a tremendous one. They had the burden of showing that some 7,000 signatures on the petition were illegal by reason of having been forged or for other reasons. In order to prove their case, the plaintiffs produced before the Commissioner hundreds of witnesses. The necessary cost in producing such a tremendous volume of evidence must have amounted to thousands of dollars.

On June 19th the plaintiffs rested their case. At that time the Commissioner announced that the plaintiffs had made a *prima facie* case, that is to say, substantial evidence had been introduced to prove the allegations in the complaint. To this hour, the defendant has not introduced one scintilla of evidence of any description even attempting to rebut the evidence introduced by the plaintiffs.

It is stated in the majority opinion that the writer thereof feels some responsibility for there being no interim session of court. The fact that this court adjourned on July 7th subsequent to the time the plaintiffs closed their case June 19th in no way prevented the defendant from proceeding. The Commissioner before whom the evidence was being taken was available and the plaintiffs had filed a perfectly good bond for any cost that might be assessed against them.

The majority say they are unwilling to decide the case in favor of the plaintiff "on a *prima facie* showing alone." The definition of a *prima facie* case as given in Ballentine's Law Dictionary is as follows: "A cause of action or a defense sufficiently established by a party's evidence to justify a verdict in his favor, provided the other party does not rebut such evidence." There is never any kind of case established at the time the plaintiff closes his case in chief except a *prima facie* one. This is also true in criminal procedure at the close of the State's case in chief, but when a capital offense is charged the *prima facie* case made by the State is sufficient to send a defendant to the electric chair if it is not rebutted.

According to the rule announced by the majority, a plaintiff can never win the kind of case involved here for the simple reason that he can never make anything other than a *prima facie* case by his evidence in chief.

The plaintiffs have complied with every order of this court and have adopted no dilatory tactics. They convinced the Commissioner, an able and outstanding member of the bar of this court, of the righteousness of their cause and are entitled to a judgment in their favor. Yet their complaint is dismissed.

I cannot agree to the dismissal. Therefore, I respectfully dissent from the opinion of the majority.

I am authorized to say Mr. Justice HOLT concurs in this dissent.

WEST, SHERIFF *v.* GENERAL CONTRACT PURCHASE CORPORATION.

4-9854 252 S. W. 2d 405

Opinion delivered October 20, 1952.

Fletcher Long, for appellant.

Guy B. Reeves, for appellee.

GEORGE ROSE SMITH, J. This appeal presents for interpretation certain sections of Act 142 of 1949, governing the registration of motor vehicle titles. Ark. Stats. 1947, Title 75, Ch. 1. The controversy centers upon a question of priority as between the claims of two creditors of J. A. White. One of these creditors, Mollie B. Cisco, obtained a municipal court judgment against

White for $245.70 and delivered a writ of execution to the appellant, the sheriff of St. Francis County. The sheriff levied upon an automobile owned by White. The other creditor, the appellee, then brought this suit against White and the sheriff to enjoin the execution sale. The complaint asserts that the plaintiff has paramount title to the car by reason of a promissory note and conditional sales contract executed by White as vendee of the vehicle. The sheriff, without exercising his option of asking that the judgment creditor be substituted as defendant (Ark. Stats., § 27-820; *Ferguson* v. *Ehrenberg,* 39 Ark. 420), undertook the defense of the case by filing an answer denying the plaintiff's right to relief.

At the trial the plaintiff rested its case after introducing its title retaining contract and proving that a delinquent balance of $996.60 was owed by White on the note. The sheriff offered the writ of execution as his authority for proceeding with the sale. Upon this proof the chancellor held the plaintiff's claim to be superior. The decree appoints the sheriff as receiver and directs that the car be sold, the proceeds to be applied first to the plaintiff's debt and then to Mrs. Cisco's judgment.

For reversal the sheriff contends that the plaintiff failed to make a *prima facie* case, in that it was not shown that a certified copy of the conditional sales contract had been deposited with the Title Department of the State Motor Vehicle Division. Ark. Stats., § 75-160. The pivotal question is whether it was essential for the plaintiff to prove its compliance with the title registration law, or whether noncompliance was a matter of defense to be pleaded and proved by the sheriff.

This is the applicable language of Act 142:

"Section 60. *Filing liens and encumbrances.* (a). No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or with-

out notice until the requirements of this article have been complied with.

"(b). There shall be deposited with the department a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this State with an attached or endorsed certificate of a notary public stating that the same is a true and correct copy of the original and accompanied by the certificate of title last issued for such vehicle.

* * * *

"Section 61. *Filing effective to give notice.* (a). Such filing and the issuance of a new certificate of title as provided in this article shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrancers except such liens as may be authorized by law dependent upon possession. In the event the documents referred to in Section 62 [Section 60] are received and filed in the central office of the department within 10 days after the date said documents were executed the constructive notice shall date from the time of the execution of said documents. Otherwise constructive notice shall date from the time of receipt and filing of such documents by the department as shown by its endorsement thereon.

"(b). The method provided in this article of giving constructive notice of a lien or encumbrance upon a registered vehicle shall be exclusive except as to liens dependent upon possession. . . ." Ark. Stats., §§ 75-160 and 75-161.

It is evident that by Act 142 the Legislature intended, with respect to motor vehicles, to subject conditional sales contracts, chattel mortgages, and other encumbrances to an identical requirement that a certified copy thereof be filed with the department. Section 61 not only provides that the statutory method of giving notice shall be exclusive but also exempts the specified documents from the operation of other recording laws.

It cannot be doubted that legislation of this kind was needed. In the past chattel mortgages were required to be recorded; indeed, there was no lien as to strangers until this requirement had been met. Ark. Stats., § 51-1002; *Thornton* v. *Findley,* 97 Ark. 432, 134 S. W. 627, 33 L. R. A., N. S. 491. And the mortgagee, in asserting his lien against a purchaser from the mortgagor, had the burden of proving compliance with the recording law. *Combs* v. *Owen,* 182 Ark. 217, 31 S. W. 2d 127.

An entirely different situation formerly existed as to title retaining contracts. There was no requirement that such an agreement be recorded, *Meyer* v. *Equitable Credit Co.,* 174 Ark. 575, 297 S. W. 846; on the contrary, the reservation of title could be made by an oral agreement. *Home Fire Ins. Co.* v. *Wray,* 177 Ark. 455, 6 S. W. 2d 546. In this State we followed the common law rule that gave a conditional vendor priority over a subsequent purchaser without notice, although in an early case we mentioned "the hardship that is sometimes discovered when the condition is to be enforced against a *bona fide* purchaser." *McIntosh* v. *Hill,* 47 Ark. 363, 1 S. W. 680.

Many hard cases resulted from the want of a recording law for conditional sales agreements. As Professor Strahorn pointed out in 1929: "One of the outstanding needs for statutory reform of the subject in Arkansas is a recording act. It should take no argument to point out that there is a great opportunity for fraud on innocent third parties when the buyer can sell the chattel, pocket the money, and leave his vendee subject to the secret reservation of title which may cause him to lose the chattel, or to have to pay up the balance of the purchase price to keep it. That such has happened is proved by the numerous times the situation has recurred in cases which have reached the Supreme Court." Strahorn, "Conditional Sales of Chattels in Arkansas," 1 U. of Ark. L. S. Bull. 3.

Now that the situation has been corrected by the General Assembly we have no inclination to undermine the legislative intent by a narrow construction of the law.

As we said of this Act in *Terrell* v. *Loomis,* 218 Ark. 296, 235 S. W. 2d 961, "The Act is mandatory in all that it requires." We would ourselves be legislating if we failed to give effect to the imperative declaration of § 75-160: "No conditional sale contract . . . is valid as against the creditors of an owner acquiring a lien by levy . . . until the requirements of this article have been complied with." The Legislature could hardly have expressed more unmistakably its determination to make the required filing a condition precedent to the validity of the encumbrance in the situation now presented. Hence the plaintiff's burden of proving a superior title was not met without a showing that its title retaining contract had been filed with the department.

In the court below the judgment debtor made no defense to either claim; the dispute was solely between the two creditors. The court rightly ordered a sale of the property, but it erred in adjudging the appellee's claim to be prior to Mrs. Cisco's judgment, instead of the other way around. In this respect the decree is modified and the cause remanded.

EX PARTE FAULKNER AND COLEMAN.

4-9870 251 S. W. 2d 822

Opinion delivered October 20, 1952.

J. C. Cole for petitioners.

MINOR W. MILLWEE, Justice. This is a petition by J. H. Faulkner and L. Q. Coleman to expunge from the records of the Circuit Court of Hot Spring County a certain grand jury report critical of petitioners.

The record reflects that a special session of the Grand Jury of Hot Spring County was called September 10, 1951, at the written request of four of the five-member board of the Malvern School District for the purpose of investigating school affairs. On September 11, a "Partial Report of Grand Jury" was received by the circuit court and spread upon the records. It states: "On the first day, the Grand Jury listened to statements made by fourteen witnesses. Among other facts which were brought to light as the result of the questioning of these fourteen persons are that

"The Grand Jury finds that Hershel Faulkner, a member of the Malvern School Board, has made irresponsible statements in which he charged a member of the Malvern faculty with sex perversion, and upon this accusation sought the discharge of the faculty member.

"After examining the fourteen witnesses, including Mr. Faulkner and the other members of the school board, the Grand Jury finds that the charge made by Hershel Faulkner has served only to disrupt and retard the administration of affairs of the public schools of Malvern.

"The Grand Jury further finds that accusations made by Faulkner were based on an affidavit made by a patron of the Malvern School District which was made by him as the result of information given him by Quentin Coleman, a discharged member of the Malvern faculty.

This patron, who also appeared before the Grand Jury, declared that the accusations made by him in the affidavit were later found by him to be untrue in view of an investigation he made on his own initiative. The Grand Jury after completing their own comprehensive examination finds that these charges are without foundation in fact, utterly false, and were conceived by Coleman out of whole cloth and implanted by him in the mind of the patron for the sole purpose of obtaining the discharge of the faculty member.''

On September 12, a Malvern newspaper published separate statements by petitioners criticizing the publicized report and inviting the grand jury to indict them if the findings contained in the report were true. On September 13, the circuit court ordered separate citations against petitioners for contempt of court. The grand jury returned separate indictments against petitioners on September 18 for libel of the grand jury in connection with the publicized statements made by petitioners in response to the grand jury report. The contempt of court charges were ordered dismissed by the circuit court on November 19 because petitioners had been indicted for the same statements which occasioned the contempt charges in the first instance.

Petitioners filed their joint motion in circuit court to expunge the partial grand jury report from the record on November 27. On January 8, 1952, the circuit court entered an order denying the motion to expunge. The charges against petitioners for libeling the grand jury were dismissed on motion of the State over petitioners' strenuous objections on January 16, 1952. The record is brought here by certiorari to review the action of the circuit court in denying the motion to expunge.

Our Constitution (Art. II, § 8) provides that a grand jury may proceed by presentment or indictment. The legal definition of a presentment is stated as follows in *State* v. *Cox,* 8 Ark. 436: ''A presentment, properly speaking, is the notice taken by a grand jury of any offense, from their own knowledge or observation, with-

out any bill of indictment laid before them at the suit of the government; upon such presentment, when proper, the officer employed to prosecute, afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. 4 Bl. Com. 301. Bouvier's Law Dict., Presentment." It is clear from the record in the case at bar that the grand jury had no intention of returning an indictment against petitioners based on the matters set out in the grand jury report. Hence, the report does not constitute a true common law presentment. Proceeding by presentment as the term was understood at common law has largely fallen into disuse in recent years although many courts still apply the term to grand jury reports whether or not such reports are intended to be followed by an indictment.

Although there is no specific statutory authority for grand jury reports in this State, it has long been the custom and practice for grand juries to make written reports to the court concerning their investigations. Grand juries are clothed with broad inquisitorial powers and the power to investigate should necessarily include the right and duty to report the result of such investigations. So long as grand jury reports relate to general conditions affecting the public welfare and without reflecting specifically upon the character, or censuring the conduct, of individual citizens they serve a wholesome purpose and are frequently followed by beneficial results to the community.

Looking to the report involved in the instant case, we note that the grand jury did not merely accuse or charge petitioners with certain acts, but actually found them guilty of such misconduct as would have fully warranted their indictment for slander, which is a felony under our statutes.[1] The question then arises as to the right of petitioners to expunge a grand jury report containing findings which would have warranted their indictment for slander where no such indictment is returned or intended.

[1] Ark. Stats., §§ 41-2405 and 2409; *State* v. *Waller*, 43 Ark. 381.

Most of the reported cases bearing on the question involve the right of a grand jury to make a report criticizing public officials where the accusations are not such as to charge a criminal offense. Certain sections of our Criminal Code dealing with the duties and scope of inquiry of the grand jury[2] are identical with those of New York where numerous cases have arisen on the question. In denying the motion to expunge the trial judge relied on the cases of *In re Jones,* 101 App. Div. 55, 92 N. Y. S. 275, appeal dismissed 181 N. Y. 389, 74 N. E. 226, and *In re Healy,* 161 Misc. 582, 293 N. Y. S. 584. In the Jones case the New York Court refused to expunge the report of a grand jury censuring public officials for improper performance of their duties although an indictment did not or could not have followed it. However, Judge Jenks, in the majority opinion, stated: "I think that if under the guise of a presentment, the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged; but I do not think that a presentment as a report upon the exercise of inquisitorial powers must be stricken out if it incidentally points out that this or that public official is responsible for omissions or commissions, negligence or defects."

A strong dissenting opinion was written by Judge Woodward in the Jones case announcing the rule that the code empowered the grand jury only to indict or not indict. He said: "If there has been no crime or offense, the grand jury, designed for the protection of the citizen, has no right to create an offense unknown to the law for the purpose of administering punishment by way of censure, for this is a 'government of laws, not of men,' to quote the preamble of the Constitution of Massachusetts and the language of Chief Justice Marshall in *Marbury*

[2] Ark. Stats., § 43-907 provides that the grand jury must inquire, "First. Into the case of every person imprisoned in the county jail, or on bail, to answer a criminal charge in that court, and who is not indicted. Second. Into the condition and management of the public prisons of the county. Third. Into the wilful and corrupt misconduct in office of public officers of every description in the county."

v. *Madison,* 1 Cranch, 163, 2 L. Ed. 60. . . . If the acts charged do not constitute a crime, then there is no indictment before the court, and the petitioners clearly have a right to be relieved of the odium of a judicial censure, where the document in which such censure is contained is a mere impertinence, without authority of law."

The lower courts of New York have consistently refused to follow the majority in the Jones case and in each instance have granted the requested motion to expunge. See, *In re Osborne,* 68 Misc. 597, 125 N. Y. S. 313; *Re Heffernan,* 125 N. Y. S. 737; *In re Funston,* 133 Misc. 620, 233 N. Y. S. 81; *In re Crosby,* 126 Misc. 250, 213 N. Y. S. 86; *People* v. *McCabe,* 148 Misc. 330, 266 N. Y. S. 363; *In matter of Wilcox,* 153 Misc. 761, 276 N. Y. S. 117, and cases cited therein. It would seem that the weight of authority supports the proposition that it is improper for a grand jury to present with words of censure and reprobation a public official or other person by name without presenting him for indictment and the accused has the right to apply to the court to have the objectionable matter expunged from the court records. 24 Am. Jur., Grand Jury, § 36; 38 C. J. S., Grand Juries, § 34(3). *Ex parte Robinson,* 231 Ala. 503, 165 So. 582; *Bennett* v. *Kalamazoo Circuit Judge,* 183 Mich. 200, 150 N. W. 141; *In re Report of Grand Jury of Baltimore City,* 152 Md. 616, 137 A. 370; *In re Report of Grand Jury,* 204 Wis. 409, 235 N. W. 789; *In re Presentment to Superior Court,* 14 N. J. Super. 542, 82 A. 2d 496.

The case of *In re Healy, supra,* is a decision rendered by the Judge of the Queens County Court of New York and involved a report criticizing an individual who was not found to be a public official. The court found that the grand jury had no right to make the report and expunged it from the record. However, the court also reviewed the New York cases involving public officials and by way of dictum approved the majority opinion in the Jones case, *supra.* In ordering the grand jury report expunged the court said: "To single out an individual, not by reason of any acts in public office, not by reason of any acts as a public official, and to condemn him with-

out a trial, without an opportunity to be heard, without the privilege of making a defense in a free American court of justice, to attempt to deprive him of his good name, to besmirch his character, is so unfair, so repugnant to the ideals of the administration of justice in America, as to merit the disapproval of this court.

"The petitioner, Healy, has been accused and censured not as a public official but as an individual, and in no reported case in this country of which this court has cognizance has any such action been approved."

In *Ex parte Cook,* 199 Ark. 1187, 137 S. W. 2d 248, we held that it was within the trial court's discretion to receive or reject a grand jury's report criticizing a former county judge's administration of county affairs where the investigation was at his request and the report did not amount to charges or accusations of criminal offenses. In that case we emphasized the fact that the former official had invited the report, saying: "We think petitioner's act in requesting an investigation was responsible for the result . . . " See, also, *Application of Knight,* 176 Misc. 635, 28 N. Y. S. 2d 353.

We find it unnecessary to a determination of the present case to definitely adopt either of the conflicting views expressed by the majority and minority opinions in the Jones case, *supra.* Since we have concluded that the matters set out in the report under consideration were sufficient to warrant an indictment of petitioners for the crime of slander, they are entitled to have the report expunged under either view. Petitioner Faulkner is a member of the Malvern School Board, but did not join in the request for the grand jury investigation. Petitioner Coleman is a private citizen. If petitioners were guilty of slander they should have been indicted for that offense. As the matter stands, they are in effect found guilty of a crime by an arm of the judiciary that is not empowered to try them. They stand condemned upon the public records without a trial and are afforded no forum in which they might be confronted with their accusers and the truthfulness of the charges against them judicially tested,

although they have diligently sought an opportunity to be heard at every step of the proceedings. Under these circumstances, there is no room for judicial discretion and petitioners have a right to the relief sought.

The writ of certiorari is accordingly granted and the report of the grand jury will be expunged from the circuit court records. It is so ordered.

VEATCH *v.* STATE.

4693 251 S. W. 2d 1015

Opinion delivered October 20, 1952.

Rehearing denied November 27, 1952.

D. L. Grace and *I. S. Simmons,* for appellant.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The appellant, George Veatch, charged by information with first degree murder, was convicted of murder in the second degree and appeals from a judgment sentencing him to imprisonment for five years.

The evidence concerning the homicide itself is almost without dispute. On the afternoon of November 24, 1951, Veatch was occupying a cabin at the Ozark Tourist Court. Dee Ashford and M. R. Dunn arrived at the tourist court and engaged a cabin for a friend of theirs, Buddy Glover. While Ashford was assisting Glover in getting settled Veatch, noticeably intoxicated, entered Glover's cabin, accused Ashford of owing him fifty dollars, and shot Ashford through the heart with a pistol.

At the trial the defense was that Veatch, as a result of combat experience during World War II, was temporarily insane when he shot Ashford. While there was some evidence to support this defense, there was much testimony to the contrary. Dr. R. G. Carnahan, a member of the State Hospital staff, testified that he had examined Veatch and that in his opinion Veatch was mentally competent and responsible at the time of the offense and at the time of the examination. Another psychiatrist, Dr. Albert Clarke, was called as a witness for the defense and described the symptoms and effects of psychoneurosis, but on cross-examination Dr. Clarke stated that during his three interviews with the accused he observed no symptoms of this malady. In view of this and other evidence the issue of insanity was plainly a matter for the jury to determine.

It is insisted that the charge should have been presented by a grand jury indictment rather than by information. We have rejected this contention in several recent cases, *e. g., Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, and we adhere to our position.

Several contentions have to do with the admissibility of evidence. It is contended that a statement made by Veatch to the county sheriff should not have been admitted until there was proof that Veatch had first been cau-

tioned that he might remain silent and that his statements could be used against him. We held to the contrary in *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493. Again, it is said that the court should have admitted certain records that would have shown that the deceased, Ashford, was convicted of drunken driving in 1947 and was divorced by his wife in 1948. The trial court was extremely liberal in permitting Veatch to go far afield in the presentation of his defense, and there was certainly no error in the rejection of proof that had not even a remote bearing upon the unprovoked attack made by Veatch upon Ashford.

It is contended that since Dr. Carnahan testified as a witness for the State, the court should not have permitted the introduction of Dr. Carnahan's written findings as to the accused's sanity. The written report, however, added nothing to the doctor's testimony, and in any event it is made admissible by statute, Ark. Stats. 1947, § 43-1302, although of course the physician must also testify in order to satisfy the constitutional requirement that the accused be confronted with the witnesses against him. Ark. Const., Art. 2, § 10. Hence there was no error. Nor, for the reasons given in *Moore* v. *State,* 184 Ark. 682, 43 S. W. 2d 228, did the court err in refusing to allow counsel for the accused to read to the jury excerpts from various medical treatises.

The motion for a new trial contains other assignments of error, some of which are argued in the brief, but we find none of sufficient merit to warrant further discussion.

Affirmed.

H. B. DEAL & COMPANY, INC. *v.* HEAD.

4-9702 251 S. W. 2d 1017

Opinion delivered October 20, 1952.

Rehearing denied November 27, 1952.

Jabe Hoggard and *Leo F. Laughren,* for appellant.

Surrey E. Gilliam, Melvin E. Mayfield, Stein & Stein, Melvin T. Chambers and *Harry Colay,* for appellees.

ED. F. MCFADDIN, Justice. The appellees, Thomas L. Head, *et al.,* (hereinafter called "Plaintiffs"), were employed by appellant, H. B. Deal & Company (hereinafter called "Deal"), in constructing the Ozark Ordnance Plant in El Dorado; and plaintiffs filed action against Deal in the Union Circuit Court, claiming additional amounts to be due each of the plaintiffs for overtime work. While the said action was pending in the Circuit Court, Deal unsuccessfully petitioned this Court for a writ of prohibition. See *Deal* v. *Marlin,* 209 Ark. 967, 193 S. W. 2d 315. After we denied prohibition, the Circuit Court action proceeded to trial on its merits before the Circuit Judge with a jury being waived.

The testimony established: (a) that the United States Government, acting through its Corps of Engineers, made a contract with Deal for the construction of the Ozark Ordnance Plant near El Dorado; (b) that in the contract, Deal was referred to as "constructor", and the contract provided in Article 10:

"The constructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day, at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics. . . ."; and (c) that the construction of the Ordnance Plant began shortly after February 16, 1942, and continued for about eighteen months, and the plaintiffs were employees of Deal in the construction of the Ordnance Plant. This action by plaintiffs was commenced in 1943; and the number of hours worked and the overtime pay claimed by each plaintiff was developed in the testimony.

The Trial Court in rendering judgment for the plaintiffs made—*inter alia*—findings of fact and declarations of law to the following effect:

(1) The plaintiffs in working for Deal, were entitled to the benefits of the Fair Labor Standards Act of the United States (See U.S.C.A. Title 29, § 201 *et seq.*) and, therefore, were entitled to recover not only for overtime, but for penalty and attorneys fees, as allowed by the said Act.

(2) In the alternative, if the plaintiffs were not entitled to recover under the provisions of the said Fair Labor Standards Act, then at all events, the plaintiffs were entitled to recover for their overtime—less penalty and attorneys fees—under the provisions of the contract between Deal and the United States for the construction of the Ozark Ordnance Plant.

From a judgment for the plaintiffs in accordance with the provisions of the Fair Labor Standards Act, Deal brings this appeal, and claims that the Circuit Court was in error in each and both of the two conclusions just stated. The record is voluminous. The transcript con-

tains 3,565 typewritten pages, and the briefs contain 1,174 printed pages. Many questions are urged by the one side and resisted by the other in the splendid briefs before us; but we conclude that we need only decide the two points hereinafter discussed.

I. *Applicability of the Fair Labor Standards Act.* That plaintiffs worked for Deal in the construction of the Ordnance Plant is admitted, but we hold that the plaintiffs are not entitled to recover under the provisions of the Fair Labor Standards Act (U.S.C.A. Title 29, § 201). This conclusion is reached because Deal was engaged in *original construction* of a plant, and interstate commerce was not involved in such original construction. There are numerous cases holding that the original constructor of a war plant is not within the purview of the Fair Labor Standards Act. We cite only a few:

(1) In *Noonan* v. *Fruco Const. Co.,* 140 Fed. 2d 633, the Eighth Circuit Court of Appeals, in holding that plaintiff's working for a constructor in the building of an ammunition plant were not entitled to invoke the benefits of the Fair Labor Standards Act, said:

"But the plant itself was not a commodity which could be the subject of interstate commerce. It was permanently placed upon an immovable site of land and was not a thing transportable in commerce nor a devise or object upon which other articles could be shipped to other states. Clearly the activities which went into its construction were local. . . . We are unable to find here that the watchman employed to guard the construction of a new building are in an occupation 'necessary' to the production of goods for commerce, even though it is contemplated that the products manufactured in the building will be sent into interstate commerce."

(2) In *Parham* v. *Austin Co.,* 158 Fed. 2d 566, the Circuit Court of Appeals of the Fifth Circuit, in holding that watchmen and guards employed by the constructor in constructing a bomber plant for the United States were not entitled to recover for overtime under the Fair Labor Standards Act, said:

"The period of employment covered by their suit is prior to any production of bombers in the plant. Their employers' connection with the plant ended upon its completion. . . . It was a new plant, as distinguished from an addition to an existing plant. Materials from out of the state were shipped to the job by train and by truck and used in the construction of the plant where they came to rest. . . . There can be no process or occupation necessary to the production of goods for commerce unless goods are produced."

(3) In *Kelly* v. *Ford,* 162 Fed. 2d 555, the Circuit Court of Appeals of the Third Circuit, in holding that employees engaged by Ford in the construction of an aircraft engine plant for the United States were not entitled to recover for overtime under the provisions of the Fair Labor Standards Act, said:

"Original construction is definitely beyond the contemplation of the Act, and appellant's employment cannot be fairly removed from that category. . . . The facts here present no justification for holding that the appellant, in his work for the defendant employer, was engaged in commerce, or in the production of goods for commerce, within the scope of the Wages and Hours Act."

(4) In *McDaniel* v. *Brown,* 172 Fed. 2d 466, the Circuit Court of Appeals for the Tenth Circuit, in holding that employees of constructors building a naval ammunition depot for the United States were not entitled to recover for overtime under the Fair Labor Standards Act, said:

"The work performed by the contractors under the contract was entirely original construction of new buildings and new facilities."

(5) A most persuasive case is that of *Spencer* v. *Porter,* from the Eighth Circuit Court of Appeals. The first opinion, under date of April 19, 1949, is reported in 174 Fed. 2d 731; and in that opinion, the Circuit Court of Appeals held that employees working for Porter in the construction of the Pine Bluff Arsenal for the United States were not entitled to recover for overtime under the

Fair Labor Standards Act. After reaching the foregoing decision, the Circuit Court of Appeals delayed a rehearing pending the decision by the Supreme Court of the United States in *U. S. Cartridge Company* v. *Powell,* Eighth Circuit, 174 Fed. 2d 718. The decision of the Supreme Court of the United States in the Cartridge case was delivered on May 8, 1950. (See 339 U. S. 497, 94 L. Ed. 1017, 70 S. Ct. 755). After the said decision of the Supreme Court of the United States, the Circuit Court of Appeals of the Eighth Circuit, rendered a second opinion in the case of *Spencer* v. *Porter,* as reported in 183 Fed. 2d 445; and in that second opinion, the Circuit Court of Appeals, having before it the United States Supreme Court opinion in the Cartridge case, said:

"This court held in the instant case that, insofar as the appellants' claims were based on services rendered by them in connection with the construction of the Pine Bluff Arsenal in Arkansas, the appellants were not within the coverage of the act. We adhere to that holding."

(6) The case of *Hartmaier* v. *Long,* decided by the Supreme Court of Missouri on March 11, 1951, (361 Mo. 1151, 238 S. W. 2d 332), deserves special notice, because the United States Supreme Court denied *certiorari* in the case on October 8, 1951. (See 342 U. S. 833, 96 L. Ed. 35, 72 S. Ct. 48.) The Supreme Court of Missouri held that the employees of Long, engaged in the construction of an aircraft engine plant for the United States, were not entitled to recover for overtime under the Fair Labor Standards Act. Nearly every question presented in the present case was considered and decided by the Supreme Court of Missouri in the Hartmaier case; and, as aforesaid, the United States Supreme Court denied *certiorari.*

In view of these cases and others to like effect,[1] we unhesitatingly hold that the plaintiffs are not entitled

[1] See Annotation in 8 A. L. R. 2d 738, wherein the holdings of the many cases are summarized in this language: "In the absence of particular factors affecting the situation, construction of new buildings, not amounting to reconstruction or an extension or enlargement of any existing building or plant, is generally regarded as not being in itself such an activity as to bring it within the contemplation of the Fair Labor Standards Act."

to invoke the Fair Labor Standards Act in the case at bar.

Strongly relied on by plaintiffs is the evidence that this Ozark Ordnance Plant was one of a series of plants, each designed to be a part of the process of manufacturing ammunition from the raw stage to the finished product. Since these plants were located in several states, it is claimed that the Ozark construction was a part of interstate commerce. Contentions to the same general effect were made and denied in *Noonan* v. *Fruco Const. Co.,* 140 Fed. 2d 633. Every bridge across a transcontinental highway, when completed, will be used as a link in interstate commerce, but until the bridge is completed, it is not a link that has been used. Such is the distinction between the case at bar and the case of *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 87 L. Ed. 656, 63 S. Ct. 494.

Again plaintiffs point out that actual production of ammunition started in some part of the Ordnance Plant on May 13, 1943, and that sixteen of the plaintiffs continued to work for Deal while the plant was still being completed. Plaintiffs claim that this work brought the sixteen so working within the purview of the Fair Labor Standards Act. But the hard fact remains that the plaintiffs were all the time working for Deal in *original construction.* General Sturgis testified without contradiction that Deal constructed the plant under a contract with the Corps of Engineers, and that the completed plant was then turned over to another branch of the armed forces for operation. So plaintiffs, while working for Deal, were engaged in original construction for an entirely different unit of the armed forces than those engaged in the production and manufacture of ammunition. These facts make the case at bar entirely different from those cases which hold that repair in construction is not original construction.

II. *Plaintiffs as Third Party Beneficiaries.* As heretofore stated, the contract between the United States Government and Deal for the construction of the Ozark Ordnance Works stated in Article 10:

"The constructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics. . . ."

In *Deal* v. *Marlin,* 209 Ark. 967, 193 S. W. 2d 315, we said of such provision:

"The government placed the quoted provision in the contract for the benefit of the workers. They therefore had a right to sue on the contract. We have repeatedly held that a contract made for the benefit of a third party is actionable by such third party. *Freer* v. *J. G. Putnam Funeral Home, Inc.,* 195 Ark. 307, 111 S. W. 2d 463, is one such case. Other cases on this point are collected in West's Arkansas Digest, 'Contracts,' § 187. See, also, 17 C. J. S. 1121. The right of a workman to sue a public contractor for wages as fixed by the wage scale in the contract has been recognized in several cases, some of which are: *Stover* v. *Winston Bros. Co.,* 185 Wash. 416, 55 Pac. 2d 821; (appeal to U. S. Sup. Ct. dismissed; 299 U. S. 508, 81 L. Ed. 376, 57 S. Ct. 44); *Fata* v. *S. A. Healy Co.,* 289 N. Y. 401, 46 N. E. 2d 339, 144 A. L. R. 1031; *Novosk* v. *Reznick,* 323 Ill. App. 544, 56 N. E. 2d 318. See, also, Annotation in 144 A. L. R. 1035."

We adhere to the above statement. The plaintiffs were not mere "incidental beneficiaries",[2] but were "direct beneficiaries",[3] and are entitled to proceed under the American majority rule stated in 12 Am. Jur. 825:

"Stated in general terms and leaving out of consideration the limitations recognized in various jurisdictions, the rule in a great majority of American jurisdictions is that a third person may enforce a promise made for his benefit, even though he is a stranger both to the contract and the consideration."

[2] The rule as to incidental beneficiaries is stated in 12 Am. Jur. 834. A case involving incidental beneficiaries is *German Alliance Co.* v. *Home Water Co.,* 226 U. S. 220, 57 L. Ed. 195, 33 S. Ct. 32.

[3] The rule as to direct beneficiaries is stated in 12 Am. Jur. 833, and see also Annotations in 81 A. L. R. 1271 and 148 A. L. R. 359.

The entire Article 10 of the contract is several pages in length and clearly demonstrates that the Government placed such provisions in the contract for the direct benefit of persons, such as the plaintiffs, who did work for Deal in the construction of the Ozark Ordnance Works. Thus the plaintiffs come within the holdings which allow third party beneficiaries to invoke the contract.

Conclusion

The Circuit Court judgment was based on the view that the Fair Labor Standards Act applied, and that judgment is reversed, as stated in Topic I, *supra;* but the portion of the judgment holding—in the alternative—that the plaintiffs are entitled to recover as third party beneficiaries, is affirmed; and the cause is remanded to the Circuit Court, with directions to enter judgments—on the record in this case—for the plaintiffs as third party beneficiaries, in accordance with the views herein expressed. This being an action at law, it follows that the costs of this appeal are taxable against appellees; but all other costs are taxable against appellant.

The Chief Justice and Justice WARD dissent.

JERNIGAN *v.* BAKER.

4-9863 251 S. W. 2d 999

Opinion delivered October 27, 1952.

S. L. White, for appellant.

W. Tillar Adamson, for appellee.

GRIFFIN SMITH, Chief Justice. Mixed questions of law and fact are presented, but the appeal requires us to determine (a) whether the edges or lower border of the roof of a building constructed on appellees' property and projecting portions of a concrete foundation, violate terms of the bill of assurance common to each proprietor; (b) whether the unauthorized use of appellants' driveway by those employed by appellees to do construction work damaged the driveway and if so to what extent; (c) were the truck drivers whose activities were alleged to have occasioned the damage employees under control of an independent contractor to whom appellants should look, rather than to the lot-owners. For brevity the parties will be identified as Jernigan and Baker.

Jernigan owns Lot G, Kingwood Place. Baker is the owner of adjoining Lot F. All of the land in Kingwood insofar as this litigation shows was formerly owned by Pulaski Investment Company, a corporation. The deeds to various parcels are tied to a bill of assurance which provides that no house shall be erected on any lot "nearer than seven and a half feet to the inside line of the building lot or plot" selected for such construction. Outbuildings, garages, and servant quarters are included in the restrictions.

The admittedly unusually wide eaves of which complaint is made extended to within less than four feet of the property line. Baker testified that according to a survey to which he referred the distance from the brick-walled side of his house to the property line varied from 7.65 feet at the rear to 7.55 feet at the front.

It is Jernigan's contention that the objectionable eaves extended to within three and seven-tenths feet of

the property line, thus obstructing the view in circumstances where the bill of assurance contemplated that the clear space between buildings on adjoining lots should be fifteen feet—seven and a half feet on each side. Baker admits the physical facts with perhaps slight variations in measurements, but thinks it unreasonable to attribute to those who planned Kingwood Place and authors of the bill of assurance an intent to extend the restrictions to incidental projections. This reasoning would restrict violations to solid walls and the like.

A second contention is that the trial court was without jurisdiction because, assuming there had been an encroachment, an adequate remedy at law by way of damages was available.

The difficulty with this defense is that the bill of assurance contains express language relating to any "attempt" to violate the covenants and restrictions. By paragraph 10 any person owning lots in the addition is given the right to prosecute proceedings at law or in equity against any person violating or attempting to violate the covenants, "and to either prevent or recover damages for such violation."

We have frequently held that jurisdiction of the subject-matter cannot be conferred by consent. *Strahan* v. *The Atlanta National Bank of Atlanta, Texas,* 206 Ark. 522, 176 S. W. 2d 236.

Facts in the case before us show that the building was not completed until around November 1, 1951. On July 16th Jernigan, through his attorney, wrote Baker and complained that his driveway was often blocked by trucks and that it was being damaged. He also complained of the projecting eaves. It is in evidence that prior to this time Jernigan had complained to Glen Henry, the contractor. Henry's version of these conversations was that Jernigan consented to "go along" without interfering with such usage provided the driveway would be restored to its original condition. While the work was in progress cars were frequently parked in such a way that Jernigan could not use the driveway. It was admitted, however,

that some of these were in charge of persons who were inspecting the new building—and, inferentially, Baker was not responsible for this class of interference.

When the scope of the transactions is considered we think the Chancellor correctly declined to dismiss for want of jurisdiction. An amended complaint alleged that Jernigan had sustained damages to the extent of $1,000 by reason of the encroachment, that he would continue to suffer damages if the obstruction were not removed, and that monetary relief would be inadequate.

While Baker and his contractor could have been mistaken in assuming that projecting eaves (extending more than three feet beyond the deadline) were not within the prohibitory language of the bill of assurance, the test is not what they honestly believed. The controlling considerations are, first, What was the purpose in inserting the restrictions? and, secondly, was the language sufficient to convey to reasonable minds the purposes Jernigan contends were intended? Each question must be answered in the affirmative. In *Leffingwell* v. *Glendenning,* 218 Ark. 767, 238 S. W. 2d 942, it was held that the owner of a lot whose contractor inadvertently built a retaining wall separating adjacent property was under legal compulsion to remove a protrusion varying from a fraction of an inch to nearly four inches over a distance of 26 feet.

In the case at bar Baker built on his own land, and to this extent the transaction differs from the Leffingwell controversy. But, though he built on his own land, he violated rights of others who bought lots in reliance upon the bill of assurance. Quite clearly the primary purpose was to guarantee that an unobstructed area of fifteen feet would separate buildings in all cases where the assurance applied. No one could seriously argue that eaves are not a part of the attached building, and in the instant case a projection of more than three and a half feet constituted an invasion of the area Jernigan had every cause to believe would always remain unobstructed. It follows that a mandatory injunction requiring removal should have been given.

The evidence is conflicting as to what damage Jernigan sustained through use of his driveway. The original demand was $500, but this was reduced by the Chancellor to $50. Henry testified that complaint was made by Jernigan and that he promised to restore the property to its original state. While Henry thought the damage was insignificant, Baker testified that "probably" the use of a bulldozer for half a day would be required at a cost of "approximately" $25, and that about three loads of crushed rock at $18 per load would be required. His estimate as a whole was "less than a hundred dollars." This did not, of course, allow for inconvenience. It is our view that any award under $100 would be inadequate, and to that extent, and in the failure to require removal of the eaves, the decree is reversed.

To whatever extent the foundation projection creates a visible obstruction, its removal would be in order. However, the slight projection appears to have been ground covered, so no order affecting it will be made at this time. If, on petition for rehearing, the right is insisted upon, further consideration will be given.

STEELE *v.* ROBINSON.

4-9765 251 S. W. 2d 1001

Opinion delivered October 27, 1952.

Clarence Clifton, J. H. Spears, J. W. Kirkpatrick and *John B. Mack,* for appellant.

Armstrong, McCadden, Allen, Braden & Goodman, Lowell W. Taylor, Hale & Fogleman and *Barrett, Wheatley & Smith,* for appellee.

George Rose Smith, J. This is an effort by the two surviving bodily heirs of Sallie Haden to regain two 160-acre tracts that have been out of the Haden family's possession for about twenty-five years. In 1895 the property was conveyed to the plaintiffs' ancestor, Sallie Haden, and to her heirs by J. T. Haden. Sallie Haden, after having obtained deeds from her own children, sold the land to the Bank of Crittenden County in 1926. The appellees, remote grantees of the Bank, rely upon the title conveyed by Sallie Haden in 1926. The main question in the case is whether Sallie Haden had a life estate with (a) a vested remainder in her children or (b) a contingent remainder in her bodily heirs.

In the court below the chancellor sustained demurrers to the separate complaints filed by the two appellants. These complaints, with their exhibits, allege that in 1895 C. A. Jenkins conveyed this land to Sallie Haden "and unto her heirs by her present husband, J. T. Haden, and assigns forever." It is shown that J. T. and Sallie Haden had eight children in all. One died in infancy, without issue, before the execution of the 1895 deed. Three others died in infancy, without issue, between 1900 and 1911. In 1912 the four surviving children gave their mother, Sallie Haden, a warranty deed to the property. Their father, J. T. Haden, died in 1917, and in 1918 these four children again conveyed the land to their mother, this time by a quitclaim deed.

One of the four children, Carrie, died without issue a few months after the execution of the quitclaim deed in 1918. Another, Hugh, died in 1922, leaving as his only descendant a daughter, Huella Haden Steele, who is one

of the two plaintiffs. In 1926 Sallie conveyed the land to the Bank. The next death was that of Sallie herself, who died January 4, 1948. Thirteen days later one of her two surviving children, Thurman, died intestate and without issue. The fourth child, Irene Haden Cockrill, is still living and is the other plaintiff. In short, the two plaintiffs are Sallie Haden's child and grandchild.

It is the plaintiffs' contention that the 1895 deed conveyed a life estate to Sallie Haden with a contingent remainder to her bodily heirs. From this premise it is argued that under the long line of cases beginning with *Horsley* v. *Hilburn,* 44 Ark. 458, Sallie's children had no interest which they could convey during their mother's lifetime. Upon this theory it is contended that upon Sallie's death in 1948 the remainder vested in equal thirds in Thurman Haden and the two plaintiffs. It would follow that upon Thurman's death the plaintiffs inherited his interest and became the sole owners of the land.

The plaintiffs' chain of reasoning depends for its validity upon the initial assertion that the deed to Sallie Haden created a contingent remainder in her bodily heirs. If, on the other hand, that deed created a vested remainder in Sallie's children it is evident that the children transferred their interest to Sallie, and she in turn conveyed a perfect title to the Bank.

In theory the distinction between a vested and a contingent remainder is clear-cut, but in practice the distinction is apt to be troublesome, since the language in a particular deed or will may fall very near the borderline. Although in this case we need not undertake a complete analysis of the subject it is essential to distinguish the three classes of remainders that are involved in the arguments presented.

It is familiar law that all remainders may be divided into four classes, and at any given moment every remainder belongs to one and to only one class. Rest., Property, § 157. First and simplest is the indefeasibly vested remainder, such as that created by a grant to A for life with

remainder to B. Here B owns the fee subject only to A's life estate; B's interest may be transferred during his lifetime or upon his death, although it does not become a possessory estate until the life tenant dies.

Almost equally simple is the remainder that is vested subject to open and let in afterborn members of the class. Here the typical grant is to A for life with remainder to his *children,* as distinguished from his bodily heirs, issue, etc. This remainder vests upon the birth of A's first child, but it opens up to admit other children later born to A. Thus the membership in the class may increase; but it cannot decrease, since the interest of a child who predeceases A passes by will or intestacy—still subject to open and let in additional children. In our reports the case of *Jenkins* v. *Packington Realty Co.,* 167 Ark. 602, 268 S. W. 620, may be cited as a typical illustration of this type of remainder.

The third class of remainders, one that is vested subject to defeasance, is not involved in the case at bar. See Rest., Property, § 157, Comments *o* to *t*.

Last is the contingent remainder, which is in most cases contingent because the identity of the remaindermen cannot be definitely ascertained until the occurrence of some future event, such as the death of the life tenant. Our leading case is *Horsley* v. *Hilburn, supra,* where the deed was to Marietta Hilburn and the heirs of her body. In that case we adhered to the traditional common law conception of a contingent remainder's character and alienability, as modified by our fee tail statute. Ark. Stats. 1947, § 50-405.

In the case before us the deed was to Sallie Haden "and unto her heirs by her present husband, J. T. Haden." This is manifestly a borderline case; for the reference to Sallie's "heirs" by J. T. Haden could mean either her children, in which case the remainder is vested subject to open, or her bodily heirs in general, in which case the remainder is contingent.

After studying this question for some months we have concluded that, upon the authority of *Shirey* v.

Clark, 72 Ark. 539, 81 S. W. 1057, the reference to Sallie Haden's heirs by J. T. Haden meant her children, and therefore the remainder was originally vested subject to open. In the *Shirey* case the conveyance was from A. W. Clark to his wife, Emily Clark, "to have and to hold during her life or widowhood . . . and after her death or future marriage then to the heirs of the said A. Wm. Clark by the said Emily Clark." We held that the remainder was vested rather than contingent, for the reason that the word "heirs" meant children. "What other meaning could attach to the words, 'heirs of said A. W. Clark by the said Emily Clark'? They could only mean the children of the said A. W. Clark by the said Emily Clark then living. The maxim, '*Nemo est haeres viventis*' does not apply here, because the word 'heirs,' as used, evidently means children *in esse.* The intention of the grantor in the deed must prevail; and it is evident by the use of the words 'heirs of said A. W. Clark by the said Emily Clark' he could have meant nothing else than the children of the said A. W. Clark by the said Emily Clark." In several other cases we have held that, in the particular circumstances, a reference to heirs was intended to mean children. *Wyman* v. *Johnson,* 68 Ark. 369, 59 S. W. 250; *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974; *Taylor* v. *Cammack,* 209 Ark. 983, 193 S. W. 2d 323, noted in 1 Ark. L. Rev. 182.

Even though the deed in the *Shirey* case was so similar to the deed to Sallie Haden that we regard the earlier case as controlling, it is nevertheless true that the *Shirey* opinion is open to a dual interpretation. There we said that the reference to A. W. Clark's heirs by Emily Clark could only mean the couple's children *then living.* This language of the opinion, taken literally, could mean that the class was forever limited to the children who were *in esse* when the deed became effective, in which case their interest would have been indefeasibly vested, just as if they had been designated by name in the deed. Yet, on the other hand, the court's reference to the children "then living" may have been an abbreviated way of saying that the estate vested in those children, subject to

opening up to let in afterborn members of the class. The opinion itself suggests that the latter view is the correct one, and an examination of the original transcript dispels all doubt. The transcript shows that one of the children, Homer P. Clark, was not born until five years after the execution of the deed to Emily Clark, but this child was awarded a proportionate share in the property. Since this child was not *in esse* when the deed became effective, it is manifest that the court actually construed the deed to create a remainder that was vested subject to open.

In spite of the close similarity between the deed in the *Shirey* case and the one now in issue the appellants advance an ingenious and not altogether illogical reason for distinguishing the earlier case. There the deed was to Emily Clark with remainder to *A.W.*'s heirs by her. Here the deed was to Sallie Haden with remainder to her heirs by J. T. Haden. The rather subtle distinction now urged is that in the *Shirey* case the remainder was to the heirs of the life tenant's *husband,* while in this case the remainder is to the life tenant's *own* heirs. The argument is that at common law a deed to A for life with remainder to *A*'s bodily heirs created a fee tail, but a deed to A for life with remainder to *B*'s bodily heirs did not create a fee tail. Hence, say the appellants, the *Shirey* case did not really come within our fee tail statute, which vests the fee in him to whom the estate tail would first pass according to the course of the common law. Ark. Stats., § 50-405.

We recognize the adroitness of counsel's argument, but we are not all convinced that the distinction proposed is really applicable to the *Shirey* case. In the suggested common law illustration, that of a deed to A for life with remainder to B's bodily heirs, there is certainly a tacit assumption that B's bodily heirs are not exactly the same persons as A's bodily heirs. Yet in the *Shirey* case that assumption would not be well founded. There the deed was to Emily Clark and A. W. Clark's heirs by her, which in practical effect is precisely the same as a deed to Emily and her heirs by him. As far as the grantor's intention is concerned, it makes no difference whether he refers to

the wife's children by the husband or the husband's children by the wife. Of course the rules of conveyancing are to some extent inflexible, and not infrequently it is necessary to give effect to form rather than to intent. But it would involve an altogether undue deference to form alone to give controlling effect to the distinction now urged by counsel.

We conclude that the deed to Sallie Haden and to her heirs by J. T. Haden was in effect a deed to Sallie and her children by him, creating a remainder that was vested subject to open. At common law such a vested remainder was alienable, and with a lone exception our decisions have adhered to the common law view. In the *Shirey* case we recognized that the vested remainder of the life tenant's children would pass by descent. There one of the children had predeceased Emily Clark, and we held that the deceased child's son succeeded to the interest of his father. In the next case, *Jenkins* v. *Packington Realty* Co., 167 Ark. 602, 268 S. W. 620, wherein the remainder was vested subject to open, it was held that the only child of the life tenants could convey his interest.

In a third case, *Landers* v. *People's Bldg. & Loan Ass'n,* 190 Ark. 1072, 81 S. W. 2d 917, the granting clause in the deed was to "Willie Millette and the heirs of her body now born and that may be born unto her." There were, however, two other references in the deed to Willie Millette and her children, who were named. Construing the deed as a whole, and without intending to impair the rule of *Horsley* v. *Hilburn,* we held that the children "took a vested interest, which would open up and let in other children that were born thereafter," and that the children could convey their interest before the termination of the life estate. The rule was again applied in *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584, where, it being agreed that the life tenant was past child-bearing age, we held that she and her children could convey a merchantable title.

Opposed to these four decisions stands only the case of *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994, noted

in 1 Ark. L. Rev. 188. The deed was to Dora Watkins for life and at her death to her children—the classic language that is used to create a remainder that is vested subject to open. We said, however, that the children's interest was not vested but contingent and therefore was inalienable until the death of the life tenant. The *Deener* case is contrary to the common law as well as to our own earlier and later cases; our efforts to distinguish it have not been successful. We think it best to overrule that decision.

Inasmuch as the interest of Sallie Haden's children was vested and transferable, it passed to Sallie Haden by the deeds of 1912 and 1918. One of the appellants, Mrs. Cockrill, seeks to disaffirm the 1912 transaction upon the ground that she was then a minor, but that disability did not exist in 1918. It is evident that in that year the entire ownership of the land rested in Sallie Haden and her four surviving children. The original deed gave Sallie a life estate with a remainder that eventually vested in the seven children that were at one time or another living after 1895. Three of the children died in infancy. The property being a new acquisition, *Wheelock* v. *Simons,* 75 Ark. 19, 86 S. W. 830, under the law then in force the estate of the infant children passed first to their father for life, then to their mother for life, and then to their brothers and sisters. Kirby's Digest, §§ 2636 and 2645; *Kelly's Heirs* v. *McGuire,* 15 Ark. 555. We need not set out the undivided interests that resulted from the deaths of the three children, for it is manifest that the 1918 quitclaim deed merged the fee simple in Sallie Haden. She conveyed to the Bank in 1926, and upon that title the appellees are entitled to prevail.

Affirmed.

WARD, J., dissents.

4-9865 251 S. W. 2d 1005

Opinion delivered October 27, 1952.

Hugh M. Bland, for appellant.

Gutensohn & Ragon and *Lyman Mikel,* for appellee.

ED. F. MCFADDIN, Justice. This appeal involves the liability of a taxicab company for allowing an assault on a passenger.

Appellant, Black & White Cab Company, (hereinafter called "Cab Company") is a corporation engaged in the taxicab business in Fort Smith. Appellee, Paul Doville, filed action against the Cab Company for actual and punitive damages which he alleged were sustained by him when he was assaulted and beaten while a passenger in a taxicab of the Cab Company. Liability was predicated not only on the failure of the driver of the taxicab to render the required degree of care to Doville, but also on the willful and wanton conduct of the driver. The Cab Company denied all liability, and trial to a jury resulted in a verdict for $500 actual damages and $500 punitive damages. The Cab Company brings this appeal and presents the points now to be discussed.

I. *Motion for Instructed Verdict.* At the close of the plaintiff's case, and again at the conclusion of all the evidence, the Cab Company moved for an instructed verdict. The refusal of such motion is assigned as error, so we review the evidence supporting the verdict.[1]

Appellee Doville telephoned the Cab Company requesting a cab to be sent to his address; and in due time, the cab arrived. The driver was Jack Faught, and on the front seat with him were Granville Stewart and Robert Early. On the back seat of the cab were Gene Hettle and Thomas Monroe. Doville was seated on the back seat immediately behind Early. When Doville said he

[1] The rule is well settled that in determining the correctness of the trial court's decision in refusing to direct a verdict for defendant, the evidence is viewed in the light most favorable to the plaintiff. *Mo. Pac. Ry.* v. *Harville,* 185 Ark. 47, 46 S. W. 2d 17; *Safeway Stores* v. *Mosely,* 192 Ark. 1059, 95 S. W. 2d 1136; *Acco Transport* v. *Smith,* 207 Ark. 70, 178 S. W. 2d 1011; and other cases collected in West's Ark. Digest "Appeal & Error," § 927 (7).

wanted to be taken to the main post office downtown, Early, who had been drinking, said: "No, you want to go with us; we are going to Alma." Doville reiterated his desired destination and then Early turned around, grabbed Doville by the necktie, pulled him forward, and hit him in the face and mouth and on the shoulders and neck. Doville was bleeding and dazed. When the cab stopped to discharge Hettle, Doville tried to get out, but Early and the other man on the front seat seized Doville and pulled him back in the cab, and Early continued to beat him over the head. The taxicab driver did not protest, call the police, or do anything to discourage the assault or to protect Doville.

When the cab was still some distance from Doville's desired destination, Early told the driver: "Let's put him out here". Accordingly, Doville was allowed to leave the cab, and he immediately called the police and gave a report of the assault. Doville insisted that he said nothing to anyone in the cab except to announce his desired destination. He testified as to his injuries, loss of time, clothing, etc.; but since the amount of the verdict for actual damages is not questioned, we forego these details.

Doville was corroborated as to the assault and battery by Gene Hettle, a young boy who was a passenger in the cab, and who also testified that the cab driver and Early each took one or two drinks of whiskey while Hettle was in the cab. Doville was also corroborated by Mr. Monroe, who was seated with him in the taxicab. Monroe testified that the driver of the taxicab did nothing to stop the assault on Doville and uttered no protest as to the assault. Monroe also testified that Early pulled Doville back in the cab when the Hettle boy got out and that Doville also tried unsuccessfully to get out of the cab when Monroe left.

It is true that Early and Stewart, testifying for the cab company, gave their version of the affair; and each claimed that Doville provoked the attack, but the facts heretofore stated clearly made a case for the jury, and

the Circuit Court was correct in refusing the Cab Company's motion for an instructed verdict.

II. *Motion for Continuance.* Jack Faught was the driver of the taxicab at the time of the attack on Doville; the Cab Company sought to obtain a continuance on account of Faught's absence at the time of the trial; but the continuance was refused. The Court was correct in so ruling. Mr. Staton, president of the Cab Company, said that Faught left Fort Smith the next day after the assault; that Staton had been unable to locate Faught, but thought he was working in Oklahoma City. Thus there was no showing whatsoever that Faught would be present at any later trial. The granting of a continuance is within the sound discretion of the trial court; and it is not an abuse of discretion to refuse to continue a cause on account of the absence of a witness when there appears no reasonable assurance of finding the witness. See *Old American Co.* v. *Hartsell,* 176 Ark. 666, 4 S. W. 2d 25; *Newhouse Mill & Lumber Co.* v. *Keller,* 103 Ark. 538, 146 S. W. 855. See also West's Ark. Digest "Continuance," § 22.

III. *Admission of Evidence.* Over the objection of the Cab Company, the Court permitted testimony to the effect that about thirty minutes after the attack on Doville, the same Jack Faught, Granville Stewart and Robert Early (who occupied the front seat of the taxicab when Doville was attacked) were together at El Charro, a drive-in place in Fort Smith; that Robert Early there assaulted Mr. Carl Patterson and knocked him down without any provocation; and that shortly after the Patterson assault, the police apprehended Early, Stewart and Faught. In admitting this evidence, part of which was testified to by Stewart on cross-examination, the trial court said:

"Ladies and gentlemen of the jury, I now instruct you that you may consider any event that may have taken place at the El Charro as this witness testified about, you cannot use it as substantive proof in this case. It only goes to show a common design or intent and

you are to only consider it for that purpose and for no other purpose."

We hold that the trial court was correct in the ruling. The three men, Stewart, Faught and Early, had been together when Doville was beaten in the taxicab. It was shown that the cab was equipped with a two-way radio to the office of the Cab Company, and that Faught never reported to the office anything about the attack on Doville. Instead, Faught continued to ride around with Early and Stewart, one of whom had assaulted his passenger, and the other of whom had grabbed the passenger and helped pull him back in the car. Instead of trying to protect his passenger as the law required, Faught continued to consort with those who had participated in the attack. Faught and Early had been drinking together while in the taxicab, and this evidence of continued association was of some force as to Faught's common design with Early and Stewart. This evidence was also of value on Faught's willfulness or wantonness, which was one of the essentials for punitive damages.

It has long been the rule that other transactions may be shown as tending to indicate a general plan or motive, if such other transactions are of the same nature as the one in question and reasonably close in time to the one in issue. *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856; *McCaskey Register Co.* v. *McCurry,* 181 Ark. 649, 26 S. W. 2d 1108.

IV. *Instruction as to Actual Damages.* In Instruction No. 3, the Court told the jury:

"You are instructed that a common carrier owes a duty to protect its passengers from assaults from third party passengers; and so in this case if you believe and find from the evidence that the conduct of the passenger, Robert Early, mentioned in evidence, by whom the plaintiff claims to have been assaulted and battered at said time and place as alleged in his complaint, while a passenger in a cab of the defendant, Black & White Cab Company, and prior to the happening of the assault and battery, the conduct of the said Robert Early was such

as would induce a reasonably vigilant and prudent cab driver by the exercise of ordinary care to have anticipated that said passenger was likely to assault and batter plaintiff, then it would become the duty of the defendant, its driver, agent, servant, and employee in the exercise of a high degree of care to use all reasonable means to protect the plaintiff from assault and battery from said passenger; and if you find and believe from the evidence that the defendant, its driver, agent, servant and employee, failed to use a high degree of care to prevent such assault and battery upon the plaintiff; and if you so find that said passenger did assault and batter the plaintiff; and if you find and believe from the evidence that the defendant, its driver, agent, servant and employee failed to exercise a high degree of care to prevent said passenger from assaulting and striking the plaintiff; and if you further believe and find from the evidence that the failure, if any, of the defendant, its driver, agent, servant and employee, to prevent said passenger from assaulting and battering the plaintiff was carelessness and negligence, if any, on the part of the defendant, its driver, agent, servant and employee; and if you further believe and find from the evidence that as a result of the carelessness and negligence, if any, on the part of the defendant, its driver, agent, servant and employee, in failing to protect plaintiff from said passenger, and that said passenger did strike and knock down plaintiff, and that as a direct result thereof, plaintiff was injured through no fault of his own, then the plaintiff is entitled to recover and your verdict must be for the plaintiff for actual damages, if any."

The Cab Company objected to this Instruction, and claimed: "Said Instruction places a higher degree of care on the defendant than that required by law". In *National Fire Ins. Co.* v. *Yellow Cab Co.*, 205 Ark. 953, 171 S. W. 2d 927, we said: "The weight of authority is to the effect that the standards of care which prevail as to common carriers, generally, apply to those engaging in the business of operating taxicabs. 4 Blashfield, Automobile Law, § 2201, p. 46." See, also, 37 Am. Jur. 598.

We have many cases in our reports stating the degree of care which a carrier owes to a passenger to attempt to protect him from an assault by another passenger. Some of these cases are: *Chicago Ry. Co.* v. *Brown,* 111 Ark. 288, 163 S. W. 525; *Mayfield* v. *St. Louis R. Co.,* 97 Ark. 24, 133 S. W. 168, 32 L. R. A., N. S. 525; *Ark. Power & Light Co.* v. *Steinheil,* 190 Ark. 470, 80 S. W. 2d 921. Also reference books state the rule of law in such cases. See 4 R. C. L. 1181, 10 Am. Jur. 266, 13 C. J. S. 1255 and 13 C. J. S. 1294.

In our case of *Arkansas Power & Light Co.* v. *Steinheil, supra,* Mr. Justice Frank G. Smith said:

". . . a carrier owes to its passengers the duty of protection from the violence and insults of other passengers or strangers so far as this can be done by the exercise of a high degree of care, and will be held responsible for its own or its servants' negligence, in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented."

Tested by our own cases and the law generally, we find no error in the Instruction No. 3 as against the objection made by the Cab Company.

V. *The Instruction on Punitive Damages.* In Instruction No. 4 the Court told the jury that if the driver of the Cab Company failed to exercise the required degree of care in protecting Doville, and if "the said driver's actions constituted a conscious indifference and a willful disregard of the rights of Paul Doville as a passenger in the defendant's taxicab, then you may in addition to plaintiff's actual damages assess punitive damages against the defendant. You are instructed that punitive damages are defined as those damages imposed by the way of punishment and are such that are awarded for that purpose in addition to compensation for the actual loss sustained."

The Cab Company claimed that the Instruction was in error, because it "does not correctly state the elements of punitive damages, but picks out only 'conscious indifference and willful disregard' leaving out the other

essential elements necessary to fully advise the jury upon what grounds the award could be made, the rule being that exemplary damages are recoverable only for willfullness, wantonness or conscious indifference to consequences from which malice will be inferred . . ."

The right of a passenger to recover punitive or exemplary damages has heretofore been before this Court. In *Chicago Ry. Co.* v. *Whitten,* 90 Ark. 462, 119 S. W. 835, Mr. Justice FRAUENTHAL gave this statement of our holdings:

"But exemplary damages will not be allowed on account of an injury growing out of a mistake, or ignorance, or negligence, no matter how gross the negligence may be. The rule relative to the right of recovery of exemplary damages from a common carrier for a wrongful or negligent violation of its obligations and duties to a passenger has been formulated by this court in the following language: 'Negligence, however gross, will not justify a verdict for exemplary damages unless the negligent party is guilty of wilfulness, wantonness, or conscious indifference to consequences, from which malice will be inferred.' *Railway* v. *Hall,* 53 Ark. 7; St. *Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136, 66 S. W. 661; *Arkansas & La. Ry. Co.* v. *Stroude,* 77 Ark. 109, 91 S. W. 18; *Choctaw, O. & G. Rd. Co.* v. *Cantwell,* 78 Ark. 331, 95 S. W. 771; *St. Louis, I. M. & S. Ry. Co.* v. *Dysart,* 89 Ark. 261, 116 S. W. 224; *Greer* v. *White,* 90 Ark. 117, 118 S. W. 258." See, also, 10 Am. Jur. 420, *et seq.*

It is clear that if the driver of the taxicab was guilty of willfulness, wantonness *or* conscious indifference to consequences, then malice might be inferred from such acts. The Instruction No. 4 said: "a conscious indifference *and* a willful disregard". It was, therefore, more favorable to the Cab Company than the law required and was not open to the objection made.

The judgment is affirmed.

PYRAMID LIFE INSURANCE COMPANY *v.* WILLIAMS.

4-9862 251 S. W. 2d 1010

Opinion delivered October 27, 1952.

[redacted]

McMillen & Teague, for appellant.

Denman & Denman, for appellee.

ROBINSON, J. The issue here is whether two life insurance policies were in force at the time of the insured's death. The deciding factor is the due date of the premium. The facts are stipulated, only a point of law being involved. The trial court held the policies to be in force and the Insurance Company has appealed.

On the 21st day of March, 1949, appellant Insurance Company issued to Cedric H. Williams two policies of life insurance in the sum of $2,500 each. The policies were delivered and the first premium was paid three days later on the 24th day of March, 1949. Williams died on the 23rd day of August, 1951. The last monthly premium was paid on July 20, 1951, which was during the 31-day grace period. The grace period began to run again on the 21st or 24th day of July. If the premium was due on the 21st day of July, the policy had lapsed prior to August 23rd, the date Williams died. On the

other hand, if the premium was due on the 24th of July, the grace period had not run out at the time of his death.

The application was made a part of the policies and the applicant agreed: "That the insurance hereby applied for shall not take effect and there shall be no liability hereunder unless and until a first premium, for the form of policy applied for in accordance with the published rates of the company, is paid and the policy delivered to me during my lifetime and good health . . .; that all premiums on any proposed insurance issued hereon, including the first premium, shall be due on the date as specified in the policy irrespective of the date of delivery or of premium payment; and at the payment of any such premium or installment thereof shall not continue the contract in force beyond the date when the next premium or installment is payable as provided in the policy."

It is provided on the face of the policy that the amount stated pays the premium for one year from the date of the policy which is given as the 21st day of March, 1949. Subsequently the premium payments were put on a monthly basis. It is stipulated by the parties as follows:

"The Pyramid Life Insurance Company thereafter periodically sent notice of premium due to the insured. . . . The notices that were sent were, first, a notice of premium due, which was mailed five (5) days before the due date. If the premium was not received, a second notice of premium being past due was sent seven (7) days before the lapse date; thereafter, if the policies were permitted to lapse, a lapse notice was sent on the date of lapsation. All notices of this kind were sent to the assured Cedric H. Williams during the life of the two policies and had on them the due date of the 21st of the appropriate month."

The case at bar is directly in point with and is controlled by *McDaniel* v. *Missouri State Life Insurance Company,* 185 Ark. 1160, 51 S. W. 2d 981. There Chief Justice Hart speaking for the court said: "It is true

that the policy itself did not take effect until it was delivered to the insured, and the first premium was paid by him while in good health. If the insured should die prior to the delivery of the policy, liability under the policy would not attach. But the insured, by agreeing that the policy should bear the date of its issuance in the same clause and that all future premiums should become due on such policy date and all extended insurance should be computed therefrom, in express terms, about which there could be no mistake, fixed the date of the policy as the date from which the extended insurance should be computed. The parties were capable of contracting, and made a contract plain and unambiguous in its terms, and courts have no right by construction to give it a different meaning."

With regard to Arkansas decisions, appellee relies on the case of *Gaugh* v. *Southern Life Insurance Company,* 179 Ark. 842, 19 S. W. 2d 1013. But that case is distinguishable. There, although the policy was issued in February and delivered in March and contained a clause stating that it did not become effective until delivered, it was further specifically provided that the premium was due on April 1st and on the 1st day of each month thereafter. The policy was delivered March 28th and the premium was paid at that time. This court held that the clause fixing April 1st as the due date of the premium referred to the first premium and that the premium was paid two days before it was due.

In the case at bar the policy specifically provides that the first premium keeps the policy in force for one year from the date of the policy which is March 21, 1949. The evidence is convincing that both the Insurance Company and the insured considered the premium to be due on the 21st day of the month. It is stipulated that all notices from the Insurance Company to the insured stated the due date as the 21st day of the appropriate month. It does not appear that the insured ever protested about this date.

The date of the issuance of the policy as provided therein prevails as to the date when the premium is due;

otherwise it would be impossible to determine the due date of the premium by an examination of the policy. In fact, it would always be a question for a jury to determine and neither the Insurance Company nor the insured would know for certain whether the payment of the premium by a given date would keep the policy in force.

Appellee cites *American National Insurance Company* v. *Gregg,* 123 Colo. 476, 231 Pac. 2d 467, which holds contrary to our own case of *McDaniel* v. *Missouri State Life Insurance Company, supra.* The McDaniel case is in line with the weight of authority which is stated in 169 A. L. R. 290 as follows:

"The general rule that when a policy, conditioned to take effect on the payment of the first premium, expressly specifies the date from which the premium period is to be computed and makes that date the day on which the recurring premiums are due and payable, such date must control, regardless of the date on which the policy is delivered." A long list of cases sustaining this view are cited.

Appellee also contends that to hold the premium paying period began March 21st, the date of the issuance of the policy, would be contrary to the law and cites Ark. Stats. § 66-507. This Section of the Statutes deals with insurance companies discriminating between individuals of the same class and is not applicable here.

The judgment is reversed and since the cause appears to have been fully developed, it is hereby dismissed.

EX PARTE JOHNSTON.

4717 251 S. W. 2d 1012

Opinion delivered October 27, 1952.

S. L. Richardson, for petitioner.

W. J. Schoonover and *James A. Robb,* for respondent.

WARD, J. The petitioner, Wilburn L. Johnston, received a divorce from his wife, Lucille Johnston, October 4, 1947. The decree of divorce provided that he should pay $35 per month for the support of their two small children, Sammy Lee and Mary Ann, and it also reserved in the court jurisdiction to make other orders for the care of the children.

The husband not having made the payments provided for in the original decree, appropriate legal steps were initiated and on May 4, 1952, a petition was filed by the ex-wife and two children alleging delinquency in payments "both prior to and continuously from March 4, 1952" and asking that the husband show cause on June 4, 1952, why he should not be held in contempt of court.

On the last above-mentioned date the Chancellor on exchange heard the case and found the petitioner guilty of contempt and remanded him to the custody of the sheriff pending further orders of the court. The Chancellor, also, in a written statement set out that in view

of the fact he was not the regular Chancellor, he would allow the petitioner to be discharged from custody if he would pay $50 for support of the children pending a further hearing by the regular Chancellor on August 13th.

Petitioner filed a response to the citation for contempt in which he did not deny being behind with the payments, but alleged that he had not paid because he was not financially able to do so, and he asked that the original decree be modified and that he be relieved from making the said monthly payments. Since we are affirming the decision of the Chancellor, only a summary of the evidence produced at the hearing will suffice.

The only evidence produced was that of the petitioner and his witnesses and there is no question but that he showed he was a man of little financial means. Petitioner is 29 years old, has married again and has two small children by his second wife. He stated that he had low blood pressure, indicating he was unable to do hard and continuous manual labor. He owns no land, but is farming about 60 acres in corn for which he pays one-third as rent. He owns his household goods and farming implements including a tractor, truck, etc., and also owns a milk cow, all of which are mortgaged for a considerable portion of their value. It takes all he has been making to feed and clothe his present family and he has to borrow money from his landlord to make a crop. It costs him about $30 to $35 per month to feed his family and he now is behind a month or two with his grocery bill.

On the other hand, some facts were developed which we think justified the Chancellor's decision. Petitioner's statement that he had low blood pressure was uncorroborated and the work he did, such as farming and carpentering, certainly indicates he was a man of reasonable health and strength. Some of the money he owes was borrowed from his father over the past year or two and he gave his father a mortgage after this proceeding was instituted. Likewise, he gave his landlord a mortgage on all his crops while the matter was pending, notwithstanding his landlord already had a lien for his

rent and advances. Though his landlord had already advanced him about $400, he was still willing to advance him $200 or $300 more, and felt safe in doing so. The lowest estimate showed that his crop will be worth something like $2,000, and the evidence indicates he has several hundred dollars' equity in his farm equipment. The evidence indicates that he might have tried to mislead the court as to the condition of his truck. Petitioner admits that all his time is not consumed in his farming operations and also admits that he has not tried, at least not consistently, to obtain other employment.

Considering the facts developed in this case, some of which are set out above, we do not feel justified in saying the Chancellor abused his discretion in holding petitioner in contempt of court, or, to say it another way, in coming to the conclusion that petitioner could have made substantial payments for the support of his children by his first wife if he had honestly tried to do so.

The law in contempt cases, though not voluminous, seems to be well settled. We find in 172 A. L. R., at page 876, what seems to be the accepted rule in these words:

"So, the enforcement by contempt of a court's orders in respect to the payment of a child's support by its father is a matter that rests in the sound discretion of the chancellor, just as it is in his sound discretion either to relieve altogether or in part or compel payment of an accumulation of unpaid allowances."

We note here that the special Chancellor expressed a willingness to offer easy terms to the petitioner which he did not see fit to accept, and we have no doubt that the regular Chancellor will, when the occasion arises later, provide terms for petitioner's release from custody which are reasonably within his financial ability.

It is well-settled law, as recognized in the case of *Hervey* v. *Hervey,* 186 Ark. 179, 52 S. W. 2d 963, that imprisonment for contempt can only be justified on the ground of willful disobedience of the orders of the court.

The same case, however, holds that the decision of the chancellor will not be disturbed unless it is against a preponderance of the evidence. Here we are unwilling to say the chancellor's finding was against the preponderance of the evidence. This rule is in harmony with, if not the same as, the rule first above announced.

As recognized in the case last cited above and also in *Tennison* v. *Tennison,* 216 Ark. 784, 227 S. W. 2d 138, chancery courts have inherent powers to punish for contempt for disobedience to their orders. It seems to us that this power is especially important if chancery courts, with their limited means, are to guard the rights of dependent children in cases like this.

Some question was raised by petitioner regarding the proper function of the Writ of *Certiorari* in this and similar cases. We call attention to the approval of this method of procedure as sanctioned in *Ex Parte Butt,* 78 Ark. 262, 93 S. W. 992, and in *Ex Parte Caple,* 81 Ark. 504, 99 S. W. 830.

In view of the conclusions reached above, the petition is denied.

FIKES *v.* STATE.

4721 251 S. W. 2d 1014

Opinion delivered October 27, 1952.

Cole & Epperson, for appellant.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The information charged murder in the first degree and the defendant admitted she killed Robert Coleman by stabbing him with a butcher knife. In the application for bail the only witness was Joe W. McCoy, the prosecuting attorney. The defendant had told McCoy how the killing occurred, but claimed self-defense, and McCoy as a witness called by the accused undertook to repeat in substance what Annie Mae had said. It was the trial court's view that a jury could find that the ingredients of first degree murder were present, hence bail was denied. In an application to review by *certiorari* counsel for the defendant contends that the state's testimony did not meet the test of Art. 2, § 8, of the Constitution which prohibits bail in capital cases where the proof is evident or the presumption great.

In an application for bail the trial court's determination will not be disturbed unless there was an abuse of discretion. *Parnell* v. *State,* 206 Ark. 652, 176 S. W. 2d 902.

When, as here, the homicide is admitted, and the information charges first degree murder, the burden is on the defendant to offer testimony showing that the proof is not evident or the presumption great. In short, the official accusation is sufficient to justify the sheriff or other custodian of the prisoner to retain that custody until by court order a status consonant with the intent of the constitutional provision is established.

In the case at bar the petitioner-defendant sought to bring herself within the exception by compelling the prosecuting attorney to repeat what she had told him. The court had a right to consider the credibility of what the defendant was alleged to have told the prosecuting attorney, and to regard as self-serving any portion of the testimony excusing the homicide. We are therefore unable to say that judicial discretion was abused.

A *per curiam* order was made September 29th overruling the petition's prayer for bail, and this opinion will be treated as having been concurred in as of that date.

4-9871 252 S. W. 2d 76

Opinion delivered October 27, 1952.

Rehearing denied November 24, 1952.

Reece Caudle, for petitioner.

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

MINOR W. MILLWEE, Justice. Petitioner, Dan Keenan, seeks a writ of prohibition to prevent the Pope Circuit Court from proceeding further in a transitory action filed against him in that court by Fred W. Rogers.

By special appearance, petitioner filed a motion to quash service of process on him in the Pope County action, alleging: (1) that the summons showed on its face that it had not been served as required by law; (2) that the summons was served after the return date thereof; and (3) that the service was obtained through fraud and deceit in that it was attempted to be had before any action was ever filed in Pope County, and that an identical action filed in Yell Circuit Court, Dardanelle District,

on May 14, 1951, in which petitioner was served with summons May 16, 1951, was dismissed by Plaintiff Rogers on the same date that he actually filed the Pope County action, namely, May 18, 1951.

After hearing testimony on the motion to quash, the circuit court overruled it and found: "Under the evidence heard surrounding the circumstances of the purported service of the summons in Russellville on defendant, as related by the Sheriff, the Court is of the opinion that legal and valid service of summons was had on Dan Keenan.

"Under the provisions of § 27-309, Ark. Stats., 1947, as to return date of summons it is provided: 'The summons shall be made returnable to the first day that the court shall be in session after twenty days after the date of issuance thereof.'

"The complaint was filed on April 10, 1951, and summons issued on the same date, returnable as provided by statute cited above. Circuit Court was in session on April 12, 16, 24, and 27 in Pope County, but no Court was held during May, 1951. The summons was served on May 18, 1951. The 20th day after the date of issuance of summons on April 10, 1951, would have been on April 30, 1951. The return day of summons was fixed under the law to the first day that the court would be in session after twenty days after the date of issuance of the summons. If the Circuit Court had met in session at any time in May, prior to May 18th, then the summons under such circumstances would have been served after the return day and therefore void. But such was not the case."

Since petitioner has not favored us with an abstract of the testimony taken on the motion to quash, we must assume that the evidence sustains the court's finding as to the validity of the service. This finding is clearly in accord with the provisions of § 27-309, *supra,* as interpreted by this court in *J. H. Hamlen & Son* v. *Allen,* 186 Ark. 1104, 57 S. W. 2d 1046.

Upon the record here presented, it appears that the Pope and Yell Circuit Courts had concurrent jurisdiction

of the subject matter of the transitory cause of action filed against petitioner. When a court has jurisdiction over the subject matter and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error which may be corrected by appeal and prohibition is not the proper remedy. *Sparkman Hardwood Lbr. Co.* v. *Bush,* 189 Ark. 391, 72 S. W. 2d 527; *Arkansas Democrat* v. *Means,* 190 Ark. 948, 82 S. W. 2d 256.

In *Finley* v. *Moose,* 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74, it was held that, if the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted, though the superior court may be of the opinion that the questions of fact have been wrongly determined by the court below, and that their correct determination would have ousted the jurisdiction.

Petitioner argues that Pope Circuit Court was completely ousted of jurisdiction as of the date of the service upon him in the Yell County action. Our statutes (Ark. Stats., §§ 27-1115 and 1119) provide what shall be done in cases where identical causes of action are pending between the same parties in courts of concurrent jurisdiction. In *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8, Judge Battle, speaking for the court, in reference to these statutes, said: "They provide that when it appears in the complaint that there is another action pending between the same parties for the same cause, the objection may be taken advantage of by demurrer; and if it does not appear in the complaint, it may be taken by answer; and if the objection is not taken by demurrer or answer, the defendant shall be deemed to have waived the same. . . . If the demurrer be overruled, or the plea in the answer be overruled, the defendant has an adequate remedy by appeal. 'But, in the first instance, the court in which the proceeding began has a right to pass on the question, and if it errs its errors can be corrected' by the Supreme Court. The fact that the court may err in deciding the question does not authorize this court to interfere

by writ of prohibition. *State ex rel. Johnson* v. *Withrow,* 108 Mo. 1, 18 S. W. 41."

Since our holding in *Anheuser-Busch, Inc.* v. *Manion,* 193 Ark. 405, 100 S. W. 2d 672, a party does not enter his appearance by appealing to this court where his objection to jurisdiction of the person is properly preserved in the trial court and his remedy by appeal is, therefore, adequate. *Twin City Lines, Inc.* v. *Cummings, Judge,* 212 Ark. 569, 206 S. W. 2d 438.

Since petitioner has an adequate remedy by appeal, the writ of prohibition is denied.

McSPADDEN *v.* MARSHALL.

4-9877 252 S. W. 2d 65

Opinion delivered October 27, 1952.

Chas. F. Cole, for appellant.

W. D. Murphy, Jr., for appellee.

HOLT, J. This is a suit in ejectment.

Appellees alleged in their complaint that they were the legal heirs of G. F. Marshall, who died in 1950, and claimed title under his will to a small strip of land (here-

inafter described) in the town of Bethesda, Independence County. They further alleged that Mr. Marshall obtained a deed (introduced in evidence) to the property in question August 27, 1924, from W. C. Robertson and wife, under the following description: "Part of the northeast quarter of the northwest quarter of section seven in township thirteen north, range seven west, described thus: beginning at the southeast corner of said quarter section, running north 454 feet, thence west 75 feet for a place of beginning, this being the beginning corner for the land herein conveyed, thence south 112 feet, thence west 200 feet, thence north 10 feet to the east line of the land heretofore conveyed by G. F. Luster and wife to J. K. Defries, thence along the east line of said tract 102 feet, thence east 200 feet to the beginning corner," and that this deed conveyed to their father 112 x 200 feet out of the northwest corner of the land sold to W. C. Robertson and Ruby Leonard by J. F. Luster July 3, 1923; that appellant, Mrs. McSpadden, claims some interest in the land, but denied that she had any interest.

Appellees further alleged that she (appellant) "does own some real estate that is adjacent to and contiguous with the property of the plaintiffs, that said property was acquired in 1933 by deed . . . and in said deed it is specifically stated that the property conveyed to Chattie McSpadden specifically excludes the G. F. Marshall lot, and metes and bounds description of the Marshall lot is given." We shall later set out the description in this deed.

Mrs. McSpadden answered with a general denial and asserted title to the property by adverse possession.

On a jury trial, there was a verdict for appellees and from the judgment is this appeal.

By stipulation, a number of deeds were introduced in evidence, including those alleged in appellees' complaint.

Appellant first contends that the description of the strip of land in question, as shown in the deed from Robertson to Marshall (August 27, 1924, above) shows that the description provides for a point of beginning as

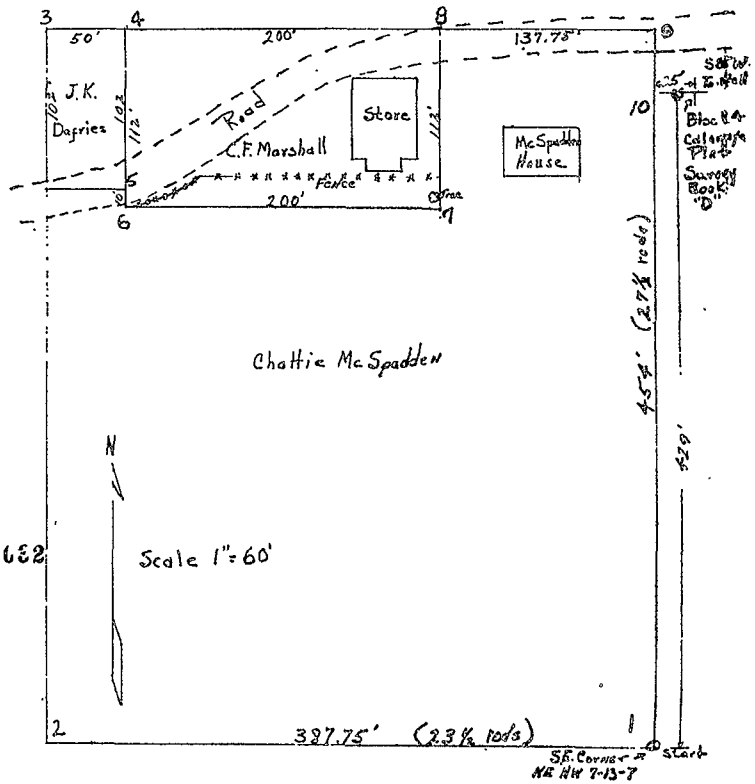
follows: "Thence west 75 feet for a place of beginning" and that when followed does not describe the land in controversy.

The record reflects that Mr. Sims, a former county surveyor, whose competence and qualifications are not questioned, made a survey of the land involved and a map or plat of this survey was introduced and admitted in evidence, without proper objection and exceptions, and is reproduced immediately following in this opinion.

EXHIBIT 6

23.

Ex 6



Mr. Sims' version of how he made the survey and prepared the plat is to the following effect (quoting from appellant's abstract): "I located the 112 ft. x 200 ft. tract two ways. By the first way I started at the southeast corner (Point No. 1 on plat) and went north 454 feet, or 27½ rods to the corner in the street, (Point No. 9 on plat). Then, I believe the first deed I tried to use was this one that called for 75 feet. (. . . the deed from W. C. Robertson and wife to G. F. Marshall). After I measured 75 feet, I saw there was an error. The east line of the Marshall tract would have been through the McSpadden house. I then used the other two descriptions and measured over to the northwest corner of the 4-acre tract; (Point No. 3 on plat), which was the northwest corner of the J. K. Defries tract; then I measured 50 feet east and 112 feet south and found an iron pin which was 112 feet from the northeast corner of the J. K. Defries tract, (Point No. 6 on plat), which was the southwest corner of the Marshall tract; I then went east 200 feet, then north 112 feet, then back west 200 feet to the point of beginning. . . .

"I have numbered each of the corners of the Marshall tract on the plat; No. 6 is the southwest corner; No. 8 is the northeast corner; No. 7 is the southeast corner; No. 4 is the northwest corner. The Marshall store was entirely within the tract, none of Mrs. McSpadden's building was on this tract; . . . I concluded the Marshall tract is where I have located it on the plat."

Mrs. McSpadden testified that her claim to the strip of land (in addition to claim by adverse possession) was based on her deed from J. A. Luster on November 17, 1933, containing the following description: "Part of the northeast quarter of the northwest quarter of section seven (7), township thirteen north, range seven west, described as follows: Beginning at the southeast corner of said quarter, running north 27½ rods, thence west 23½ rods, thence south 27½ rods, thence east 23½ rods to the place of beginning, *except* one lot 102 feet north and south by 50 feet wide in the northwest corner of said tract and the lot owned by C. F. Marshall,

beginning at the northeast corner of the J. K. Defries lot, running east 200 feet, thence south 112 feet, thence west 200 feet to the east boundary of said J. K. Defries lot."

We think it clear that when the above deed to Mr. Marshall from his predecessor in title, Robertson, in which is described the Defries' exception as shown on the plat, also the deed from Robertson and wife to J. A. Luster (Mrs. McSpadden's predecessor in title) on December 1, 1927, under the following description: "A part of the northeast quarter of the northwest quarter of section seven (7), township thirteen (13) north, range seven (7) west, more accurately described as follows: Beginning at the southeast corner of said quarter, running thence north 27½ rods, thence west 23 1/3 rods, thence south 27½ rods, thence east 23 1/3 rods to place of beginning, except one parcel of ground measuring 102 feet north and south by 50 feet east and west, lying in the northwest corner of above described tract of four acres, said 50 x 102 foot lot having been previously sold to J. K. Defries by G. F. Luster and wife, and EXCEPT one other parcel of ground measuring 200 feet east and west and 112 feet north and south lying in the northwest corner of above described tract of four acres, and lying east of and adjoining the parcel sold to J. K. Defries, said parcel of ground 112 x 200 feet having been sold by W. C. Robertson and wife to C. F. Marshall," and the deed from J. A. Luster to Mrs. McSpadden, above, are all considered, there is obviously no error in the method used by Sims in his survey and the plat he made of the strip of land involved conforms to the descriptions involved in the deeds and correctly located and described the Marshall tract involved.

Appellant's contention that the court erred in using the following language: "The plaintiff has set out a record title of the property" in its instruction No. 1, is untenable for the reason that appellant has failed to abstract all the instructions given by the court and the presumption must be indulged that the other instruc-

tions supplied any deficiency in Instruction No. 1. Therefore, appellant cannot complain.

We announced the controlling and long established rule in *Southeast Arkansas Telephone & Power Company* v. *Allen,* 191 Ark. 520, 87 S. W. 2d 35. We there said: "The legal presumption by which we are bound is that other instructions were correct and met or supplied any alleged deficiencies in those criticised in the brief." See cases there cited.

On the question of appellant's claim of ownership by adverse possession, it suffices to say that the jury, on conflicting testimony, found against her, on substantial evidence.

Finally, appellant alleges error in the following procedure reflected by the record: After the jury had been given the case, it returned and propounded this question to the court: "What the jury wanted to know was if we were to find in favor of the plaintiff, would it have any effect on the ownership of the Chattie McSpadden house? In other words, the deeds say go west 75 feet, then south. By the Court: I will say this to you, subject to correction, if the court remembers the proof in the record, it would not involve the question of the house. Am I right? By Mr. Murphy: The plaintiffs would stipulate that it would not. By Mr. Cole: I think the pleadings in the case would be determinative of what the issues would be in that. If they are claiming under the deed, I think it would, because that is as much a part of the deed as anything else. By Mr. Murphy: I will state in open court that we have disclaimed and do disclaim their house through the metes and bounds description as amended. By Mr. Cole: I object to whatever statement you might make and any kind of a statement relative to what you disclaim. By the Court: As the court remembers the proof, the 30 feet or more in question here does not involve title to Mrs. McSpadden's house. Does that answer your question? . . . Gentlemen, according to the proof in the record as the Court remembers it, and according to the plat which is in evidence here, and by which the plaintiffs are bound, the

property in question in this lawsuit does not include the house of Mrs. McSpadden."

We find no error.

Appellees' witnesses testified as to the location of the property. The survey of Sims and the plat above which he prepared show that Mrs. McSpadden's house was not within the boundary of the Marshall tract. In fact, appellees did not claim her house and the jury was so told by the court. It is difficult to see how any prejudice could have resulted to appellant in this connection.

Finding no error, the judgment is affirmed.

WARD, J., not participating.

CHEEK *v.* HALL, SECRETARY OF STATE.

5-24 252 S. W. 2d 68

Opinion delivered October 27, 1952.

Townsend & Townsend, for appellant.

Ike Murry, Attorney General, *Cleveland Holland,* Assistant Attorney General and *Tom Downie,* for appellee.

GRIFFIN SMITH, Chief Justice. As nominee of the republican party appellant tendered to the secretary of state the Treasurer's receipt for his ballot fee as a candidate for senator from the Fifteenth district. The district is entitled to three senators. *Smith* v. *The Board of Apportionment,* 219 Ark. 611, 243 S. W. 2d 755; *Pickens* v. *The Board of Apportionment,* 246 S. W. 2d 556, 220 Ark. 145.

Act 238 of 1943, Ark. Stat's, § 3-213, is a directive to the proper committee to require candidates for the enumerated offices (when two or more nomineès are to be selected) to designate in writing a particular position, such as position No. 1, position No. 2, position No. 3, etc. This must be done at the time the party pledge is filed with the secretary of the committee; thereupon selection of the nominee shall be made as in other races. The last sentence of the section reads: "When a candidate has once filed and designated for a certain position he shall not be permitted to thereafter change such position."

We agree with appellant that this statute applies to preferential primaries, but nevertheless it does require candidates to select positions. As nominees the three democrats were certified to the secretary of state in circumstances depriving each of any discretion.

The question is, Did the Secretary of State err in declining to accept Cheek's certificate of nomination when the latter demanded a place on the general election ballot as a candidate at large without selecting the *position* he sought? In other words, is the ballot form controlled in all respects by Act 353 of 1949 or other statutory or constitutional provisions inconsistent with the course pursued by the Secretary of State?

Section 6 of Act 353 requires that every ballot shall contain the name of each candidate who has been nomi-

nated, "or has qualified in accordance with law for each office." The names are to appear in perpendicular columns under the name of each office to be filled. In general elections the county board of election commissioners shall determine by lots at a public meeting the order [or sequence] "in which the names of the respective candidates shall appear on the ballot." [In primary elections this function is performed by the county central committee.] By the name of each candidate in a general election shall be his party designation, or the word "independent" if that status exists.

Section 9 reads: "In all elections, except primary elections, *at the bottom of each list of names for each position or office appearing on the ballot* there shall be a blank line or lines, for possible write-in votes for that position or office. There shall be no write-in votes in primary elections." Section 11 contains this provision: "Opposite the designation of each office there shall appear these words: 'Vote For .....' The number of persons required to fill the vacancy in office shall be placed in the blank space, as, 'Justice of the Peace, Vote For Ten.' " The Act was approved March 21, 1949, without the emergency clause.

At the same session in 1949 Act 479 was passed with an attempted emergency clause. It authorizes primary election officials to omit from the ballot the name of a candidate who has qualified "for a particular office or position" if such candidate is unopposed.

Amendment No. 23 to the Constitution created an apportionment board and vested the Supreme Court with supervisory duties. Section 3 of the Amendment limits the senate to 35 members. Either the board of apportionment or the Supreme Court must divide the state into convenient senatorial districts. Under authority of the Amendment this Court, in the Pickens case, created the Fifteenth senatorial district, composed of Pulaski county alone. We said in the Smith case that the basis for apportionment is a district, "but the senators from that district represent all of the people. If this were not true

block voting [in the senate] responsive to area interests would militate against the welfare of the commonwealth as a whole."

There is nothing in the Amendment referring to positions in a district to which more than one senator has been assigned, but the preferential primary election Act of 1943 comprehends an orderly procedure under which nominations may be made with complete fairness to the candidates and without impairing the right or convenience of voters. Responsive to this Court's reapportionment, and in conformity with Act 238, three men were nominated as democratic candidates for senator in the Fifteenth district. Section 6 of the general election law (Act 353 of 1949) obligates election officials to place on the ballot the name of each candidate who has been nominated or has qualified *"in accordance with law for each office."*

It is conceded that three democrats—Howell, Fagan, and Gregory—were nominated, respectively, for positions Nos. 1, 2 and 3. If names are to appear on the ballot "in accordance with law for each office" it is not illogical to say that when by statute these men were required to select positions in the primary, their selection as nominees was according to law, and that the designations may properly follow in the general election. If any disadvantage or prejudice to an opposition candidate could be pointed to a pertinent inquiry would be presented, but we can see none. Certainly a republican or independent candidate has the right to select his opponent, just as appellant did when upon the refusal of Secretary Hall to permit filing without designation of a position, he chose to contend for the first place.

Affirmed.

George Rose Smith, J., dissenting. The majority opinion in this case seems so completely without justification that I find myself hesitant to focus attention upon it by writing a dissenting opinion. Yet I feel so strongly about this case that I cannot let it pass with no word of

protest. All that I will attempt, however, is to state the case for the minority; I see nothing to be gained by a detailed analysis of the majority's views.

The simple question is whether, in a contest in which three State senators are to be chosen, the lone Republican candidate (the appellant) must be shown on the ballot as opposing a particular Democratic nominee or as running at large against the three Democratic nominees.

For sixty years the minority candidate has been required by law to run as a candidate at large in Arkansas. No one questioned his legal right to do so until this year, when the Secretary of State directed this appellant to designate a particular opponent. I find it not surprising that the question was not raised for sixty years, for the statutes have been so explicit that "he that runs may read."

As long ago as 1891 the Legislature gave the exact form of ballot to be used when there are several candidates for the same office:

"For Representative. Vote for two.

John Doe, Dem.
Richard Roe, Dem.
Hiram Smith, Ind.
Henry Jones, Ind.
William Carter, Rep.

Nathan Hardy, Rep." (Ark. Stats., 1947, § 3-812.)

This law, which required candidates to run as a field and not by position, remained upon the statute books until 1949. In that year certain revisions were made in the election laws, but the substance of § 3-812 was carried forward into the new law. By Act 353 of 1949 (Ark. Stats., § 3-823) the Legislature directed that "The names of candidates shall be listed in a perpendicular column under the name of each office to be filled." Going even farther, this Act explicitly commanded: "Opposite the designation of each office there shall appear these words: 'Vote for .....' The number of persons required to fill the vacancy

in office shall be placed in the blank space, as 'Justice of the Peace. Vote for 10.' " § 3-828.

It is this phrase, "Vote for 10," that conclusively demonstrates the legislative intention that candidates must run as a field. For if they run by position, how could the voter ever vote for ten? Obviously he could not. When the candidates run by position the elector must vote for one and only one; he cannot vote for ten or any other plural number. Thus for sixty years the Legislature has declared, as plainly as the English language permits, that in a general election the nominees are to run at large and not by position.

How, then, did the Secretary of State fall into the error of supposing that the law required the appellant to specify a position on the ballot? The answer is that this officer inadvertently confused the primary election law with the general election law.

Until the adoption of Amendment 29 the Constitution made no distinction between a primary election and a general election. In both instances the successful candidate needed only a plurality of the votes, not a majority. But Amendment 29 changed the rule as to primaries, though not as to general elections, by requiring that a candidate for nomination in a party primary must receive "a majority of all the votes cast for candidates for the office."

It soon became apparent that this requirement of Amendment 29 was not adapted to the existing practice by which candidates ran at large against one another. For under that system it may be impossible, without a separate tabulation, to tell whether a candidate has received "a majority of all the votes cast for candidates for the office." In the case at bar, for instance, we have three vacancies and four candidates. Suppose the voting showed this result:

Candidate A	9,000
Candidate B	8,000
Candidate C	7,000
Candidate D	3,000
	27,000

Which candidates have received a majority of all the votes cast for the office? It is impossible to say. Each elector had the right to vote for three of the four nominees, yet he also had the privilege of voting for only one or two. Ark. Stats., § 3-1006. Hence no one can say how many votes were cast for the office. In the example given it is possible that every elector cast a vote for three candidates. In that case only 9,000 voted for the office, and candidates A, B, and C all received a majority of the total vote. But it is also possible that every elector chose to vote for one nominee only. In that case 27,000 people voted for the office, and not a single candidate received a majority.

From this example it is evident that the former system of running at large was not suitable for primary elections after the adoption of Amendment 29. Hence the Legislature in 1943 quite logically required candidates to run by position in primary elections; in that way it can easily be determined whether the required majority has been received. But this requirement, and the statute itself, apply only to primaries; they have nothing whatever to do with the general election. There is not one syllable in the general election law to indicate that a candidate must run by position; on the contrary, the law provides now, as it has for sixty years, that candidates are to run at large in a general election. The opposite view simply means that when the Legislature in 1943 required candidates to run by position in primary elections, the General Assembly not only repealed the 1891 Act but also repealed Act 353, which was not passed until six years later. For these reasons I think the decree should be reversed.

HOLT and WARD, JJ., join in this dissent.

DEARIEN *v.* LANCASTER.

4-9872 252 S. W. 2d 72

Opinion delivered October 27, 1952.

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

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

George Rose Smith, J. This is a bill in equity filed by the appellee to compel M. C. Dearien, the principal defendant, to account for the assets of a joint venture between these two parties to the suit. The appellee is a young woman of twenty-eight, Dearien a young man of thirty-three. The two were sweethearts from 1947 until Dearien married another girl in 1951. It is the appellee's theory that during those years she and the appellant jointly acquired a herd of cattle and a pick-up truck. Dearien denies the existence of a partnership. The chancellor found that a partnership existed and by his decree settled the partnership accounts.

The testimony of the two interested parties is in direct conflict. The appellee contends that in 1947 she and Dearien went into the business of buying cattle. She says that in February of that year she gave the appellant $300 as her share of the first purchase of cattle. These animals were sold in the fall, but Dearien kept the proceeds of sale upon the understanding that the venture would continue. Miss Lancaster says that she contributed another $200 to the enterprise in the spring of 1948 and $500 more in August of that year. In 1950 she deposited $300 in Dearien's bank account, and in 1951 she advanced $882 toward the purchase of the truck. These last three advances, totaling $1,682, are incontrovertibly established by canceled checks and bank deposit slips.

Dearien admits having received those advances that were indisputably proved by the plaintiff, but he either denies or does not remember having received those which are supported by the plaintiff's word alone. He insists, however, that the money was not contributed toward the purchase of the herd of cattle that he acquired during the years in question. Instead, he contends, and offered to prove, that he and the appellee were making expensive week-end trips together during these years, and that the appellee was merely paying her share toward the cost of these excursions. Although the chancellor rejected this offer of proof we think the evidence to be relevant and have taken it into account in reviewing the case *de novo.*

The parties contradict each other so sharply that both versions cannot be true. Upon the printed record we cannot say with any feeling of certainty that the truth lies on one side or the other. From the appellee's point of view it is not unreasonable to believe that a young couple perhaps contemplating marriage pooled their earnings to acquire property together. The appellant's offer of proof is not entirely inconsistent with this view. Too, Miss Lancaster's version is supported by the testimony of her second cousin and his wife, by proof that she kept records for the joint venture, and by other evidence of her activity in the partnership. For the appellant there is a considerable amount of testimony indicating that Dearien's brother bought the herd in order to enable Dearien to qualify for training as a war veteran. Dearien insists that the pick-up truck was not used in the cattle business, but his admission that he used his uncle's truck instead seems to indicate that a truck of some kind was needed in the business. With the testimony about evenly balanced we are not in a position to say that the chancellor's conclusions are wrong. The vital issue was that of credibility, and his opportunity to decide that question was immeasurably better than ours.

The decree orders an equal division of the herd, which originally cost $1,600 and to which the chancellor

found the appellee to have contributed $1,300. The appellee was also given judgment below for the $882 which she undoubtedly advanced as her approximate half of the purchase price of the truck, which was used exclusively by the defendant and eventually traded in upon a car of his own. We affirm both these items. But there is no evidence to support that part of the decree which finds that Dearien sold cattle from the herd for the sum of $2,625 and which requires him to account for half that sum. Nor is there any testimony supporting the further finding that Dearien should be allowed $787.50 as the expense of feeding and caring for the cattle. Upon each of these items the party having the burden of proof failed to meet that burden, and it may well be that the proceeds from such animals as may have been sold would offset the expense of caring for the herd. We think substantial justice will be accomplished by an affirmance with the modifications mentioned, the parties to bear their own costs.

DAUGHERTY *v.* HELENA & NORTHWESTERN RAILWAY.

4-9957 252 S. W. 2d 546

Opinion delivered November 3, 1952.

Rehearing denied December 8, 1952.

Dinning & Dinning, for appellant.

John L. Anderson, Charles J. Lincoln and *House, Moses & Holmes,* for appellee.

George Rose Smith, J. This is a suit in ejectment brought by the appellee railroad company to recover a 1.32-acre tract of land that was formerly occupied by the company's tracks. The railroad line was abandoned in 1951, and the trackage was removed. It is contended by the appellants, the abutting landowners, that the railroad company had a mere easement in the property and that the right of possession reverted to the landowners when the railroad was abandoned. The company contends that it owned not an easement but the fee simple. The circuit court, trying the case on an agreed statement of fact, upheld the railway's position.

The sole issue is whether a deed that was executed to this company's predecessor in 1907 conveyed an easement or the fee. This is the relevant language of the deed:

"In consideration of the sum of five dollars . . . and of the benefits to accrue to us from the construction of the Missouri & North Arkansas Railroad, we do hereby grant, bargain, sell and convey unto the Missouri & North Arkansas Railroad Company, and unto its successors and assigns forever, a strip of land 100 feet in width for a right of way, over and upon the following

described [160 acres], said strip of land being fifty feet in width on each side of the center of the main track of said railroad as the same is now, or may hereafter be, located and constructed on and across said tract of land, with the right to change watercourses, and to take stone, gravel and timber, and to borrow earth on said right of way for the construction and maintenance of said railroad." The deed contains neither a habendum nor a warranty clause.

The appellee's contention that the deed conveyed the fee simple depends largely upon the fact that the property was described as "a strip of land." It is insisted that these words show that the grantors intended to convey the land itself rather than an easement therein. Reliance is also placed on Ark. Stats. 1947, § 50-403, which provides that words of inheritance are not necessary in the creation of a fee simple and that all deeds shall be construed to convey the fee, "unless expressly limited by appropriate words."

We do not find this argument convincing. The deed refers not simply to a strip of land; it specifies "a strip of land 100 feet in width *for a right of way.*" We realize that when the grantor unequivocally conveys the fee his designation of the property's intended use should be regarded as surplusage; but when the grantor's intention is itself subject to question then the fact that he attempts to restrict the future use of the property becomes a factor in the interpretation of his deed. We have no decisions in Arkansas that bear closely upon the case at bar; in other jurisdictions the authorities are pretty evenly divided. Probably the majority view, and in any event the view that we consider preferable, holds that a conveyance such as this one creates an easement only. The fullest discussion is contained in *Magnolia Petroleum Co.* v. *Thompson,* 8th Cir., 106 F. 2d 217, reversed on other grounds, 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876. There the court analyzed the question in great detail and considered some forty decisions in arriving at the conclusion that a deed similar to this one creates an ease-

ment. Among many cases to the same effect are *Sherman* v. *Petroleum Exploration,* 280 Ky. 105, 132 S. W. 2d 768, 132 A. L. R. 137, and *State ex rel. State Highway Com'n* v. *Griffith,* 342 Mo. 229, 114 S. W. 2d 976.

In this case, however, we do not have to rely solely upon the circumstance that the grantors conveyed the land "for a right of way." Apart from this expression the deed bristles with indications that an easement alone was intended. The recited consideration reflects that the grantors accepted a nominal sum for the deed because they were interested not in selling land but in assisting the company to complete its line. As the court remarked in the *Thompson* case, *supra,* "This language makes it perfectly clear that the parties met for the sole purpose of contracting for a railroad right of way." For that purpose an easement was equally as effective as the fee.

The shape of the tract—a 100-foot strip across a quarter section—is peculiarly suited to railway purposes and to little else. This, too, was mentioned in the *Thompson* opinion: "Obviously the railroad company was interested at that time in no other use of the land else it would assuredly have acquired more than a strip of land 60 feet wide." Again, the form of the deed, without habendum or warranty, is not that usually and customarily employed to transfer absolute title.

Finally, the grantee is expressly given the right "to take stone, gravel and timber, and to borrow earth on said right of way for the construction and maintenance of said railroad." The appellee forcibly argues that this language adds nothing to the deed, since even when the railroad company has a mere easement there is an implied right to use stone, gravel, and earth for purposes germane to the easement. This may be true, but still the language *is* in the instrument and cannot be ignored in determining the intention of the parties. If a fee simple had been intended it would have been unusual, it would have been almost absurd, to take the precaution of assuring the grantee that it could take its own stone and gravel and borrow its own earth. Yet if an easement were meant

the insertion of this language might well be considered a sensible precaution against future controversy.

Construing this somewhat ambiguous deed as a whole we are convinced that the parties had primarily in mind the matter of providing a right of way for railway purposes only. Nearly all the language chosen points to the creation of a servitude and negatives the notion that a fee was intended. The appellee candidly admits that even the language it relies upon, "a strip of land 100 feet in width for a right of way," would unquestionably have created an easement had the words been transposed to read, "a right of way upon a strip of land 100 feet in width." When we take into account the other recitals in the instrument we have no doubt that this is the legal effect of the language actually selected.

Reversed.

HANNAH *v.* DANIEL.

4-9864 252 S. W. 2d 548

Opinion delivered November 3, 1952.

Rehearing denied December 8, 1952.

Milton McLees, for appellant.

Byron Bogard and *Barber, Henry & Thurman,* for appellee.

HOLT, J. Appellants, R. H. Hannah and wife, are the owners of Lot 12, Block 107, Park Hill Addition to the City of North Little Rock, and appellees, the Daniels, are the owners of lots 4 to 10 inclusive, in the same block, appellees' lot 7 having a common boundary line with appellants' lot 12 on the rear. Appellants acquired title to lot 12 from the owners, J. C. King and wife, on June 16, 1950, by an unconditional warranty deed, and took possession July 25th thereafter.

Shortly after taking possession and moving into their new home, appellants observed Daniel making preparations for building a pond on the rear of his lot 7 and lot 11 and trespassing on the rear of appellants' lot 12. Upon inquiry, appellants learned from Daniel that he, Daniel, claimed a permanent easement by virtue of an oral (unrecorded) agreement which he had obtained (prior to appellants' purchase) from the Kings, appellants' grantors and other nearby lot owners, to use that part of appellants' lot in the northwest corner, measuring about 37 feet north to south along the west line and to a depth of about 25 feet over on appellants' property, on which to construct (and fence) a pond. The north boundary line of appellants' lot was 131 feet long (east to west) and the south boundary line 125 feet (east to west). The rear of the lot (north to south) was 48 feet wide and the front 60 feet.

When appellants objected to any trespassing by appellees, and began to fill in and improve the rear of their lot to their property lines, and build terraces, Daniel, by suit, sought to enjoin appellants. By cross-complaint appellants asked for permanent injunctive relief against Daniel to restrain and prevent him from building the pond, fence and dam, and from trespassing on their property (Lot 12). J. C. King and wife, appellants' grantors, were made defendants by appellants, and such

relief as equity might warrant was prayed against them on their warranty in their deed to appellants.

The trial court found the issues in favor of appellees (Daniel and King) and permanently enjoined appellants from interfering with appellees' alleged easement rights.

We hold that the trial court erred in so doing.

After a careful consideration of all the evidence, we have concluded that the preponderance thereof is against the Chancellor's findings.

It appears undisputed that appellants had no knowledge from the Kings or from any one of an alleged oral (unrecorded) agreement for an easement between the Kings, appellants' grantors, Daniel and other adjoining property owners. When the Kings executed their unconditional deed to appellants, they admit they did not tell appellants of any alleged agreement. In fact, at appellants' request they executed on the same day on which the deed was made, an affidavit containing the following provisions: "That I/we, Jesse C. King and Jessie I. King—, being first duly sworn, on oath state that I/we are the owners of the following described lands situated in the County of Pulaski, and State of Arkansas, to-wit: Lot Twelve (12), Block Hundred Seven (107), PARK HILL ADDITION to the City of North Little Rock, Arkansas.

"I/we further certify, that there is no adverse occupant of said lands; that there are no unrecorded options to purchase, sales contracts, or lease agreements outstanding affecting said property; and that there have been no improvements made thereon during the past 100 days for which a Mechanic's or Materialman's lien may be filed." (Duly signed and acknowledged by the Kings).

In these circumstances, appellants, having no actual notice of the alleged agreement, unless the preponderance of the evidence shows that they had what amounted to a constructive notice of the existence of a claimed ease-

ment, then they were not bound thereby. "A purchaser of real estate is charged with notice of an easement where the existence of the servitude is apparent upon an ordinary inspection of the premises." 17 Am. Jur., § 130, p. 1018.

We announced the rule in this language in *Waller* v. *Dansby,* 145 Ark. 306, 224 S. W. 615: "The general rule is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. Or, as the rule has been expressed more briefly, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it."

With this rule in mind, we examine the evidence.

At the time of appellant's purchase, he observed the physical condition of his lot. It was small and obviously crowded with a two-story residence with basement. It dipped rather sharply to the rear and the back end was largely covered with weeds and underbrush. It was low and swampy and where the two lots met a small ravine had formed affording drainage. For a distance of about 31 feet on appellants' lot across the southerly part of the ravine, Daniel had erected a small earth dam. A fair perspective is afforded us by many pictures, maps and plats in evidence.

At the time of appellants' purchase no pond was in process of construction on appellants' property. There was, however, at the time of purchase, in the northwest corner of the rear of appellants' lot also a small narrow rock wall, a few feet from appellants' west property line and parallel with it, extending apparently about 18 feet over on appellants' lot and had the appearance of a retaining wall. As to this wall and dam, Dr. Hannah testified: "Q. Prior to that time had Mr. Kooistra attempted to tell you where the corner of the property was located? A. The only thing he said, one corner was

back by the telephone pole and the other one off to the right forty-eight feet. That is all I got out of him. Q. That is all he told you? A. That is the only information he gave me. Q. Now then, was this structure, in its character as a dam, I mean by that a devise intended to act as a barrier to the flow of water, was it visible to you as such on the occasion that you looked the property over? A. It did not. It looked like maybe somebody had built a retaining wall there and left off the lot below. Q. That is the lot south of yours? A. South of me. Q. Or the Stacy lot and the lower slope of that lot does have the appearance of being about surface of that rock wall? A. That is right, that rock wall. Q. Now then, when did you find out that Mr. Daniel claimed the right to maintain this thing as a dam to impound water and make a lake upon part of your property? A. After I had it surveyed I had markers placed and one evening I came home and my wife said they had been in that place back there with bulldozer and knocked my marker down and running around there moving the mud, churning that place up. . . . Did you have a conversation with Mr. Daniel? A. I did. Q. What was it about? A. I asked him what it was down there. He told me he was going to build a pond. I told him I didn't want any pond on the back end of my property. Q. And what was his response to that? A. He said I could be a good neighbor or be an ass. . . . Was there anything in the outward appearance of that property there at the time you bought it that would cause you to believe that then, or any time in the future, it was intended that a lake or pond would be made back there which would be on your property or anybody else's property? A. Certainly not, it is not large enough. There isn't sufficient space to make a lake of any kind without having stagnant water."

As indicated, we think the preponderance of the evidence is against appellees' contention that the physical condition of lot 12 at the time of appellants' purchase was such, by reasonable inspection, to make it apparent of the existence of a servitude that would charge them

with notice of an easement. The narrow rock wall on appellants' property did not constitute adverse holding by Daniel sufficient to put Hannah on notice of any claim of an easement.

The decree is reversed and the cause remanded with directions to grant appellants the injunctive relief prayed in their cross-complaint.

WARD, J., dissents.

RANKIN, COMMISSIONER OF STATE LANDS *v.* WILLIAMS, CHANCELLOR.

4-9906 252 S. W. 2d 551

Opinion delivered November 3, 1952.

Rehearing denied December 8, 1952.

Ike Murry, Attorney General, *Francis W. Wilson,* Assistant Attorney General and *Lamar Williamson,* Special Assistant Attorney General, for petitioner.

Bailey & Warren and *Bruce T. Bullion,* for respondent.

WARD, J. The petitioner, Claude A. Rankin, State Land Commissioner, asks this Court to prohibit the Chancery Court of Pulaski County, Second Division, from further proceedings in the cause of *R. V. Kimble* v. *Claude A. Rankin, State Land Commissioner,* which is now pending. This petition grows out of a fact situation which is substantially as set out below.

For many years there have existed in the Mississippi River two or more islands on the Arkansas side in Chicot County. One of these islands, designated as Island 87, was owned by one J. W. Griffin. At some time other land came into existence adjacent to and just south of Island 87, either by accretion or as a separate island. It is evidently difficult to tell which way. This is the disputed land involved herein and it is known as Harwood Island. In the year 1933 the said Kimble bought Island 87 together with all accretions thereto belonging. His grantor was the daughter and sole heir of the said J. W. Griffin. When Kimble bought the lands he apparently held back part of the purchase price because of some doubt about the title to the "accretions," but he paid the balance after he learned that other parties had contacted the State Land Commissioner, whose deputy was Claude A. Rankin, to buy the "accretions" and were informed that the State had no claim to said lands as "island lands." Following this and on October 20, 1947, Fred P. Branson filed an application with the petitioner, pursuant to Ark. Stats., § 10-602, to purchase Harwood Island in Chicot

County. The petitioner, pursuant to statute, appointed a Special State Land Surveyor to make and file an accurate survey of the lands in question. This survey showed a metes and bounds description of the lands. Kimble filed a protest claiming that the lands were in fact accretions and belonged to him under his deed above mentioned. On this issue petitioner held a series of formal hearings extending over a period of three or four years and he also made, with the consent of the parties, a personal inspection of the lands. The result was that the petitioner, as State Land Commissioner, decided that the lands were formed as an island and announced his intention of conveying the same to Branson under the authority of Ark. Stats., § 10-601. In accordance with the above determination petitioner prepared a deed conveying said lands to Anderson-Tully Company [successor to Branson]. However, before the said deed could be or was delivered, Kimble, in March, 1952, filed suit in the Second Division of the Pulaski Chancery Court to restrain petitioner from delivering the said deed.

The suit filed by Kimble is the one referred to in the first paragraph, and the allegations were substantially the facts set forth in the preceding paragraph. The petition also alleged that Kimble had been misled by the actions of the State Land Commissioner in formerly declaring the lands to be accretions and that the State was therefore estopped, and that Kimble and his predecessors in title had been in adverse possession of the lands for 37 years. A temporary restraining order was issued by the lower court, but action on the permanent order is being withheld, by agreement, pending our decision herein.

The view we take, that a proper interpretation and application of the provisions of the "Island Act," Act 282 of 1917 [set out in Ark. Stats. as §§ 10-601 to 10-607 inclusive], is conclusive of the issue here involved, will eliminate from full discussion many of the issues raised in the briefs. Some of the issues we refer to are estoppel, adverse possession, venue, and suit against the State.

Said Act 282 never contemplated that the State Land Commissioner should do more than make an *initial* determination as to whether lands found in the navigable streams of this state were formed by accretion or as an island. The Act simply provides that when an application is made to purchase such lands the Land Commissioner shall appoint a surveyor to make an accurate description of the same and then, upon completion of the survey, he is instructed to issue "such muniments of title as is now provided by law for the sale of state lands." No provision is made for the Land Commissioner to make a *final* determination as to how the land was formed. If the Act did so provide [for a *final* determination] it might be open to attack as an unconstitutional delegation of judicial powers. It is obvious that before litigation can arise over the question whether certain lands were formed by accretion or as an island, someone must make the initial determination and in doing so must exercise choice or discretion. Act 282 clothed the State Land Commissioner with this choice or discretion. This being true, he had no alternative other than to exercise his discretion when application is made. From *State* v. *Guthrie,* 203 Ark. 60, 156 S. W. 2d 210, we quote, on this point, the following:

"The Land Commissioner, who conveyed for the state, was acting as its agent. He was required to comply with every provision of Act 282 . . ."

"The Supreme Court of the United States [quoting from 22 R. C. L. 455] has repeatedly asserted that all the officers of the government from the highest to the lowest are creatures of the law and bound to obey it . . ." The last quoted case, which involved an interpretation of the duties of the State Land Commissioner under Act 282, also recognized that the Commissioner was invested with discretion and that his decision was not final. On this point we quote:

"However, this discretion may be abused, and while the presumption is that the Land Commissioner did not abuse his discretion, this presumption is not conclusive,

but may be rebutted by competent proof. We are cited to no statute that would make conclusive this presumption in favor of the validity of the Land Commissioner's act." In *Wunderlich, et al.* v. *Cates, et al.,* 213 Ark. 695, 212 S. W. 2d 556, the court, at page 701 of the opinion, stated: "The State's deed was *prima facie* evidence of ownership." The case of *Conway* v. *Shuck,* 203 Ark. 559, 157 S. W. 2d 777, recognizes the right and duty of the Land Commissioner to exercise his discretion to determine that lands were formed as an island and to issue his deed therefor, and it further recognized, by inference at least, in the last paragraph of the opinion that anyone questioning the correctness of such determination had a right to do so in a court of competent jurisdiction. This right of Kimble in this case to go into a court of competent jurisdiction and litigate the finding of the Land Commissioner [in which he determined the land to be an island] is not only not questioned by petitioner but is positively affirmed repeatedly in the reply brief.

Since the petitioner, as State Land Commissioner, was exercising the discretion given him under Act 282 and was directed under the Act to deliver a deed to the applicant, he was merely acting as an officer of the State in his ministerial capacity and cannot be restrained from so acting by the Chancery Court. This is the settled law in this state.

From *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002, at page 160, we quote:

"The statutory definition of 'mandamus' is, 'an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law.' Crawford & Moses' Digest, § 7021. It is a settled rule of law, recognized by this court in numerous decisions, that mandamus will not lie to control an officer in the performance of a discretionary act nor to control the discretion of an officer in the performance of his duty where such discretion

is vested by law, but will only lie to compel an officer to exercise his discretion where he has refused to act at all."

The language set out below is found in the case of *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, at page 477:

". . . this suit must fail, by reason of the well recognized rule of law, adhered to by both the Federal and State courts, that an officer of the executive branch of the government cannot be controlled by the courts in the exercise and performance of his official acts, involving his judgment and discretion. When the courts are called on to review and control the official acts of an officer in a coordinate branch of the government, they should proceed with extreme caution and circumspection, and the right of the courts to exercise this power should be manifestly clear and free from doubt and not made to depend upon uncertainties or the doubtful construction of a statute."

In 1920 this Court, in *Lewis* v. *Owen,* 146 Ark. 469, 225 S. W. 648, had before it a question similar to the one involved here and involving the duties of the State Land Commissioner under said Act 282 of 1917. There mandamus was brought in the Pulaski Circuit Court to require the Land Commissioner to convey to the petitioner a state deed to lands which he conceived to be formed as an island but which the Land Commissioner decided were not so formed. This Court upheld the trial court in sustaining a demurrer to the complaint and, in so doing, stated, among other things: (a) the legislature constituted the Commissioner as the agent of the State in disposing of island lands and gave him a discretion in the discharge of his duties; (b) the Commissioner's decision [in deciding the lands were not formed as an island] may have been erroneous; (c) but the Commissioner's decision cannot be corrected or controlled by mandamus. This case dealt with § 5 of said Act 282 [Ark. Stats., § 10-605], relating to preference rights of rival claimant to have a deed executed by the Commissioner, and properly held that the Commissioner had the *final* decision as

to whether he would issue the deed on the basis of "island lands" or "accretion." The word *final* appears nowhere else in the act.

In view of the above it is clear that the Commissioner had a right to exercise his discretion and make the decision he did and that he should be allowed to execute and deliver the deed to Anderson-Tully Company. It is also clear that the Pulaski Chancery Court has no jurisdiction to prevent or control his official actions.

Assuming that the Land Commissioner delivers his deed to the prospective purchaser, then Kimble may urge—either in a suit he may institute or in an action brought against him—all claims and defenses that he now has.

Kimble's plea of estoppel cannot be sustained since this plea is not available against the State in circumstances such as are presented here. See: *Woodward* v. *Campbell,* 39 Ark. 580; *Hankins* v. *City of Pine Bluff,* 217 Ark. 226, 229 S. W. 2d 231.

It appears that some timber on the land in controversy has been sold, with the consent of all interested parties, and the money is now being held by the Commissioner pending a final determination of Kimble's claim to the land. Assuming that further litigation will follow, the Commissioner should continue to hold said money in escrow until Kimble has exhausted or waived any rights he may have.

The lower court being without jurisdiction to try the case of *Kimble* v. *Rankin, State Land Commissioner,* the Writ is granted.

GRIFFIN SMITH, Chief Justice, concurring. Statutory duties imposed upon the Land Commissioner are ministerial. Act 282 of 1917. Section 5 contemplates that the Commissioner shall predicate his determinations upon reports made by a surveyor, together with the surveyor's attending field notes. The Commissioner is permitted to promulgate rules for ascertaining whether land formations are accretion or island, and the legisla-

tive language is such that, in the absence of fraud or collusion, the Commissioner's findings shall be final. Section 4 of the Act authorizes issuance of "such muniment of title as is now provided by law for the sale of state lands".

In *Lewis* v. *Owen,* 146 Ark. 469, 225 S. W. 648, it was said that the Commissioner's decision respecting land sought to be purchased by the petitioner in that case, could not be corrected or controlled by mandamus, even though error had occurred. The holding was cited in *Wunderlich et al.* v. *Cates,* 213 Ark. 695, 212 S. W. 2d 556.

It is axiomatic that although an official's discretionary actions pursuant to a statutory directive cannot be controlled by mandamus—and the corollary would be that such acts cannot be reached by injunction—no right of judicial review can be denied in an independent suit brought to test the facts motivating or supporting the ministerial finding—in this case the muniment of title "as is now provided by law for the sale of state lands". The venue would be where the land is situated if in a single county.

ROBINSON, Justice (dissenting). The "Island Act" is now Ark. Stats. §§ 10-601 to 10-605, inclusive. Section 10-601 provides: "All islands formed or which may form in the navigable rivers or streams of this State, subsequent to the admission of the State of Arkansas into the Union, are hereby declared to be the property of the State and subject to sale and disposition in the manner and form hereinafter provided." There is no provision in the law which indicates in any manner that the land commissioner may, in his discretion, arbitrarily declare land to be an island. It is perfectly clear to me that the statute only gives to the commissioner the authority to convey an island when there is no dispute as to the land being an island.

By the majority opinion this court has, in effect, said the land commissioner can let it be known today that he is going to execute and deliver a deed to the entire land on which is situated the City of Pine Bluff, in Jef-

ferson County, and the property owners could not come into Pulaski County, where service may be had on the commissioner, and stop such action until there had been a judicial determination of the question as to whether the land constitutes an island, within the provisions of the "Island Act". The opinion indicates that such a suit could be filed in the county where the land is located. If the land commissioner is acting outside the scope of his authority, the plaintiff should be permitted to enjoin his action in any county where service could be had upon him. Of course, to determine whether the commissioner is acting within, or without the scope of his authority, evidence would have to be taken to ascertain if the land in controversy is an island.

As a result of the majority opinion in this case, if the prospective purchaser pays to the land commissioner the purchase price of several thousand dollars, the commissioner will turn the money over to the State treasury, or a new suit may be filed in the Chicot Chancery Court and enjoin the commissioner from executing and delivering a deed to the property; or perhaps Kimble, the alleged owner of the property, who apparently has possession thereof, will retain such possession and wait for an ejectment suit to be filed against him in the circuit court, or he may take the initiative and file a suit in the chancery court to clear the title. Finally, if Kimble is declared to be the owner, the one who attempts to buy from the land commissioner will, in all probability, have quite a problem in getting his purchase money refunded. In fact, he might not get it. Act 169 of 1945, authorizing refunds by the land commissioner, seems to apply only to tax-forfeited lands. Furthermore, the State does not warrant the title but only gives a quit-claim deed. It occurs to me that if the legislature intended that the commissioner could sell just any land, by saying it is an island, some provision would have been made for the return of the purchase price, in the event a court of competent jurisdiction should finally declare the property not to be an island.

The majority opinion in this case cites *Lewis* v. *Owen,* 146 Ark. 469, 225 S. W. 648, to the effect that the land commissioner has "discretion", the implication being that the commissioner has discretion to say, in the first instance, what is, and what is not, an island; but the case merely holds that the commissioner has discretion as to whom he will convey the land, provided there is no controversy about whether it is an island. The actual language of the opinion in the Lewis case is as follows: "The Legislature constituted the Commissioner of State Lands as the agent of the State in disposing of islands in the navigable streams of the State, and by Section 5 of the act of 1917 he was given a discretion in the discharge of his duties. This was done because it was necessarily contemplated that there might be conflicting applications to buy the same island, and that there might be questions of fact for the Commissioner to decide." I hardly see how this language can be construed to mean that the commissioner has any discretion whatever in determining whether certain land is an island.

If, as in the case at bar, there is a controversy between the commissioner, who says that certain land is an island, and others, who claim it is accretion, then the commissioner should file a suit in the county where the land is located to determine the question of ownership; or those who claim it as accretion to their property should be permitted to file suit against the commissioner, in any county where service can be had upon him, to enjoin and restrain him from executing and delivering a deed to the property until there can be a judicial determination of the ownership: and that is exactly what the plaintiffs have attempted to do in this case.

For the reasons set out, I respectfully dissent.

4-9873 252 S. W. 2d 78

Opinion delivered November 3, 1952.

[redacted]

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

Opie Rogers, for appellee.

GEORGE ROSE SMITH, J. This is an action by M. V. Hatchett, a real estate broker, to recover a $900 commission for having procured a purchaser for a farm owned by the appellee, Elmo Story. Story's answer admits liability for $300 but denies liability for any greater amount. A jury trial resulted in a verdict for the appellant for $300. For reversal the appellant assigns errors in the court's instructions, but since we have concluded that there was no substantial evidence to support the claim for a $900 commission we need not discuss the instructions that are complained of.

On August 30, 1950, Story listed his farm with Hatchett. The pertinent paragraphs of the contract stress the matter of procuring a purchaser:

"(B) I [Story] grant you the sole and exclusive right to procure a purchaser for said property, at a price of $9,000 . . .

"(C) I agree that if a purchaser is procured through you, or your representative, at a price and on terms as herein stated . . . I will pay you forthwith a commission of 10% . . .

"(D) I agree that if the property described herein is sold during the term of this agreement to a purchaser procured through my own efforts, or through any broker, agent, person or organization other than you, I will forthwith pay you 1/3 commission as provided in paragraph (C) above."

Thus the question we are considering is whether there is any substantial evidence to show that Hatchett or his representative procured the purchaser, John Waters, who eventually bought the farm for $9,000.

The testimony, viewed most favorably to Hatchett, shows that Waters first visited Hatchett's office on March 19, 1951, in the hope of buying a home. Mrs. Hatchett testified that she had previously mailed to Waters, at his address in Iowa, certain mimeographed circulars that included a description of the Story farm and some sixteen or eighteen other properties. The jury could have inferred that Waters came to Arkansas as a result of having received these circulars, but there is no evidence to indicate that Waters was interested in or inquired about any of the properties described in the circulars.

On the day of Waters' visit Mrs. Hatchett showed him other property, but no sale was made. She did not show him the Story farm, nor was it even mentioned. The next day Waters had lunch at June LaTure's cafe, next door to the Hatchett office. Mrs. LaTure knew that the Story place was listed with Hatchett; she had been interested at one time in buying it. To be agreeable to a customer Mrs. LaTure chatted with Waters and asked him if he had yet found a home. She then men-

tioned and described the Story farm. As Waters seemed interested she telephoned the Hatchett office in his presence and learned that the property was still for sale. Thereafter Waters communicated directly with Mrs. Story, and their negotiations resulted in a sale.

The appellant must rely on three facts to sustain his contention that he procured the purchaser within the terms of the contract. First, it is said that Waters came to Clinton, Arkansas, in response to literature sent out by Hatchett. This may be true, but a broker does not procure a purchaser merely by being responsible for his presence in the general vicinity of the property. It was incumbent upon Hatchett to show not only that he induced Waters to visit Clinton but also that Hatchett's efforts were the efficient cause of Waters' becoming interested in the Story farm. That showing is wholly lacking.

Second, it is contended that Mrs. LaTure's telephone call to the Hatchett office sufficiently connected Hatchett with the sale to constitute him the procuring cause. Mrs. LaTure, however, was not the broker's representative, and it is not indicated that Mrs. Hatchett, who answered the telephone, said anything more than that the Story property was still on the market. A broker does not procure a sale by merely answering such an inquiry, nor is he entitled to the benefit of a former prospective purchaser's action in bringing the buyer and seller together.

Third, while Mrs. Story and Waters were negotiating the sale Waters requested that certain minor improvements be made. Mrs. Story mentioned this request to Hatchett when she happened to meet him in Mrs. LaTure's cafe, and Hatchett estimated that the work would cost less than $100. Mrs. Story, doubtless relying on this advice, later acceded to Waters' request. We do not consider that this chance encounter would have warranted the jury in finding that Hatchett thereby complied with his duty to procure a purchaser. If procurement was intended to mean the mere introduction of the

parties the event had already occurred when Hatchett gave his advice. And if procurement had the broader meaning of bringing about the consummation of the sale it is well settled that the broker's efforts must be the proximate cause of the transaction rather than a mere incidental link in the chain of causation. *Neiswender* v. *Campbell,* 119 Calif. App. 504, 6 P. 2d 584; *John T. Burns & Sons, Inc.* v. *Hands,* 283 Mass. 420, 186 N. E. 547; *Low* v. *Paddock,* (Mo. App.) 220 S. W. 969.

For convenience we have mentioned separately the three factors tending to connect Hatchett with the sale, but of course we do not mean to imply that a broker's activity is to be tested as a succession of disconnected acts rather than as a continuous course of conduct. Here, however, Hatchett's three points of contact with the transaction had nothing to do with one another; their cumulative effect falls short of establishing Hatchett as the procuring cause of the sale. The evidence, with all inferences resolved in Hatchett's favor, shows that it was Mrs. LaTure who brought the parties together and that the negotiations were carried through by Mrs. Story herself. Upon the testimony the trial court would have been justified in directing a verdict for Hatchett in the sum of $300 only, and in that view the possibility that erroneous instructions were given becomes immaterial.

Affirmed.

WARD, J., dissents.

McCOOL *v.* JONES.

4-9876 252 S. W. 2d 80

Opinion delivered November 3, 1952.

Eugene Coffelt, for appellant.

Eli Leflar, for appellee.

ROBINSON, J. This suit was filed by Jim McCool seeking to enforce a laborer's lien against property now owned by appellees, Earl V. and Shirley M. Jones. Jim McCool died subsequent to filing of the suit and the cause has been revived in the name of appellants herein. When the plaintiffs rested their case, defendants demurred to the evidence. The demurrer was sustained and plaintiffs have appealed.

Appellees say they were at all times owners of the property in question but that the plaintiff, Jim McCool, failed to give them notice of the filing of the lien as required by Ark. Stats., § 51-608, and, therefore, plaintiffs cannot recover. Appellees also contend that Dallas McCool was the contractor on the job and that plaintiffs cannot recover because the said Dallas McCool was not made a party to the suit, as provided by Ark. Stats., § 51-610. It is stated in appellees' brief: "There is only one question presented in this appeal—the status of Dallas McCool. Was he the owner or was he a contractor?"

It is the contention of appellants that Dallas McCool was the owner of the property at the time Jim McCool worked thereon, and Jones obtained title subsequent to the filing of the lien.

The parties stipulated as follows: "It is stipulated and agreed by and between the parties hereto that Den-

ton and Louise McCool, his wife, acquired title to the real estate involved herein by warranty deed executed by Gene Thrasher and Juanita Thrasher on the 8th day of August, 1950, as shown by Deed Record Book 286 at page 584.

"It is further stipulated that Denton McCool and Louise McCool, his wife, conveyed the property in question to Earl V. Jones and Shirley M. Jones by warranty deed on the 15th day of November, 1950, and made a matter of record on the 18th day of November, 1950, as reflected by Deed Record 288, page 570. It is further stipulated that Earl V. Jones and Shirley M. Jones executed their deed of trust in favor of the United Building & Loan Association of Fort Smith, Arkansas, on the 15th day of November, 1950, and it became a matter of record on the 18th day of November, 1950, as reflected by Mortgage Record 169 at page 78. All records being records in the Recorder's office in Benton County, Arkansas. It is further stipulated that Lien Record C at page 143 reflects a lien filed by Jim McCool against Dallas McCool and Earl Jones on November 10, 1950; said purported lien in its original form consisting of two sheets being marked plaintiffs' Exhibit No. 1 and offered in evidence."

Mrs. Ethel McCool, widow of Jim McCool, testified that Dallas McCool and Denton McCool were one and the same person. She further testified that her husband, Jim McCool, in his lifetime worked for Denton McCool at Rogers as a carpenter building a house on the property involved in this lawsuit; that her husband worked on the house from June until the 30th or 31st of August, and that he was never paid for his labor. When the plaintiffs had rested their case, on the authority of Ark. Stats., § 27-1729, the defendants demurred to the evidence and the court sustained the demurrer. It is claimed by appellees that the following testimony given on cross-examination by Mrs. Ethel McCool proves that her husband, Jim McCool, was the contractor and the Joneses were the

owners, and, therefore, the court was justified in sustaining the demurrer to the evidence.

. . . . . .

"Q. As a matter of fact, do you know Dallas McCool had a contract to build a house for Earl Jones?

"A. Yes.

"Q. You have previously stated that he was employed by Dallas McCool or Denton McCool to do certain carpenter work—is that right?

"A. On the Jones house.

"Q. What was the reference made to this house by your husband—was he speaking of it as the Denton McCool or Dallas McCool house, or was he speaking of it as the Jones house?

"A. He would just say Denton-Jones. He knew Denton was building the house for Jones.

"Q. Do you know of any work which Jim McCool ever did under contract with Earl Jones or Shirley Jones?

"A. No, I don't.

"Q. If he had done such work would you have known of it?

"A. Sure."

. . . . . .

We do not think this testimony justifies sustaining the demurrer to the evidence. If the demurrer had been overruled and the defendant had produced no evidence, and a decree had been rendered in behalf of the plaintiffs, it could not be said that the evidence does not support the decree.

It is stipulated that Denton McCool and Louise McCool, his wife, acquired title to the real estate involved herein by warranty deed executed by Gene Thrasher and Juanita Thrasher on August 8, 1950, which was prior to the filing of the lien. This stipulation in itself would be sufficient to constitute a *prima facie* case on behalf of

plaintiffs as to the ownership of the property. Moreover, in addition to the stipulation, there are inferences to be drawn from the evidence going to show that Denton McCool was the owner—the fact that he and his wife received a warranty deed to the property—the fact that they held the property as an estate by the entirety—the fact that they conveyed by warranty deed.

In the case of *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, this Court had under consideration Act 470 of 1949 (Ark. Stats., § 27-1729) authorizing demurrers to the evidence in chancery cases, and there said: "What, then, is the effect of a demurrer to the evidence or a similar pleading in jurisdictions recognizing that practice? The question may arise either in equity cases, where the Chancellor is the arbiter of the facts, or in cases tried at law without a jury, where also the trial judge decides all issues of fact. By the overwhelming weight of authority, it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case."

The decree is accordingly reversed and the cause remanded for further proceedings.

JACKSON *v.* STATE.

4714 252 S. W. 2d 73

Opinion delivered November 3, 1952.

Love & Love, for appellant.

Ike Murry, Attorney General and *Wm. M. Moorhead,* Assistant Attorney General, for appellee.

HOLT, J. By information, appellant, John Barney Jackson, was charged with the crime "of enticing a female for immoral practices committed as follows, to-wit: The said defendant on the 17th day of December, 1951, in Union County, Arkansas, did unlawfully, inveigle and entice and attempt to inveigle and entice Beverly Jane Tucker, a female aged eight years, to a place in the woods in the rear of the Yocum School House in El Dorado, Arkansas, for immoral practices, in violation of § 41-3217, Ark. Stats., against the peace and dignity of the State of Arkansas."

A jury found him guilty and assessed his punishment at a term of four years in the Penitentiary. From the judgment is this appeal.

The conclusions we have reached make it necessary for us to consider only appellant's contention that the verdict was contrary to the law and the evidence and that the facts alleged in the information did not constitute an offense under the statute upon which the charge was based. This contention must be sustained.

The testimony showed that appellant, after offering a little eight year old girl money, took her by the hand, led her into the woods, and got down on his knees and seized the hem of her coat, at which time she jerked away from him and escaped. There was other evidence of a corroborative nature.

The present case is controlled by *Braun* v. *State,* 143 Ark. 593, 219 S. W. 750, and the very recent case of *Horne* v. *State,* 220 Ark. 912, 251 S. W. 2d 489. In the Braun case, this court said: "The purpose of the statute was to pun-

ish persons, whether male or female, who should engage in the business of inveigling or enticing girls under the age of eighteen to places of assignation or other places for the purpose of prostitution or other immoral practices. It has no application to persons who shall take away girls from their fathers or guardians to any convenient place for the sole purpose of having an act of illicit intercourse. There is another statute making that an offense. The act applies to such persons only, as entice girls to a designated place for the purpose of prostitution, or other immoral practices. Thus the act has a tendency to prevent girls from being inveigled to a disorderly or other house where they might become prostitutes or resort to other immoral practices. . . . Thus it will be seen that the statute has for its object the prevention of the establishment of rooms or other places for the entrance of young and inexperienced females for the purposes of prostitution or other immoral purposes."

In the Horne case, on a similar charge based on § 41-3217 above, and facts similar in effect to those presented here, we reaffirmed the Braun case and said: "It has been decided that the statute in question, known as the Pandering Act, is intended to punish persons who engage in the business of enticing young girls to places of assignation for the purpose of prostitution. *Braun* v. *State,* 143 Ark. 593, 219 S. W. 750. We there said that the statute has no application to a person who takes a girl to a convenient place for the sole purpose of having an act of illicit intercourse. 'The statute has for its purpose the prevention of the establishment of rooms or other places for the entrance of young and inexperienced females for the purposes of prostitution or other immoral purposes.' . . . In the case at bar the information in rather general terms charged an offense under the statute, but the proof fails to show that the statute was violated."

Tested by the rule announced in the above authorities, the judgment must be, and is reversed, and the cause remanded for such other proceedings as the State may elect.

CASEY *v.* STRAIT, JUDGE.

4-9907 252 S. W. 2d 75

Opinion delivered November 3, 1952.

[redacted]

John G. Rye, for petitioner.

Robt. J. White, for respondent.

ED. F. MCFADDIN, Justice. This is an original proceeding seeking to prohibit the Pope Circuit Court from trying a case therein pending in which Adney and wife are plaintiffs, and Casey is defendant.

Adney and wife filed action for damages in the Pope Circuit Court against Casey, alleging, *inter alia,* that Casey's injured child was about to be transported by truck to Russellville; that Casey requested Mrs. Adney (his mother-in-law) to ride in the truck to assist in caring for the injured child; that Casey drove the truck in a negligent and careless manner; that Mrs. Adney was injured when the truck was overturned in Pope County, Arkansas; and that the plaintiffs were at all times residents of Pope County, Arkansas. To the complaint, Casey filed a demurrer in which he claimed that the complaint showed on its face that Mrs. Adney was barred from a recovery because of Act No. 179 of 1935, called the "guest statute", and now found in § 75-915 Ark. Stats. The Pope Circuit Court overruled Casey's de-

murrer; and thereupon Casey filed in this Court the present petition for a writ of prohibition, his theory being that the Pope Circuit Court erred in overruling his demurrer.

It is evident that the Pope Circuit Court had jurisdiction if the complaint alleged a cause of action, so this prohibition proceeding is not a case of entire absence of jurisdiction, in line with such cases as *Gainsburg* v. *Dodge,* 193 Ark. 473, 101 S. W. 2d 178, and *Western Union* v. *Bush,* 191 Ark. 1085, 89 S. W. 2d 723, 103 A. L. R. 367. The only issue here is whether the Pope Circuit Court was correct in overruling Casey's demurrer to the complaint.

Prohibition is not the proper remedy to test a ruling of the trial court on a demurrer. The correct procedure would be for the defendant to save exceptions and then, if finally defeated in the trial court, to prosecute an appeal to this Court where the ruling on the demurrer could be questioned. If prohibition should be entertained by this Court in a case such as the one here, then by like token, every time any trial court overruled a defendant's demurrer, all further proceedings might be suspended in the trial court until the Supreme Court could determine the correctness of the demurrer ruling. Such is not the purpose or function of a writ of prohibition. The case of *Harris Distributors, Inc.* v. *Marlin, Judge,* 220 Ark. 621, 249 S. W. 2d 3, contains a discussion on this point; and on the authority of that case, we deny the petition for writ of prohibition in the case at bar.

RECONSTRUCTION FINANCE CORPORATION *v.* HOME INVESTMENT COMPANY.

4-9874 252 S. W. 2d 398

Opinion delivered November 3, 1952.

E. J. Butler and *Arnold Adams,* for appellant.

Norton & Norton, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Home Investment Company, intervened in a suit brought by appellant, Reconstruction Finance Corporation, hereinafter called "RFC", to foreclose a chattel mortgage against Forrest City Frozen Foods, Inc., hereinafter called, "Frozen Foods". Appellee's claim, that the lien of RFC's mortgage was subject to a prior claim or lien of appellee against the mortgaged property under a certain lease contract, was sustained by the chancellor. This appeal follows.

In October, 1946, appellee leased to Thos. W. Notestine the ground floor of a building in Forrest City in which Notestine installed a frozen food locker plant. The lease contract was for a term of five years and contained a provision against subletting or assignment by lessee without written consent of the lessor and that the contract should be binding upon the heirs, successors and assigns of the parties.

Paragraphs 6 and 12 of the lease contract read: "(6) It is mutually agreed that any and all improvements, repairs and additions to the building or premises of every description and character, heretofore or hereafter made by the Lessee, even though attached to the building of the Lessor in a permanent manner, shall remain the separate property of the Lessee and be the same as per-

sonal property for all purposes and these improvements and additions together with all fixtures of every kind and description, including partitions, may be removed from said premises by the Lessee at any time prior to the expiration or termination of this lease, or the expiration or termination of any renewal of said lease as hereinafter provided; provided further that in installing any such improvements, additions and fixtures of every kind and description, and in removing same, Lessee shall not structurally change or damage said building and at the end of this lease or the renewal thereof, shall surrender the leased premises in as good condition as at the time Lessee began making any such improvements thereon or additions thereto.

"(12) If Lessee shall fail or refuse to pay the rentals aforesaid at any time for three consecutive months, or shall fail to do or perform any other of the covenants on his part herein contained, or shall violate in any particular any of the conditions hereof, then and in any or either of such events the Lessor may, at its option, declare this lease terminated, and shall have the right to enter upon and take possession of said property and premises either with or without notice, and evict and expel the Lessee and any or all of his property, belongings and effects therefrom; provided that if the lease is terminated in this manner, the Lessee shall have thirty (30) days after such declaration of the termination on the part of the Lessor in which to remove all improvements, additions, repairs and fixtures as hereinbefore provided in Paragraph 6 hereof; and, no delay in the exercise of the option aforesaid by the Lessor shall be deemed a waiver of its rights to exercise same at a later time; *and there shall be no removal by Lessee of such improvements, repairs, additions and fixtures while in arrears in payment of rent or other obligation hereunder.*" (Italics supplied.)

The lease was recorded August 7, 1948. On May 13, 1947, the Planters' Bank & Trust Co. of Forrest City made a loan of $36,000 to Notestine under an arrange-

ment whereby RFC purchased 75% of said loan and the bank took indorsements from individuals in Forrest City for the other 25%. The chattel mortgage executed by Notestine to secure payment of his note covered the locker equipment and fixtures as well as the lease which he assigned to the bank and the latter assigned to RFC. Notestine defaulted in his loan and rental payments and on August 23, 1948, RFC instituted foreclosure proceedings in which appellee was made a party on October 25, 1948. A foreclosure decree was entered on October 26, 1948, in favor of RFC but subject to the unadjudicated claims of appellee and Roy Butcher Supply.

In its answer filed on November 3, 1948, appellee claimed a prior lien for delinquent rents due under its lease in the sum of $1,135 and asserted that none of the parties had any right to remove the improvements and fixtures until all rents were paid. RFC purchased the mortgaged property, including the leasehold interest, at a receiver's sale November 24, 1948, held pursuant to the foreclosure decree subject to the unadjudicated claims of appellee and Roy Butcher Supply. The latter claim proceeded to a decree which was affirmed in *Roy* v. *Notestine,* 216 Ark. 447, 226 S. W. 2d 66.

RFC did not engage in plant operations and was anxious that the locker plant be maintained as a going concern at the same location, if possible. A group of Forrest City citizens, who were desirous of maintaining the plant for the community, organized Frozen Foods. Attorneys representing RFC, appellee and Frozen Foods entered into negotiations for sale of the locker plant to, and its continued operation by, Frozen Foods at the same location. As a result of these negotiations and at the request of counsel for Frozen Foods, appellee, through its board of directors, on November 24, 1948, issued its written authorization directed to RFC agreeing that the Notestine lease should continue in effect as to Frozen Foods at the same rentals until its expiration date, provided all delinquent rents were paid and current monthly rentals were paid regularly thereafter.

RFC sold the locker plant to Frozen Foods and on December 3, 1948, Frozen Foods executed its note and chattel mortgage to RFC for $30,000, payable $500 monthly, and a few days later paid to appellee the back rents due it in the foreclosure suit against Notestine.

Operation of the locker plant by Frozen Foods also proved unsuccessful and delinquent installment payments to RFC of $10,000, and back rents to appellee of $1,100, had accumulated on February 1, 1951, when RFC filed the instant suit to foreclose its mortgage against Frozen Foods. As in the first suit, RFC asked for foreclosure of the lien of the leasehold assignment along with the plant fixtures and equipment.

Appellee intervened in the 1951 suit seeking judgment against Frozen Foods for back rents and asking that the rights and interests of RFC and others in the fixtures and equipment be declared subject to appellee's prior lien under the lease contract. It also alleged that, following the decree in the first foreclosure suit, counsel then representing RFC agreed with appellee's counsel that the provision against removal of the fixtures in the lease contract was in effect an equitable mortgage which took precedence over the mortgage to RFC; that, relying on such agreement, appellee consented to the sale and assignment to Frozen Foods upon the condition that all rents in arrears first be paid; that the inadequacy of the security of RFC, unless the amount owing could be worked out by Frozen Foods, was well known to all parties and appellee consented to the reinstatement of the lease contract in reliance upon the agreement that it had a first lien upon the property in the leased premises for rents; and that RFC was estopped to deny the first lien of appellee or to assert any right to remove the property until back rents were paid. Trial resulted in a decree on October 30, 1951, granting foreclosure by RFC but declaring its mortgage lien subject to a prior lien in favor of appellee as security for its judgment against Frozen Foods for back rents in the sum of $1,283.52.

RFC contends that the lease contract, and more particularly that provision of Paragraph 12 against removal by lessee of improvements and fixtures while in arrears in payment of rent, was insufficient to create an equitable lien or mortgage upon the fixtures and equipment placed in the leased premises by Notestine or his transferees. Both parties rely on *Nakdimen* v. *Royal Stores, Inc.*, 190 Ark. 724, 81 S. W. 2d 853, where the language of the lease contract was held sufficient to create an equitable lien upon the mortgaged property in favor of lessor for the payment of back rents. The effect of the decision was that, as between the parties to the contract and their privies, an equitable lien existed but such lien was not enforceable against an innocent purchaser without knowledge of the lien. As pointed out by counsel for RFC, the lease contract involved in that case, and others relied on by appellee, contained language expressly reserving a lien and showing a clear intent to pledge the property as security for an obligation.

In the Nakdimen case the court quoted with approval the first sentence of § 1416 of 36 C. J., Landlord and Tenant, which reads: "*A stipulation in a lease that the lessee shall not dispose of any property upon the demised premises until the rent is paid is a mere personal covenant, and is ineffective to reserve a lien.* It has been held, however, that, where a tenant expressly reserves the right to remove fixtures at the end of his term upon the payment of all rent due, his right is thereby limited to a removal at the end of the term, and the lessor's right to prevent such removal until the rent is paid is superior to a chattel mortgage. In some jurisdictions, it is held that a stipulation against removal operates as a mortgage, and if recorded, it creates a lien." (Italics supplied.)

Under the facts in the instant case we find it unnecessary to determine whether the language of the lease contract in question was sufficient to create an equitable lien or mortgage in favor of the lessor, even as between the parties and their privies. Even if the condition

against removal be treated as a mere personal covenant, it was binding upon the lessee and his privies regardless of whether or not it created a lien. We think the evidence clearly shows that RFC merely stepped into the shoes of the lessee in the first foreclosure proceedings and repeated that performance in the instant suit. The lease was assigned to RFC and the mortgage by Notestine expressly covered the lease as well as the physical property. The lessee's and his transferee's interests in the leasehold were foreclosed and purchased by RFC at both foreclosure sales. There are no innocent purchasers involved and RFC became the owner of the lease with full knowledge of all its provisions. It assumed the same position with reference to the lease as did the lessee and had no more right to remove the property while rents were in arrears than the original lessee would have.

It is true that there was a provision against assignment of the lease without written consent of the lessor, but this provision was for the benefit of appellee and is one which it could, and clearly did, waive.

RFC also argues that the lease was not signed or acknowledged by Notestine. While the signature and acknowledgment are blank in the recorded copy of the lease, it is undisputed that lessee and Frozen Foods took possession of and operated the premises under it and RFC relied upon it throughout the proceedings.

We are also of the opinion that the evidence is sufficient to support a finding that counsel representing RFC in the first foreclosure suit agreed that appellee had a prior lien for the payment of back rents. Since we have concluded that RFC is in the same position as the lessee, it is unnecessary to determine whether such agreement and other circumstances connected therewith are such as to estop RFC to deny the existence of a prior lien in favor of appellee.

Affirmed.

4-9878 252 S. W. 2d 388

Opinion delivered November 3, 1952.

[redacted]

Milton McLees, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a judgment dismissing the complaint upon a finding that the cause was *res judicata.*

In April, 1949, Eiermann and his daughter, Bertha, purchased from Margaret Beck and J. G. Elsken the Bee Restaurant. It was operated in a building owned by J. M. Beck and his wife, Margaret. The amount paid in cash with acceptance of an offer to sell for $7,500 was $750. The remainder was paid at a later date and is not an issue here. Concurrently the Eiermanns leased that part of the realty occupied for restaurant purposes for a period of three years with an option for six additional years, agreeing to pay the Becks $110 per month.

The purchasers took possession May 1, 1949, and operated until June 12th. However, on June 1st the Eiermanns sued in equity under allegations that income from the business had been so grossly misrepresented as to amount to fraud. Other allegations were: (a) Because of the misrepresentations made by the defendants, "plaintiffs have suffered heavy loss every day since they took

possession of the premises; . . . (b) the defendants removed their deposit with the utility companies in the total sum of $200, although it was contemplated by the parties that these sums would be left on deposit and inure to the benefit of the plaintiffs; . . . (c) Margaret E. Beck removed knives, forks, spoons, chinaware, and kitchen utensils, all of which were covered by the bill of sale, and (d) she removed and refused to replace the stock of goods covered by the sale of the aggregate value of $96.29."

The demand was for judgment for $7,500 representing purchase price of the building, for $330 covering rent, and for $211.10 covering "the amount paid by plaintiffs to replace the equipment removed by the defendants," and for $96.29 representing the value of goods removed by Margaret E. Beck—a total of $8,137.39.

Complaint in the suit at bar was filed in October, 1950. It is alleged that the Becks and Elsken (the latter having acted as agent) represented that the restaurant produced an average income of $3,000 per month with an overhead expense of $700. This expense, said the complaint, was grossly understated, and the income was palpably exaggerated, with full knowledge that each statement was false. Actual income during May was alleged to have been $1,577.77 against which overhead expenses were $983.44, "resulting in a gross profit of $594.33. If representations made by the defendants had been true the plaintiffs would have realized a gross profit of $1,705.67. During the twelve operational days of June the income was $495.67, offset by a cost of $497.31, leaving a gross deficit . . ." The gross profit they should have realized was set out as $920.04. The prayer was for damages of $2,626.35.

A photostatic copy of the decree rendered in consequence of the chancery complaint of June 1, 1949, recites that the cause was submitted upon the pleadings, testimony of witnesses taken *ore tenus* at the bar of the court, "and other matters and proof before the court." The lease was cancelled, the contract of purchase was set

aside, and judgment was rendered against Margaret Beck and J. G. Elsken for $7,500 with interest from April 14, 1949. This judgment was paid.

Circuit court, in dismissing the instant case, necessarily found that the parties to each action were the same. This is not disputed. It must also have found that the damages now alleged were known to the plaintiffs when the bill was filed, or that failure to amend and include all elements of loss before trial August 25, 1949, was with knowledge that the damages now alleged had occurred, hence they elected to litigate the controversy as set out in the chancery action. It will be noted that demands other than for cancellation of the bill of sale and lease were included in the complaint.

In a quotation from Chitty, Judge HART, speaking for the court, approved the rule that where there is a false warranty containing elements of fraud and deceit, the party has his election to affirm the contract and sue upon the breach of warranty, or repudiate it, offer a return of all received, then rescind and sue for damages. *Warden* v. *Middleton,* 110 Ark. 215, 161 S. W. 151. This rule is too well established to require emphasis.

Appellants' contention is that when the suit was brought June 1st without surrender of the property, damages accruing from that time until June 12th were not ascertainable and the action was essentially for cancellation. The demand, however, was for $8,137.39, so certain elements of damage were included, although the sums now claimed were not mentioned.

We are cited to Judge BATTLE's opinion in *Roth* v. *Merchants' & Planters' Bank,* 70 Ark. 200, 66 S. W. 918. It was held that a judgment avoiding a negotiable note given for a patent (void because not executed in conformity to the statute requiring that it be on a printed form showing the consideration) did not bar a subsequent suit against the maker for the balance due on the price of the patent. Judge BATTLE, in the same opinion, quoted from *Shaver* v. *Sharp County,* 62 Ark. 76, 34 S. W. 261: "That which has not been tried cannot have been adjudicated.

. . . That which is not within the scope of the issue presented cannot be concluded by the judgment."

Our cases do not draw a distinct line beyond which *res judicata* invariably applies and within which it does not. The very nature of litigation makes that impossible. The rule, however, seems to be that if the forum selected by the plaintiff has jurisdiction of the person and the subject-matter, and the parties in each instance are the same, and if claims that were made or could have been made grew out of the same transaction, then it is the duty of the aggrieved party or parties to include in one action all rights subject to judicial determination at the time suit was brought, thus preventing multiple litigation. It is inconceivable that the Eiermanns did not know, shortly after June 12th, what they were going to claim by way of losses. The figures were available from the books they claim to have kept. But slight effort would have been required to amend the complaint, to the end that all incidents directly connected with the fraud alleged or necessarily pertaining to the claimed deceit, could have been disposed of.

The right of a court of chancery to adjudge damages where upon another ground it has acquired jurisdiction is discussed in *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729. LaFargue, sheriff of Arkansas county, sued Horstmann and others, alleging that the defendants conspired with John Peters and that the natural sequence of such conspiracy produced the personal injury complained of, for which $10,700 was asked. The case is unusual in that equity jurisdiction was acquired under allegations that the Horstmanns had fraudulently conveyed property to defeat creditors, thus rendering themselves insolvent. When LaFargue undertook to levy an execution on personal property owned by one of the Horstmanns he was shot by Peters.

In affirming Arkansas Chancery Court, Judge Frank G. Smith quoted with approval from Pomeroy and cases mentioned on pages 568-'69 of the opinion: "If the controversy contains any equitable features, or requires any

purely equitable relief which would belong to the exclusive jurisdiction, or involve any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to complete adjudication, and may thus establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority." Another quotation from the same opinion (with citations) is: "This principle has been applied in many cases in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose, although for the purpose of collecting damages merely they would not have had jurisdiction."

The Uniform Sales Act is to be found in Ark. Stat's, and §§ 68-1469 and '70 are pertinent.

We think the court correctly determined that the appellants here should have litigated their demands in the equity action—a forum they selected.

Affirmed.

George Rose Smith, J., concurring. The judgment should be affirmed, but I think the reason is that the appellants are bound by an election of remedies. Their first suit was to disaffirm the contract, and certainly when that judgment was paid the contract went out of existence. It is now too late for them to seek the inconsistent remedy of deceit, which is an action in affirmance of the agreement. Williston, Contracts, §§ 1528, 1528A.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY
v. COUNTS.

4-9869 252 S. W. 2d 390

Opinion delivered November 3, 1952.

Rehearing denied December 1, 1952.

W. H. Glover, for appellant.

H. B. Means, Jr., and *J. C. Cole,* for appellee.

ED. F. MCFADDIN, Justice. Appellee, Gus Counts, as beneficiary,[1] filed action against appellant, Woodmen of the World Life Insurance Society (hereinafter called "Woodmen Society") to recover double indemnity bene-

[1] Mrs. Counts, wife of Gus Counts and mother of Junior Counts, was also a beneficiary in the policy and a party to this litigation.

fits on a life insurance policy issued to Junior Counts, the son of appellee. For defense, the Woodmen Society claimed, *inter alia,* that the policy had no double indemnity benefits. The jury verdict was for the plaintiff, and the Woodmen Society brings this appeal. Appellant questions the sufficiency of the evidence to support the verdict; and this necessitates a statement of facts, viewing the evidence in the light most favorable to the verdict.[2]

On March 10, 1951, appellee contacted Mr. Edmondson, Secretary of the local camp of the Woodmen Society, and requested a life insurance policy with double indemnity benefits on the life of Junior Counts, the 25-year-old son of appellee. Edmondson completed the application blank which, it is admitted, included double indemnity benefits; and Edmondson accepted appellee's check for $30.54, which was the annual premium according to an old rate book in Edmondson's possession. Junior Counts was not at home at the time, so his sister signed the application with the consent of Edmondson and appellee. Later the same day, Junior Counts fully ratified all that had been done.

Edmondson forwarded the said application and check to Mr. Watkins, assistant State Manager for the Woodmen Society. Watkins discovered that according to a new rate book, the correct premium was $32.54; and sent that amount and the application to the home office of the Woodmen Society in Omaha, Nebraska, where the application was to receive final action. On March 29, 1951, the President of the Woodmen Society wrote Junior Counts a letter, saying, *inter alia*:

"I am happy that your application for membership in our Society has been approved. Your certificate has been mailed to our Representative for delivery to you. You will please make future payments on your certificate to the Financial Secretary of your Camp, whose name and address appear on the enclosed recognition card."

[2] The rule is well settled that in determining whether the evidence is sufficient to support the verdict, this Court views the evidence in the light most favorable to the party who won the verdict. See *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287; and other cases collected in West's Ark. Digest "Appeal & Error," § 930.

Notwithstanding the fact that the letter said the application had been accepted, it appears that in fact it was not accepted *in toto*: when the application was submitted to the Medical Examiner of the Woodmen Society, he observed that Junior Counts was of draft age, and instructed that the policy be issued without double indemnity benefits, as was the practice in effect at that time by the Woodmen Society. So the policy, as actually issued on April 1st and delivered some two weeks later, had no double indemnity benefits. But this fact—that the policy had no double indemnity benefits—was never actually known by Junior Counts or the appellee, Gus Counts, because the policy was not read by either of them.

Junior Counts left Arkansas about March 21st and never personally received either the letter of March 29th or the policy, but his father, Gus Counts, received both the letter and the policy and read the letter; and Gus Counts acted as the agent of the insured, Junior Counts, in all matters herein. Aside from the policy, no information, written or oral, was ever conveyed to the insured or the beneficiary to the effect that the policy did not have double indemnity benefits, just as the application had stated. There was no return of any premium for failure to have double indemnity benefits.

In June, 1951, Junior Counts died by accidental drowning in California, and his death was within the provisions of double indemnity benefits. Appellee Counts filed claim as beneficiary under the policy. The Woodmen Society paid the life insurance benefits, but resisted the double indemnity benefits, and this action resulted.

Preliminary to the principal issues, we point out:

(a) The signing of the application by the insured's sister, having been ratified, gives to the Woodmen Society no right to say that the insured never applied for a policy; and (b) the actions of the appellee, Gus Counts, for his son, Junior Counts, were in all instances the same as if the son had acted, for the father was the agent and had the right to receive the letter and policy for his son.

The case of *Inter-Southern Life Ins. Co.* v. *Holzhauer,* 177 Ark. 927, 9 S. W. 2d 26, points to our decision in the case at bar. In the reported case, Holzhauer applied to the agent Logsden for life insurance with double indemnity benefits, and the agent advised him that such benefits would be effective immediately on issuance of the policy. The policy, as issued on September 4, 1925, provided that the double indemnity benefits would be delayed one year before being effective, but when the company sent the policy to Holzhauer, it was enclosed in a letter which said:

"Enclosed please find your policy . . . being the same as applied for and explained to you by our Mr. P. H. Logsden, Agent."

Holzhauer never read the policy and never knew that the double indemnity benefits would be delayed one year. He was accidentally killed on January 5, 1926, after the issuance of the policy on September 4, 1925; and his beneficiary sued for the double indemnity benefits. This Court, in holding that the insurance company had estopped itself when it wrote the letter to Holzhauer, as above quoted, said:

"This brings us, in the final analysis, to the crux of the lawsuit—that is, whether the letter from the appellant's State manager to the insured, taken in connection with the other facts, was sufficient to estop the company and thereby enable appellee to obtain the relief sought. A majority of the court has reached the conclusion that the appellant is estopped. . . ."

And quoting from 32 C. J. 1135, the Court said:

" 'Even where there is a mistake, and both parties act in good faith, yet when the mistake is that of the company or its agents, and it reasonably induces the other party to believe that he is insured, the company is estopped to deny the effectiveness of the insurance. The delivery of a policy with the assurance that it is in compliance with the application is a waiver of an agreement that the insured would notify the company if the policy

were not right.' . . . See, also, *Fidelity Insurance Company* v. *Palmer,* 91 Conn. 410, 99 Atl. 1052. See, also, *Connecticut Fire Insurance Co.* v. *Wigginton,* 134 Ark. 152, 203 S. W. 844; *Stewart* v. *Fleming,* 96 Ark. 371, 131 S. W. 955. The appellant is clearly estopped from asserting that the policy is different from that which its agents represented it would be."

So in the case at bar, the application of Junior Counts was for double indemnity benefits. No one ever advised him or his father for him that the policy was not exactly as applied for: quite to the contrary, the President of the Woodmen Society wrote Junior Counts: "Your application . . . has been approved. . . ." The estoppel is as strong in the case at bar as in the reported case.

The holdings in other jurisdictions are in accordance with our holding in the Holzhauer case. In 29 Am. Jur. 155, the rule is stated:

"Moreover, according to some authority, notification to an applicant for life insurance of the arrival of his policy, by the local agent who received the application and to whom the policy was forwarded for delivery, completed the contract of insurance, which the insurer could not deny after loss although in fact it had issued a different form of policy from that applied for, where it had notified the agent to secure an amendment to the application to make it conform to the policy issued, which the agent failed to do."

To sustain the above quoted statement, there is the case of *Kimbro* v. *N. Y. Life Ins. Co.,* 134 Iowa 84, 108 N. W. 1025, 12 L. R. A., N. S. 421.[3] Likewise, in *Robinson* v. *U. S. Ben. Soc.,* 132 Mich. 695, 94 N. W. 211, 102 A. S. R. 436, the Supreme Court of Michigan, in holding an insurance company liable in a case where the insured was informed that the application had been accepted, said of the defendant insurance company:

[3] There is an Annotation on the point in 12 L. R. A. N. S. 421; and see also *Rake* v. *Century Ins. Co.,* 148 Iowa 170, 125 N. W. 207; and *Lewis* v. *State Mut. Ins. Co.,* 115 W. Va. 405, 177 S. E. 449.

"The duty of the defendant was to issue the policy in compliance with the terms of the application. If it chose to insert inconsistent provisions, it was its duty to call the attention of the insured to them, so that he might accept or refuse the policy. The insured has the right to assume that his policy will be in accordance with the terms of his application, and he cannot be bound by a different policy, until he has had the opportunity to ratify or waive the inconsistent provisions: See, also, *Gristock* v. *Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 634, and authorities there cited."

Appellant argues that Gus Counts, the beneficiary, is in no position to claim that the company is estopped; and this is on the theory that the son never received the letter and so did not change his position in any way in reliance on the letter stating the application had been accepted. In the Holzhauer case the beneficiary claimed the estoppel because of the letter to the insured. When we say, as we do, that the letter to Junior Counts being received by his father was the same as being received by him, then this case is exactly within the rule of the Holzhauer case. The Woodmen Society actually knew that Gus Counts had issued his check to pay the premium[4] for his son. If Gus Counts had known that there were no double indemnity benefits on this policy, he, acting for his son, could have applied to some other company for double indemnity benefits.

The appellant argues that under the by-laws and rules of the Woodmen Society, the medical examiner was correct in directing that a policy would not be issued with double indemnity benefits to a person of draft age; and appellant says that both Junior Counts and the beneficiary, Gus Counts, are bound by such rules of the Woodmen Society, and therefore cannot claim double indemnity benefits. The answer to this argument is: (a) that a policy with double indemnity benefits was not an illegal act; (b) that the Woodmen Society could waive its own by-laws and issue the policy if it so desired; and (c) that

[4] The check of Gus Counts was forwarded to Mr. Watkins, the Assistant State Manager of the Woodmen Society.

the action of the President of the Woodmen Society in advising the insured: "Your application . . . has been approved," constituted such waiver. In 44 C. J. S. 1092, the holdings on this point are stated:

"In general the company may waive any provisions in the policy or in its constitution or by-laws which are intended for its benefit, but it cannot by waiver or estoppel validate a contract which is entirely void or forbidden by law."

Finally, there is the contention that the appellee, Gus Counts, for himself and for the insured, Junior Counts, is charged with knowledge that the policy did not contain double indemnity benefits because Gus Counts kept the policy, even unread, from its receipt in April until the death of the insured on June 8th. It is argued that such holding of the policy constituted a ratification of its provisions, even though contrary to the application. Ratification in a case such as the one here must be based on evidence (a) that the insured or his agent *knew* of the variance between the policy and the application and kept the policy after such knowledge; or (b) that the insured or his agent kept the policy for such a long period of time that knowledge can be implied from such delay. The facts entirely negative any actual knowledge under "(a)" above; but appellant strenuously urges "(b)" above, and refers to the case of *Inter-Southern Life Ins. Co.* v. *Holzhauer (supra),* in which we said:

"Unless the insured was induced by the insurance company, or its agent, not to read his policy, it would be manifestly unjust to the company to allow him to retain the policy an unreasonable time, or until his note became due, and then plead that the policy did not express the contract. Because, in the meantime, he had been insured, and if he had died the company would have had to pay. Hence under those circumstances he would be estopped."

But in the said Holzhauer case, the policy was dated September 4, 1925, and the insured died on January 5, 1926, so the insured had the policy four months, yet he was not held in law or in fact to have ratified the variance

between the application and the policy. In refusing the defense of the insurance company, the Court said:

"But if the insurance company . . . has so misled the insured and caused him not to read . . . the policy, then the insurance company, when suit is brought against it by the beneficiary . . . cannot defend on the ground that the insured did not read the policy, . . . or return the policy within a reasonable time. For, under such circumstances, it would be obviously unfair . . . to permit the company to take advantage of its own wrong, . . . Under such circumstances the company is estopped."

In the case at bar, the policy was dated March 23, 1951, and actually received by the appellee for his son sometime in April, 1951. The insured died on June 8, 1951; so there is less elapsed time between receipt of the policy and death of the insured in the case at bar than there was in the Holzhauer case. Furthermore, the letter written by the President of the Woodmen Society in the case at bar was equally as strong as was the letter in the Holzhauer case; and in each instance such letter apparently made unnecessary the reading of the policy.

The judgment is affirmed.

WARD, J., dissenting. I can not agree with the majority opinion herein for the reasons set out below.

Regardless of what view one may take of the case, I take it that appellees can win only on the ground of estoppel. Briefly, the facts that must be relied upon to constitute estoppel are as follows: The son [through his father] applied for a $1,000 insurance policy with double indemnity; appellant's president sent out a form letter to the father stating the application had been approved, saying nothing about double indemnity; the form letter stated that the policy [certificate] would follow; the certificate did follow and came into the possession of the father about two weeks after receipt of the form letter; if the father had read the certificate, it would have informed him that double indemnity had been eliminated. Up to this point I will concede, for the

sake of argument only, that the father was misled to the point that the plea of estoppel would lie. However, there are other facts that must be considered.

It is conceded that the son left home before the form letter was received by the father and, further, that the father was never at any time before the death of the son able to contact the son. Conceding this, it must also be conceded that the father, even if he had read the certificate or had never received the form letter, could have done absolutely nothing about obtaining double indemnity from the appellant or any other insurance company. There is no way that I can think of in which the father was damaged or hurt. The only thing he could have done [and I think he had no legal right] was to cancel the policy, get his $30.00 back and lose the $1,000.00 which he has received.

Since the father was in no way hurt or damaged [by being misled, if he was] estoppel will not lie. This is the universal rule of this and all other jurisdictions.

Nakdimen v. *Baker,* 111 F. 2d 778, holds: an indispensable element of estoppel is a detrimental change of the party asserting it.

Gambill v. *Wilson,* 211 Ark. 733, 202 S. W. 2d 185, states in substance: the principle of equitable estoppel is that when a person has deliberately done an act or said a thing, and another person who *had a right* to do so has relied on that act or word and *shaped his conduct accordingly* AND WILL BE INJURED, estoppel will lie.

Peoples National Bank of Little Rock v. *Linebarger Const. Co.,* 219 Ark. 11, 240 S. W. 2d 12, holds: one, who, by his act or conduct, leads another to do *what he would not have otherwise* done shall not subject such person to LOSS OR INJURY by disappointing expectations upon which he acted.

Schuman v. *Stevenson,* 215 Ark. 102, 219 S. W. 2d 429, is to the effect: before a party will be estopped it must be shown that the party relying on the estoppel

is put to a DISADVANTAGE and has been led to CHANGE HIS POSITION FOR THE WORSE.

In *Lewin* v. *Telluride Iron Works,* 272 F. 590, Judge SANBORN said:

"The indispensable elements of estoppel are: (1) ignorance of the person who invokes estoppel; (2) a representation by the party estopped which misleads; (3) an innocent and detrimental change of the party asserting . . ."

SAULSBERRY *v.* SIEGEL.

4-9891 252 S. W. 2d 834

Opinion delivered November 10, 1952.

Rehearing denied December 22, 1952.

Neill C. Marsh, Jr., Keith & Clegg and *Spencer & Spencer,* for appellant.

J. S. Brooks and *Mahony & Yocum,* for appellee.

ROBINSON, J. Appellants, C. J. Saulsberry, *et al.,* filed suit to cancel an oil and gas lease and have appealed

from a decree in favor of the appellees, who are owners of a lease executed in 1922; and Saulsberry is the lessee named in a lease executed in 1951 on the same property. The chancellor's decree sustains the 1922 lease and cancels the 1951 lease.

On April 5, 1922, Tennyson Allen and wife, parents of the appellants, Joe Allen and Marion E. Norton, executed to H. M. Johnson, trustee, an oil and gas lease on thirty acres of land, described as the south half of the southeast quarter of the southeast quarter of section 18, township 17 south, range 14 west, Union County, Arkansas, and the northeast quarter of the southeast quarter of the southeast quarter in the same section. The lessees drilled four wells, and perhaps a fifth one, on the thirty acres. These wells were all drilled to what is known as the Nacatoch sand. There was no production of any consequence from any of the wells, except one located on the north ten acres of the tract. According to appellants' contention, this well ceased to produce in 1930. At that time, or at a later date, the derrick was destroyed by fire. In 1934 the well was again put into production and has continued to produce since then. Through various assignments the appellees are now owners of the lease.

In 1951 appellants, Joe Allen and Marion E. Norton, executed to appellant, Saulsberry, a lease on the property. Saulsberry also owned a lease on an adjoining ten acres on which he drilled down to what is known as the Glenrose sand and brought in a good well. This was the first well that had produced oil below the Nacatoch sand, with the exception of what is known as the Stokes well, located about three-quarters of a mile northwest of the property here involved. The Stokes well was drilled about the year 1926 and produced oil for some time thereafter. About fourteen or fifteen other wells were drilled on properties surrounding the Stokes well, none of which was productive. As soon as the appellees learned that Saulsberry was likely to bring in a well in the Glenrose sand, they secured a permit to drill to that sand on the

south twenty acres of their lease; but when this suit was filed, asking that the lease be cancelled on the south twenty acres, but not asking for cancellation of the northeast ten acres, they had the permit amended to permit them to drill to the Glenrose sand on the northeast ten acres and produced a well.

Appellants contend that there has been a complete, or a partial forfeiture of the 1922 lease for three reasons:

(1)—The lease terminated upon cessation of production on the leased premises in 1930;

(2)—If there has not been a termination of the entire lease because of cessation of production, then there has been an abandonment, so far as the south twenty acres are concerned; and

(3)—Lessors were not required to give notice of the forfeiture but, if so required, such notice was given.

As to the first contention made by appellants, that the lease terminated in 1930 due to a cessation of the production of oil, it is not clear from the record just when there was a complete stoppage of production; but accepting appellants' claim that it was for a period extending from 1930 to 1934, the fact remains that the derrick had been destroyed by fire and the lessees rebuilt it, putting the well into production. Apparently lessors made no claim during that time, or for some fifteen or twenty years thereafter, that the lease had terminated by reason of the well being shut down in 1930. Seemingly, the lessors considered that the cessation of production in 1930 was temporary; they made no objection to the lessees rebuilding the derrick and putting the well into production. In fact, they made no claim to the lessees of a forfeiture until the amended complaint was filed in this case, about twenty-one years after the year 1930, the date they now say the lease terminated; and, furthermore, appellants do not even now ask for cancellation of the lease as to the northeast ten acres of the tract on which is located the only well that was producing in 1930, when there was a cessation of all production until 1934.

In the case of *Reynolds* v. *McNeil,* 218 Ark. 453, 236 S. W. 2d 723, this court said:

"The chancellor was right in refusing to declare a forfeiture. The lessee and his assignees had spent large sums in successfully attaining production within the primary term of six months. When that event occurred a valuable estate vested in the lessee, to continue as long as oil or gas was produced in paying quantities.

"The appellants contend, however, that the estate terminated at the end of the primary term because oil was no longer being produced in commercial amounts. According to the weight of authority, and we think the better view, when the lessee's estate has vested it does not automatically terminate upon a temporary cessation of production. In ventures of this kind the lessee makes a very substantial investment and bears the entire loss if the well is unproductive. It would be harsh and inequitable to say that upon a temporary stoppage of production the lessor can declare a forfeiture and take over the property himself. Hence most authorities allow the lessee a reasonable time within which to reinstate paying production. For instance, in a case where the derricks blew down in a heavy storm, and later burned, the lessor was not permitted to declare the lease at an end because his royalties had ceased for the time being."

Next is appellants' contention that the inactivity of the lessees was a breach of the implied covenants of exploration and development as to the south twenty acres. The lessees drilled four wells for certain, and perhaps a fifth one, all to the Nacatoch sand. The test, as to whether there has been a breach of the implied covenant to explore and develop, is whether the lessee has acted with reasonable diligence so as to produce oil and gas upon the entire tract. *Standard Oil Company of Louisiana* v. *Giller,* 183 Ark. 776, 38 S. W. 2d 766. In *Smart* v. *Crow,* 220 Ark. 141, 246 S. W. 2d 432, this court said:

"The lessee must act for the mutual advantage of both the lessor and lessee, and must consider not only

his interest but, also, the interest of the lessor. He must perform the contract so as to further the original purpose and intention of the parties. *Ezzell* v. *Oil Associates,* 180 Ark. 802, 22 S. W. 2d 1015. However, in the Ezzell case, the court said: 'Of course due deference should be given to the judgment of the lessee as operator to determine how many wells should be drilled, but he must use sound judgment in the matter and cannot act arbitrarily. He must deal with the leased premises so as to promote the interest of both parties and to protect their mutual interest.' "

It cannot be said that the lessees did not exercise sound judgment or that they acted arbitrarily. Only one well drilled to a depth lower than the Nacatoch sand which produced any oil was the Stokes well drilled in 1926. This well was located about three-quarters of a mile northwest of the lease here involved; and, moreover, fourteen or fifteen wells were drilled around the Stokes well to the same depth, and none of these wells was productive. A map was introduced in evidence in this case which shows dozens of wells drilled all around and in the immediate vicinity of the lease under consideration. A great majority of all these wells have ceased production. There is no evidence whatever in the record of any existing fact, or theory, whereby it can be said that the lessees have failed to use reasonable diligence, or have acted in an arbitrary manner by not drilling below the Nacatoch sand until Saulsberry had done so on an adjoining tract. Just what fact, or theory, caused Saulsberry to drill to a greater depth is not shown in the record. On this phase of the case appellants rely on *Smith* v. *Moody,* 192 Ark. 704, 94 S. W. 2d 357; but there the situation was entirely different. Three hundred and forty acres were involved in the lease on which there had been drilled only eight wells, seven of those being on the west property line and one on the north. It was the contention of the lessees that other wells could not be drilled and operated on the property except at a great loss. This court said: "This contention may be disposed of by saying that, if true, the lessees have not

been damaged by the cancellation of so much of the contract of lease as cannot be profitably performed."

In the case at bar at least four wells were drilled on the thirty acres, and at least one well was drilled on each ten-acre tract, with the exception of the southwest ten acres, and that particular area was completely surrounded by non-productive wells. It is settled that the lessee: must act for the mutual advantage of both the lessor and lessee; must perform the contract so as to further the original purpose and intention of the parties; must use sound judgment in the matter and cannot act arbitrarily. Whether the lessee has acted in such manner is to be determined from all the facts and circumstances in the case. Here, after considering such facts and circumstances, the chancellor found in favor of the lessee; and we cannot say the decree is contrary to the preponderance of the evidence.

Finally, appellants say that the lessors were not required to give notice of the forfeiture, but, if so required, such notice was given. Since it is being held that the chancellor did not err in holding there was no forfeiture, notice of appellants' contention, in that respect, is of no consequence.

Affirmed.

Mr. Justice MILLWEE and Mr. Justice WARD dissent.

ARKANSAS MOTOR FREIGHT LINES, INC. *v.* JOHNSON.

4-9882 252 S. W. 2d 814

Opinion delivered November 10, 1952.

Rehearing denied December 15, 1952.

Harper, Harper & Young, for appellant.

Ed E. Ashbaugh and *G. Lawrence Blackwell,* for appellee.

George Rose Smith, J. This proceeding was originally instituted by the Public Service Commission upon its own motion, for the purpose of clarifying a certificate of convenience and necessity held by the appellees, whose trade name is Atlas Transit & Warehouse Company. The Commission's initial notice to Atlas and to all other interested carriers recited that the Atlas certificate authorized it to engage in long distance transportation of property, that a question had arisen as to the meaning of the word "property," and that a hear-

ing would be held to construe the certificate and to determine the rights and authority of Atlas.

At the hearing held pursuant to this notice the members of the Commission, as well as the attorneys who appeared for various carriers, were in some doubt as to the proper procedure to be followed. In this situation the appellant, a motor carrier licensed to transport general commodities, volunteered to file a complaint formally raising the issues to be determined. This suggestion was accepted, and the complaint was later filed.

The complaint charges that the certificates issued to Atlas and its predecessor are void in that they do not restrict the carrier to defined routes not exceeding 20% of the State highway system. In the alternative the complaint asserts that these certificates purport to authorize the transportation of "property," which was intended to mean, and should be limited to, household goods only. After a hearing the Commission restricted Atlas to specified routes aggregating less than 20% of the highway system and so modified the Atlas certificate as to permit the carriage of household goods, heavy machinery, and general commodities only. The circuit court affirmed the order. On this appeal the appellant continues to demand the relief asked in its complaint.

The proof shows that the certificate now held by Atlas was originally issued to P. D. Gathright in 1930 and authorized him to conduct a general transfer and drayage business at Pine Bluff "and to engage in long distance transportation of property." Atlas bought Gathright's business in 1946, and when the certificate was reissued to Atlas in 1948 it empowered Atlas to operate "as a common carrier of household goods over the following route, to-wit: General transfer and drayage business at Pine Bluff, Arkansas, and to engage in long distance transportation of property." Neither Gathright's nor Atlas' permit restricted the holder to 20% of the highway system, as contemplated by prior and present statutes. Act 62 of 1929, § 3 (c); Ark. Stats. 1947, § 73-1710 (e).

We agree with the Commission's view that the failure to impose a mileage limitation did not render the certificates void. Whether these permits were mere nullities depends upon whether their issuance was beyond the Commission's jurisdiction. We do not regard the legislative directive, that no certificate be issued for a total mileage in excess of 20% of the highway system, as a matter going to the jurisdiction of the Commission. Rather, the failure to observe this directive was an error that might have been corrected by appeal and which, in the absence of an appeal, is still subject to correction under the Commission's continuing power to require compliance with the statutes. Ark. Stats., § 73-1707 (6). The original defect has now been remedied by the order under review.

In the alternative the appellant contends that Atlas should be confined to the transportation of household goods. It will be remembered that both the Gathright certificate and the Atlas certificate authorized the long distance transportation of "property," which was broadly defined by § 1 (g) of Act 62 as any kind of property transported by a motor carrier. Appellant alleged below that although the word "property" was meant to include household goods only, Atlas has in fact carried general commodities and other property in addition to household goods. The proof is undisputed that between 1941 and 1950 Atlas and its predecessor transported lumber, wallboard, flooring, sewer piping, a road grader, refrigeration equipment, transformers, printing equipment, office furniture, cotton, ice, vinegar, canned goods, etc.

It is evident that pursuant to certificates permitting the carriage of property in general Gathright and Atlas built up a business devoted to the conveyance of many commodities in addition to household goods. What the Commission attempted to do was to confine Atlas' future operations to those fields in which it and Gathright had engaged in the past. To this end the Commission limited Atlas to the carriage of household goods, heavy machinery, and general commodities. These terms appear

to be three of various classifications used by the Commission in allocating the motor freight business among common carriers. We are not told what is included in each classification, but this is unimportant. The appellant, as a carrier of general commodities, presumably is interested only in eliminating Atlas from that field, and appellant concedes that Atlas and Gathright have been carrying general commodities, whatever the phrase may mean.

The weight of the evidence sustains the Commission's decision to permit Atlas to haul general commodities as well as household goods. There is, it is true, some testimony implying that Gathright at first intended to restrict himself to the moving of household goods. But it must be borne in mind that his permit authorized the long distance transportation of property, which was then defined by statute as including about any movable chattel. Even though the statutory definition was not repeated when the present statute was adopted in 1941, nevertheless the words in Gathright's certificate continued to have some meaning. Under the authority of that permit he expanded his business to include the conveyance of general commodities, and he and Atlas occupied that field for about a decade. It does not appear that any competing carrier objected until the Commission itself raised the issue in 1950. In these circumstances we cannot say that Gathright's conduct was unauthorized or that the Commission was in error in allowing it to continue.

The appellant's other contentions relate to matters of procedure. It is insisted that upon the filing of the complaint notice should have been given to all other carriers who might be affected by a modification of the Atlas certificate. Had the complaint been an entirely original proceeding this might be true, but in fact it was a continuation of the action begun by the Commission on its own motion. The Commission had already notified all affected carriers that the meaning of Atlas' permit was in question and that a hearing would be held to determine "the rights and authority" of Atlas under

its certificate. We think this language broad enough to cover the questions later presented by appellant's complaint, and hence that pleading did not allege such a new cause of action as to require a repetition of the notice. *Smith* v. *Smith,* 190 Ark. 418, 79 S. W. 2d 265. Nor do we think that the Commission went beyond the issues raised by the complaint in reaching its decision.

It is also contended that, since the Commission's order amounts to the granting of a new permit, Atlas should have been required to prove that there is a public need for its services along the routes designated in the order. Whether the order is really tantamount to the issuance of a new certificate or is merely a narrowing of an existing certificate is open to question, but in any event the point now urged was not raised below and cannot be asserted for the first time on appeal.

Affirmed.

WILLIS *v.* STATE.

4715 252 S. W. 2d 618

Opinion delivered November 10, 1952.

N. A. McDaniel and *O. Wendell Hall, Jr.,* for appellant.

Ike Murry, Attorney General, and *Dowell Anders,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. On March 19, 1952, Curtis Willis was indicted for the crime of rape [1] alleged to have been committed on his daughter, Billie Jean Willis. He was tried on that indictment and convicted of carnal abuse [2] and brings this appeal presenting the points now to be discussed.

I. *Sufficiency of the Evidence.* Billie Jean Willis testified that she was 15 years of age on January 4, 1952; that her father, the appellant, raped her on September 3, 1946; and that he continued to compel her to have sexual intercourse with him at frequent intervals thereafter, until about two weeks before the returning of the

[1] See § 41-3401 Ark. Stats.
[2] See § 41-3406 Ark. Stats.

indictment. The prosecuting witness testified to the many acts of carnal abuse within the statutory period, and her testimony made a jury case independent of corroboration, even though she was in fact corroborated. *Hodges* v. *State,* 210 Ark. 672, 197 S. W. 2d 52; *Tugg* v. *State,* 206 Ark. 161, 174 S. W. 2d 374; *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813. One indicted for rape can be convicted for carnal abuse. *Warford & Clift* v. *State,* 214 Ark. 423, 216 S. W. 2d 781, 8 A. L. R. 2d 996. We conclude that the evidence was sufficient to take the case to the jury and to support the jury's verdict.

II. *Bill of Particulars.* The indictment charged the rape to have been committed on September 3, 1946. The appellant moved the trial court to require the State to furnish him—in advance of the impaneling of the jury—with information as to any other and subsequent dates in which the State would claim there had been sexual intercourse by the appellant with his daughter. The appellant assigns as error the refusal by the trial court to require the State to furnish such information.

Since rape is a capital offense (§ 41-3403 Ark. Stats.), there could be no valid claim of limitations by appellant against a rape committed 6 years before the indictment (See § 43-1601 Ark. Stats.). Thus, insofar as the offense of rape was concerned, § 43-1015 Ark. Stats. applies and that section says:

"The statement, in the indictment, as to the time at which the offense was committed, is not material, further than as a statement that it was committed before the time of finding the indictment, except where the time is a material ingredient in the offense."

When the accused presented his motion for detailed information, which amounted to a motion for a bill of particulars, he was being tried on an indictment which charged rape and it was immaterial whether there might be proof of any sexual intercourse after the one charged in the indictment, which was September 3, 1946. The statute on bill of particulars is § 43-804 Ark. Stats., and says:

"The bill of particulars now required by law in criminal cases shall state the act relied upon by the State in sufficient details, as formerly required by an indictment; that is, with sufficient certainty to apprise the defendant of the specific crime with which he is charged, in order to enable him to prepare his defense. . . ."

The indictment in this case definitely charged the appellant with rape, and made unnecessary any bill of particulars as to the rape. Here is the wording of the indictment:

"The Grand Jury of Saline County, in the name and by the authority of the State of Arkansas, accuse Curtis Willis of the crime of Rape committed as follows, to-wit: The said Curtis Willis in the County and State aforesaid, on the 3rd day of September, A. D., 1946, did unlawfully in and upon one Billie Jean Willis, a female person under the age of sixteen years, forcibly, violently and feloniously rape and assault her, the said Billie Jean Willis, then and there violently, forcibly and against her will and consent, did ravish and carnally know, and against the peace and dignity of the State of Arkansas."

If the indictment had only charged carnal abuse, a date within the statutory period might have been material, because, by § 43-1602, the limitation period for a felony less than capital is three years. Even in this rape case, it would not have been improper for the Court to have required the Prosecuting Attorney to inform the defendant of the dates of the acts of intercourse within the three-year period, but in the state of the record at the time the motion was made and acted on by the trial court, we see no error in the ruling of the trial court in refusing the motion for bill of particulars.

In the Court's Instruction No. 4 to the jury, the Court said:

"The alleged offense of carnal abuse must have occurred within three years before the filing of the indictment on March 19, 1952."

Thus the defendant's rights were protected. In *Venable v. State,* 177 Ark. 91, 5 S. W. 2d 716, we held that a state-

ment as to the time of the commission of a carnal abuse is not material except as a statement that it was committed before the time of the finding of the indictment; and in *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305, the defendant was charged with carnal abuse committed "on the ..... day of ....., 191....." and we sustained that indictment, saying:

"In a criminal prosecution, the State must *prove* that the offense was committed within the period of the statute bar, . . ."

The defendant knew that under the indictment, he could be convicted of carnal abuse and also knew that any act of sexual intercourse by him with the prosecuting witness, within three years next before the finding of the indictment, would be within the statutory period; so the defendant could not have been prejudiced by the Court's ruling. See *Bender* v. *State,* 202 Ark. 606, 151 S. W. 2d 668. We find no merit in the appellant's assignment of error regarding the ruling on the bill of particulars.

III. *Rulings in Regard to the Evidence.*

(a) The prosecuting witness told of the attack on her on September 3, 1946, and also testified as to many subsequent acts of sexual intercourse by her father on her at frequent intervals up to a few weeks before the returning of the indictment. Some of these acts took place outside of Saline County. The Court told the jury that the girl would be allowed to continue her chronological account of the trips and the acts outside of Saline County in order to go along with the narrative as to the acts in Saline County, but the Court told the jury that it would not consider any of such acts—committed outside of Saline County—in arriving at its verdict. The appellant assigns error in the ruling of the Court because it allowed testimony as to acts of intercourse outside of Saline County. Due to the age of the prosecuting witness, we cannot say that the trial court erred in allowing her to make a chronological statement under the cautionary instruction given to the jury by the Court. The trial court could observe her demeanor on the wit-

ness stand. We cannot say that there was any error in the light of the cautionary instruction which went along with the testimony.

(b) The defense sought to show by Mrs. Barnes that the prosecuting witness, Billie Jean Willis, had at one time driven an automobile of Mrs. Barnes without the permission of the owner. The purpose of this evidence was explained by the defense in this language:

"The evidence is not meant for the purpose of charging or claiming that the said witness committed a felony, but it is offered solely for the purpose of showing the character and the disposition of the said prosecuting witness, the said Billie Jean Willis, that she was a reckless girl and would resort to anything to get out and get with a crowd and furnish the car to carry them in."

The trial court refused the proffered evidence and the appellant claims error. The trial court was correct. A witness cannot be impeached by evidence from other witnesses as to specific acts of bad conduct. *Kirkpatrick* v. *State,* 177 Ark. 1124, 9 S. W. 2d 574. Even in a carnal abuse case, evidence of specific acts of immorality of the prosecuting witness is not admissible as affecting her creditability. *Davis* v. *State,* 150 Ark. 500, 234 S. W. 482. In a carnal abuse case, the defense can cross-examine the prosecuting witness as to her conduct, but is bound by her answers. *Rowe* v. *State,* 155 Ark. 419, 244 S. W. 463.

IV. *Other Assignments.* Several assignments in defendant's motion for new trial relate to the ruling of the Court in the giving and refusing of instructions. Most of these instructions related to the rape charge; and any complaint as to them was rendered moot by the jury's verdict of not guilty of the rape charge. We have carefully checked all of the 20 assignments in the motion for new trial, and find no reversible error in the record.

Affirmed.

4-9892 252 S. W. 2d 408

Opinion delivered November 10, 1952.

[redacted]

Jabe Hoggard and *Crumpler & O'Connor,* for appellant.

Stein & Stein, for appellee.

MINOR W. MILLWEE, Justice. Appellees are thirteen homeowners residing along U. S. Highway 82 a few miles southeast of El Dorado, Arkansas, in the vicinity of White and Caney creeks. Appellants, Spartan Drilling Company and C. A. Lee, own and operate several oil wells in the vicinity which also produce large quantities of salt water. This suit was brought by appellees to restrain appellants from polluting the creeks by allowing salt water to escape into White Creek which flows into Caney Creek and thereby causing the breeding of

such large quantities of salt water mosquitoes as to render it impossible for appellees to enjoy their properties.

In their demurrer and answer appellants alleged that the Arkansas Oil and Gas Commission had jurisdiction of the subject matter of the suit and that chancery court was without jurisdiction since appellees had failed to exhaust their administrative remedies. Appellants also asserted they had constructed a complete and adequate salt water disposal system and denied that they were allowing any salt water to escape into the streams. They further alleged that there were low and marshy spots in the area in which mosquitoes might breed and that other producers also allowed salt water to flow into one of the streams.

The demurrer was overruled and upon trial of the issues the chancellor found that, by their operations, appellants were polluting the creeks and should be permanently enjoined from permitting the salt water to escape from their wells and disposal pits into White Creek. Appellees' prayer for a mandatory injunction requiring appellants to clean up the polluted area was denied.

The chancellor correctly overruled the demurrer to the complaint. The Oil and Gas Commission is granted broad supervisory powers relating to oil and gas production under Act 105 of 1939 (Ark. Stats., §§ 53-101 *et seq.*). Under § 11 of the Act (Ark. Stats., § 53-111), the Commission is authorized to make reasonable rules, regulations and orders to prevent the pollution of fresh water supplies by salt water. The demurrer of appellants does not allege, nor is there anything in the record to indicate, that the Commission ever adopted any rules or regulations governing the disposal of salt water in connection with the operations involved here. In other words, there is no showing that appellees have been afforded an administrative remedy under the Act relied upon. Even if the Commission had exercised the authority given it under the Act, there is nothing in the statute indicating an intention by the Legislature to declare that

such jurisdiction should be exclusive or to deprive courts of equity of their inherent power to abate or enjoin a nuisance. It is not infrequent that a dual remedy, one in the judicial and another in the administrative forum, may be available to the same party for the enforcement of the same right. 42 Am. Jur., Public Administrative Law, § 252. We hold that the jurisdiction granted the Oil and Gas Commission in its supervisory capacity over oil and gas production is not exclusive, and that appellees had the right to maintain the instant suit.

It is also argued that the proof is insufficient to sustain the chancellor's finding that appellants were polluting White Creek. The testimony reveals that in conducting their operations appellants produced salt water which was at first allowed to flow into White Creek nearby. Early in 1951 earthen pits were dug on two of the leases which proved inadequate to handle an increased production of salt water. Appellants then leased five acres around a dry hole which was used as a salt water disposal well. This arrangement also proved inadequate in the summer of 1951 when the pits were deepened and another pump and disposal well were installed. This installation was completed in October, 1951. While witnesses for appellants testified that the disposal system was adequate to handle present and estimated future production of salt water in the field, there was no denial of the evidence introduced by appellees to the effect that approximately 200 gallons of salt water was seeping through the sides of the earthen pits daily and escaping into White Creek. There was proof that White Creek was ordinarily a dry branch in the summer months until appellants began their operations. Since that time White and Caney creeks have become impregnated with salt water which stands in stagnant pools resulting in the breeding of large numbers of salt water mosquitoes.

Appellees described the mosquitoes as large and vicious biting and stated that they were so numerous in the spring and summer months as to make it impossible

for them to enjoy their properties. The mosquitoes swarm on appellees and their children when they walk into their yards and ordinary clothing affords no protection against their painful bites. Appellees' livestock are also molested by the mosquitoes.

Although there was some dispute in the testimony, we think a preponderance of the evidence supports the chancellor's finding that appellants were polluting White Creek and that the breeding of large numbers of salt water mosquitoes resulting therefrom constituted a nuisance and was so detrimental and discomforting to appellees as to render it impossible for them to enjoy their properties.

Appellants contend that since they have expended more than $57,000 in the construction of their present water disposal system, they should not be required to make additional expenditures in order to eliminate a seepage of approximately 200 gallons of salt water per day. We do not understand appellants to contend that this seepage cannot be stopped or that the cost of doing so would be excessive or prohibitive. Spartan's superintendent frankly stated that appellants had not done everything they intended to do to curb the salt water.

Many of our earlier cases involve the question of a nuisance in the maintenance of a livery stable. In *Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519, the court said: "It is the duty of every one to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used as to destroy the comfort of persons owning and occupying adjoining premises, creating an annoyance which renders life uncomfortable; and it may be abated as a nuisance." Another statement from that case which has been approved in many subsequent cases is: "The law takes care that a lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or overrefined person. But, on the other hand,

it does not allow any one, whatever his circumstances or conditions may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity."

In *Yaffee* v. *Fort Smith,* 178 Ark. 406, 10 S. W. 2d 886, 61 A. L. R. 1138, this court held that it constituted a nuisance for the owner of a junk yard to allow water to accumulate in cans and other receptacles so as to cause the breeding of mosquitoes to the annoyance and injury of the health and comfort of persons in that vicinity. In that case the owner was required to either construct a roof over the junk piles so that water would not accumulate in the containers or move the yard to some other location, regardless of the cost of either procedure.

In *Meriwether Sand & Gravel Co.* v. *State, ex rel. Attorney General,* 181 Ark. 216, 26 S. W. 2d 57, the appellant was enjoined from polluting a creek so as to destroy fish and otherwise render the stream unfit for the use and pleasure of the riparian owners. We held that appellants' contention that the granting of the injunction would result in the destruction of its business was not justified even though additional expense would be incurred in order to prevent further pollution. We think the same situation exists in the instant case and that the applicability of the familiar rule that every man must so use his property as not to injure that of his neighbor is unaltered by the fact that additional expense may be incurred to prevent further pollution of White Creek by the appellants.

On the whole case we think the evidence was sufficient to support the chancellor's conclusion that the continued discomfort suffered by appellees on account of the salt water pollution caused by appellants was positive and substantial rather than trivial or imaginary and constituted a nuisance which was subject to abatement. The decree is accordingly affirmed.

WELCH *v.* BURTON.

4-9901 252 S. W. 2d 411

Opinion delivered November 10, 1952.

D. H. Crawford and *Wood & Smith,* for appellant.

McMillan & McMillan and *Thomas B. Keys,* for appellee.

WARD, J. About the year 1912 one C. O. Burton, Sr. became the owner of twenty acres of land a few miles north of Arkadelphia. The land was divided by Highway No. 7 running north and south. Burton, Sr., his wife and four children lived on the land as a homestead until he died in 1927, and thereafter the widow and children remained there for about fifteen months. Then the family moved away, the widow died, and the three

daughters' whereabouts became unknown for many years. However, the other child, C. O. Burton, Jr., continued to live in the community until he was a grown boy, and then was away several years, part of which time he spent in the Army.

In 1930 Burton, Jr., one of the appellees, rented this land to Welch, one of the appellants, but the terms and circumstances are in dispute. Burton Jr. paid the taxes until 1934 when it became delinquent and Welch arranged for his son-in-law to buy the land from the State which he did in 1939, but deeded it to Welch in 1946. In 1947 Welch brought suit to confirm title, but got no service on any of the appellees. Soon after the decree of confirmation Welch platted and improved the land by building houses thereon. All contentions regarding the land west of the road have been compromised and settled, and that part of the land is not involved here. In 1948 Welch built two houses east of the road and sold one of them to Hunnicutt in 1951. The year before, 1950, Welch secured a deed from Willie Jean Lighty, one of the four children, conveying to him her one-fourth interest in all the land. This suit was brought by the other three children of C. O. Burton, Sr. asserting their undivided three-fourths interest in said lands and asking the Court to set aside the confirmation decree of 1947, to quiet their title to an undivided three-fourths interest, and to appoint commissioners to make partition. Appellants Welch and his wife answered and pleaded the confirmation suit and adverse possession, and also that appellees were estopped by the actions of Burton, Jr. in leading them to believe he and his sisters had no interest in the land. Appellants Hunnicutt and his wife pleaded good faith and asked to be protected from loss. The Federal National Mortgage Association was made a party to the suit because it held a mortgage on part of the lands, and they entered a demurrer on the grounds (a) that the court is without jurisdiction to try title and partition in the same suit, and (b) the 1947 confirmation decree could not be set aside, after lapse of term, without complying with Ark. Stats. § 29-508. The record shows

this demurrer was overruled, but error is not urged in the briefs.

We think the trial court was correct in cancelling the 1947 confirmation decree. Ark. Stats. § 34-1902 is applicable and controlling in this instance, the last portion of which reads as follows:

" and if the petitioner has knowledge of any other person who has or claims to have an interest in such lands, the petitioner shall so state, and such person or persons shall be summoned as defendants in the case." In the petition for confirmation of title which Welch filed in 1947 he did not make any of the children of C. O. Burton, Sr. parties defendants and he did not serve any of them, although the record is clear that he did have knowledge of them and their interest. Even though the whereabouts of the three daughters was not known to Welch, he did know of their existence and should have had them made defendants and served as in the case of non-residents. In the case of Burton, Jr. it appears that he might have gotten personal service on him by the exercise of diligence. It is contended that appellees are bound by the 1947 confirmation decree because they did not within three years bring this suit to vacate as provided in Ark. Stats. 34-1910. The answer to this is that said section is not applicable in instances where section 34-1902 is not followed. It was so held in *Union Sawmill* v. *Rowland,* 178 Ark. 372, 10 S. W. 2d 858, and *Hargis* v. *Lawrence,* 135 Ark. 321, 204 S. W. 755.

A suit brought, as this one, to set aside a confirmation decree is not a collateral but a direct attack. *Quertermous* v. *Bilby,* 144 Ark. 98, 221 S. W. 856, and *Grayling Lumber Co.* v. *Tillar,* 162 Ark. 221, 258 S. W. 132.

In addition to the confirmation suit Welch defended on the ground of adverse possession and estoppel. The chancellor held against him on both grounds and we cannot say his holding was against a preponderance of the evidence. The defense of adverse possession must fail if the defense of estoppel fails. The defense of estoppel rests on disputed testimony and, as stated above, we

are unwilling to say the chancellor found against the preponderance of the evidence. Welch states that he had no deal with Burton Jr. to rent his land or to keep the taxes paid during the years Burton Jr. was absent. On the other hand Burton Jr. is positive that he did. The testimony of other witnesses and certain circumstances seem to give more corroboration to Burton Jr.'s position in the matter. This determination having been made, Welch, of course, could not assert a claim of adverse possession.

Betterments

In view of what has been said, we must agree with the chancellor that Welch was not entitled to betterments for improvements placed on the lands. It can not be said, in view of our factual determination above, that he acted in good faith as the law contemplates in such instances. Likewise, we agree that Hunnicutt, having bought from Welch after the improvements [all except $100] had been made, is in no better position to claim betterments than is Welch. The statute governing betterments is Ark. Stats. 34-1423, and runs in favor of anyone believing himself to be the owner. This has been interpreted to refer to anyone who acts in good faith and our cases define good faith, and places the burden of proof on the claimant. *Greer* v. *Fontaine,* 71 Ark. 605, 77 S. W. 56. In *Beard* v. *Dansby,* 48 Ark. 183, 2 S. W. 701, it was said that good faith consists of "an honest belief and an ignorance that any other person claims a better right to the land." Here it is not denied that Welch knew of the heirship of the children of Burton Sr. and, accepting the finding of the chancellor as we do on the factual situation, we must also conclude that Welch must have known they had a better right to the land than he had.

It is insisted by the Federal National Mortgage Association, in an effort to protect its security, that Hunnicutt and Welch are entitled to betterments for two reasons: (a) Welch was a co-tenant with appellees, and (b) this is a suit for partition. It is true that Welch

bought the one-fourth undivided interest of one of the children and thereby became a co-tenant with the others. But it is also true that all improvements were made before that relationship was established. *Dunavant* v. *Fields,* 68 Ark. 534, 60 S. W. 420, *Swift* v. *Swift,* 121 Ark. 197, 108 S. W. 742, and *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21, cited by appellant, are authority that a co-tenant may recover for betterments in an action for partition by one of the co-tenants, but in each instance the improvements were made after that relationship came into existence. The lower court gave the loan company the right of subrogation to the claim of Hunnicutt against Welch on his warranty and also a lien on the proceeds of the sale of Welch's one-fourth interest in the premises. This is all the loan company is entitled to receive.

Affirmed.

The Chief Justice did not participate in the determination of this case.

TRANTHAM *v.* TRANTHAM, EXECUTRIX.

4-9880 252 S. W. 2d 401

Opinion delivered November 10, 1952.

Ed B. Cook, for appellant.

Marcus Evrard, for appellee.

HOLT, J. N. W. Trantham died testate December 21, 1951. He left surviving his widow, Mrs. Beulah Trantham, and two sons by a former marriage, Clem Owen and Kim Roy Trantham. Beulah Trantham was named executrix of his estate.

The present suit grew out of a claim of $500 filed against the estate by Clem, which was disallowed by the executrix, and on appeal to the Probate Court, the action of the executrix was affirmed. This appeal followed.

The facts are not in dispute. Appellant's claim, *supra,* contained this language: "The undersigned has a claim or demand against the estate of N. W. Trantham, deceased, for the sum of Five Hundred ($500) Dollars, founded on contract and evidenced by two promissory notes, copies of which are attached hereto."

On September 15, 1945, N. W. Trantham and his two sons signed an instrument called an "Agreement" which provided in part: "This agreement is entered into between N. W. Trantham . . . and his sons, Clem Owen Trantham and Kim Roy Trantham, . . . and is intended to reflect an agreement between the parties with reference to the disposition of N. W. Trantham's estate. . . . It is the desire of the parties that each of the sons who are parties hereto shall receive from their father, either before or after his death, at his convenience and option the sum of One Thousand ($1,000) Dollars. At the time of the execution of this agreement the father has already advanced to Clem Owen Trantham the sum of $250 but has made no similar advancement to Kim Roy Trantham. . . .

"For the purpose of putting into the hands of his sons some concrete evidence of what amount will still be unpaid after the father's death, N. W. Trantham is executing and delivering to Clem Owen Trantham three

notes for the sum of $250 each, to bear no interest, and providing that they are payable after his death, but reserving to him the right to pay any or all of said notes before his death. For the same purpose, the father is delivering to Kim Roy Trantham four notes for $250 each. . . .

"N. W. Trantham is executing a will carrying substantially these provisions, and, as hereinbefore stated, the purpose of this agreement is to give evidence of the fact that those provisions of the will have been included in there with the consent and agreement of the parties affected and with their approval."

The alleged notes referred to and executed by N. W. Trantham on the same date are all identical and each provides: "NOTE—Blytheville, Arkansas, September 15, 1945—On demand after my death, I direct and command the executor of my will or the administrator of my estate to pay to my son, Clem Owen Trantham, the sum of Two Hundred Fifty and No/100 Dollars, without interest.

"This note is given to be retained by my son as evidence of the fact that the amount here mentioned is payable to him from my estate under the provisions of my last will and testament, executed on the date hereof, if this note is still outstanding at the time of my death. I reserve the right, at my own sole option, to pay to my son the amount hereof during my lifetime upon surrender and cancellation of this note."

The will, *supra,* also bearing date of September 15, 1945, contains (among others) this provision: "Prior to the execution of this will I have agreed with my sons, Kim Roy Trantham and Clem Owen Trantham, that each of them shall receive from me during my lifetime, or from my estate after my death, the sum of One Thousand Dollars ($1,000), and before the execution of this will I have actually given Clem Owen Trantham the sum of $250 upon the amount agreed to be given to him.

"In order that there may be tangible evidence available to my sons after my death, from which they may

show what amount is due them under our agreement, from my estate, I have, after the payment of the above amount to Clem Owen Trantham, delivered to him three notes signed by me for the sum of $250 each; and, since I have actually paid no money to my son, Kim Roy Trantham, I have delivered to him four notes for the sum of $250 each. All notes provide that they are payable on demand after my death, without interest, and that I have the right at my own option to pay any of the notes prior to my death. If I advance any further sums to either of my sons during my lifetime, each such advance will be made in the sum of $250 and upon making such advance I will take up one of the notes here referred to.

"I, therefore, will and bequeath to each of my sons, out of the property of my estate, a sum of money equal to the aggregate principal amount of all of the notes, such as are here described, that such son shall still hold at the time of my death, which sum shall be paid upon the surrender of the notes so held by him."

This will was later, on June 13, 1951, revoked by another will which, in addition to the revoking clause, contained this provision: "I will and bequeath to my son, Kim Roy Trantham, the sum of two hundred fifty dollars ($250), upon the condition, however, that this bequest shall be accepted by him in full settlement and satisfaction of any claim which he may have or claim to have against my estate under any agreement, contract or other thing made or said to have been made between us during my lifetime; and if my said son shall file, present or assert any such claim against my estate, then in that event, it is my will and command that this section of my will shall be rendered null and void upon the presentation of such claim by him, and he shall take nothing under the provisions of my will in such event. This bequest to my said son, when added to other sums which I have advanced to him during my lifetime, will equalize him with advances which I have made during my lifetime to my other son, Clem Owen Trantham."

The alleged notes, agreement and the first will, above, all executed on the same date (September 15,

1945), were so interlocked with reference to the same facts, that they must be read together to get at their meaning and effect. When this is done, it will be observed that the alleged notes provided for payment after the father's death and were given to the sons "as evidence of the fact that the amount here mentioned is payable to him from my estate under the provisions of my last will and testament, executed on the date hereof" (9-15-45) unless paid by the father during his lifetime. No consideration is set out or mentioned.

The agreement was executed, on the same date, (9-15-45) in which, in effect,—without mentioning any consideration,—the same facts were recited, and which also provided that he, Mr. Trantham, was executing a will simultaneously which embodied, in effect, the provisions of the alleged notes and agreement "in order that there may be tangible evidence available to my sons after my death," to show what amount may be due them "under our agreement." On the same date, (9-15-45) Mr. Trantham did execute the first will, above, embodying, in effect, the provisions of the alleged notes and agreement.

The undisputed evidence shows that Mr. Trantham was under no obligation to leave any part of his estate to his two sons. He owed them nothing at his death according to the undisputed testimony of the stepmother, Mrs. Beulah Trantham, executrix. He, of course, had the right to dispose of or will his property as he pleased. As indicated, there was no evidence, whatever, of any consideration to support the alleged notes, and the agreement, to will his two sons $1,000, and no consideration was recited in any of these instruments. It is fundamental law that "a consideration is essential to the validity of every contract," *Catlin* v. *Horne,* 34 Ark. 169.

Mr. Trantham had the right to revoke the first will made in 1945, and he did revoke it as indicated by a second will on June 13, 1951. The parties are therefore bound by this latter will.

The judgment is correct and is affirmed.

4-9904 252 S. W. 2d 404

Opinion delivered November 10, 1952.

[redacted]

Moore, Burrow, Chowning & Mitchell and *Lawrence C. Burrow, Jr.*, for appellant.

Carroll C. Hollensworth and *B. Ball*, for appellee.

GRIFFIN SMITH, Chief Justice. As a corporation Little Rock Road Machinery Company entered into an arrangement with Roland G. Frazier to supply a tractor and bulldozer. The writing is captioned, "Equipment Lease Contract". The lease covered ten months beginning May 15, 1950, at a rental of $800 per month plus [sales] tax, payable in advance. Option was given to renew the lease for one month for $800 and tax. Payment of the first rental in each renewal period "shall be construed as the exercise by the lessee of [his] option to renew for the entire period".

By § 6 the lessor agreed to sell such equipment at the end of the lease period for $8,745, and in that event rental payments were to apply on the purchase price.

The original contract introduced by appellant contains a clause disclaiming any warranty as to the fitness of the machinery; and upon expiration of ten months or any renewal period the lessee was to deliver the equipment to the Little Rock company's yard, all freight and delivery charges prepaid. Another condition is that the writing contains the entire contract, and that no agreement or representations by any of the company's agents or employees should be binding on the lessor, for "only an official of lessor has authority to execute the lease for it".

The appeal is from a defendant's judgment on a finding by the jury that Frazier did not owe the company $52.02 for parts and supplies, and that rental charges for September, October, and November had not been earned. The last item amounts to $2,448.

There was no exercise by Frazier of his option to make the last payment and purchase the machinery. On the contrary, he contended that the contract retained by the company was executed in blank insofar as its application to his specific needs were concerned; that in negotiating with an official of the company the machinery was warranted for 90 days; that he later wrote for a copy of the contract and the copy received (later—as it was claimed—lost and therefore not susceptible of introduction) differed materially from the one he signed. During early operational stages it was discovered that the tractor used an inordinate amount of oil, and the "tracks" kept coming off—"they gave me a world of trouble".

Frazier paid rentals for four months, but claims to have protested repeatedly regarding condition of the machinery. He telephoned to "some one" in the company's maintenance and repair division and received assurances that the warranty would be fulfilled. E. R. Pils was identified as one of the persons with whom conversations were had. Gordon Wilson, manager and part owner of the machinery company, identified Pils as "our office and credit manager". Testimony relating to agreements with Pils was given by Viola Lee Frazier,

the defendant-appellee's wife who acted as his agent, and who had written letters for her husband.

According to Frazier's testimony he finally offered to pay transportation charges on the machinery if the company would send for it and terminate the release and acquit him of liability. A receipt dated Dec. 8, 1950, was shown the witness. By it the company acknowledged payment of $96.90 for "freight charges on tractor and dozer". The witness would not confirm the date.

When the entire defense is summarized it amounts to this: Frazier insists he made a verbal contract with the company through Gordon Wilson when the machines were shown him on the company's yard; that his purpose in procuring the equipment was to construct ponds for farmers, and that Wilson fully guaranteed the machinery. In reliance upon these representations he (Frazier) signed some papers in the office, but did not get a copy. Wilson admitted it was not customary to give the lessee a copy of the contract until the machinery was ready for delivery. He insisted, however, that the copy sent Frazier was identical with the original retained and offered as an exhibit. Appellant calls attention to letters admitted by Frazier to have been directed to the company after the so-called 90-day guarantee period had expired, and in which promises of payment were made.

The principal ground for reversal urged by appellant is the court's action in giving Instruction No. 2 telling the jury that if it believed the defendant made a compromise proposal under which he would reimburse the plaintiff for transportation charges incident to a return of the machinery; and if inter-party intentions were to terminate the contract, then the defendant should prevail.

Appellant earnestly insists that the testimony did not warrant this instruction. A majority of the judges, however, hold the view that there was substantial evidence of accord and satisfaction, hence the instruction was proper. This would, of course, affirm the judgment, and it is so ordered.

Mr. Justice George Rose Smith dissents.

4-9900 252 S. W. 2d 396

Opinion delivered November 10, 1952.

J. Ford Smith, for appellant.

John D. Eldridge, Jr., for appellee.

MINOR W. MILLWEE, Justice. Appellees, Ida Shoup Garland and J. S. Garland, agreed to sell certain lands to appellants, L. D. and Carrie Peebles, for $4,500. Appellants paid $100 of the purchase price when the contract was executed and agreed to pay the balance upon delivery of a warranty deed conveying a merchantable title. Upon appellants' refusal to accept the deed tendered by appellees under the contract, this suit was instituted for specific performance.

D. P. Shoup was the owner of the lands in question at the time of his death, testate, in 1929. Under his will the lands were devised "to my beloved daughter, Ida Shoup Garland, for and during her natural life, and after her death to the heirs of her body". At the time of the execution of the sales contract, Ida Shoup Garland, was seventy years of age and medically incapable of having further issue. Appellee, J. S. Garland, her only child, is 48 years of age and the father of two minor children.

Appellants declined to accept the warranty deed tendered by appellees on the ground that the will of D. P.

Shoup created a life estate in appellee, Ida Shoup Garland, with a contingent remainder to appellee, J. S. Garland. The chancellor found that a vested remainder in appellee, J. S. Garland, was created by the above-quoted language of the will and that appellees had, therefore, tendered a merchantable title and specific performance was directed. Hence, the issue presented is whether J. S. Garland, who was 24 years of age at the time of the testator's death in 1929, took a contingent or a vested remainder under the will of his grandfather.

In *Horsley* v. *Hilburn,* 44 Ark. 458, a father conveyed lands to his daughter and "the heirs of her body that are now born or hereafter may be born". One of the questions there presented was whether Ida, a child of the first grantee, in being at the time of the conveyance but who died without issue prior to the death of her mother, took a contingent or vested remainder under the conveyance. The court held that a conveyance to a grantee and the heirs of her body conveyed a fee tail general which, under our statute (Ark. Stats., § 50-405), became a life estate in the grantee as against the contention that a conditional fee was created which became absolute on the birth of issue. It was also held that only a contingent remainder passed to Ida and that the remainder did not become vested until the death of the life tenant and then only in those brothers and sisters of Ida and their descendants who survived the life tenants. The court said: "The statute says that the remainder shall pass in fee simple absolute to the person to whom the estate tail *would first pass* according to the course of the common law. It never could, under the circumstances, have passed to Ida at common law. During her mother's lifetime she was not heir at all. At her mother's death she was gone without leaving issue. There had been only a contingency that she might get an interest by surviving the mother, and that a vague and uncertain interest, which might be more or less according as there might be no more or many brothers and sisters. Nothing was vested as a right which she might transmit. At common law the surviving brothers, sisters and their descendants

per stirpes, would be entitled to have the estate pass to them on the death of the mother, without any portion being intercepted by inheritance of the mother from Ida. (See Fearne on Remainders, vol. 11, p. 202.) The estate vested in the surviving children and their issue at the death of the mother, and did not vest in remainder at all, in any one, during her life."

The decision announced in *Horsley* v. *Hilburn, supra,* has never been overruled but has been followed in many cases. In *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540, the court said that the Horsley case had become a rule of property in this state. We reaffirmed the rule in the recent case of *Steele* v. *Robinson, et al., ante,* p. 58, 251 S. W. 2d 1001.

Appellees cite several cases where the devise or conveyance is to A for life with remainder over to A's "children", or words showing an intention to convey or devise the remainder to children rather than to bodily heirs. In such cases we have held that upon birth of issue to the life tenant the remainder to the child becomes vested subject to be opened up to let in afterborn children. Some of these cases are: *Jenkins* v. *Packington Realty Co.,* 167 Ark. 602, 268 S. W. 620; *McKinney* v. *Dillard & Coffin Co.,* 170 Ark. 1181, 283 S. W. 16; *Landers* v. *Peoples Bldg. & Loan Ass'n.,* 190 Ark. 1072, 81 S. W. 2d 917; and *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584. Obviously the rule announced in these cases does not apply to the devise here. Appellees call our attention to the inconsistency in the holding in these cases with the decision in *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994, but this inconsistency was removed by the decision in *Steele* v. *Robinson, et al., supra,* overruling the Deener case.

Appellees also argue that a different rule is applicable here because the conveyance in *Horsley* v. *Hilburn, supra,* was to A and the heirs of her body, while here the devise is to A *for life* and then to the heirs of her body. However, the addition of the expressed life estate makes no difference either at common law or under our

statute. At common law a conveyance or devise to A and the heirs of his body created a fee tail and the same was true of a conveyance to A for life and then to the heirs of his body. See, Restatement, Property, §§ 59, 60. In the following cases the conveyance or devise contained an express life estate with remainder to the life tenant's bodily heirs and this court held the remainder to be contingent. *Plumlee* v. *Bounds,* 118 Ark. 274, 176 S. W. 140; *Gray* v. *McGuire,* 140 Ark. 109, 215 S. W. 693; *Gaines* v. *Ark. Nat. Bank,* 170 Ark. 679, 280 S. W. 993; *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379.

Our attention is also called to such cases as *Pletner* v. *Southern Lbr. Co.,* 173 Ark. 277, 292 S. W. 370, and *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927, which involved a conveyance or devise to A for life, then to *B* and his bodily heirs. In these cases the court held that the particular conveyance or devise created an exception to the general rule announced in *Horsley* v. *Hilburn, supra,* but that doctrine cannot be applied in the case at bar.

Under the holding in *Horsley* v. *Hilburn, supra,* and many subsequent cases, the remainder to appellee, J. S. Garland, is contingent and a merchantable title cannot be conveyed until the remainder estate vests upon the death of the life tenant. As pointed out by the appellants, it is not inconceivable that J. S. Garland may precede his mother in death and in that event the title will pass upon her subsequent death to the children of J. S. Garland or other bodily heirs of Ida S. Garland, if any. It follows that J. S. Garland has no vested interest in the lands pending the death of his mother and the deed tendered by appellees does not convey a merchantable title.

The decree is accordingly reversed and the cause remanded with directions to dismiss the complaint of appellees and to enter a decree for appellants upon their cross complaint for the return of $100 in earnest money paid appellees.

OUACHITA RURAL ELECTRIC COOPERATIVE CORPORATION
v. GARRETT.

4-9917 252 S. W. 2d 545

Opinion delivered November 17, 1952.

Gaughan, McClellan & Gaughan, for appellant.

Wm. C. Medley, for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by the appellee to restrain the appellant from imposing a minimum charge of more than $2.50 a month for electric current used by the appellee in the operation of a welding machine. By cross-complaint the appellant asserted that its minimum rate in this situation is $10.00 a month and asked judgment for the difference between that rate and the amount collected. A temporary injunction against the higher charge was granted when the suit was filed in 1942, and this injunction was made permanent when the case was brought to trial in 1952.

The facts are not in dispute. The electric distribution system at Hampton, Arkansas, was formerly owned by the West Memphis Power & Water Company. When

the appellee installed his welding machine in 1939 or early 1940 the Company agreed to a tentative minimum monthly rate of $10.00, with the understanding that it would be reduced if the amount of current used did not justify such a high rate. The first month's experience showed that the machine used only twenty kilowatt-hours of energy, and the Company reduced the rate to a $2.50 minimum.

As of December 31, 1941, the appellant purchased this distribution system and two months later obtained a franchise from the city council. The ordinance granting the franchise contains this provision: "The Cooperative shall maintain a reasonable schedule of rates, said rates not to exceed the rates in effect at the present time without the consent of the Municipality, but may be lowered at any time practicable." At that time the West Memphis Power & Water Company had on file with the Public Service Commission a rate schedule showing that the minimum monthly charge for a machine such as the appellee's was $10.00.

After the appellant took over the system it continued to bill the appellee at the $2.50 figure until December 1, 1942, when it contended that the $10.00 minimum applied and threatened to discontinue service unless the higher rate were paid. This suit was then filed by Garrett.

For recovery the appellant relies upon the rule that, since a public utility is not permitted to discriminate among its patrons, it cannot validly agree to give a preferential rate to a particular consumer. We have often applied the rule in cases arising under the Interstate Commerce Act, as in *Mo. Pac. R. Co.* v. *Pfeiffer Stone Co.*, 166 Ark. 226, 266 S. W. 82. Before applying the rule to this appellant we should first have to determine whether such a cooperative is a public utility and if so whether it is forbidden by statute or by the common law to discriminate among its customers.

We find it unnecessary to explore these questions, for we think that by its franchise the appellant agreed to the $2.50 rate being paid by Garrett in 1942, and actual

discrimination is not shown. The franchise limited the appellant to a reasonable schedule of rates, "not to exceed the rates *in effect*" when the ordinance was passed. It cannot be denied that the $2.50 minimum rate, voidable though it may have been, was then in effect and had been for more than a year, as the appellant must have known had it examined its vendor's records. Indeed, the appellant itself continued the lower rate for nine months after its purchase. Although the appellant's manager testified that the cooperative meant to agree to the schedule then on file with the Public Service Commission, his opinion cannot alter the terms of the ordinance.

We see nothing to prevent the cooperative's agreement that the lower rate should govern. Except for the requirement that it obtain a certificate of convenience and necessity an electric cooperative is not subject to the jurisdiction of the Public Service Commission. Ark. Stats. 1947, §§ 77-1131 and 77-1136; *Department of Public Utilities* v. *McConnell,* 198 Ark. 502, 130 S. W. 2d 9. Hence the appellant was not compelled by law to adhere to the rates then on file. Nor does the record show its agreement to have been discriminatory in fact, since there is no testimony to the effect that any other consumer actually pays a greater amount for the same service.

Affirmed.

SHEPHERD *v.* STATE.

4687 252 S. W. 2d 621

Opinion delivered November 17, 1952.

Lookadoo & Lookadoo and *McMillan & McMillan,* for appellant.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

HOLT, J. Appellant, J. R. Shepherd, was tried in Hempstead County and found guilty by a jury on a charge of having violated the Overdraft Statute (§§ 67-714-15-16, Ark. Stats. 1947), and his punishment fixed at a term of one year in the penitentiary. From the judgment is this appeal.

Numerous assignments of alleged errors are presented by appellant, but not all are argued. Since we have concluded that the judgment must be reversed and remanded for error of the trial court in denying appellant the right to introduce certain testimony in rebuttal hereinafter considered, we shall examine only one of the other assignments in which he strenuously challenges the sufficiency of the evidence to support the verdict.

The information charged that with felonious intent to defraud, Shepherd drew a certain $2,100 check, dated July 27, 1950, on the Citizens National Bank of Arkadelphia, which check was turned down by the Bank when presented for payment for the reason that said appellant did not have sufficient funds, credits or monies on deposit in said bank to cover payment of said check and that appellant has since neglected and refused to make said check good, notwithstanding more than ten days notice of nonpayment had been given to him.

There was evidence that appellant was operating an automobile sales business of new and used cars, wholesale and retail, on a large scale, in Arkadelphia, Clark County. He wrote a check in Arkadelphia on a bank in Clark County for $2,100, payable to the "Trading Post" in Hope, Hempstead County, in payment for a Ford automobile which he had bought (over the telephone) through Verdis Moses, agent for the "Trading Post." The check was dated July 27, 1950, and there was evidence that it was delivered to the "Trading Post," the seller in Hope, by appellant's agent in the afternoon of the 27th and the following morning deposited in the First National Bank of Hope. A few days later this check was returned unpaid for insufficient funds and although appellant was notified and demand for payment made on him several times, after he had been given notice, the check was not paid within the ten days notice and has, in fact, never been paid. Appellant's defense was that when the check in question was issued, he had on deposit sufficient funds to cover it, that he had no intent to defraud, that "the State's *prima facie* case was completely overcome," and introduced evidence which tended to sustain his contention. The evidence presented by the State tended to contradict that of appellant.

We do not attempt to detail the testimony here. It suffices to say that there was substantial evidence introduced by the State to sustain the charge against appellant and to make a case for the jury.

We come now to consideration of the error indicated above.

Appellant contended that the venue was in Clark, his home county, and not in Hempstead County, where he was charged and tried. It appears undisputed that the check in question was executed in Arkadelphia, but there is conflict in the testimony as to whether it was delivered in Clark or Hempstead County. If delivered in Clark County, as appellant contended, then the venue would be in Clark, and not Hempstead.

The Court instructed the jury: "First, he (appellant) says that the check was written and delivered in Clark County, Arkansas. In that connection you are told that if you believe from the evidence in this case that said check was written and delivered in Clark County, Arkansas, you will find him not guilty."

On this point, the record reflects that the State had subpoenaed, on its behalf, witnesses, Grady Pate, an employee of appellant in Arkadelphia, and Verdis Moses, an employe of the "Trading Post" in Hope, and both were present at the trial. Pate was not called by the State, but the State did call Moses who, on his direct examination, testified: "Do you know who brought the check down here? A. It was the driver of the car brought the check down. Q. Do you know his name? A. No, sir, but he is in the—back here (indicating)—heavy set guy. I don't know what his name was. Q. He brought you that check there? A. Yes, he did." On cross-examination, he testified that he sold the car over the telephone to appellant who was in Arkadelphia at the time and that the car "was picked up about five or six o'clock in the afternoon. Q. By his driver. A. Yes, sir. Q. Do you know who the driver was? A. No, sir. Q. You say he was a large heavy set fellow? A. Yes, sir. Q. About your size? A. Yes, or a little bit heavier. Q. Could you call his name for the jury? A. I don't know his name. Q. Did you say it was Grady Pate? A. Grady Pate came down and he went back and the drivers went on with the car." (At this point, the court, upon appellant's request, permitted a witness to be brought from the witness room for identification). "Q. Is this the young man that got the car? Yes, sir, he is the man that picked the car up. By Mr. McMillan: Let the record show that the young man's name is Carl Manning—your name is Carl Manning? By the witness: Yes, sir."

We think it clear that the effect of the above testimony was that Moses claimed he received the check in question from the driver of the car, who was identified as Carl Manning.

Following the testimony of Moses, the State, after presenting witness, J. H. James, rested.

The appellant, on his own behalf, then offered Carl Manning, who testified: "Q. Mr. Manning, did you bring the check or did you deliver the check to the Trading Post or any one connected with it that day? A. No, sir, I didn't." Following Manning's testimony, A. O. Shepherd, appellant's brother, testified that Moses "came to Arkadelphia and got the check" in question.

The State then, in rebuttal, recalled Moses, put him back on the stand, and he then testified for the first time that: "Did you testify this morning that the check was brought to you by the driver? A. No, sir, it was brought to me by Grady Pate." Up to this point, Pate had not been called by either party and had not testified. Appellant then called Pate and in an effort to rebut this statement of Moses (made for the first time by him in rebuttal) that it was Pate and not Manning who actually delivered the check in Hope, asked Pate the following question: "Q. It has been testified here by Mr. Moses that a Ford car was purchased by him,—by Roland Shepherd over the telephone on the 27th day of July, 1950, and that a check was issued by Roland Shepherd and that you, in company with Carl Manning, brought the check down to The Trading Post; I believe they call it, here at Hope, and delivered it to Mr. Moses; tell the jury whether or not you brought that check down there?" Upon objection by the State, Pate was not permitted to answer the question. Had he been allowed to answer, his answer would have been: "I did not." Proper exceptions to the court's ruling were preserved by appellant.

In the circumstances, we hold that the Court erred in refusing to allow Pate to answer the question. Having permitted the State to, in effect, reopen its case in chief by requesting Moses to clarify or change a statement made by him in his testimony in chief, on a vital issue, it was highly prejudicial to appellant's rights to deny him the right to rebut or contradict this very damaging

testimony of Moses, the man who made the deal with appellant for the purchase of the car. While it is true that in such circumstances, the trial court must be, and is allowed discretion in admitting testimony after the State has rested, such discretion must always be exercised in such a manner as would not "prejudice the defendant through surprise or otherwise at a time when the disadvantage could not be overcome," *Anglin* v. *State,* 215 Ark. 49, 219 S. W. 2d 421.

We think it obvious that the State was given an advantage by first admitting the rebuttal testimony of Moses and then at the same time refusing appellant the opportunity to overcome this advantage, by the rebuttal testimony of Pate, above, and that appellant's rights have been prejudiced.

For the error indicated, the judgment is reversed and the cause remanded.

Justice McFaddin not participating.

Seawood *v.* Ozan Lumber Company.

4-9899 252 S. W. 2d 829

Opinion delivered November 17, 1952.

Rehearing denied December 15, 1952.

John H. Wright, for appellant.

Tompkins, McKenzie & McRae, for appellee.

MINOR W. MILLWEE, Justice. Appellants brought this suit to partition an 80-acre tract of land and for an accounting of the sale proceeds of timber cut from the land by appellee, Ozan Lumber Co. Appellants claimed ownership of an undivided 3/9 interest in the land as heirs of Amaziah Wilson, deceased. Appellee, Ozan Lumber Co. defended on the grounds that appellants were barred of recovery by limitations and laches and asked that its title be quieted. Trial resulted in a decree in favor of appellee in which the chancellor held that appellants were barred by laches.

Amaziah Wilson was the owner of the 80-acre tract at the time of his death, intestate, in 1900. He was survived by his widow who died in 1927 and by nine children. Appellants are the children of three of these nine children. Tennie Ivory, daughter of Amaziah Wilson, lived near the land and looked after it following the death of her parents. The land forfeited for the 1920 taxes and J. A. Carr obtained a clerk's tax deed in 1923. In December, 1925, Carr executed to Tennie Ivory a quit claim deed which was recorded in January, 1926. In August, 1926, Carr executed a quit claim deed to the timber on the land to Tennie Ivory. In the same month Tennie Ivory executed a deed conveying all pine timber on the land to Louisiana Pulp & Paper Co. and this deed was recorded in September, 1926. In July, 1926, she also executed a deed of one-half the minerals to A. D. Madding.

On December 1, 1928, four of the nine children of Amaziah Wilson, who were all the original nine children then living except Tennie, executed a quit claim deed conveying the land to Tennie Ivory and this deed was filed for record January 1, 1929. According to the testimony of Tennie Ivory she then executed a mortgage to

W. P. Adams to secure money with which to defray expenses of her husband's illness. She denied her signature to a $300 note dated February 26, 1929, payable to Adams and reciting that it was secured by a deed of trust on the lands in controversy. Neither the note nor a deed of trust was introduced in evidence. Although Tennie Ivory admitted that she executed a mortgage to Adams, she stated that she repaid the loan and denied her signature to a warranty deed executed and filed for record January 5, 1935, conveying the whole title to Adams and reciting a consideration of $300.

On May 1, 1941, W. P. Adams executed a warranty deed conveying 794 acres of land to Thomas Brothers, a partnership, and the 80-acre tract in controversy was included in the deed. Adams died March 1, 1942. On June 10, 1947, Thomas Brothers conveyed the 80 acres to appellee, Ozan Lumber Co., by warranty deed which was filed for record June 14, 1947. This deed included a total of 5,034 acres at a recited consideration of $277,-500, or an average price of approximately $54 per acre.

Adams paid taxes on the tract for the years 1935 to 1939. Thomas Brothers paid for the years 1940 to 1946 and appellee for the years 1947 to 1950. The lands in controversy are in timber and except for one small strip have been unoccupied and unenclosed for more than forty years. The tract is located one-half mile from a road and adjacent to land owned and resided upon by Johnnie Milton who testified that he cultivated and fenced about two acres of the land in controversy in 1947 when appellee cut some timber on the tract. According to Milton this cultivation was under an agreement with appellant, Richard Griffen, that Milton would look after the timber on the entire tract in lieu of payment of rent. Appellee made no complaint to Milton about cultivation of the strip when it cut some timber from the 80-acre tract in the fall of 1947. The county surveyor testified that the cultivated strip contained about three or four acres.

Richard Griffen and some of the other appellants live about 17 miles from the 80-acre tract. He testified

that he thought Tennie Ivory was looking after the land for all the heirs; that he had been over the land several times in recent years, but had not talked to Tennie Ivory about tax payments for "a good while". He also stated that he discussed the ownership of the lands with Adams and did not know about Thomas Brothers buying the land or cutting timber on it in 1943, but knew of the purchase by appellee before it cut some timber from the lands in 1947. Other witnesses who resided in the vicinity did not know of the timber cutting by Thomas Brothers in 1943.

The testimony of Tennie Ivory is rather confusing. She stated that she looked after the lands for all the heirs; denied that the deed from Carr in 1925 was made to her alone; and had no recollection of executing the timber and mineral deeds in 1926. She further testified that Adams had some patches worked on the 80-acre tract "after he got the land". She also stated that she learned of the deed to Thomas Brothers shortly after Adam's death in 1942 when she talked with the Thomases about the sale and also told the other heirs about it. While she was negotiating with Thomas Brothers, the latter sold the land to appellee.

Nathan Thomas testified that the partnership cut several thousand feet of timber from the land in 1943 and he did not learn that they did not have full record title to the lands until 1947. At that time he was advised by counsel for appellee that there were outstanding heirs to the property. Before the sale, and in an effort to cure the record title, he then talked with Tennie Ivory who told him that she did not have a deed from all the heirs when she acquired the interest of some of them in 1928. His testimony was corroborated by that of his brother and it would seem that the negotiations had by the partnership with Tennie Ivory with reference to the interest of the other heirs were in 1947 rather than in 1942 as she testified.

Appellee, Ozan Lumber Co., cut and removed about 10,000 feet of timber from the land in 1947 and had cut

about 60,000 feet in 1949 when this suit was instituted. Appellee knew that the record title showed there were outstanding heirs to the land when they purchased in 1947. The timbered 80-acre tract had a value of approximately $200 in 1935, $1,000 in 1941, $7,500 in 1947, and $10,000 in 1949 when the suit was instituted. The evidence as to values is to the effect that the price paid for the land by appellee in 1947 represented less than 2/3 of its actual value at that time.

Although the chancellor found that appellants were barred by laches from claiming any interest in the lands, appellee earnestly insists that appellants were also barred by the seven-year statute of limitations (Ark. Stats., § 37-101) when that statute is construed in connection with Ark. Stats. § 37-102 and the payment of taxes for more than seven years by appellee and its predecessors in title. Appellee relies on the cases of *McGill* v. *Adams,* 120 Ark. 249, 179 S. W. 489; *Smith* v. *Boynton Land & Lumber Co.,* 131 Ark. 22, 198 S. W. 107; and *Patterson* v. *Miller,* 154 Ark. 124, 241 S. W. 875. It is true that in these cases the court held that seven years payment of taxes on wild and unimproved land under color of title is equivalent to actual possession, but the rights of cotenants were not involved in these cases.

When Tennie Ivory acquired the interests of her four brothers and sisters in 1928, she became the owner of an undivided 5/9 interest in the land. When she conveyed to W. P. Adams in 1935, the latter became a cotenant with the appellants who owned an undivided 3/9 interest in the land. The 1935 deed, though recorded, was not in appellants' line of title and did not, therefore, constitute constructive notice to them. This court so held in *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958. The rule is well settled that where one or more cotenants convey the entire fee to a stranger the conveyance gives color of title, and if possession is taken, and the grantee claims title to the whole, it amounts to an ouster of the cotenants and the possession of the grantee is adverse to them. *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537;

Bowers v. *Rightsell,* 173 Ark. 788, 294 S. W. 21. Appellee concedes that the rule announced in these cases is not directly applicable here since there has been no actual possession of the lands in controversy by any of the parties for many years. But it is insisted that the deed from Tennie Ivory to Adams in 1935 conveying the whole title was an act of ouster and that the payment of taxes thereunder for seven years ripened into title under § 37-102, *supra.*

Both parties rely on *Brasher* v. *Taylor,* 109 Ark. 281, 159 S. W. 1120. In that case the circuit court held that an action of ejectment could not be maintained by the plaintiff cotenants where the defendants were not in actual possession of the lands which were wild and unenclosed. This court reversed and held that payment of taxes for seven years under the statute was equivalent to possession and that actual possession was, therefore, no longer an indispensable prerequisite to the right to bring an ejectment action. There the defendants and their predecessors in title had paid taxes on the lands for 37 years during which time the lands had sold at an execution sale and there had been several conveyances beginning with that of the grantee under the execution deed. The court said: "There is nothing in the record to show that the plaintiffs had actual knowledge that T. J. Brasher had conveyed the entire tract of land to the defendants or their predecessors in title. The fact that the plaintiffs never paid any taxes on the land and made no efforts whatever to assert their title to the land during the long period of time that the taxes were paid by the defendants and their grantors raises a strong presumption that they recognized the claim of title of the defendants and their grantors as superior to their own, or, at least, that they had abandoned any claim of their own to the land, but this is a presumption of fact and does not become a conclusive presumption of law."

While it is true that in the Brasher case the court held that payments of taxes for seven years under color of title constituted such possession as would authorize an action in ejectment, it did not hold that defendants

thereby acquired title by adverse possession. If the court had intended to so hold, it would have rendered judgment for defendants since it was undisputed that they and their predecessors in title had paid the taxes for 37 years. The clear implication of the holding in that case is that payment of taxes on wild and unimproved lands for the statutory period by one tenant in common is not equivalent to actual possession so as to ripen into title by adverse possession as against his cotenants, at least, in the absence of a further showing that the latter had actual knowledge of the conveyance or that there are such notorious acts of ouster by the former as to put his cotenants on notice that the full title is claimed. While the chancellor did not pass on this issue, we do not think appellee's plea of limitations is sustained by a preponderance of the evidence.

As to the defense of laches which was sustained by the able chancellor, it may first be pointed out that the appellants are not seeking equitable relief, but only to enforce a legal title, and the doctrine of laches does not apply in such cases. See *Beattie* v. *McKinney,* 160 Ark. 81, 254 S. W. 338, and cases there cited. Regardless of this we do not think appellants are barred by laches.

The following definition of the doctrine set forth in 5 Pomeroy, Eq. Jur. (3rd Ed.) § 21, has been repeatedly approved and applied by this court: "Laches, in legal significance, is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has in good faith become so changed that he can not be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side, and injury therefrom on the other, it

is a ground for denial of relief." *Tatum* v. *Arkansas Lumber Co.;* 103 Ark. 251, 146 S. W. 135.

Since appellee purchased the land with full knowledge of appellants' interests it is difficult to see how it could claim injury on account of appellants' delay in asserting their rights. Neither appellee nor its predecessors have made any improvements on the land and its increased value on account of rising timber prices is incidental and unrelated to any merit of the appellee or fault of the appellants. The relative positions of the parties here have not been changed by delay. The fact that the land was worth at least a third more than the price paid by appellee would indicate that it was not misled to its prejudice. In *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970, the plaintiff cotenants sought to cancel numerous leases and mineral deeds to lands that had suddenly become valuable for the production of oil. Having sought such equitable relief, the court held that laches applied and that the defendants had a right to interpose it as a defense. It was further held that plaintiffs were precluded from maintaining the suit by a decree confirming the tax title of one of the cotenants and that plaintiffs had actual knowledge of his adverse claim of title. Other facts distinguished that case from the case at bar.

Having concluded that appellants are not barred from maintaining the instant suit by limitations or laches, the decree is reversed and the cause remanded with directions to enter a decree for the appellants in accordance with this opinion.

PARKER *v.* KEENAN.

4-9857 252 S. W. 2d 811

Opinion delivered November 17, 1952.

Rehearing denied December 15, 1952.

F. D. Majors and *Parker Parker,* for appellant.

Scott & Goodier and *Hays, Williams & Gardner,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellant seeks review of the chancellor's location of the boundary between property of the parties. It was stipulated that appellant's land was north and appellee's south of the line dividing townships 5 and 6. No question of adverse possession is involved. Appellant charges that appellees, through erroneous claim as to the location of the township line, encroach upon her property and are illegally in possession of a strip running east and west along the south boundary in the form of a trapezoid 85 feet at the east end and 22 feet on the west.

Much testimony was introduced by each side in an attempt to determine the township line separating the respective properties. Seven surveys were made and

numerous witnesses were called to describe physical indications of line and section corner locations. The result was a wide range of conflict.

The chancellor eventually directed Floyd Ragsdale, a surveyor first called as a witness by appellee, to ignore all other considerations, such as locating section lines and corners, and to trace township line east and west. In doing this the survey was conducted without reference to contiguous lines and corners. The line thus established adhered closely to physical evidence, mainly the course of an ancient fence row with traces of rusted wire overgrown by trees, and terminated at the north side of a lock on an abandoned levee. Resolving the conflict on the basis of this evidence, the chancellor adopted this line in his decree.

The line so established was not proved to coincide with physical features described in field notes of the original government survey, the explanation being that identifying markers were not found. Nor was any attempt made to support the location by ascertaining the corners of adjoining sections. The trial court found that the township line was straight, and this finding, together with objection to the lack of conformity with the original survey, forms the chief basis for appeal.

We are faced with a problem similar to the one confronting the trial court. The surveyors failed to agree as to the line and there was a notable lack of harmony respecting the procedure whereby accuracy might be achieved.

Our task of sifting the evidence and in endeavoring to reconcile opposing claims is rendered extremely difficult because in practically every instance where explanation of written diagrams or photographs was attempted there was insufficient identification of the details referred to, hence no clear understanding of the specific point in discussion is possible. Many witnesses, in testifying about maps, photographs or diagrams, used such expressions as "here" and "there" without making a corresponding notation on the writing. While the chan-

cellor was present and could observe the particular portion indicated, we have no such advantage. Our review is thus restricted to a consideration of that part of the record and exhibits which can be identified as bearing directly on the testimony. In such cases, the finding of fact by the trial court must not be disturbed. *East Texas Motor Freight Lines* v. *Dennis,* 214 Ark. 87, 215 S. W. 2d 145.

At the area in issue the line between townships 5 and 6 divides sections 34, 35 and 36 on the north, in township 6, and sections 1, 2 and 3 on the south, in township 5. Controversy centers on the position of the northeast corner of section 2, which is "lost." Its location is actually on the township line, between the northwest corner of section 2 and the Arkansas River. Appellant contends that establishing this corner is an indispensable element in locating the township line, and that only by following United States Land Office rules of procedure for restoration can such corners be located. These rules require measurement from known corners on the same line and known corners on a perpendicular line to a point of intersection. Appellee agrees that this method is proper where the known factors are present, but insists that here one of the factors is missing—that only one known section corner, the northwest corner of section 2, can be found.

Floyd Ragsdale and Elmer Smith each conducted an independent survey and then a joint one. The line finally adopted by the court was from this joint survey.

To project the township line, Ragsdale and Smith went west of a lake to "some land lines" and located a point of intersection by a north-south fence at the northeast corner of section 4. Here the east-west township line coincided with old fence-rows. The surveyors used this line as a starting point, checking their instruments by its course, and proceeded eastward. This led through a dense lake bottom and eventually to an iron pin at the northwest corner of section 2, and "hit reasonably close to it," (the iron pin). They continued east, following very close to an old fence line, to a point on a levee, two

feet south of a fence post, then along the same course to an old lock on a former levee. The terminus was a bolt on the north headwall of the lock. No markers were placed and no attempt was made to "tie in" the line with established locations or measurements to the north or south. This procedure is criticized by appellant as being inadequate to establish a line.

It is argued that no single line can be accurately established by relying primarily on compass readings. Compasses, it is pointed out, vary materially, not only as to particular instruments, but as to localities. Difference can be caused by ore fields, metal objects, or other factors. Furthermore, appellant insists, the survey finally accepted not only failed to coincide with the original government survey, made in 1825 and 1826, but did not agree with the line first found by Ragsdale himself in a prior survey where an attempt was made to check the location of the township line against other locations to the north and south.

Witnesses testified that lines did not conform to monuments mentioned in the original field notes—that none of the trees referred to could be found. While the county surveyor, who was called as a witness by appellant, reported that he began his work at a government corner, (the southeast corner of section 2) he admitted that he depended on information given by Norborn Jackson that a stake by a tree was in fact the marker for such corner.

The priority of original government surveys is not in issue, because no witness established, with sufficient certainty, that a particular survey was in conformity with the original government survey. We do not hold that a survey which establishes a line at variance with the original government survey can be accepted. We conclude only that such variation has not been shown here, because monuments on the government survey have apparently been obliterated.

Ragsdale admitted that the line he established would cause the southern portions of sections 34-36 to have less

than regular acreage, whereas under normal circumstances shortages or irregularities would have pertained to the northern tier of sections 1-3, it having been the practice at the time of the original government survey to compensate for errors by adjustments in the northern tier of sections. This is not sufficient reason, however, to reject the Ragsdale line.

Failure to follow procedure prescribed by the U. S. Land Office for restoration of lost corners does not necessarily render a survey objectionable. The rules cited require presence of two known corners from which lines are run to create an intersection restoring the lost corner. Here, only one corner was known, the northwest corner of section 2. There appears to have been some dissension as to this fact, but we think it was resolved by the statement appearing in the transcript in the form of a question directed to appellant's counsel:

"Q. Mr. Parker, do you accept the iron stake at the northwest corner of [Sec.] 2 as being a correct boundary line?"

"A. The northwest corner of Section 2 has been accepted by all parties as a correct starting point."

It is noted that the final Ragsdale line missed this point by two feet. This variation was explained as having been caused by the fact that when proceeding east along the township line a dense growth was encountered in a lake bed before arriving at the northwest corner of section 2. It is recognized by all parties that absolute accuracy cannot be expected and the chancellor's refusal to reject the line because of a two-foot differential at this point cannot be regarded as inconsistent with the preponderating evidence rule.

Appellant charges that the chancellor's decretal finding that a township line is straight is not in accord with facts. To support this conclusion she refers to the testimony of Col. A. S. Turner, who teaches engineering at Arkansas Polytechnic College, and who stated that the east-west lines followed the curvature of the earth. As

we understand this testimony, however, the line would be straight east and west, the curvature being subject to illustration as the inside of a series of parallel concentric circles.

Appellant urges that the Ragsdale line, if it coincides at certain locations with the old fence row, would have ended farther south on the eastern terminus.

Placing the line where appellant insists it should be would require acceptance of his location of the southeast corner of section 2, because this is the chief basis of surveys locating the line farther south. Since the findings of all surveyors varied considerably it cannot be said that the chancellor was compelled to accept any particular one. Directing the township line to be run was a method of securing further evidence as to the true location. Ample opportunity for examination of Ragsdale was given and utilized. The line found coincided with physical evidence and crossed the one recognized section corner location. We cannot say that the chancellor's finding is contrary to a preponderance of evidence.

Affirmed.

WHITTON *v.* ARNOLD.

4-9898 253 S. W. 2d 364

Opinion delivered November 17, 1952.

G. W. Lookadoo, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

ROBINSON, J. The plaintiff has appealed from an order of the circuit court quashing service of summons on defendant in a civil case.

Appellant alleged that on January 5th she had sustained injuries in an automobile collision caused by the negligence of the defendant, M. F. Arnold. Mrs. Whitton is represented by G. W. Lookadoo, who is a practicing attorney of Clark County and also prosecuting attorney of the judicial district in which that county is situated.

Soon after the collision occurred, while Arnold was still in Arkadelphia, the county seat of Clark County, a state patrolman served him with a summons to appear in the Municipal Court of Arkadelphia on the 10th day of January. The summons stated that Arnold had violated the motor vehicle regulations by having no tail light on his car and in driving on the wrong side of the road. Arnold, a soldier, proceeded to Hot Springs in Garland County and later returned to Arkadelphia, where he employed Travis Mathis, an attorney, to represent him in the matter. Subsequent to filing the suit for Mrs. Whitton, Lookadoo and Mathis went to Hot Springs and had a talk with Arnold, at which time he was advised that no charges were pending against him in Clark County and that none would be filed unless Mrs. Whitton died. In fact, no charges were ever filed against Arnold; but he was advised by the prosecuting attorney not to leave the state for five days.

No session of Municipal Court was held in Arkadelphia on January 10th; but Arnold went there on the 11th on the advice of his lawyer. The evidence is conflicting as to whether Arnold went to Arkadelphia because of the summons which had been served on him by the state patrolman or for some other reason. Assuming that Arnold was in Clark County by reason of having been told by the prosecuting attorney not to leave the state for five days, or by reason of having been served with a summons, the fact remains that when he arrived in Arkadelphia on January 11th, he spoke on the phone with his attorney and was advised that he did not have

to appear in Municipal Court. He knew that suit had been filed against him in Clark County; and on advice of his counsel, he voluntarily went to the sheriff's office to be served with summons. No summons was in the hands of the sheriff; and Arnold waited until plaintiff's attorney brought the summons to the sheriff's office where it was served.

We do not think Arnold can now successfully contend that summons should be quashed. He waived his right of immunity. There is a distinction between the case at bar and such cases as *Martin* v. *Bacon,* 76 Ark. 158, 88 S. W. 863, where this court said: "It is well settled by the great weight of authority that a party cannot be lawfully served with civil process while he is in attendance on a court in a State other than that of his residence, either as a party or a witness, or while going to and returning therefrom." This ruling has been adhered to in *Caldwell* v. *Dodge,* 179 Ark. 235, 15 S. W. 2d 318, and *Barnes* v. *Moore,* 217 Ark. 241, 229 S. W. 2d 492. But here we do not have a case where advantage was taken of the defendant's presence in the county in answer to a summons in a criminal case to serve him with process in a civil case. We have a situation where, subsequent to the time defendant learned that no criminal charge was pending against him, he voluntarily presented himself at the sheriff's office to be served with a summons in a civil case. The sheriff did not even have the summons; and for the very purpose of permitting the service the defendant waited until the summons was brought to the sheriff's office. Defendant was immune to service of process while he was in the county in response to summons in a criminal case; but this right of immunity could be waived. *McCullough* v. *McCullough,* 168 N. W. 929, 14 A. L. R. 783, Note.

Defendant's wife and child were injured in the accident, and upon leaving Arkadelphia, he carried them to a United States government hospital in Hot Springs, Garland County. There plaintiff's attorney talked with defendant and his attorney a day or two after suit was

filed. Defendant could have been served with the summons at that time; but such action was deferred because it was understood that he would return to Clark County and be served there. If the defendant, while acting on the advice of counsel, did not waive his immunity from being legally served with summons in a civil case by voluntarily going to the sheriff's office to be served, and by waiting until such summons was brought to the sheriff's office by plaintiff's attorney, then it would be impossible for a defendant to waive his immunity. The right of immunity from civil process, as any other known right, may be waived. Such immunity is waived by failure to file a motion to quash. 42 Am. Jur. 135; *First Nat. Bank* v. *Bank of Horatio,* 161 Ark. 259, 255 S. W. 881; *J. C. Engleman, Inc.* v. *Briscoe,* 172 Ark. 1088, 291 S. W. 795; *Chicago Mill & Lumber Co.* v. *Lamb,* 174 Ark. 258, 295 S. W. 27. It can also be waived by voluntarily accepting service, especially when such service is accepted on advice of counsel, as in the present case.

The cause is reversed with directions to overrule the motion to quash.

ED. F. MCFADDIN, Justice (concurring). In order to obtain a reversal of the Trial Court's ruling in sustaining the questioned service, it is necessary for the appellant to demonstrate that there is no substantial evidence in the record to support the factual finding of the Trial Court. 5 C. J. S. 562; *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 2d 462; *Mosley* v. *Mohawk Lumber Co.,* 122 Ark. 227, 183 S. W. 187. The uncontradicted testimony is that Arnold agreed in Hot Springs to accept service of summons in Arkadelphia if Whitton's attorney would not serve Arnold in Hot Springs. Whitton's attorney testified:

"At that time I carried a summons made out to the Sheriff of Garland County to be served on him and I talked with him, and as Mr. Mathis said, he was upset and I didn't care to bother him with it over there, and I told him I had the summons for the sheriff over there to serve on him, and he made a date with Mr. Mathis to come back either the next day or the following day or whenever the

service was obtained, and I told him that if he was coming over there, I would have the sheriff over here to serve it on him then, and when he got over here, I had forgotten to have it served by the sheriff, and Mr. Arnold was kind enough to go by the sheriff's office and I had to bring it down to the sheriff's office and get them to serve it on him."

When Arnold was asked about this by Whitton's attorney, the following occurred:

"Q. Do you recall that I mentioned to you that I had a summons to be served on you to be delivered to the sheriff there in Garland County and if you were coming over the next day I wouldn't go by the sheriff's office that day but would wait until you came over here and it would be served on you the next day? A. I don't recall. I don't say you didn't. It is possible you might have said it but I don't recall it."

Thus we have uncontradicted testimony to the fact that Arnold voluntarily agreed to go from Garland County to Clark County to be served with summons, if Whitton's attorney would forego serving Arnold in Garland County. The establishment of such fact made the service valid in Clark County without any reference to the matter of immunity.

Therefore, because of the said agreement, I concur in the result reached by the majority.

HEAD *v.* STATE.

4700 252 S. W. 2d 617

Opinion delivered November 17, 1952.

George F. Edwardes, for appellant.

Ike Murry, Attorney General and *Dowell Anders,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted below of assault with intent to kill and was sentenced to imprisonment for ten years. The evidence showed that the accused, in the course of an unprovoked attack upon Boyd Handsbro, a complete stranger, inflicted seven separate knife wounds.

For reversal it is argued that the accused was prejudiced by improper closing argument on the part of the prosecuting attorney. The record discloses that during this argument the prosecuting attorney said to the jury, "Let's send him back," and then changed his statement and said, "Send him to the pen." Counsel for the defense asked for a mistrial, on the ground that the prosecution had implied that the accused had been confined in a penal institution, but the court declined to rule upon the request and did not declare a mistrial.

This record does not show the court to have been in error. The settled rule that the trial judge has wide discretion in controlling the argument of counsel is based upon the trial court's superior opportunity of deciding whether the jury may have been misled. Here the two remarks complained of do not necessarily suggest that the accused had previously been in a penitentiary—a suggestion that is unsupported by anything else in the record. There is evidence only that Head had been committed to the State Hospital for an examination, insanity being the chief defense. Whether the prosecuting attorney's statements carried the implication of former imprisonment depends upon the tenor of the argument

immediately preceding these remarks, upon the lapse of time between the statements, and especially upon the tone of voice and inflection that were used. We have no information whatever about these matters, while the trial judge heard the argument at firsthand and was in a position to know whether there was a possibility of prejudice. In overruling the motion for a new trial he stated that he had listened attentively to the argument and that in his opinion there was nothing of any nature to imply that the defendant had been in the penitentiary. In these circumstances no manifest abuse of discretion is shown. *Wilson* v. *State,* 126 Ark. 354, 190 S. W. 441.

Affirmed.

NEWELL *v.* ARLINGTON HOTEL COMPANY.

4-9890 252 S. W. 2d 611

Opinion delivered November 17, 1952.

Wils Davis, W. H. Fisher and *A. D. Shelton,* for appellant.

Wootton, Land & Matthews, for appellee.

Ed. F. McFaddin, Justice. Appellant, Mrs. Newell, as plaintiff, filed action against appellee, Arlington Hotel Company, as defendant, alleging that while a guest she fell in the Hotel kitchen and sustained injuries for which she sought damages. Trial to a jury resulted in a verdict for defendant, and this appeal followed.

Mrs. Newell was a member of the Business & Professional Women's Club of Hot Springs, which met in regular meeting each month with a dinner at the Arlington Hotel. In January, 1950, the meeting was held at 7:00 P. M. in one of the private dining rooms at the rear of the grand ballroom on the second floor of the Hotel. The ladies were advised by the Hotel that there would be a large meeting in the ballroom at 8:00 P. M., and that if the Business & Professional Women's meeting was not concluded by 8:00 P. M., then the ladies of the B. & P. W. Club would make their exit from the private dining room by going down one flight of stairs to the kitchen and through the kitchen to the Hotel lobby.

The Business & Professional Women's Club meeting continued until about 8:30, and the ladies used the said kitchen exit. In going through the kitchen, Mrs. Newell fell and suffered painful and disabling injuries. By herself and her witnesses, Mrs. Newell undertook to establish that the kitchen was poorly lighted; that the Hotel had a rubber and metal mat in the kitchen over which Mrs. Newell was obliged to walk; that the mat was old

and worn; and that her shoe became fastened in the mat and caused her to fall. By its witnesses, the Hotel undertook to establish that the kitchen was perfectly lighted; that the mat was not old; that it had no metal in it; that Mrs. Newell never stepped on the mat; that Mrs. Newell fell because she was wearing high heel platform sole shoes; that her ankle turned; and that Mrs. Newell admitted after her injuries that the fall was entirely her own fault. On appeal only three points were argued.

I. *Cross-Examination of Mrs. Dodd.* Mrs. Dodd was a witness for the plaintiff, and on cross-examination, this occurred:

"Q. What was the condition of the lighting in the kitchen as compared to the dining room from which you came?

"A. It was dim, much darker.

"Q. You mean there was less light in the kitchen than there was in the dining room?

"A. Yes, sir.

"Q. Now, did you make safe passage through the kitchen?

"A. Oh, yes.

"Q. Did you have any difficulty?

"A. Somewhat.

"Q. In what respect did you have difficulty?

"A. Well, I've never been through there before.

"Q. Could you see the floor?

"A. Yes.

"Q. Could you see any object that was on the floor?

"A. I could.

"Q. You could see the doorway through which you turned to go out?

"A. Yes.

"Q. You could see the floor in front of the doorway?

"A. Oh, yes, by watching carefully."

The appellant says that the Court erred in requiring the witness on cross-examination to answer the question whether she had any difficulty in getting out of the kitchen; and to support the objection, appellant cites the case of *Davis* v. *Safeway Stores,* 195 Ark. 23, 110 S. W. 2d 695; the contention in the case at bar being that it was not a question whether other people could get out of the kitchen, but whether the Hotel Company used ordinary care to provide a safe exit for *all* people.

Mrs. Dodd was being cross-examined on the same points that the appellant had asked her on direct examination. She had testified that she was directed through the kitchen by a colored boy and that she was about twelve feet behind Mrs. Newell; and that three or four other ladies were between them. Then she also testified on direct examination:

"Q. What was the difference in the lighting system where you had dinner, in the dining room, and the kitchen part of it?

"A. Well, it was much darker.

"Q. In the dining room or kitchen?

"A. In the kitchen.

"Q. Much darker in the kitchen?

"A. Yes, sir.

"Q. As you went down then, you went down into a dimmer lighted stairway and little hallway?

"A. Yes, sir.

"Q. And then on through the kitchen?

"A. Yes, sir."

When we consider the direct examination, it becomes apparent that the cross-examination is within the judicially allowable latitude for cross-examination. In *Tiner*

v. *State,* 109 Ark. 138, 158 S. W. 1087, in discussing the extent of cross-examination, we said:

"It is well settled that cross-examination should be permitted as to all matters developed on direct examination, and it may be extended into all circumstances surrounding or affecting the transaction which the witness has detailed in his direct examination."

Other Arkansas cases to the same effect are collected in West's Arkansas Digest, "Witnesses," § 268. The general rule in American jurisdictions is in accord with our holding above quoted. See 58 Am. Jur. 349. We have repeatedly held that the trial court is vested with broad discretion in regulating the scope of cross-examinations. One such case is *Zorub* v. *Mo. Pac. Rd. Co.,* 182 Ark. 232, 31 S. W. 2d 421, which also holds that the rule regarding the latitude of cross-examination is the same in civil and criminal cases. We hold that the trial court did not abuse its discretion in allowing the cross-examination of Mrs. Dodd.

II. *Ruling on the Testimony of L. M. White.* In her case in chief, the plaintiff had described in words the kind of mat on which she fell, but no mat had been introduced. In the defendant's case in chief, there was introduced a roll of corrugated rubber matting, which defendant's witnesses identified as being identical with the rubber mat that was on the floor at the time Mrs. Newell received her injuries. Then on rebuttal, plaintiff called L. M. White, an employee of the Arlington Hotel, and exhibited to him a rubber mat, and the following transpired:

"Q. I show you a mat, and I want to now offer this as Exhibit '4' to Mrs. Newell's testimony. I want to show you a sectional mat with wire in it. Tell the jury whether it was that type of mat or not? . . .

"A. Isn't that a rubber mat there? That's all I know.

"Q. Well, was it the type of rubber mat I hold in my hand or not? That's what I'm trying to—

"A. I think it was a little type like that. I'd rather not—I don't know. That's what I was thinking about, a rubber mat like that. (Holding up Plaintiff's Exhibit '4')."

Assuming without deciding that White's testimony as to the mat was proper on rebuttal, it is clear that the witness answered the question because he said the mat in the Hotel kitchen was like the one which the plaintiff's counsel exhibited to him as plaintiff's Exhibit "4."

The plaintiff's attorney then asked the witness this question:

"Q. I ask you if you didn't state in that statement that the mat in front of the egg-boiler was made out of rubber and iron parts or pins. It was old, worn, dark at that time, and those ladies had to pass over that mat?"

The defendant objected to the question and claimed that the plaintiff's attorney was seeking to impeach his own witness; and upon the Court's ruling, the propounded question was never answered. The plaintiff saved exceptions to the ruling, but did not pursue the matter any further. If the quoted question was not by way of impeachment, the plaintiff's attorney could have asked the Court for permission to allow the witness to refresh his memory by reference to the alleged statement; and then the interrogation could have been continued. Such is the proper procedure. See *National Americans* v. *Ritch,* 121 Ark. 185, 180 S. W. 488; and see, also, 58 Am. Jur. 324. But no such request was made, so there is no foundation on which to predicate an assignment of error for refusal to allow the witness to refresh his memory.

If the quoted question was by way of impeachment, then plaintiff's attorney should have pleaded surprise and made an offer to prove the written statement to support the surprise and to lay the foundation for impeachment. But no such offer of proof was made, and therefore there is no foundation on which to predicate an assignment of error. See *Jonesboro etc. Rd. Co.* v. *Gainer,* 112 Ark. 477, 166 S. W. 571; and see, also, 58 Am. Jur. 444. The exclusion of evidence is not a ground for re-

versal when the appellant has failed to show what the excluded evidence was.[1] *Tidwell* v. *Southern etc. Works,* 87 Ark. 52, 112 S. W. 152; *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; see, also, 5 C. J. S. 938, and cases collected in West's Arkansas Digest, "Appeal and Error," § 1056 (1). We find no foundation to support the assignment of error here argued.

III. *Defendant's Instruction No. 2.* The Court gave the defendant's Instruction No. 2, as follows:

"You are instructed that the defendant, Arlington Hotel Company, is not an insurer of the safety of its guests, but is required only to use ordinary and reasonable care for the safety of such persons; and if you find from the evidence in this case that the Arlington Hotel Company used ordinary and reasonable care for the safety of the plaintiff, then your verdict will be for the defendant, Arlington Hotel Company."

The plaintiff's objection to this Instruction, as made in the Trial Court, reads as follows:

"Plaintiff objects to defendant's requested instruction No. 2 for the reason that it is abstract and does not state the whole law of this case in the respect of the care required of the Arlington Hotel. It is true that the hotel company is not the insurer of the safety of the guests, but there is an implied contract between the guest of the hotel and the operators of the hotel that the premises are safe and it is not required of plaintiff to make any extra investigation or as to condition; that they have a right to rely upon the places where they go as a guest to be safe. In other words, it's not like one who is crossing a railroad. They don't have to stop, look and listen for danger."

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[1] In 1918, Colonel C. C. Hamby, a distinguished member of the Prescott, Arkansas, Bar, published a short treatise entitled, "Appeal and Error"; and on page 14, this statement appears:

"If the court sustains an objection to a question asked a witness, or refuses to permit a witness to testify to desired state of facts, the party introducing the witness should state then and there what facts the witness would swear to and have the court stenographer take it down. . . . If this is not done the Supreme Court will not pass on the question. *K. P. Supreme Lodge* v. *Robbins,* 70 Ark. 364, 67 S. W. 758; *Boland* v. *Stanley,* 88 Ark. 562, 115 S. W. 163; . . ."

Thus the objection challenged the instruction, by claiming (a) that it was abstract; and (b) that it failed to fully state the applicable law as to the degree of care required of the Hotel. (a) The instruction is not abstract[2] because it relates to the applicable rule of law in the case between these parties. See 53 Am. Jur. 451.

(b) The instruction fully and correctly states the applicable rule of law as to the degree of care required of the Hotel. In *Ford* v. *Adams,* 212 Ark. 458, 206 S. W. 2d 970, 207 S. W. 2d 311, in discussing the degree of care that a hotel owed to its guests, we said:

"Inasmuch as the owners and the lessee of the hotel were not insurers of the safety of their guests, liability must be determined by the answer to the question 'Did they furnish the facilities for the safety of their guests which ordinary care required and reasonable prudence would have suggested?' If they did they were not negligent, although it may now appear that some 'suitable and workable' method might have been employed which was not employed."

In *Trulock* v. *Willey,* 187 Fed. 956,[3] the Appellate Court approved the instruction that the trial court gave to the jury:

"A keeper of a hotel is not an insurer of the safety of his guests. The limit of his duty is to exercise reasonable care for the safety and comfort of his guests, . . . "

In 28 Am. Jur. 579, the holdings from many jurisdictions are summarized in this general statement:

"It is the duty of proprietors of hotels and other houses of public accommodation to provide reasonably

[2] Ballentine's Law Dictionary, published in 1930, defines an abstract instruction: "An instruction given by the court to the jury amounting to a mere abstract statement of the law. As the very purpose of instructions is to aid the jury in arriving at a proper verdict, the jury should be informed in clear, plain and concise terms as to the law which is applicable to the case at bar and it is erroneous to give instructions which are not applicable, but are mere abstract statements of the law. See 14 R. C. L. 782."

[3] This is a case decided by the Circuit Court of Appeals of the 8th Circuit, and is cited by the appellant to sustain her contention.

safe ways of ingress and egress for their patrons, and to exercise ordinary care to keep the hallways and passageways reasonably well lighted and free of obstructions so that guests may pass to and from their rooms and other places about the premises in safety; . . . ”

We hold that the questioned instruction is good against the objections urged against it.

Affirmed.

CARNEY *v.* DUNN.

4-9912 252 S. W. 2d 827

Opinion delivered November 24, 1952.

Donald S. Martz and *J. S. Abercrombie,* for appellant.

Byron Bogard, for appellee.

HOLT, J. This litigation grew out of a dispute as to the correct division line between two adjoining residence lots in Little Rock.

The lots involved were described according to the recorded plat as Lot 1, Block 9, Jansen's Addition to the

City of Little Rock, and Lot 1, Block 1, Riffel & Rhoton's Addition to the City of Little Rock, the Jansen lot lying east of the Riffel & Rhoton lot.

The question presented is whether the boundary line should be fixed on the center line dividing the two lots in accordance with the recorded plat description above, or along a zigzag line marked partly by a hedge on the north end and a rock retaining wall on the south that is west of the center line some four feet on the north end and seven feet on the south.

Appellees brought the action asserting title to the disputed strip, sought injunctive relief and the removal of a make-shift "tin" garage partly on the strip. The trial court found that appellees "are the owners in fee of Lot 1, Block 1, Riffel & Rhoton's Addition to the City of Little Rock, Arkansas, as said addition is platted, and that the defendants have acquired no title to any portion of said lot by reason of any encroachments heretofore existing thereon, and that title in said lot should be quieted and confirmed in plaintiffs (appellees) and the defendant (appellants) should be restrained in interfering in any manner with the plaintiffs' peaceful possession thereof," and entered a decree in accordance therewith, establishing the true line as platted. This appeal followed.

For reversal appellants contend that the line marked by the hedge and rock wall was shown to be an agreed boundary line and also claimed the strip by adverse possession.

It is undisputed that Joe LePlant, Sr., acquired by deed Lot 1, Block 9, January 18, 1938, and also Lot 1, Block 1, March 21, 1942, that he sold Lot 1, Block 1, to Henry Carpenter August 3, 1946, and Carpenter in turn sold Lot 1, Block 1, to appellees, the Dunns, on March 18, 1949. Mr. LePlant died prior to 1950, and on August 3, 1950, his heirs conveyed Lot 1, Block 9, to appellants, the Carneys. It thus appears that Mr. LePlant as early as 1942 owned both of these lots at the same time, and in all the deeds effecting their conveyance, including those

to the parties here, no reference was made to the boundary line as hedge and wall as claimed by appellants. A legal description only was used in accordance with the recorded plat, simply describing the lots as above.

When Mr. LePlant sold Lot 1, Block 1, to Carpenter in 1946, Carpenter testified in effect that the boundary line between the two lots was discussed and agreed upon, and LePlant admitted that the hedge line was over some three feet on appellees' Lot 1, Block 1, and a survey by Carpenter showed the distance to be nearer four feet. When Mr. LePlant's attention was called to the survey, he said, "Well, I guess that is right," and further told Carpenter that "I am going to move that garage down there," which was partly over the line on appellees' lot. There was no misunderstanding about the true line while Carpenter owned Lot 1, Block 1. E. A. Dunn testified that at the time he purchased from Carpenter in 1949, Joe LePlant, Jr., (son of Joe LePlant, Sr.) told him that the survey above reflected the true line, that the hedge-wall line was not the true line, and that the garage was partly over the line on appellees' lot, and that they would remove it. Dunn's testimony appears not contradicted. Joe did not testify.

We conclude that when all the evidence is considered, the finding of the trial court that appellants had failed to establish the hedge as the agreed boundary line was not against the preponderance thereof. While Mr. LePlant, Sr., owned both lots, he clearly had the right to establish the true line between them to be the center line as platted and to so convey them under the recorded plat description without exceptions. This we hold the preponderance of the testimony shows he and his heirs did. The parties were bound by the descriptions in their deeds.

"Platted lots may be conveyed by numbers corresponding with those of a township survey or on a recorded plat." 26 C. J. S. 218 § 30d.

"In the absence of something in a deed clearly showing a different intention, a description of the land as a

certain lot or subdivision generally conveys the whole thereof. . . . The word "lot," when used unqualifiedly, means a lot in a township, as duly laid out by the original proprietors." 8 R. C. L. 1082, § 138.

Appellants' claim of title by adverse possession for a period of seven years is also untenable for the reason that the present suit was brought less than seven years after appellants bought Lot 1, Block 9, in 1950 from the LePlant heirs. *Barham* v. *Gattuso,* 216 Ark. 690, 227 S. W. 2d 151.

No errors appearing, the decree is affirmed.

COMMERCIAL CREDIT CORPORATION *v.* MACKAY.

4-9911 252 S. W. 2d 819

Opinion delivered November 24, 1952.

Shackleford & Shackleford, for appellant.

Walter L. Brown, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal by the plaintiff from an adverse judgment and presents a question involving procedural matters.

On June 5, 1951, Commercial Credit Corporation (hereinafter called "Plaintiff"), filed action in replevin against Mrs. Mackay (hereinafter called "Defendant") to recover an automobile in the possession of the defendant and to which the plaintiff claimed title. Plaintiff gave bond as provided by law,[1] and the Sheriff seized the car. When the defendant failed to execute a cross-bond within two days,[2] the Sheriff delivered the car to the plaintiff [3] on June 7th. Then on June 12th, plaintiff's attorney entered, on the page of the Court docket where the replevin case was listed, the following notation, dated, signed by the plaintiff's attorney, and attested by the Clerk, to-wit: "Dismissed without prejudice."

On July 27, 1951, the defendant filed answer in the replevin action, denying the allegations of the complaint and seeking damages. After amended and substituted answer, and amended reply, the plaintiff filed a motion on December 7, 1951, asking that the plaintiff's original action in replevin be "reinstated." When this motion was denied, the plaintiff saved exceptions and the cause was tried to a jury on December 7th; and the Court—over plaintiff's objections and exceptions—limited the issues to the value of the car and the defendant's damages. In other words, the Trial Court ruled that all questions as to plaintiff's right of replevin were precluded by the notation of dismissal previously mentioned.[4]

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[1] Sec. 34-2105 Ark. Stats.

[2] Sec. 34-2109 Ark. Stats.

[3] Sec. 34-2108 Ark. Stats.

[4] In making the ruling the Trial Court said to the plaintiff's attorney:

"I do not think that the determination in this case will cut you off from bringing a suit on the contract, if you see fit to do so; but, under the state of the pleadings, now, the only issue for trial is the

The jury awarded the defendant a judgment for $2,250 for the value of the car and $500 for damages; and from a judgment on the verdict there is this appeal duly presenting the issue now to be discussed.

Even though the trial court refused the plaintiff's motion to "reinstate" the original replevin action, the fact is that the replevin action was never legally dismissed. This is true because the replevin action could not be dismissed in vacation under § 27-1406 Ark. Stats. (as was evidently attempted), because such section specifically says that dismissals can be made in all cases "except actions of replevin." The failure of the defendant to execute a cross-bond did not amount to a relinquishment of defendant's claim to the car because the taking of possession by the plaintiff under replevin bond made a pending action until the Court entered judgment.

Thus the vacation notation of June 12, 1951—"Dismissed without prejudice"—was without any legal authority; and the replevin case remained pending the same as if this notation had never been made. Why the plaintiff made the notation does not appear, but the defendant tacitly admitted the continued pendency of the replevin action when, on July 27th, she filed an answer to the complaint. We therefore hold that the trial court should have permitted the plaintiff to introduce its proof on the alleged cause of action of replevin. The plaintiff's motion seeking to "reinstate" the replevin action, together with the Court's ruling thereon and the plaintiff's exceptions of record, sufficiently show the error of the trial court.

The case at bar is entirely different from the case of *Glenn* v. *Porter,* 68 Ark. 320, 57 S. W. 1109, because in that case, the dismissal of the replevin action was in open court, which is permissible under § 27-1406 Ark. Stats. Likewise, in *Martin* v. *Hodge,* 47 Ark. 378, 1 S. W. 694, the original replevin action was dismissed in the

right of defendant to possession on the dismissal of your replevin action, and the question of the reasonable usable or rental value of the car for the time the plaintiff has had possession of it since such dismissal."

Court of the Justice of the Peace. In 2 A. L. R. 200 there is an Annotation on the voluntary dismissal of a replevin action; and many cases are there reviewed. But our attention has not been called to any decision—supporting appellee's contention herein—from a jurisdiction having a Statute like our § 27-1406 Ark. Stats., which prohibits vacation dismissal of replevin actions.

Furthermore, we point out that, when the defendant sought damages from the plaintiff, then the plaintiff had the right, under our practice,[5] to offer every possible defense. One such defense was the plaintiff's claim to the legal title and right to possession of the car. The plaintiff, by the said motion to "reinstate" the replevin action, sought to offer a defense to the claim for damages. Even if the replevin action could have been legally dismissed without prejudice in vacation (which we have shown was not permitted under § 27-1406 Ark. Stats.), nevertheless the plaintiff had the right under our nonsuit statute,[6] to file a new action within one year from the date of the dismissal of the replevin suit. The motion to "reinstate" the replevin action was, therefore, in effect, tendering the replevin action as a defense against the defendant's damage claim.

The judgment of the Circuit Court is reversed, and the case is remanded.

PARKER, COMMISSIONER OF REVENUES *v.* MARSH.

4-9925 252 S. W. 2d 624

Opinion delivered November 24, 1952.

[5] See § 27-1121, Ark. Stats., and cases cited in the Annotation to it.

[6] Sec. 37-222, Ark. Stats.

O. T. Ward, for appellant.

Wendell Utley, for appellee.

ROBINSON, J. The Commissioner of Revenues for the State of Arkansas filed suit, alleging: "That the defendant, George D. Marsh, is indebted to the State of Arkansas for tax on alcoholic beverages purchased in the State of Louisiana and brought into the State of Arkansas for sale or consumption from the date of March 13, 1950, to September 8, 1950, in the total sum of $4,437." It is also alleged that, according to the provisions of § 84-1734, Ark. Stats., the defendant is liable for three times the amount of the taxes said to have been avoided. There was a directed verdict for the defendant, and the commissioner has appealed.

It was stipulated between the parties that copies of transportation permits issued by the Revenue Department of the State of Louisiana to the defendant could be used as evidence in behalf of the plaintiff. These permits, numbering about eighty-four, were accordingly introduced in evidence. The plaintiff then attempted to show that the defendant had been convicted for selling liquor in Columbia County and that he had the reputation of illegally dealing in liquor. The defendant's objection to the introduction of this testimony was sustained. To support his contention that this evidence was admissible, appellant relies on Ark. Stats., § 48-940, which provides: "In any prosecution or proceeding for any violation of this act, the general reputation of de-

fendant or defendants for moonshining, bootlegging, or being engaged in the illicit manufacture of, or trade in, intoxicating liquors, shall be admissible in evidence against said defendant or defendants." This is a part of Act 108 of the Acts of 1935; and it is clear from the act, as a whole, that the above quoted section applies to criminal prosecutions and not civil suits.

Next, appellant offered to introduce evidence to the effect that the defendant was a holder of a federal tax stamp and, further, that he had admitted to Mr. Merrick, a Federal Alcoholic Control Agent, that he was transporting whiskey from the State of Louisiana into the State of Arkansas, but that all the whiskey bore a federal stamp. The court sustained the objection to introduction of this testimony. This evidence should have been admitted. The fact that the defendant had a federal license to sell liquor in Arkansas was a circumstance tending to prove the allegations in the complaint. Where one obtains a federal license to sell whiskey, it is reasonable to infer that he is engaged in such business and that he will, therefore, obtain and sell liquor. In *Appling* v. *State,* 88 Ark. 393, 114 S. W. 927, this court, in speaking of a similar situation, said: "Evidence of the issuance of this license does not raise a presumption of guilt, unless made so by statute; but it is competent evidence for the purpose of showing what business the defendant is engaged in, or that he keeps liquor for sale, and generally on the question of intent." This ruling was followed in *Seibert* v. *State,* 121 Ark. 258, 180 S. W. 990, and in *Collins* v. *State,* 94 Ark. 94, 125 S. W. 647. Although the evidence is circumstantial, it is no less admissible. "Moreover, circumstantial testimony is legal and proper, and when properly connected, furnishes a substantial basis and support for a jury's verdict." *Dowell* v. *State,* 191 Ark. 311, 86 S. W. 2d 23.

The evidence as to the statement of the defendant to the federal agent, Merrick, about bringing whiskey into Arkansas was admissible as an admission. "Admissions and declarations are admissible where they tend to prove the principle or ultimate fact in issue and where

they are directed to the establishment of pertinent evidentiary facts. It is clear, moreover, that admissions of a party which are relevant to the issues are admissible, notwithstanding the transaction to which they refer, or out of which they arose, is itself not related to the issue before the court.'' 20 Am. Jur. 461. If the evidence as to the federal license, and the admission of the defendant, had been admitted in evidence, the plaintiff would have made a sufficient case to go to the jury.

With reference to appellant's contention that Ark. Stats., § 84-1734, is authority for assessing three times the amount of the taxes avoided, the section of the statute in question, among other things, provides: ''Any person, firm or corporation so convicted shall, as a part of the penalty of such conviction, pay to the state a sum equal to three times the amount of taxes avoided.'' The section mentioned applies to convictions in criminal trials and not civil cases.

Reversed and remanded for new trial.

SATTERWHITE *v.* YOUNG.

4-9888 252 S. W. 2d 626

Opinion delivered November 24, 1952.

A. A. Thomason, for appellant.

Tompkins, McKenzie & McRae, for appellee.

GRIFFIN SMITH, Chief Justice. B. W. Pace and his brother, J. M. Pace, and their sister, Mollie, lived on 240 acres owned by B. W. Neither was married and their home life appears to have been marked by conventional tranquillity quite in keeping with their rural surroundings and self-sufficiency. The land had been owned by B. W. since 1895 and the three occupied the same house until Mollie died in 1939 and B. W. died in 1942.

In 1937 B. W. executed a deed to the land, naming J. M. and Mollie as grantees, a condition being that the instrument was not to take effect ". . . until the death of the said B. W. Pace." The acknowledgment was before a justice of the peace who died several years before the instant suit was brought.

Two brothers surviving B. W. were Manse and Alex. Six brothers and sisters had predeceased B. W., some of whom left issue. The claims of these survivors to various estate interests forms the subject-matter of the adverse decree resulting in this appeal.

In September, 1947, J. M. conveyed to H. P. Young, his nephew. Young undertook to acquire the interests of certain heirs. The collateral kinsmen of B. W. and Mollie Pace then conferred and concluded to attack the deed executed by B. W. to J. M. and Mollie, alleging, (a) that B. W. Pace lived under the supervision of J. M.; (b) that the three Paces—B. W., J. M., and Mollie—gained their subsistence from the land; (c) that no consideration was paid for the deed, and (d) that B. W., "if not actually mentally incompetent, was of such inferior mentality that he was not able to comprehend the effect of business transactions."

It is also argued that a fiduciary relationship existed between B. W. and J. M., and that the latter must be held to a high degree of accountability in dealing with the property of his brother.

The chancellor found that when the deed was delivered B. W. was in full possession of his mental faculties, that it was given for value and conveyed the property in question.

Appellants emphasize the rule that gifts will be scrutinized with the most jealous care when made in favor of a party who occupies a confidential relationship—a relationship which makes it the duty of the person benefited by the bounty to guard and protect the interests of the donor; and further, it is the duty of such beneficiary to give such advise as would promote the purposes of the giver. As Mr. Justice BUTLER said for the court in *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495, ". . . this duty is not confined to cases where there is a legal control. [Such duties] are supposed to arise wherever there is a relationship of dependence or confidence—especially that most unquestioning of all confidences which springs from affection on the one side and a trust in a reciprocal affection on the other."

The competency of B. W. Pace to deal with his material affairs was questioned in 1926 when Alex Pace and others petitioned the probate court of Columbia county for an adjudication of incompetency. The evidence was submitted to a jury and a verdict finding that B. W. was of sound mind "and competent to attend to his own business" was returned. This adjudication is in sharp contradiction of testimony given by witnesses for appellants in the case at bar. Many of them thought that B. W.'s mentality was that of a ten- or twelve- year-old child.

In 1938 B. W. sold timber to J. E. Speer Lumber Company for $1,000, and in 1938 he executed an oil and gas lease to Hunt Oil Company for $1,200. In March, 1940, B. W. was adjudged insane and a guardian was appointed. He was then 80 years of age.

Some of the appellants, or witnesses by whom they undertook to establish B. W.'s incompetency, testified that they did not observe any change in the subject's condition between 1924 and 1937 or '38. It was shown that B. W. maintained an account with Peoples Bank of Waldo, but checks were signed, "B. W. Pace, by J. M. Pace." Testimony as abstracted indicates that at the time of his death B. W. had approximately $2,000.

J. H. Williams, who handled the timber transaction for the Speer Company, testified that he talked the matter over with B. W. Pace; J. M. was around somewhere on the premises, but did not have any direct connection with the timber sale. The first offer was $800. This was refused by B. W., as was an offer of $900. During these negotiations (resulting in an agreement to pay $1,000) there was nothing in B. W.'s actions to indicate that he did not thoroughly understand what was being done; in fact, he succeeded in getting $200 more than was first offered.

Although the testimony is in acuminated conflict and appellants do not rely wholly upon observations and beliefs of interested persons,—and this is equally true of appellees— we cannot say that the Chancellor's findings are not supported under the equity rule.

Affirmed.

Mr. Justice McFaddin not participating.

PROVIDENCE WASHINGTON INSURANCE COMPANY *v.* McKENZIE.

4-9896 252 S. W. 2d 627

Opinion delivered November 24, 1952.

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

Killough & Killough, for appellee.

MINOR W. MILLWEE, Justice. This is an action by plaintiff, Lonnie McKenzie, to recover for the loss of his automobile by fire under an insurance policy issued to him by the defendant, Providence Washington Insurance Co. At the conclusion of plaintiff's testimony, each party requested a directed verdict whereupon the trial court took the case from the jury and rendered judgment for plaintiff in the sum of $575, plus the statutory penalty and attorney's fee.

There is no dispute in the material facts. Sometime in the latter part of 1949 plaintiff, a resident of Wynne, Arkansas, had extensive repairs made on his 1941 Pontiac automobile. He approached David Drexler, owner and manager of Wynne Insurance & Loan Co., about a loan to pay for the repairs and a small balance owing to a finance company. Plaintiff borrowed $400 from Wynne Insurance & Loan Co. which he used to pay the repair bill and the balance due the finance company. He executed his note payable in ten monthly installments to the Wynne company and a mortgage on his car to secure payment of the note. In making the loan

Drexler required that plaintiff insure the car. Drexler's company was engaged in both the insurance and loan businesses and he was the agent of several insurance companies including the defendant.

On December 10, 1949, which is apparently the same date that the loan was consummated, Drexler, as agent for defendant, issued a policy to plaintiff insuring the car against loss by fire, theft, collision and windstorm for one year at a premium of $66.55 which plaintiff paid. The mortgage to Wynne Insurance & Loan Company was declared in the policy which contained a loss payable clause in the company's favor.

On September 20, 1950, plaintiff borrowed $225 from Herman Young and paid the balance of $100 remaining due under the mortgage to Wynne Insurance & Loan Company and another debt. The note to Young was payable in monthly installments of $56.25 and was secured by a mortgage on the car executed by plaintiff on the same date that he paid the balance of the first loan. The payment to the Wynne Insurance & Loan Co. was made to Mrs. Beverly Byrd, Drexler's secretary, cashier, and general office manager, who was experienced in the insurance business and had broad authority to act for Drexler when he was absent from the office. When plaintiff paid the balance of the first loan, he told Mrs. Byrd that he had borrowed money on the car to pay off his debts. When the payment was made Mrs. Byrd delivered the cancelled note and mortgage to plaintiff, but did not deliver the copy of the insurance policy which the company had retained and the mortgage to Herman Young was never indorsed or otherwise noted on the policy.

Plaintiff made the first payment of $56.25 due under the mortgage to Young. The car was destroyed by fire on November 18, 1950. Plaintiff immediately notified Drexler and the latter told him to get a wrecker and bring the burned car to Wynne.

The defendant's request for a directed verdict in its favor was predicated on the defense set up in its answer

that plaintiff was barred from recovery under that provision of the policy which states: "This policy does not apply: . . . (b) under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy." Although the trial court did not indicate the ground upon which the judgment was based, the cause was apparently presented by plaintiff on the theory that defendant had either waived this provision of the policy or was estopped to rely upon it since much proof was directed to the authority of Mrs. Byrd to bind the defendant on these issues. Both parties have presented excellent briefs on the waiver question.

In view of our conclusion that the facts presented fail to show a violation of the above clause against encumbrances, we find it unnecessary to determine whether waiver was effectively established. While there is some conflict in the decisions on the question, the weight of authority supports the general rule that the execution of a new mortgage in a sum equal to or smaller than the amount of the mortgage to which the insurer has assented, does not constitute a violation of the clause against encumbrances where the new mortgage is executed at the time of or after a complete discharge of the original mortgage. 29 Am. Jur., Insurance, § 628. This rule has been applied in several cases where the facts, as here, show that no prejudice could have resulted to the insurer from the execution of the second mortgage. The cases are collected in an annotation in 163 A. L. R. 1402.

In *Kister* v. *Lebanon Mut. Ins. Co.*, 128 Pa. 553, 18 A. 447, 5 L. R. A. 646, the policy provided that it should be void "if the insured have the property encumbered without notice to the company indorsed hereon." In holding that the provision was not violated by liens placed on the property without notice to the company after issuance of the policy where such liens were less than the amount of the original mortgage, the court said: "This provision of the policy is based upon the

increased risk resulting from incumbrances. A person is supposed to have less interest in the preservation of his property when it is incumbered beyond its value. If the testimony contained in the offer is true, the company was willing to assume the obligation with the incumbrances then existing, and if these incumbrances were not increased in amount during the continuance of the policy then the company was merely held to the risk which it at first assumed, and no more." The rule was followed in *Gould* v. *Dwelling House Ins. Co.,* 134 Pa. 570, 19 A. 792, and *Weiss* v. *American F. Ins. Co.,* 148 Pa. 349, 23 A. 991.

In the following cases it was held that the condition against encumbrances is not violated where the insured pays off the original declared mortgage and executed a second mortgage in a sum equal to or less than the original mortgage. *Bandy* v. *East & W. Ins. Co.* (Mo. App.) 163 S. W. 2d 350; *Koshland* v. *Home Mut. Ins. Co.,* 31 Or. 321, 49 Pac. 864, 50 Pac. 567; *McKibban* v. *Des Moines Ins. Co.,* 114 Iowa 41, 86 N. W. 38; *Georgia Home Ins. Co.* v. *Stein,* 72 Miss. 943, 18 So. 414.[1]

The case of *Medford* v. *Pac. Nat. Fire Ins. Co.,* 189 Or. 617, 219 Pac. 2d 142, 222 Pac. 2d 407, 16 A. L. R. 2d 1181, involved a provision identical with the one under consideration here. The Oregon court held that the provision was a stipulation against encumbrances existing when the insurance contract was made, but not against future encumbrances on the ground that the phraseology used created an ambiguity which should be resolved in favor of the insured. This holding seems to be against the weight of authority and we merely mention it here to show the extent to which some courts go in order to protect the insured against a forfeiture of his policy. See criticism by the annotator in 16 A. L. R. 2d 752.

It should be noted that in some of the foregoing cases the second mortgage was for a sum less than, or equal to, the amount of the first mortgage debt existing at the time of the issuance of the policy while in others the second mortgage was for a sum equal to the origi-

[1] Contra: *Hankins* v. *Rockford Ins. Co.,* 70 Wis. 1, 35 N. W. 34.

nal indebtedness as reduced by subsequent payments. The principle involved in these cases was recognized by this court in *National Union Fire Ins. Co.* v. *Avant,* 167 Ark. 307, 268 S. W. 20. In that case the loss payable clause in an automobile policy provided that the policy would be wholly void if any of the notes due the mortgagee should not be completely paid on or before ten days after maturity, or if any change be made in any of the notes representing the encumbrances otherwise than by payment. At the time the automobile burned, the insured had arranged with the mortgagee for an extension of some of the notes without notice to the insurer and the notes had been past due and unpaid for more than ten days after maturity. In affirming a judgment for the insured the court said: "The words in the clause, 'if any change is made in any of the notes representing said indebtedness or incumbrance,' necessarily meant some change that would be detrimental to the insurer. The parties to the contract of insurance could not have meant that immaterial changes, or changes that did not affect the risk, were included in the contract. See *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528, 25 S. W. 535; *Mutual Reserve Fund Life Insurance Co.* v. *Farmer,* 65 Ark. 581, 47 S. W. 850; *Des Moines Life Ins. Co.* v. *Clay,* 89 Ark. 230, 116 S. W. 232.

"Under the construction we give the policy, the extension of the time for the payment of the notes was not a change in the notes, but, if so, certainly not a material change. So far as the insurer was concerned; its purpose was to preserve the conditions that existed at the time of the issuance of the policy, and to have the policy so framed that it would be warranted against any change in the notes representing the indebtedness that would affect the risk to its prejudice."

Applying these principles here, we hold that the undisputed facts do not show a violation of the spirit and purpose of the clause against encumbrances. The original mortgage to which appellant assented was for $400. At the time of the fire the second mortgage had been reduced to $168.75 and the car was then worth $575.

There was no fraudulent concealment by the plaintiff and there was certainly less risk of an intentional burning at the time of the fire than the company assumed in the first instance. If defendant thought the policy was voided by the execution of the second mortgage, it seems that it would have tendered a return of the unearned portion of the premium, but it has not done so. As to future encumbrances, we think the policy should be construed as applying to an encumbrance prejudicial to the insurer and was not meant to cover one that did not affect the risk which the defendant was willing to accept when it issued the policy. We realize that automobile values are subject to considerable fluctuation and we would not follow the rule laid down in the Pennsylvania cases where it is shown that the second mortgage affected the risk to the prejudice of the insurer, even if such mortgage involved a sum less than the amount of the original indebtedness.

Defendant also contends the $575 figure which the court fixed as the difference in market value of the car immediately before and after the fire was excessive. Without reviewing the various estimates as to market value, it is sufficient to say that there was substantial evidence to support a judgment for any sum from $565 to $580.

The judgment recites a penalty of 12½% instead of the statutory 12%. Both parties concede that this was an inadvertent error. The judgment will, therefore, be corrected to show a penalty of 12%. With this modification, the judgment is affirmed.

LINDNER *v.* MID-CONTINENT PETROLEUM CORPORATION.

4-9914 252 S. W. 2d 631

Opinion delivered November 24, 1952.

Vol T. Lindsey, for appellant.

Eugene Coffelt, R. H. Wills and *Ben Hatcher,* for appellee.

George Rose Smith, J. This is an action by Mid-Continent Petroleum Corporation to recover possession of a filling station owned by Cora Lee Lindner and leased by her to Mid-Continent. The theory of the complaint is that Mrs. Lindner wrongfully attempted to cancel the lease and thereafter unjustifiably withheld possession from the plaintiff. There was also involved certain equipment appurtenant to the filling station, but the arguments advanced on appeal present no issue with respect to this equipment. The defenses below were that Mrs. Lindner's lease to Mid-Continent was void for lack of mutuality and that the lessee was in default in the payment of rent. Trial before a jury resulted in a verdict awarding possession to the plaintiff.

The jury may have concluded from the proof that on March 19, 1949, Mid-Continent wished to rent the station as an outlet for the sale of its petroleum products, Mrs. Lindner desired to lease the property to Mid-Continent, and Mrs. Lindner's husband, the other appellant, wanted to undertake the operation of the station. In furtherance of these ends the parties executed four instruments on the date mentioned. First, Mrs. Lindner, for a rental of one cent for each gallon of motor fuel sold on the premises, leased the filling station to Mid-Con-

tinent for a term of three years with an option by which the lessee might extend the lease for two more years. In this lease the lessee reserved the privilege of termination at any time upon ten days notice to the lessor. Second, Mid-Continent in turn rented the property to Paul Lindner upon a month-to-month basis at the same rental, both parties retaining the privilege of termination upon ten days notice. Third, the Lindners authorized Mid-Continent to offset the rents against each other, so that Mid-Continent would not be required to collect the rent monthly from Lindner and pay over an identical amount to Mrs. Lindner. Fourth, Mid-Continent and Lindner agreed upon the price schedule at which the company would sell petroleum products to Lindner, this contract also being cancelable upon ten days notice by either party.

These arrangements appear to have been satisfactory until the year 1951, when Lindner removed Mid-Continent's advertising from the service station and began buying gas and oil from a competing company. On July 23, 1951, Mid-Continent gave notice that it elected to terminate its lease to Paul Lindner and its agreement to sell petroleum products to him. Three days later the Lindners retaliated by attempting to cancel Mrs. Lindner's lease to Mid-Continent. When the latter demanded possession at the expiration of the ten-day notice by which its sublease to Paul Lindner had been canceled the defendants refused to give up the property. This suit was then filed.

It is argued by the appellants that the lease from Mrs. Lindner to Mid-Continent is lacking in mutuality in that the lessee can terminate the contract upon ten days notice, while no similar privilege is granted to the lessor. This contention is without merit. Williston has pointed out that the use of the term "mutuality" in this connection "is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be a valid consideration." Williston on Contracts, § 141. As we held in *Johnson* v. *Johnson,* 188 Ark. 992, 68 S. W. 2d 465, the requirement of mutuality

does not mean that the promisor's obligation must be exactly co-extensive with that of the promisee. It is enough that the duty unconditionally undertaken by each party be regarded by the law as a sufficient consideration for the other's promise. Of course a promise which is merely illusory, such as an agreement to buy only what the promisor may choose to buy, falls short of being a consideration for the promisee's undertaking, and neither is bound. *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184, 131 S. W. 460; Williston, § 104. If, however, each party's binding duty of performance amounts to a valuable consideration the courts do not insist that the bargain be precisely as favorable to one side as to the other.

In this view it will be seen that Mid-Continent's option to cancel the lease upon ten days notice to Mrs. Lindner is not fatal to the validity of the contract. This is not an option by which the lessee may terminate the lease at pleasure and without notice; at the very least the lessee bound itself to pay rent for ten days. Even lesser duties than this are held to be a sufficient consideration to support a contract. Williston, §§ 103F and 105.

The appellants' other contentions may be answered in a few words. The argument that Mid-Continent defaulted in the payment of rent is based on the fact that it tendered no payments after the date on which the cancellation of its sublease to Paul Lindner became effective. After that date, however, the tenant was being wrongfully deprived of possession by the landlord, and in those circumstances no rent was due. *Collins* v. *Karatopsky,* 36 Ark. 316. Nor do we think the court erred in charging the jury that these leases are legal in form or in refusing to allow the jury to decide whether Mrs. Lindner's lease to Mid-Continent made the lessee's duty of performance entirely optional. The interpretation of an unambiguous contract is for the court, not for the jury, *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400, 153 S. W.

833, and the court was correct in its construction of these agreements.

Affirmed.

ANDERSON *v.* STATE.

4694 252 S. W. 2d 615

Opinion delivered November 24, 1952.

Brockman & Brockman, for appellant.

Ike Murry, Attorney General, and *Dowell Anders,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. The defendant, S. J. Anderson, was charged with murder in the second degree in the killing of L. J. Avery, a seventeen-year-old boy. He was found guilty of voluntary manslaughter and his punishment fixed at five years in the penitentiary.

According to the testimony on behalf of the State Anderson, who was 30 years old, Avery and three companions were engaged in a dice game in a shed behind a cafe located on the Princeton Pike several miles from Pine Bluff, Arkansas, about midnight on December 7,

1951. After the Avery boy had lost three or four dollars, he caught or "hung" the dice and asserted that he wanted financial assistance from the others in order to stay in the game. When this assistance was refused, he announced that nobody would "shoot" the dice. A violent quarrel between Avery and the defendant followed. When Avery struck at the defendant with a Coca-Cola box, the latter grabbed him. After a brief scuffle Avery ran from the shed into the darkness with the defendant in hot pursuit. The defendant returned to his car, which was parked near the shed, a few minutes later with a knife in his hand. When a companion asked him whether he caught the Avery boy and did anything to him, defendant replied, "I goosed him to get aloose from him." The defendant and his companion then left the scene in the defendant's automobile.

Avery's body was found the next morning about 100 yards from the shed. The deputy coroner who examined the body at that time found a knife wound in Avery's chest and one in his back. Either of said wounds could have caused his death which had occurred eight or ten hours prior to the examination.

In his testimony the defendant admitted the struggle inside the shed, but denied that he chased Avery outside. He stated that Avery raised his hand to strike the defendant with a knife as defendant started out the door, that he caught hold of Avery's wrist and after a struggle wrenched the knife out of his hand and that Avery then fled. The effect of his testimony was to deny that he intentionally struck Avery with the knife.

When viewed in the light most favorable to the State, the evidence is sufficient to sustain a conviction for a higher degree of homicide than voluntary manslaughter.

On his own motion the trial judge gave several instructions on self-defense. In instruction No. 12 the jury were told that even though the defendant was acting in self-defense at the beginning of the difficulty, still if the jury found beyond a reasonable doubt that "at the time the defendant stabbed the deceased" the defendant

was in no danger, apparent to him, of losing his life or receiving great bodily harm at the hands of the deceased, then defendant would be guilty of some degree of homicide as explained in the instructions.

There was only a general objection to the instruction. The defendant now argues that the instruction erroneously assumed that he stabbed the deceased when there is no testimony in the record to support this assumption. The evidence, though partly circumstantial, shows almost conclusively that defendant did stab the deceased. As previously indicated, the effect of defendant's testimony was that if he did cut the deceased it was unintentional and in his own self-defense. Instructions on self-defense are usually framed on the assumption that the defendant did the killing. Instruction No. 12 was not inherently defective as an instruction on self-defense. If the defendant felt that the instruction contained an erroneous assumption, the objectionable language should have been met by a specific objection. If this had been done, the court would doubtless have modified the instruction to eliminate the objection now urged. See *Edwards* v. *State,* 180 Ark. 363, 21 S. W. 2d 850. The other instructions given on self-defense have been approved by this court in many cases.

The court also gave instruction No. 14 at the request of the defendant. It reads: "If you find from the evidence that the deceased, Avery, and the defendant, Anderson, became involved in an argument in a room where a dice game was in progress and that deceased assaulted the defendant, Anderson, that thereafter the deceased, Avery, renewed the difficulty and assaulted Anderson with an open knife; that Anderson seized Avery's hand and a struggle ensued; and if you find that while they struggled for possession of the knife, deceased rushed or fell against said knife, causing his injury and death, as shown by the evidence, you will acquit the defendant." This instruction was more favorable to the defendant than the evidence, when considered in the light most favorable to him, warranted. There is nothing in the record to indicate that any prejudice resulted to the

defendant from the objectionable language of instruction No. 12, which could and should have been reached by a specific objection.

We have considered other assignments of error which are not argued and find them to be without merit.

The judgment is affirmed.

CARSON *v.* HENSLEE, SUPERINTENDENT STATE PENITENTIARY.

4719 252 S. W. 2d 609

Opinion delivered November 24, 1952.

Sam Laser, for petitioner.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for respondent.

WARD, J. Joel Carson, being held in the Arkansas State Penitentiary, presented a petition for a writ of *habeas corpus* to the Circuit Court asking to be released from prison on the ground that he had theretofore been pardoned by the Governor of the State of Arkansas. The Circuit Court denied the petition and we are asked to review the decision of that Court on petition for certiorari. The factual situation on which these proceed-

ings are based is undisputed and is substantially as hereinafter set forth.

In 1938 Joel Carson was convicted in Pulaski County of murder and adjudged to be electrocuted. Later this sentence was reduced to life and then again to 21 years in prison. In 1943 Carson was convicted in Sebastian County on two separate charges of robbery [Cases No. 5257 and No. 5258] and sentenced to serve a term of fifteen years on each conviction, the sentences to run consecutively.

On April 4, 1952, the Governor issued a pardon to petitioner which reads as follows:

"TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETING:

"WHEREAS, Joel Carson, White Male, No. 38093, was convicted in Pulaski and Sebastian Counties of the crime of Murder 1st Degree and Robbery and sentenced on November 25, 1938, to a term of Twenty-One years in the Penitentiary; and

"WHEREAS, said Joel Carson was given a furlough on August 1, 1951, and was released from supervision in that his minimum sentence expired on March 9, 1952; and

"WHEREAS, the Board of Pardons, Paroles and Probation has recommended that subject's citizenship be restored;

"NOW, THEREFORE, I, Sid McMath, by virtue of the power and authority vested in me as Governor of the State of Arkansas, do hereby pardon Joel Carson of the above *crime* and restore to him all rights, privileges and immunities as enjoyed before passage of the above *sentence.*

"This Proclamation is being granted without application being made to me by an Attorney or Paid Representative of Joel Carson." [emphasis supplied]

The question presented here is: Should the language in the above pardon be interpreted to include the

conviction for murder in 1938 and the two convictions for robbery in 1943?

Notwithstanding the fact that the pardon does not accurately describe, by dates and places, all the admitted convictions yet we think, under the rules announced by this Court for the interpretation of pardons, it was adequate to show the intention of the Governor to pardon petitioner for all convictions.

In the case of *Redd* v. *State,* 65 Ark. 475, 47 S. W. 119, this Court was called upon to determine whether the language in a pardon was sufficient to comprehend certain offenses. It was shown that one James Robinson had been convicted of the crimes of burglary and grand and petit larceny, the dates and places not being disclosed in the opinion. The language of the pardon is set out in full in the opinion but it suffices here to state the following essential parts: The "Whereas" clause recognized that Robinson had been convicted "in a certain court or courts of this state" of the offenses of burglary and larceny, and he was pardoned for the offense of "burglary and larceny, or burglary or larceny, either grand or petit, and of all felonies of which he may have heretofore been convicted, in any court or courts of this state."

It will be noted, of course, that the pardon in the above-cited case does not describe any particular conviction by setting out the date and place. The Court, in holding the pardon good for all convictions, gave several reasons for its conclusion. It repeated the old rule that a pardon must be construed most strictly against the king or state, and most beneficially for the subject, and that like any other grant, if its meaning be in doubt, it is taken more strongly against the grantor. It was stated that the pardon was good if it was intended to cover and does cover the offense of which the conviction was had. It was pointed out that if there had been a conviction for some offense not mentioned in the pardon the conclusion might have been different. We think it is clear from the context that the Court meant to distinguish between generic offenses and not between dif-

ferent convictions for the same generic offense; for example, between murder and larceny and not between two convictions for larceny.

When we apply the holding and reasoning in the *Redd* case it leads us to conclude that in the case before us the Governor meant to pardon petitioner for all convictions for murder and robbery. Both of these offenses are mentioned in the pardon and they are the only ones for which petitioner was convicted, and it makes no difference that the pardon failed to describe in detail all the convictions for each offense by dates, places and case numbers.

The rule that pardons are to be liberally construed in favor of the pardonee and that there is a presumption in favor of their validity was affirmed in those exact words in the case of *Horton* v. *Gillespie,* 170 Ark. 107, 279 S. W. 1020.

In trying to arrive at what offenses or convictions the Governor had in mind when he issued the pardon, it is necessary to consider all and not just a part of the language used therein. We find that he restored petitioner to "all rights, privileges and immunities as enjoyed before passage of the above sentence." The quoted language would, of course, be meaningless if the Governor meant to leave one conviction unpardoned.

Apparently the lower court took the view that the pardon does not specifically point out all three convictions; that it, at most, referred to one murder case and one robbery case when in fact there were one murder and two robbery convictions; and that, consequently, before the intent to pardon all three convictions can be read into the pardon, there must be what amounts to a reformation of the pardon. Then the case of *Nelson* v. *Hall,* 171 Ark. 683, 285 S. W. 386, is cited as authority that a pardon cannot be reformed. It is true that the cited case holds as indicated, but we think the decision is not applicable here because it was based on an entirely different state of facts. There the pardon, issued by an acting governor, entirely omitted certain phrase-

ology which was required by statute, and the Court, on the authority of *Horton* v. *Gillespie, supra,* said the omission rendered the pardon void. The Court then proceeded to say that, under such circumstances, the pardon could not be reformed.

In the case before us no words required by the statute were omitted from the pardon, which fact, we think, leaves us to apply the rule that it must be construed liberally in favor of petitioner. Applying this rule and considering what has been said before, we conclude that it was the intent of the Governor, gathered from the language in the pardon, to grant full immunity from all three convictions.

The writ is granted, and the petitioner will be released from custody.

McFaddin, J., dissents.

Evans *v.* City of Little Rock.

4-9916 253 S. W. 2d 347

Opinion delivered December 1, 1952.

Rehearing denied January 12, 1953.

Dorothy J. Stager, Edward E. Stocker and *Cooper Jacoway,* for appellant.

O. D. Longstreth, Jr., and *Dave E. Witt,* for appellee.

Catlett & Henderson and *Frank H. Cox,* for interveners.

George Rose Smith, J. This is a continuation of the zoning controversy that was before us in *City of Little Rock* v. *Evans,* 213 Ark. 522, 212 S. W. 2d 28. The appellant owns a combined foundry and heating-equipment factory situated on the south side of Fifteenth Street in a residential district in Little Rock. This plant, which is the only commercial establishment in the neighborhood, occupies less than a quarter of a city block. The two lots now in dispute lie just across the street from the appellant's plant, in the middle of the block on the north side of Fifteenth Street. These two lots have been zoned for residential use only ever since the city adopted its zoning ordinance in 1937. Evans bought these lots in 1946 and obtained permission from the city to use them for storage purposes for ninety days. Under that temporary permit he erected a small building on the lots and devoted them to commercial use. When the permit expired Evans was directed to remove this building, but instead he brought suit to enjoin the city from enforcing the ordinance. In the earlier case we held the suit to be premature, as Evans had not exhausted his administrative remedies.

Thereafter Evans pursued without success the administrative procedure for having the lots reclassified as business property. His application was disapproved by the City Planning Commission, the Board of Adjustment, and the city council. Evans then filed this suit, but the chancellor denied relief.

Before the courts may reject the findings of the municipal authorities it must be shown that their action was unreasonable and arbitrary. *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167. In his insistence that this burden of proof has been met Evans presents a two-fold argument.

First, it is contended that the property in question is so ill-suited to residential use that its restriction to

that classification amounts to confiscation. This issue presented to the chancellor a question of fact upon which the testimony is in the sharpest dispute. In contending that the lots are without substantial value as a residential site the appellant relies upon the fact that his factory is directly across the street and the fact that the houses next to the lots in dispute have been so placed that their backyards abut these lots on all sides except that fronting on Fifteenth Street. We attach little importance to the latter fact, since in any residential district there is the possibility that a lot in the middle of the block may be confronted by backyards on three sides. This circumstance results not from the impact of the zoning ordinance but from the fact that the owners of corner lots may face their dwellings upon either street. We are not willing to say that the owner of a lot so situated is entitled by the constitution to use it for industrial purposes, to the detriment of his neighbors.

Nor is it shown that the presence of the appellant's factory has destroyed the value of neighboring property for residential use. Several witnesses testified for each side as experts in the field of real estate values. It cannot be said that the evidence given by the witnesses called by the plaintiff outweighs that presented by the defendant and the intervening property owners. On the contrary, the history of the neighborhood decidedly supports the view that Evans' lots have not lost their worth as homesites. Evans began his commercial activities upon a small scale and has expanded them over a period of years, but the existence of his plant has not deterred others from building homes all around it. Much of this construction took place after the plant had attained its present size. One of the plaintiff's expert witnesses admits that in the earlier litigation he testified that certain property, then vacant, immediately west of the factory was not suitable for residential use. Yet in the interval between the two trials houses were built upon this land and it is now entirely occupied. Another of the plaintiff's witnesses stated on direct examination that the lots in question would be "an ideal spot for anyone that works in the foundry to build a home there." There

is other evidence indicating that the lots are now worth as much as they were when Evans bought them in 1946. We think the weight of the testimony shows pretty well beyond question that the proximity of the appellant's relatively small plant has not substantially impaired the value of these lots as homesites.

Second, Evans insists that since his factory was lawfully established he has the right to extend the business area to the land across the street. In this connection he relies upon our cases holding that property upon the periphery of an established business district cannot be confined to residential use if its value for that purpose is altogether disproportionate to its potential worth as commercial property. *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883; *Little Rock* v. *Sun Bldg. & Dev. Co.,* 199 Ark. 333, 134 S. W. 2d 582; *Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890; *Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446.

Owing to the difference in the facts the principle of those decisions does not extend to the case at bar. In each of the cited cases the commercial area was in fact a district, comprising several blocks devoted to business use. This is typical of proper zoning, which has been defined as the regulation *by districts* of building development and the uses of property. Bettman, "Constitutionality of Zoning," 37 Harv. L. Rev. 834. Such a district is often a community center that has a natural tendency to grow as the surrounding residential area becomes more densely populated, with a correspondingly increased need for neighborhood commercial facilities.

That is not the situation in the case at bar. Evans' factory is an island in a vicinity that is otherwise wholly residential. The record shows without much question that the lots in controversy have little inherent appeal to prospective purchasers of commercial property. These lots are especially desirable for business use only to Evans, the reason being that their location is convenient to his factory. Louis Tarlowski, a witness having long experience in the field of city planning, testified that the

conversion of this property to commercial use "would constitute spot zoning of the worst type." For us to uphold the appellant's contention would mean that any person who gradually expands an isolated business originally confined to his own homestead has a constitutional right to acquire the property next door and to convert it to industrial use. We are not convinced that the law requires us to go that far.

Affirmed.

MILLWEE, J., not participating; HOLT, J., dissents.

ROLLANS *v.* DOUGLAS.

4-9886 252 S. W. 2d 833

Opinion delivered December 1, 1952.

Franklin Wilder, for appellant.

Mark E. Woolsey, for appellee.

ED. F. MCFADDIN, Justice. Appellant, Rollans, complains of the judgment for $1,443.13 recovered against him by Douglas.

Rollans decided to grow and market turkeys in commercial quantities. In order to obtain feed for the turkeys, Rollans executed a "grower's agreement" and mortgage to Quaker Oats Company (hereinafter called "Quaker") who made arrangements with Douglas to furnish feed to Rollans on signed receipts. Rollans signed four such receipts totalling $5,277.83, and Quaker paid

Douglas that amount. Thereafter Rollans needed additional feed for the turkeys from October until sale dates in November and December; and Douglas claims to have personally furnished Rollans this additional feed in the amount of $1,443.13.

Quaker sued in the Chancery Court to foreclose its mortgage on Rollans' turkeys. Douglas sued Rollans at law on his open account, and sought attachment of the turkeys. On Rollans' motion, the Douglas case was transferred to Chancery, where it was tried along with the Quaker suit. At the trial there was no dispute between Douglas and Quaker and there does not appear to have been any real dispute by Rollans as to the Quaker suit against him; but Rollans strongly insisted that he owed nothing to Douglas, and that was the point at issue in the trial below.

At various stages in the litigation, Rollans had different attorneys; but at the trial in chancery, he represented himself. The Chancellor was very patient, and after hearing all the evidence rendered judgment for Douglas for the amount of $1,443.13; and Rollans has now appealed. His present counsel did not represent him until after the trial below.

Although several questions are argued in appellant's brief, there was only one question in the trial court;[1] and that was whether Douglas, independent of Quaker, furnished feed to Rollans in the amount of $1,443.13. The Chancellor saw the witnesses and heard them testify, and found for Douglas on sharply disputed testimony of the parties. We have studied the record and conclude that the decree is correct.

Affirmed.

Mr. Justice HOLT not participating.

[1] In *Gulley* v. *Budd*, 209 Ark. 23, 189 S. W. 2d 385, we reiterated the well known rule: "This Court has frequently held that no issue can be raised in this Court which was not raised in the trial court; . . ."

WENDLER *v.* BURNS.

4-9930 252 S. W. 2d 821

Opinion delivered December 1, 1952.

[redacted]

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

Glenn F. Walther, for appellee.

ROBINSON, J. This is an appeal from a decree holding that owners of adjoining lots each have an easement over that portion of the other's lot, on which is located a driveway used by both parties.

Appellant is the owner of lot 3, block 22, Park Addition to the City of Little Rock, and appellee is the owner of the adjoining lot 4. The parties live on their respective properties, and between the houses there is a two-strip concrete driveway. Each strip of concrete is two feet in width, and the overall width of the driveway is six and one-half feet. With the exception of the north two feet, all of the driveway is located on lot 4, and the concrete strip thereon is 73.6 feet in length, although the driveway actually extends three feet beyond the paving. Appellant, Wendler, owner of lot 3, attempted to build a fence between the two concrete strips, and appellee filed this suit to enjoin the construction of such fence and alleged that there is an easement in favor of the owner of lot 4 over that part of lot 3 on which the driveway is located. The chancellor held that each of the parties has

such easement. The decree provides: "That this driveway was constructed many years ago by a predecessor in title to lot 4 and has been used as a driveway by and for the convenience of owners of both lots for a period of time in excess of thirty years; that the defendant has constructed a fence along the boundary between the two lots; that a temporary restraining order restraining the defendant from constructing said fence was signed by the Court, but the fence was completed before the order was served; that the plaintiff and her predecessors in title have acquired an easement over the south 2 feet of the west 73.6 feet of lot 3, block 22 of Park Addition and the defendant and her predecessors in title have acquired an easement over the north 4.8 feet of the west 73.6 feet of lot 4, block 22 of Park Addition to the City of Little Rock, Arkansas." We cannot say the chancellor's holding is against the preponderance of the evidence.

Appellee makes no contention that appellant does not have an easement over that portion of the driveway located on lot 4. It is undisputed that the driveway has been located between the two houses since prior to 1919. In that year a fence on lot 3, north of the driveway, was considered by the owners of both lots as being on the property line. In the early part of 1920 Mr. Kilman, who then owned lot 4, removed the fence and built the concrete driveway. A member of the family who owned lot 3, and lived thereon from 1909 until 1929, testified that the driveway was considered as part of lot 4; that her family made no claim to it; that they got permission from Mr. Kilman, the owner of lot 4, to use it. Later, witness' husband agreed to help keep the driveway in repair for the right to use it. Another witness testified that she has known of the existence of the driveway since 1920; that the public has used it since that time in gaining access to both houses. Mrs. Wendler, the appellant, moved into the house on lot 3 in 1935; and bought the property in 1941 or 1942; and has used the driveway ever since she occupied the premises. Sometime after purchasing the property, her husband had a survey made, but it was only about the time of the filing of this suit in

1951 that she attempted to have a fence constructed on the property line.

In the case of *Bond* v. *Stanton,* 182 Ark. 289, 31 S. W. 2d 409, Chief Justice HART said: "The doctrine that the owner of one lot may acquire an easement over the lot of another by the open, notorious, and adverse use thereof under a claim or right for a period of seven years is well settled in this State. Such adverse use is sufficient to vest the claimant with an easement therein." See also *St. Louis Southwestern Ry. Co.* v. *Elmore,* 185 Ark. 364, 47 S. W. 2d 39.

On cross-appeal appellee contends the easement the owner of lot 4 has over lot 3 should be 76.6 feet in length, instead of 73.6 feet, and that the decree should be modified to that extent. We think the evidence sustains appellee's contention. The undisputed evidence is that since 1919 those living on lot 4 have used the driveway to reach the rear thereof, where a garage is located. In order for an automobile to pass between the house on lot 4, and any fence that the owner of lot 3 may construct, the driveway must extend a few feet further east than the point where the concrete ends. In other words, automobiles traveling to the rear portion of lot 4 must have been using about three feet of lot 3 contiguous to the concrete strip. In addition to the fact that a car must use the three-foot strip to get to the garage on lot 4, there is evidence that there are clearly marked tracks which indicate the use of such strip as part of the driveway.

Affirmed on appeal and reversed on cross-appeal.

DALRYMPLE *v.* DALRYMPLE.

4-9895 252 S. W. 2d 823

Opinion delivered December 1, 1952.

Robinson & Robinson, for appellant.

Searcy & Searcy, for appellee.

J. Seaborn Holt, J. This is a suit to collect balance alleged to be due on the following note:

"$4800.00 Benton, Louisiana

February 11, 1946

In installments of $40 per month beginning March 1, 1946, and on the 1st. day of each month thereafter after date I promise to pay to the order of Estell Allen Dalrymple, at Plain Dealing, Louisiana, the sum of Four Thousand Eight Hundred and No/100—$4800—Dollars with interest at the rate of Eight per cent per annum from maturity until paid, Value received. The maker of this note hereby waives presentation for payment, demand, notice of non-payment and protest, all pleas of division or discussion and consents that time of payment may be extended without notice thereof, and in the event of non-payment at maturity, it is agreed to pay all attorney fees incurred in the collection of this note, or any portion thereof, including interest, which fees are hereby fixed at 10 per cent on the amount to be collected. The consideration for this note is the obligation of the maker to provide subsistence and support of his two minor children, Barbara Ann Dalrymple and Doroty Joan Dalrymple, and it is agreed that should both of the aforementioned die, then this note shall be considered satisfied

upon the death of the second child, both children then being dead and the reason for the subsistence no longer existing. In the event both children survive it is understood and agreed that no subsistence will be paid after the younger of the two children reaches the age of eighteen years. In the event of failure to pay any of the said installments when due or the failure to pay interest when due, and in that event, each and all installments shall immediately become due and collectable at the option of the holder.

John H. Dalrymple."

The note was executed by appellant and delivered to appellee, Estell Allen Dalrymple, on February 11, 1946, the same day on which Mrs. Dalrymple was awarded a decree of divorce from appellant, in a Louisiana court, and also "the permanent care and custody" of their two minor children. Appellant, the maker of the note, refused to pay the January, 1951, installment and appellee, relying on the acceleration clause, elected to declare the remaining installments due and sued as indicated.

Appellant, by demurrer, denied liability primarily on the ground that the note lacked consideration and that no cause of action was alleged. He further contended "that the obligation of the husband to care for the children recited in the instrument when given its strongest interpretation becomes a mere motive for bringing about an agreement in contemplation of a divorce, rather than a consideration sufficient to create an enforceable contract between the parties". The cause was submitted on November 14, 1951, to the trial court, on the demurrer and testimony of witnesses, by agreement of the parties, and there was a judgment for appellee for $2654.45, with 8% interest from October 30, 1951. This appeal followed.

It is conceded that the note was executed in Louisiana and therefore its validity is governed by the laws of that State.

The record reflects that in the above divorce decree there was no mention of any property settlement, or any

provision for alimony or for maintenance of the two children awarded to appellee, the Mother. We are not here concerned with a case involving the support of a divorced wife, but the duty of a father to support and care for his minor children. The rule is well settled in Louisiana, as well as in this State, that it is the father's duty to support his children during their minority. This duty also obtains whether the children are in the custody of the divorced wife or not.

"It is a father's duty to support his minor children, and that duty is not affected by divorce and the assignment of the custody of children to the wife." *Wilson* v. *Wilson* (1944), 205 La. 196, 17 So. 2d 249.

"It is the duty of the father to support his minor children whether they are in the custody of the mother or not." *Davieson* v. *Davieson* (1939), 192 La. 44, 187 So. 49.

Is this natural obligation to support his minor children a sufficient consideration under Louisiana law for the note here in question? We hold that it is. In the Louisiana case, "*In Re Atkins Estate, Atkins* v. *Commissioner of Internal Revenue,* United States Circuit Court of Appeals, 5th Circuit, 30 Fed. 2d 761", the court, in considering the question of the effect of the natural obligation of a parent to his children as being sufficient consideration for a note or contract, said:

"Petitioner contends that the decedent, having made donations of money to his other children, incurred the natural obligation to equalize his gifts to all his children, and having endeavored to do so by giving the notes to his two sons, as found by the board, that under the law of Louisiana this natural obligation was sufficient consideration for the notes, and they were enforceable one-half against his estate as an obligation of the community.

. . . . . .

'Art. 1757. . . . 2. A natural obligation is one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice.

. . . . . .

'Art. 1759. . . . 2. A natural obligation is a sufficient consideration for a new contract.

. . . . . .

"That a natural obligation is sufficient consideration for a note is well settled by the following analogous cases." Citing many cases.

The younger child was fourteen years of age when the present suit was filed. The note was made by appellant on the same day the divorce was granted. As to its execution appellant testified:

"Q. That is dated February 11th? (Referring to the divorce decree)

"A. Yes, sir.

"Q. Now, on that same day you executed this note that has been filed here?

"A. Yes, sir.

"Q. For what purpose was that note made; what was the consideration if any for making that note?

"A. She said she needed some assurance she would get compensation for the children and it was agreeable because I wanted to help them and she wouldn't take my word and wanted some assurance she would get that money."

We find nothing in the terms of the note that would make it unenforceable as between the parties. The acceleration clause was binding and enforceable in the circumstances.

Finding no error, the judgment is affirmed.

STREET IMPROVEMENT DISTRICT NO. 419 *v.* PINKERT.

4-9764 253 S. W. 2d 780

Opinion delivered December 1, 1952.

Townsend & Townsend, for appellant.

U. A. Gentry, for appellee.

GEORGE ROSE SMITH, J. This case presents varied questions that arise from the fact that our laws permit overlapping improvement districts to foreclose their tax liens separately and thereby acquire independent titles to the same property. Here this conflict of ownership results from successive foreclosure suits brought by a Little Rock sewer district and a Little Rock street district, the appellant. Each district bought in the land at its own sale.

In the court below this was a three-cornered controversy involving the title to two city lots. Pinkert, the

first litigant, brought suit to quiet the title he had acquired by mesne conveyances from the sewer district. McMinn, the second litigant, defended the suit on the ground that the street district had foreclosed the lien of its assessments for 1934 and 1935 and had conveyed its title to him. The street district, the third litigant, intervened to contend that even though it had conveyed its first foreclosure title to McMinn in 1947, it was nevertheless entitled to foreclose its lien for assessments coming due after 1935; that is, for the years not represented by the title previously conveyed to McMinn. It is not contended that the street district is barred by the special statute of limitations applicable to counties having a population in excess of 75,000, Ark. Stats. 1947, §§ 20-1140 and 20-1142; for the district has kept its liens alive by bringing suits from time to time, though most of these cases have not been pressed to conclusion.

The chancellor ordered a public sale, as all three parties desired, but he permitted only Pinkert and McMinn to share in the proceeds. It being shown that the sewer district had sold its title to Pinkert's predecessor for $5.50 and that the street district had sold its 1934-1935 title to McMinn for $147.18, the chancellor decreed that the proceeds of sale should be applied to the repayment of these amounts, as well as to the reimbursement of certain general taxes paid by McMinn, and that the surplus should be divided in the ratio of 3.6% to Pinkert and 96.4% to McMinn. *Sanders* v. *Mhoon,* 214 Ark. 589, 217 S. W. 2d 349. The chancellor further held that the street district's liens after 1935 had merged in its original foreclosure title, so that the district had no claim to the proceeds of sale. The district brings the case to us for review.

In order to determine the respective rights of the three claimants we must first ascertain the relative positions of the two districts after each had acquired title by foreclosure. In spite of our many decisions in the field of improvement district law we have not definitively settled the status of title when two districts foreclose their liens against the same land.

At least three theories have been suggested. (1) The first district to foreclose acquires title free of the accrued liens of any other district, a result that may be obtained by a proceeding under a seldom-invoked provision of the statutes. Ark. Stats., § 21-548; *Board of Com. of McKinney Bayou Dr. Dist.* v. *Board of Dir. of Garland Levee Dist.,* 181 Ark. 898, 28 S. W. 2d 721. (2) "Title is in the district holding the last sale, subject to the liens of the other districts." Walker, "Conflicting Tax Titles in Overlapping Improvement Districts in Arkansas," 1 Ark. L. Rev. 32. (3) The districts become tenants in common.

In our attempt to arrive at the theory that best harmonizes with existing law we take as our starting point the settled rule that the liens of different districts are on a parity with one another. *McKinney Bayou, supra.* If this condition of equality has any meaning in practice, it must follow that neither district should lose its claim to parity by reason of having foreclosed its lien or by reason of not having done so. The worth of a legal right can be measured only by the remedy available; so it would be idle to say that two original liens are on a parity and yet in the next breath to declare that the early or delayed enforcement of one lien confers priority.

It is for this reason that the first two theories are out of harmony with our decisions. In nearly every case the combined claims of two overlapping districts represent only a fraction of the value of the land. Thus there is almost always an equity or profit that is potentially available either to one district or to both, if title be acquired by foreclosure. The defect in theories (1) and (2) is that this profit is given entirely to one district only, destroying the parity of lien that is contemplated by the statutes.

Under the second theory, for example, the first foreclosing district acquires the entire ownership, subject only to the lien of the second district. But if the second district then enforces its lien, it in turn acquires the whole title, subject now to the lien of the first district.

Presumably it would then behoove the first district to bring a second suit in order to reinstate its priority. We are unable to see at what point this series of lawsuits would end, unless, as in *Jarndyce* v. *Jarndyce,* the court costs finally consume the property. The first theory is even less acceptable, for it permits the first foreclosing district to extinguish the accrued claims of the others.

No similar objection can be made to the theory of a tenancy in common, which has been adopted elsewhere in analogous situations. *Monheit* v. *Cigna,* 28 Calif. 2d 19, 168 P. 2d 965, 167 A. L. R. 995; *In re Gould,* 110 Minn. 324, 125 N. W. 273; *Gould* v. *City of St. Paul,* 120 Minn. 172, 139 N. W. 293. Under this view the first foreclosing district obtains title, subject to the liens of other districts. But when a second district obtains title at its own later sale it becomes a tenant in common with the first, in somewhat the same way as a vested remainder in brothers and sisters may open up to admit afterborn members of the class. *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584.

It may be noted that the California and Minnesota cases are not in complete agreement as to the interests of the respective co-tenants. In California the co-tenants are first reimbursed to the amount of their claims, and any surplus is then divided equally. This procedure disturbs the basic parity of claims, by giving the lesser co-tenant a disproportionate share of the potential profit. As indicated by our conclusion in *Sanders* v. *Mhoon,* 214 Ark. 589, 217 S. W. 2d 349, we prefer the Minnesota view, by which the two taxing authorities are simply tenants in common in the ratio of their respective claims. In this way the equality of lien is preserved from beginning to end.

We hold, then, that by its 1934-1935 foreclosure suit the street district acquired legal title to the property, as a tenant in common with the sewer district. It is contended by the appellee Pinkert that the street district's claim for assessments coming due while it owned the property merged with its previously acquired title. It is true that our holding in *Crowe* v. *Wells River Sav. Bk.,*

182 Ark. 672, 32 S. W. 2d 617, supports this contention. There we said that while a road district held the title to property it could not bring suit to collect a later assessment. Our reasoning was that since the State cannot levy taxes against land owned by an improvement district, it follows that the land is equally exempt from improvement district taxes while title is in the district. Yet the two situations are not in fact alike. The reason that improvement district property is immune from State taxation lies in the constitutional provision exempting public property from taxation. Ark. Const., Art. 16, § 5. But there is no similar provision that prevents an improvement district from taxing public property; on the contrary, a number of statutes have authorized the assessment of benefits against public property. Sloan, Improvement Districts in Arkansas, § 865.

Although the *Crowe* case has not been expressly overruled, later cases have disregarded its doctrine. In *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600, we recognized that even though the title is in one district the property may still be subject to the claims of another district, as we said: "The drainage district and the levee district are separate districts, and have levied taxes based upon different benefits, which each may enforce without reference to the action of the other." In a situation like that presented by the case at bar we were even more explicit in *Word* v. *Grigsby,* 206 Ark. 164, 174 S. W. 2d 439: "The delinquent assessments for years subsequent to 1930 should have been foreclosed each year as same matured (or several years could be foreclosed together) regardless of the fact that the district had purchased the property under the decree for the 1930 delinquent assessments." In view of these later decisions we are of the opinion that the street district's matured claims subsequent to 1935 did not merge in its 1934-1935 title.

Of course, it would have been permissible for the district to accept McMinn's purchase money in 1947 as full satisfaction of all claims then held by the district against these lots; but on this record that is not what

the parties intended. The district assigned its 1934-1935 certificates of purchase to McMinn, who then obtained a deed from the court commissioner who had conducted the sale. In its decree below the court found that the consideration paid by McMinn exactly equalled the district's taxes for 1934 and 1935, together with penalties, costs, etc. It is significant that the district did not assign to McMinn its later certificates of purchase, nor did it release these lots from its pending suits. Clearly the district meant to sell, and McMinn meant to buy, only the district's original title, subject to its claim for later assessments. As a practical matter it is desirable to permit the parties to adopt this course, since on the one hand a hard-pressed landowner may not be able to satisfy all the taxing agency's claims at one time, and on the other the district may not wish to collect later assessments until it becomes evident that they are needed to pay debts or to equalize the tax burden among the landowners.

We conclude that Pinkert and McMinn are tenants in common in the ratio of the amounts paid by them or their predecessors in obtaining title from the districts. We need not pause to demonstrate, as it is easy to do, why a ratio based on the respective payments to the districts, rather than one based on the districts' original claims, is to the best interest not only of the districts themselves but also of the original landowner. We expressly adopted the former ratio in the *Sanders* case, *supra*. There Sanders had purchased from one district for $364.33, and Mhoon's predecessor had purchased from another district for $77.26. We said that they had liens for those amounts and that upon a sale of the property each litigant should be repaid the amount of his lien, with the surplus to be divided between them in the same ratio. It is evident that the injection of this lien concept is somewhat awkward both in theory and in practice. Even assuming that a purchaser from a district acquires in some way a lien as well as an interest in the fee, we perceive no reason why the lien should not merge in the fee if it be held, as it was in that case, that the purchasers' liens are in exactly the same pro-

portion as their interest in the equity over and above the liens. In practice this result is altogether desirable, since the existence of a lien necessarily means that one party or the other must bring suit to foreclose, while the recognition of a merger eliminates that needless litigation. Hence we adhere to the result reached in the *Sanders* case, but we approve the simpler and more direct theory of a tenancy in common.

It follows that the chancellor was right in dividing the surplus proceeds of sale in the ratio of 3.6% to Pinkert and 96.4% to McMinn. But the decree should have ordered the foreclosure of the street district's liens, with the proceeds of sale to be applied first to the satisfaction of its claims, next to the repayment of general taxes paid by any party to the suit, and the remainder to be distributed to the tenants in common in proportion to their interests. The decree must be reversed and the cause remanded for further proceedings.

McFaddin, J., concurs in the result.

Ed. F. McFaddin, Justice (concurring). I agree with the result reached in this case; but I dissent (a) from some of the language in the opinion and (b) from the extent to which the majority has seen fit to go.

The majority has stated in its opinion:

"We conclude that Pinkert and McMinn are tenants in common in the ratio of the amounts paid by them or their predecessors in obtaining title from the Districts."

To this language, designating Pinkert and McMinn as tenants in common, I respectfully direct this dissent; and here are my reasons:

(1) After long and serious consideration in *Sanders* v. *Mhoon,* 214 Ark. 589, 217 S. W. 2d 349, we refused to denominate the relationship as "tenants in common." The majority is now doing what we deliberately refused to do in *Sanders* v. *Mhoon.*

(2) Furthermore, to say that Pinkert and McMinn are "*tenants in common*" is dictum. It is only necessary for us in this case to settle the rights between the litigants;

and it is not necessary for us to designate or denominate their relationship so as to surround these parties, and other parties that may be similarly situated, with the rights and duties flowing from the relationship of tenancy in common. I urged my brother judges to use language (a) that the relationship between Pinkert and McMinn, insofar as this case was concerned, had the aspects of tenancy in common, or (b) that the rights of Pinkert and McMinn could be settled by applying some of the rules of tenancy in common. Either statement would have been sufficient for this opinion; and anything beyond such statement is dictum.

(3) The language of the majority in designating Pinkert and McMinn as tenants in common is language that will come back to plague us in future cases. Tenants in common have certain rights, duties and liabilities, and remedies between themselves and as regards others. Some such items are adverse possession, payment of taxes, improvements, repairs and tax sales. An examination of any treatise or law encyclopedia article on co-tenancy will disclose a multitude of matters relating to tenants in common. I predict that the rules on these various matters cannot be applied in all—or even in a majority of—instances between persons situated as are Pinkert and McMinn in the case at bar, who have acquired separate and distinct titles under improvement district foreclosure proceedings. Eventually the language of the majority in the case at bar will have to be explained and modified.

Therefore, to summarize: the majority has gone further than we went in *Sanders* v. *Mhoon;* the language as to co-tenancy was broader than was necessary to a holding in the case at bar; and the designation of co-tenancy will come back to plague us.

MEADOWS *v.* COSTOFF.

4-9843 252 S. W. 2d 825

Opinion delivered December 1, 1952.

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

Robert J. White, for appellee.

ED. F. MCFADDIN, Justice. Appellee has filed motion to strike the bill of exceptions, as filed too late. We now deny the motion; but, because of the question presented, we are delivering this written opinion. We hold that it is unnecessary for a chancery decree to fix the time for filing the bill of exceptions since Act 139 of 1951 fixes such time.[1]

[1] There may be cases in which Chancery Courts desire to shorten the time from the maximum allowed by Act 139 of 1951. The power to do so is not an issue in the case now before us.

I. *Date of Decree.* Mrs. Meadows sued Costoff in the Northern District of the Logan Chancery Court. The testimony was taken *ore tenus* on May 24 and May 29, 1951; and the cause taken under advisement. On October 1, 1951, the Chancellor informed the attorneys of his decision, but left it to them to prepare a precedent for decree to be submitted to him for approval. The decree as finally prepared and signed was not filed with the Clerk until January 8, 1952. Under these circumstances, —this being a vacation decree—we hold that the decree was not effectively rendered until January 8, 1952. See *Redbud Realty Co.* v. *South,* 145 Ark. 604, 224 S. W. 964; and *Jelks* v. *Jelks,* 207 Ark. 475, 181 S. W. 2d 235.

II. *Time for Filing the Bill of Exceptions.* In the decree of January 8, 1952, no time was given for filing the bill of exceptions. The terms of the Chancery Court for the Northern District of Logan County are the second Mondays in February, June and October of each year. This decree of January 8, 1951, was rendered in the October, 1951, term, which ended on the convening of the February, 1952, term; and the bill of exceptions in this case was not approved and filed until March 24, 1952, which was a day in the next succeeding term after the decree was rendered. Under our old cases, where no time was given for filing the bill of exceptions, then the right to file the bill ended with the term in which the decree was rendered. See *Ogletree* v. *Welker,* 185 Ark. 805, 49 S. W. 2d 1054; *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618; and other cases on page 58 of C. R. Stevenson's Book on Supreme Court Procedure, 1948 Edition.

But there has been a consistent course of Legislative enactments and judicial opinions liberalizing the rule of the aforesaid cases. By Act No. 10 of 1943, the Legislature gave the trial judge power to extend the time for filing the bill of exceptions, declaring: ". . . this may be done by the Judge in vacation as well as in court, and may be done after as well as before the expiration of any time previously given". In *Floyd* v. *Richmond,* 211 Ark.

177, 199 S. W. 2d 754, we applied the liberalizing effects of said Act No. 10.

Then by Act No. 90 of 1949, the Legislature again sought to liberalize the rule of our previous cases by allowing the bill of exceptions to be filed ". . . but not beyond the succeeding term". The purpose of this Act was to clearly show that the end of the term had no effect on the power of the Court to approve the bill of exceptions; and *Yahraus* v. *Continental Oil Co.*, 218 Ark. 182, 235 S. W. 2d 544, was decided under the terms of the said Act No. 90.

Still, however, there remained some uncertainties in procedural requirements, as evidenced by such cases as *Johnson* v. *U. S. Gypsum Co.*, 217 Ark. 264, 229 S. W. 2d 671; *Criner* v. *Criner*, 217 Ark. 722, 233 S. W. 2d 393; and *Prescott Corp.* v. *McFarland*, 217 Ark. 731, 233 S. W. 2d 70. So the Legislature passed Act No. 139 of 1951, which had for its purpose (as stated in the caption): "To make uniform throughout all Chancery Districts in the State of Arkansas the law governing the filing and preservation for use on appeal of evidence filed and introduced in the several Chancery Districts of the State of Arkansas".

Section 3 of said Act 139 says that ". . . a complete record of the proceedings shall be made. . . . and filed with the Clerk of the Court . . . not less than 20 days before the expiration of the time allowed for appeal". The clear purpose of the quoted language was to definitely fix a uniform time for filing of the bill of exceptions in Chancery cases. Section 4 of the Act 139 says: "The Chancellor may . . . approve and sign the record . . ."—meaning, of course, the record filed in accordance with § 3 as above mentioned. Section 4 of the Act also says:

"Upon the approval of the transcribed record, as herein provided, the same shall constitute a bill of exceptions and become a part of the record."

It is evident that the purpose of this Act No. 139 was to allow the Chancellor to approve any bill of exceptions

filed ". . . not less than 20 days before the expiration for the time allowed for appeal". This Act 139 was not to restrict the powers of extension granted by Act No. 10 of 1943 and Act No. 90 of 1949, but to make uniform all such powers as applied to Chancery cases.[2] We said in *Bolls* v. *Craig,* 220 Ark. 880, 251 S. W. 2d 482: "But, as previously stated, Act No. 139 of 1951 is now the governing statute in Chancery cases". Under that Act 139, the Chancellor had the power to approve the bill of exceptions in the case at bar on March 24, 1952, which was within the time allowed by the said Act.[3] In *Bolls* v. *Craig, supra,* just as in the case at bar, testimony was taken *ore tenus* and no time fixed by the decree for filing the bill of exceptions. But in *Bolls* v. *Craig,* the testimony was not filed until 6 months and 17 days after the decree, whereas in the case at bar the testimony was filed 2 months and 16 days after the decree, which was well within the time allowed by Act No. 139 of 1951.

Therefore, we deny the appellee's motion to strike the bill of exceptions.

JOHNSON *v.* DANIELS.

4-9883—4-9884, Consolidated 254 S. W. 2d 946

Opinion delivered December 1, 1952.

Rehearing denied March 9, 1953.

[2] Act No. 90 still governs in Law Courts, as Act No. 139 applies only to Chancery Courts.

[3] In cases such as *Bolls* v. *Craig* and the case at bar, the time for appeal is 6 months from the decree, so that the bill of exceptions can be filed within 5 months and 10 days after the decree. But there are some cases—such as those involving improvement districts, elections, etc.—in which the time for appeal is less than 6 months.

C. M. Martin, McKay, McKay & Anderson and *E. B. Kimpel, Jr.*, for appellant.

Silas W. Rogers, J. S. Brooks, M. P. Matheney, Rothe, Marston, Bohn & Mazey, G. L. Grant and *J. Hugh Wharton,* for appellee.

MINOR W. MILLWEE, Justice. The instant appeals, one in chancery the other in probate, are an aftermath of *Daniels* v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401, decided January 9, 1950. That was a proceeding in the Probate Court under § 21 of Act 297 of 1945 (Ark. Stats., § 62-1301) for determination of heirship of one-half the estate of J. W. (Jim) Edwards, deceased, it being conceded that his widow took the other half interest.

J. W. (Jim) Edwards was the son of "Old Joe" and Aveline Edwards, former slaves. On the former appeal we held that two lines of collateral heirs were entitled to

inherit: (1) the descendants of five children of the slave marriage of "Old Joe" Edwards and Patsy Gant, referred to as the "Patsy line," who are the appellees here; (2) the descendants of five children of another slave marriage of "Old Joe" Edwards and Susan Wroten, referred to as the "Susan line," who are the appellants here.

The probate judgment involved on the former appeal was rendered December 10, 1948, the trial court finding that the "Susan line" represented by the present appellants constituted the sole collateral heirs of the estate.

On December 15, 1948, appellants filed suit in the Chancery Court to quiet their title to the real estate alleging that the claims of appellees and others constituted a cloud on their title. Appellees and other defendants either answered or intervened and some of the parties asked for the cancellation of certain deeds and mineral contracts issued on the lands.

On September 5, 1950, the Probate Court entered judgment on the mandate issued by the Supreme Court on the former appeal reversing the judgment of December 10, 1948, to the extent that the "Patsy line" should be permitted to inherit on the same basis as the "Susan line."

Trial of the chancery suit to quiet title was begun on November 6, 1951, and concluded on November 8, 1951. It was there stipulated that the record in the original probate proceeding might be used in the chancery trial and any appeal to this court. The record on the former appeal disclosed that all the legal descendants were not in the case and on remand notice of subsequent proceedings to identify all the heirs was given. As a result, 55 persons intervened as descendants of the "Patsy line" who, in addition to the original 22, are the appellees here. No other heirs of the "Susan line" intervened and the present 15 appellants are the same persons involved in all previous proceedings.

A "Final Judgment Determining Heirship," dated November 6, 1951, was entered by the Probate Court

determining that appellants and appellees constituted all the legal collateral heirs of the estate and directing a division of said estate between them in accordance with the mandate of this court on the first appeal. That trial was begun on November 5, 1951, and the judgment recites that an appeal was prayed by and granted to appellants.

A decree was entered in the chancery suit to quiet title on November 8, 1951, containing the same findings as to determination of heirship as did the final probate judgment. Under this decree the intervention of other adverse claimants was dismissed and certain instruments were cancelled as clouds on the title to the real estate.

On November 20, 1951, the appellants filed in the Probate Court a motion to set aside all findings and judgments previously entered therein and for a new trial on the ground of newly discovered evidence. This motion was heard and overruled on April 21, 1952. Appellants have appealed from the order overruling this motion and from the decree of the chancery court of November 8, 1951. The two appeals have been consolidated for presentation here.

In holding on the former appeal that appellees, as representatives of the "Patsy line," were entitled to inherit we said: "The evidence introduced at the trial in the Probate Court for the purpose of establishing the relationships of the various claimants to 'Old Joe' Edwards and his son the decedent Jim consisted largely, as already stated, of family hearsay passed down from parent to child concerning relationships within the family groups, plus statements which older members of the families said they had heard made by Patsy and Susan themselves concerning their marital relations with 'Old Joe' Edwards. About two score of witnesses gave testimony of this character. In addition there were some witnesses who had lived their lives in the same community with the families involved and knew the community reputation as to their relationships. Notable among these was Mrs. Nancy Britt, child of the Gant family which owned 'Old Joe' and Patsy, born in 1853 and therefore nearly 96

years old at the date of trial yet with a memory clear even in small details concerning the slaves with whom she played in her childhood. Patsy Gant was the 'black mammy' who cared for Mrs. Nancy Britt until the end of the war terminated their relationship when Nancy was about 12 years old. Mrs. Britt's acquaintance with her family's former slaves and their relatives and descendants continued down through the years to the present. Mrs. Britt testified to many facts as of her own knowledge, but she also testified as to general reputation in the community concerning other facts."

We further held that the evidence that "Old Joe" and Patsy cohabited for eight years as husband and wife was perhaps stronger than evidence of similar cohabitation of "Old Joe" and Susan, saying: "The evidence is absolutely uncontradicted that five children were born to 'Old Joe' and Patsy in the Gant's back yard, and that these children were recognized by 'Old Joe' as his own. The hearsay testimony in the record to the effect that Patsy told younger members of her family that she had 'jumped the broom' with 'Old Joe' is larger in quantity than the similar testimony concerning his 'jumping the broom' with Susan, and both batches of testimony are about equally credible. Mrs. Nancy Britt testified: 'Everyone in the community said that when a slave man and woman were having children they were considered married. They generally lived in the same house or near each other. . . .Q. When he took up with Patsy, he called that marrying her? A. I suppose so. That is the way they did in those days. . . . Q. And you say Joe and Patsy were living on the same place and were living there and had children as man and wife? A. Yes.' It is true that Mrs. Britt in her testimony insisted that 'Old Joe' and Patsy were not married, but this only establishes that they were not married in the legal sense that was impossible in any event for slaves."

In holding the family hearsay testimony admissible we said: "The modern rule, which we accept, is that declarations concerning the whole range of pedigree facts are admissible in evidence when made by members of the

family or by any other persons closely associated with members of the family as servants, masters and mistresses (like Mrs. Nancy Britt), neighbors, business partners, or the like, the association being such as to give them access to family facts on a basis similar to that afforded family members. See Wigmore, Evidence (3rd Ed., 1940), §§ 1486, 1487: 'It is not necessary to maintain that the statements of *any friend* are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to his sufficient knowledge, equally with the family members, of the facts of the family history.''

The first contention for reversal is that the order of the Probate Court determining heirship was only *prima facie* evidence of the facts found therein and, when weighed against the evidence offered by appellants in the chancery suit, was overcome, and appellants are, therefore, entitled to prevail in the chancery suit. In answer appellees say that the prior probate judgments and this court's decision on the former appeal are *res judicata* on the question of the determination of heirship as to all parties to those proceedings, which includes all the appellants; and that such judgments were not, therefore, subject to collateral attack in the chancery suit. On the former appeal we said: ''Under Act 297, § 21, the determination of heirship arrived at is '*prima facie* evidence of the facts therein found,' but does not finally conclude the rights of persons not parties to the proceeding.[1] The Act provides that 'any executor or administrator may make a final distribution of an estate upon such determination and shall, thereupon, together with the surety upon his bond, be discharged from liability arising from such determined interest.' ''

Now the implication of this language is that the probate judgment would be final and conclusive of appellants' rights, but we find it unnecessary to determine this interesting question of statutory construction. Con-

"[1] This 1945 procedure for the determination of Heirship is now superseded by the somewhat different provisions of § 173 of Act 140 of 1949, appearing in Ark. Stats. (1949 Supp.), § 62-2914."

ceding, without deciding, that the probate judgment amounted to only a *prima facie* determination of heirship, we hold, as did the chancellor, that when all the evidence in both the probate proceeding and the chancery suit is considered, the preponderance thereof still supports the claims of the appellees.

As the opinion in the former appeal reflects, we considered the testimony of Mrs. Nancy Britt highly credible and convincing in establishing the inheritance rights of appellees as the descendants of "Old Joe" and Patsy as well as the rights of appellants to inherit as the descendants of "Old Joe" and Susan. In an effort to discredit that part of the testimony of Mrs. Britt and others tending to establish the slave marriage of "Old Joe" and Patsy and the birth and rearing of their children in Union County, appellants introduced for the first time in the chancery court the testimony of Lazarus Pearce, Mrs. Viola Chandler and the two daughters of Mrs. Nancy Britt, the latter having died in the meantime. The testimony offered by these witnesses was to the effect that appellees are descendants of a slave marriage of Patsy and one Lyander Edwards, that "Old Joe" Edwards and Patsy never co-habited, that Patsy and Lyander "jumped the broom" in the parlor of Lazarus Pearce, their master, in Ripley, Mississippi, and that they had six children when Pearce moved to Union County, Arkansas, in 1860; that Patsy and the children were sold to Gant who later purchased "Old Joe" from Wroten; and that the maiden name of Mrs. Nancy Britt was Cole and not Gant as this court implied on the former appeal, although the Cole and Gant plantations joined.

We agree with the chancellor that a great portion of this testimony was incompetent, irrelevant and inadmissible. Part of it was obtained by leading questions and appellees' objections on that ground were sustained. The witness Lazarus Pearce is the nephew of Lazarus Pearce, who allegedly brought Patsy and Lyander Edwards to Arkansas, and Mrs. Viola Chandler is the daughter of the older Mr. Pearce. Most of their testimony dealt

with family hearsay about the Pearce family and only indirectly pertained to the Edwards family and the declarations offered were not by any members of the Edwards family. Lazarus Pearce testified that he had heard older members of the Pearce family say that his uncle purchased Lyander, Patsy, and their four or five children shortly before he moved from Mississippi to Arkansas in 1860. Although Mrs. Chandler could not remember the date of her father's birth or death or whether he was a deacon in the church, she did remember her father saying that he brought Patsy, Lyander Edwards and their six children, two boys and four girls, to Arkansas in 1860 and that Patsy and the children were sold to Mr. Gant in 1861. Her father died in 1913. She never saw Patsy or her children, but did remember Lyander. Upon being recalled, Lazarus Pearce stated that he had heard his mother say that Patsy and Lyander "jumped the broom" in the Pearce parlor in Mississippi although he had previously stated that his uncle purchased Lyander, Patsy and their children about a year before the Pearce family moved to Arkansas.

The greater part of the testimony of the two daughters of Mrs. Nancy Britt was to the effect that their mother had repeatedly made statements contradictory to the testimony which she gave in the probate hearing concerning the co-habitation of "Old Joe" and Patsy and the rearing of their children. One of the daughters, who sat by during the entire examination of her mother as a witness, testified that Mrs. Britt was mentally and physically exhausted at the time; that witness noticed that her mother had made certain misstatements; that immediately after the examination she reminded her mother of the mistake which the latter admitted; and that Mrs. Britt had made other statements to the effect that Lyander, and not "Old Joe," was the father of Patsy's children. We agree with appellees' contention that this testimony was inadmissible since appellants thereby sought to contradict, discredit and impeach the testimony of their own witness without laying the proper foundation. It should be remembered that Mrs. Britt was a witness for the present appellants on the former

appeal and that counsel for appellees were not present at the taking of her deposition although she was cross-examined by counsel for claimants whose interests were adverse to the parties here.

It is well settled by statute and our cases that a party who is surprised by unfavorable testimony of his own witness may contradict him by substantive testimony of other witnesses or may contradict and impeach his testimony by showing that he has made statements different from his present testimony provided the proper foundation is laid by calling his attention to the contradictory statements and inquiring of him whether he made them. Ark. Stats., §§ 28-706 and 708, *Jonesboro, L. C. & E. Rd. Co.* v. *Gainer,* 112 Ark. 477, 166 S. W. 571; *Graves* v. *Gardner,* 137 Ark. 197, 208 S. W. 785. We have held it to be error to permit a witness to be impeached by proof of contradictory statements without first laying a foundation by inquiring of him whether he made them. *Murphy* v. *St. Louis, I. M. & S. Ry. Co.,* 92 Ark. 159, 122 S. W. 636.

Appellants rely on the cases of *Midland Valley R. Co.* v. *Lemoyne,* 104 Ark. 327, 148 S. W. 654, and *Sharpensteen* v. *Pearce,* 219 Ark. 916, 245 S. W. 2d 385. In those cases we held that it was proper for a party to contradict either his own unfavorable testimony or that of his own witness by the substantive testimony of other witnesses, but there was no attempt at impeachment by proof of contradictory statements of the witness sought to be discredited as is the case here. Although appellants admit that they noticed inconsistencies in the testimony of Mrs. Britt and other testimony previously given, they say they had no reason to believe that it was untrue at that time and could not, therefore, plead surprise. The fact remains that the testimony which they sought to discredit three years later, and after the death of Mrs. Britt, was unfavorable and prejudicial to the interests of their clients. The further fact that Mrs. Britt was never afforded an opportunity to explain or refute the alleged contradictory statements, is one of the basic reasons for requiring that a proper foundation be

laid for the impeachment of her testimony. *Murphy* v. *St. Louis, I. M. & S. Ry. Co., supra.* Appellants also say that the testimony of the two daughters was admissible as pedigree evidence, but the general rule is that the previous inconsistent statements of a witness cannot be accorded any value as substantive evidence. 58 Am. Jur., Witnesses, § 804.

We have again reviewed the testimony given by Mrs. Britt in the first hearing in the Probate Court. The testimony itself refutes the contention that she was mentally exhausted when she gave it. She required no leading and her answers were clear and direct. Although she did become annoyed on direct examination when counsel persisted in repeating the same questions, any other witness might have reacted in the same manner.

On the whole record, close factual questions are presented upon highly conflicting testimony relative to the hazy happenings of a hundred years, or more, ago. The chancellor heard and observed most of the witnesses and was in a better position than this court to judge credibility. We cannot say that his findings are against the preponderance of the evidence.

Since all the newly discovered evidence asserted as a basis for the motion to set aside the probate judgments and for a new trial was produced in the chancery suit, and since we have determined that such evidence was insufficient to overcome the *prima facie* evidence produced in the probate action, it necessarily follows that the motion was properly denied.

The decree of the Chancery Court and the judgment of the Probate Court are, therefore, affirmed.

STEWARD *v.* RUST.

4-9918 252 S. W. 2d 816

Opinion delivered December 1, 1952.

[redacted]

Barber, Henry & Thurman, for appellant.

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

WARD, J. Suit was brought in the Pulaski Circuit Court by appellant, Steward, asking to be adjudged a duly elected member of the Board of Public Affairs of the City of North Little Rock. The Court, without a jury, held against his contentions and he prosecutes this appeal for a reversal.

Ark. Stats., §§ 19-1020 and 19-1022, provide for such a Board to be composed of the Mayor, as Chairman, and two citizens to be elected by the City Council, clothed with power to make purchases and execute contracts for the City. The dispute which precipitated this litigation arose as hereinafter set out.

On January 14, 1952, being the regular day for the election of a Board member, a resolution, filed on the 9th, nominating appellee as a member was presented to the Council but was rejected by a recorded vote of five

to three. Thereupon one of the councilmen nominated appellant for the position and he was chosen by a *viva voce* vote of five to three. Three days later the Mayor filed with the City Clerk his written veto of the action of the Council in selecting appellant. At the next regular meeting of the Council on January 28th, the minutes of the first meeting were read and, after considerable discussion, a motion was made and carried by a vote of five to three to "disapprove" that portion which dealt with the nomination and selection of appellant. Objection to this procedure was made at the time by one of the councilmen. Then, at this same meeting, a resolution which had been filed with the Clerk on the 17th was adopted electing appellee as a member of the Board.

The principal arguments made by both sides and the issues which we shall discuss will, for convenience, be grouped under the following three headings: First, was appellant's election on the 14th by an oral motion a sufficient compliance with the law?; second, what was the effect of the action of the City Council on the 28th wherein the Council attempted to discharge appellant by "disapproving" the minutes of the previous meeting?; and, third, what was the effect of the Mayor's veto?

First: In our opinion the election of appellant on the 14th was valid up to that point. It is not disputed that he received a sufficient number of votes as required in such instances by Ark. Stat., § 19-905, but his nomination was not presented in writing as in the case of appellee. Appellee says that, under the authority of *Hill* v. *City of Rector,* 161 Ark. 574, 256 S. W. 848, the election was void because no resolution was first presented. This case, however, does not define a "resolution." In our opinion a resolution, particularly when used to express a ministerial act by a deliberative body, need not partake of any definite form and need not be a written instrument. This Court, in *Allen* v. *Morton,* 94 Ark. 405, 127 S. W. 450, which involved the election of a treasurer of the University of Arkansas pursuant to a state statute, used this language:

"Correctly speaking, his selection is an appointment. It is immaterial how he may be appointed if he is selected by a majority of the board at a meeting authorized by law to do so. The mode of selection does not make it more or less than an appointment by the board."

This court had under consideration a "motion" before a city council in *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718, and held it was in effect a resolution. In doing so the opinion quoted from *Village of Altamont* v. *Baltimore & Ohio Ry. Co.,* 184 Ill. 47, 56 N. E. 340, the following: "A resolution or order is not a law, but merely a form in which the legislative body expresses an opinion . . . mere ministerial acts may be in the form of a resolution." Other jurisdictions have been even more explicit in stating that an oral motion is a form of resolution. *Meade* v. *Dane County,* 155 Wis. 632, 145 N. W. 239 says: "An oral motion passed by a common council of a city thereupon becomes a resolution." It was likewise so stated in *Green Bay* v. *Brauns,* 50 Wis. 204, 6 N. W. 503.

It is contended by appellee that, in all events, the election of appellant on the 14th was void because a resolution, proposing his selection, was not filed previously pursuant to city ordinance, but, in view of our final conclusion, it is not necessary to discuss this contention.

Second. It is contended by appellee that even though appellant was duly elected on the 14th, he was in effect removed from office by the action of the City Council on the 28th when it voted to "disapprove" the minutes of the earlier meeting. We think, however, that if appellant was duly elected he could not be removed in the manner stated. The disapproval vote carried by five to three but § 19-1020, *supra,* requires a two-thirds majority.

In this connection it is also urged that the Council meeting on the 28th had a right, by a majority vote, to approve or disapprove the minutes of the earlier meeting. It appears to us from the record, however, that the Council did not try to disapprove the *minutes* but tried to disapprove what was actually done at the former

meeting. The City Clerk stated that the minutes of the former meeting were correct until they were disapproved.

Third. Finally it is contended by appellee that, regardless of the regularity of appellant's election on the 14th, and regardless of the effect of the attempted "disapproval" of the minutes on the 28th, the Mayor had a right to and did veto the action of the Council on the 14th, and that since the veto was not overridden by the Council, appellant is not a member of the Board and cannot, therefore, prevail in this action. A majority of the Court agrees with appellee in this contention.

Sections 19-1020 and 19-1022, *supra,* which create the Board of Public Affairs and define its powers and duties, are both a part of section one of Act No. 67 of the Acts of 1885. The second section of this same Act gives the Mayor the right to veto "any ordinance, resolution, or order adopted or made by the City Council . . . which in his judgment is contrary to the public interest." It cannot be disputed, of course, that appellant's election was by "resolution." Not only have we pointed this out before but appellant also insists that it is true. Since the same Act that creates the Board also gives the Mayor the power to veto and since the wording of the Act is plain and clear, we can see no reason why it was not intended to apply in the case before us.

The argument is advanced that to allow the Mayor the right of veto here would be to destroy the whole intent of the Act because it would give the Mayor a voice in selecting the members of the Board. The answer to this argument appears to be that the Legislature had the right to make any arrangements it saw fit to make. After all, the Act does give some degree of independence to the Council because it is given the right to override the Mayor's veto by a two-thirds vote.

The judgment of the trial court is affirmed.

Justice McFaddin concurs.

DRIVER *v.* KELLEY.

4-9910 252 S. W. 2d 809

Opinion delivered December 1, 1952.

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

Chas. L. Farish and *John G. Moore,* for appellee.

GRIFFIN SMITH, Chief Justice. The issue is whether a deed executed by father and mother to their daughter—an only child—should be cancelled, modified, or sustained in its entirety. It is also insisted that $1,600 in cash, or that portion not expended for the benefit of father and mother, should be returned by the daughter. The land aggregate is 78.5 acres.

John Kelley, 71 years of age at trial, is unable to read or write. Because of these handicaps his wife, Emma, looked after domestic matters requiring some degree of education. It is in evidence that Kelley could not count money when the amount was large, therefore Mrs. Kelley received payments intended for their mutual benefit, and family bills were paid by her. The couple had accumulated the $1,600 mentioned in the complaint and

its keeping and incidental expenditures from it were entrusted to Mrs. Kelley.

On October 24th, 1949, Mr. and Mrs. Kelley went to Charles Eddy, a notary public who had known them for more than a quarter of a century, and asked him to prepare the deed. In the suit for cancellation resulting in this appeal Kelley alleged that he was under the influence of his wife, that he did not want to part with the property, but finally consented that the deed be prepared when it was explained to him that effectiveness depended upon delivery—a transaction he vigorously denied with intimation that the daughter, Dorothy Driver, took the instrument from a trunk and had it recorded, and in some manner it was returned. The recited consideration was $1, and love and affection.

Mrs. Kelley died June 16, 1951, and shortly thereafter Kelley, while handling other papers, observed writing on the deed. He explained that, although he could not read, he recognized that the "recorded part of the deed" had been filled out. Efforts to induce Mrs. Driver to reconvey that property were unavailing and this suit followed.

Intimations in the brief are that the Kelleys executed the conveyance in order to qualify for state relief payments. They did not live on the land, but occupied a home on thirteen acres nearby. Mrs. Kelley had been in poor health for eight or ten years and had been hospitalized several times. Shortly before her final illness an argument arose regarding the accumulation of money ($1,600). There is testimony that Kelley refused to send his wife to the hospital unless the money were given to him. Mrs. Driver admitted having it, but instead of giving the containers to her father she pinned them to her mother's underclothing. After Mrs. Kelley's death Mrs. Driver turned over to her father $679.47 that remained after necessary bills had been paid. Included in proven payments was $450 to Dr. Linton.

The trial court was correct in finding that Mrs. Driver had accounted for the money.

We are not persuaded that Kelley was mentally incompetent, or that his wife's over-persuasion was an influence that should militate against the grantee. Neither do we accept the argument made by Kelley's counsel that no burden could attach to Mrs. Driver's action in deeding the land back to her father because, being an only child, ". . . she would thus have inherited the lands in a few years". In the meantime, of course, the grantee could otherwise dispose of the estate and proceeds.

There is evidence that the Kelleys, after execution of the deed, mentioned the fact that the land had been conveyed to their daughter.

Allen Driver, Kelley's son-in-law, testified that the grantors brought the deed to his home, told his wife it should be recorded and [assessments] changed on the tax books. Driver then effectuated recordatory details, brought the deed back, and later gave it to Kelley.

Dorothy Driver testified that she loved her father, "and I will do anything I can to help him. He can have the use of the land during his lifetime, although there is nothing whatever in the deed about it". She disclaimed any responsibility for the action of her father and mother in executing the deed, and emphatically denied spending any of the $1,600 for personal purposes. The grantors, she said, brought the deed to her and asked that it be recorded and assessments changed in such a way as to show who the true owner was, to the end that confusion in tax payments would not arise.

Since preponderating testimony does not disclose mental incapacity, undue influence, or an agreement by the grantee to maintain her father in consideration that she receive the land, the true status appears to be that Kelley has changed his mind. There is no delineation of title, hence the actual legal or equitable interest of Mrs. Kelley does not appear, although inferentially title was in Kelley and his wife's interest was dower and homestead unless the actual homestead attached exclusively to the thirteen-acre tract.

The deed, *prima facie,* was the grant of John and Emma Kelley. In the absence of evidence to the contrary we must assume that Mrs. Kelley's interest was proprietary; hence when she and her husband made the conveyance and when the deed was delivered, title vested in their daughter.

In her answer to John Kelley's complaint, Mrs. Driver said: "Defendant further states, without binding herself for any specific amount, that if her father, the plaintiff herein, was in need, that she would assist him in every way possible". The trial court seems to have treated this statement as having some bearing on the original grant, but since there is insufficient testimony of a competent character to show that Mrs. Driver, in 1949, consented to anything not expressed in the deed, we think Mrs. Kelley's wishes become of controlling importance.

Anything alien to the deed's provisions should not be judicially imposed upon the grantee because one party to the transaction now has a different conception of intent. Nor can Mrs. Driver's pleading be regarded as anything more than a moral obligation to assist her father to the extent of her ability when necessity arises.

Mrs. Driver's assurance in open court that she was willing for her father to have the land for life is different from the indefinite promise of support. Entity and the imposition of a life estate in Kelley's favor through the implied (if not wholly expressed) consent of Mrs. Driver present no practical difficulties. So we modify by vesting the fee in Mrs. Driver, subject to a life estate in her father. In other respects the decree is affirmed.

MAY *v.* ALSOBROOK.

4-9929 253 S. W. 2d 29

Opinion delivered December 8, 1952.

Rose, Meek, House, Barron & Nash, for appellant.

T. S. Lovett, Jr., and *Bridges, Bridges, Young & Jones,* for appellee.

ROBINSON, Justice. On March 20th, 1950, appellant, W. D. May, made a contract with Mabel Graham Knipe, whereby, in consideration of $1,000, to be applied on the purchase price, May was given an option to purchase about 1,900 acres of land in Lincoln County, for the total sum of $32,000. He was given ninety days, after the delivery of the abstracts, to notify the seller of any material objection, and was to pay the balance of $31,000 within ten days after the title was shown to be merchantable, or acceptable to him. Later, May paid an additional $500, and the option was extended to December 28, 1950. May did not have the balance of the purchase price, $30,500, and attempted to borrow that sum from appellee, W. R. Alsobrook. May contends that he obtained this money from Alsobrook by giving, as security for the loan, a deed to the property, and that it was agreed that Alsobrook would reconvey the property to May, upon payment of $30,500 and ten per cent interest. Alsobrook denies that he received the deed as consideration for a loan, but claims that he acquired the property by a *bona fide* purchase, with no agreement to deed the property back to May. The decree was in favor of Alsobrook, and May has appealed.

There is nothing in the deed itself which shows it to be in fact a mortgage. To ingraft on a deed, terms, conditions or a consideration not expressed therein, the evidence must be clear, cogent and convincing. *Gunnels*

v. *Machen,* 213 Ark. 800, 212 S. W. 2d 702; *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236. There must be something more than a mere preponderance of the evidence. *Fretwell* v. *Nix,* 172 Ark. 230, 288 S. W. 8, and *Viesey* v. *Wooten,* 220 Ark. 962, 251 S. W. 2d 593.

The question here is: does the extrinsic evidence, to the effect that the transaction was a mortgage, meet the requirements of the law in that respect? Alsobrook maintains that it was an outright purchase for the price of $32,000, thereby saving May the $1,500 down payment. May claims the transaction to be in fact a mortgage. There are circumstances supporting the contention of both parties, and to here abstract the testimony would unduly prolong this opinion.

At the time of the transaction between May and Alsobrook, James Nix was employed by May, who directed him to deliver the deed to Alsobrook early in the morning of December 28th. At the time of the trial, Alsobrook had sold the property to a third party, and Nix was then working for Alsobrook's grantee.

If Nix, who was called as a witness by appellant, testified truthfully about the circumstances of the delivery of the deed, appellant cannot prevail. He testified that at the time he delivered the deed, Alsobrook made it clear to him that he was accepting the deed only on condition that it was an outright purchase by him, with no strings attached, and told Nix to make that plain to May; that if there was any other understanding about the matter, to return his $30,500 draft which he delivered to Nix at the time. This was the amount needed to pay Mrs. Knipe on that date. Nix also testified that Alsobrook offered him the additional $1,500 to make up the $32,000, but that he would not accept it because he had not been instructed to do so. Nix further testified that before delivering Alsobrook's draft to Mrs. Knipe's attorney, he talked with May on the phone and told him of Alsobrook's message, and then May told him to deliver the draft to Mrs. Knipe's lawyer. On re-direct examination Nix further testified: "A. He (Alsobrook) told me if there were any strings attached, he instructed

me strictly, if there were any strings attached, to bring the draft back to him. Q. But that was the only thing said by him, if any strings were attached? A. He made it plain to me that he was buying the land. Q. As a matter of fact, did he say anything about buying the land? A. Yes, he made it plain that it was an outright purchase. Q. Didn't you tell Mr. Brockman and me, that the only thing he asked, is there any strings attached? A. He didn't ask me, he instructed me. He instructed me to find out from Mr. May if there were any strings, and if there was any whatsoever, for me to bring it back, for me to bring that money back."

The trial court had the opportunity to observe the witness' demeanor, appearance, mannerisms, candor, or lack of candor, and, consequently, was in a much better position than is this court to judge the credibility of the witness.

In view of Nix's testimony, we cannot say that the evidence in the case is clear, cogent and convincing that there was an oral agreement between the parties that Alsobrook would reconvey the property to May.

Affirmed.

Mr. Justice George Rose Smith not participating.

Ramsey *v.* Ramsey.

4-9893 253 S. W. 2d 219

Opinion delivered December 8, 1952.

Kenneth C. Coffelt, for appellant.

Ernest Briner, for appellee.

GRIFFIN SMITH, Chief Justice. The Chancellor found that when Daisy L. Ramsey deeded lands to her son, George T. Ramsey, in 1937, she was mentally competent. The action to cancel was brought by those who, but for the deed, would have inherited various interests. Nine children were born to T. F. and Daisy Ramsey. Certain individuals doing business as Capitol City Lumber Company, and the company as an entity, were made defendants because George Ramsey had sold timber for which $5,000 was received.

Daisy Ramsey had been married to T. F. Ramsey. The two were separated "in the early '20's". In 1928—a divorce having been decreed—the land now contended for was deeded to Daisy. Seemingly all parties at that time regarded Mrs. Ramsey as mentally competent, although there was testimony that as early as 1907 symptoms of nervousness were discernible. The witness who held this view thought another breakdown occurred in

1917, after which Mrs. Ramsey improved, but by 1925 she was again noticeably affected. Several "bad spells" were thought to have occurred from 1930 to 1935. Another witness thought Mrs. Ramsey got violent in 1934, and in 1936 and 1937 "she was in pretty bad shape".

This was the general trend of testimony by persons called by the plaintiffs (appellants here), although some of them did not notice any difference in Mrs. Ramsey's condition between 1928 and 1939 when she was committed to the Louisiana State Hospital at Pineville. Witnesses supporting the defendant's contention that his mother was competent had noted her conduct and habits for years and did not observe unusual tendencies or evidences of subnormal mentality. Opinion witnesses called by the plaintiffs, including a psychiatrist, did not think Mrs. Ramsey was capable of transacting business in 1937. Dr. Fletcher's answer to hypothetical questions was in line with beliefs expressed by lay-witnesses; but on the other hand there was no direct proof that rational periods did not exist unless general terms used by some of the witnesses are to be construed in that manner.

A circumstance tending to show that after receiving the deed George Ramsey considered that his brothers and sisters had a remaining interest is the fact that after selling the timber he (George) offered Ohlas W. Ramsey a check for $500 "for his part" if a quitclaim deed were delivered. Wilburn Ramsey asserted a similar offer, made in 1947. Wilburn testified that George settled with H. C. Ramsey, but H. C. did not say what he received.

A. L. Carson, justice of the peace who acknowledged the mortgage, executed by Daisy Ramsey to her son, testified that he had lived in Saline county since 1893 and had known Daisy ever since he came to the state. He lived within two or three hundred yards of her. Mrs. Ramsey came to him to have the acknowledgment taken and appeared "fair like myself—never very brilliant". From daily observations it was the opinion of this witness that Mrs. Ramsey acted like any ordinary person. Some of the defendant's witnesses admitted they had heard that Mrs. Ramsey "had spells", but these state-

ments were usually qualified by the remark that "she was always normal when I met her".

L. Jean Cook, a Texarkana lawyer, identified the deed Mrs. Ramsey executed in favor of George. Cook was a notary public in 1937 when Mrs. Ramsey and George came to his office. His stenographer prepared the deed. Mrs. Ramsey was not in the presence of this witness for a protracted period, but he did recall that after the business in hand had been finished there was talk about other matters. His best judgment was that Mrs. Ramsey was "all right mentally".

It was George Ramsey's contention that over a long period of time he had substantially assisted his mother. He had also helped personally and financially with the younger children. It was his mother's idea that the $800 mortgage be executed to the end that he be protected. In 1937 when the deed was delivered Mrs. Ramsey was 57 years of age.

We know judicially that 1932 and succeeding years prior to World War II were marked by a financial depression and that lands generally were not readily marketable at a satisfactory price.

We do not, of course, know that a particular tract of land was not desirable at a specified time. But in the case at bar George Ramsey testified that some of the value evidenced by the mortgage came into existence when he improved the farm house in 1932. The rear portion of the main dwelling had been built in 1893. Two rooms were added in 1907, making five rooms in all. The work of remodeling begun in 1932 continued for almost a year. It included an extra room, painting, canvassing and papering. A large front porch and a long, narrow back porch were added. With a new roof the improvements had cost a great deal more than had been anticipated. While this work was going on he bought all of the groceries for the family and paid some of his relatives for work they did. Sixty-four checks were referred to representing expenditures of more than $3,000 from 1943 to 1948. The plaintiffs, he said, knew that the work was being done and they stood by and per-

mitted it to continue. In summation Ramsey estimated that he had spent more than $9,000 for improvements.

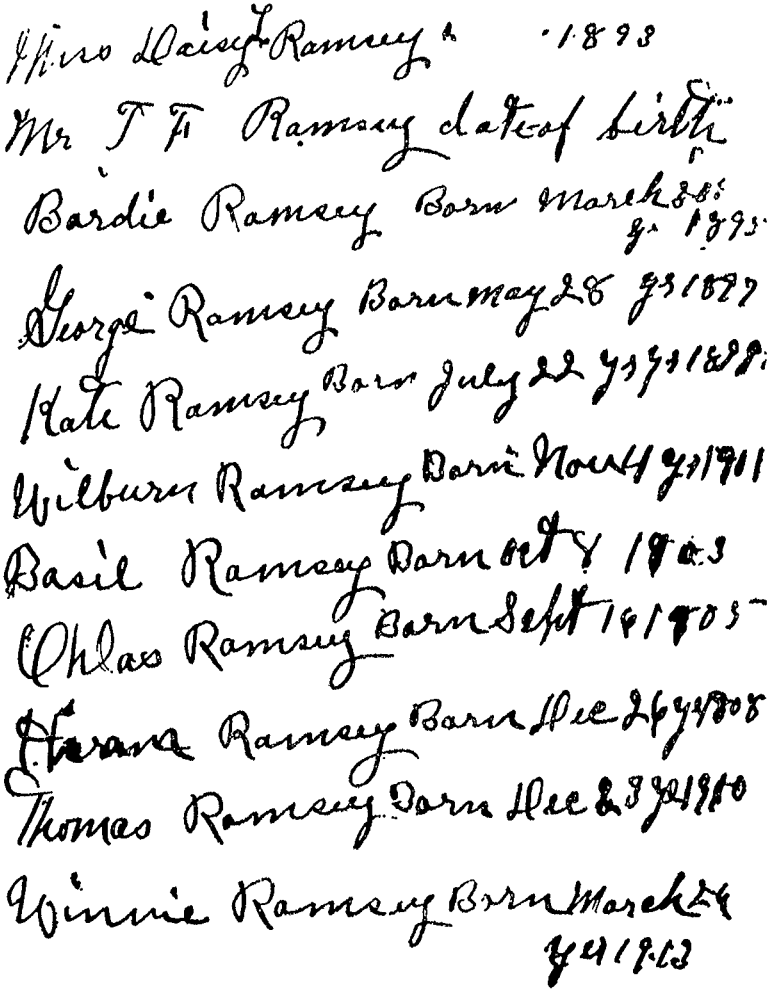
Mental capacity to dispose of property, and the existence or absence of undue influence, are factual considerations. There is convincing proof here that George was favored, but the evidence is just as convincing that he entertained greater solicitude for his mother's welfare than did the other children, thereby meriting a somewhat higher degree of affection and material consideration than would otherwise have been the case. For 27 years George had been a postal transportation clerk receiving a regular salary. There is preponderating evidence that he had the financial means to do the things now claimed to have resulted in benefits to his mother, and the Chancellor could have found that the other children were either unable or unwilling to make cash expenditures during the depression years.

That Mrs. Ramsey was not under restraint prior to 1939 is undisputed, and probabilities disclosed by testimony are that in 1932 the land was not worth a great deal more than the amount for which it was voluntarily mortgaged.

An approved definition of mental capacity in its application to the issues here is to be found in *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539. It includes a recollection of the persons related to the grantor or testator by ties of blood and affection, "and of the nature of the claims of those who are excluded from participating in the estate". There are citations to cases where in effect it was said that the testator must have capacity to retain in memory, without prompting, the extent and condition of his or her property, and comprehend to whom it is being devised; and [she] must be capable of appreciating the deserts and relations [to her] of others who are being excluded from participation in the estate.

Tested by these rules we are not able to say that the Chancellor reached an erroneous result. As a part of the record there appears a writing executed by Daisy Ramsey in 1937 about the time the deed was delivered. George

Ramsey testified that he asked his mother for a memorandum of dates (births and deaths) respecting immediate members of the family. Paper, pen, and ink were supplied and she made out the list photographed below:


Hiro Daisy Ramsey 1893
Mr T F Ramsey date of birth
Bardie Ramsey Born March 28 yr 1893
George Ramsey Born May 28 yr 1877
Kate Ramsey Born July 22 yr 1888
Wilburn Ramsey Born Nov 1 yr 1911
Basil Ramsey Born Oct 9 1903
Chlaos Ramsey Born Sept 14 1905
Verna Ramsey Born Dec 26 yr 1908
Thomas Ramsey Born Dec 23 yr 1910
Winnie Ramsey Born March 24 yr 1913

There is no contradiction of testimony given by George that the request was willingly complied with and the work executed without suggestion or prompting—that is, no contradiction other than that implied by law when an interested witness is testifying.

If, as the Chancellor believed, Mrs. Ramsey was able in 1937 to remember these names, dates, etc., and to follow a course of social demeanor avouched by many of the witnesses, her action in executing the deed was voluntary and she had sufficient mentality at that time to meet the tests heretofore referred to.

Affirmed.

CRITTENDEN *v.* LYTLE.

4-9897 253 S. W. 2d 361

Opinion delivered December 8, 1952.

Reinberger & Eilbott, for appellant.

Coleman, Gantt & Ramsay, for appellee.

WARD, Justice. The only question involved in this appeal is the interpretation of the words "my heirs" found in the last will and testament of Virginia C. Wilson.

Mrs. Wilson died on December 4, 1950, leaving a will, the material portion of which is set out below:

"II. I will, devise and bequeath to Martin Wilson and Frank Wilson, brothers of my deceased husband, R. K. Wilson, and to Cora Wilson and Mrs. Flora Norton, sisters of my deceased husband, R. K. Wilson, an undivided one-half of the remainder of my properties of every kind and nature, which I may own at the time of my death, in equal shares, that is, to each of said four devisees an undivided one-eighth interest in said remainder of my estate; and the other half of said remainder to *my heirs.*" [Emphasis supplied.]

The reason for the insertion of the words "the remainder of my property" in the above portion of her will was that the first paragraph directed the payment of all her debts and funeral expenses, and no other significance attaches.

Mrs. Wilson died seized and possessed of many hundreds of acres of valuable real estate including residential and business property. She also owned, at her death, a large amount of personal property, but it is not involved in this litigation.

The heirs of Mrs. Wilson are numerous and are determined by a somewhat involved process, but there is no dispute between the parties as to who they are, and so for the purpose of this opinion, the delineation presently set out will suffice.

Mrs. Wilson never had any children, she left surviving no brothers or sisters [nor the descendants of any], and she was predeceased by her parents and grandparents. Her only heirs, therefore, were those of her father and mother. On her father's side her only heirs were his four brothers and one sister [or the heirs of those that were deceased].

For all practical purposes and for clarity and convenience we may hereafter speak of Mrs. Wilson as having left five heirs on her father's side. These five heirs [or sets of heirs] are the appellants in this case.

Mrs. Wilson's mother had no brothers and only one sister, and from this line of ancestors there is only one heir. This one heir is R. S. Lytle, who is the appellee here. So, in the manner that we speak of five heirs on her paternal side, we can also speak of one heir on Mrs. Wilson's maternal side.

It is conceded by both sides that the will effectively vested the brothers and sisters of Mrs. Wilson's husband with an undivided one-half interest in all her real estate, leaving the other undivided one-half interest to the six heirs [or sets of heirs] set forth above. Hereafter we shall refer to the undivided one-half interest in Mrs. Wilson's real property which she left to her heirs as "the estate" or "her estate."

The question presented to us is whether the estate shall be divided among the heirs of the deceased in six equal portions, as contended by appellants, or one-half to the heirs on her father's side and one-half to the heir on her mother's side as contended by that heir who is also the appellee.

The question of the proper division of the estate arose out of a partition suit filed in Chancery Court by the four brothers and sisters of the deceased's husband who held togther the undivided one-half interest. In the process of litigation it was found that the land could not be divided in kind so a sale was ordered and had, and the division now relates to the proceeds of the sale which is treated as realty. The Chancellor held that the appellee, R. S. Lytle, as the only heir on the maternal side, was entitled to one-half of the estate and that the five heirs on the paternal side were together entitled to the other half. It is this decision that appellants seek to reverse, contending that one-sixth of the proceeds of the sale should go to each of the said six heirs [or sets of heirs].

Appellants base their persuasive argument on the well-established rule for the construction of wills as set forth in numerous texts and decisions, citing 57 Am. Jur., p. 726, and *Hoyle* v. *Baddour,* 193 Ark. 233, 98 S. W. 2d 959; *Parker* v. *Wilson,* 98 Ark. 553, 136 S. W. 981, and *Union & Mercantile Trust Co.* v. *(Moore) Hudson,* 143 Ark. 519, 220 S. W. 820. The general rule referred to, with which we are in complete accord, is, broadly stated, that courts must ascertain the intent of the testator and give effect thereto, and ordinarily the intent must be derived from the language of the will. The rule has been stated many different ways as is well illustrated by short quotations from the above citations. In Am. Jur. we find "the chief object and purpose in construing a will is to ascertain and give effect to the intention of the testator" and "if the testator's intent can be clearly perceived or ascertained it must prevail." In the opinion in the *Hoyle* case we find this: "We have frequently held that in the construction of wills courts will endeavor to arrive at the intention of the testator, which intention is generally to be gathered from the language used." The *Parker* case states the rule this way: "In construing the provisions of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will . . ."

Based on this rule of "intent" appellants point out several reasons to support their view that Mrs. Wilson intended her property to be divided in six equal moieties. First, she specified that each brother and sister of her husband should take equally. Second, it is not reasonable to think Mrs. Wilson intended for appellee, who was only a cousin, to get a larger portion of her estate than one of her uncles. Third, the fact that Mrs. Wilson divided her estate equally between her heirs and her husband's heirs, and then gave equal portions to each of the latter, evidences a clear intent on her part to treat all her heirs with an impartiality inconsistent with the Chancellor's decision.

We are not in accord with appellants' contention. In the first place it seems to us there is little in the language of the will that evidences the intention attributed to the testatrix. On the other hand, it could be argued with some reason that the testatrix evidenced an intent *not* to divide her property among her heirs in equal portions since she failed to so state, and that such failure was no oversight since she did specify an equal division among the heirs of her husband. The principal reason, however, why we cannot agree with appellants' view is that there are other rules, in addition to the one mentioned, governing the interpretation of wills which we think apply here and which compel an affirmance of this case.

One such rule is that where the language of a will is clear there is no necessity for trying to arrive at any intention other than that expressed by its language. In the case of *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546, we find this rule forcefully stated in the following words:

"The polestar of the court, in construing a will, should always be the intention of the testator; and the will itself is ordinarily the only place to which the court should resort to find such intention. If it be in the will expressed in language that is clear and unmistakable the court should go no further, but should put in effect the intention of the testator, as thus clearly set forth in his will."

It seems to us that there is nothing unusual or ambiguous about the language used in Mrs. Wilson's will, as examination of the will discloses. The only language in the will which might cause any uncertainty are the words "my heirs." It may, in fact, be possible that some people, including the testator in this instance, do not comprehend the full import of these words, but it cannot be said they are not commonly used. Certainly there is nothing in the will which indicates Mrs. Wilson did not understand the meaning of the words she used, and we must therefore presume that she did. In the

early case of *Moody* v. *Walker,* 3 Ark. 147, this court said:

"When technical phrases or terms of art are used, it is fair to presume that the testator understood their meaning, and that they expressed the intention of his will, according to their import and signification. When certain terms or words have by repeated adjudication received a precise, definite and legal construction, if the testator in making his will use such terms or similar expressions, they shall be construed according to their legal effect . . ."

The words "my heirs" used in the will, like the word "heir," have a technical meaning which has been many times defined by the courts. Their meaning in a will is well stated in 57 Am. Jur., 908, § 1369, as "those persons who would take the property of the person designated as ancestor in case of his death intestate." The same definition of the word "heir" when used in wills and other legal documents has been given, sometimes with different phrasing, by the courts of this and other states. See *Emery* v. *Emery,* 325 Ill. 212, 156 N. E. 364; *In Re Beck's Estate,* 225 Pa. 578, 74 A. 607; *Johnson* v. *Knights of Honor,* 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974; and *Dyer* v. *Lane,* 202 Ark. 571, 151 S. W. 2d 678.

By giving the words "my heirs" in Mrs. Wilson's will the meaning described above, it follows that her estate must go to the same persons to whom it would have gone had she died leaving no will. If she had left no will the distribution of her state would have been governed by Ark. Stat., § 61-111. Under this statute and under the facts in this case, one-half must go to appellants and the other half must go to appellee, R. S. Lytle.

It is conceivable that in some instances apparent inequities may result from construing certain words or phrases according to their recognized technical meanings, but, in the language used in *Moody* v. *Walker, supra,* ". . . if this was not the case, titles to estates would be daily unsettled, to the ruin of thousands. It

is all-important to the interest of society that the rules of property should be definitely settled, and that they should possess uniformity and consistency."

There are instances where words used in a will should not be construed according to their technical meaning, but only where explanatory words are used to qualify them or give them a different meaning. This was recognized in *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A., N. S. 782, and in many other decisions of this court. There are no such explanatory words in the will under consideration which bring it within this exception.

Some question was raised regarding the disposition of certain ancestral property coming to the testator from the maternal side of her family, but having disposed of the main issue as we have, it is not questioned that the disposition of this property is governed by Ark. Stat., § 61-110.

No error appearing, the decree of the Chancellor is affirmed.

GOODMAN *v.* STOREY, SHERIFF.

4716 254 S. W. 2d 63

Opinion delivered December 8, 1952.

Rehearing denied January 12, 1953.

Ivan Williamson & Ben B. Williamson, for appellant.

Ike Murry, Attorney General, and *Wm. M. Moorhead,* Assistant Attorney General, for appellee.

ROBINSON, Justice. Petitioner seeks to review the action of the trial court in refusing his release from prison on a petition for a writ of *habeas corpus*. He was charged in a justice of the peace court with illegal co-habitation and also "selling intoxicating liquors in a dry territory. Section 48-912." The defendant was represented by counsel, and there was a plea of guilty to both charges. A fine of $100 and costs was assessed, but suspended on the illegal co-habitation charge, and a fine of $100 and costs, and a suspended six month jail sentence, were imposed on the liquor selling charge. Later, petitioner got into further trouble, and the suspended sentences were revoked. He then filed a petition for a writ of *habeas corpus* in circuit court, seeking his release from prison.

It is not necessary at this time to discuss the authority, or lack of authority, of the justice of the peace to suspend any part of the sentences.

It is the contention of petitioner that he was charged with selling liquor in a dry territory and that the penalty, as provided by Ark. Stats., § 48-803, applies but that no jail sentence can be assessed for a first offense under that section, and, furthermore, that he has paid the fines and costs assessed against him. It developed at the hearing in the *habeas corpus* proceedings in circuit court that the petitioner had paid the fine in the liquor case and the costs in both cases, but the fine in the alleged co-habitation case had not been paid. Moreover, he was not committed to jail until July 5th and filed a petition for *habeas corpus* July 11th, hence he could have served only a few days of the six months jail sentence.

The liquor charge, as it appears on the docket of the justice of the peace, is as follows: "selling intoxicating liquor in a dry territory, Section 48-912." Section 48-912 obviously refers to that section of Ark. Stats. which provides: "Any person who shall sell, barter, exchange or give any intoxicating alcoholic liquor without having a valid license as provided by this act . . . shall, in addition to losing his license, be deemed guilty

of a misdemeanor and, upon conviction, shall be fined not less than fifty ($50.00) dollars, nor more than five hundred ($500.00) dollars, or imprisoned for not exceeding six (6) months, or both so fined and imprisoned in the discretion of the court or jury." At the time of the plea of guilty, a penalty authorized by § 48-912, was imposed. The court had jurisdiction to assess a penalty under either § 48-803 or § 48-912; and the court had jurisdiction of the defendant. If the justice of the peace imposed a sentence authorized by § 48-912, and the defendant claimed he pleaded guilty to a charge for which § 48-803 was the penalty, the remedy was by appeal; but the defendant did not appeal.

In the case of *Ex parte O'Neil,* 191 Ark. 696, 87 S. W. 2d 401, the defendant pleaded guilty to murder in the first degree and, without empaneling a jury to assess the penalty, as provided by statute in such cases, the court sentenced the defendant to life in the penitentiary. The defendant attempted to set aside the judgment in a *habeas corpus* proceeding. In denying the petitioner the relief he sought, this court said: "Erroneous judgments are not necessarily void judgments. If the court in which the erroneous judgment is entered has jurisdiction of the subject-matter and the parties thereto, such judgment is voidable, but not void, 33 C. J. 1078, § 39, 15 R. C. L. 835, § 310. The circuit court of Jackson County had jurisdiction of the subject-matter, and of the person of the petitioner, and the judgment entered, though it may be erroneous, is not void, and its validity can only be brought in question by appeal or writ of error."

In *Lancaster* v. *State,* 71 Ark. 100, 71 S. W. 251, defendant pleaded guilty to an indictment charging murder in the first degree and was sentenced by the court to be hanged. The judgment was set aside by bringing the cause to this court by writ of error and not by a *habeas corpus* proceeding.

In Brandon, *Ex parte,* 49 Ark. 143, 4 S. W. 452, the court said: ". . . an application for *habeas corpus* cannot be made to perform the function of an appeal, or

writ of error, in correcting errors and irregularities at the trial. To authorize the judge of the superior court to interfere and discharge a convicted prisoner in this summary fashion, the sentence must be a nullity, or the court which imposed it must have been without jurisdiction."

In the case at bar the justice of the peace had jurisdiction and the sentence was not a nullity.

Affirmed.

Mr. Justice WARD dissents.

THE HOME COMPANY *v.* LAMMERS.

4-9937 254 S. W. 2d 65

Opinion delivered December 8, 1952.

Rehearing denied January 12, 1953.

Sam Rorex and *L. P. Biggs,* for appellant.

John F. Gibson and *Thomas L. Cashion,* for appellee.

GEORGE ROSE SMITH, J. This is an action in unlawful detainer brought by the appellants to recover possession of Sterling Plantation, which comprises more than a thousand acres. When the complaint was filed in February of 1951 it was alleged that the annual rental value of the property is $20,000, and the plaintiffs obtained a writ of possession by posting a $40,000 bond. Ark. Stats. 1947, §§ 34-1506 and 34-1507. The defendant did not file a cross-bond in order to retain possession during the pendency of the suit. By answer and cross-complaint the defendant admitted the above rental value but contended that he was entitled to possession during 1951, 1952, and 1953. He further asserted that his eviction at the commencement of the suit was wrongful and had damaged him in the sum of $16,531. Trial before a jury resulted in a verdict for the defendant for $17,000, upon which the court rendered judgment for $16,531, the amount sued for by the defendant. It is now contended by the appellants' counsel, who did not participate in the trial below, that the court should have entered judgment for the plaintiffs notwithstanding the verdict and in the alternative that the judgment is excessive.

The Home Company is a corporation owned by the other two appellants, G. B. Oliver, Jr., and his wife. On February 4, 1948, this company leased the plantation to Lammers for 1948, 1949, and 1950, with an option by which Lammers might extend the lease for three additional years by giving six months notice. In both the pleadings and the proof the pivotal issue was apparently whether Lammers had exercised his option to extend the term.

Oliver testified in effect that Lammers' operation of the farm was satisfactory in 1948 and 1949, but in 1950

Lammers planted only about 300 acres and also wrongfully paid personal debts with money advanced by Oliver for the making of a crop. According to Oliver, Lammers did not request a renewal of the lease; instead he and Oliver orally agreed that during 1951 Lammers would retain only the 300 acres that had been planted to rice in 1950, the rest of the land to be turned back to the lessor. Early in 1951 Oliver had an opportunity to sell this and another farm for $200,000, and then for the first time Lammers contended that he had exercised his privilege of extending the lease for three years. Oliver, treating this assertion as a repudiation of the oral contract for 1951, elected to terminate that agreement and brought this suit to regain possession. Oliver's testimony is corroborated by the purchasers who bought the two farms.

Lammers' version is directly at variance with Oliver's. Lammers testified that on several occasions, all more than six months before the end of the primary term, he notified Oliver that he was exercising his option to renew. Lammers says that Oliver assured him that he could stay for life if he wanted to. And naturally Lammers denies the making of the superseding oral agreement by which he was to retain 300 acres for 1951 only.

On this proof there would ordinarily have been a clear-cut issue for the jury; that is, had the lease been extended? But when the time came for the case to go to the jury three forms for the verdict were suggested, apparently by the court. Form 1 was an outright finding for the plaintiffs. Form 2 was an equally comprehensive finding for the defendant, with an assessment of damages for the eviction in 1951 and a restitution of possession for 1952 and 1953. Form 3 read as follows:

"We, the jury, find that the original contract was not renewed but that a new contract was entered into between the parties hereto for the year 1951 and assess the defendant Lammers' damages in the sum of . . ."

The plaintiffs at first objected to Form 3, but when the court then offered to discard it the plaintiffs with-

drew their objection and asked that this form be given to the jury. This was done, and the jury later returned its verdict on the third form, fixing the damages at $17,000. The plaintiffs at once moved for judgment notwithstanding the verdict, upon the ground that since the jury had found that the lease had not been renewed the defendant was not entitled to recover under his own theory or that of the plaintiffs. In the latter connection the court had instructed the jury that if Lammers, after having made the oral contract for 1951, later sought to extend it to the whole plantation, the plaintiffs were justified in demanding the return of the entire acreage and in bringing this action. The court overruled the motion for judgment notwithstanding the verdict.

On this first point the appellants' basic contention is that the submission of Form 3 was in substance the propounding of a special interrogatory to the jury, and hence the court should have entered judgment for the plaintiffs in view of the jury's finding that the original contract had not been renewed. It is evidently true, as argued by the appellants, that this finding, if it stood alone, would prevent Lammers from recovering under the testimony of either party. But it must be remembered that the plaintiffs requested the submission of Form 3, and we have often held that a litigant is not entitled to a new trial on account of an error which he induced the trial court to commit. For instance, when the losing party has asked that a particular issue be submitted to the jury he cannot complain that all the evidence shows the verdict on this issue to be wrong. *Western Union Tel. Co.* v. *Cowardin,* 113 Ark. 160, 168 S. W. 1133. That principle is controlling here unless it can be said that Form 3 was merely a special interrogatory.

We are unable to construe this form so narrowly. To begin with, by its language Form 3 is more than a response to a specific question. It includes also a finding upon the whole case, and it is familiar law that a general verdict is an indivisible entity. *Martin* v. *Street Imp. Dist. No. 349,* 180 Ark. 298, 21 S. W. 2d 430. Fur-

thermore, the attendant circumstances rebut the suggestion that Form 3 was nothing more than an inquiry. Had this form not been used the plaintiffs stood either to win a complete victory under Form 1 or to suffer a complete defeat under Form 2, the latter entailing not only an award of damages for 1951 but also the loss of possession for two more years. In this situation Form 3 offered the jury something in the nature of a compromise which, although inconsistent with the theory of either litigant, nevertheless permitted an award of damages to Lammers without restoring his possession for two years. By requesting the submission of Form 3 the plaintiffs in effect represented to the jury that it was possible for Lammers to recover damages even though the original contract had not been renewed. The jury acted upon that understanding, and it is now too late for the plaintiffs to insist that in legal effect the jury's award of substantial damages to Lammers upon Form 3 is exactly the same as a verdict for the plaintiffs upon Form 1.

In the alternative the appellants contend that the judgment is excessive. Had the case gone to the jury under correct instructions there might be merit in this contention. We have held that when the tenant prevails in unlawful detainer his measure of damages is the difference by which the rental value of the property exceeds the agreed rent, together with such special damages as may be incident to the unlawful eviction. *McElvaney* v. *Smith,* 76 Ark. 468, 88 S. W. 981. Here Lammers offered proof of special damages slightly in excess of $1,000, but there is not much evidence to indicate that the rental value of the plantation exceeded the crop rent that he had agreed to pay. Upon such proof the tenant's general damages would ordinarily be nominal. *Rose* v. *Wynn,* 42 Ark. 257.

The trouble in the case at bar is that the plaintiffs brought about their predicament by obtaining an erroneous instruction. At the plaintiffs' request the court gave a charge which told the jury that the parties had agreed that the rental value for one year was $20,000;

that if Lammers were found to have been wrongfully evicted the jury in fixing his damages should consider that it was his duty to cultivate as much of the plantation as possible; and that the jury might "deduct the rental that the [plantation] did produce or should have produced from the $20,000, which will establish the damages, if any, Lammers has sustained."

We do not regard this as a correct declaration of law, but upon the theory of this instruction the jury's verdict is unquestionably supported by the evidence. By the unmistakable language of this instruction the jury were given the choice of deducting from $20,000 either what the land "did produce" or what it should have produced. The proof shows that in 1948, 1949, and 1950 the plantation returned only about $4,000 a year to the landlord. Thus the jury were given the privilege of fixing Lammers' principal damages at about $16,000, and the special damages are enough to bring the total up to the amount of the judgment. It is with much reluctance that we affirm this judgment, since we feel that Lammers is being more than compensated for his eviction; but we have held in dozens of cases that a party cannot complain of error in instructions of his own asking. This rule is so well settled and so obviously necessary to the orderly conduct of litigation that we are left with no alternative.

Affirmed.

STRANGE *v.* CORLEY.

4-9933 253 S. W. 2d 337

Opinion delivered December 8, 1952.

Rehearing denied January 12, 1953.

Kincannon & Kincannon, for appellant.

Gean & Gean, for appellee.

J. Seaborn Holt, Justice. Appellees, Carl M. Corley and A. T. Crouch, as partners, sued Mark J. Strange, doing business as Strange Welders, in replevin, alleging ownership of a mower-tractor valued at $1,650 and damages.

Appellant answered denying every material allegation in the complaint and in a cross-complaint pleaded a lien on the property in the amount of $858.50 for alleged labor performed and materials furnished, under § 51-404, Ark. Stats. 1947. Appellees answered the cross-complaint with a general denial.

A trial before the court (a jury having been waived by agreement) resulted in a judgment for appellees for the property, or in the event appellant was unable to make return, for the property's value, which the court found to be $1,650. Appellant's cross-complaint was dismissed and jurisdiction reserved to determine any question of damages claimed by appellees. From the judgment is this appeal.

As we view the record, the primary and decisive question is one of fact. Therefore, if there appear, from all the testimony, when viewed in its most favorable light in favor of appellees, any substantial evidence to support the findings and judgment of the trial court, we must affirm. In this connection, our rule is well established that the findings of the trial court have the same force and effect as the jury's verdict.

There was evidence to the following effect: On June 20, 1951, appellees sold to W. E. Blain the tractor-mower in question for $1,650. Blain, in payment, at the time executed in favor of appellees a lien "installment note" in which appellees retained title to the property until the note was fully paid. The note became due and was unpaid.

Blain, who held a patent for a "greens cutter" machine, engaged the services of appellant (Welders) to build (or manufacture) a model cutter according to plans and specifications which he furnished appellant. He also instructed appellant to build the machine so that it could be easily attached to the frame of the tractor-mower, above, as well as to any tractor-mower of that model, and for this purpose, he, Blain, delivered the tractor-mower, above, which he had purchased from appellees, to appellant. Thereafter, appellant constructed the "greens cutter" and by boring some holes in the frame of the mower (at a nominal labor cost of some fifteen or twenty dollars, the only work done on the tractor-mower) it could be easily attached by bolts (or welding) to the tractor-mower, or a similar model. It is appellant's contention, in the circumstances, that he has a lien on the tractor-mower for his labor and materials in the building of the "greens cutter" because Blain, who engaged him to build the cutter, was either appellees' partner at the time, or was acting on the authority of appellee, Corley, (one of the partners), or on the authority of D. C. Chitwood, (appellees' sales manager), who was acting as appellees' authorized agent, and that appellees were estopped. We do not agree to any of these contentions.

Appellees stoutly denied any partnership arrangement with Blain, or that he, or any one with authority acted as their agent in Blain's dealings with appellant. Appellant's testimony, in some instances, tended to contradict that of appellees. However, as indicated, any such conflicts were resolved by the trial court in favor of appellees.

It could serve no useful purpose to attempt to detail the testimony or analyze its effect. It suffices to say, that on the whole, we find it substantial and ample to support the court's findings and judgment.

Affirmed.

WIMBERLY *v.* NORMAN.

4-9926 253 S. W. 2d 222

Opinion delivered December 8, 1952.

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

William S. Arnold, for appellee.

MINOR W. MILLWEE, Justice. Appellants are the widow and heirs of R. W. Wimberly who died intestate in 1947. Appellees are the heirs and devisees of George Norman and E. W. Gates, deceased.

Appellants brought this suit against appellees to quiet their title to a 40-acre tract of land described as the NE¼ of the SE¼ of section 18, township 17 south, range 8 west, in Ashley County, Arkansas. They alleged that R. W. Wimberly acquired title by warranty deed executed in 1902 and by adverse possession of the tract from that date until his death in 1947. They also alleged that a tax deed to the land issued to George Norman and E. W. Gates in 1904 was void for numerous reasons. Appellees denied these allegations and asserted that appellants' complaint was barred by limitations and laches. Trial resulted in a decree holding that appellees had superior title to the lands and ordering dismissal of appellants' complaint.

In 1899 R. W. Wimberly moved with his family into a house on an 80-acre tract of land lying immediately north of the forty in controversy and described as the S½ of the NE¼ of section 18, township 17 south, range 8 west, under a rental contract with Amanda Thompson. On November 27, 1902, Amanda and Maria Thompson conveyed the 40 acres in controversy and the 80 acres north of said forty to R. W. Wimberly. In June, 1902, the 40 acres in controversy forfeited for the taxes of 1901 and was purchased at the tax sale by George Norman who assigned a half interest in the certificate of purchase to E. W. Gates. The land not having been redeemed, a clerk's tax deed was executed and delivered to Norman and Gates on June 21, 1904. The validity of this tax deed is now conceded. While a few of the tax payments between 1908 and 1913 were not shown, the county records having burned about 1922, it is fairly certain from the record that Norman and Gates paid the

taxes each year from 1903 to 1913 and it is undisputed that they paid said taxes from 1914 to 1946.

In 1919 R. W. Wimberly and wife executed an oil and gas lease covering the 80 acres lying north of the forty in controversy and another 40-acre tract which Wimberly then owned lying east of the 40 acres in controversy. In 1920 they executed a mortgage on the same lands which did not include the forty in controversy. This mortgage was foreclosed in 1928 and the lands involved therein were eventually purchased by Luther Wimberly, one of the appellants. R. W. Wimberly continued to reside in a house located on the 80-acre tract north of the forty in controversy, until his death in 1947 and his widow and some of their children have continued to live there since. There is a sharp dispute in the evidence as to their use or possession of the 40 acres in controversy from 1904 to 1921. Some of the appellants testified that a rail fence enclosed a part of the forty in 1902, and that R. W. Wimberly cultivated small patches on the tract until about 1921 when he quit farming; that the rail fence subsequently burned and in 1925 Wimberly constructed a wire fence along the north boundary of the 40 acres in controversy; that since 1925 they have continued to cut fire wood and fence posts from the forty and that they maintained a small pasture which ran down to a water hole on the forty until about 1942.

L. L. Morris, a timber cruiser for a lumber company who had been familiar with the tract since 1908 and had looked after it and other lands for George Norman, testified that he had observed no enclosure or fencing of the forty; that it appeared there had been some cultivation on the east side about fifty or sixty years ago, but that a good stand of timber had since grown on it and the timber recently cut showed to be of an average age of 35 or 40 years.

A railway line runs through the forty and there are about 10 acres west of the line which have never been enclosed or cultivated. While no survey of boundary lines was introduced, witnesses testified that the 1925 fence ran west from the northeast corner of the forty in

controversy and varied slightly to the south of what they thought was the true line so that it enclosed less than ½ acre of the forty in controversy.

Henry Stevens testified that about 1945 he cruised some timber for R. W. Wimberly for the purpose of selling the pulp wood therefrom and that the lands cruised were east of and across the road from the forty in controversy and nothing was said about the sale of timber from said forty. He also stated that he had since cut the timber off the north half of the forty in controversy and found no pastures or fields and that some of the timber was more than fifty years old and was scattered over the entire tract except for a plot of about 2½ acres near the road in the northeast corner where the timber was not large enough to cut as saw logs. He also stated that the water hole described by appellants was not on the forty in question and he saw no evidence that it had ever been enclosed.

The chancellor found that appellees and their predecessors acquired superior title to the 40-acre tract under their 1904 tax deed and the payment of taxes for 45 years; that the evidence was insufficient to show actual adverse possession of any portion of said land by the Wimberlys after 1925 except the narrow strip along the north fence boundary; that the evidence strongly indicated that R. W. Wimberly did not hold possession of any part of the forty in hostility to the title of Norman and Gates, but had abandoned said lands and recognized their superior title. The chancellor further found that appellants were guilty of laches in delaying institution of the present suit until after the death of Wimberly and Norman whose testimony could have made certain many uncertainties relative to the title.

Since the validity of the tax deed to Norman and Gates in 1904 is conceded, it is apparent that they thereby acquired superior record title to the lands in controversy. Ark. Stats., § 84-1302, provides, and our cases hold, that the effect of a valid clerk's tax deed is to vest in the grantee all right, title and interest of the former owner. *Nelson* v. *Pierce,* 119 Ark. 291, 177 S. W. 899.

But appellants contend that they reacquired title to the forty acres by continued adverse possession for more than seven years after the issuance of the tax deed. They rely on such cases as *McCrary* v. *Joyner,* 64 Ark. 547, 44 S. W. 79, and *Moorehead* v. *Dial,* 134 Ark. 548, 204 S. W. 424, which hold that the original owner of lands sold for general taxes may by subsequent adverse possession acquire title as against the purchaser at a tax sale. We agree with the chancellor that the preponderance of the evidence fails to show that R. W. Wimberly held actual adverse possession of the 40-acre tract for the statutory period after the tax deed to Norman and Gates. There are several circumstances which support this conclusion. Although Wimberly continued to pay taxes on the north 80 acres and another forty that he owned, he did not pay the taxes on the forty in controversy. The tract was not included in the mortgage, lease or sales of timber which he made from the other lands. His construction of the fence in 1925 along the boundary between the forty in controversy and the north forty where he lived also indicates a lack of intention on his part to claim the land in controversy.

Appellants also contend that even if they did not establish actual adverse possession of the lands, the deed to R. W. Wimberly in 1902 constituted color of title to the entire 120 acres conveyed and that their actual possession of a small part of the 40 acres in controversy amounted to constructive adverse possession of the entire tract. The rule relied on is that where adverse possession is entered under color of title, the grantee in the instrument constituting color of title will be deemed in constructive possession of the entire body of land described in the instrument, if in the actual possession of any part thereof. *Thornton* v. *McDonald,* 167 Ark. 114, 266 S. W. 946; *Moore* v. *McHenry,* 167 Ark. 483, 268 S. W. 858. But this rule is not one which may or should be applied in all cases and under all circumstances. *Smith* v. *Southern Kraft Corporation,* 203 Ark. 814, 159 S. W. 2d 59.

The situation here is similar to that in *Union Sawmill Co.* v. *Pagan,* 175 Ark. 559, 299 S. W. 2d 1012, where

the appellant held the legal record title to, and paid the taxes for more than seven years on, a 40-acre tract which appellees claimed by constructive adverse possession under color of title. After restating the rule of the Thornton and Moore cases, *supra,* the court said: "The doctrine of these cases has no application here, because of the difference in the facts. The appellees here, with only color of title, seek to acquire title by constructive adverse possession against the true owner of uninclosed and unimproved lands, who has continuously paid the taxes thereon each year since the time of his purchase thereof for more than seven years. The doctrine applicable here is that the true owner of wild and unimproved lands, who has continuously paid taxes thereon from the time he acquired title thereto and for more than seven years in succession, cannot be defeated of his title and right to the actual possession of his lands by one who merely claims title thereto under color of title and by only a constructive adverse possession. The general rule is that constructive possession follows the title, and can only be overcome or defeated by an actual possession adverse thereto." See, also, *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236, and *Anthony* v. *International Paper Co.,* 207 Ark. 396, 180 S. W. 2d 828.

But appellants say that appellees cannot claim the benefits of the seven-year statute of limitations by payment of taxes under Ark. Stats., § 37-102, because the land involved is not wild or "unimproved and uninclosed." While the testimony is in dispute as to whether part of the land was enclosed and in cultivation from 1904 to 1921, a decided preponderance of the evidence shows that the land reverted to its natural state in 1921 and has so remained since. In *Moore* v. *Morris,* 118 Ark. 516, 177 S. W. 6, the court said: "The statute applies only to 'unimproved and uninclosed land'; that is to say, land that is wild and in a state of nature. This does not mean, however, that the lands must never have had any other status, for improved lands may be permitted to return to a state of nature. The statute relates to the condition of the lands at the time the payment of taxes

is made under color of title, regardless of the former state of the lands; and if at that time they are unimproved and uninclosed, that is to say in a wild state as before the improvements were first made, then they fall within the terms of the statute and such payments amount to occupancy which will in course of time ripen into title by limitation. *Fenton* v. *Collum,* 104 Ark. 624, 150 S. W. 140."

Appellants also say the chancellor erroneously applied the doctrine of laches. They rely upon such cases as *Fordyce* v. *Vickers,* 99 Ark. 500, 138 S. W. 1010; *Herget* v. *McLeod,* 102 Ark. 59, 143 S. W. 103, and *Carmical* v. *Arkansas Lumber Co.,* 105 Ark. 663, 152 S. W. 286, which hold that a true owner of land cannot be divested of his title thereto by his mere failure to pay taxes and the enhancement of the value of the land. But in none of these cases had the defendant tax title purchaser paid the taxes for a period as long as seven years prior to commencement of the suit. The doctrine of these cases was aptly stated as follows in *Herget* v. *McLeod, supra:* "It will thus appear that, before the plea of laches can be available to deprive the true owner of his land, it must be shown that the party claiming same and his grantors have, prior to the commencement of the suit, paid the taxes upon the land under color of title for at least seven years, the statutory period of limitation. The fact that the true owner has failed to pay taxes on the land for a period longer than seven years will not alone bar him; but it must also appear that during such period the defendant and those under whom he claims have themselves paid taxes thereon for at least seven years prior to the institution of the suit before the true owner can be declared barred by laches."

The facts in the case at bar are similar to those in *Burbridge* v. *Wilson,* 99 Ark. 455, 138 S. W. 880, where the original owners of wild and unoccupied lands stood by and permitted the tax title purchaser and his grantee to pay the taxes for 23 years while the value of the land was undergoing enhancement. After citing earlier cases on the subject, the court said: "The basis of the doc-

trine of laches as applied in these cases is that the asserted rights have been abandoned by long inaction while others are permitted to bear the burdens of taxation, the value of the lands being in the meantime enhanced." In that case the tax payments were made under a void tax deed while it is conceded here that appellees' tax deed is valid. The factual differences in the cases which appellants rely upon and the instant case are illustrated in *McGill* v. *Adams,* 120 Ark. 249, 179 S. W. 489, where the defendant and his grantor had paid the taxes for 14 years under a void tax deed. The court said: "We have uniformly held that the failure to pay taxes on unimproved lands for a long period of time, together with great enhancement in values, constitute an abandonment, and that an action seeking equitable relief against one who has paid taxes under those circumstances for more than seven years is barred by laches. In many other cases we have decided that there is no bar against one who has not paid taxes for as much as seven years, unless there are other intervening equities sufficient in themselves to create an estoppel."

In the case at bar appellees and their predecessors paid the taxes under a valid tax deed for more than 20 years after the lands reverted to the status of unimproved and uninclosed lands. There are the additional circumstances of R. W. Wimberly's mortgaging, leasing, and selling timber from other lands which he owned without including the lands in controversy and the fact that he drew back his fence in 1925 to a line near the boundary between the forty in controversy and the eighty upon which he lived. We conclude that under the applicable law, the chancellor correctly held that appellants failed to establish title and right to possession of the forty acres in controversy, except the narrow strip enclosed by the 1925 fence; and that the defense of laches was properly sustained as to said lands.

But the appellants have acquired title by actual adverse possession of the narrow strip enclosed by the 1925 fence. Since the testimony does not show the exact area enclosed, the decree will be modified and the cause

remanded with directions to ascertain and describe the land so adversely occupied. In all other respects, the decree is affirmed.

PROVIDENCE WASHINGTON INSURANCE COMPANY *v.* ARKANSAS FARM BUREAU FINANCE COMPANY, INC.

4-9915 253 S. W. 2d 226

Opinion delivered December 8, 1952.

Vol T. Lindsey, for appellant.

Clifton Wade, Russell Elrod, A. D. McAllister, Jr., Clayton N. Little and *William H. Enfield,* for appellee.

ED F. MCFADDIN, Justice. This is a "four-cornered" lawsuit. As hereinafter referred to: (1) "Smith" is W. L. Smith, a resident of Benton County, and engaged in the growing of chickens for the commercial broiler market. (2) "Bureau" is the Benton County Farm Bureau Association (Inc.), of Rogers, Arkansas, and engaged in furnishing feed, etc. to persons such as Smith, and also engaged in acting as the agent of Finance Company. (3) "Finance Company" is the Arkansas Farm Bureau Finance Company, Inc., with its home office in Little Rock and a branch office in Fayetteville, and engaged in financing persons such as Smith. (4) "Insurance Company" is the Providence Washington Insurance Company, of Providence, Rhode Island, and engaged in the fire insurance business in this State.

In October, 1947, Smith had 5,000 chickens which he was growing for the broiler market. He had been buying his feed and other supplies from Lester Glover, but decided to give his business to Bureau. Bureau had a contract with Finance Company, to act as its agent in obtaining persons to be financed, so that Finance Company would pay Bureau for the feed, etc. that such persons received. Accordingly, on October 23, 1947, Bureau required Smith to execute a note for $3,300, and a chattel mortgage on his said chickens. Bureau sent the note and mortgage to Finance Company, which had the mortgage filed in the Circuit Clerk's Office of the County. Included in the note was the amount of fire insurance premium on Smith's chickens. The payee in the said $3,300 note and the grantee in the said chattel mortgage, executed by Smith, was not Bureau, but was Finance Company, because Bureau and Finance Company had the relationship previously mentioned.

From October 23rd until December 20th, Bureau furnished feed and supplies to Smith in the amount of $2,046.97. On November 25, 1947, Finance Company notified Bureau that Finance Company would not accept

the Smith note and mortgage and, therefore, would not reimburse Bureau for any past or future advances Bureau made, or might make, to Smith. Neither Finance Company nor Bureau ever informed Smith of Finance Company's rejection of the note and mortgage: on the contrary, the note and mortgage were retained by Finance Company, and Bureau continued to furnish Smith with feed and supplies up to December 20th.

Finance Company had a floater insurance policy with the Insurance Company, with the premium computed and paid on a monthly reporting basis. This was not a "name by name" report, but only a gross volume report, so that the Insurance Company had no way of knowing which individual grower's chickens were insured by the premiums so remitted. Finance Company did not include any part of the Smith note and indebtedness in the report to the Insurance Company for the October business or the November business; and it was not until Finance Company's remittance of January 21, 1948, that Finance Company attempted to remit any premium for insurance coverage on Smith's chickens.

On December 20, 1947, 3,100 of Smith's chickens were destroyed by fire; and this lawsuit ensued. The parties and their claims were as follows:

(a) Bureau sued Smith for $2,046.97 for feed and supplies furnished him; and in the same suit, Bureau also sued Finance Company for $2,046.97, alleging that Finance Company had agreed to obtain insurance for Bureau on the Smith chickens and that Finance Company's rejection of the Smith note and mortgage was ineffectual.

(b) Smith answered the Bureau complaint by cross-complaining against Bureau, and also suing Finance Company; and claiming that Bureau, for itself and as agent of Finance Company, had promised to obtain fire insurance on Smith's chickens, and that neither Bureau nor Finance Company had ever notified Smith to the contrary.

(c) Finance Company denied all liability to Bureau and to Smith, stating that Finance Company had

rejected Smith's loan and had so notified Bureau, and that such rejection and notice to Bureau terminated any possible liability of Finance Company to Smith or to Bureau, insofar as insurance coverage was concerned. But Finance Company also cross-complained against the Insurance Company, claiming that Finance Company had an omnibus coverage policy with Insurance Company which insured Finance Company against loss by fire occurring to the property of anyone indebted to Finance Company, if such account had been duly reported, and that Finance Company had reported the Smith indebtedness on January 21, 1948.

(d) The Insurance Company denied all liability to Finance Company: stating that the first attempt of Finance Company to pay any premium on the Smith account was on January 21, 1948, which was more than a month after the fire loss; and that the Insurance Company had denied liability on the Smith fire shortly after the fire and long before January 21, 1948.

On the issues made by the pleadings, all four parties introduced evidence to a jury. It developed in the proof that Lester Glover, who had furnished feed, etc. to Smith prior to Smith's dealings with Bureau, had some insurance on Smith's chickens, and that the amount of this insurance reduced Smith's net loss to $1,029. The jury returned three verdicts:

(1) In favor of Bureau against Smith for $1,029.

(2) In favor of Smith against Finance Company for $1,029.

(3) In favor of Finance Company against Insurance Company for $1,029.

The net result of the three verdicts was that the Insurance Company was cast for $1,029. The Insurance Company filed its motion for new trial and has appealed from the order overruling same. Likewise, Finance Company filed its motion for new trial, insofar as the judgment of Smith against Finance Company was concerned, and has appealed from the order overruling said motion.

I. *The Judgment of Bureau Against Smith.* Smith has not appealed from that judgment, so it need not be discussed.

II. *The Judgment of Smith Against The Finance Company.* The Finance Company has appealed from this judgment and claims:

"... there was not any evidence to justify the submission of the matter to the jury, and that the lower court erred in allowing the issue to go to the jury ..." In view of the fact that the jury reached a verdict in favor of Smith, we review the evidence most favorable to support the verdict.[1] So reviewed, the evidence discloses: that Finance Company had a written contract appointing Bureau as its agent; that the manager of Bureau went to Fayetteville where the Smith note and mortgage were prepared by Finance Company; that the manager of Bureau then had Smith execute the note and mortgage, which were immediately sent by Bureau to Finance Company; that Finance Company had the mortgage duly filed in the Circuit Clerk's Office to complete the lien on Smith's chickens; that Bureau, as agent of Finance Company, told Smith that the note included the fire insurance premium on his chickens; that prior to December 20th (the date of the fire) Smith was never notified that Finance Company had rejected his note; that Finance Company at all times retained the Smith note and mortgage; and that Bureau continued to furnish feed, etc. to Smith from the date of the note (October 23rd) until the date of the fire (December 20th).

With these facts established by the evidence, we hold that a case was made for the jury by Smith. Since the Bureau was the agent of the Finance Company, the latter must be held responsible for the failure of its agent to notify Smith that his note and mortgage had been rejected. Since Smith was continuing to receive feed, etc. from Bureau because he had executed the note and mortgage, he had a right to believe that Finance Company, as mortgagee, had acted in good faith and

[1] See cases collected in West's Arkansas Digest "Appeal & Error", § 930.

used reasonable care in effecting insurance coverage. That the Finance Company could have obtained such insurance by the exercise of reasonable care, is demonstrated by the fact that the Finance Company did have an insurance policy covering any accounts that it might report.

In several of our cases, the mortgagee had the ***right*** but not the *duty* to obtain insurance, and under such situations, we logically held that the mortgagee, *being under no obligation to obtain such insurance,* could not be held liable for the failure to obtain it. Some such cases are *Milburn* v. *Peoples B. & L. Assn.,* 106 Ark. 415, 153 S. W. 605; and *Kissire* v. *Plunkett-Jarrell Gro. Co.,* 103 Ark. 473, 145 S. W. 567. But these cases inferentially recognize that if the mortgagee had *agreed* to obtain insurance, then the breach of such an agreement would entitle the mortgagor to redress.

In *Broyles* v. *International Harvester Co.,* 202 Ark. 267, 150 S. W. 2d 733, and again in *Derby* v. *Blankenship,* 217 Ark. 272, 230 S. W. 2d 481, we recognized that an oral agreement to obtain insurance was valid and the breach of such agreement would afford redress in the courts. In 36 Am. Jur. 852, the holdings from the various jurisdictions are summarized:

"A mortgagee who agrees to place insurance on the mortgaged property has been held liable as an insurer for failure to execute his agreement properly, that is, in good faith and with reasonable care."

Supporting the foregoing statement are the two Annotations, being 41 A.L.R. 1283 and 130 A.L.R. 598; and in the first mentioned Annotation, the holdings are summarized:

"The effect of the decisions is to uphold the proposition that a mortgagee who has agreed to place insurance on the mortgaged property must act in good faith, and must use reasonable care, . . ."

The execution of the note and mortgage by Smith to the Finance Company furnished the consideration to support the oral promise to insure as made by Bureau,

Finance Company's agent, to Smith. So we affirm the verdict and judgment for Smith against the Finance Company.

III. *The Judgment of Finance Company Against the Insurance Company.* The Insurance Company was entitled to an instructed verdict in its favor. The policy issued by the Insurance Company to the Finance Company provided, as one of the conditions for insurance coverage, that the Finance Company agreed ". . . to keep an accurate itemized record showing all property insured hereunder and to pay premiums monthly at the rate of 65¢[2] per $100 per month on the unpaid balance, as of the last day of each month, and to report such values to this company[3] not later than the 15th day of the following month."

The undisputed evidence shows that at no time prior to the fire did the Finance Company enter the Smith note and mortgage on its books, so, therefore, the Finance Company did not include the Smith account in the "accurate itemized record showing all property insured." Likewise, the undisputed evidence shows that at no time prior to the fire did the Finance Company report to the Insurance Company anything about the Smith note and mortgage, or tender to the Insurance Company any premium so as to make the insurance binding on the Smith property. If the fire had occurred, say, on October 29th—which was in the month in which the account arose—then there might be a real question as to insurance coverage, but that situation is not before us.

From October 23rd to November 25th, the Finance Company received in its day by day reports from the Bureau (covering furnishings made by Bureau on notes held by Finance) regular reports of furnishings made to Smith; yet in neither the October nor November report to the Insurance Company, did the Finance Company include anything about the Smith account, and

[2] By endorsement on the policy, this was subsequently changed to 60¢.

[3] That is, the Insurance Company.

prior to the fire made no payment of any premium on that account. It is, therefore, clear that at the time of the fire, the Finance Company had no insurance on the Smith property.

We consider, next, what happened *after* the fire, which might effectuate insurance on property already destroyed. The testimony shows that a day or two after the fire, Bureau reported the Smith loss to an adjuster for the Insurance Company, and such adjuster promptly denied liability, since there had been no insurance. Then Finance Company discussed the Smith loss with the local Fayetteville Agent for the Insurance Company, and Finance Company claims that such agent told Finance Company to include the Smith premium in the Finance Company's report to the Insurance Company for December (to be made January 15th) and see if the Insurance Company would admit liability on the Smith loss. The Finance Company lays great stress on this remark of the local agent. But such statement of the local agent was not an admission of liability that would bind the Insurance Company, even assuming that the local agent had power and authority to bind the Company (which point is not decided): rather, the statement of the local agent was a suggestion as to possible procedure that the Finance Company might use to see if the Insurance Company would admit liability.

The Finance Company waited until January 21st, and then in the monthly report for December, included a premium of $14.21 on the Smith account for December. This was in a gross amount of $425.76 and without reference to any name or note maker. As soon as the Insurance Company learned that the Finance Company was trying to include the Smith item, the Insurance Company promptly denied liability. Our case of *American Ins. Co.* v. *Russell,* 183 Ark. 285, 35 S. W. 2d 1014, was an attempt by an insured to remit a premium *after* the fire, and in refusing relief to the insured, this Court held that acceptance of a past due premium after loss without knowledge of the loss did not revive a previously forfeited policy. The rationale of that holding

as applied to the case at bar is that the Insurance Company is not bound for a loss occurring before the property was ever reported when the Insurance Company did not know that a tendered premium was included in a gross sum.

The Finance Company claims that the following language in the policy gives the Finance Company 90 days in which to list the report of the Smith note and mortgage:

"If, at any time during the term of this policy for a period of more than 90 days, the assured shall fail to make declaration of amounts as required herein, this insurance shall forthwith become suspended and shall be of no force or effect until reports shall have been delivered by the assured to the Company or its authorized representative; . . ."

This quoted language refers to the effect of an entire failure of the Finance Company to make any report for a period of 90 days. It does not extend for 90 days the duty imposed on the Finance Company to make a monthly report. The quoted language is a restriction on liability and not an extension for reporting.

Finally, the Finance Company says that the insurance policy here involved was ambiguous and therefore the question of coverage should have been submitted to the jury. We find no such ambiguity in the policy, as Finance Company claims. The policy covered only items that were duly reported, and the Smith account was never reported until after the fire, and that was too late. Furthermore there was no admission of liability.

Conclusion

The Circuit Court judgment for Smith against the Finance Company is in all things affirmed, and in addition, Smith will recover all his appeal costs from Finance Company.

The judgment of Finance Company against the Insurance Company is reversed and such cause is remanded, with instructions for the Trial Court to dismiss

the claim of *Finance Company* v. *Insurance Company,* and award the Insurance Company all its costs to be recovered from Finance Company.

FAUST BAND SAW MILL *v.* RICHARDSON.

4-9940 253 S. W. 2d 213

Opinion delivered December 8, 1952.

Wright, Harrison, Lindsey & Upton, for appellant.

Dinning & Dinning, for appellee.

GRIFFIN SMITH, Chief Justice. In finding against liability and adjudging that Gertrude Richardson could not recover for the death of her husband, Workmen's Compensation Commission said:

"To hold that an employer is liable for the death of an employe simply because he dies within the hours of his employment while engaged in his usual occupation without the intervention of an unusual happening brought about by a risk or hazard created by the employment, would be placing a liability upon the employer which is not contemplated by the Act, and would in effect be

changing Workmen's Compensation coverage into health, sickness, and life insurance".

The application of this pronouncement is presented by the appeal of Faust Band Saw Mill and its liability carrier, American Mutual Liability Insurance Company. Circuit court reversed the Commission, and we, in turn, must reverse the trial court.

The decedent had spent a large part of his life as an agricultural worker, but for a considerable period prior to death had been engaged as a lumber stacker for the sawmill company. At 11:30 a. m. Sept. 12, 1950, a brief rest was taken after unloading a wagon and waiting for another. The interim is estimated at from three to five minutes. During this period Richardson talked with other workers and gave no indication of physical impairment or distress other than an incidental remark to the effect that he was not feeling well. He had, however, mentioned that a son had been in trouble. Another witness, in commenting upon Richardson's attitude and reactions, remembered his comment that the son's involvement had been disposed of.

Milton Lynch was working with Richardson the day death occurred. The two had been associates since December, but in previous years had worked together. A stacking crew is composed of two men; one stands on the lumber pile to receive the sawed product as it is taken from a wagon, while the ground man (in this case Richardson) uses a jack to assist in lifting. The jack is described as a five-foot piece of iron or steel about four inches wide, approximately an inch thick and its weight was 36 lbs. It is used as a lever to aid in hoisting the lumber.

The planks sawed the morning of September 12th were cottonwood, an inch thick—considerably lighter than oak or hickory. When asked whether a stack of lumber had been partially finished Lynch replied, "No, just a little low pile". But in explaining details of the morning operations the witness testified that ninety layers of lumber had been stacked between seven o'clock and 11:30. In answer to the question, "Did you stop during that

time?" Lynch replied, "Oh, yes, we sat around!" Some days they would stack 120, 130 or 140 layers before noon, depending on how rapidly the product came from the mill. Two stacking crews were employed and the men were paid by the thousand board feet. Appellee assumes from this circumstance, and from testimony given by Lynch, that there was some competition between the two groups for access to wagons as they came from the mill. The clear inference deducible from this testimony is that the competition was voluntary and that there was an entire absence of compulsion.

After the three-to-five minute intermission Lynch and Richardson observed a wagon approaching with a load of lumber. It is indicated that Richardson (who had picked up the jack and had it on one shoulder) concluded to make first contact with the wagon and thereby establish priority over the second crew. He started walking in the direction of the wagon—"just an ordinary [fast] walk, he wasn't running"—and was seen to fall backward. Lynch was not far behind the unfortunate man. When he reached Richardson the stricken worker gasped and died almost immediately. In falling Richardson was not vitally hit by the jack, which fell on his legs.

Lynch had testified that their purpose in getting possession of the lumber was to complete a stack of a hundred layers before noon; that they were seven or eight shy; that eight tiers could be laid in five minutes, and they had about thirty minutes in which to complete the task.

Two physicians testified. Dr. H. B. Oldham saw the dead man within fifteen minutes after the heart attack occurred. Coronary occlusion was the diagnosis. From an examination no outward appearances indicated that the cause of death was accelerated by any accidental injury, nor were there symptoms suggesting that death had occurred from any abnormal cause. The witness could not say whether rapid walking and a 36-lb. load brought on the coronary stoppage—"he could have had it while resting". On cross-examination Dr. Oldham said that the heart trouble would not necessarily have been

disclosed by previous symptoms, that is, not in a manner causing suffering and distress. Undue exertion and unusual strain "possibly" could have had a tendency to cause collapse. The Doctor would not say that the exercise admittedly engaged in by Richardson "probably" caused heart stoppage. Question: "If it be true that the deceased collapsed while carrying a steel bar and while walking at a rapid gait, state whether or not, in your opinion, his death would have occurred at that time and place if it had not been for such *unusual* exertion on his part?" Answer: "It is impossible to answer 'yes' or 'no' to this question. [He could have had] coronary at any time".

Dr. Doyle W. Fulmer, under examination by the claimant's attorney, reached the following conclusions: "Any unusual stress or strain on a diseased blood vessel—especially those of the heart and brain—will produce symptoms. The act of carrying a heavy object and hurrying is likely to aggravate a diseased vessel and result in rupture or occlusion. From this case history it is my opinion that the act of hurrying and carrying a weight aggravated a diseased condition".

The applicable law here does not differ appreciably from what was said in *Baker* v. *Slaughter,* 220 Ark. 325, 248 S. W. 2d 106. Ark. Stat's, § 81-1302. Compensation is recoverable only when death or injury results from an accident. A worker killed or disabled while on the job, or whose death is perceptively hastened by reason of some unusual transaction—a transaction that might with reason be construed to be an accident—comes within the Act's provisions. But, as the Commission has so aptly said, the benefits are not insurance in the sense that compensation may be claimed for disability or death where at the time of impairment the work load was precisely what the employe had been engaged to carry and it is not unreasonable.

There is substantial testimony to establish a normal course of conduct. Rest periods were frequent, the lumber handled September 12th was not of the heaviest, the iron jack was not being used to hoist mill products, the quantity stacked was below an average, and Rich-

ardson was merely walking rapidly with a 36-pound load when the heart attack occurred. He did not stumble or strike anything while approaching the wagon, and the fall itself was not traumatically serious.

Our decisions rest on the proposition that the Commission must ascertain essential facts and that its conclusions will not be disturbed if the evidence for or against an award is substantial. Here the finding was that death occurred from a natural cause, hence circuit court erred in disturbing the decision.

Reversed with directions that the Commission's findings be reinstated.

Mr. Justice MILLWEE dissents; Mr. Justice WARD concurs.

PARKS *v.* CROWLEY.

4-9932 253 S. W. 2d 561

Opinion delivered December 15, 1952.

Rehearing denied January 19, 1953.

Ward, Coleman & Mayes, for appellant.

Kirsch & Cathey and *Gerald Brown,* for appellee.

J. Seaborn Holt, J. This suit involves the custody of Pamela Crowley, a little girl about five and one-half years of age at the time of the trial. Appellant, Frances Parks (formerly Frances Crowley) is the natural mother of the child and appellees are its paternal grandparents. Jack Crowley, the child's father, is not a party to this action. According to this record, he has never shown the slightest interest in Pamela and has never provided a home or any support for her. In fact, it clearly appears that he has, in general, proven a great disappointment to his parents (appellees) who reared him. On February 28, 1949, Frances married Parks and they now have a son two years of age. The record discloses that on September 4, 1946, Jack Crowley secured a Florida divorce from Frances and seven days later, she gave birth to Pamela. Shortly thereafter, Frances took her baby to the home of her parents in Paragould and later secured employment to support herself and child. During this period, Frances had allowed the child to stay in the home of its paternal grandparents (appellees) a greater part of the time. Appellees are good people and their affection for the child and desire to care for it are not questioned. This arrangement continued until January 23, 1951, when appellees, feeling that the conduct of Frances and her mother was so bad that the child's welfare, while with Frances in her mother's home, was endangered, decided to keep the child permanently in their own home, and refused to allow Frances to have her at all. Thereupon, appellant, Frances, filed suit for Pamela's custody. A hearing resulted in a decree for

appellees on findings that while Frances was not guilty of immoral conduct, she was addicted to drink and frequent profanity to such an extent as to make her unfit to have the custody of the child. She was allowed, however, to visit the child at all reasonable times.

The present suit was filed by Frances November 13, 1951, seeking a modification of the above decree of July 23, 1951, on the grounds of such changed conditions since its rendition that would warrant transfer of custody to appellant. Trial was had February 6, 1952, and the court, after a patient and painstaking hearing, declined to disturb the child's custody and this appeal followed.

We try the case *de novo* here.

In determining the custody of a minor child or the modification of an award of custody thereafter, the welfare of the child is the controlling consideration. In such cases, unfortunately we have no definite yardstick as a guide. Each case must stand on its own facts. Here, while the trial court has continuing authority to alter its orders affecting custody and control of this minor child, such order should not be changed "without proof showing a change in circumstances from those existing at the time of the original order, which changed circumstances, when considered from the standpoint of the child's welfare, are such as to require or justify the transfer of custody from one parent to the other." *Myers* v. *Myers,* 207 Ark. 169, 179 S. W. 2d 865.

The burden is on appellant who is seeking the modification.

In this connection, we have certain definite and approved general rules to govern us in reaching a decision.

"The paramount consideration in this case, as in all other cases involving the custody of a minor child, is the welfare of the child, but the rights and feelings of the parents must also be weighed and due regard given to the natural desire of the parents to have and rear their offspring." *French* v. *Graves,* 205 Ark. 409, 168 S. W. 2d 1108.

In *Servaes* v. *Bryant,* 220 Ark. 769, 250 S. W. 2d 134, we said: " 'There can be no question in the law that, as between a mother and grandparents, the mother is entitled to the custody of her child, "unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to the life and well-being of her child," *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Baker* v. *Durham,* 95 Ark. 355, 129 S. W. 789.' *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726.

" '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,' " (Citing several cases) and in *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474, this court said: "Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life."

In considering this case, we do not lose sight of the fact that we are dealing with the welfare of a little girl of the tender age of five years when obviously she is most in need of the loving care of its real mother unless the mother is so depraved morally or otherwise as would render her unfit to have her child. While appellees have had her custody for most of her life, when the real mother shows that she is entitled to its custody, we must know, human nature being what it is, that the love and attachment of this little girl for her grandparents (appellees) cannot have become so deep rooted and attached that it could not, within a very short time, be transferred to her real mother by proper treatment, love and care, if given the opportunity. Appellees concede that Parks, the stepfather, is a good man and have found no fault with him. He works regularly, earning from forty to fifty dollars per week, and is willing to provide an ample, though modest home. He wants the child and

is willing to support her. The evidence on which the first decree, above, was based showed that Frances (as well as her mother) was addicted occasionally to excessive drinking, to frequenting "beer parlors," and to the use of profanity. The court found that there was no evidence of immorality. Since that decree, Frances appears to have quit drinking, has joined the church, and her conduct improved.

The Chancellor's findings recite in part: "It is an action upon the part of the mother to regain custody of the child who has spent very little of its five years and ten months approximately, or eleven months, in her custody. The testimony before the Court in July, 1951, related largely to the conduct or misconduct upon the part of the mother and stepfather of this infant child. The Court felt at that time and has not changed his opinion that the testimony that showed that up until the time they left Paragould in February, 1951, their conduct had been such that it would not justify a recognition of the parental love and take the child away from its paternal grandparents. The evidence was insufficient to show to the satisfaction of the Court that their conduct since leaving in February, 1951, had been changed to such an extent to change their [his] view of their conduct when they were here. The Court found that the environment in which the child would be taken was not conducive to its best interest. It is indeed gratifying to me to learn that the outward conduct at least of the mother and stepfather of this child has certainly and unquestionably improved to the extent that they have since that time refrained from frequenting places of ill repute and indulging——I don't mean anything except an alcoholic standpoint is concerned—and indulging in drinking of alcoholic beverages and misconduct that is always incident to the excessive use thereof. I am glad and delighted to know that they have taken some interest in spiritual and religious affairs and I hope that conduct will continue and grow better. I hope they are sincere in their statements of reformation in that connection. Unfortunately, ill feeling has arisen between the two families involved in this case and I think that's been manifested

by the bad judgment exercised by both sides since the hearing in July, 1951. In this case I had the benefit of evidence more than I did in the other case because, as I say, the evidence in the other case was directed largely to the accusation and denial of the conduct and misconduct of the parties involved. I had the benefit in this hearing of testimony that gives me a better insight and better view concerning the environment and surroundings that this child will be surrounded with wherever she might be. * * *

"This child has been with its paternal grandfather and grandmother for many years, ties of love and affection have grown up between them. The child is of a nervous disposition, she is visibly confused—affected by the confusion backwards and forwards between the two families. Taking into consideration her own attitude and all of the testimony before the Court and after having weighed it carefully and given it much thought, not only in the courtroom but outside the courtroom, I have reached the conclusion in my judgment that it would not be for the best interest of this child to disturb her custody at this time."

It appears from the record that the court, by agreement of counsel, during the course of the trial, privately talked to Pamela at some length and she, in effect, expressed the desire to remain with her grandparents. In the Chancellor's findings, he stated that he was influenced in his decision by what he learned in his personal, private interview with the child. Even though, as appears, this child was interviewed by agreement, still we are bound to attach little, if any significance or force to her testimony on account of her tender age. By our statute (§ 28-601, Ark. Stats. 1947) infants under the age of ten are incompetent to testify, in a civil case.

Without attempting to detail the testimony, much of which is in conflict, when all is considered, we have concluded that appellant has by a preponderance of the evidence shown such a change in circumstances since the date of the order of July 23, 1951, and the date of the hearing in the present case (February 6, 1952) as to

justify, and require, a modification of the July decree and the transfer of custody of her child to her, with privilege of visitation by appellees at reasonable times.

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

The Chief Justice and Justice McFaddin dissent.

Ed. F. McFaddin, Justice (dissenting). In my dissenting opinion in the case of *Nutt* v. *Nutt,* 214 Ark. 24, 214 S. W. 2d 366, I stated my views and expressed my feelings in a child custody case wherein the facts, in most determinating respects, were similar to the facts that exist in the case at bar. The views expressed in the Nutt case impel my dissent in the present case. I summarize my views in the present case:

(1) The Chancellor saw the parties and heard the testimony. He concluded that the little girl would be better cared for if left with the grandparents. We have only the cold print before us, and I am unwilling to reverse his findings.

(2) There had been a previous hearing in this case on July 23, 1951, wherein the custody was awarded to the grandparents. The present hearing was on February 6, 1952; and the Chancellor evidently found a lack of bona fides in the alleged change of circumstances. I believe he was correct.

(3) When a mother leaves her small child with grandparents and goes off with another husband, the mother necessarily expects the love of the child to go to the grandparents. In such a situation, the mother, having abandoned her claim of priority, should not be allowed to again reassert it. In reversing the Chancellor, the majority is accomplishing such a result.

ARKANSAS STATE GAME & FISH COMMISSION v. KIZER.

4-9921 253 S. W. 2d 215

Opinion delivered December 15, 1952.

Ed E. Ashbaugh, for appellant.

John L. Anderson, for appellee.

ED. F. MCFADDIN, Justice. This case involves the water level of Old Town Lake in Phillips County. Since the decree of the Chancery Court must be reversed on procedural points, we mention only the facts involving such points.

Appellees, Kizer, et al., as affected land owners, brought suit in the Chancery Court against the Commissioners of the White River Drainage District of Phillips and Desha Counties, and alleged that the Drainage District, by means of a flood gate, had raised the water level in Old Town Lake from the former level of 159[1] feet to the present level of 164[1] feet. The relief prayed was that the water level be fixed at 159 feet. In the answer, the Drainage District and its Commissioners professed a willingness to fix the water level of the Lake at whatever elevation the Court might decree.

[1] In this opinon all figures as to the water level refer to the elevation above mean sea level, unless otherwise indicated.

Then Toney and other riparian (littoral) land owners (hereinafter referred to as "Intervening Landowners") intervened, claiming that the water level of Old Town Lake should be fixed at 169 feet. The Arkansas State Game & Fish Commission (hereinafter called "Commission") also intervened; and claimed that the Commission was interested in the fish life of Old Town Lake and that the water level should be maintained at 169 feet. All through the case the Intervening Landowners and the Commission[2] made common cause as litigants. The Drainage District and its Commissioners were all the time willing to any water level that the Court might fix.

More than a score of witnesses testified *ore tenus;* and at the conclusion of the hearing the Chancery Court, on September 5, 1951, appointed three engineers "to make a fair and impartial survey of Old Town Lake and to make their recommendation to the Court for his approval or disapproval . . ." The Intervening Landowners and the Commission objected and excepted to this order. On January 17, 1952, the three engineers filed their signed but unverified report, reading in part:

"That we have made a thorough study of the available records and gauge readings of Old Town Lake covering a period of the past 10 years; that we have, in conjunction with said study, examined the topography of adjoining lands and hydrographs showing the water elevations of said Lake for the years 1942 to 1950; that in addition thereto we have taken soundings to determine the depth of the water in Old Town Lake, and we have concluded that the average normal water level, before the control structure was in operation was 162 feet, mean gulf level,[3] exclusive of extreme high and low stages."

[2] A question not presented in the briefs, but one which arose in the consultation in this Court, is the power of the Commission to resist any reasonable order fixing the water level in Old Town Lake. We forego any discussion on this point since the intervening landowners had the right to be heard in regard to fixing the water level, and they have appealed to this Court. We mention the matter only for the purpose of negativing any idea that the present opinion is a holding either way on the question.

[3] "Mean gulf level" would be less than 3/10ths of a foot higher than "mean sea level" in Old Town Lake.

The Intervening Landowners and the Commission, in their pleading against the report, said, *inter alia:*

"That at the conclusion of the trial of this case the plaintiffs, the defendants, and the interveners announced that they had each concluded all matters concerning them and submitted the case to the court for final decision. That the court instead of deciding the case determined to appoint a board composed of three engineers to go further into the matter and fix the average water level of Old Town Lake. That at that time the interveners objected to the appointment of such board and stated that they would have no opportunity to cross-examine said engineers. . . . That the interveners have had no opportunity to cross-examine said engineers and that the court is without power at law or in equity and is without jurisdiction to appoint said board of engineers or to allow the filing of said report."

The Chancery Court heard no further evidence; and on March 11, 1952, entered the decree, which (a) adopted the engineers' report *in toto,* (b) fixed the water level of Old Town Lake at 162 feet, (c) denied the appellants' motion to strike the engineer's report, and (d) refused the Intervening Landowners and the Commission any opportunity to cross-examine the engineers on their said report. From such decree, there is this appeal.

The Chancery decree must be reversed because of the refusal of the Court to allow the Intervening Landowners to cross-examine the engineers on their report, after the Court admitted it in evidence. Of course, the report, as offered, was not admissible. It was the *ex parte* statement of the three engineers, and should not have been admitted as evidence until the parties making the report appeared as witnesses. In *Newman* v. *Lybrand,* 130 Ark. 424, 197 S. W. 855, there was offered a certificate of the Sheriff and Tax Collector:

". . . to the effect that he had examined the tax records in his office for the years 1903 to 1910, inclusive, and that they showed that the taxes on the lands in controversy were regularly paid for each of said years, and that the lands were not returned delinquent for the

nonpayment of taxes for the year 1910, and were not marked delinquent on the real estate record."

In the reported case, the Chancery Court refused to allow the certificate to be considered as evidence; and on appeal, we affirmed the ruling, saying:

"But the chancellor found that the witnesses were not brought into court; that the certificate was not taken as a deposition; that no notice was given to the defendant when it was made; that it was not sworn to, and that in such certificate he made no profert of the record itself or presented any certified copies of the record about which he testified. The chancellor correctly held, upon these findings, that the certificate was incompetent to be considered as evidence in the cause."

Likewise in *Trannum* v. *George,* 211 Ark. 665, 201 S. W. 2d 1015, there was offered as evidence in a child custody case "the *record,*" which was a narrative report by the welfare worker. We held this report was inadmissible. Mr. Justice Robins said:

"This 'record' is chiefly a narrative report by the welfare worker of conversations she had concerning the case of the children with various parties and it also contains correspondence had with the mother of the children. All this was 'hearsay' and should not have been admitted in evidence. Certainly the custody of a man's children ought not to be taken away from him on unsworn statements made out of court. *Title Guaranty & Surety Company* v. *Bank of Fulton,* 89 Ark. 471, 117 S. W. 537, 33 L. R. A., N. S. 676; *Tipler-Grossman Lumber Company* v. *Forrest City Box Company,* 148 Ark. 132, 229 S. W. 17; *Spencer Lumber Company* v. *Dover,* 99 Ark. 488, 138 S. W. 985; *Shelton* v. *Shelton,* 102 Ark. 54, 143 S. W. 110; *Roberson* v. *Roberson,* 188 Ark. 1018, 69 S. W. 2d 275."

The report of the engineers in the case at bar is in the same category as that of the Sheriff and the welfare worker in the two reported cases.[4] The engineers' re-

[4] In *Fewel* v. *Fewel,* 23 Calif. 2d 431, 144 Pac. 2d 592, the Supreme Court of California discussed the necessity of investigators appearing in Court to authenticate a report and to be subjected to cross-examination.

port was not admissible as evidence, and yet it contained the information on which the Court fixed the water level at 162 feet.

But when the Court admitted the engineer's report as evidence, then, certainly the Intervening Landowners had the right to cross-examine the engineers; and the denial of such right requires a reversal of the decree. In 58 Am. Jur. 340, the holdings of various jurisdictions are summarized in this language:

"In a judicial investigation the right of cross-examination is absolute, and not a mere privilege of the one against whom a witness may be called. In a civil action a party has the right to cross-examine witnesses against him whether the evidence is given *ore tenus* or by deposition."[5]

In *Ottawa* v. *Stewart,* 70 U. S. (3 Wall.) 268, 18 L. Ed. 165, Mr. Justice CLIFFORD used this clarifying language:

"Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief; and the time and place when and where they occurred, and the attending circumstances; and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witnesses; . . ."

See, also, *Babirecki* v. *Virgil,* 97 N. J. Eq. 315, 127 Atl. 594, 39 A. L. R. 171; and *State ex rel. Bailes* v. *Guardian Realty Co.,* 237 Ala. 201, 186 So. 168, 121 A. L. R. 634; and see also Annotations in 15 L. R. N. S. 493 and 25 L. R. N. S. 683.

Because the appellants were not allowed the right to cross-examine the engineers, we reverse the decree and remand the cause to the Chancery Court. But the

[5] In the present opinion, we are referring only to civil cases. In criminal cases the right of confrontation is guaranteed by Art. 2, § 10 of the Constitution of Arkansas. For a few criminal cases on confrontation and the right of cross-examination, see *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173; *Alford* v. *U. S.,* 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 218.

hearing on remand is limited:[6] (a) the Chancery Court will call the engineers to testify in order to make their report admissible; and (b) then the Litigants will be allowed the right of cross-examination. On the present record plus that made on remand as above indicated, the Chancery Court will render its decree. The amount of fee to be allowed the engineers and the propriety of taxing the fee as costs on a pro rata basis are matters not foreclosed by the present decision.

The costs of the present appeal are assessed against the parties who were plaintiffs in the lower Court.

[redacted]

NANCE *v.* FLAUGH.

4-9913 253 S. W. 2d 207

Opinion delivered December 15, 1952.

[redacted]

Cole & Epperson and *Dennis K. Williams,* for appellant.

[6] Some other cases in which Chancery decrees were remanded for further proceedings on a particular point are *Carmack* v. *Lovett,* 44 Ark. 180; *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886; *Carlile* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620; and *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653.

George Rose Smith, J. This is a complaint for libel, upon which the jury fixed the plaintiff's damages at $1,500. For reversal the defendant contends (*a*) that the court should have quashed the service of summons and (*b*) that the court erred in entering a default judgment on the issue of liability, leaving to the jury only the assessment of damages.

The original complaint alleged that the defendant had written a letter to the plaintiff's wife in which the defendant had quoted the plaintiff's son as having stated that the plaintiff had committed specified immoral acts; that these statements were false; etc. To this complaint the defendant filed an answer and later a demurrer. Before the court ruled upon the demurrer the plaintiff, with leave of court, filed a substituted complaint, which is in substance the same as the original pleading except that it is alleged that the plaintiff's son did not in fact make the slanderous statements attributed to him in the defendant's letter. Thereafter the defendant moved to quash the service upon the ground that he is a resident of Louisiana and was served in Arkansas while attending court as a witness in a criminal case. After hearing testimony the court denied the motion.

We think the court acted correctly. Of course the defendant entered his appearance by his answer and demurrer to the first complaint. He now argues, however, that his appearance related only to the first pleading and that he was free to appear specially to the substituted complaint. This position might be well taken had the second complaint asserted a new cause of action, for it would then have been incumbent upon the plaintiff to obtain a new service of process. *Arbaugh* v. *West,* 127 Ark. 98, 192 S. W. 171. But a defendant is still subject to the court's jurisdiction if the amended complaint does not amount to the bringing of a new suit. *Smith* v. *Smith,* 190 Ark. 418, 79 S. W. 2d 265. Here the second complaint merely added an assertion that the plaintiff's son had not actually made the statements quoted by the defendant. This makes no difference, however, as the defendant's letter was equally a defamation whether he had fabricated the accusations himself or was simply

repeating what he had heard. Newell, Slander and Libel, § 300. Since a new cause of action was not alleged the defendant's entry of appearance applied also to the substituted pleading, and it was too late for him to attempt to appear specially.

Upon the motion to quash being overruled the defendant declined to plead further and refused to take part in the trial. The court, at the beginning of the trial, told the jury that its only duty was to assess the damages against the defendant. It is now insisted that inasmuch as the defendant had filed an answer containing a general denial the court was wrong in awarding the plaintiff a judgment by default. We need not pass upon this contention, for the record further shows that at the close of the case the court in fact submitted the issue of liability to the jury, by instructing them that the plaintiff had the burden of proving every material allegation of his complaint and that if that burden had not been sustained the verdict should be for the defendant. Thus in effect the trial judge reconsidered his earlier ruling, as he was at liberty to do. *Arnold, Sheriff,* v. *State, ex rel. Burton,* 220 Ark. 25, 245 S. W. 2d 818.

Affirmed.

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

4-9922 253 S. W. 2d 208

Opinion delivered December 15, 1952.

Milton McLees, for appellant.

Lee Miles and *H. B. Stubblefield,* for appellee.

WARD, Justice. Suit was filed by appellant to enforce specific performance of a sales contract wherein he agreed to purchase and appellees agreed to sell certain lands. All of appellant's dealings were with Walthour-Flake, appellee, as agent for the owners of the land who are also appellees. The trial court sustained a demurrer to appellant's complaint on the ground that the description contained in the sales contract was not definite. This appeal is therefore presented on the complaint and the exhibited sales contract, the demurrer, and also on certain correspondence between the owners of the land and Walthour-Flake which was filed in the case on motion of appellant and by order of the court.

The complaint alleges, among other things: that the appellees, except Walthour-Flake, are the owners of the "North Eighteen (18) acres of South one-half (S½) Northeast Quarter (NE¼) Southeast Quarter (SE¼) Section Twenty (20), Township Two (2) North, Range Eleven West"; that Walthour-Flake was acting as agent for the owners; that appellant made an offer to said agent to buy 16 acres of the above-described property lying east of Highway No. 67 East at Fairfax Crossing for the sum of $5,500; that he paid to the agent the sum of $250 as earnest money, and that said offer was accepted, all as set out in a certain written contract which was attached as an exhibit; and that appellees fail and refuse to carry out the contract. The balance of the purchase price was tendered into court. The prayer was that appellee be required to carry out the obligations of the sales contract by executing a deed or, in lieu thereof, to respond in damages.

We deem it unnecessary to set out the sales contract in full. The pertinent part of the contract is the description which reads: "16 acres—67 Highway East at Fairfax Crossing." It is dated December 16, 1950,

and signed by appellant. The acceptance of appellant's offer is shown signed by Walthour-Flake on January 25, 1951.

The correspondence referred to above which is a part of the record is not material to a decision herein except insofar as it fails to furnish any description of the land more definite than that shown in the contract. It does reveal, however, that on June 25, 1951, the owners accepted an offer from A. N. McAninch of $6,500 for land described as "the North 16 acres of S½ NE¼ SE¼, Sec. 2, Twp. 2 N. Rng. 11 W., East Hy. 67 E."

Appellant makes no serious contention that the description contained in the sales contract, standing alone, is sufficiently definite to sustain an action for specific performance, but he does earnestly contend that he should have been permitted to introduce oral testimony for the purpose of locating and identifying the land, and that the trial court erred in refusing to let him do so.

We are of the opinion that appellant's contention in this matter cannot be sustained. The principal reason for this conclusion is that, since the description of the land in the sales contract is admittedly not definite, there are no words or phrases in the contract itself or in any of the correspondence which furnish a *key* whereby the land could be definitely located and described. This is the test that has been consistently announced in many decisions of this court, a few of which are noted below.

In the case of *Fordyce Lumber Company* v. *Wallace,* 85 Ark. 1, 107 S. W. 160, Justice McCullough, speaking for the court, said:

"Before a court of equity is justified in requiring specific performance of a contract to convey land, the property which is the subject must be accurately described; the contract must disclose a description which in itself is definite and certain, or one which is capable of being made certain by other proof, the contract itself furnishing the *key* by which the property may be identified." [Emphasis supplied.]

Although this case has been cited many times it has never been overruled. It was distinguished in the case of *Hirschman* v. *Forehand,* 114 Ark. 436, 170 S. W. 98, where the court, in spite of an indefinite description, permitted the introduction of proof to make it more specific, but on the theory that the case was taken out of the statute of frauds because the purchaser had entered into possession and made valuable improvements. Those features, of course, are not present in the case under consideration.

Testimony was permitted to identify lands indefinitely described in a sales agreement in the case of *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983, but it was allowed under the rule in the *Fordyce Lumber Company* case, *supra.*

In the case of *Rawls* v. *Free,* 184 Ark. 737, 43 S. W. 2d 540, the court again permitted testimony for the purpose of identifying the land. The contract between the buyer and seller consisted of letters in which the property was described as "the property of the Ross Estate, upon which Free held a mortgage which he was then foreclosing." In applying the rule heretofore announced, the court used this language:

"An accurate description of the lands might have been obtained from the mortgage or from the decree ordering its foreclosure, and the contract furnished the *key* by which the property might be certainly identified." [Emphasis supplied.]

Appellant cites several cases where the courts have permitted testimony to amplify an indefinite description in a sales contract but none of them abrogates the rule above announced.

The case of *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671, cited by appellant, deserves special consideration. It was there said by the court, in discussing a contract for sale which consisted of numerous letters between the parties, that: "The letters indicate that from the beginning both parties definitely understood the tract of land which was the subject of their negotiations." If

this language states a correct rule of law and if this is the sole test to be applied in such cases, then appellant's contention for a reversal of this case would appear to have merit, because it is reasonable to assume that appellant and Walthour-Flake both understood exactly what land was involved. This is indicated by the fact, shown by the correspondence, that during the time of the negotiations, covering several months, no question was raised regarding the location or identity of the land, notwithstanding the owners and Walthour-Flake were all the time promising to deliver a deed and abstract. We can hardly imagine appellant being willing to pay out $5,500 without knowing just what he was going to get for his money nor can we imagine the owners offering to deliver title to valuable land unless they knew exactly what land they expected to convey.

The above-indicated rule, however, is not one that has been approved by our court, nor would it be a reasonable one since it would amount to a complete nullification of the statute of frauds in such instances. Although the quoted language was used in the cited case it was not relied on to reach the conclusion. The rule relied on was the one first announced as is clearly shown by certain language used in the opinion, some of which we quote:

". . . if we take every part of the description in the letters, including the acreage and location, and give every part its due weight, we have a fixed and definite tract of land. . . ."

"The letters which constitute the contract identify and furnish the *means* of finding the land." [Emphasis supplied.]

The word *means,* just used, is analogous to the word *key* used in other citations.

In the case under consideration there is no *key* either in the contract or the correspondence [none of which was seen by appellant until it was filed in court] which could lead to a definite description of the land; consequently, it does not come within the rule permitting the introduction of testimony.

In our search of the authorities the closest approach we find to the contention of appellant here is the case of *Grindell* v. *Bass,* 2 Chancery Division, page 487, an English decision in 1920. There the court held that a pleading filed by the defendant, owner of the property, supplied the defect in the memorandum contract to sell and so took it out of the statute of frauds. Here it could be argued that the sales contract executed by Mattie Redding and Felix Richardson, owners of the land, agreeing to sell to A. N. McAninch, contained a definite description and therefore would take this case out of the statute of frauds. The sales contract we speak of is the one dated several months after the execution of the contract sued on and was never delivered to appellant, but was produced in court by appellees on motion of appellant. The fact that it was not a part of the contract with appellant and was not delivered to him is vital and therefore affords appellant no relief here. We have heretofore so held in the case of *Harris* v. *Dacus,* 209 Ark. 1031, 193 S. W. 2d 1006. Harris brought suit against Dacus [the owner of certain land] for specific performance on an insufficient memorandum contract and he offered in evidence a letter from Burns [the agent through whom Harris was buying] to Dacus which might have supplied the necessary elements. In rejecting this letter as evidence to supply the missing link, the court, referring to a former decision, said:

"We adhere to the rule there announced, and hold that, even if the letter of Burns to Dacus, relied on by appellant as constituting the memorandum of the contract of sale, could be said to be sufficient in its language and terms to satisfy the requirements of the statute of frauds, yet, since this letter was never delivered to appellant, it could not form the basis of a suit by appellant for specific performance."

From what has been said, it follows that the trial court was correct in sustaining appellee's demurrer and its action is therefore affirmed.

SEARCY FEDERAL SAVINGS & LOAN ASSOCIATION *v.* CITY OF SEARCY.

5-44 253 S. W. 2d 211

Opinion delivered December 15, 1952.

[redacted]

C. E. Yingling and *C. E. Yingling, Jr.,* for appellant.

Culbert L. Pearce, for appellee.

ROBINSON, Justice. In the City of Searcy there are several improvement districts which have accomplished the purpose for which they were organized years ago, and all of the bonds have been paid. These districts have on deposit unexpended funds in various amounts with the Searcy Federal Savings & Loan Association, the Security Bank and the Searcy Bank. The City Council of Searcy passed an ordinance creating what is known as Consolidated Street Improvement District of the City of Searcy. The ordinance attempts to give the consolidated district authority to take over and use for the repair of the city streets the above mentioned surplus funds. Subsequent to the organization of the consolidated district, the commissioners thereof filed suit, asking that the loan association and the banks be required to turn over to the consolidated district the funds on deposit. Street Improvement District No. 6 intervened. A demurrer was filed to the complaint and overruled, and the loan association, the banks and the intervener have appealed.

The complaint alleged: the creation of the Consolidated Street Improvement District of the City of Searcy by Ordinance No. 338; that during the period from 1926 to 1930 several local districts were created within the

corporate limits of Searcy for the purpose of paving and curbing certain streets; that after the districts had paid all indebtedness and obligations, they had surplus funds which were on deposit with the loan company and the banks. It is further alleged that commissioners of the various districts have ceased to exercise control over the improvements made and have left the burden of maintaining said improvements to the City of Searcy; that the State Highway Department contributed certain moneys to Improvement District No. 6. There is a prayer for an order directing the appellants, the loan association and banks, to deliver the funds, assets and records of the said districts to the commissioners of the consolidated district.

Ark. Stats., § 20-136, authorizes certain improvement districts, "which at the time of their organization had boundaries, co-extensive with the city," to wind up their affairs in a prescribed manner by turning certain assets over to the city; but here there is no allegation that any of the districts involved are co-extensive with the city. Nor does it appear to be compulsory that the district wind up its affairs in that manner. Also, Ark. Stats., § 20-236, provides as follows: "Hereafter, in any municipality in this State in which there has been more than one paving district receiving aid from the State under what is commonly referred to as the Municipal Bond Retirement Fund, in the event any of said districts, upon payment in full of all of the outstanding bonds against such district, has a surplus remaining in the treasury of the district, the city council of the municipality in which said districts are located may, by ordinance or resolution, transfer the balance in said paid-out district and place it in the treasury of such district or districts which still have outstanding bonds to be retired, and the money so transferred shall be used in the payment of bonds as they mature. It is the intention of this act [section] to specifically authorize the transfer of surplus moneys from paid-out districts to be used for the payment of bonds to become due in other paving districts where all of said districts have at one time qualified and received aid from the State of Arkansas."

In the case at bar there is no allegation that the newly formed consolidated district, which seeks to obtain the funds from the other districts, intends to use the money in payment of bonds. In fact, the consolidated district has no outstanding bonds: on the contrary, it is stated in the complaint that the consolidated district proposes to use the money for repair work.

Appellees cite *Wilson* v. *Blanks,* 95 Ark. 496, 130 S. W. 517, to the effect that two improvement districts which cover the entire territory of a town may be consolidated. On this point appellees also cite *Bateman* v. *Board of Commissioners,* 102 Ark. 306, 143 S. W. 1062, and *McCoy* v. *Holman,* 173 Ark. 592, 292 S. W. 999. These cases have no application here since the improvements were completed long ago, and there is no allegation that the districts involved cover the same territory.

The demurrer should have been sustained. The issue here is governed by the case of *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795. There is no act of the Legislature which authorizes the use of funds of improvement districts as is here attempted by appellees. In the Fernandez case this court said: "The majority of the court are of the opinion that the special act of the General Assembly is unconstitutional, as authorizing a diversion of funds collected for one purpose to be appropriated to another use, as an improvement district organized to construct streets has no authority to use funds collected for that purpose to thereafter appropriate any portion thereof for purposes of repair and the special act did not confer that authority because it was not based upon the consent of the taxpayers of the city, as required by the Constitution. In other words, to create an improvement district for the purpose of building or repairing streets in a city, the consent of the taxpayers must first be obtained in the manner provided by law and the authority conferred by the original petition under which the district was formed could not be subsequently enlarged by legislative enactment to which the taxpayers had not consented."

Reversed with directions to sustain the demurrer.

WARD *v.* FARRELL.

4-9931 253 S. W. 2d 353

Opinion delivered December 15, 1952.

Lee Ward, for appellant.

Gerald Brown and *Kirsch & Cathey,* for appellee.

WARD, Justice. Appellant, as a citizen and taxpayer of Greene County, brought this suit against appellee, the County Judge, to enjoin him from certain allegedly illegal practices and to recover for the County sums of money which he allegedly drew illegally and also sums in excess of his authorized salary as County Judge. The pleadings, in substance, are as set out below.

The complaint states, generally, that: appellee, for the years 1947 to 1951 inclusive, has drawn from the public funds over and above his authorized salary large sums under the guise of "expenses", and that he will continue to do so; appellee has procured and cashed the following warrants—(here is set out 63 in number totaling $4,350.75); he is drawing his salary in advance, and will continue to do so. The prayer was that appellee be enjoined from collecting "expense" money over and above his authorized salary and from collecting his salary in advance, and for recovery of $4,350.75.

Appellee filed a motion to make the complaint more definite and certain by pointing out in what respect each item is illegal and invalid. This same motion was also filed later, but on both occasions it was refused by the Chancellor. In our opinion had the motion been granted, it would have lent clarity to the proceedings that followed.

The answer alleges: a denial that appellee is drawing illegally amounts for "expenses"; that there is an adequate remedy at law by appeal from the County Court; that some of the warrants were for cash items such as wood, stamps, etc., which appellee paid for upon receipt with his own money and later filed his claim therefor, and that this was the custom; that the 3 years statute of limitations applies; that appellee, at all times covered by the suit, has been Ex-Officio Road Commissioner and entitled to draw expenses as such, and that his actual expenses have been more than the amounts drawn; that for the years 1949, 1950 and 1951 the quorum court appropriated funds in the sum of $100 per month, in advance, for expenses of the Road Commissioner; denies that he is wrongfully and unlawfully drawing his salary in advance, or that he will continue to do so; and that his accounts for the years 1947, 1948 and 1949 have been duly audited by the State Auditorial Department of the Comptroller's Office, that it is the duty of the Comptroller to demand payment for any liability and no such demand has been made by either the Attorney General or the Prosecuting Attorney, and that, therefore, this action by the appellant is premature.

A reply was filed by appellant denying appellee was Ex-Officio Road Commissioner, denying that the necessary expense for appellee as such road commissioner has been in *excess* of the amounts he has drawn, and denying all other allegations in the answer.

Stipulation. It was stipulated that appellee drew and cashed certain small warrants issued to him in instances where he had paid out his own money for wood, stamps, etc., and was reimbursed for same and that this had been the practice, but that he would not continue the practice; that appellee had drawn $100 per month as road commissioner each month since the suit was filed; that he drew $50 per month as such commissioner for the last five months in 1948, and that he drew $100 as commissioner for each month thereafter up to the time of filing this suit; that he would testify that for each and every month his expenses equaled or exceeded the amounts drawn; that the County received value for all items for which he was reimbursed; and that on November 19, 1951, the Quorum Court appropriated $600 for each of the years 1947 and 1948.

Evidence. Appellant introduced no witnesses and the only witnesses testifying for appellee were himself and Robert L. Wrape, the man who sold him the small amounts of fuel wood. There is little, if any, disagreement over the facts in this case. It is undisputed that appellee did draw some of his salary in advance; that he made no profit from the small out-of-pocket purchases and that the County got value received for all reimbursements; that there were no appropriations made by the Quorum Court for expenses of the Road Commissioner in 1947 and 1948, but were made or attempted to be made in 1951; and there was a proper appropriation for the year 1949. The exhibits show that the appropriations were by the Quorum Court supposedly for expenses of the Road Commissioner for the years 1949, 1950 and 1951, although the language employed could have been made plainer, as will be noted later.

At the conclusion of the hearing the Chancellor, after taking the matter under advisement and after the

presentation of briefs, made a comprehensive statement of facts and conclusions of law, and dismissed appellant's complaint. This statement evidences much thought and research, and we agree with many parts of it, but, for reasons hereafter set out, we have concluded the cause must be reversed for further proceedings. In the discussion that follows we have in mind that this case involves matters of public interest about which there seems to be more or less confusion, and that perhaps this fact justifies a consideration of some points that might not otherwise be required.

The right of appellant to maintain this suit. It is insisted by appellee that appellant, as a taxpayer, has no such right because of Act No. 41 of 1931 [part of which is *Ark. Stats.,* § 13-227]. This Act, as indicated above, invests the Comptroller's Office with the authority to audit county records and file same with certain officials to be used as evidence, etc. It is the view of appellee that this Act vests exclusive authority in the Auditorial Department of the State and in certain state and county officials to institute actions such as this one, and that appellant, therefore, has no such right. We do not agree with this contention. There is nothing in the Act itself which is susceptible to such an interpretation. Moreover, the right of an individual taxpayer to maintain such a suit is founded in Art. 16, § 13, of the State Constitution. This view has been sustained by this Court. In *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875, it was said:

"The Constitution (art. 16, § 13) provides that 'any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.' "

"This court has construed that provision to mean that a misapplication by a public official of funds arising from taxation constitutes an exaction from the taxpayers and empowers any citizen to maintain a suit to prevent such a misapplication of funds."

In *McLellan* v. *Pledger, County Treasurer,* 209 Ark. 159, 189 S. W. 2d 789, after quoting the section of the Constitution set out above, the Court referred to *Farrell* v. *Oliver,* 146 Ark. 599, 226 S. W. 529, and quoted therefrom as follows:

"There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as referred to above, that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitle them to relief against such misapplication."

The three years statute of limitation applies here, as is contended by appellee. Very much the same question was presented in the case of *State, Use and Benefit of Garland County, et al* v. *Jones, et al,* 198 Ark. 756, 131 S. W. 2d 612, where the court considered the application of the three years statute and also the five years statute and chose the former, using the following language:

"An analysis of such decisions as throw light upon the question here involved has convinced us that an action to recover money paid or obtained through an honest mistake of fact or law, in the absence of fraud, corruption, or wilful diversion, is an action founded upon an implied contract or liability, not in writing, and must be commenced within three years."

It was held in *Baker* v. *Allen,* 204 Ark. 818, 164 S. W. 2d 1004, that fees wrongfully withheld by the sheriff could not be collected from him where such fees were received more than three years before the suit was filed.

Out-of-pocket payments by the County Judge. It appears that appellee, thinking he was favoring the County by saving the expense of filing small claims, followed the custom of paying for small essentials such as wood, stamps, etc., out of his own funds and then allowing a claim against the County for reimbursement. It is not claimed that the County did not get full value or that he profited by such transactions. In commenting

on this practice the Chancellor stated there was nothing for him to do but hold it illegal. We agree with the Chancellor, on the authority of *Ark. Stats.*, § 22-612 and the inhibition in the Constitution [Art. 7, § 20] against a county judge passing on his own claim. During the hearing appellee stated that he would not continue such practice if it was held illegal and, on this statement by appellee, the Chancellor denied appellant's prayer for injunctive relief. We think the Chancellor was in error, or at least we think it would have been a more wholesome procedure to have granted the relief prayed for, particularly since a matter of costs was involved and there was no offer on the part of appellee to share the payment or any portion thereof. We also agree with the Chancellor that no recovery can be had against appellee for the amounts so received by him under the circumstances in this case and under the holding in the recent case of *Dowell* v. *School District No. 1, Boone County,* 220 Ark. 828, 250 S. W. 2d 127.

Drawing Salary in Advance. The county judge's salary is payable quarterly and it is not denied that in some instances appellee did draw his salary for the full period in advance, and it appears from the testimony that he might have quit this practice only after the suit was filed. Payment of salary is for services rendered and should not be paid until the services have been rendered. We do not agree with appellant that appellee had no right to allow a claim and issue a warrant for his own salary, because his salary is fixed by law and his actions therein involved no discretion. Under the authority of the *Dowell* case cited above, the Chancellor was correct in refusing to require appellee to repay that portion of his salary drawn in advance, but, for reasons before-mentioned, he should have enjoined such practice in the future.

Ex-Officio Road Commissioner. It is the contention of appellant that appellee had no right to draw expense money as Ex-Officio Road Commissioner because no such office or position exists. This contention cannot be sustained.

Act 97 of 1929, § 2, provides that "Each of the County and Probate Judges is hereby made Ex-Officio Road Commissioner of his county . . ." and further provides that the quorum court may make appropriations for their expenses. This section of said Act 97 has never been repealed and is still the law. To determine this fact it was necessary to examine a large number of other related acts. Without going into unnecessary details a summary of our investigation will suffice.

The original act dealing with county judges' salaries and Ex-Officio Road Commissioners was Act 140 of 1927. Section 1 of this Act fixed the salaries of all county judges in the State on a county basis, while § 2 created the position of Ex-Officio Road Commissioners. Act 59 of 1929 amended § 2 of said Act 140 by re-enacting the same but fixing the expenses of the Ex-Officio Road Commissioner in Conway County at $1,000 per annum. Said Act 97 was re-enactment of Act 140 except that in fixing all county judges' salaries it changed some and left off the provision about Conway County. Following the passage of Act 97 of 1929 the Legislature passed a large number of acts amending § 1 of said Act 97, rewriting the entire section, apparently for the purpose of changing some of the judges' salaries, but none of these acts repealed or changed § 2 of Act 97 which provides for Ex-Officio Road Commissioners. An additional indication that the Legislature meant to retain Ex-Officio Road Commissioners is the fact that all the amendatory acts referred to contained a proviso that in White County the judge's salary should include his expenses.

In this connection it must be noted that appellant contends Ex-Officio Road Commissioners were done away with by the Legislature by the passage of Act 379 in 1939. This Act creates a County Highway Commission composed of the County Judge and two members appointed by him with the approval of the levying court, and provides that the two appointed members shall draw $5 per day (for not more than 12 days in any one year) as compensation. It is our view that said Act 379 is in

no way inconsistent with the retention of Ex-Officio Road Commissioners, particularly since the Act itself contains no such repealing clause.

Appropriations by the Quorum Court. Appellant argues that even though it be conceded the office of Ex-Officio Road Commissioner does exist there were no legal appropriations made for such expenses by the Quorum Court in this instance. Possibly this contention does not go to the years 1949, 1950 and 1951, but if it does we cannot agree with appellant. The record shows, for the first year, "Expenses of County Judge as Road & Bridge Comm., $1,200.00." Certainly the insertion of the word "Bridge" in the appropriation item is no indication that it was meant for anything other than expenses for road commissioner. For the other two years the appropriation item reads "County Judge Car Expense, $1,200.00." Of course, this language might have been improved upon and made more definite, yet the Act does not set forth any required language for appropriations, and since there is no showing or contention that the money was intended or used for any other purpose than expenses for Ex-Officio Road Commissioner, we deem it a sufficient compliance with the law for that purpose.

No Appropriation for 1948. The matter of an appropriation for 1948 presents a different situation from that obtaining for the years following, as discussed above. Since, as indicated above, the three years statute of limitations applies and this suit was filed on July 23, 1951, this leaves for our consideration the period of time from July 23, 1948, to January 1, 1949. The record reflects that no appropriation by the Quorum Court for expenses of the County Judge as Ex-Officio Road Commissioner was made for 1948 either during that year or the year preceding. The record does reflect, however, that on November 19, 1951, after the filing of this suit, the Quorum Court met and made, or attempted to make, an appropriation for said purpose the amount of $600 for the year 1948 [and 1947].

It is the contention of appellee that no appropriation of any kind was necessary in order for it to be legal

for the County Judge to draw money from the County as Ex-Officio Commissioner. This contention is based on dubious authority. It is admitted that the case of *Ladd* v. *Stubblefield,* 195 Ark. 261, 11 S. W. 2d 555, holds that an appropriation is necessary, but appellee attempts to explain that the decision probably would have been different had the court known [or had called to its attention] that Johnson County was exempt from the provisions of Act 217 of 1917 [by later enactment]. Without speculating on what the court might have done in the cited case, we point out that in this case we are concerned with Act 97 of 1929 and not with said Act 217. The wording in § 2 of Act 97 convinces us that it was the intention of the Legislature that no money should be paid to the county judges as Ex-Officio Road Commissioners unless the quorum court first made an appropriation for that purpose. Having said this it follows that the attempted appropriation made by the quorum court of Greene County on November 19, 1951, was ineffectual to validate the expenditure of $600 in 1948 as expenses for the County Judge [as Ex-Officio Road Commissioner] in that year.

It does not follow from the above, however, that the Chancellor should have ordered the County Judge to reimburse the County for the amount he drew as Road Commissioner from July 23, 1948, to January 1, 1949, at the rate of $50 per month. If appellee actually spent his own money or incurred actual expenses in the discharge of his duties as road commissioner and Greene County received full benefit therefor, and if he can by detailed evidence establish these to be facts, he should be given credit therefor against the money he received from the County during the period of time in question. If such credits do not equal the amount of money drawn, he should, of course, be required to reimburse the County for the difference. Again we reach this conclusion under the authority in the *Dowell* case, *supra.*

Since the case was not developed on the above point, appellee should be given an opportunity to show, in the manner indicated above, to what extent he actually incurred expenses as Ex-Officio Road Commissioner from

July 23, 1948, to January 1, 1949, and further show that such expenditure by the county did not cause the total expenditures for the year 1948 to exceed the revenues for the same year. The latter requirement is necessary under the provisions of Amendment 10 to the State Constitution which prohibits counties from spending in excess of their revenues. Since the adoption of Amendment 17 we have held that amendment must be strictly construed.

In view of what we have heretofore said, this cause is reversed and remanded to the trial court with the following instructions:

The trial court is instructed: (a) to enjoin the appellee from issuing and accepting warrants in payment for out-of-pocket cash items as heretofore referred to, and from drawing his salary in advance; and (b) to give appellee an opportunity to justify his acceptance of expenses as Ex-Officio Road Commissioner for part of the year 1948 as referred to previously.

WITHROW *v.* SULLIVAN.

4-9943 253 S. W. 2d 339

Opinion delivered December 15, 1952.

Rehearing denied January 12, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

Brooks Bradley and *Josh W. McHughes,* for appellee.

GRIFFIN SMITH, Chief Justice. Thorough Waterproofing Company was the trade name applied to a business conducted by Charles P. Sullivan during the greater part of 1947. Early in 1948 he approached Nevil C. Withrow regarding future operations. Until October, 1948, Withrow's business was a partnership composed of his wife and himself; but in October a corporation designated Nevil C. Withrow Company was formed. For the purpose of this suit the corporation and Withrow are treated as one.

Sullivan's connection with Withrow began March 3, 1948. In suing for claimed balances Sullivan alleged successive verbal contracts. Initially he was to be paid weekly wages equivalent to the union scale, "which was going to be" $2 per hour. At the end of the year a differential sufficient to bring his income to $10,000 would be paid. This arrangement, according to Sullivan, resulted from Withrow's unwillingness or inability to carry a heavy payroll and provide sufficient unimpaired operating capital. Withrow, says Sullivan, agreed to reduce the agreement to writing, but explained several weeks later that his attorney had advised against a fixed commitment. In explaining Withrow's attitude Sullivan testified that the amount could or would be increased to as much as $15,000 the second year if the business continued to operate at a profit.

Sullivan's equipment was purchased for slightly more than $1,200.

Approximately six weeks after the oral contract is alleged to have been made Withrow informed Sullivan of his attorney's objection to a flat guarantee; thereupon (says Sullivan) Withrow advanced a second proposal. It is claimed that under this recast relationship wages were to be paid as in the past—that is, there would be weekly withdrawals equivalent to the prevailing union scale applicable to a superintendent;—but the actual measure of compensation would be supplemented by 10% of the gross earnings of the waterproofing division. In testifying Sullivan said that under the first agreement actual weekly withdrawals were to be $80, but that at the end of the year the difference between this sum and the union schedule would be considered as earned. The same arrangement applied to the second contract except that instead of a flat $10,000 differential Sullivan would receive 10% of the gross profits. Gross profits were to be ascertained after a third of the office, warehouse, rentals and insurance charges had been deducted.

The weekly payments fluctuated from $80, to $85, then to $100, and finally to $135.

Sullivan was very certain that Withrow had agreed to permit occasional examination of the books. Until a temporary agreement was made February 23, 1951, the contract now sought by Sullivan to be established rested entirely upon disputed parol, and notwithstanding his assertions respecting the first understanding and Withrow's flat refusal to put it into effect, Sullivan entered into the second employment stage with nothing to substantiate what is now claimed to have been a definite commitment other than his construction of promises alleged to have been verbally made.

Sullivan readily conceded that Withrow had breached his first contract, but just as unhesitatingly asserted that the second arrangement was projected at a time when he had complete confidence in Withrow's veracity.

A voucher-check for $2,500, marked "bonus" was issued to Sullivan in August, 1949. The payee contended

that in cashing the check (the voucher portion of which was detached and retained by Sullivan) he did not notice the word *bonus;* and, inferentially, he did not observe that $375 had been deducted for "W.H. [withholding] tax", leaving the net amount $2,125. Printed on the voucher was the following: "By the acceptance and endorsement of the attached check the payee acknowledges payment as shown above".

Sullivan knew—but the date of this information is not given—that the business lost money in 1949. He then added that no question was being raised that the $2,500 item was full payment for the first year. This statement was later contradicted.

About January 1, 1951, Sullivan was shown a financial statement disclosing losses in operation of the waterproofing division. He insists that for a protracted period efforts had been made to inspect the company books, but he was put off with the explanation that the records were in an auditor's hands. Sullivan explained that the higher weekly withdrawals were "cost of living increases".

Severance of relationship occurred when on February 23, 1951, Withrow wrote Sullivan that certain personal promotion work the latter was doing on company time was unsatisfactory. He was allowed to continue working, as the letter expressed it, "until you procure another place". Sullivan does not contend that participating interests were payable after Withrow wrote this letter.

An independent audit of Withrow's books was made at the Chancellor's suggestion. Attached to Sullivan's complaint was a statement showing that from March 3, 1948, to February 1, 1951, the amount appellee received was $14,027.50. The sum claimed to have been earned as union wages plus a superintendent's stipend was $20,176.87, and the asserted unpaid portion was set out as $6,049.37. This is in addition to 10%.

The decree disallowed the additional wage claims, but gave Sullivan a 10% participating profit, less the bonus. The judgment was for $5,085.34.

Withrow was emphatic in his denial of the contract Sullivan seeks to establish. The original consideration resulting in the employment included purchase by Withrow of Sullivan's Thorough Waterproofing Company's equipment. This was paid for and Sullivan's duties were those of a superintendent, starting at $2 per hour, with a 40-hour week. Withrow did not, at that time, have union connections. He became contractually affiliated in the spring of 1951. The several increases in hourly compensation were agreed to because the company considered that its men were entitled to more pay as the cost of living advanced. Workers other than Sullivan were included in wage boosts. Although Sullivan was paid weekly with hours as a basis, deductions do not appear to have been made for partial weeks, and sometimes expense charges were allocated to different jobs. The latter practice is illustrated by a check-stub in evidence of a payment made to Sullivan for the week ending August 23, 1950. Twenty hours of time put in by Sullivan were apportioned to The First Methodist Church contract (at $2 per hour) and the remaining half to Warehouse ("Consistory"). It is noteworthy that the payment is marked "wages, less social security, $1.50, [and] withholding tax and insurance, $8.05".

The bonus payment, said Withrow, was more than a gratuity, but it was in no sense contractual. The waterproofing division had made money that year and the feeling was that those who primarily promoted the current success should be rewarded. Minutes of directors' meetings were introduced, one showing that on August 3, 1949, the chairman (Withrow) "proposed" that Sullivan be paid $2,500 as a bonus. This was later changed by substituting the word "reported". It was felt by Sullivan's counsel that the alteration was an afterthought and that the minutes did not correctly reflect what was actually done. Comments made by the Chancellor indicate that he did not attach any importance to the alteration, and we agree in that respect.

Circumstances that cannot be ignored or explained away strongly substantiate Withrow's understanding of the contract. For instance, the union wage scale from

August 24, 1950, to December 31 of the same year was $3 per hour, but Sullivan was paid $3.37½ an hour. From January 1, 1951, to February 21, the union scale was $3.25, but Sullivan drew $3.37½. The result is that from August, 1950, appellee was being paid more than the union wage.

The case is difficult, as the Chancellor undoubtedly found, because the word of one man was challenged by the other. But it is inconceivable that Sullivan can be correct in his insistence that he did not read the notation on the bonus check. In the first place each party agrees that the bonus was to be $2,500, yet the check was for $2,125 when reduced by $375 representing withholding tax. It seems wholly unreasonable that one who expected $2,500 would accept $2,125 without observing the deduction. This, however, is not controlling. For many years Sullivan had been a railway locomotive fireman with final monthly earnings of from $350 to $450. It is not disputed that he told Withrow that operation of his (Sullivan's) waterproofing business could not be satisfactorily handled by one man, and Withrow's testimony is that Sullivan approached him and suggested selling. Seemingly the price fixed by Sullivan was satisfactory.

There is nothing, other than Sullivan's contention, to indicate that at year's end (the company's fiscal period closed Sept. 30) demands were made for settlement, or that a claim was advanced for the sums now contended for. Surely, after Withrow had declined to perform under the first agreement, any prudent person looking back upon the first default Sullivan alleged, would have required something more tangible than parol as a guarantee that wages would be paid under the verbal stipulation, and that in addition he would be given ten percent of the so-called "gross" earnings—earnings not based upon company profits, but upon income less relatively small deductions.

Nothing has been pointed to in Withrow's conduct covering a period of nearly three years to distinguish his actions from the course any business man or organization would be expected to follow. Not until the letter of

dismissal was received did Sullivan pursue an affirmative course other than to say at trial that he asked for account book information and discussed with Withrow the adjustments now said to be due. On the other hand every scrap of writing, such as checks, vouchers, payrolls, etc., shows ordinary business procedure with no indication that differentials were in dispute. In these circumstances, where the burden of proving the oral contract was upon appellee, we are unable to say that the evidence preponderates in Sullivan's favor, or that it is evenly balanced.

Reversed and cause dismissed.

PARKER *v.* JONES.

4-9936 253 S. W. 2d 342

Opinion delivered December 15, 1952.

F. D. Majors, for appellant.

Hays, Williams & Gardner and *J. M. Smallwood,* for appellee.

MINOR W. MILLWEE, Justice. This action was originally brought by the appellant, Parker Parker, against Noel and Mary Sue Jones, doing business as Nebo Lumber Co., C. J. Robinson, and J. R. Turner for the conversion of timber on 40 acres of wild and unoccupied lands. According to appellant's contention the defendants conspired to deprive him of his timber by having Turner execute an invalid timber deed to Robinson who cut the timber and sold it to Noel Jones who financed the transaction.

On a former appeal we held that appellant's complaint alleged two separate trespasses or torts, one as to an alleged cutting on the east 20 acres of the tract in 1947 and another cutting from the west 20 acres in 1948. We also held that appellees' plea of *res judicata,* growing out of a consent judgment in a former suit, was erroneously sustained as to the 1947 cutting in the absence of a hearing on the merits. *Parker* v. *Turner,* 219 Ark. 194, 242 S. W. 2d 148. Trial to a jury on remand resulted in a verdict and judgment in favor of the defendants who are the appellees here.

Although there are numerous contentions for reversal, the most serious question presented is whether there is substantial evidence to support a jury finding that appellant's cousin, J. R. Turner, had authority to sell the timber in question as the agent of appellant. Turner executed a timber deed to C. J. Robinson on October 25, 1947, purporting to convey the pine timber on the 40-acre tract with six months allowed for its removal. Appellant was then in the Army and was not discharged until December, 1947.

Appellees offered testimony tending to show that Turner was acting as appellant's agent in selling the timber to Robinson. W. B. Halbrook testified that he purchased timber belonging to the appellant from J. R. Turner on two separate occasions in September and November, 1947. His checks delivered to Turner but payable to the appellant for the timber were introduced in evidence. Appellant endorsed one of the checks and his mother endorsed appellant's name to the other with his consent and approval. One witness who was a prospective buyer of the timber in question testified that appellant's mother directed witness to see Turner. There was evidence of other circumstances indicating that appellant held his cousin out as an agent with authority to sell the timber.

Appellant strenuously denied that Turner had ever sold anything for him or that he had authority to act as his agent. He also stated that he had quite a "curse fight" with his cousin and that Turner had never paid him any part of the $2,250 which Robinson paid for the timber although appellant had demanded such payment of Turner and the other defendants. Appellant testified: "J. R. Turner has never paid me one cent on that, and that is why this law suit is here."

Under this conflict in the evidence the trial court held that a jury question was presented as to whether Turner was acting as appellant's agent in the sale of the timber and instructions were given properly submitting this issue to the jury. In this connection the jury were told that even if they found that Turner was authorized to sell the timber, the deed executed by him in his own name would be ineffectual to bind the appellant unless the latter by his action and conduct was estopped to plead Turner's lack of authority.

We have said that agency may be established by circumstantial evidence as well as by positive testimony. *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020. While the authority to convey land or growing timber must be conferred by an instrument of equal dignity with the instrument of conveyance, the authority to sell and to make a binding contract of sale may be conferred verbally and

is not within the statute of frauds. *Davis* v. *Spann,* 92 Ark. 213, 122 S. W. 495; *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671.

In *Austin Western Rd. Mach. Co.* v. *Grant County,* 164 Ark. 228, 261 S. W. 283, the court said: "Where a general authority to do an act is alleged, and the plaintiff or defendant relies on the other's having held out a third person as his agent, other instances of his having treated the person as his agent for such an act are receivable to show a general holding out of that person as agent. Wigmore on Evidence, vol. 1, 2d Ed., § 377." This rule has been applied where the question at issue was that of an agent's authority to make a sale of land. *Vaught* v. *Paddock,* 98 Ark. 10, 135 S. W. 331. While the kinship of appellant and Turner standing alone would not justify an inference of agency, such relationship is entitled to some weight, when considered with other circumstances, as tending to establish the fact of agency. *Braley* v. *Arkhola Sand & Gravel Co.,* 203 Ark. 894, 159 S. W. 2d 449. We conclude that there was substantial evidence to support a finding that Turner was acting as appellant's agent in the sale of the timber to Robinson.

Appellant also argues that appellees cannot rely on agency and estoppel because same were not properly pleaded as defenses. In his answer, C. J. Robinson specifically denied the allegation in appellant's complaint that Turner had no authority to sell the timber, and the other defendants denied generally the allegations of the complaint. Moreover, much testimony was presented on the issues of agency and estoppel without objection. Where a case is tried upon an issue not tendered by an answer and evidence is introduced concerning it without objection, the answer will be treated as having been amended to conform to the proof and the sufficiency of the answer may not be challenged on appeal. *Athletic Tea Co.* v. *McCormack,* 159 Ark. 405, 252 S. W. 7. In *Fairbanks-Morse & Co.* v. *Hogan,* 201 Ark. 1114, 148 S. W. 2d 162, we said: "When appellee introduced evidence which tended to create an estoppel there was no objection, and it cannot be complained of now." There was no objection at the trial that agency and estoppel

had not been properly pleaded and such objection comes too late after testimony is admitted on these issues without objection.

Another sharply disputed question presented to the jury was whether appellant released the appellees from liability for the 1947 cutting when Robinson and Nobe Buckman paid appellant $1,500 in settlement of the consent judgment rendered in the first suit filed in 1949. Robinson, who was a party to that suit, was positive in his testimony that he paid $750 of the $1,500 payment to appellant in full settlement for all the timber cut and removed from the 40-acre tract. Appellant stoutly denied this testimony and the issue was submitted to the jury under proper instructions. Appellant earnestly suggests that we should disbelieve the testimony of Robinson and others. The jury, and not this court, are the exclusive judges of the credibility of the witnesses. That body could have found from the evidence that the settlement of the first law suit was in full satisfaction of all damages resulting from the timber cutting on the 40-acre tract.

Appellant also objected to the trial court's action in excluding certain testimony. The court refused to permit one witness to state that he had at one time "guessed" that a certain amount of timber was removed from the 40 acres after the witness had frankly stated that he did not know the amount of timber removed. In sustaining the objection to this testimony the court offered to permit counsel to qualify the witness to make an estimate of the timber removed. The court also refused to permit certain hearsay testimony, but the record fails to disclose any exception to the court's ruling by the appellant. We find no error in these rulings. The trial court was very liberal in permitting appellant to testify what his examination of the public records showed as to tax payments and other matters relative to his claim of title over the objection of appellees that the tax receipts and records would be the best evidence.

The trial court on his own motion gave 11 instructions which fully covered the issues in the case. Appel-

lant made only a general objection to these instructions. None of these instructions are inherently erroneous nor are they subject to the specific objections that appellant now seeks to urge against them.

Appellant also requested 14 instructions which were refused by the trial court. Most of these instructions included the name of Mary Sue Jones as a defendant when the court had instructed the jury that all parties were in agreement that Mrs. Jones was not subject to any possible liability in the case. Some of the instructions requested were peremptory and the matters contained in others were fully covered by the instructions given.

We find no prejudicial error in the record and the judgment is affirmed.

McFaddin, J., not participating.

Cayce *v.* Nordin, Trustee.

4-9939 253 S. W. 2d 338

Opinion delivered December 15, 1952.

Rehearing denied January 12, 1953.

A. D. Chavis, for appellant.

T. S. Lovett, Jr., for appellee.

ROBINSON, Justice. This is an appeal from a decree of the chancery court quieting appellee's title to certain described lands.

Appellant claims ownership by having acquired title from the Farmington Bank of Farmington, Missouri, the owner at the time the lands forfeited for non-payment of the 1932 taxes. The parties stipulated, *inter alia,* as follows: "That the lands involved in this suit forfeited to the State of Arkansas, for the taxes of 1932, said sale being held on the 6th day of June, 1933; that said lands were certified to the State of Arkansas by the Clerk of Lincoln County, Arkansas, on the 2nd day of November, 1936; that the State of Arkansas made a deed to said lands to W. R. Alsobrook, February 25, 1937; that said lands are wild and unimproved; that all of this land was purchased from the State of Arkansas by W. R. Alsobrook, prior to 1940; that W. R. Alsobrook received deeds to said property which deeds contained a valid description thereof; that the said W. R. Alsobrook and his successors in title have paid the taxes on said lands regularly before they became delinquent for more than seven (7) years prior to January 18, 1949 (the date upon which this cause of action was filed) and subsequent to his purchase from, and receipt of deeds from the State of Arkansas, said deeds from the State of Arkansas having been executed in the regular manner by the Commissioner of State Lands, and were what is designated by said Commissioner as deeds 'For Forfeited Lands Sold'." Facts were also stipulated which would render the tax sale void.

Appellee, together with his predecessors in title, have paid taxes, for more than seven years, on the lands which are wild and unimproved. A state deed to tax forfeited lands gives color of title, even though based on a void tax sale. *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681; *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390, 11 L. R. A., N. S. 772; *McKewen* v. *Allen,* 80 Ark. 181, 96 S. W. 392; *Brandon* v. *Parker,* 124 Ark. 379, 187 S. W. 312; *Terry* v. *Drainage District No. 6, Miller Co.,* 206 Ark.

940, 178 S. W. 2d 857; and *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425.

By the payment of taxes on wild and unimproved lands for seven years under color of title, the appellee acquired a valid title. *Pattillo* v. *International Paper Co.,* 210 Ark. 1036, 199 S. W. 2d 307.

Affirmed.

ARNOLD BARBER & BEAUTY SUPPLY COMPANY *v.* PROVANCE.

4-9951 253 S. W. 2d 367

Opinion delivered December 22, 1952.

Beloit Taylor and *A. D. Whitehead,* for appellant.

Dinning & Dinning, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellant to recover a balance of $526.79 owed to it under a title retaining contract by which it had sold certain beauty shop equipment to Opal Parker. Upon the filing

of the complaint the plaintiff obtained a writ of attachment and had the sheriff take possession of the above equipment. The appellee, Virginia Provance, by intervention asserted that several months before the suit was brought she had formed a partnership with Opal Parker and had bought a half interest in the fixtures that were later attached. The intervener, alleging that the partnership property was not subject to attachment for Opal Parker's individual debt, sought damages for the wrongful seizure of the equipment. On an earlier appeal we held the intervention not demurrable, since by electing to sue for the debt the plaintiff had waived its retention of title. 218 Ark. 274, 235 S. W. 2d 970.

Trial resulted in a verdict for Mrs. Provance in the sum of $300. To support her claim for damages Mrs. Provance proved her written partnership agreement with Opal Parker, showed that she had bought a half interest in this and other equipment owned by Mrs. Parker, and testified as to the rental value of the attached property. In defense of the intervener's claim the appellant proved that Opal Parker, in selling an interest in her business, failed to comply with the Bulk Sales Law, Ark. Stats. 1947, §§ 68-1501 *et seq.,* and further that the partners had operated under a trade name, Opal's Beauty Shop, without having filed the certificate required of persons doing business under an assumed name. §§ 70-401 *et seq.*

The appellant's assignments of error all relate to the giving or refusal of instructions. It is said that the court should have directed a verdict for the plaintiff, upon the theory that since Mrs. Provance had just begun learning the business of cosmetology she could not have been damaged by the fact that the attachment had the effect of putting the firm out of business. But Mrs. Provance is suing not for loss of profits but for the rental value of her property while it was in the sheriff's custody, *Boatwright* v. *Stewart,* 37 Ark. 614, and her evidence sustains the amount of the verdict.

Another contention is that the court should have instructed the jury that Mrs. Provance, by entering the

partnership, became liable for all prior partnership debts and that this liability might be satisfied out of partnership property. This requested instruction is assertedly based on § 17 of the Uniform Partnership Act, Ark. Stats., § 65-117, but the statute is not susceptible of the interpretation urged by appellant. It applies only to one who enters an existing partnership, and here Mrs. Parker had done business by herself until the new concern was formed. What happened was that Opal Parker put encumbered property into the venture. Of course the appellant might have asserted a prior claim by replevying the property, but we held on the other appeal that it waived its superior title by suing for the debt. By that action it elected to look to Opal Parker personally for payment of its claim, and the Act is explicit in providing that a partner's interest in specific partnership property is not subject to attachment for such a personal debt. Ark. Stats., § 65-125 (2, c); Commissioners' Notes, 7 U. L. A. § 25. In this situation the Act allows a judgment creditor to obtain a charging order against his debtor's interest in the profits, § 65-128, but the appellant has not attempted to pursue that remedy.

We think the court correctly refused to instruct the jury to find for the plaintiff if the Bulk Sales Law had been disregarded in Mrs. Parker's sale of a half interest in the business to Mrs. Provance. By its terms that law applies to the sale of "a stock of merchandise, or merchandise and fixtures." § 68-1501. It does not, for example, affect the transfer of a restaurant devoted primarily to the serving of food and drink, even though merchandise such as cigars and confections is incidentally sold to patrons. *D. C. Goff Co.* v. *First State Bank of DeQueen,* 175 Ark. 158, 298 S. W. 884. So here, the operators of the beauty shop were engaged principally in the rendition of services and made only isolated sales of minor items such as lipstick.

Another refused instruction would have unconditionally directed the jury to return a verdict for the plaintiff if it were found that the partners had engaged

in business under a trade name without having filed the certificate required by Act 11 of 1943. The charge, in the form offered, was properly rejected. The statute does not by its terms deny all recourse to the courts to those who ignore its provisions; it merely imposes a small fine for disobedience. § 70-405. Under an assumed name statute of this type it is usually held that noncompliance does not prevent the partners from maintaining a tort action. *Denton* v. *Booth,* 202 Mich. 215, 168 N. W. 491, 2 A. L. R. 114. This should certainly be the rule when the failure to file the certificate "has no causal relation to the injury." *Hudgens* v. *Douglas,* 56 Ga. App. 877, 194 S. E. 398. Here the appellant made no effort to establish such a causal connection, as by proof that it searched the public records before attaching property thought to belong to Opal Parker alone. Even had such evidence been offered its weight would have been for the jury rather than for the court. Hence the court properly declined an instruction which would have required the jury to find for the plaintiff upon the fact of noncompliance only, without regard to the issue of proximate cause.

Finally, in closing its brief the appellant rather casually criticizes the instructions that were given. These instructions take up more than four pages in the printed abstract, but the appellant has only this to say about them: "Appellant insists that the oral statement by the court, the oral instructions and the court's four written instructions were misleading and not backed up by the evidence and the law." We do not regard this statement as a sufficient assignment of error. An appellant must specify the mistake he complains of. "He must be able to lay his finger upon the error, and point it out, if he seeks to review or correct it." *Lenox* v. *Pike,* 2 Ark. 14. This appellant's criticism of the court's instructions amounts to no more than a conclusion of law; no doubt its insertion in the brief was based on the hope that we might discover some inaccuracy not perceived by counsel. This practice is not uncommon, however, and we think it not amiss to say that, except in reviewing

felony convictions, we must decline invitations to search for errors not specifically brought to our attention.

Affirmed.

PENNEY *v.* VESSELLS.

4-9956 253 S. W. 2d 968

Opinion delivered December 22, 1952.

Rehearing denied February 2, 1953.

Collins, Core & Collins, for appellant.

Byron Goodson and *E. K. Edwards,* for appellee.

ED. F. MCFADDIN, Justice. The determination of this case turns on the validity of a contract for sale of the homestead of an insane wife.

Appellant, Ralph Penney, owned property in Sevier County, which was occupied as a homestead by himself and his wife, Mrs. Juanita Penney. She was insane, although she had no legal guardian until Penney was so appointed on October 8, 1951. On September 12, 1951, Penney and appellee, H. G. Vessells, entered into a contract (Penney being designated as First Party and Vessells, as Second Party) which provided, *inter-alia*: (1) that Penney agreed to sell and Vessells agreed to buy

the Penney homestead, and also a restaurant and tourist court business located on the homestead:[1] (2) that Vessells would deposit $2,500 with the named escrow agent and could then take possession of the restaurant pending the completion of the entire transaction; and (3) the contract further provided:

"First party shall immediately start Court proceedings in order to clear up the interest of First Party's wife in said property. Upon the Court allowing a conveyance of the said property clear of the interest of the said wife, then the First Party shall deliver a Warranty deed conveying said property to Second Party to the said escrow agent. . . . In the event the First Party is unable to convey clear title to said property to the said Second Party, the said escrow agent shall return all cash payments to the said Second Party and this contract shall then be terminated. In the event the First Party is able to convey clear title to said property to the said Second Party, the said Escrow agent shall turn over the cash payments, note and mortgage, all of which were made by the Second Party, to the First Party and said escrow agent shall deliver the said Warranty Deed, made by the First Party, to the Second Party. In the event the Second Party refuses or is unable to complete this contract, all cash payments made by the said Second Party shall be turned over to the said First Party as his liquidated damages. . . ."

In accordance with the said contract, Vessells deposited the $2,500 with the Escrow Agent, and took possession of the restaurant a few days later. He was immediately informed by Mrs. Juanita Penney's father (who lived with the Penneys) that appellant, Ralph Penney, could not convey the property. Vessells kept possession of the restaurant for a day and a night, and then returned possession to Penney. A large portion of the evidence is directed to the reason why Vessells surrendered possession. Witnesses for Penney claimed that Vessells became "sick of his bargain", and that Vessells realized he could not successfully manage the restaurant.

[1] And also six additional acres not homestead.

Vessells claimed defect of title, and that the entire trade had been misrepresented by Penney. We regard all such evidence as unimportant, because the main issue is the homestead question, as hereinafter discussed.

At all events, after Vessells surrendered possession of the restaurant, Penney then had himself appointed guardian of the person and estate of his insane wife, and procured what he claims to be full power from the Probate Court to carry out the contract with Vessells for the sale of the homestead. Then on November 6, 1951, Penney filed the present action against Vessells and the Escrow Agent for the $2,500 as liquidated damages. The Escrow Agent paid the money into the registry of the Court and was discharged. Vessells resisted the action, making the defense, *inter-alia,* that Penney was legally unable to make a valid contract for the conveyance of the homestead because of the insanity of Mrs. Penney. The Circuit Court, sitting as a jury, held the contract to be void on account of the homestead question, and ordered the $2,500 paid to Vessells, less $180 which Vessells obtained from the restaurant while operating it. Both sides have appealed.

We affirm the Circuit Court judgment in favor of Vessells. Section 50-415 Ark. Stats. says:

"No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless the wife joins in the execution of such instrument and acknowledges the same."

We have construed and applied this Statute in scores of cases, some of which are *Pipkin* v. *Williams,* 57 Ark. 242, 21 S. W. 433, 38 A. S. R. 241; *Waters* v. *Hanley,* 120 Ark. 465, 179 S. W. 817; *Oliver* v. *Routh,* 123 Ark. 189, 184 S. W. 843; *Ferrell* v. *Wood,* 149 Ark. 376, 232 S. W. 577, 16 A. L. R. 1033; *Bowden* v. *Wilson,* 214 Ark. 828, 218 S. W. 2d 374.

In *Ferrell* v. *Wood, supra,* we held that when the husband made a contract to convey the homestead and

the wife did not join in the contract, then the husband would not be liable in damages for breach of the contract upon refusing to execute the deed. In so holding, we quote with approval this language:

"'. . . it seems to us that to hold that a person is liable in damages for the nonperformance of a contract which he is under no legal obligation to perform would be illogical, and without analogy or precedent in the law. The very proposition involves a legal inconsistency. We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against the obligor. There are also strong practical considerations in favor of this view. While it is true, as counsel suggests, that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance, or of being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages might, and naturally would, often indirectly defeat the very object of the statute. There is nothing unjust to the obligee in holding such a contract absolutely void for all purposes: He is bound to know the law, and he always has actual notice, or the means of obtaining actual notice, of the fact that the land with which he is about to deal is a homestead.'"

In *Waters* v. *Hanley, supra,* Waters, without joinder of his wife, entered into a contract with Hanley whereby for $6,500 cash paid, Waters agreed to deliver to Hanley, within 30 days, a deed to, and possession of, the Waters homestead. Within said 30-day period, the Waters house was destroyed by fire, without fault of either party. Thereupon, Waters and his wife tendered to Hanley a deed, duly signed and acknowledged by Mr. and Mrs. Waters. Hanley refused the deed and sued to recover the $6,500 purchase money paid. In affirming a recovery

by Hanley, we pointed out that by Statute [2] the original contract was void because Mrs. Waters did not sign and acknowledge it, and we said:

"Under the facts of this case, the husband did not have the ability to carry out the contract made by himself for the conveyance of his homestead, and the equitable title never vested in his vendee. It does not help the case any that the wife after the fire joined with the husband in the execution of a deed. This was her voluntary act, and was not done in compliance with the requirements of the contract."

Some of the Justices of this Court are of the opinion that our case of *Waters* v. *Hanley, supra,* is determinative of the case at bar; but the majority of the Court holds that under the existing condition of our law, the homestead of an insane wife cannot be sold while such homestead right continues. Well considered cases from other jurisdictions, having statutes somewhat similar to ours, deny the power to convey the homestead of an insane wife.[3] In 26 Am. Jur. 96, such holdings are summarized:

"The authorities, for the most part, hold that in the absence of statute, the insanity of one of the spouses does not dispense with the necessity for the joinder of both in the alienation of any interest in the homestead; the other spouse may not execute a valid and effectual conveyance or encumbrance of the property, the consequence being that its alienation is impossible. This is true, in the absence of statute, even though the husband has been appointed guardian by the court, and has secured leave to execute the instrument. . . . The joinder of the regularly appointed guardian of the insane spouse in the conveyance or encumbrance is deemed, ordinarily, not to

[2] Now § 50-415 Ark. Stats.

[3] Some such cases are *Curry* v. *Wilson,* 45 Wash. 19, 87 Pac. 1065; *Locke* v. *Redmond,* 6 Kan. App. 76, 49 Pac. 670, affirmed in 59 Kan. 773, 52 Pac. 97; *Singleton* v. *National Land Co.,* 183 Iowa 1108, 167 N. W. 97; *Flege* v. *Garvey,* 47 Cal. 371; *Weatherington* v. *Smith,* 77 Nebr. 363, 109 N. W. 381, 124 A. S. R. 855, 13 L. R. A., N. S. 430. See also Annotations in 13 L. R. A., N. S. 430, 9 Am. Cas. 14, 45 A. L. R. 432, and 155 A. L. R. 306.

be her consent, within the meaning of homestead acts governing conveyances, and a mortgage thus executed is invalid.''

Turning then to our own statutes, we find only the following as having even the most remote bearing on the question; and we comment on each such statute:

(a) Section 215 of Act 140 of 1949 (now found in § 57-628 of the 1951 Pocket Supplement to Ark. Stats.) relates only to homestead contracts made *before* insanity occurred.

(b) Section 226 of Act 140 of 1949 (now found in § 57-639 of the 1951 Pocket Supplement to Ark. Stats.), in referring to the sale of the real property of the ward, says that it includes the homestead of *minors*. The inclusion of the *minor's* homestead and the failure to mention the *insane's* homestead calls for the application of the maxim, *''inclusio unius est exclusio alterius.''*

(c) Section 534 of the Civil Code (as found in § 34-1835 Ark. Stats.) was amended by Act 349 of 1949; and the amendatory Act (as now found in § 34-1835 of the 1951 Pocket Supplement to Ark. Stats.), if not repealed by Act 140 of 1949 (a question on which we need express no opinion), lists survivorship, entirety, tenancy in common and joint tenancy, but does not mention homestead; and such failure gives application to the maxim, *''inclusio unius est exclusio alterius.''*

(d) Act 402 of 1941 (found in § 57-433 Ark. Stats.), even if not repealed by Act 140 of 1949, relates only to the homestead of a *surviving* spouse, and not to the homestead of an *insane* spouse.

Thus there is no statute in Arkansas specifically authorizing the sale of the homestead of an insane wife. Furthermore it is well to point out that § 50-415 Ark. Stats. comes to us from Act 64 of 1887, which was an Act relating specifically to homesteads. To hold that any of the Acts above listed, in (a) to (d) inclusive, repealed or amended § 50-415 Ark. Stats. would be to accomplish such repeal or amendment by implication only, and im-

plied repeals and amendments are not favored. As regards repeals by implication, see *Aday* v. *Chimes School Dist.*, 209 Ark. 675, 191 S. W. 2d 963. As regards amendments by implication, see Sutherland on Statutory Construction, 3rd Ed. Sec. 1913:

"Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together."

Therefore, the majority of this Court holds that there is no legislation in Arkansas empowering the Probate Court to sell the homestead of an insane wife; and that the judgment in favor of Vessells is affirmed on direct appeal.

We also affirm the Circuit Court judgment on Vessell's cross appeal. He had charge of the restaurant for the time heretofore indicated, and took the proceeds from the business; and there is some substantial evidence from which the Circuit Court could have found that this amounted to the sum of $180.

Affirmed on both direct and cross appeal.

MEEK *v.* BLEDSOE.

4-9945 **253 S. W. 2d 369**

Opinion delivered December 22, 1952.

Harper, Harper & Young, for appellant.

Hardin, Barton & Hardin, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges a Probate Court judgment which admitted a will to probate.

Mrs. Mary N. Old, died on June 17, 1951, at the age of 78. A few days later, her will, dated *July 21, 1945,* was admitted to probate, and in the will the appellant, Meek, was beneficiary and executor. But in August, 1951, a subsequent will, dated *December 4, 1949,* was offered for probate; and the appellees are the beneficiaries under the 1949 will. On January 22, 1952, after a hearing of which all interested parties were notified, the Probate Court entered judgment admitting the *1949 will* to probate, and revoking the probate of the *1945 will;* and this appeal ensued.

The mental capacity of the testatrix is not questioned. The 1949 will was drawn by Mr. Geiger and witnessed in his office by Mr. Williams and Mrs. Rodenhiser. Each of the said witnesses testified clearly and positively that they were present with Mrs. Old, and at her request, in Mr. Geiger's office in 1949; that at said meeting Mr. Geiger stated that Mrs. Old wanted witnesses to her will; that Mrs. Old first signed the will; that Mr. Williams and Mrs. Rodenhiser then signed as witnesses;[1] and that Mrs. Old remained in Mr. Geiger's

[1] The clause after Mrs. Old's signature and immediately above the signatures of the attesting witnesses reads as follows:

"And, WE, the undersigned, Harry W. Williams and Mamie Rodenheiser, residents of Huntington, Sebastian County, Arkansas, having been requested by Mrs. Mary N. Old, the maker and signer of the within and foregoing Last Will and Testament, to serve as her witnesses to such act, do hereby declare that we, each and both of us, in her presence and in the presence of each other, did see and observe that

office after the witnesses left. Thus it is clear that the 1949 will was duly signed by the testatrix and the witnesses as required by law. (See § 19 of Act 140 of 1949, as now found in § 60-403 of the 1951 Pocket Supplement of Ark. Stats.).

But the appellant claims that Mr. Geiger, the scrivener, did not read the will to Mrs. Old before she signed it, and that Mrs. Old herself did not read the will before she signed it; and appellant relies on the following statements as the applicable law:

". . . it is essential to the validity of a will that the testator know and understand the contents thereof. In general such knowledge must be possessed at the time the will is executed." 57 Am. Jur. 50.

Also from 68 C. J. 606:

"It is indispensable to the validity of a will that the testator should know its contents at the time of its execution, knowledge after the execution being insufficient. However, as elsewhere shown, knowledge will ordinarily be presumed from the execution of the instrument, although the presumption is only a *prima facie* one and may be rebutted. If it appears affirmatively that he did not read the will and that it was not read to him, it must be shown that the contents were in some way known to him."

Mr. Geiger testified as to Mrs. Old's frequent visits to him, her request that he prepare the will, her detailed instructions as to the matters to be placed in the will, his preparation of the will, the signing by Mrs. Old[2] and the witnesses, and Mrs. Old's lengthy visit and favorable

she did make and sign such instrument in our presence, without any influence or persuasion from any person or persons whomsoever, she declaring it to be an entirely free and voluntary act of her own."

[2] The paragraph in the will immediately preceding Mrs. Old's signature reads:

"IN TESTIMONY WHEREOF, I have this December 4, 1949, set my hand and seal to this my Last Will and Testament, having requested that Harry W. Williams and Mamie Rodenheiser, both residents of Huntington, Arkansas, serve as such witnesses to my signing and sealing, which request they have herein done in my presence and in the presence of each other."

comments on the will while she was still in his office. On this latter point he testified:

". . . She spent an hour and a half or two hours with it after it was over before she went away; and after she'd instructed me what to do with it, she spent at least an hour with it in her hands and possession.

. . .

"Q. Well, were the contents of this will what she told you to put in it?

"A. Absolutely. The things that were specified here are exactly the way she said to do it, in every little old small detail.

"Q. And after she read it, did she approve it?

"A. She said, 'That's what I'd like to have happen.' 'Now, then,' she said, 'I'll get this thing like I want it.' That was her final summation."

On cross-examination, Mr. Geiger frankly stated:

"Q. In other words, she executed it before she read it?

"A. I wouldn't say that. I'll swear,—I'd have to take that position.

"Q. Your best recollection is that she did not read it before she signed it?

"A. If she did, she didn't read it then, but she spent—I'm not going to say that—I'm not going to make that remark.

"Q. You can't say whether she read it or not?

"A. No, sir, I can't."

The last quoted testimony is the main basis for the appellant's contention. We point out, however, that Mr. Geiger testified that he could not *definitely* say whether Mrs. Old read the will before she executed it: he did *not* definitely testify that she did *not* read the will or know its contents. Thus the Trial Court could well have found

that the presumption referred to in the quotation from 68 C. J. 606, *supra,* had not been rebutted by the appellant in this case.

The precise question here before us—as to the necessity of showing a reading of the will before signing—has not been decided by this Court, but other Courts have spoken on the matter. A leading case is that of *Hess' Appeal,* 43 Pa. St. 73, 82 Am. Dec. 551, decided by the Supreme Court of Pennsylvania in 1862, and with facts strikingly similar to those here. There, the testator, trusting the scrivener, executed the will without having read it, and the scrivener testified that he wrote the will exactly as the testator directed. The Supreme Court of Pennsylvania admitted the will to the record, saying:

"But when the very witness who proves the omission proves also the authenticity of the writing, as the very will of the testator, ascertained and written from his own dictation freely made, then what have we to doubt about? When the testator trusts his scrivener, why should we distrust him, when there is no word or act that impeaches his honesty?"

Another well considered opinion on the same point is that of *In Re: Bose's Estate,* 136 Neb. 156, 285 N. W. 319, decided by the Supreme Court of Nebraska in 1939. The pertinent language in that opinion reads:

"It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. Where a will, written in the presence of the testator according to his dictation, is executed according to the statute, it is valid though not read to or by him. Hess Appeal, 43 Pa. 73, 82 Am. Dec. 551.

"The doctrine as stated by the English cases on this point is illuminating, viz.: 'If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain

disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'' ' *Parker* v. *Felgate,* Eng., 1882-1883, 8 Prob. Div. L. R. 171. This doctrine was expressly approved in *Perera* v. *Perera,* Eng. (1901) App. Cas. 354.''

In *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936, we said:

'' 'Publication under the statute is necessary to give effect to a will; but it means that the testator, having capacity to make a will, shall understand that the instrument which he is about to execute, is a testamentary disposition of his property, and that he shall, at the time, communicate to the witnesses, that he does so understand it.' '' (quoting from *Rogers* v. *Diamond,* 13 Ark. 474.) The evidence in the case at bar shows full compliance with the above quoted requirement. Mrs. Old was thoroughly satisfied with the provisions of her will, as evidenced by her subsequent conduct. From a study of the entire record and from an examination of the original will, we conclude that the judgment of the Probate Court, here challenged, was in all things correct.

Affirmed.

POWERS *v.* LONG.

4-9952 253 S. W. 2d 359

Opinion delivered December 22, 1952.

Dorothy Yancy and *J. Roy Howard,* for appellant.

Carl Langston and *Wayne Foster,* for appellee.

WARD, Justice. This appeal presents only one question: Did the trial court err in refusing to admit a photograph in evidence?

On August 26, 1951, appellees, Ernest E. Long, his wife and a minor child, Sammie Hardin, were driving east on Denny Road in Pulaski County in a Ford car when their car collided with a car being driven in the opposite direction by appellant, Oliver H. Powers. It appears that the cars collided near the top of a steep grade. All the appellees were injured and suit was brought against Powers.

The complaint alleges negligence on the part of Powers in that he was driving on his left side of the road without keeping a proper lookout and without the exercise of due care. The answer denies the above allegations and contains an allegation of contributory negligence in that Ernest E. Long, the driver of the car in which appellees were riding, was driving at an excessive rate of speed and did not keep a proper lookout.

The trial before a jury resulted in a judgment against Powers in favor of all the appellees. No contention is made that the judgments are excessive.

One of the important points raised during the trial was the exact position on the road relative to the center line at which the cars collided. It is not disputed that they hit approximately head on, with the left portion of one car hitting about the same place on the other car.

The evidence was conflicting with each side attempting to fix the point of contact on the road at a place most favorable to it.

The question about which we are concerned arose when appellant's witness, Bill Johnson, offered in evidence a photograph showing the two cars in what was purported to be the position they were in when the collision occurred. Johnson, a deputy sheriff, was called to the scene of the accident soon after it happened and

having learned that a boy had made a picture of the cars obtained from him the film or picture in question.

When the picture was offered in evidence objection was made and the following occurred between the Court and Johnson:

"Court: Sheriff Johnson, does that fairly represent the entire highway there as you saw it there?

"A. Yes, sir, with the exception that it will have to be explained. This car here as I have said, from the shoulder to the back of the car was three feet. You see, this car was going east. That is on the south side. This picture being taken at an angle, it makes this picture look wider than it really is."

. . . . . .

"Court: I think I am going to rule this picture out because it does not show the entire width of the highway there. It shows one side of the highway and as Mr. Johnson says, it was taken at an angle and it gives you a false impression of the width of the highway with respect to the particular side that is shown, and since it is not—does not include the entire highway, and since it was taken at an angle, I believe I will rule the picture out as inadmissible."

The picture in question is attached to the record and from an observation of the same we agree with the Court that it does not show the entire width of the highway. In fact there is no way of telling from the picture the relative positions of the cars with respect to the north and south lines of the road. The picture also indicates that it was taken at such an angle that it might give the wrong impression relative to certain distances, as was admitted by Johnson.

The witnesses testified as to the relative positions of the cars with reference to the sides of the road and, though the testimony on behalf of the plaintiffs conflicted with that of the defendant, the picture would have thrown no light on the question. It appears to us

that the picture might have given the jury an erroneous impression and thus been more harmful than helpful to the jury in arriving at the true situation.

Under these circumstances the offer of the picture in evidence presented a question addressed to the discretion of the trial judge, and we think he did not abuse his discretion in refusing to admit the same.

The well-established rule regarding the introduction of photographs in evidence is stated in 32 C. J. S. at page 625 in these few words:

"The admission or rejection of a photograph is a matter which rests largely in the discretion of the trial judge. . . ."

The footnote reference to this rule shows that it is approved by many cases in many different states and that Arkansas is among them. Our Court has affirmed the rule in numerous cases, among which are: *Dermont Grocery & Commission Company of Eudora* v. *Meyer,* 193 Ark. 591, 101 S. W. 2d 443; *Arkansas Power & Light Company* v. *Marsh,* 195 Ark. 1135, 115 S. W. 2d 825; and *McGeorge Construction Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. In the opinion of the last-cited case, at page 515, appears this statement:

"The admissibility of this photograph, in the circumstances, was within the sound discretion of the court."

As we have stated above, it does not appear that the trial judge abused his discretion in refusing to admit the photograph in evidence in this case. This court sustained the trial court in such refusal in the *Meyer* case and the *Marsh* case, *supra,* under circumstances less favorable to such ruling than in this case, it seems to us.

No error appearing, the cause is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY *v.* WILLIAMS.

4-9944 253 S. W. 2d 349

Opinion delivered December 22, 1952.

Wright, Harrison, Lindsey & Upton, for appellant.

L. B. Smead and *W. C. Medley,* for appellee.

J. SEABORN HOLT, J. Appellee, Williams, sued to recover $200 damages to a four year old Hereford bull for injuries alleged to have resulted when he was struck by one of appellant's freight trains August 21, 1950, and also for damages in the amount of $165 for a cow alleged to have been killed by another one of appellant's freight trains on December 24, 1950. Both animals were struck at night.

There was a jury verdict for appellee for the full amount sought in each case and from the judgment is this appeal.

Appellant conceded that "the appellee presented evidence that justified an inference that his livestock

was killed or wounded by the running of trains and that the presumption of negligence arose," (Ark. Stats. 1947, § 73-1001).

We said in *St. Louis Southwestern Railway Company* v. *Vaughan,* 180 Ark. 559, 21 S. W. 2d 971: "When the evidence shows that an injury was caused by the operation of a train, the presumption is that the company operating the train was guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence. Appellant is correct in its statement that this presumption can be rebutted and overcome by testimony on the part of the defendant. The only question in this case is, did the appellant overcome this presumption by evidence? The Supreme Court of the United States recently said, in construing a statute similar to the Arkansas statute: 'The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for jury upon all the evidence'," and in *St. Louis-San Francisco Ry. Company* v. *Call,* 197 Ark. 225, 122 S. W. 2d 178, we said: "The killing of and injury to the property being admitted the law presumes appellants were negligent and the burden rested upon them to show that they were not negligent. . . . They have not met the burden by the undisputed evidence." See also *St. Louis, I. M. & So. Railway Company* v. *Chambliss,* 54 Ark. 214, 15 S. W. 469.

The evidence when considered in its most favorable light in appellee's favor, as we must do, tends to show that the point where the bull was injured and also the place where the cow was killed (neither being at a crossing) were on a straight stretch of track—for more than a mile. The bull was struck on the night of August 21, 1950, seriously injured, and its usefulness impaired. Appellant's engineer testified that he was operating the Diesel engine of the train and "I did not see any stock on the track. I saw a cow's head sticking out of the brush about six or eight feet out from the track." The cow (bull) was on the right side of the track—track was

straight—and he was "about 250 ft. away" when he saw him. His headlight was burning and in good condition and "so far as I could see" no part of the engine struck the bull. He denied that he had told appellee, Williams, that he hit a cow or bull, however, Williams testified that he did. There appears to be no evidence that any warning signals were given or that brakes were applied after the bull was first seen.

Appellee testified that he found tracks of the bull where he had crossed the railroad track and that he found the bull lying by the side of the track about 20 ft. "from the rail at the bottom of the dump * * *. The right of way had grown up in saplings three or four foot and he went down through them—they were knocked down."

As to the cow, there was evidence on the part of appellant that when first seen by the engineer, she was about 225 ft. away and about 45 ft. from the left of the track, that she "threw up its head—you don't know which way they are going to go—and she went across the track and the engine went by." He blew the whistle, could not stop the train in time, was going about 25 miles per hour. "Q. You made no effort to put the brakes on? A. No, sir, I did shut the throttle off. Q. When did you first see the cow? A. She rolled out on my side, but the fireman saw her."

When all of the evidence is considered, we are unable to say that there was no substantial evidence on which the verdict could be based. Whether in the circumstances, the failure of the operators of the train to give any warning signals and apply the brakes in the case of the bull after discovering him and their failure to apply the brakes after discovery of the cow, amounted to negligence on the part of the railroad, were issues for the jury, and upon which reasonable minds might differ or draw different conclusions, and therefore we must allow the verdict to stand.

Affirmed.

George Rose Smith, J. (dissenting). With respect to the killing of the cow I see no difference between this

case and *Chicago, R. I. & P. R. Co.* v. *Reeves,* 217 Ark. 33, 231 S. W. 2d 103. In both cases the engineer testified that after a warning whistle had been sounded the animal suddenly ran in front of the locomotive at a time when it was too late to stop the train. In neither case is there any proof of negligence on the part of the defendant, other than the statutory presumption which disappears when rebutting evidence is presented. Since I regard the *Reeves* case as controlling I would affirm the judgment only on condition that the damages for the death of the cow be remitted.

WARD and ROBINSON, JJ., join in this dissent.

SANDERS *v.* ABERNATHY.

4-9962 253 S. W. 2d 351

Opinion delivered December 22, 1952.

Claude F. Cooper, for appellant.

James M. Gardner, for appellee.

MINOR W. MILLWEE, Justice. A. J. Abernathy was a resident of Blytheville, Arkansas, where he died March 28, 1952, at the age of 72 years. Appellant, Ethel Sand-

ers, was housekeeper for Mr. Abernathy for about twelve years prior to his death. Attorney Frank C. Douglas, who had at times represented Mr. Abernathy, was appointed administrator of his estate.

On April 4, 1952, the administrator reported to the Probate Court that in taking inventory of a grocery store belonging to the estate, he found in an iron safe a sealed envelope containing two separate writings which appeared to be written and signed by the deceased as follows:

(1)

April 22, 1950

I, A. J. Abernathy making my will to Ethel Sanders willing here all property care traler house and all my money She gave me a home after my children ran me a way from home i was sick i used here money made what i have willing my children 1.00 a peace that all fore them please hold this will good for i want Ethel Sanders have every thing in my name at my Deth

A. J. Abernathy

Mr. A. J. Abernathy

(2)

April 2, 1948

Willing all i have in my name to Ethel Sanders at my deth i made all of it with here money heirs 1 00 each

A. J. Abernathy

The administrator also reported that appellant had turned over to him another writing dated January 1, 1947, purportedly signed by the deceased but in handwriting different from the signature and containing provisions similar to the writing of April 22, 1950. The administrator further alleged that the writing of April 22, 1950, appeared to be the last will of the decedent, and that all heirs and interested parties should be notified of a hearing for the purpose of approving or contesting the probate of said will.

Appellees who are eight children and heirs of A. J. Abernathy filed a response asserting that the purported will was a forgery by reason of which a fraud was being perpetrated on the court by unknown persons.

After hearings on April 28 and May 9, 1952, an order was entered holding that the purported will was not entitled to probate because the evidence submitted to support it did not meet the requirement of § 20 of Act 140 of 1949 (Ark. Stats., § 60-404). The only question presented on this appeal was whether the trial court's conclusion is supported by a preponderance of the evidence.

Ark. Stats., § 60-404, *supra,* provides: "Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator, such will may be established by the evidence of at least three credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to such will." Another applicable provision of the Probate Code is Ark. Stats., § 62-2117(b) which provides that a holographic will shall be proved: "By the testimony of at least three credible disinterested witnesses proving the handwriting and signature of the testator, and such other facts and circumstances as would be sufficient to prove a controverted issue in equity."

C. B. Kittinger was well acquainted with deceased for 7½ years and had rented a store building from him for 2½ years during which time deceased issued monthly rental receipts and other papers including a lease to and in the presence of Kittinger. When asked to give his opinion as to whether the writing dated April 22, 1950, was written and signed by Abernathy, the witness replied: "I would say, surely this is his writing. But I am not an expert."

Charles O. Doyle lived in the same block where Abernathy's store was located and rented a building from him for four years during which time deceased executed rental receipts in Doyle's presence. When asked to state

whether the purported will was in deceased's handwriting, Doyle stated: "It looks like his to me." Deceased also told Doyle shortly before his death that he had made a will to the appellant.

Mrs. A. D. Dowland and her husband rented a store building from deceased for twenty months during which time the deceased lived immediately behind the store building. Mrs. Dowland testified that in addition to rental receipts which deceased executed she had many times observed his writings including notes which he frequently left in the store for others and that she was familiar with his handwriting. When asked about the writing in question, she stated: "Yes, sir; that is Mr. Abernathy's handwriting." A. D. Dowland gave a similar opinion after stating that he had observed deceased's handwriting in the execution of the rent receipts.

Ben T. Mayes also rented a building from deceased for a year, had observed his writing of rent receipts and was familiar with his handwriting. When asked to give his opinion as to whether the writing in question was by the deceased, he replied: "Yes, sir; it is all written in his handwriting."

The vice-president of one bank and the cashier of another where deceased did business for several years, and an experienced abstractor, all testified that they were familiar with deceased's signature and that the "A. J. Abernathy" appearing once at the top and twice at the bottom of the writing in question were in the handwriting of deceased. After examining the writing in question and comparing it with other exhibits containing the admitted signature of the decedent, Cashier Bannister also stated that in his opinion the whole writing in question was in decedent's own handwriting. He explained in detail the reasons for his conclusion and pointed out similarities of certain letters in the body of the will to those in the admitted signatures. Upon further examination by the court, he also admitted that there were some dissimilarities in some of the letters of

the admitted signatures and the body of the instrument in question but he also stated that such dissimilarities existed even as between the several admitted signatures.

There were other witnesses who gave testimony similar to that heretofore set out. The only testimony offered in opposition to the foregoing was that of the witness, Mrs. Ray Moxley, offered by the appellees. Mrs. Moxley testified that she lived near a store operated by deceased in Kennett, Missouri, about 27 years ago; that she had seen him try to write; that his wife did most of the writing at that time and that witness had not observed his handwriting in the past 20 years. She stated that the writing in question "doesn't look like his writing to me."

E. E. Abernathy, one of the nine children of the deceased, refused to join in the contest of the purported will and testified that in his opinion it was in his father's handwriting.

In *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346, we defined "credible person", within the meaning of a change of venue statute, as follows: "A credible person is one who has the capacity to testify on a given subject and is worthy of belief; and one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry." Many courts have defined a "credible witness" as one who, being competent to give evidence, is worthy of belief. Words & Phrases, Vol. 10, p. 344. This definition has been applied to a statute setting forth the requirements to make a valid holographic will similar to those found in our statute. *In re Williams' Will,* 215 N. C. 259, 1 S. E. 2d 857.

The witnesses offered by the administrator and the appellant denied that they had any interest in the controversy and none is shown in the record. The testimony of E. E. Abernathy was, of course, against his own interest. We cannot agree with appellees' contention that the administrator and the appellant did not offer as

many as three witnesses who were sufficiently familiar with deceased's handwriting to testify thereto. Nor are we able to conclude by a mere comparison of exhibits, as suggested by appellees, that said witnesses are not credible within the meaning of the statute.

It is our opinion that the trial court's conclusion, that the evidence submitted in support of the purported will does not meet the requirement of § 60-404, *supra,* is against the preponderance of the evidence. The judgment is accordingly reversed and the cause remanded with directions to admit the will to probate.

CURLIN *v.* HARDING DRAIN IMPROVEMENT DISTRICT.

5-58 253 S. W. 2d 345

Opinion delivered December 22, 1952.

Gene Baim, for appellant.

A. F. Triplett, for appellee.

GRIFFIN SMITH, Chief Justice. The constitutional right of rural property owners to form a district for drainage purposes and to include virtually all of the City of Pine Bluff is questioned by the appeal.

Harding Drain Improvement District was created by order of Jefferson county court pursuant to § 21-501, et seq., Arkansas Statutes. An area of approximately 6,400 acres in and out of Pine Bluff is delineated, the city proportion being about 71% of the whole.

The brief writers agree that conditions well-nigh intolerable exist respecting the municipality. A bayou converted into a ditch, known as Harding Drain, extends east-west through most of the urban territory. Originally its outlet was the Arkansas river, but high water stages retard flowage to such an extent that occasionally large sections of the city are flooded by water originating in the upper drain, supplemented by the backsweep from river pressure.

The difficulty was partially overcome when a floodgate was installed near the river supplementing Baxter Ditch—now called the Outlet Canal. This ditch ran from Harding Drain in a southerly direction to empty into Bayou Bartholomew. It is now asserted that the outlet canal—originally designed to carry water the floodgate would not accommodate—has deteriorated and that recurring floods have taken such a heavy property toll and discommoded the urban and interurban districts and normal community life to such an extent that common reason finds concurrence in objectives for which Harding Drain Improvement District was created; and this is said to be true to a greater extent within the city than it is in the rural boundaries upon which precipitation causing most of the headwater occurs.

Many factors enter into the city's necessity for drainage relief, but with these we are not judicially concerned, since the appeal presents a purely legal question. For instance, it is shown that current expenditures of $1,750,000 are being made to rebuild and renovate Pine Bluff's sewage system. There is the contention that the improvements the commissioners of the Harding District are authorized to make are in the nature of companion projects to the sewage disposal undertaking. Factual matters indicating this relationship and details of the drainage project are disclosed by the pleadings.

Estimated cost to the appellee district and the Federal government is close to $600,000. Of this total the contributed portion is more than $300,000. Local coöperation includes the assurance that right-of-ways will be made available. New bridges, where necessary, must

also be provided. Harding Drain must be cleared, an Eighteenth-st. lateral guaranteed, and the government must be held harmless against damage claims arising as an incident to the work. After completion maintenance will be the district's responsibility.

Inequality of assessments is not an issue, nor does the record show a contention that unnecessary work is planned, or that construction will not be prosecuted expeditiously and as prudently as circumstances may warrant. It is therefore unnecessary to enter into a discussion of phases not pertinent to our decision.

Appellants rely upon *Craig* v. *Russellville Waterworks Improvement District,* 84 Ark. 390, 105 S. W. 867. It was there said that those who framed the constitution expressly recognized power of the legislature to authorize assessments in towns and cities affecting realty, "But," says the opinion, in quoting from Mr. Justice Riddick (*Crane* v. *Siloam Springs,* 67 Ark. 30, 55 S. W. 955), "[the constitution limits such assessments] to local improvements, and requires that they should be made only on property adjoining the locality affected, and based upon the consent of a majority in value of the owners of such property. . . ."

Reversal of the instant case, say appellants, is required by the admitted fact that most of Pine Bluff is within the drainage area, and consent of a majority in value of urban proprietors was not obtained.

We have concluded that *Butler* v. *Board of Directors of Fourche Drainage District,* 99 Ark. 100, 137 S. W. 251, is authority for upholding formation of the district. Craig's suit against Russellville was commented upon in the opinion written by Chief Justice McCulloch; but Butler's case contains a statement that Art. 19, § 27, of the Constitution, applies only to assessments made for purely local improvements within a municipality,—"and not to local improvements covering wider territory, even though a part or all of the municipality be included therein."

Succinctly, the holding is that an improvement district such as the one with which we are dealing, cover-

ing both city and rural property, does not fall within the letter or the spirit of the constitutional provision appellants would invoke.

If the complaining parties had shown that rural property insignificant in area or so grossly disproportionate in value as to suggest fraud, had been included in the district without the consent mentioned in Art. 19, § 27, a different principle would apply.

Affirmed. This appeal having been advanced in the public interest, an immediate mandate should issue.

WELCH GRAPE JUICE COMPANY *v.* ROBERTS.

4-9953 253 S. W. 2d 769

Opinion delivered December 22, 1952.

Rehearing denied January 26, 1953.

Shaw, Jones & Shaw, for appellant.

Greenhaw & Greenhaw, for appellee.

ROBINSON, Justice. Appellee, Roberts, had worked for appellant, Welch Grape Juice Company, about one week when he became disabled due to a hernia which he claimed was caused by slipping and falling while carrying a box of grapes. He also claims his back was injured in the alleged accident. The Workmen's Compensation Commission refused to make an award for either alleged injury. Roberts appealed to the Circuit Court. The commission's action in not making an award for the alleged back injury was affirmed, but the commission was ordered to make an award because of the hernia. The employer has appealed.

The commission reached the following conclusion:

"The question for determination in this case is whether or not the claimant sustained an accidental injury as alleged by him.

"In this connection the record reflects that the claimant's signed statement, which was introduced, is to the effect that he had never sustained a hernia. The testimony he gave was to the effect that he had been suffering with hernia for a year or more prior to his employment with the Welch Grape Juice Company. The claimant stated that he was working with three other employees at the time he slipped and fell on the night of September 9, 1949; that he did not know the names of any of these employees, and did not attempt to secure their attendance at the hearing.

"Mr. Goheen, who checked the claimant out the night he got sick, did not receive any history of an accidental injury and according to his testimony the claimant merely stated he was sick at his stomach, and later he was unable to locate anyone about the plant who could substantiate the claimant's story of having slipped and fallen.

"The undisputed evidence reflects that the claimant never made a claim for compensation nor did he make any inquiry at the Welch Grape Juice office. The first claim for compensation that was brought to the attention of the Welch Grape Juice Company was the claim made before the Commission.

"Dr. Sisco, who first saw and operated on the claimant, failed to make any mention of the claimant giving a history of any injury in his report of September 20, 1949. This report merely states that while the claimant was working he had a sudden pain in his right side and got sick; it is unfortunate that Dr. Sisco did not give the history of the alleged injury so that it could be verified, but being busy through oversight this was not done. The records of the City Hospital, Fayetteville, Arkansas, do not reflect that any statement was

made by the claimant of having sustained an accidental injury, although the claimant was confined to the institution for a period of about 12 days.

"The only evidence the claimant produced that would substantiate his present story of having slipped and fallen is the last statement of Dr. Sisco one year later, after refreshing his memory, that the claimant stated to him that he thought his pain started when he slipped on the floor while carrying a crate, and the sudden jerk started his hernia to bothering him. It is also noted in Dr. Sisco's report of September 8, 1950, that on September 16, 1949, the claimant complained of backache, and he advised the claimant to have bed rest, and the claimant's back was strapped with adhesive in order to give him relief. The claimant was released from the hospital and on one or two occasions from the time of his release from the hospital on September 22, 1949, he went to Dr. Sisco for a check-up. This check-up was in regards to his operation, and no mention was made of any back condition, during all of the time from September 22, 1949, until the present time, so far as Dr. Sisco is concerned.

"Dr. Samuel B. Thompson, Orthopedic Surgeon, Little Rock, Arkansas, examined the claimant's back and does not attribute his present condition to any accidental injury.

"After a careful consideration of all the evidence in this case, it is the opinion of the Commission, that the claimant has failed to establish an accidental injury arising out of and occurring during the course of his employment with the respondent employer on September 9, 1949, and that the disability the claimant alleges has no causal connection with his employment with the respondent employer, Welch Grape Juice Company."

Roberts was employed in September, 1949, as a laborer by the Welch Grape Juice Company. On the night of September 9th he was compelled to stop working because of a strangulated hernia. The attending

physician was unable to reduce the hernia by manipulation and ordered him removed to a hospital where an operation was performed that night. A few days later, while still in the hospital, Roberts, for the first time, complained of soreness in his back. There was a hearing before the compensation commission about a year later when he testified that he was still unable to work because of the alleged injury to his back.

In all probability, if any kind of accident had occurred which injured Roberts, he would have reported it to his foreman on the night it was alleged to have happened. Roberts claims to have given such information to the foreman, who, on the other hand, maintains he did not receive such information. Both men appeared before the compensation commission, and the commission was in a better position to judge the credibility of the two witnesses. Furthermore, the following hospital record was introduced in evidence, dated September 10th, 1949, apparently only a few hours after he had entered the hospital, and it reads: "Chief complaint: Date and mode of onset, probable cause, course—CC: Severe cramping in the abdomen with nausea and vomiting—duration 4 hours. Patient states that approximately at 9:00 o'clock while working at the Welch Grape Juice, he took with pain in the right inguinal region and became deathly sick. He immediately went home and there vomited. He was seen by a physician at 12:30, who brought him immediately into the hospital. He states that he has had a hernia in the right inguinal region for approximately one year, but this is the first time it has ever given him any trouble. Attempts at reducing were done in the home, but were unsuccessful, and the doctor did not procrastinate, and advised immediate surgery." Details of his past history were also given, but no mention whatever at that time was made of any accident or of any injury to his back.

About six or seven days after appellee had been operated on, he complained of pain in his back, but on September 20th the hospital record shows: "Back improved. Apparently the point of tenderness is localized

over site of spinal puncture". It is highly probable that if appellee had suffered a fall of such severity as to cause a strangulated hernia or an injury to his back, which disabled him for over a year, he would have said something about such alleged injury at the time he now claims it occurred.

In our opinion, the evidence sustains the finding of the commission.

Reversed.

RESOLUTE INSURANCE COMPANY *v.* BAILEY.

4-9950 253 S. W. 2d 771

Opinion delivered December 22, 1952.

Rehearing denied January 26, 1953.

Josh W. McHughes, for appellant.

Willis V. Lewis, for appellee.

MINOR W. MILLWEE, Justice. Appellees, J. W. Bailey and J. F. Dempsey, are partners doing business as Bailey Oil Company in Pulaski County, Arkansas. They brought this action against the appellant, Resolute Insurance Company, to recover collision damages to one of their

heavy Mack motor trucks, under an insurance policy executed by appellant on August 21, 1950.

Appellees alleged that the truck was damaged in the sum of $2,734 and that they were entitled to judgment in that sum, less $250 deductible under the provisions of the policy, or the sum of $2,484, plus penalty and attorney's fee. They also alleged that appellant had failed and refused to pay the loss after appellees' full compliance with all provisions of the policy.

Appellant answered with a general denial and specifically denied that appellees filed proof of loss. By agreement there was a trial before the court sitting as a jury resulting in a judgment for appellees for $2,484, plus the statutory penalty of 12% and attorney's fee of $500.

There is little dispute in the evidence. Appellees' truck collided with another vehicle near El Dorado, Arkansas, on January 16, 1951. The driver of the truck notified appellee Bailey immediately after the collision and the latter immediately notified appellant's local agent. Before Bailey reached El Dorado on the night of the accident, an adjuster from El Dorado representing the appellant had visited the scene of the collision and inspected the truck. This adjuster took written statements from Bailey and the truck driver the next morning and directed Bailey to have a wrecker take the damaged truck to North Little Rock and this was done. The truck was taken to Robinson's Garage, which was partly owned by appellees and was operated by J. E. Robinson, who was paid a weekly salary to keep appellees' trucks in repair and in addition Robinson did repair work for others. Upon arrival of the truck, it was inspected by appellant's Little Rock adjusters, J. W. Tisdale and Bob Terry, co-owners of the Arkansas Adjustment Company.

A few days later J. E. Robinson and William Etzback, of Rebsamen Motors, made separate estimates of the necessary repairs to the truck. Robinson's estimate included $2,300.82 for parts and $199.18 for labor. Reb-

samen Motors' estimate included $2,283.32 for parts and Etzback estimated labor costs at $700. Summers & Corbin Garage also submitted an estimate, at appellant's request, of $632.14 which included $439 for labor and the balance for parts. None of the estimates included the undisputed damage of $104 to a tire and $130 for wrecker service in moving the truck from El Dorado to North Little Rock.

Adjuster Tisdale inspected the damaged truck at the time the estimates were made by Robinson and Rebsamen Motors and concurred in such estimates as to damaged parts that would have to be replaced. Parts prices were obtained directly from the manufacturer and many of the parts were to be exchanged. Tisdale considered the bid submitted by Summers & Corbin to be grossly inadequate to cover the damage and did not accept it as a valid bid and so advised the appellant. Appellee Bailey had Robinson to submit the low bid of $199.18 for labor because appellees were paying Robinson a weekly salary and knew they could obtain the scarce parts for the truck which they urgently needed in their business as gasoline distributor. Appellant's adjusters authorized Robinson to proceed with the repairs on the basis of his bid.

A few days later one of the adjusters informed Bailey that appellant "had changed their minds" and had elected to take the truck to Tulsa, Oklahoma, and have it repaired. Although Robinson had already purchased the parts and had received most of them, Bailey reluctantly signed a release for appellant to take the truck to Tulsa, provided the repairs were made within 20 days. About 15 days later a small 1935 model wrecker arrived from Tulsa, Oklahoma, and the driver for the trucking company immediately concluded that the wrecker was too small to carry the damaged truck to Oklahoma. He called his employer and about three days later appellant's adjuster from Tulsa arrived. After some investigation he advised Bailey that the company did not have a wrecker large enough to take the truck to Tulsa; that it might take 10 or 15 days longer to find

one; and that there was nothing he could do about it. He then turned to the wrecker driver and said: "Let's just forget about it and go to the races." Bailey had previously apprised appellant's adjusters of a heavy hauling company near his place of business that could take the wrecked truck to Tulsa and had even offered to take the truck himself, but such offer was never accepted.

On or about March 5, 1951, Bailey told Robinson to proceed with the repairs and this was done at a cost of approximately $3,500. The heavier actual cost was incurred on account of the inadequate charge which Bailey had authorized for labor in order to get the truck on the road and certain damages which were not visible when the estimates were made, including a new transmission. Upon appellant's refusal to make payment under the policy this action was brought by appellees on April 2, 1951. Appellant's local agent and adjusters freely admitted that appellees fully cooperated in every way in seeking to adjust the loss and that they had signed all papers which they had been requested to sign.

The only testimony in opposition to the foregoing is that of L. V. Sweatman who made the Summers & Corbin estimate. He thought the truck frame could have been straightened without being replaced, while those making the other estimates were positive that a new frame was required together with several other expensive parts which Sweatman had failed to observe as being damaged.

For reversal it is first contended that appellees breached the insurance contract by refusing to allow appellant to repair the truck. The undisputed facts refute this contention and show that appellees agreed for appellant to make the repairs, even after the latter had directed Robinson to make them, but that appellant failed to live up to its part of the agreement. It is undisputed that the wrecked truck was still in Robinson's Garage on March 5, 1951, which was approximately 20 days after the appellant had agreed to take

it to Tulsa and have it repaired. The trial court doubtless concluded from the testimony that appellant had itself breached the insurance contract and failed to perform under its election to repair the truck. There is ample evidence to support the conclusion that appellant was afforded full opportunity to repair the truck but failed to do so. Under these circumstances, appellant's plea that it was refused permission to repair the truck is of no avail. Appleman, Insurance Law and Practice, § 4003. Where the insurer elects to make the repairs, there is an implied obligation to perform within a reasonable time. *Ibid,* § 4004. According to the undisputed testimony, appellant failed to meet this obligation.

Appellant's further contention that the judgment is excessive because it was not given credit for the deductible sum of $250 is likewise without merit. We think it is clear from the judgment that the trial court allowed recovery under the Robinson estimate of $2,500, plus the tire damage of $104 and wrecker service of $130, less the $250 deductible under the insurance contract. This was the amount sued for and there is ample evidence to support the judgment. It would be difficult to understand how the trial court could have reached any other conclusion under the testimony here presented.

Affirmed.

LYON *v.* BOLLIGER.

4-9920 253 S. W. 2d 773

Opinion delivered December 22, 1952.

Rehearing denied January 26, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

Townsend & Townsend, for appellee.

WARD, Justice. On August 31, 1951, appellee, plaintiff below, filed suit in the 2nd Division of the Pulaski County Chancery Court against Stanley E. Lyon, Granvil E. Grass, Louise Grass and Motor Products Manufacturing Company (the latter being a corporation), asking for judgment in the amount of $3,800 against Stanley E. Lyon and Granvil E. Grass, for a receiver to take charge of the assets of the corporation, and for a dissolution of the corporation.

The factual background leading up to the filing of this suit will be helpful to a clearer understanding of the issues. The year before the suit was filed Stanley E. Lyons and Granvil E. Grass, as partners, were engaged in manufacturing and selling a product labelled "Lustre Chrome". This product was designed to refinish chrome on automobiles, and was sold in cartons of one dozen packages to service stations, used car dealers and other retail outlets. Soon thereafter appellee was employed by said partnership as a salesman and worked about three months when he started a similar business for himself selling "Steel Chrome", which was similar to, if not exactly like, the product sold by the partnership and put up in the same kind of packages. A few months later, on or about May 9, 1951, the three men, having decided to go into business together, formed a corporation called "Motor Products Manufacturing Company", which corporation was to carry on the same kind of business, selling "Lustre Chrome". Each of the three men held equal shares of stock in the new corpo-

ration and all three were elected to the three-man Board of Directors. Lyon was elected President; Grass, Vice-President, and Bolliger, Secretary-Treasurer, all for a term of one year. The corporation employed five salesmen who sold on a commission basis. The three stockholders also spent most, if not all, of their time on the road as salesmen but on a different basis, however, as will be explained presently. Whereas the cartons were charged out to the regular salesmen for the price of $7 each, they were charged out to the three stockholders at the price of $2 each, the latter price being approximately the cost of manufacturing. It appears that the product was manufactured or assembled at or near the places of residence of the three stockholders by employed help under the supervision of the three stockholders.

Sometime in July, 1951, a difficulty arose between appellee and the other two stockholders concerning the manner in which the business was being conducted, and numerous discussions failed to culminate in any satisfactory arrangement. Apparently the trouble started because appellee disapproved of the employment of his sister, the wife of Granvil E. Grass, as a bookkeeper, and also he entertained the impression that the other two stockholders were trying to discharge him as secretary-treasurer of the corporation. It is the contention of the appellee that as a result of these conferences he was relieved of his official capacity in the corporation and also that he was denied the right to sell products of the corporation on the favorable terms mentioned above.

One of the principal contentions of appellee is that before and at the time of the formation of the corporation, the three of them had the understanding that their wives would not be used as employees in any capacity, that each of them would have the right to sell their products on the road, and that there would be no partiality in the assignment of sales territory.

Among other things the complaint alleges: that contrary to the by-laws and without the authority of the

Board of Directors, the President had hired Mrs. Grass as an employee and had fixed her salary; that meetings of the shareholders and directors of the corporation had been held without notice to him; that the other directors had refused to establish a bank account as provided for in the by-laws, and had permitted unauthorized persons to sign checks; that Granvil Grass had used the corporate funds for his own use and expenses; that the other directors had refused to allow him to examine the corporate books and refused to permit an audit of the books; that there was such dissension among the directors and shareholders as to impair the operations of the corporation on a profitable basis; and that although it was agreed before the incorporation that each shareholder would be allowed to sell the product, he was informed about July 28, 1951, that he would no longer have that privilege. The prayer was for damages in the sum of $3,800 and a dissolution of the corporation. The complaint was later amended to include a share of the profits made from sales by the other two directors after July 28, 1951.

Appellants filed a general denial and also asked for judgment against appellee for the price of 28 dozen cartons of "Lustre Chrome" which he allegedly took without authority from one of the salesmen.

The Chancellor found that appellee was entitled to damages in the amount of $3,000, against which he offset earnings in the amount of $893. A receiver was appointed and the corporation was ordered dissolved.

It appears that at the first day of the hearing, and after only the witnesses for appellee had testified, the Chancellor made an interlocutory order. In this order he set December 10, 1951, for a final determination of the case, ordered 200 dozen cartons of "Lustre Chrome" to be turned over to appellee for sale and distribution in territory of his selection, granted appellee full access to the books of the corporation, and ordered the corporation to continue to do business as usual.

On December 10, 1951, appellants' testimony and appellee's rebuttal testimony were taken and on December 17th the Court rendered its decree in which judgment was given to appellee as before stated; a receiver was appointed and ordered to deliver to appellee 100 cartons at $2 each, and the corporation was dissolved. Appellants were also permanently enjoined from disposing of any assets or papers of the corporation.

The main contention of appellants on appeal is that the Court had no right to dissolve the corporation, but there are several other assignments of error which we will first mention but need not discuss fully in view of the final determination we make herein. One is that the Court was not justified in turning over to appellee 200 dozen cartons of "Lustre Chrome" at the conclusion of appellee's testimony on November 28th. Another is that the Court adjudged them guilty of contempt without giving them a chance to be heard, and still another is that the Court was not justified in appointing a receiver. Some of these questions can be resolved upon remand of the cause.

Appellee prayed for damages and also for a dissolution of the corporation because of the misconduct of appellants, as set out heretofore. Since we are hereafter concluding that the Court had no right to dissolve the corporation because appellee did not sustain the allegations of his complaint, it follows that he is not entitled to damages. Before discussing the one serious contention made by appellee and the one upon which this decision turns, we shall discuss briefly appellee's other contentions.

It was alleged that appellants hired Mrs. Grass to keep the books and fixed her salary; that appellants refused to establish a bank account as provided by the by-laws of the corporation; that unauthorized persons were permitted to sign checks. These allegations were not sustained by the evidence and even if they had been it seems that none of the acts was of such magnitude as to justify a dissolution of the corporation, as will be later

shown. Mrs. Grass was employed to keep books and write checks, but it was done with the consent of the majority of the directors, and it was explained that she was and appellee was not in a position to do this job. Certainly no loss to appellee or impairment of the corporation was shown to have resulted thereby. The same thing can be said about the failure to designate a bank. The facts are that the corporation just continued to use the same bank that had been used by the partnership before the formation of the corporation. It was not shown that any damage or impairment resulted. Appellee also alleged: (a) that the stockholders held meetings without notice to him [he admitted, however, that he knew of no such meetings]; (b) that Grass had used corporate funds for his own personal use [this, however, was not sustained by the evidence]; and (c) that the majority stockholders [Lyon and Grass] had refused to have the books audited [again this was not borne out by the evidence].

Two allegations and two contentions are made by appellee which require special consideration. The first is that when the corporation was formed it was understood by all three of the incorporators that each of them would have a right to sell their product on the road in territory impartially selected. The very nature of their business makes this a very important consideration as it was only in this way that appellee could hope to obtain the maximum benefits. The privilege of buying from the corporation at cost and selling for a large profit was the way in which the stockholders could expect to gain more profit than the ordinary salesman who had to buy at a less favorable price. It is true, as contended by appellants, that the evidence establishing this oral agreement is not entirely clear and satisfactory but we think it is sufficient, considering what we have already said, to establish the fact that such an understanding was entered into as contended by appellee.

The other allegation and contention by appellee, which it was necessary for him to sustain before he was

entitled to a dissolution of the corporation, is that appellants refused to allow him to carry out the purpose of the corporation, viz., to buy company products at cost and sell them to the buying public. In our opinion appellee has failed by the evidence to substantiate this second contention.

From the testimony offered by appellee and his witnesses we get the impression that appellee, for some reason, first became dissatisfied because his sister, Mrs. Grass, was engaged to keep books and write checks for the company, that he was jealous of his title as Secretary-Treasurer which he thought he was going to lose, and that he started a course of action to get himself discharged by his two fellow stockholders for the very purpose of having the corporation dissolved. Much of the testimony relied on by appellee to sustain his contention before the Court consists of conversations by the three of them at a Board meeting on the 28th of July, 1951. The very inception of this meeting and the way it was arranged lends credence to the appearance that he was trying to trick Lyon and Grass into discharging him. This meeting was held in appellee's room in which he had installed, without the knowledge or consent of Lyon and Grass, a recording machine. A transcription of their conversations on this occasion is in the record, and the very beginning, which we set out below, is significant:

"Bolliger (on telephone): Oh, you can't do any such thing. Marion has gone to the beauty parlor so let's hold the meeting up here where there is no one to bother us. In fact, I'm sick, so let's have it up here. I'm already undressed and everything else. How about coming up here? You're not sick, Stan, I am the one that's sick. I don't feel flippant about the matter, Stan, I don't feel flippant. So come on up here."

The conversations that follow are far from convincing that appellee was denied the right to sell products of the company. Most of the objections made by appellee were to the appointment of Mrs. Grass as bookkeeper and were based on the assumption that he was

thereby being relieved as Secretary-Treasurer. No objection was made to her employment on any other ground. In one place the following appears:

"Bolliger: I was elected for a year. Why are you removing me?

"Grass: Bud, we are not removing anybody . . .

. . . . . .

"Grass: Now, Bud, let's just lay our cards on the table. Have you talked to an attorney on these by-laws?

"Bolliger: I have."

Appellee was again objecting to Mrs. Grass signing checks and there was a misunderstanding about what could be done under the by-laws, etc.

"Bolliger: Well what is your reason? What are you guys' reasons?

"Lyon: The only reason I have is that I'd rather have Helen [Mrs. Grass] down there signing checks. Should you sign a check, me sign a check and Grass sign checks?

. . . . . .

"Bolliger: Is that right, Grass? You have made her treasurer.

"Grass: No, not treasurer, she's cashier."

. . . . . .

"Grass: Nobody's trying to take the office of treasurer away from you.

"Bolliger: Well, I don't care anything about the title if I can't have the function."

. . . . . .

"Bolliger: Well, how can you stop me from being treasurer unless you remove me from office?

"Lyon: Then consider yourself removed from office.

"Bolliger: Then I can consider myself removed from office?

"Lyon: You can have the title but not the authority.

. . . . . .

"Bolliger: All right, are you going to vote me out as treasurer?

"Grass: No.

"Lyon: No."

Bolliger then asked if they were going to make Helen secretary and Lyon responded that they were only going to make her bookkeeper. Then followed much discussion about what bank would be used and it was explained to appellee that they would retain the same bank for the time being. It was further explained that Helen would be available at all times to keep books and write checks, and that appellee would not be available due to the fact that he would be out on the road.

Even though appellee was at one point told he could consider himself relieved of his office as Secretary-Treasurer, it seems to us that he more or less goaded his associates into making such statement. Moreover, it appears that none of them understood just what authority they had under the by-laws and that the real intent of Lyon and Grass was not to discharge appellee but merely to give certain secretarial functions to Mrs. Grass which apparently was a reasonable thing to do. In all events this evidence falls short of establishing the one important element, *i. e.,* that Grass and Lyon prevented appellee from selling products of the company. One statement that comes close to establishing this point is the testimony of Grass when he stated:

"Q. When was that subject mentioned, do you recall? [referring to marketing products]

"A. Well the first instance on it that I recall actually came up on it was when we asked him [appellee] to turn over this inventory sheet of the corporation

which was property of the corporation. I told Mr. Bolliger at the time, I said 'If you force us to have to go into Court to get a court order to get what is rightfully the property of the corporation', I said that I would do my best to see that he didn't represent this company on the road anymore as a sales representative.

"Q. And that was the only thing ever said?

"A. That's the only time I talked with the man since that date."

At most, Grass' statement was a threat which was never carried out. If the above could be interpreted to mean that Grass definitely prevented appellee from selling at any time, it was offset by the testimony of Lyon when he stated:

"Q. Have you ever told him [appellee] that he could not sell products of the corporation?

"A. I never have."

Grass, of course, could not discharge appellee if he tried without the consent of Lyon.

As previously stated, the one important fact incumbent upon appellee to establish was that he has been deprived of the right to sell products of the company. It is evident from the secret recording of the meeting on the night of July 28th that he was not at that time so deprived. Appellee admits as much in his testimony, as will appear from the following excerpt thereof:

"Q. Now when did you first learn you were not going to be able to sell the products of the corporation? You learned you were not going to be Secretary-Treasurer at the July 28th meeting, when did you learn you were not going to be allowed to sell the product?

"A. I believe an hour or so after that, or the next day."

No explanation was made by appellee on his direct examination as to just what was said to him. Later, on cross-examination, he stated that he had had no other conversations with Lyon or Grass after that time, but did

explain that he had some property which belonged to the corporation and when he refused to turn it over to the corporation he stated that Grass and Lyon told him he wouldn't be selling any more. This alleged statement was explained by appellants, saying they told appellee that if they had to go to court to get the books and property of the corporation, they would try to see that he didn't sell any more. From all this we are not convinced that Grass and Lyon meant then or mean now to refuse to let appellee sell products of the company provided he wishes to do so in a reasonable, cooperative spirit.

From all the evidence we are convinced that appellee's own conduct and lack of cooperation contributed to whatever trouble he finds himself now in, and, further, that the conduct of appellants and the changes which they sought to make appear to be reasonable and for the best interest of all concerned. In fact, their language used at a time when they did not know it would be recorded indicates that they used considerable restraint and patience.

For us to hold that appellee has a right to dissolve this corporation because many of the decisions made by the majority of the directors were not agreeable to him even though considered for the best interest of the company would be to place in jeopardy the very existence of any business conducted through the medium of a corporation. Such a holding would be against the whole spirit of the law providing for the organization and management of business corporations. Many cases support the fundamental rule which is set out in 19 C. J. S. § 1647, at page 1418, which reads:

"In the absence of statutory authorization, as a general rule a court of equity has no jurisdiction to dissolve a corporation or appoint a receiver thereof."

The above quotation appears almost verbatim in Am. Jur., Vol. 13, at page 1164, § 1295. The general rule is again stated more fully in 39 L. R. A. (N. S.) at page 1032 in these words:

"I. General rule. The general rule has been asserted that corporations are the creatures of the state, hence, in general, their life depends upon the action of the state or the stockholders as a whole; and especially if a going concern whose charter or franchise has not yet expired, they cannot, in the absence of statute, be dissolved at the instance of a stockholder by an action in equity for that purpose, and therefore equity is without jurisdiction of a suit by a stockholder, the principal purpose of which is to wind up the affairs of the corporation or to have a receiver appointed with that end in view."

The same authority recognizes that some jurisdictions make an exception to the general rule in case of fraud or mismanagement and some do not. Regarding those jurisdictions that do not recognize any exception to the general rule, in a note at page 1034, it is stated:

"But even where the question has been squarely raised, in many jurisdictions it has been denied that fraud or mismanagement of the corporate property by its officers affords any ground for equity jurisdiction to dissolve the corporation in a suit by a stockholder."

Our own Court goes along with those states that do recognize the exception to the general rule but only in cases of fraud or mismanagement, as will be later noted. In the case of *Corning Custom Gin Co.* v. *Oliver,* 171 Ark. 175, 283 S. W. 977, wherein an action was brought in Chancery Court to dissolve a corporation, our Court applied the general rule, in this language:

"Where the corporation is a going concern it is undoubtedly true that a minority stockholder can not maintain a bill to have it dissolved or to have its assets distributed. In such case if the shareholders disapprove of the company management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw."

We very readily understand that a grave injustice would be done to appellee who entered the corporation

with the understanding which he asserts and was later arbitrarily prevented from doing the one thing which was calculated to be remunerative to him, that is, to be allowed to sell products of the company which he could purchase at cost. If this were the situation, courts of equity would still be open to him for relief, notwithstanding the general rule announced above, as is indicated in the case of *Red Bud Realty Company* v. *South,* 153 Ark. 380, 241 S. W. 21. In this case the court enumerated some of the facts justifying a dissolution of the corporation as follows:

"The proof in this case justifies the conclusion reached by the trial court that Powell was no longer managing the affairs of the corporation for the benefit of the corporate entity, but was merely using the corporation for his own private purposes and entirely ignoring the rights of the minority stockholders. . . . Although having considerable sums of money in his hands at different times, no dividends were declared, and South was completely ignored, all the funds of the corporation being indiscriminately used by Powell for his own personal benefit."

Thereupon the court further states:

"Where there is an abuse of trust by reason of fraudulent management of those controlling the corporation which has resulted in substantial injury to the corporate entity and its minor stockholder, a court of equity, in the language of the Supreme Court of Minnesota, 'may, without statutory authority and in the absence of corporation insolvency, intervene by way of receivership, require an accounting from the delinquent officers, order a sale of the corporate assets and a dissolution of the corporation."

In our judgment the evidence in this case falls short of bringing it within the exception to the general rule, above announced, and that, therefore, the cause must be reversed with directions to the lower court to: (a) dissolve the receivership after the receiver has made a report and accounting: (b) grant a hearing to appel-

lants on the matter of contempt if the court does not see fit to dismiss the same of its own accord; (c) set aside the judgment for damages against appellants; (d) set aside the judgment dissolving the corporation; and (e) make such other necessary adjudications as are not inconsistent with this opinion.

McFaddin, J., dissents.

Todd *v.* Thedford.

4-9941 253 S. W. 2d 961

Opinion delivered January 12, 1953.

Gordon & Gordon, for appellant.

George W. Shepherd and *J. G. Moore,* for appellee.

Griffin Smith, Chief Justice. We determine whether the probate court correctly ordered distribution of the estate of Jewell Emma Thedford when it ruled that the applicable law was § 61-111 of Arkansas statutes, Digest of 1947. Appellants contend that the correct directive is § 61-101.

Miss Thedford's father and mother predeceased her. Formerly each had been married to another, and children were the result of such unions. Miss Thedford was survived by a brother of the whole blood. A brother by the half blood—the issue of her mother's preceding marriage—died prior to the action resulting in this appeal. He is survived by a son who claims through his father. Six daughters were born to Miss Thedford's father

and his former wife. One daughter is dead and her interest in the half sister's estate is claimed by four daughters.

Decedent had no children and these relatives are her sole surviving heirs, all others having predeceased her without issue. It is conceded that no ancestral estate is involved, all property being personalty or a new acquisition.

Section § 61-101, Ark. Stat's, upon which appellants predicate their claims, reads: "When any person shall die having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner: First: To children, or their descendants, in equal parts. Second: If there be no children, then to the father and mother in equal parts, or, if one parent be dead, then the whole to the surviving parent; if no father or mother, then the brothers and sisters (or their descendants) in equal parts. Third: If there be no children, nor their descendants, father, mother, brothers, or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestee [ancestor], and their children and their descendants, in equal parts."

Since Miss Thedford's father and mother predeceased her, and since she had no children, appellants insist that the estate should be awarded the surviving brothers and sisters *per capita* and to the children of deceased brothers or sisters *per stirpes*.

Appellees think the litigation is controlled by Ark. Stat's § 61-111, which is: "*Descent Where no Father or Mother*. The estate of an intestate, in default of a father and mother, shall go as follows: One-half to the brothers and sisters, and their descendants, of the father, and the other one-half to the brothers and sisters, and their descendants, of the mother; provided, that if such

line of either the father or the mother shall be extinct, then the entire estate shall go to such line of the other. This provision applies only where there are no kindred, either lineal or collateral, who stand in a near relation, and does not apply to ancestral estates.''

By appellants' interpretation each heir would receive ⅛, except the four children of the deceased half sister, who would share equally in their mother's portion, receiving 1/32 of the total estate. By appellee's construction the brother and heir of the deceased half brother would receive half the estate, to divide equally, and the other half would be divided equally between the brother and the remaining heirs, except the four children of the deceased half sister, who would divide the share which would have come to their mother had she survived. The brother and half brothers' heir would thus receive ¼ each, and the brother and other heirs 1/7 each, of the remaining half.

The functions of Ark. Stat's, § 61-111, and its connection with § 61-101, were discussed in *Daniels* v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401. It was there held that § 61-111 does not amend or repeal § 61-101, but only defines the manner of descent and distribution of non-ancestral estates under the third subparagraph of § 61-101. Where brothers and sisters survive a decedent, § 61-111 has no application because brothers and sisters stand in a near*er* relationship to the decedent than the class of distributees who are provided for by § 61-111. The opinion language is: ''It is as though § 61-111 reads, 'The estate of an intestate, in default of [descendants, or brothers and sisters or their descendants] or a father and mother, shall go as follows. . . .' ''

Because there were brothers and sisters surviving, § 61-111 did not apply. The correct distribution is an equal division to all surviving brothers and sisters, *per capita;* and to the issue of those who predeceased the intestate, *per stirpes.*

Relatives by the half blood share non-ancestral estates equally with the whole blood. Ark. Stat's, § 61-112.

Reversed and remanded.

PARKER, COMMISSIONER OF REVENUES *v.* KERN-LIMERICK, INC.

4-9924 254 S. W. 2d 454

Opinion delivered January 12, 1953.

Rehearing denied February 23, 1953.

O. T. Ward, for appellant.

Rose, Meek, House, Barron & Nash and *Berryman Green,* for appellee.

WARD, Justice. The United States of America, through and on behalf of the Navy Department, entered into a written contract [designated as NOy23197] with Winston Bros. Company, C. F. Haglin & Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. [hereinafter referred to as WHMS] to construct a Naval Ammunition Depot at Shumaker, Arkansas, the total cost of which was approximated at

$30,800,000. By the terms of the contract of employment WHMS was to procure all labor, supplies, materials, etc., necessary for constructing and equipping said depot and pay for the same, and the Government was to reimburse WHMS for all such expenditures and pay them, in addition, the sum of $580,000 for their services as contractors. The type of contract referred to is designated and is generally known as a "Cost-Plus-a-Fixed-Fee Contract". Other provisions of the contract will be specifically mentioned later.

The question herein to be decided arose in the manner presently set forth. On December 14, 1950, Kern-Limerick, Inc., a machinery and equipment company of Little Rock, Arkansas, sold to WHMS [as contended by appellant] or to the United States [as contended by the latter] two diesel tractors for a total price of $17,146.66, and the tractors were delivered at the site of construction at Shumaker, Arkansas. The Revenue Commissioner for the State of Arkansas demanded payment from Kern-Limerick, Inc. in the sum of $342.93 as a 2% tax on the sale price pursuant to the provisions of the Arkansas Gross Receipts Act of 1941. Payment of the tax was made under protest by Kern-Limerick, Inc. and later suit was filed in the Chancery Court of Pulaski County, Arkansas, for the recovery of the amount so paid. The United States intervened in this suit, contending that the sale in question was a sale to it and that consequently no tax was collectable thereon by the State of Arkansas. The Chancery Court held with the contention of the United States and the Commissioner of Revenues for the State of Arkansas has appealed to this Court for a reversal.

The 1941 Gross Receipts Act, referred to before, provides that no tax shall be paid on sales to the United States; therefore, the question confronting this Court is whether the sale in question was made to WHMS or to the United States. To answer this question it is necessary to examine the provisions of the contract between WHMS and the United States and to do so in the light of court decisions relating thereto.

In order to obtain the savings in money and time that may reasonably be expected by the negotiation of a cost-plus contract such as the one here involved, it is obvious that the U. S. Government must maintain, and so the contract must provide, effective control over all purchases by the contractor; otherwise, the Government could not be assured it would receive standard materials and services at the lowest possible prices. Therefore, as would be expected, the United States in this case wrote into its contract with WHMS provisions for strict control of all purchases of labor, materials, and equipment which were to be used in or for the construction of the Ammunition Depot.

Contract. Some of the pertinent provisions were: (a) All applications for purchases, all bids, and all purchases must be made on Government [Navy] forms and all must be approved by an Officer in Charge who was an officer representing the Navy Department; (b) After approval WHMS consummated the transaction by paying the purchase price and taking delivery at the site of construction at Shumaker, Arkansas: (c) Upon presentation of the evidence of purchase and upon a showing that all requirements had been complied with, the purchase price paid, and delivery made, the Government would reimburse WHMS. Before reimbursement it must also appear that the Government had appropriated money for that purpose; (d) Title to the property so purchased never vested in WHMS but did vest in the United States; (e) WHMS was acting as purchasing agent for the United States in negotiating all purchases; (f) The United States was obligated to the vendor to pay the purchase price; and (g) The vendor was to make demand for payment by submitting an invoice to WHMS.

Some of the terms of the contract, including those designated (e), (f) and (g) above, were printed on the back of all "Request for Bids" and "Purchase Order" blanks which went to prospective vendors.

Arkansas Statute. The tax sought to be imposed herein by the Arkansas Revenue Commissioner is levied by Act No. 386 of 1941, which specifies a tax of 2%

[*Ark. Stats.* § 84-1903] upon the gross proceeds derived from all sales, and requires the vendor [*Ark. Stats.* § 84-1908] to pay the tax to the Commissioner. Some other pertinent provisions of said Act No. 386 are set out below.

(1) *Ark. Stats.* § 84-1902 (c):

"Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished."

(2) *Ark. Stats.* § 84-1902 (i):

"Consumer—User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(3) *Ark. Stats.* § 84-1903 (e)—last paragraph:

"Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale."

As has been previously stated, the vital question is: Who was the "purchaser" in this instance? Was it WHMS or the United States? It is conceded that if it was the former the tax is collectable, and if it was the latter the tax is not collectable. The opinion of the United States Supreme Court in the case of *Alabama* v. *King and Boozer* [which will be cited later], in which this same question was under consideration, contains this language: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Giving a reasonable interpretation to the language of the Arkansas Gross Receipts Act as it is set out in subparagraphs above (1) defining a Sale, (2) defining Consumer-User, and (3) relating to contractors, and having in mind all the provisions of the contract between WHMS and the United States, we are of the opinion that WHMS was the "purchaser" in this instance and that consequently Kern-Limerick, Inc., is liable to the Commissioner for the tax on the two tractors which it sold.

Notwithstanding the above, however, it is obvious that the State of Arkansas could not arbitrarily define WHMS as the "purchaser" and thereby impose a tax on the United States Government if in fact and in truth the latter was the purchaser in this instance, and so we will proceed to consider the question from that standpoint after making this further observation. In determining whether or not the State of Arkansas has acted arbitrarily in enacting this particular Act with the language it contains depends on whether the Act is discriminatory, and, particularly in this instance, whether it discriminates against the United States. The opinion referred to above recognizes this test and makes it clear that the mere fact that the tax is eventually passed on to the Federal Government is no indication it is discriminatory or that it violates the immunity of the Government. In our opinion the Arkansas Statute meets all the tests.

Was the United States the Purchaser? In coming to the conclusion that the United States was not, in this instance, the "purchaser," we base our decision primarily on the opinion in the case of *Alabama* v. *King & Boozer,* 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case. The opinion which overruled some former decisions and approved others is comprehensive and logical and appears to be a landmark case on the issue involved. It upheld the imposition of a sales tax by an Alabama Stat-

ute on the sale of lumber by King and Boozer to a cost-plus-a-fixed fee contractor who was engaged in constructing a project for the Government pursuant to a contract presently to be mentioned.

For the sake of brevity it suffices for this opinion to say that the Government contract in the *King and Boozer* case was like the contract here with the same provisions and regulations except three on which the intervener relies to distinguish the two cases. The three exceptions referred to are: (a) In the cited case the contractor was liable to the vendor for the purchase price while here the contract provides the Government shall be liable; (b) Here the contract designates the contractor [WHMS] as Purchasing Agent for the Government, while in the cited case no such provision appears in the contract; and (c) Here the contract provides that title to any purchased article vests immediately in the Government while in the cited case it vested in the Government upon delivery at the site of construction and approval by the Government.

It is our judgment that the distinguishing features set out above are more synthetic than real and that they do not justify a conclusion here different from that reached in the *King and Boozer* opinion.

(a) Appellees lay great stress on the fact that here the Government has obligated itself to pay the vendor and that this indicates the Government was the real purchaser, and say that this feature, which was lacking in the *King and Boozer* case, was a necessary element to sustain the opinion. The cited opinion does contain this phrase: "It is equally plain that they [the contractors] did not assume to bind the Government to pay for the lumber. . . ." We are not convinced that the court attached the same importance to this feature as appellees do, but we are convinced that there is actually no real difference. Under the terms of the contract here it is hard to see how the credit of the Government could be pledged to the vendor. In the process of buying the tractors the Government [through the Navy Officer in Charge] checked every step in detail. When the sale was

finally made the tractors were paid for by WHMS, delivered to the site of construction, and again checked and inspected by the agent. Only then and after WHMS proved to the Government's satisfaction that the purchase price had been paid by WHMS to Kern-Limerick, Inc., did the Government reimburse WHMS. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interest of the Government, but for another purpose, and maybe considered redundant. We understand appellees do not seriously deny this provision was inserted to avoid the effect of the decision in the *King and Boozer* case. Granting the propriety of such purpose, we do not think it effective.

(b) *WHMS as Purchasing Agent.* Much of what was said above applies to this provision of the contract and especially as to the possible purpose of its insertion. Actually, the contractor in the *King and Boozer* case acted as effectively as an agent for the Government as WHMS does under the contract in this case. However, in neither case do we deem it proper to speak of the contractor as an "agent" because in each instance he was a contractor [an independent contractor] and was so designated in the contract of employment. Whether WHMS could be legally made an agent for the purpose of making purchases for the Government in this instance will be later discussed.

(c) *Title in the Government.* The fact that under the terms of the contract title to the tractors never rested in WHMS also, as we view the entire case, fails to distinguish this case from the *King and Boozer* case. There the title to the lumber rested in the contractor only until the lumber was delivered and paid for and then title automatically vested in the Government. The practical result was the same in both instances and we are unwilling to say that the legal fiction of divesting WHMS of title momentarily here has any significant bearing on the immunity of the United States from taxation. By no process of reasoning can we see how such a provision was necessary to better protect the interest of the Gov-

ernment, and we again conclude it must have been devised for another purpose.

Before the decision in the *King and Boozer* case Congress had refused to exempt from taxation purchases made by cost-plus contractors in constructing projects for the Government. Since the decision an attempt to evade its effect was made by proposed legislation in the Congress, but, after exhaustive hearings, Congress refused to sanction such enactment. In view of this definite attitude on the part of the Government itself, we think any attempt to reach a different result by skillful legal phraseology should be cautiously considered. We recognize the supremacy of the Government in the field of taxation and the urgency of the need for funds by both the State and Federal Governments, but where the interests of the two conflict, it is necessary to have a division line with due respect for both. This idea is well expressed, in the opinion referred to, in this language:

"So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties."

Armed Services Procurement Act of 1947. This Act of Congress will be referred to by sections as it appears in *U. S. C. A.,* Volume 41, page 189, Title 41, beginning with § 151. In some way, appellees urge, this Act strengthens their contention that the United States was the actual purchaser in this instance. Their theory seems to be that the Act gives direct authority to the Navy Department to make purchases for its own use and purposes, that this authority can be delegated to an agent, and that such delegation was made in this instance to WHMS. We do not agree with this interpretation of the Act.

As we see it, the over-all purpose of this Procurement Act was to empower the Navy Department [as well as the Army, Air Force and Coast Guard] to purchase [or contract to purchase] supplies or services for

its own *use,* as stated in § 151. Considering, without holding, the Act authorized the Navy Department to buy an Ammunition Dump at Shumaker, Arkansas, [had one been in existence] for its use, it does not follow that the Navy Department was authorized to buy nails, lumber, cement, tractors, etc., which were not to be *used* by the Navy but by WHMS [in this instance] to construct, as independent contractors, the Ammunition Dump.

Delegation of Agency. Appellant takes the position that even if the Navy Department had the authority to make the purchase of the tractors here, it does not have the power under the Act to delegate this power to WHMS in this instance, and we agree with this view.

Section 156 reads as follows:

"§ 156. *Determinations and decisions—(a) Powers of agency head; finality; delegation.*

"The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

"*Non-delegable powers; delegation to chief procurement officer only.*

"(b) The power of the agency head to make the determination or decisions specified in paragraphs (12)-(16) of section 151 (c) of this title and in section 154 (a) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 151 (c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000."

From the above we conclude that if the power in this instance was delegable at all, it would be only to an

officer or official of the Navy. Here the attempt was to delegate the power to WHMS. It appears probable to us that the purchases here were to be made under paragraphs (12)-(16) of section 151(c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees, Paragraph (10) designates "supplies and services for which it is impracticable to secure competition."

Appellees also contend that § 153(b) provides the authority for the execution of the contract under consideration. We think they would be right if the purpose of the contract with WHMS had been to buy and accumulate [for the future use of the Navy Department] materials, as contended by appellees, is repugnant to the over-all content and purpose of the contract. Not only are the contractors designated and treated as such in the contract but obviously the only purpose of the contract was to obtain the experience, skill and knowledge necessary to assemble proper materials and services and fashion them into an ammunition depot in the most efficient manner. If the United States had only been interested in obtaining the services of a purchasing agent to buy materials it could, no doubt, have selected a competent Naval Officer at no extra cost to perform that function and, in all events, it could have surely secured the services of such an agent for considerable less than half a million dollars.

Reversed.

Justice George Rose Smith not participating.

Robinson, Justice (dissenting). No one will contend that if the Government is a *bona fide* purchaser of equipment, a state sales tax should be collected. If the Government is not the purchaser in this instance, it is hard to imagine a situation where it is ever the purchaser. The Government is invisible and intangible and must, necessarily, act through agents and has the exclusive right to appoint its own agent, or agents. Certainly no state has the power to say who can, or who cannot, act as agent for the Government. Moreover, the Government, through its

duly appointed agents, has the right, in fact it is the duty of such agents, to avoid incurring unnecessary expenses, including taxes.

The majority opinion is based primarily on *Alabama* v. *King & Boozer,* 341 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3. An attempt is made to show that there is no real distinction between that case and the case at bar, but, in my opinion, the facts in the two cases are altogether different. None of the facts on which the court based the opinion in the King and Boozer case are present in this case.

In the King and Boozer case the court said: "As the sale of the lumber by King and Boozer was not for cash, the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes." Then the court pointed out the following facts upon which it based the opinion that the Government was not the purchaser:

(1) The contractor was required to make all such contracts in his own name, and on his own credit, and not bind or purport to bind the Government or the contracting officer.

(2) The Government was not to be bound by the purchase contract.

(3) The purchase order stated that the purchase did not bind or purport to bind the United States Government or Government officers.

(4) The Government's credit was not pledged and the court said: "We cannot say that the contractors would not, or that the Government was, bound to have paid the purchase price."

The facts in the present case which distinguish it from those set forth above are as follows:

(1) The Government was bound to pay for the equipment.

(2) The equipment was not bought in the name of the contractor or on the contractor's credit.

(3) The Government's credit was pledged.

(4) The request for bids provides that the contractor shall not acquire title to any of the property purchased.

If the contractor had attempted to divert to his own use property purchased for this Government job, there is no court in the land that would not have enjoined such diversion, upon a showing of the facts in the case. This is true because the contractor had acquired possession of the property as agent of the Government. At no time did the contractor own the property, nor was the contractor liable for the payment of the purchase price, and the property had not been sold on the credit of the contractor. To say here that the Government must pay the sales tax is to say that it can never, at any time, employ a contractor to do any work without paying a sales tax to the state on all material the Government buys and pays for and the contractor uses in doing such work.

For the reasons set out herein, I respectfully dissent.

Justice HOLT concurs in this dissent.

C & L RURAL ELECTRIC COOPERATIVE CORPORATION *v.* KINCAID.

4-9858 256 S. W. 2d 337

Opinion delivered January 12, 1953.

Rehearing denied April 20, 1953.

T. S. Lovett, Jr., and *Rose, Meek, House, Barrow & Nash,* for appellant.

V. J. Brocato and *Brockman & Brockman,* for appellee.

J. SEABORN HOLT, J. Appellants, corporations operating in this State, sued appellees on an indemnity contract. Appellees filed a demurrer to the complaint and also a motion to dismiss, both of which were sustained by the trial court. Appellants elected to stand on the complaint, prayed, and were granted an appeal.

The complaint filed June 21, 1950, alleged, in effect, that their cause of action grew out of business transacted by appellees in this State; that prior to February, 1947, appellant, C & L Rural Electric Cooperative Corporation, owned and operated transmission lines going through several counties of this State, most of which had been constructed for it by appellees, Delta Construction Co.; that in February, 1947, C & L made a contract with appellees, under the terms of which appellees agreed to furnish all material and labor necessary to construct some 700 additional miles of electric transmission wires in this State to tie in with said plaintiffs' existing system.

It was provided in Article IV, section 1 of the contract: "Section 1.—PROTECTION TO PERSONS AND PROPERTY. The Contractor shall at all times take all reasonable precautions for the safety of employees on the work and of the public, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards

shall be guarded in accordance with the 'Manual of Accident Prevention in Construction' of the Associated General Contractors of America unless such instructions are incompatible with Federal, State, or Municipal laws or regulations.

"The following provisions shall not limit the generality of the above requirements: (a) The Contractor shall at no time and under no circumstances cause or permit any employee of the Contractor to perform any work upon energized lines, or upon poles carrying energized lines. * * * (g) The Project, from the commencement of work to completion, or to such earlier date or dates when the Owner may take possession and control in whole or in part as hereinafter provided shall be under the charge and control of the Contractor and during such period of control by the Contractor all risks in connection with the construction of the Project and the materials to be used therein shall be borne by the Contractor. The Contractor shall make good and fully repair all injuries and damages to the Project or any portion thereof under the control of the Contractor by reason of any act of God or other casualty or cause whether or not the same shall have occurred by reason of the Contractor's negligence. The Contractor shall hold the Owner harmless from any and all claims for injuries to persons or for damage to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part thereof."

It was further alleged that on June 19, 1947, appellees had in their employ and control Grady L. McEntire, who, while performing certain work on an energized pole under the directions and orders of appellees' superintendent, Strode, came in contact with a live wire and was seriously and permanently injured; that thereafter on February 9, 1948, McEntire sued appellant, C & L Rural Electric Cooperative Corporation and others, not including appellees.

A trial resulted in a judgment against C & L for $40,000 damages and that on appeal to this court, the judgment was affirmed December 19, 1949, *(C & L Rural Electric Cooperative Corporation* v. *McEntire,* 216 Ark. 276, 225 S. W. 2d 941), that notice of the pendency of the McEntire suit was duly given to Delta Construction, appellees, but they refused to defend said suit.

Appellants further alleged that at the time McEntire received his injury, appellant, Employer's Mutual Liability Insurance Company of Wisconsin, had issued to appellant, C & L, its liability policy, under the terms of which it had agreed to pay all sums up to $25,000 which C & L might be required to pay McEntire, cost of any litigation, and that in the event of payment by the Insurance Company under the policy, said Company should be subrogated to all of the insured's (C & L's) rights under the policy. It was further alleged that appellant, Insurance Company, has duly performed its obligation under the policy; that on February 13, 1950, C & L paid on the McEntire judgment $10,742.99, appellant, Insurance Company, paid $26,858.33, and the balance of the judgment was paid by the American Casualty Company, the insurance carrier of co-defendants, Dickinson & White, in the McEntire suit above; that "by reason of Article IV, section 1, of the contract of construction hereinbefore referred to, defendants (appellees) assumed all risks in connection with the construction of the project, so that by virtue of said assumption of risk the defendants have become liable to the plaintiff, C & L Rural Electric Cooperative Corporation, and to the plaintiff, Employer's Mutual Liability Insurance Company of Wisconsin, as its subrogee for their disbursements in connection with the said McEntire case.

"13. The defendants (appellees) were negligent in failing to use ordinary care to furnish their employee, the said McEntire, a safe place to work, in failing to warn and advise the said McEntire that said Pole 249 carried energized wires, and in failing to advise the plaintiff, C & L Rural Electric Cooperative Corporation, that they proposed to work on said pole at said time, and

the injuries sustained by the said McEntire proximately resulted from negligence on the part of defendants. By reason of Article IV, section 1, of said contract of construction, defendants are liable to indemnify the plaintiff, C & L Rural Electric Cooperative Corporation, and the plaintiff, Employer's Mutual Liability Insurance Company of Wisconsin, as its subrogee, for their disbursements and expenses in said McEntire case, inasmuch as said Article provided that Delta should hold C & L Rural Electric Cooperative Corporation harmless for any and all claims for injuries to persons happening by reason of any negligence on the part of Delta Construction Company or its agents or employees during the control of said construction company of the Project or any part thereof. At the time of the accident to the said McEntire defendants were in control of the Project. . . . C & L Rural Electric Cooperative Corporation prays judgment against the defendants for the sum of $10,742.99, and plaintiff, Employer's Mutual Liability Insurance Company of Wisconsin, as subrogee, prays judgment against defendants for the sum of $28,-475.47, and for all proper relief."

Appellees' demurrer filed July 12, 1950, alleged misjoinder of parties, plaintiff, and that a cause of action was not stated. Their motion to dismiss filed September 10, 1950, alleged, in effect, that (1) The Circuit Court had no jurisdiction because the Arkansas Workmen's Compensation Commission had sole jurisdiction to hear and determine the matters alleged in the complaint. (2) C & L had no cause of action which it could subrogate to its co-plaintiff. (3) The contract of indemnity sued upon does not indemnify against C & L's negligence and the complaint avers facts and circumstances from which it appears that both C & L and Delta were guilty of negligence. (4) The plaintiffs may not now sue Delta directly because they failed to bring Delta in as a joint tortfeasor in the original suit between C & L and McEntire.

We hold that the complaint stated a cause of action and that the court erred in holding otherwise.

The present suit is one on an indemnity contract and is not an action in tort, as we shall point out.

Appellees earnestly contend that all issues raised in appellants' complaint have been adjudicated in the original McEntire case adversely to appellant and that the judgment in that case is *res adjudicata* and conclusive of appellants' right in the present case. They further contend "that under the facts and circumstances alleged in the instant complaint whether C & L under the facts proved in the McEntire case can assert claim for contribution or indemnity must have been asserted in the original action and a failure to do so is fatal to the complaint now before the Court." We do not agree to either contention.

As to the defense of *res judicata,* we think it without merit and can have no application here for the reason that the parties are not the same as in the McEntire suit and the issues and subject matter in the present case are entirely different. It is well settled that *res judicata* only applies to parties and their privies.

The answer to appellees' second contention must depend on the proper interpretation and effect to be given our Workmen's Compensation Law (§§ 81-1301—81-1349, Ark. Stats. 1947), and our Uniform Joint Tortfeasors' Act (§§ 34-1001—34-1009, Ark. Stats. 1947).

We hold that appellee was not a proper party defendant in the original McEntire case for the reason that in that case Delta (appellee) carried insurance in accordance with the provisions of the Workmen's Compensation Law, above, and had paid to its employee, McEntire, all compensation due him under that act and its liability to him was thus ended. Delta had no tort liability to McEntire. Its liability to him was purely statutory and limited by the Workmen's Compensation Law, which was exclusive.

Section 81-1304 provides: "The rights and remedies herein granted to an employee subject to the provisions of this act [§§ 81-1301—81-1349], on account of personal

injury or death, shall be exclusive of all other rights and remedies of such employee, * * *."

We now consider the provisions of the Joint Tortfeasors' Act [§§ 34-1001—34-1009] in connection with appellees' contention that appellants "are now precluded from suing defendants (appellees) indirectly since they failed under the Joint Tortfeasors' Act of Arkansas to bring Delta Construction Company in as a third-party in the original action." Section 34-1001 of the Statute provides: "'JOINT TORTFEASORS' DEFINED.—For the purpose of this act [§§ 34-1001—34-1009] the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."

Section 34-1002 provides: "RIGHT OF CONTRIBUTION—ACCRUAL—PRO RATA SHARE.—(1) The right of contribution exists among joint tortfeasors. (2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof. (3) A joint tortfeasor who enters into settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. (4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares," and § 34-1007 provides:

"(1) * * * a defendant seeking contribution in a tort action may move * * * for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defense to the complaint of the

plaintiff and to the third-party complaint in the same manner as defenses are made by an original defendant to an original complaint. * * * The plaintiff shall amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of his own liability to the plaintiff and to the third-party plaintiff."

It appears obvious from a mere reading of the above provisions that the right of contribution between joint tortfeasors only is contemplated,—that is, where there is a common liability to an injured person in tort, or to persons who are "liable in tort for the same injury to person or property."

The present suit by appellants is based not on tort, but an indemnity contract that C & L had with Delta (contractor), which contract, as indicated, provided: "The Contractor (Delta) shall hold the owner (C & L) harmless from any and all claims for injuries to persons or for damages to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part hereof."

While we do not appear in any of our former decisions to have passed on the issues now presented, we think the reasoning of the Maryland Supreme Court in the case of *Baltimore Transit Company* v. *State,* 183 Md. 674, 39 A. 2d 858, 156 A.L.R. 460, in interpreting and applying the provisions of the Workmen's Compensation Law and the Uniform Tortfeasors' Act (both acts being similar in effect to our own) in circumstances similar to those presented here, is sound and applicable here. That court held against permitting a third-party defendant (Delta here) to be brought in or impleaded under the Uniform Tortfeasors' Act on the ground that to do so would enlarge the liability of the employer beyond the limits of the Workmen's Compensation Law. It was

there said: "There is no doubt that the Workmen's Compensation Act substituted for the common law liability of an employer for negligence, subject to the corresponding common law defenses, an absolute, but limited, liability regardless of fault, and made that liability exclusive, in the case of a conforming employer. (Citing the Act) * * * It is contended, however, that the employer's immunity from suit by the employee was modified by the passage of the Joint Tortfeasors Act in 1941, so as to permit the joinder of a conforming employer whose negligence caused or contributed to the happening of an accident, at the instance of the negligent third-party."

The Court then, after an analysis of the Uniform Tort-feasors' Act, continued: "We think these provisions make it clear that the Act is only applicable to a situation where there is a common liability to an injured person in tort. Such liability may be joint or several, but there can be no contribution where the injured person has no right of action against the third-party defendant. The right of contribution is a derivative right and not a new cause of action. . . .

"We think the weight of authority supports the proposition that the Compensation Law limits the employer's liability as well as the employee's recovery. The employer should not be held liable indirectly in an amount that could not be recovered directly, for this would run counter to one of the fundamental purposes of the compensation law."

We must point out that the extent of Delta's liability to C & L on Delta's indemnity contract with C & L would be measured by, or depend upon, its degree of negligence, if any, in contributing to McEntire's injury and pro-rated accordingly.

The judgment is reversed and the cause remanded with directions to overrule the demurrer and motion to dismiss.

Justice George Rose Smith not participating.

OAK RIDGE MINERALS, INC., *v.* MCKNIGHT.

4-9986 253 S. W. 2d 962

Opinion delivered January 12, 1953.

Rex W. Perkins, Jeff Duty and *E. J. Ball,* for appellant.

Claude Duty, Lee Seamster and *Lawrence S. Morgan,* for appellee.

ROBINSON, Justice. This is an appeal from a judgment in the sum of $12,951.25 for personal services rendered by appellee to appellant and O. B. Saner, its predecessor in the mining business. Saner lived at Kerrville, Texas, and had been engaged in the mining and oil business. In 1946 he called upon McKnight who lived at

Hot Springs. The two entered into an agreement, whereby McKnight would search for a suitable deposit of silica to be mined. It was further agreed between the parties that Saner would pay McKnight the sum of $37.50 per week, which the latter claims was a grubstake, merely enough to carry him along until such time as the silica could be located and developed. McKnight claims it was also agreed that, in the event of a discovery of a suitable deposit of silica, and that same was developed and put into production, he was to get fifteen per cent interest in the business as a consideration for his work in connection with the discovery and development of the silica deposit.

McKnight was unable to find a suitable deposit of silica in the vicinity of Hot Springs. He then made an additional agreement with Saner, whereby he would go to Rogers, where he had considerable mining experience, and attempt to locate a silica deposit in that vicinity, and if he was able to find one and develop it into the finished product, he was to get twenty-five per cent of the business, or was to be paid a reasonable sum for his services in connection with the discovery and development of the project. At this time the weekly allowance, or grubstake, was increased to $47.50.

McKnight located a satisfactory deposit of silica near Rogers and proceeded to supervise both the construction of mining facilities and the erection of a plant to process the material. Saner furnished the money for this development to the extent of about $150,000. Later Saner formed a corporation with all of the stock held by his family. Before the processing plant was completed to the point where it could be actually placed in operation, although the building had been constructed and quite a bit of machinery had been placed therein, Saner died, leaving the bulk of his estate to his widow.

Subsequent to the formation of the corporation, McKnight continued to work in connection with the silica operation and was paid the same amount he had received, namely $47.50 per week. No deductions were made for Social Security.

In the latter part of December, 1950, McKnight was in an automobile wreck and was seriously injured, losing a leg. While in the hospital, he was visited by the brother of Mrs. Saner, Mr. Randolph, who was looking after the business for her. Randolph delivered a check to McKnight, based on the weekly allowance he had been receiving, and told him that was the final payment. No effort was made to complete the processing plant; in fact, it has been sold.

McKnight filed this suit, asking for judgment in the sum of $20,000 as reasonable pay for his services in connection with the discovery of the silica deposit and building of the processing plant under the agreement with Saner. The court rendered judgment for McKnight in the sum of $20,000, less all the weekly allowances he had been paid, also minus the damage done to the company truck which was being driven by McKnight in December when he was injured. After making these deductions, the judgment in McKnight's favor amounts to $12,951.25.

The record is convincing that McKnight is telling the truth in regard to his oral agreement with Saner. There are many circumstances proved by the evidence that show McKnight was more than a $47.50 per week laborer. In fact, he is a successful, experienced mining engineer. He spent about five years locating and developing the deposit of silica and building the processing plant. During this time he spent for Saner, and Saner's corporation, the Oak Ridge Minerals, Incorporated, about $150,000. There is not one word, by insinuation or otherwise, that one dime of this money was wasted or misspent. There is some evidence in the record that on one occasion McKnight may have gotten drunk, but if this did happen, it was of no consequence since Saner continued to use his services on the same basis as in the past. After the corporation was formed, an attempt was made to borrow $120,000 from the R.F.C. In connection with the request for this loan, McKnight prepared an application consisting of about sixty-five pages. A part of that application is in the record and it shows, beyond any doubt, that McKnight was highly

skilled in the technicalities of the business in which he was engaged.

Undoubtedly, McKnight and Saner had some agreement, whereby McKnight was to receive compensation for his work, in addition to the weekly allowance made to him. It is not probable that Saner, a successful businessman, would have turned over to McKnight the management of a project the size here involved, with authority to spend $150,000 of his money, if McKnight was no more than a $47.50 a week laborer; and it is not likely that McKnight would have agreed to work merely for that small sum. The undisputed evidence in the case is that a reasonable salary for a man of McKnight's experience and ability is from $700 to $1,500 a month.

Appellants argue that even if there was a contract between Saner and McKnight, the corporation would not be liable to McKnight by reason of such contract. The corporation was brought into existence by Saner merely for the purpose of continuing the same business in which Saner was engaged. All stock was held by him, or issued to other members of his immediate family. There were no innocent purchasers of stock that would be injured by compelling the corporation to carry out contracts made by Saner in connection with the operation of the business. As some have expressed it, the corporation was Saner's "other pocket." Saner was solely responsible for the organization of the corporation and owned or controlled all the stock. Therefore, the corporation necessarily, as such, knew everything that Saner had done in connection with the business. In addition, the corporation continued to use McKnight's services, apparently on the same basis he had been working, in the same business before the corporation was formed.

In *Fort Smith Refrigeration & Equipment Co., Inc.,* v. *Ferguson,* 217 Ark. 457, 230 S. W. 2d 943, this court quoted, with approval, from Fletcher on Corporations, §§ 4012 and 4014 as follows: "A corporation succeeding a partnership or association is liable on the contracts or

obligations of the latter where it either assumes them under express agreement or where the facts and circumstances are such as to show an assumption. . . . It is quite generally recognized that a corporation may be held to have impliedly assumed the obligations of its predecessor, for an assumption of liability by the corporation, like any other fact, may be established by circumstantial evidence.'' See, also, *Baker* v. *Bellows,* 205 Ark. 448, 170 S. W. 2d 75.

Appellant further contends that if there was a contract, the terms of the agreement were that McKnight was only to receive additional compensation for the work that he had done in the event of actual finished production, and that here, since the plant was never completed, there was no finished production and, therefore, McKnight cannot recover. This argument might be sound if, through some fault or carelessness on the part of McKnight, there was no production; but such is not the case. The evidence clearly shows the only thing necessary to get finished production is completion of the installation of the machinery in the building, and that McKnight would have seen to such installation if he had been permitted to do so.

After a careful review of the entire record, we are of the opinion that the chancellor's decree is not contrary to a preponderance of the evidence.

Affirmed.

Justice McFaddin not participating.

VANLANDINGHAM *v.* SCHOOL DISTRICT No. 37.

4-9963 253 S. W. 2d 965

Opinion delivered January 12, 1953.

S. J. Reid, for appellant.

Wm. J. McClellan and *W. H. McClellan,* for appellee.

ED. F. MCFADDIN, Justice. Appellant, a school teacher, brought this action against appellee, School District, to recover a bonus of $172.02 claimed by appellant under Act No. 319 of 1941, known as "The Arkansas Teachers' Salary Law," which, with amendments, is now found in § 80-1301 *et seq.,* Ark. Stats. The Trial Court entered judgment for the School District, and this appeal ensued.

The facts were stipulated and the cause was tried by the Court sitting as a Jury. Appellant was employed as a teacher for School District No. 5[1] of Grant County, for a 7-months term of 1947-8, at $95 per month. The contract was in the usual form.[2] Appellant performed the contract and received $665 therefor, being $95 per month for 7 months. Some time in the 1948-9 school year, it was established that there had been an unexpended balance of $172.02 in the Teachers' Salary Fund of said School District No. 5 for 1947-8. This balance could have been paid to appellant under our holding in *Fowlkes* v. *Wilson,* 205 Ark. 895, 171 S. W. 2d 958; and on September 18, 1950, appellant filed this action against the present appellee, and sought to recover the said $172.02.

But events which occurred after the close of the 1947-8 school year clearly establish that prior to the filing of this action, the appellant had received the equiva-

[1] School District No. 5 was an entirely separate District from the present appellee when the contract was made, and was later consolidated with the present appellee, as will hereinafter appear.

[2] See § 80-1306 Ark. Stats.

lent of the bonus that she here seeks. We mention three such matters:

(1) The Directors of School District No. 5 carried the $172.02 (balance from 1947-8 school year) into the Teachers' Salary Account for the school year 1948-9; and because of such sum, said School District No. 5 was enabled to have a 9-months school term in 1948-9; and appellant was employed by said School District No. 5 to teach a 9-months school term in 1948-9, at a salary of $125 per month.

(2) In the early part of the 1948-9 school year, the County Supervisor of Grant County (in which both School District No. 5 and School District No. 37 were located) conferred with the State Department of Education concerning the carry over of $172.02 made by School District No. 5, and was advised that such procedure would be approved in this instance: so the County Supervisor did not order the County Treasurer to withhold warrant payments, as provided in § 80-1306 (b) Ark. Stats.

(3) During the 1948-9 school year, School District No. 5 was consolidated with School District No. 37 (the present appellee); and School District No. 37, in order to complete School District No. 5's contract with appellant, used all of the money in the Teachers' Salary Account in School District No. 5, plus $60 of appellee's money. Thus, appellant received under her 1948-9 contract all of the $172.02, plus $60 additional; and there is no evidence of any complaint being registered by the appellant as to the $172.02 being carried over from the 1947-8 year to the 1948-9 year until shortly before, and in evident anticipation of, the filing of this action.

Appellant relies on our holding in *Fowlkes* v. *Wilson, supra,* wherein we held that the balance remaining in the Teachers' Salary Fund of a School District at the end of a school year should be paid to the teachers as a bonus. That litigation arose prior to Act No. 136 of 1943 and Act No. 301 of 1945; and the last mentioned Act amended § 3 of Act 319 of 1941, as well as Act 136

of 1943, so that after 1945, the law contained subdivision "(f)"[3] of §§ 80-1303 Ark. Stats., which reads in part:

"Each district in the state shall spend for teachers' salaries in each fiscal year not less than 90% of the total revenue accruing to the Teachers' Salary Fund during that fiscal year, plus any cash surplus in the Teachers' Salary Fund carried over from the previous fiscal year, plus any money received by the district from the State Teachers' Salary Fund."

Thus the Legislature by the above quoted language recognized that there might be a small surplus in the Teachers' Salary Fund "carried over" to the succeeding year; and this subdivision "(f)" undoubtedly influenced the decision of the State Board of Education, as previously mentioned.

We conclude that the appellant has received all of the amount of $172.02 here sought, plus an additional amount supplied by the appellee District.

The judgment of the Trial Court is affirmed.

LAWS *v.* MELTON.

4-9964 253 S. W. 2d 966

Opinion delivered January 12, 1953.

[3] No language similar to this subdivision "(f)" was in the law that governed at the time of our decision in *Fowlkes* v. *Wilson, supra.* The subdivision "(f)" was first added by Act No. 136 of 1943.

W. F. Reeves, for appellant.

Mills & Mills and *N. J. Henley,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellant, Mary Laws, for specific performance of a parol contract to convey land. She alleged that her foster mother, Carrie Dampf Blackwell, agreed to deed or give the land to appellant if she would move from California where she resided in 1948 and live with and take care of Mrs. Blackwell for the remainder of her life; but that Mrs. Blackwell died in June, 1950, without having made the promised conveyance although appellant had performed her part of the contract.

At the conclusion of the testimony on behalf of the appellant, the appellees, who are the heirs of Carrie Dampf Blackwell, deceased, filed a demurrer to the evidence. This appeal is from a decree sustaining the demurrer and dismissing the complaint.

We have construed Ark. Stats., § 27-1729, as amended by Act 470 of 1949, as requiring the chancellor, in passing upon a demurrer to the evidence, to give such evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence, when so considered, fails to make a *prima facie* case. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. Hence, the only question presented here is whether the evidence

presented by the appellant was sufficient to make a *prima facie* case.

The evidence offered by appellant shows that she made her home with Mr. and Mrs. Blackwell at Marshall, Arkansas, from about 1930 when appellant was nine years of age until 1940 when she went to California where she married. Appellant continued to reside in California until March, 1950, when she returned to Marshall, Arkansas, and lived with Mr. and Mrs. Blackwell until the latter's death in June, 1950.

Mrs. Blackwell owned land in Marshall which was separated into two tracts by U. S. Highway 65 with the Blackwell home located on the south side of the road and some tourist cabins north of the road. Mrs. Blackwell visited the appellant and her husband in California in November and December, 1948. At that time she expressed an intention to give or convey the home place located south of the highway at Marshall to the appellant at some future date. Mrs. Blackwell also expressed to her neighbors the same intention on numerous occasions before and after the appellant returned to Marshall in 1950.

We have carefully examined the testimony and find no witness testifying to the existence of a contract to convey the land as was the case in *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155, and other cases cited by the appellant. While the declarations of Mrs. Blackwell manifested an intention to give the land to appellant at some time, we agree with the chancellor that this evidence is inconsistent with the theory that appellant should have to earn the property by rendering some service to Mrs. Blackwell. This evidence is similar to that adduced by the appellant in *Smithwick* v. *Bank of Corning,* 95 Ark. 463, 130 S. W. 166, where a widow frequently spoke of monies left her by her deceased husband as belonging to his sole heir, but died leaving said heir nothing in her will. The court said: "The money received by the widow in the division of the estate of her husband was her absolute property. Her frequent declarations that it was the appellant's money did not convert it into a

trust fund. They manifested an intention to give the same to appellant at some time. But they were not based on any consideration, and were not binding on her. Intention without acts is of no effect."

Nor do we find any substantial evidence to support a completed oral gift of the land to the appellant. We have frequently held that a parol gift of land will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable and unjust. *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *McCulloch* v. *McCulloch,* 213 Ark. 1004, 214 S. W. 2d 209. There is nothing in either the pleadings or proof in the instant case to indicate that Mrs. Blackwell ever surrendered or delivered the possession of the land to the appellant.

Since there is no substantial evidence of either the existence of a contract to convey to the appellant or of a completed oral gift of said land, the appellant failed to make a *prima facie* case and the chancellor correctly sustained the demurrer to the evidence.

The decree is affirmed.

GREAT AMERICAN INDEMNITY COMPANY, ET AL. *v.* BAILEY

AND

BAILEY *v.* GREAT AMERICAN INDEMNITY COMPANY, ET AL.

Series 5-67 254 S. W. 2d 322

Opinion delivered January 19, 1953.

Rehearing denied February 16, 1953.

[redacted]

Hardin, Barton, Hardin & Garner, for appellant.

Gutensohn & Ragon, for appellee.

Griffin Smith, Chief Justice. Our first problem is to determine whether the circuit court correctly found that there was substantial evidence upon which Workmen's Compensation Commission made its award to W. H. Bailey and that Great America's policy of insurance comprehended coverage in the unusual circumstances attending the controversy. A secondary issue is the Commission's right to direct payment of emergency treatment when an award has been made and before the primary right to compensation has been judicially concluded.

Day and Nite Cleaners, now incorporated, operated for many years in Fort Smith as a personal enterprise owned by William H. Carter. One establishment is on Rogers street. A second plant is on Grand avenue and a pickup office is maintained at Camp Chaffee. Personnel employment varies from 33 to more than forty and a

quarterly payroll copied in the transcript discloses employment expenditures in excess of $17,000. This includes Carter's salary.

Carter owned 18 acres on Highway 22 east of Ft. Smith where he resides, and where tenant quarters appropriate to operational necessities are provided. The place has long been known as Circle C Ranch. Following the incorporation of Day and Nite Cleaners Carter transferred the so-called ranch property and it became a part of the corporate entity.

By § 81-1302 (c) (1), agricultural farm labor is excepted from the definition of employment, although the exclusion may be waived. See § 81-1307, Ark. Stat's. In the case at bar it is conceded that the notice mentioned in § 81-1307 and more particularly set out in § 81-1308 was not given. Appellant believes Bailey was an agricultural farm laborer and points to the fact that he resided on the ranch, attended stock, made incidental repairs to fences and minor equipage, and was required to report for duty at the cleaning plants only when accumulated work suggested that course to the management. Bailey was paid with Day and Nite checks at $100 per month, but was allowed free use of ranch facilities equal, as the Commission found, to an additional $40 per month.

Bailey's connection with Carter and his enterprises began June 2, 1952, when he replaced L. H. Davis, resigned. Davis had been preceded by Rolen Slaten whose working conditions were substantially the same as those under which Davis and Bailey rendered service accountability, and pay was the same.

Under "Classification" in the insurance policy cleaning or dyeing is covered, including repairing or pressing. Route supervisors, salesmen, drivers, chauffeurs and their helpers, are under Code No. 2586. A subsection (b) includes a risk not pertinent to our review. The total estimated advance premium was $243.15. Item 5 reads: "This employer is conducting no other business

operations at this or any other location not herein disclosed—except as herein stated:—No exceptions."

The injury for which compensation was awarded occurred June 10th when Bailey fell from a tree while working under Carter's supervision on the 18-acre tract. The accident happened eight days after Bailey succeeded Davis and the injured man had not done any work in the cleaning establishments. It was shown, however, that Davis and Slaten had received periodic calls to work in the cleaning plants. The evidence is that Bailey's duties were not different from those to which Davis had responded; so the issue is whether, as a matter of law, Bailey's assignment to the ranch excluded him from the insurance coverage pertaining to Day and Nite employes. The problem is not without its perplexing phases and no case absolute in factual structure has been cited.

Quite clearly the coverage contracted for is that itemized on the first page of the policy as 1 (a), hence the term "such injuries" frequently found in the policy was no doubt intended by the insurer to limit recovery to that class. But we are met with other language that is susceptible of a broader connotation—a construction the insured might with reason have thought to be more embracive than the restrictive verbiage of Item 1 (a). Section 6 expresses the insurer's purposes to make the agreement applicable "to such injuries sustained by any person or persons employed by this employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this policy is to be computed and adjusted".

Appellant's custom was to check the quarterly returns made by the employer in withholding federal tax estimates, a report that is combined with federal insurance contributions and deductions. For the period ending Sept. 30, 1951, Slaten was listed as an employe. For the quarter closing June 30, 1952, Davis is shown to have been entitled to taxable wages amounting to $343.50. Davis testified that he frequently received overtime payment.

Bailey testified that he was to be available for work at Day and Nite six hours a day—"That's what I was supposed to do, but I hadn't done any work yet because it was the slack season".

The Commission seemingly attached importance to Carter's explanation of ranch operations and why the property was maintained. Prior to 1940 Carter had been connected with Sears-Roebuck Company, but suffered a nervous breakdown and was advised by Mayo Clinic physicians to adopt a hobby. Horseback riding in particular was recommended. The acreage was acquired with this purpose in view.

After entering the cleaning business it occurred to Carter that good will would be promoted by making the ranch facilities available to friends and customers. He specialized in Palomino horses and kept from eight to twelve. These were sometimes taken out of the state and entered in stock shows. To some extent the expense of operating the ranch was met in this manner. Perhaps a little profit had been realized, but in the main the undertaking had just about broken even. Financial matters connected with the ranch were handled through Day and Nite. During summer months some cows were bought and they grazed on pasture lands, but no attendant looked after them except when incidental services were required. It was Carter's belief that the advertising value resulting from maintenance of the ranch more than justified its retention. No crop of any kind—not even a garden—was cultivated.

Appellee calls attention to the fact that all information required by the insurer was procurable by agents who annually checked payrolls in order to determine what additional premium should be charged, and included in such primary and secondary payments was the name of at least one of Bailey's predecessors.

We agree with appellant that the expressions exempting agricultural farm labor is broader than mere cultivation of the soil. But in the case here there was substantial evidence for the Commission's finding, and

circuit court's affirmation, that Carter's corporation was not engaged in an agricultural pursuit within the meaning of the law; and, while the worker whose back was broken when he fell from the tree had not reported at the cleaning establishment, the insurance company with available means for determining classifications and the nature of all risks assumed was willing to rely upon federal tax reports which carried the names of persons whose salaries were included in fixing premiums. We have therefore concluded that the fact-finding agency was not without warrant in holding that appellant had not overcome the verity attaching to the payroll reports and testimony showing business methods and the responsibility of employees.

On November 24th this court entered an order of remand permitting circuit court to reinvest the Commission with jurisdiction to exercise its discretion in directing or declining to direct immediate payment of emergency treatment costs, pursuant to § 81-1311, Ark. Stat's. The Commission took the view that express language of the statute—that is, § 11 of the initiated Act of 1948—deprives it of any authority to require the employer to furnish medical, surgical, hospital, or nursing services before final court adjudication of liability for compensation has been had.

The pertinent paragraph is: "The employer shall not be liable for any of the payments [provided for in the section] in case of a contest of liability where the Commission shall decide that the injury does not come within the provisions of the Act".

It is our view that the purpose of the statute was to invest the Commission with discretion to direct immediate assistance when, as in this case, the primary question of compensation had been decided in favor of the claimant. It may be argued that, in the event of appeal and reversal of the Commission's findings, interim expenditures by the employer or its insurance carrier would in many instances be a loss. This, however, does not render the Act invalid for want of due

process. In *California State Auto. Ass'n Inter-Insurance Bureau* v. *Maloney, Insurance Commissioner,* 341 U. S. 105, 71 S. Ct. 601, 95 L. Ed. 788, the U. S. Supreme Court said that the power of a state is broad enough to take over the whole insurance business, leaving no part for private enterprise. It also said that a state's police power extends to all the great public needs, and may be utilized in aid of what the legislative judgment deems necessary to the public welfare, "[and this is] peculiarly apt when the business of insurance is involved."

The court was considering the California Compulsory Assignment Risk Law that provided for approval by the insurance commissioner of a reasonable plan for equitable apportionment among insurers of automobile insurance applicants who are in good faith entitled to, but are unable to procure, insurance through ordinary methods. The plan made it mandatory for all insurers to subscribe to the plan, and the court held that the subject-matter was within the state's police power.

The reasoning of the Maloney case when applied to the state's right to require injured employees to be given medical treatment is quite clear.

The circuit court's judgment upholding the Commission's determination that Bailey is entitled to compensation is affirmed. Its holding that the Commission is without power to direct emergency treatment is reversed.

Mr. Justice WARD dissents; Mr. Justice GEORGE ROSE SMITH concurs.

WARD, J. (dissenting). It is my best judgment, reluctantly arrived at due to sympathy for appellee, that the majority opinion reaches an erroneous conclusion, and that the error is such moment that it deserves comment.

Due to the facts and issues in this case, regardless of whatever view may be taken, appellee is not entitled to recover if in fact he was an agricultural farm laborer as that term is used in Ark. Stats., § 81-1302 (c) (1).

To begin with, *agricultural farm labor* is a broader term than *farm labor.* Many cases have held this to be

true. In the case of *Cook* v. *Massey,* (Idaho), 220 P. 1088, it was stated that the term "agricultural labor" is much broader and more comprehensive than is the term "farm labor." Our statute might be said to include both.

In this case appellee's own testimony and the testimony of his employer [both of whom must be considered interested in recovery] show: Carter, the employer, owned from 18 to 20 acres of land in a rural section on which were located several dwellings and barns; appellee received $100 per month plus a house, lights and gas to feed, water and look after a number of horses and cows and to clean stalls and repair barns and fences; and Carter derived a profit from this operation. Sometimes Carter bought and sold horses and cattle. On several occasions, in his testimony, Carter spoke of the place as his "farm."

In order to determine what definition our courts have given to the terms "agricultural operations" and "farming" we have examined several authorities, among which, are the following: 2 C. J. 988; *Hight* v. *Industrial Commission,* 44 Ariz. 129, 34 Pac. 2d 404; *Greischar* v. *St. Mary's College,* 176 Minn. 100, 222 N. W. 525; *DeFontenay* v. *Childs,* 93 Mont. 480, 19 P. 2d 650, and *Beyer* v. *Decker,* 159 Md. 289, 150 A. 804. All these cases and authority say that feeding and raising cattle and/or horses comes within the term agricultural farming. In the *Hight* case the court used this language:

"Every standard authority that defines the word 'agricultural' includes in the definition the rearing and care of livestock."

Now let us examine some of the cases presented by appellee to rebut the above array of authority.

1. *Pridgen* v. *Murphy,* 44 Ga. App. 147, 160 S. E. 701. In this case a man who rode over a pine forest to check on the flow of turpentine resin was held not to be a farm laborer. It was stated that the U. S. Supreme Court had held that producing turpentine was not farming.

2. *Carrol* v. *General Necessities Corp.,* 233 Mich. 541, 207 N. W. 831. In this case a man used horses in the

drayage business. In the winter time when he had no use for the horses he kept them in a barn which he rented for the purpose. The court held this was not farming.

3. *Matis* v. *Schaeffer, et al.,* 270 Pa. 114, 113 A. 64. Claimant was employed to work for a party who was engaged in the coal business in a city, but on the occasion when he was injured he had gone out to a farm to do some incidental work for his employer. The court held he was not engaged in farming on the ground that the statute applied to the general character of employment and not to incidental work. Applying the same rule here it must be said that appellee's main or general employment was on the farm and not in the pressing shop.

4. *Mattison, et al.* v. *Dunlap, et al.,* 191 Okla. 168, 127 P. 2d 140. In a per curiam opinion the court held claimant was not engaged in farm activities. The meager facts set forth show that he was engaged in building a garage at the home of an attorney located on 20 acres of land which was covered with ravines and not planted. He did keep a few saddle horses. The decision turned on the statutory definition of a "farm" to be land devoted to agriculture, either to raising crops, or pasture, or both.

We do not possibly see any merit in appellee's contention that (a) the same corporation owned both the farm and the cleaning establishment or (b) that the farm was used to advertise the cleaning business.

(a) If this contention is adopted then John Doe could own a mercantile business in Little Rock and own a cotton farm in Mississippi County and classify both as mercantile.

(b) The admitted evidence is that Carter made a profit from this farm. The general conception of advertising is that it is very expensive. Nor can we see how showing his horses in other states would help his cleaning business in Fort Smith.

It seems to me that the majority opinion should not stand unless the court can present a workable definition of agricultural farm operations by which the facts here

are distinguished from activities commonly known as such. Such an attempt would probably result in confusion and uncertainties.

My fears are that the majority opinion is the beginning of a "nibbling" process that could circumvent the clear intent of the statute. In the language of *Pestlin* v. *Haxton Canning Company,* 80 N. Y. S. 2d 869, 274 App. Div. 144, "This clear and definite legislative purpose must not be 'whittled away by strained construction or false findings'."

NEW YORK LIFE INSURANCE COMPANY *v.* THWEATT.

4-9947 AND 9948 254 S. W. 2d 68

Opinion delivered January 19, 1953.

Elton A. Rieves, Jr., and *Rose, Meek, House, Barron & Nash,* for appellant.

Hale & Fogleman, for appellee.

ED. F. MCFADDIN, Justice. This appeal involves the double indemnity benefits[1] on two insurance policies, each for $1,000. The insured, Rayford W. Thweatt, died on December 23, 1950, from a pistol shot in the head. The life benefits were promptly paid, but the appellant refused to pay the double indemnity benefits, and claimed that the insured had committed suicide. Mrs. Thweatt brought one action[2] as an individual, and another as guardian of her minor daughter; and each action was to compel the Insurance Company to pay the double indemnity benefits. The jury found against the suicide theory urged by the Insurance Company, and the cases are here on appeal. Only three questions are here urged.

I. *The Appellant Says: "The Court erred in refusing to transfer the cases to Equity".* The policy under which Mrs. Thweatt claims as an individual was issued in 1940, and the policy under which she claims as guardian was issued in 1937. But in March, 1943, the insured and the Insurance Company entered into a Trust Agreement on each policy, by the terms of which the Insurance Company, *as Insurer,* agreed to pay to itself, *as Trustee,* all of the proceeds of the policy. The proceeds from one policy were to be paid by the Trustee to Mrs. Thweatt individually at stated intervals over a period of years; and the proceeds from the other policy

[1] That is, each policy provided that double the face amount would be paid if the insured died because of external violent accidental means, excluding suicide.

[2] Since there were two separate policies, and two different *cestue que* trusts, there were two actions; but the cases were consolidated and tried on one record and are disposed of in this one opinion.

were to be paid by the Trustee to the daughter (of whom Mrs. Thweatt is now guardian) at stated intervals over a period of years. When the Insurance Company refused to pay to itself, as Trustee, the double indemnity benefits, Mrs. Thweatt, individually, and as guardian, filed these two actions on November 2, 1951. The Insurance Company filed its answer in each case on November 26, 1951, denying liability on the sole ground that the insured had committed suicide, which was excluded from the double indemnity coverage. On May 1, 1952, the day the jury trial began in the cases, the Insurance Company filed in each case its motion to transfer to Equity, which motion, in its entirety, is as follows:

"The proceeds of the Policy which is involved in this suit are payable in accordance with the terms of a Trust Agreement dated March 15, 1943. By the terms of said Agreement any amounts collectible as double indemnity benefits are to be held by New York Life Insurance Company, as Trustee, and distributed to the beneficiaries in monthly installments. A copy of the Trust Agreement is attached, marked Exhibit 'A', and made a part hereof. To compel the defendant to transfer to itself, as Trustee, or to compel the defendant, as Trustee, to acknowledge that it holds the double indemnity benefit for distribution under the terms of the Trust Agreement is a proceeding over which equity alone has jurisdiction. It is improper for this Court, directly or indirectly, to assume jurisdiction over a trust or trustee obligations. Wherefore, the defendant asks that this suit be transferred to equity."

The Trial Court denied the motion to transfer to Equity; and we hold that the Trial Court was correct. The Trust Agreement between the insured and the Insurance Company, referred to as Exhibit "A" in the said motion, provided in part:

"Said Company, immediately upon receipt at its Home Office of due proof of my death, shall receive as Trustee, from itself as insurer, the proceeds of said policies . . ."

Thus the Insurance Company was to act in two distinct capacities: (1) as the insurer, and (2) as the trustee. Until the insurer paid the double indemnity benefits, it did not act as trustee. The Insurance Company, *as insurer,* refused to pay the double indemnity benefits, so no trust had ever come into existence on the double indemnity benefits here involved. These actions were to compel *the insurer* to fulfill its obligations as *such insurer.* To compel payments under the terms of an insurance policy, an action at law is proper. Certainly the Insurance Company, as trustee, would not or at least in this case did not—sue itself as insurer. Then who could sue the Insurance Company in its capacity as insurer? Mrs. Thweatt, as the individual in one policy and the guardian in the other, was the proper party to bring such action. Our Statute (§ 27-801 Ark. Stats.) provides that an action must be brought in the name of the real party in interest. The Insurance Company was a party defendant, and Mrs. Thweatt individually and as guardian, was the one that was anxious to see the money paid by the insurer to the trustee.

Our cases hold that if the defendant sets up an equitable defense, then the case should be transferred to Chancery; but that it is error to transfer a case to Chancery when the only defense is one that can be made in a case at law. In *New York Life Ins. Co.* v. *Parker,* 188 Ark. 39, 64 S. W. 2d 556, we said on this point:

"It was lastly argued by the appellant that the court erred in refusing to transfer the case to equity. The court correctly retained the case for the reason that all of the defenses urged were available in a court at law, and adequate and complete relief could there be had. No prejudice could therefore have resulted from the court's action in this regard. *Hugus* v. *Sanders,* 164 Ark. 385, 261 S. W. 899; *Mott* v. *First Nat. Bk.,* 171 Ark. 7, 283 S. W. 3; *Bassett* v. *Mutual, etc. Assn.,* 178 Ark. 906, 12 S. W. 2d 893."

For other cases to the same effect, see *Berg* v. *Johnson,* 139 Ark. 243, 213 S. W. 393, 8 A. L. R. 489; *Sheffield* v. *Maxwell,* 163 Ark. 448, 260 S. W. 399; *Wasson*

v. *Taylor,* 191 Ark. 659, 87 S. W. 2d 63; and *Rice* v. *Rice,* 206 Ark. 937, 175 S. W. 2d 201.

In the case at bar, the only defense made by the Insurance Company was the defense of suicide, and that was an issue that could be settled in an action at law. The motion to transfer to equity stated that there was a Trust Agreement. But, the Insurance Company was not sued as Trustee; it was sued *as Insurer,* and the only defense was one that could be determined in an action at law. Therefore, the Trial Court was correct in denying the motion to transfer to Equity.

II. *The Appellant Says That It "was entitled to directed verdicts".* This presents the suicide theory relied on by the Insurance Company, and necessitates a statement of the applicable law and also a review of the evidence in the case at bar. One of our landmark cases is that of *Grand Lodge* v. *Banister,* 80 Ark. 190, 96 S. W. 742. There, as here, the insured died from a pistol shot wound, and payment of the policy was refused on the claim that the insured had committed suicide. There, as here, the jury found against the Insurance Company, and the question was whether an instructed verdict should have been given for the Insurance Company. Justice McCulloch, speaking for the Court, said:

"The only disputed question is whether the shot was accidental or an act of intentional self-destruction. The burden of proving suicide was upon the defendant. It alleged that fact as a defense to the action, and must prove it, for until that fact is established liability of the defendant for the amount of the policy is clear. "There is no dispute about the facts which were susceptible of direct proof, but the case turns upon the conclusion to be drawn therefrom—whether or not they establish suicide indisputably. For if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury.

St. Louis, I. M. & S. Ry. Co. v. *Martin,* 61 Ark. 549, 33 S. W. 1070. "After careful consideration of the evidence we are of the opinion that this question was properly submitted to the jury, and that there was evidence sufficient to support the verdict. Conceding that the theory of death by suicide finds more rational support in the facts established by direct proof than the theory of death by accident—that there is greater probability from the evidence that death resulted from a suicidal act than an accident—still we cannot say that death by suicide is the only reasonable conclusion to be drawn from the evidence. The proof does not exclude with reasonable certainty death from accidental shooting, and, the burden being upon the defendant to establish the defense by proof, it was properly left to the jury to say whether or not it was a case of suicide."

We have followed the rule of the Banister case in our subsequent cases: sustaining the suicide defense in such cases as *New York Life Ins. Co.* v. *Watters* (7/3/22), 154 Ark. 569, 243 S. W. 831; *Fidelity Mutual Ins. Co.* v. *Wilson* (1/16/28), 175 Ark. 1094, 2 S. W. 2d 80; *Mutual Life* v. *Sturdivant,* 215 Ark. 697, 222 S. W. 2d 812; and refusing the suicide defense in such cases as *Aetna Life* v. *Taylor* (3/19/17), 128 Ark. 155, Ann. Cas. 1918(b) 1122, 193 S. W. 540, Ann. Cas. 1918B, 1122; *N. Y. Life Ins. Co.* v. *Redmon* (12/16/35), 191 Ark. 1003, 88 S. W. 2d 324; and *Continental Cas. Co.* v. *Speer,* 215 Ark. 174, 219 S. W. 2d 763.

The language in the Banister case, as above quoted, has been reiterated in many subsequent cases. So from our holdings, the law is clear: the question is whether the facts are entirely inconsistent with any reasonable hypothesis of death other than by suicide. In other words, for the Insurance Company to be entitled to an instructed verdict in this case, the evidence pointing to suicide must be so conclusive that fair minded men can reach no other conclusion.

Has the Insurance Company discharged such burden? This necessitates a review of the evidence. The insured, Ray Thweatt, was 35 years of age, engaged

in rather extensive farming operations. He had more than $40,000 invested in farm equipment. He and his wife lived on their farm a short distance from Marion, Arkansas, and he also rented and cultivated other farms. The Thweatts had been married 15 years, and had two children, Elizabeth, aged 8, and Ray, Jr., aged 6. After enjoying the usual breakfast, about 8:30 on the morning of December 23, 1950, Mr. Thweatt told his wife that he would drive over to one of the farms to see about some corn being pulled, and would return shortly; as he was planning to take his wife and children to Memphis for Christmas shopping that day. He told one of the hired men around the house that he would be back in about 30 minutes. He did not return.

About 6:00 o'clock that afternoon, a search was instituted; and Mr. Thweatt was found dead in his car in the field. A pistol shot had entered his head about an inch above and just in front of his right ear, and had come out of his head about an inch above and just behind the left ear. That bullet was never found. Both doors of the car (a Chevrolet coupe) were closed; the glass of the right window was closed, and the glass of the left window was open.

The position of Thweatt's body was shown: he was in a slumped position, sitting in the driver's seat under the steering wheel, with his feet crossed near the ankles. His head was forward toward his chest. His hands were cupped in his lap, and a .38 Smith & Wesson revolver was in his hands, with the barrel toward the front of the car and at a 45-degree angle. His left hand was around the barrel and his right hand around the handle. There was a small powder burn about the hair area on the right side of the head, and also a small powder burn on one hand. The mortician said there was no evidence of hemorrhage, and that Mr. Thweatt had been dead several hours before his body was found.

The car was in a field just off U. S. Highway No. 61, and was visible to people riding in vehicles along the highway. That the car had been there in the field for at least four or five hours before Mr. Thweatt's body

was discovered is shown by the evidence. Furthermore, it was a foggy morning on the day in question, and when the motor was started in Mr. Thweatt's car, it was found that the windshield wipers and the heater started operating.

It was the Insurance Company's theory that Mr. Thweatt had placed the pistol to his head and pulled the trigger, and then his hands, still clutching the pistol, had fallen into the position stated. Whether his hands were over or under the steering wheel is not shown. That Mr. Thweatt's death occurred through external violent means is conceded. But did he commit suicide, or was his death the result of an accident or foul play? That is the question. To negative the suicide theory, the plaintiff showed Mr. Thweatt's financial condition, his happy home life, the universal friendship in which he was held, his cheerful outlook on life, and his farming plans for the next year. While he owed money, he was entirely solvent and had unlimited credit; he was in good health, domestically happy, devoted to his family, and had made contracts with his workers for cultivating his crops in the next year. He had purchased $45 worth of fireworks for a Christmas party for his friends. There had never been any indication by Mr. Thweatt that he contemplated suicide, and no notes so indicating were ever found. In short, the plaintiff insisted that Mr. Thweatt had everything to live for and no reason for suicide.

To support the idea of foul play, the plaintiffs argued that if Mr. Thweatt had shot himself in the head, it would have been impossible for the pistol to have remained in his hands and then to have fallen into the position found. Also, the plaintiffs showed the physical conditions around Mr. Thweatt's parked car. There was a beer can on the left of the car, and also one on the right, although both doors were closed and the right window was up. Mr. Thweatt's car was parked almost in the field road, and there were wagon tracks in the field indicating that someone had driven out of the field road to get around the car. There were two empty

cartridges in the pistol (admittedly Mr. Thweatt's) and one spent bullet was found in his pocket. The Sheriff testified that the bullet "looks like it had been shot at something and then probably pried out". There were no bullet holes in the car. The pistol was a revolver and not an automatic.

To detail all of the evidence would extend this opinion to voluminous proportions. The transcript consists of 334 typewritten pages, and the printed briefs consume 247 pages. As stated in *Grand Lodge* v. *Banister, supra,* the question for this Court on appeal is not whether Thweatt committed suicide, but whether the Insurance Company has repelled all reasonable hypotheses that his death occurred in any way except suicide. From the facts as we have mentioned them, particularly the physical facts, there are certainly two diametrically opposed conclusions that reasonable men could reach in drawing the inferences from these facts. One conclusion points to suicide: the other conclusion points to foul play and the placing of the gun in Thweatt's hands after his death. Since there is a conclusion that could be reached other than suicide, it therefore follows that the Insurance Company was not entitled to an instructed verdict; and the Trial Court was correct in so ruling.

III. *The Insurance Company Claims "the judgments were excessive".* In each case the plaintiff had sued for the double indemnity benefit, plus 12% as penalty and plus a reasonable attorneys' fee. (See § 66-514 Ark. Stats.) The jury gave the plaintiff the full amount sued for, and the Court added in each case $120 as the statutory penalty and $300 as the attorneys' fee. These amounts were not excessive, and we find no merit to the appellant's claim in this regard.

There is, however, one point on which the judgments should be amended, and it is this: when Mrs. Thweatt individually and as guardian, obtained judgment against the Insurance Company *in its capacity as insurer,* then such judgments should have provided that the insurance money—less penalties, attorneys' fees and court costs—be paid to the Insurance Company, *in its capacity as*

Trustee, and not to Mrs. Thweatt individually or as guardian. In the oral argument before this Court, appellees' attorneys admitted that the judgment should be amended to so provide, and we so amend and affirm the judgment at the cost of the appellant, but allow no additional attorneys' fees for this appeal.

Affirmed.

Justice GEORGE ROSE SMITH not participating.

KANSAS CITY FIRE & MARINE INSURANCE COMPANY v. KELLUM.

4-9960 254 S. W. 2d 50

Opinion delivered January 19, 1953.

Willis & Walker and *Ernie E. Wright,* for appellant.

H. J. Denton, for appellee.

J. SEABORN HOLT, J. A jury awarded appellee, D. J. Kellum, $2,096.96, and in addition, the statutory penalty and attorney's fee (§ 66-514, Ark. Stats. 1947), resulting from the almost complete destruction of appellee's 1949

Ford 3-ton truck by fire. From the judgment is this appeal. Material facts appear not to be in dispute.

On December 26, 1950, appellee bought the truck in question from Eugene Horn and as part of the purchase price executed his note, secured by a second mortgage on the truck for $2,000. The transaction was executed in a Mt. Ida bank in the office of R. A. Rice, who was an employee of the bank and also a general agent of appellant, insurance company. As the bank's agent, Rice loaned appellee at the time $1,722, which appellee used as a cash payment to Horn. This loan was evidenced by an installment note to the bank, secured by a first mortgage to the bank on the truck. The $2,000 mortgage above from appellee to Horn, as well as the $1,722 mortgage securing the installment note to the bank, were all prepared by Rice December 26, 1950. At the same time, and as a part of the same transaction, Rice, with full knowledge of these two mortgages on the truck, and as appellant's agent, prepared, countersigned, and delivered to appellee appellant's policy of insurance here in question which insured appellee against any loss by fire not to exceed $3,000. Appellee at the time paid the premium to Rice ($140). No written application for the policy appears. As indicated, the truck was destroyed by fire July 20, 1951, and appellee notified Rice on the next day, the 21st, and requested necessary forms on which to make proof of loss, but was informed by Rice that it would not be necessary to file written proof of loss in the circumstances but that he, Rice, would send an adjuster. On August 15, 1951, Mr. Scott, the adjuster, called on appellee, took his written statement, as well as some others, as to the loss. This investigation by Scott was made within thirty days from the date of the loss and notice to appellant, insurer. Mr. Rice did not testify in the case.

The policy provided in part: "Except with respect to bailment, lease, conditional sale, mortgage or other encumbrance, the insured is the sole owner of the automobile except as stated herein: . . . § 16. Declarations: By acceptance of this policy the insured agrees that the

statements in the declarations are his agreements and representations; that this policy is issued in reliance upon the proof of such representation and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance. . . Exclusions, (b): Under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy. § 11. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy. § 14. Fraud and Misrepresentation: This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The primary contention of appellant for reversal is that the policy contract here was void when issued because the truck was subject to a second mortgage not declared and described in the policy, and for the further reason that appellee was not the sole owner of the truck at the time the policy was issued or when the loss occurred. We do not agree to either contention.

On these issues, the court correctly instructed the jury: "Ladies and gentlemen, before you could find for the plaintiff, you would have to find that he owned the truck.

"You are instructed that the mortgage of the witness, Horn, is not referred to in the policy of insurance and that under the terms of that policy the failure of the plaintiff to disclose that mortgage in the policy would render the policy void, unless you should find by a preponderance of the evidence that the defendant's agent

at the time of the writing of the policy knew of the Horn mortgage as agent for the company, and knew of its existence, and waived the provision that it should be referred to in the policy."

There was ample evidence, as pointed out above, that appellee, Kellum, owned the truck. He so testified and Horn testified that he sold it to him. There was also ample evidence that appellant waived the No Encumbrance provision in the policy as to the $2,000 mortgage and also waived the making of written or formal proof of loss by appellee.

Our rule is well established that: "Knowledge of the agent of the insurer, obtained while performing the duties of his agency in receiving applications and delivering policies, is imputed to the insurer." *Callicott* v. *Dixie Life & Accident Insurance Company,* 198 Ark. 69, 127 S. W. 2d 620.

We held in *Mechanics & Traders Insurance Company* v. *Gramling,* 213 Ark. 546, 211 S. W. 2d 645 (Headnote 1): "Insurance—Notice to Agent of Insurer.—Knowledge of the agent of appellants of a mortgage in favor of the vendors of property sold and which appellants had insured was knowledge of appellants," and in *Capital Fire Insurance Co.* v. *Montgomery,* 81 Ark. 508, 99 S. W. 687, it was held: (Headnote 1, 2 and 3) "1. Where a fire insurance company relies upon a breach of the warranty therein against incumbrances, the insured may by parol evidence show that when he applied for the policy he informed the insurance company's agent that the property was mortgaged. 2. A warranty in a fire insurance policy that the property insured is unincumbered is waived where the insurer's agent was notified when application was made for the policy that the property was incumbered. 3. The authority of one to receive and forward applications for fire insurance is sufficient to bind the insurance company with regard to any information imparted to him in the course of his employment."

In *London & Lancashire Insurance Company, Ltd.* v. *Payne,* 180 Ark. 638, 22 S. W. 2d 165, we said: "It

was also shown that the local agent of the insurance company who issued the policy . . . was duly notified of the destruction of the property by fire . . . and he said no proof of loss would be required. . . .

"It is first contended that the decree should be reversed because the proof of loss was not filed within the time prescribed by the policy. The compliance with this provision of the policy was expressly waived by the local agent of the insurance company who issued the policy and delivered it to the insured. The local agent had authority to issue fire insurance, write and deliver policies, and collect premiums, and to notify the insurance company of loss. Having been clothed with these powers, he had *prima facie* authority to waive presentation of proof of loss."

Appellant also complained that the court erred in giving certain instructions and in not giving others after modification. It could serve no purpose to set out these instructions. It suffices to say that we have carefully examined each and find that the court fairly and correctly stated the applicable law in the circumstances and we find no error.

Finally, appellant argues that there was error in allowing penalty and attorney's fee as provided in the above statute. We do not agree. The record reflects that at the conclusion of the evidence in the case, appellee was permitted to amend his complaint and reduce the amount for which he sued to $2,096.96. The extent of appellant's liability was $3,000. Appellant refused to accept the correctness of appellee's claim after the reduction and continued to deny all liability. The jury returned a verdict in favor of appellee for the reduced amount of the claim, $2,096.96, upon correct instructions by the court limiting recovery to $2,096.96. There was evidence that appellee's damages were greater than the amount allowed him by the jury.

In circumstances similar to the present case, we said in *Progressive Life Insurance Company* v. *Hulbert,* 196 Ark. 352, 118 S. W. 2d 268: "But the sum finally sued for

was $266.67, and it was within the discretion of the court to permit this amendment. Had the insurance company offered to confess judgment for this amount when the complaint was amended it would have been proper to enter a judgment for that amount without penalty or attorney's fee. But this was not done. The defendant then insisted, and now insists that the plaintiff was not entitled to recover anything. It was not error, therefore, to award judgment for the penalty provided by statute, and for the attorney's fee, which does not appear to be excessive."

The verdict here was not excessive.

Affirmed.

TOLSON *v.* PYRAMID LIFE INSURANCE COMPANY.

4-9981 254 S. W. 2d 53

Opinion delivered January 19, 1953.

Cunningham & Sloan, for appellants.

Ponder & Lingo, for appellee.

WARD, Justice. The record shows the following to be substantially the facts and circumstances in this case:

On April 10, 1931, Mrs. Corrine Young, being the owner of the east half of lots 5 and 6, block 43, Fontaines' Addition to Walnut Ridge, executed a mortgage on said lots to the Georgia State Savings Association to secure her note in the sum of $1,750. Due, perhaps, to the depression, she made only a few payments on the note and consequently became delinquent on her payments to the loan company and also on improvement taxes on the property.

Later, Mrs. Young married Marvin Jones and they also allowed the monthly payments and interest to accrue until on October 1, 1939, the amount due Georgia State Savings Association, including interest and advances for insurance and state and county taxes, was $2,888.50, and, in addition, they owed a considerable amount for delinquent taxes to Street Improvement District No. 2 of Walnut Ridge.

By agreement of all parties concerned it was arranged, in effect, for appellants to buy the property from Mr. and Mrs. Jones for approximately $500 less than the amount then due and to apply to the Georgia State Savings Association for a loan in the required amount. Accordingly, on August 26, 1939, appellants signed an application, on a regular form, to said loan company for a loan in the amount of $2,300. This application showed there were delinquent taxes due Improvement District No. 2 in the amount of $690.30 for the years 1930 to 1939, inclusive, which amount applicants [appellants] assumed and Georgia State Savings Association agreed to later advance if necessary to protect its title.

On August 30, 1939, Jones and his wife executed a warranty deed conveying the described property to E. C. Tolson for the consideration of $1.00 and the agreement of the grantee to refinance the original loan mentioned above. The deed stated that the grantee would assume all unpaid taxes due said District No. 2.

On October 4, 1939, appellants executed a note and deed of trust to said loan company in the amount of $2,300, payable $23.64 per month for 144 months, including principal and interest. It was explained that the reason the loan company did not make a loan sufficient to also pay the improvement taxes was that it appeared there was a chance to settle with the Improvement District for a less amount.

Appellants kept up their monthly payments on the loan, but paid nothing on the delinquent taxes to the Improvement District. Therefore, Georgia State Savings Association, under a provision of the deed of trust, advanced the necessary money by two checks in 1940 and 1941. These checks, for $90.30 and $600, were made out to and endorsed by R. B. Warner, Receiver for the Street Improvement District, and E. C. Tolson.

On December 23, 1949, Georgia State Savings Association assigned its note and deed of trust to appellee and at that time so informed Tolson by letter in which he was reminded it had paid the delinquent taxes mentioned above, and advised him to have the loan refinanced.

Appellants made the last monthly payment under the terms of the deed of trust [but nothing on the advances] on October 4, 1951, and so notified appellee. Due to an error in bookkeeping, appellee executed and mailed to appellants a full release. There is no contention by appellants that this was not an error on the part of appellee.

Appellee made demand on appellants for the money advanced for the payment of said delinquent taxes and interest thereon. After some days of fruitless negotiations appellee filed suit to foreclose its mortgage. The lower court ruled in favor of appellee and, on appeal, appellants urge two grounds for a reversal.

First, appellants quote extensively from the ledger sheet showing the status of the Corrine Young loan at the time they took title, in an attempt to show Georgia State Savings Association made excessive [not usurious]

interest charges. This contention has no merit because appellants, in effect, bought the property at a stipulated price of $2,300. This was what they evidently thought the property was worth, considering the delinquent tax situation, and this is the amount they borrowed from the loan company. If appellants desired to buy the property cheaper than $2,300 they should not have accepted the deed from Mr. and Mrs. Jones and should not have signed the note and deed of trust to the loan company. Moreover, there is nothing in the record to show that appellee had knowledge of any such overcharges, if in fact they existed, and so must be considered an innocent purchaser for value.

Second, neither can we agree with appellants' contention that appellee's suit is barred by the statute of limitations, as an open account. Appellee's right to reimbursement arises from the terms of the deed of trust signed by appellants, and would not be barred until five years after the last payment became due. The advancements were made pursuant to certain provisions contained in the deed of trust, the pertinent parts of which were as follows:

(a) ". . . and thus secure . . . the prompt payment of any other or additional indebtedness owing by the borrower to lender . . ."

(b) "And in further trust to secure the payment of any other or additional indebtedness of whatever kind or character that may be owing by the borrower to the lender, any additional loan or loans made by lender to borrower . . . up to the time of foreclosure of this deed of trust."

(c) "And in default of payment of installments of principal and interest . . . or non-payment of insurance premiums, taxes, assessments, or other charges. . . ." the trustee could sell the property. The documentary and oral testimony leave no doubt that appellants knew at the beginning and all along they were obligated to pay the delinquent assessments, and they

accepted the money [by endorsing the checks] from the loan company for that purpose.

Advancements made by the loan company under the facts and circumstances set forth above became a part of the principal debt and were secured by the deed of trust. In the case of *Kansas City Life Insurance Co.* v. *Marsh,* 196 Ark. 1121, 121 S. W. 2d 81, the court rejected a contention that a payment by a mortgagee as an advancement for taxes under a mortgage was not a payment on the principal debt so as to extend the statute of limitations. In this connection the court, at page 1126, said:

"It is contended that this shows a payment on taxes only and not on the notes, and, therefore, there was no revival of the debt. We cannot agree that such is the effect, but are of the opinion, that these payments should be treated as payments on the whole debt existing at that time, including interest, taxes, insurance, etc., all secured by the mortgage along with the notes."

Affirmed.

STEWART, ET AL. *v.* STATE.

4705 TO 4713 254 S. W. 2d 55

Opinion delivered January 19, 1953.

G. Love Grant and *Gutensohn & Ragon,* for appellant.

Ike Murry, Attorney General, and *George E. Lusk, Jr.,* Assistant Attorney General, for appellee.

George Rose Smith, J. By *certiorari* the nine petitioners bring up for review an order by which the chancellor punished them for criminal contempt. The trial court found that the petitioners had violated a temporary injunction which prohibited certain picketing activity. Charles E. Stewart, a representative of the international labor union involved, was fined $200 and sentenced to serve thirty days in jail. Allen Jones, the president of the local union, was fined $50. Six other petitioners, members of the local union, were fined $10 each. G. L. Grant, the attorney who advised the union members to take the action that was later deemed by the chancellor to be contempt of court, was fined $500 and sentenced to serve thirty days in jail, but the chancellor suspended the jail sentence because of Grant's age and poor health. For reversal the petitioners contend that the chancellor was in error in holding that the temporary injunction had been disobeyed.

Although there are minor conflicts in the testimony, the salient facts are not in dispute. In March, 1952, the employees of the Dixie Cup Company went on strike. Picket lines were established at Dixie Cup's principal

place of business in Fort Smith, and in addition the striking employees picketed in the vicinity of a warehouse owned by Federal Compress & Warehouse Company. Storage space in this warehouse had been rented to Dixie Cup and to other business concerns, and one or more of the Dixie Cup employees ordinarily worked there. The present dispute centers upon the picketing that occurred at the warehouse.

This warehouse is served by two railroad spur tracks, the Missouri Pacific track entering from the east and the Kansas City Southern from the west. Twenty-third Street lies on the east side of the compress company's property and is crossed by the Missouri Pacific track as it enters the premises. There are also two motor vehicle entrances on the east, one leaving Twenty-third Street about seventy-five yards north of the track and the other about fifty yards south of the track.

It does not appear that the Kansas City Southern spur track, as it approaches the warehouse from the west, crosses any street in the immediate vicinity of the compress company's property. This track does, however, cross Incinerator Road at a point about a mile west of the warehouse.

At the beginning of the strike the Dixie Cup employees picketed the Missouri Pacific track at its intersection with Twenty-third Street and the Kansas City Southern track at its intersection with Incinerator Road. When the regular switching crews refused to cross these picket lines supervisory employees took charge of the trains and attempted to continue service to Dixie Cup. Thereupon the pickets, who seem to have then been without legal advice, stood between the rails and challenged the railroad employees to run over them. In the oral argument it was readily admitted by petitioners' counsel that this physical obstruction of the trains went beyond the permissible limits of picketing and was unlawful.

The railroad companies, finding themselves unable to serve Dixie Cup, filed separate suits for injunctive relief. The principal issues in this case turn upon the

wording of the temporary injunction that was immediately issued in the Missouri Pacific case. By that order the international and local unions, their members and agents, were restrained from committing the following acts:

"Picketing in any manner, either singly or in large numbers, plaintiff's railroad tracks and spur tracks or right of way or property in any manner whatsoever in the City of Fort Smith, Sebastian County, Arkansas;

"Stopping, obstructing, injuring, impairing and weakening the plaintiff's trains, railroad tracks, machinery and employees in any manner and by any means whatsoever in the City of Fort Smith, Sebastian County, Arkansas."

After the issuance of the preliminary injunctions the union members consulted Grant. At his direction the pickets were removed entirely from the Kansas City Southern spur track, but at the Missouri Pacific crossing on Twenty-third Street the picketing was merely modified. Grant went to the scene with some of his clients and decided that the pickets should keep at least fourteen feet away from the rails. A placard giving notice of the strike was set up at that distance on each side of the spur track. Thereafter the pickets patrolled between those placards and the highway entrances to the warehouse, one picket walking between the north placard and the access road seventy-five yards to the north and the other picket traveling between the south placard and the southern access road. This modified form of picketing proved to be effective, as the regular train crews still refused to drive the trains into the warehouse premises when destined for Dixie Cup, even though the pickets had been instructed to, and did, call out to the trainmen that the railroad was not being picketed and that they were free to serve Dixie Cup if they wished. In this situation the Missouri Pacific was compelled to man its trains with supervisory employees in the five-week interval between the issuance of the temporary order and the final hearing. As we have intimated, there was no interruption

in the carrier's normal service to the other lessees of the compress company.

When at the final hearing the chancellor learned what was taking place he caused nine of the union members to be cited for contempt, and later on Grant was cited as well. One of the nine employees was found not guilty; the other eight and Grant have brought the case to us. It will be convenient to consider separately the contentions of the union members and those of their attorney, even though the arguments are to a large extent overlapping.

At the trial several employee witnesses testified that it was not their intention to picket the Missouri Pacific; instead, their activity was directed solely against trucks entering the warehouse by way of the two access roads. The chancellor was fully warranted in treating this version of the matter as a subterfuge. It will be remembered that a placard had been placed on each side of the track, fourteen feet from the rail. These signs faced east, so that they were clearly visible to approaching trainmen. Yet these signs could have been seen by a truck driver only as he came abreast of them, which he might not even do, since a truck coming from the north might turn in the northern access road seventy-five yards away from the nearer sign and equally far from the picket if that person happened to be at the other end of his route. It was conceded in oral argument that the picketing would have been more effective as to motor vehicle traffic had it been confined to the highway entrances.

Stress is laid on the fact that the pickets were withdrawn from the Kansas City Southern track. Incinerator Road, however, does not lead to the warehouse; so it is reasonable to conclude that the cessation of picketing at that intersection was due to the fact that continued activity would have undeniably been aimed at the railroad alone.

Reliance is also placed on the pickets' action in announcing to trainmen that the railroad was not being picketed. Yet this was evidently an empty gesture when

the experience of five weeks showed that the regular crews steadfastly declined to cross what they undoubtedly regarded as a picket line. Indeed, one of the attorneys for the petitioners inadvertently recognized this to be true when, by a slip of the tongue, he put this question to a witness: "Did they [the trainmen] cross the picket line? Excuse me. There was no picket line according to my theory. Did they cross the highway at that point?" On the whole we do not think it can be seriously argued that the picketing was intended for the benefit of truck traffic only.

Grant's defences, which are advanced by the other petitioners as well, have to do with the wording of the temporary order. It is first said that the order is ambiguous. In this connection counsel point out that the preliminary injunction forbade "picketing in any manner . . . plaintiff's railroad tracks," but in the final decree this was changed to "picketing in any manner . . . at, on or near plaintiff's railroad tracks." Of course the mere fact of amendment does not demonstrate that the first order lacked clarity, since even a very exact statement may often be made still more precise by the use of additional language.

We do not think the temporary order subject to the charge of ambiguity. The second paragraph which we have quoted enjoined the defendants from stopping or obstructing the plaintiff's trains. This language was doubtless directed at the physical obstructions which led to the suit, though it is perhaps broad enough to encompass any picketing which brought about the forbidden result. But this provision does not stand alone. The court also enjoined the defendants from picketing "in any manner" the plaintiff's tracks. We do not see how this sweeping prohibition could be misunderstood; certainly it includes picketing "at, on or near" the tracks, as the final order put it. That the petitioners thought the order too comprehensive is of course immaterial, since it was their duty to obey even an erroneous decree as long as it continued in force. *Carnes* v. *Butt, Chancellor,* 215 Ark. 549, 221 S. W. 2d 416.

A more subtle contention is that since the temporary injunction prohibited picketing *against the railroad* it was not violated by conduct which *as a matter of law* was directed only against Dixie Cup. It is insisted, in other words, that even though the picketing prevented the regular train crews from serving Dixie Cup the boycott was nevertheless against the employer rather than the carrier. Our study of the record convinces us that Grant so construed the order in advising his clients. For instance, it is shown that he read to them our opinion in *Mo. Pac. R. Co.* v. *United Brick etc. Union,* 218 Ark. 707, 238 S. W. 2d 945. There we held that picketing similar to that which led to these contempt citations was directed against the employer and did not amount to a secondary boycott against the railway company. It is evident that a lawyer of Grant's experience and ability would not have considered the cited case even to be relevant except upon the theory now advanced; that is, that the injunction prohibited picketing "against the railroad" only in the sense that disinterested outsiders were not to be dissuaded from doing business with the carrier. Again, this construction of the order explains why the pickets were removed from the Kansas City Southern crossing, for at that point no primary boycott of Dixie Cup was possible. This view, had it been correct, would also have justified Grant in permitting his clients to come within fourteen feet of the Missouri Pacific tracks even though that conduct was calculated to prevent normal train service to Dixie Cup.

Needless to say, both Grant and his clients took the risk that his interpretation of the injunction might be incorrect. We have no doubt that the advice given was erroneous. Mr. Grant, in construing the chancellor's proscription of any picketing of the railroad, in effect took the language from its context and analysed it as if it were a completely isolated phrase. But the injunction was issued in a contested case, in response to a complaint, and must be read in its proper setting. The Missouri Pacific's complaint contained no suggestion that an independent boycott, unconnected with the Dixie

Cup dispute, had been imposed upon the plaintiff. Instead, the complaint averred that in the course of their strike against Dixie Cup the defendants had blocked the railroad track with their bodies, that such conduct was unlawful, and that the defendants should be enjoined "from committing any of the acts aforesaid, and from picketing the plaintiff's railroad tracks." It is not reasonable to suppose, as Grant must have done, that the chancellor not only chose to ignore the issues in the case but also went out of his way to forbid conduct that was neither alleged to have occurred nor even remotely likely to take place. On the other hand it is perfectly reasonable to believe that the chancellor, upon being shown that illegal acts had been committed, decided to restrain all picketing that might affect the train service to Dixie Cup until the matter could be explored upon final hearing. We regard the latter as the only permissible interpretation of the order and conclude that the proof shows beyond a reasonable doubt that the continued picketing amounted to criminal contempt.

In the main we affirm the decree, but three modifications are necessary. First, the trial court suspended Grant's jail sentence "due to the age and health of the defendant." This reference to the attorney's health does not seem to mean a sudden or temporary illness rendering immediate confinement inadvisable. Rather, the court's clemency seems to have been motivated by the fact that this petitioner is seventy-two years old and not well able to withstand the hardships of a month in prison. We think it best to state explicitly that in these circumstances the suspension of the sentence is in effect its complete remission. In ordinary criminal cases a suspended sentence is a useful deterrent to later wrongdoing. The same considerations do not apply in cases of contempt, and we are aware of no authority for an indefinite suspension in a case of this kind.

Second, Charles E. Stewart, the representative of the international union, was fined $200 and sentenced to serve thirty days in jail. When we consider the record as a whole, and especially when we remember that

Stewart merely followed the directions given by Grant, whose punishment does not involve imprisonment, we are not willing to approve the jail sentence in Stewart's case.

Third, three of the petitioners, John Pettyjohn, Millard Davis, and Russell Clyma, are not shown by the record to have committed overt acts amounting to criminal contempt of court. These men were assigned to night picket duty and merely sat in their cars at some distance from the Missouri Pacific track. Doubtless they were ready to disobey the injunction had the occasion arisen, but we find no actual disobedience. The nominal fines of $10 each assessed against these three petitioners are set aside.

With the modifications mentioned the decree is affirmed.

Griffin Smith, Chief Justice, dissenting. The majority opinion rests upon the proposition that the Chancellor concluded to restrain all picketing that might affect Dixie Cup train service "until the matter could be explored upon final hearing." For, say the judges who make this explanation, "We regard [this] as the only permissible interpretation of the order and conclude that the proof shows beyond a reasonable doubt that the continued picketing amounted to criminal contempt." It is then said: "When we consider the record as a whole, and especially when we remember that Stewart merely followed directions given by Grant, . . . we are not willing to approve the jail sentence in Stewart's case."

But as authority for holding the pickets and their advisors guilty of criminal contempt the case involving Missouri Pacific Railroad Company against United Brick and Clay Workers' Union, Local No. 602, is cited to emphasize the position taken there that the picketing was directed against the employer, hence it did not amount to a secondary boycott against the railway company. The writer of the majority opinion handed down today wrote the opinion in the case just cited. In concluding it was said: "We . . . think it rather far-fetched to sup-

pose that [by the Act of 1868] the General Assembly intended . . . to establish a policy making a picket line unlawful *simply because sympathetic railway employes prefer not to cross it.*" The opinion will not be two years old until May of 1953, and yet it is having the fundamental substructure kicked from under it with as little reference to consistency as though never intended as a judicial expression.

Gist of the controversy lies in the fact that the picketing strikers personally notified railway operatives that they were not striking against or picketing Missouri Pacific. The record does not show that after the injunction these defendants went upon railroad property. Of course one against whom a restraining order has been issued in circumstances where the court had jurisdiction assumes the risk of determining what the limitation or circumscription is, and he is not excused if, acting in good faith, the order is disobeyed. But in the case before us an experienced attorney (who is one of the defendants) read this court's more recent decisions and told the men they could not picket railroad premises. But they could, said the attorney, stay off of the company's property and direct their activities against truckers who were not included in the restraining order.

But while I would reverse and dismiss the criminal convictions, this would be done with an opinion expressing the utmost respect for the fine qualities inherent in the Chancellor whose many outstanding decisions and whose devotion to idealistic jurisprudence serve to remove the slightest suspicion that in rendering judgment against the petitioners he was actuated by any purpose other than impartial administration of the law. It is my thought that *retrospectively* the Chancellor believed that he had intended to prohibit picketing, *per se*. Wording of the order, however, was not sufficient to encompass what the Chancellor subsequently considered he had made clear.

Rhetorically the result is neither fish, flesh, nor fowl from a judicial standpoint. There is a finding that the injunction was disobeyed, that the defendants are guilty of criminal contempt beyond a reasonable doubt, but by

fiat the jail sentences are removed. If inconsistencies of the opinion were disregarded all urge to exercise the pardoning power would be eliminated and logic would remain unassailed.

ROBINSON, Justice (dissenting). Mr. Grant did not represent the union members at the hearing when the temporary injunction was issued, but when the order was served they sought his interpretation of the injunction which provides:

"Picketing in any manner, either singly or in large numbers, plaintiff's railroad tracks and spur tracks or right-of-way or property in any manner whatsoever in the City of Fort Smith, Sebastian County, Arkansas;

"Stopping, obstructing, injuring, impairing and weakening the plaintiff's trains, railroad tracks, machinery and employees in any manner and by any means whatsoever in the City of Fort Smith, Sebastian County, Arkansas."

Construction of the second paragraph is not necessary, since its meaning is so clear. And there is no claim that this portion of the order was violated in any respect. But it is a different matter as to the first paragraph, which prohibits picketing railroad tracks, or spur tracks, in any manner whatsoever.

The railroad employees were informed that the railroad was not being picketed, and the trains thereafter crossed the picket line and serviced all the users of the warehouse, with the exception of the Dixie Cup Company. No complaint whatever was made by anyone that the temporary order was violated until the trial on the issue of whether the order should be made permanent. It was then that the trial court came to the conclusion there may have been a violation of the temporary injunction and ordered the institution of the contempt proceedings.

The strikers were not enjoined from picketing the Dixie Cup Company, the concern with whom they had a dispute. They had no quarrel with the railroad company. The decision Mr. Grant had to make was whether

the presence of pickets at the point where the railroad tracks enter the property, on which the warehouse used by the Dixie Cup Company was located, could be considered as picketing the railroad tracks. In reaching his conclusion he was guided by *Missouri Pacific Railroad Company, Thompson, Trustee* v. *United Brick and Clay Workers' Union, Local No. 602,* 218 Ark. 707, 238 S. W. 2d 945, which was handed down April 9th, 1951. In view of what was said in that case, I do not see how it can be held that the placing of pickets near the railroad right-of-way, at a point where the tracks entered warehouse property, could be construed as picketing the railroad tracks. In fact, it was specifically held in the above case that the location of pickets in an identical situation did not constitute picketing the railroad company. In that case the court said:

"The striking employees, members of the appellee labor union, established picket lines at the highway gates and also at a point about a quarter of a mile from the plant where the main line crosses a public highway. . . . The proof makes it plain that the pickets' purpose is to convey their message to trainmen who are on their way to the Acme plant. . . . This case differs from the average only in that the pickets patrol an isolated railroad crossing instead of a sidewalk used by the general public. But the railroad track is a means of access to the Acme plant, and we think it immaterial that the railroad company alone habitually uses this entrance. It is easy to imagine a sawmill situated in a forest, accessible only by rail. Unless pickets could present their message to persons arriving by train such a mill would be immune from the usual means of advertising the existence of a strike. . . . In an effort to show that the appellee's purpose is illegal the appellant presents a threefold argument. First, it is said that the picketing prevents the railroad from complying with its duty to provide equal and nondiscriminatory service to all shippers. . . . This argument is unsound. It is at least questionable whether a railroad is required to provide service when impeded by a strike beyond its control.

. . . But a more clear-cut answer to this contention is that the purpose of the picketing is not to prevent the carrier from performing its duties; that is merely an incidental result. And that result comes about only because the railroad's own employees, over whom it presumably has control, are refusing to cross the picket line. Carried to its logical end the appellant's argument would outlaw all picketing, since it could always be shown that some employee of a motor carrier or other public utility had refused to enter the strike-bound premises. . . . The picket line is maintained as close to Acme's plant as is possible without a trespass. As we have already seen, the fact that the appellant alone is affected is immaterial. Like most picket lines this one has among its purposes that of discouraging outsiders from doing business with the strikers' former employer. In its present location the picketing is primary and not secondary. . . . As to the federal law, the exact point was decided adversely to the appellant in Ryan Construction Corp., 85 N.L.R.B., No. 76. There the strikers picketed the entire premises, including a gate which had been cut in the fence for the exclusive use of a construction company which was working on a project for the strike-bound employer. The employees of the construction company refused to cross the picket line at their special gate. The Board held that the picketing, even though it affected only the construction company, was primary and therefore not an unfair labor practice under the cited section of the Taft-Hartley Law. So here, the appellee is picketing both entrances to the Acme plant, and the strike is not directed against the appellant merely because it is the only visitor using this particular entrance."

According to the evidence, Mr. Grant read the above case over with the strikers and came to the conclusion that placing the pickets at the point where they were finally placed could not be considered as picketing of the railroad company and, consequently, would not be in violation of the restraining order. It seems to me that anyone, while acting with the utmost good faith, and with the intent of abiding by both the letter and the spirit of

the temporary injunction, could arrive at the same conclusion as Mr. Grant and the striking employees, in this instance. Therefore, I do not believe the facts justify a contempt conviction; and I respectfully dissent from the majority opinion.

LOCAL UNION NO. 656, ET AL. *v.* MISSOURI PACIFIC RAILROAD CO., THOMPSON, TRUSTEE.

4-9902 254 S. W. 2d 62

Opinion delivered January 19, 1953.

G. Love Grant and *Gutensohn & Ragon,* for appellants.

Hardin, Barton, Hardin & Garner, T. B. Pryor, Jr., and *Pat Mehaffy,* for appellee.

GEORGE ROSE SMITH, J. This is a suit filed by the two appellee railroad companies to enjoin picketing on the part of the appellant labor union and its members. The chancellor issued a temporary injunction and later made the order permanent. The appeal is from the latter decree only.

The facts are fully stated in *Stewart* v. *State, ante,* p. 496, and need only be outlined in this opinion. A labor dispute existed between the union and Dixie Cup Company. Dixie Cup was renting space in the warehouse of Federal Compress & Warehouse Company,

in Fort Smith. Upon a strike being called, the union established picket lines on the spur tracks by which the railway companies serve the warehouse in question. The railroads, alleging that the pickets had committed unlawful acts, brought this suit and obtained the injunctive decree from which this appeal was taken.

At the outset we are met by the appellees' motion to dismiss the appeal upon the ground that the case has become moot. It is alleged, and the appellants concede, that the strike against Dixie Cup has now been settled. Thus there is no longer any occasion for picketing or any controversy between the parties to this appeal. In these circumstances neither an affirmance nor a reversal of the decree would have any practical effect except as it might affect the matter of court costs, which is not alone a sufficient issue to call for a decision in an otherwise moot case. *Quellmalz Lbr. & Mfg. Co.* v. *Day,* 132 Ark. 469, 201 S. W. 125. We think the case at bar falls within the rule announced in *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617: "It is the duty of this court to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon abstract propositions or to declare principles of law which cannot affect the matter in issue in the case at bar."

The appellants, in insisting that their appeal presents more than an academic question, stress the fact that the injunction is in form permanent and express the fear that the decree, if allowed to stand, may prevent similar picketing if the Dixie Cup employees ever call another strike. Even so, the appellants' remedy is in the trial court and not here. An injunction, unlike most judgments, may be modified or vacated after the lapse of the term without regard to the statutes that ordinarily come into play when the term expires. *Stane* v. *Mettetal,* 213 Ark. 404, 210 S. W. 2d 804. In cases involving injunctions against picketing we have recognized the chancellor's power to dissolve the injunction when its continuance is no longer warranted. *Local Union No. 858 etc.* v. *Jiannas,* 211 Ark. 352, 200 S. W. 2d 763; *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45. Hence the appellants are

free to apply at any time for relief in the chancery court, where proof may be taken if necessary.

There being no controversy before us the appeal is dismissed.

TWIST *v.* TWIST.

4-9822 254 S. W. 2d 687

Opinion delivered January 26, 1953.

Rehearing denied March 2, 1953.

J. W. Kirkpatrick and *Norton & Norton,* for appellant.

E. J. Butler, for appellee.

ROBINSON, Justice. J. Frank Twist and C. C. Twist were partners in a large farming operation. They owned about 17,000 acres of land, of which approximately 10,000 acres were under cultivation. In 1938, when C. C. Twist died and a receiver was appointed to take charge of the property, the farm's indebtedness amounted to more than $600,000. Later, in 1939, J. Frank Twist, the surviving partner, and Ira F. Twist, son of the deceased partner, were appointed trustees. In 1942 J. Frank Twist died, leaving his estate to his widow, who was appointed to serve with Ira Twist as co-trustee. They were so successful in the operation of the business that in 1946 a great portion of all the partnership debts had been paid. They then leased between 2,000 and 3,000 acres to Bert Dickey and approximately 8,800 acres to Brawley and Spicer, who did business as St. Francis Planting Company. Included in the latter lease were 100 acres on which was situated the headquarters, consisting of a gin, store, dwelling houses, etc. These leases were for a period of five years, the last year covered by the lease being 1951.

In 1947 the two families, that is, the families of J. Frank Twist and C. C. Twist, agreed on a division of the property, the C. C. Twist family to get 57½ per cent of the land, and the J. Frank Twist family to get 42½ per cent. It was further agreed that the 100 acres, on which the headquarters was located, would not be divided at that time, and each family would refinance a loan on the part of the property received, so there would be no indebtedness against the headquarters property, which consisted of the 100 acres mentioned above. Deeds were executed accordingly and approved by the court. The partition agreement was in writing and provided, *inter alia,* as follows:

"It is further agreed by and between the parties hereto that the Trusteeship which now exists under the jurisdiction of the Chancery Court of Cross County, Arkansas, and under which Mrs. J. Frank Twist and Ira F. Twist are Trustees, shall remain in force as long as necessary but not longer than December 31st, 1951, the

purpose of continuing such Trusteeship in existence being to perform agreements provided for herein, collect rents, pay taxes and to finish all obligations that said Trusteeship entered into under now existing rent contracts; provided, however, that should the Brawley-Spicer lease fall through or be terminated or breached, then the said Trusteeship shall be terminated as well as all of the obligations thereunder, and the interested owners of their respective properties under the division herein provided for will accept full separate responsibility for the proper performance of the other contracts as applied in their particular lands covered in the other Trusteeship contracts."

In 1950 Brawley and Spicer formed a partnership with Dickey, and they continued doing business as the St. Francis Planting Company. They knew of the division of the Twist lands and that their lease, which expired in 1951, would not be renewed. In cultivating the Twist lands, they used their own farming equipment which was valued in excess of $100,000. They attempted to enter into an agreement with John Twist, of the J. Frank Twist family, whereby his family would join with the St. Francis Planting Company for the cultivation in 1951 of the property which had been deeded to the members of that family. This was to be done on the basis of the proposed partnership paying the same rent for the lands that the St. Francis Planting Company had agreed to pay. Also, the J. Frank Twist family was to purchase from the planting company a considerable portion of the farming equipment used in the cultivation of such lands.

Ira Twist, of the C. C. Twist family, and one of the trustees was approached with the same proposition, and whereas John Twist, the son of Mrs. J. Frank Twist, the other trustee, refused to accept it, Ira Twist and his family wanted to do so. But John Twist and his family strenuously objected to Ira Twist entering into an agreement with the St. Francis Planting Company for the cultivation in 1951 of even the lands that had been deeded to the C. C. Twist family; and John Twist threatened to sue Ira Twist, in the event that he

should enter into such an arrangement. Therefore, Ira Twist, since he was one of the trustees, withdrew from any negotiations in connection with the proposition of joining with the St. Francis Planting Company. Other members of the Ira Twist family did join with the planting company in the cultivation in 1951 of those lands belonging to the C. C. Twist family. The new partnership was called the Delta Farms Company, and it paid the old partnership, the St. Francis Planting Company, $140,000 for farming equipment.

It is contended by the J. Frank Twist family that there had been a large increase in the rental value of the farm lands between the year 1946, when the property was leased to the St. Francis Planting Company, and the year 1950, when that company rented the lands to the Delta Farms Company; that Ira Twist is a member of the partnership of the Delta Farms Company, and that since he was still co-trustee for all the Twist lands, he is liable for the increased rental value. However, the chancellor did not find that Ira Twist had any connection with the Delta Farm Company, and the finding of the court in this respect is sustained by the evidence.

In June, 1951, the C. C. Twist family sold their interest in the 100 acres, on which the headquarters was located, to the J. Frank Twist family. Among other things, the deed provides: "It is understood that this deed is subject to the lease outstanding in favor of St. Francis Planting Company and its sub-lessees, and that the grantees are not entitled to possession under this deed until December 31, 1951." The grantees were not required to pay for the land until the expiration of the lease mentioned in the deed. The 100 acres involved were under lease to the St. Francis Planting Company as part of the approximate 8,800 acres that had been leased to that partnership in 1946, on the same rental basis as all the other land involved in the lease. But appellants claim that the 100 acres should be considered on a different basis than other lands and that, since they acquired the ownership of the property in June, 1951, they are entitled to the entire rent of the 100 acres

for the year 1951. We do not agree with appellants' contention. The J. Frank Twist family knew at the time they purchased the interest of the C. C. Twist family that the property was under lease to the St. Francis Planting Company for the year 1951; and they also knew that the interest of the C. C. Twist family was sold for the purpose of completely effectuating a division of the entire property between the two families. All the other real estate had been previously divided, with the exception of the 100 acres, which were included in the lease to the St. Francis Planting Company at a stipulated sum, along with the other acreage. When that company paid its rent for the year 1951, it necessarily paid all the rent due on the 100 acres, and the J. Frank Twist family was only entitled to its proportionate share, as held by the chancellor.

In dissolving the trust, the chancellor allowed Ira Twist $15 a month for a period of three years, a total of $540, for his services in connection with keeping the books of the trust estate. Appellants contend that under the authority of *Imboden* v. *Hunter,* 23 Ark. 622, a trustee who has an interest in the trust cannot collect a fee for administering same, where there has been no previous agreement or order providing for such fee. Regardless of the applicability of the cited case, we do not think that it was anticipated by either side that Ira Twist would be paid anything for his services in connection with the bookkeeping. He collected the rents and distributed the money in an obviously satisfactory manner. In fact, it is suggested that for the duration of the trust he collected and distributed over a million dollars, and if he is entitled to any fee at all, it would seem that it should be for an amount many times the $540 allowed; but he made no claim for any kind of a fee and did not intimate that he was entitled to one until the closing days of the trust, and it appears that his request then was somewhat of an afterthought.

Appellees contend the court erred in not assessing the entire cost of the trusteeship against appellants but took no cross appeal from the court's decree in that re-

spect. We have concluded that the decree of the court should be affirmed in all respects, except the allowance of the $540 fee to Ira Twist, and that the entire cost of this appeal should be assessed against the appellants. It is so ordered.

ED. F. MCFADDIN, Justice (concurring). I concur with the result reached in this case, but I reach such result by a process of reasoning entirely different from that contained in the majority opinion.

It is my view: (a) that Ira Twist was the trustee for the C. C. Twist family; (b) that Mrs. J. Frank Twist was trustee for the J. Frank Twist family; and (c) that the two families dealt at arm's length. My conclusion is that Ira Twist was not a trustee for the J. Frank Twist family, and, therefore, could not have violated any trust obligations to the J. Frank Twist family, since he was not a trustee for that family.

The present case is the second appearance in this Court of litigation involving the original partnership of J. F. Twist and Clarence C. Twist. See *Twist* v. *Gray,* 201 Ark. 812, 147 S. W. 2d 29. In that case, it was shown that following the death of Clarence C. Twist, A. L. Gray was appointed receiver of the Twist properties; and the litigation involved the compensation of the trustee.

In the course of that litigation, it was agreed that the control of all the Twist properties would be placed in J. F. Twist and Ira Twist "as co-trustees." When J. F. Twist died, his widow, Mrs. J. Frank Twist, became the trustee for the J. Frank Twist family. When the two trustees were unable to reach an agreement, then the Chancery Court settled the differences and made an order.

Thus through the years, Ira Twist represented the C. C. Twist family, and Mrs. J. Frank Twist represented the J. Frank Twist family. They acted as representatives of their respective families, which dealt at arm's length. I cannot see where either represented the opposite family.

In the light of the foregoing, it is clear that the decree in this case is correct. Certainly Ira Twist's com-

pensation should not be charged against the J. Frank Twist family.

WOODSON *v.* LEE.

4-9967 254 S. W. 2d 326

Opinion delivered January 26, 1953.

Talley & Owen and *Dean R. Morley,* for appellant.

Reece Caudle, for appellee.

WARD, Justice. John Bernerd Woodson here seeks reversal of an order of the Probate Court which granted adoption of his young son, John Bernerd, Jr., to the father and mother of his divorced wife and mother of the boy. In reaching the conclusion it did the Probate Court held, necessarily, that appellant had abandoned the boy for a period of six months before the petition for adoption was filed.

The only question before us is: Did appellant, under the facts in this case, so abandon his son? The more accurate statement of the question is. Does the weight

of the evidence in this case sustain the finding of the trial court on this point?

Our judgment is that the trial court's finding is not supported by the evidence. The law under which the trial court assumed jurisdiction and proceeded in this instance is § 56-106 of *Ark. Stats.,* the pertinent part of which is set out below:

"Consent of parents or guardian.—(a) The adoption of a child shall not be permitted without the written consent verified by affidavit, of its parents or parent, if living, except as follows:

(b) The consent of a parent or parents may be dispensed with if the court, upon competent evidence, makes one of the following findings:

(1) The parent has abandoned the child for more than six (6) months next preceding the filing of the petition."

The facts are substantially as follows:

Appellant and his wife, Juanita Lee Woodson, were divorced on November 22, 1948. The divorce decree gave the custody of their son to the mother with rights of visitation to the father and approved a property settlement previously made by the parties. The property settlement provided for the wife to pay the husband $10,000, for the husband to convey to the wife his interest in certain described lots and a motor business in Russellville and in a partnership business in Morrilton, and for him to convey to her his interest in their two bank accounts and their household furniture. The settlement also provided that the mother would be responsible for the maintenance, care and upkeep of the child during his minority. In a signed statement attached to the property settlement appellee, D. W. Lee, bound himself to the fulfillment of the obligation of the mother regarding financial support of the child.

It appears that in October, 1949, after the divorce decree in November, 1948, the mother filed a petition to adopt her son but on March 31, 1950, a substituted

petition for adoption was filed by appellees, alleging appellant had abandoned his son. The period of abandonment was not mentioned. In the latter proceeding the mother entered her consent for adoption as provided by statute.

After the divorce appellant returned to his former home in Memphis where he has at all times been substantially employed. It is not disputed that he visited his son at Russellville regularly every two weeks until sometime in March, 1949. Appellant states he was forced to discontinue these visits because of the attitude of his former wife. She admits that she objected to his visits on one occasion when he appeared unshaven and poorly dressed and, as she thought, under the influence of liquor. On two other occasions she also objected over the telephone. There is in evidence a copy of a letter, dated December 11, 1948, she wrote to appellant's sister in which she stated she didn't want his father and mother to visit the boy during Christmas.

Appellant states positively that he never at any time intended to abandon his son; that he sent him Christmas presents; and that he ceased trying to continue his visits, on advice of his attorneys, in order to avoid trouble and in an effort to effect peaceable arrangements. The fact that appellant had engaged counsel to preserve his rights of visitation granted by the decree of divorce is evidenced by the introduction in evidence of a copy of a letter, dated April 12, 1949, written by his attorneys of record to the attorney representing Mrs. Woodson. In this letter, among other things, it was stated that appellant was entitled to see his son, and the addressee was asked to reply regarding the matter. This letter was answered two days later, stating advice would be given as soon as certain information was obtained. The record fails to disclose any further correspondence.

There is no other testimony on the part of appellees which throws any material light on appellant's intent to abandon his son or his acts which might indicate such intent.

The above statement of facts, weighed by the rules announced by text writers and court decisions, fails, in our opinion, to sustain the trial court's finding that appellant abandoned his son. The weight of the evidence, we think, indicates appellant did not intend to and in fact never did abandon his son.

Appellees cite as the appropriate rule an excerpt from 2 *C. J. S.* page 388, which reads:

"On the other hand, conduct of the parents indicating a settled intention to leave the child permanently at the care of others constitutes an abandonment within the meaning of the statute . . ."

We are in general accord with the rule above stated but, since we find there was no "settled intention" to abandon, it could only support the argument that appellant abandoned his child because he, perhaps, wisely provided for others to pay for his upkeep. Such interpretation is, we think, unwarranted, not only because it would penalize the father for securing the welfare of his son, but because it ignores the fact that he gave up certain property rights in the property settlement which could have been the consideration for the security obtained. Such an arrangement is not unlike a father procuring an insurance policy for the future security of a child.

Preceding the text copied above, on the same page, we also find:

"Ordinarily, abandonment by a parent, to justify in law the adoption of his child by a stranger without his consent, is conduct which evinces a settled purpose to forego all parental duties continued for a prescribed period of time when the statute so provides. Merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment . . ."

Likewise, we approve the language used in the same text at pages 383 and 384:

"While the right of the natural parents to the custody of their children is not a proprietary right in the same sense as if the child were a chattel, it has ever been

regarded, even in primitive civilization, as one of the highest of natural rights, and the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent."

The views we hold here are well expressed by the language used in the California case *In Re Cordy,* 146 Pac. 532. There certain parties sought to adopt the child of Mrs. Cordy, without her consent, under an abandonment statute somewhat similar to our own. In denying the adoption the court approved, from another case, the following language:

". . . the power of the court in adoption proceedings to deprive a parent of her child, being in derogation of her natural right to it, and being a special power conferred by the statute, such statute should be strictly construed; that 'the law is solicitous toward maintaining the integrity of the natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. . . . Every intendment should have been in favor of the claim of the mother under the evidence, and if the statute was open to construction and interpretation it should be construed in support of the right of the natural parent.' " The same decision also approved Webster's definition of "abandonment" as follows:

"To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake."

We have examined the decisions presented by appellees and find nothing contrary to the views above expressed.

Reversed.

UNION LIFE INSURANCE COMPANY *v.* EPPERSON.

4-9969 254 S. W. 2d 311

Opinion delivered January 26, 1953.

[redacted]

M. J. Harrison and *E. M. Arnold,* for appellant.

Gordon & Gordon, for appellee.

J. SEABORN HOLT, Justice. September 5, 1951, appellee, Epperson, sued appellant, Insurance Company, under the terms of a group insurance contract with the Arkansas State Highway Department for injuries received on March 28, 1951, in the course of his employment with the Highway Department. Appellant demurred to the complaint on the ground that it failed to state a cause of action. The court overruled this demurrer and appellant answered denying all liability, and from a judgment for the full amount sought, plus the statutory penalty and attorney's fee, comes this appeal.

A jury was empanelled to try the case October 11, 1951, and at the conclusion of all the testimony introduced by the parties, both sides asked for a directed verdict. The court then discharged the jury, took the case under advisement, and on February 4, 1952, rendered judgment for appellee for "$931.50 covering all disability and other items for which he is entitled to recover under the policy sued on to and including October 11, 1951," and on February 27, 1952, during term time, assessed the statutory penalty (§ 66-514, Ark. Stats. 1947) and $350 attorney's fee.

For reversal, appellant contends that the trial court erred in overruling its demurrer and that appellee "did not discharge the burden of showing that he sustained an accident and that the accident caused his disability, and for this reason, the cause should be reversed and dismissed, having been fully developed at the trial; that there is no substantial evidence to sustain the judgment and that it is based on conjecture and speculation."

Material facts appear not to be in dispute.

Appellee, 47 years of age, while employed by the State Highway Department and working in such capacity, suffered a rupture or perforation of a gastric ulcer. He testified, in effect, (quoting from appellant's abstract): "There was a stripped shaft in the pump that pulls the asphalt machine, which shaft was about half buried in the asphalt. The shaft was in the chassis of an old automobile and was right on the ground. Had to work in a stooped position and in getting it out had to stand straddle of it and reaching over to do the work and prising. After I got it loose, I picked it up, stepped out of the frame and laid it on the end of my pick-up truck. During the procedure, pain hit me just like a knife sticking in me and I went out. A doctor was called and gave me a shot and sent me to the hospital. Had been working 35 to 40 minutes before I felt the pain. . . . A. I am sure that pain came in the action of me moving this shaft from where it was to the back end of my pick-up truck.

"The shaft weighed around 70 to 75 lbs. Was brought to Morrilton in an ambulance and treated by Dr. Mobley, who operated on me that same day. In 1949, Dr. Mobley had told me that I had a stomach ulcer, but it had not been giving me trouble except for a slight indigestion for close to two years. Have not been able to work since March 28, 1951. Made claim to the Workmen's Compensation Commission and later had correspondence with defendant, which rejected claim."

The insurance policy contained the following pertinent provisions: "Does hereby insure the employees of the Arkansas State Highway Commission . . . against the effects resulting directly and exclusively of all other causes from bodily injuries sustained by the employees of the Employer solely through external, violent and accidental means while engaged in the course of employment for the Employer, and only while actually performing duties for the Employer . . .

"Liability Exceptions. Section (4). This policy does not cover: . . . injury resulting from any disease or bodily infirmity."

On the record before us, we have concluded that the complaint stated a cause of action and that there was substantial evidence to support the findings and judgment of the trial court. The facts bring this case within the rule recently reaffirmed by this court in *Metropolitan Casualty Insurance Company* v. *Fairchild*, 215 Ark. 416, 220 S. W. 2d 803. There, as here, an injury following overexertion or strain was involved. We there concluded that while there is some conflict in the authorities, we have adopted the view that where an injury following overexertion or strain is unforeseen or unexpected, and is not such as would naturally and probably result from the voluntary act done, but is rather an unusual result, such injury (or death) is an accident or is effected by accidental means and that where, as here, the accidental injury is the primary or proximate cause of the disability, it is not material that a pre-existing diseased condition contributed thereto. We there said:

"It is also clear from our cases that disability or death results solely and exclusively from accidental means although disease plays a part in the disability or death, if the disease was due to the accident. We have also held in several cases that, if an accidental injury is the primary or proximate cause of death or disability, it is not material that disease contributed thereto. These cases are cited in the recent case of *The Travelers' Insurance Co.* v. *Johnston,* 204 Ark. 307, 162 S. W. 2d 480. In that case we reaffirmed the rule announced in *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A., N. S., 493, where it was held (Headnote 1): 'When an accident insurance policy limits liability to "bodily injuries sustained through accidental means resulting directly, independently and exclusively of all other causes of death," and it appears that death resulted from an aggravation of a latent disease to which the deceased was subject, an instruction is correct to the effect that the defendant insurance company is liable, under the contract, if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury.' "

Here, the proof shows, as indicated, that the rupture or perforation of the ulcer occurred at a time when appellee was in a stooped and strained position, lifting the shaft in question. Dr. Mobley, attending physician, testifying on the presence of an ulcer and the rupture or perforation, said: "I think that definitely that trauma does have an influence. I think that it was a determining factor in this case from the history and from the findings."

In the circumstances, we hold that there was ample evidence to sustain the following finding of the trial court: "The court finds, therefore, that the disability alleged and for which compensation is sought, occurred through accidental means; that the rupture or perforation occurred as the proximate result of overexertion and strain; that the fact that plaintiff had been afflicted with an ulcer prior to the date of its rupture while a

contributing factor to his disability, yet was not the proximate cause of same under the evidence."

The record also reflects that the original findings and judgment of the trial court were filed January 22, 1952, judgment was rendered against appellant February 4, 1952, and the motion for a new trial overruled February 15, 1952. Thereafter, on February 22, 1952, during term time, the court set aside the above judgment and order overruling motion for a new trial and permitted appellee to amend his complaint to ask for a penalty and attorney's fee, and also permitted the introduction of testimony as to what would be a reasonable attorney's fee. On the same date, appellant asked that it be permitted to amend its answer and specifically pleaded as a defense, § 4, above. The court denied this request.

Appellant argues that the court abused its discretion in allowing appellee to present testimony on the attorney's fee and that, in any event, the fee was excessive, and further erred in refusing to permit it to amend its answer, as indicated. We do not agree to any of these contentions. Under the above statute, (§ 66-514, Ark. Stats. 1947) in a suit such as this, the insurance company (appellant) "shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve [12] per cent damages upon the amount of such loss together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fee to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected," etc.

The penalty and attorney's fee were therefore properly assessed, and we do not find the fee excessive.

There was no error in refusing to permit appellant to amend its answer for the reason that had appellant specifically pleaded § 4 of the policy, above, in its original answer, it would not have been a defense under the above authorities.

Affirmed.

SLATE *v.* STATE.

4-4725 254 S. W. 2d 314

Opinion delivered January 26, 1953.

J. Allen Eades, for appellant.

Ike Murry, Attorney General, and *Wm. M. Moorhead,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, Justice. The appellant was convicted of having possessed untaxed intoxicating liquor and was sentenced to the minimum fine of fifty dollars. Ark. Stats. 1947, § 48-934. For reversal he contends that there is no substantial evidence to support the verdict.

On August 31, 1952, a deputy sheriff and two State policemen, acting upon an anonymous telephone call, obtained a search warrant and went to Slate's home. In the house they found neither any intoxicants nor any malt, malt cans, or other ingredients used in the making of home-brew. Some sixty or seventy feet behind the dwelling the officers found a five-gallon crock full of home-brew, which analysis showed to be intoxicating. It does not appear that Slate's house is completely enclosed by fences, but there is a fence that runs past one side of the house. The crock was sitting in the open about three feet from this fence, on the side toward Slate's house. The officers testified that there was a well-worn path from the back steps to the spot where the beer was found. Other paths led into a wooded area behind Slate's property, where the officers found a quantity of beer cans and old sugar sacks, all at a distance of a hundred yards or more from the dwelling.

Slate, who has not previously been convicted of an offense, has steadfastly denied any knowledge of the home-brew. He is regularly employed in the trucking business and had lived in the house in question for only twelve days before the officers made their search. He testified that the fence we have mentioned is not on his property line and that if the crock was within three feet of the fence it was on property owned by his neighbor.

We agree that this proof was insufficient to take the case to the jury. The State refers us to *Roberts* v. *State,* 220 Ark. 245, 247 S. W. 2d 360, where we upheld a conviction which followed the discovery of untaxed whiskey in a field behind the accused's home. But there the prosecution offered other circumstances indicating ownership in the defendant, such as his admission to an investigator that he had liquor for sale, his reputation as a bootlegger, etc. Here the sole fact pointing to Slate's guilt is the discovery of the crock in the vicinity of his house. In view of his brief occupancy of the residence the fact that the paths were well-worn and that the sugar sacks were old points rather to the guilt of some one else than to that of this appellant. It is our conclusion that the evidence raises a mere suspicion against Slate, which is not a sufficient basis for his conviction. *Martin* v. *State,* 151 Ark. 365, 236 S. W. 274.

Reversed and remanded for a new trial.

FISER *v.* CLAYTON, STATE TREASURER AND CLAYTON, STATE TREASURER *v.* MCAMIS.

4-9718 and 4-9829 254 S. W. 2d 315

Opinion delivered January 26, 1953.

Sol J. Russell, for appellant.

Wright, Harrison, Lindsey & Upton, E. R. Parham and *Bailey & Warren; Ike Murry,* Attorney General; *Cleveland Holland* and *W. R. Thrasher,* Assistant Attorneys General, for appellee.

Pickens & Pickens, for certain appellants in Case No. 9829.

GRIFFIN SMITH, Chief Justice. The two cases—one instituted by A. J. McAmis and the other by Tom Fiser—involve the same primary factor: that is, Does Act 214 of 1943 (which by § 4 denounces violation as a felony) prohibit a state officer, agent, employe, or any employe of a state agency, from rendering compensable services or selling goods, wares, or merchandise to a department of the state where, in respect of such purchasing department or agency the seller has no interest or connection other than that which might be implied from the fact of membership upon the board or commission that is *not* the purchaser?

Stated differently, Was it the legislative intent to circumscribe the conduct of every board and commission member to such an extent that no relationship whatever involving possibility of profit to such non-purchasing member or to any corporation, partnership, or association in which he was interested, might accrue?

An example would be this: A is a member of the board of trustees of B. college and owns a share of stock in an insurance corporation. The University of Arkansas, for wholly practicable purposes and admittedly, in a particular case, where convenience is best served and rates of all companies are identical, purchases a policy of insurance covering University property. A does not know that the transaction has occurred and through exercise of reasonable diligence would not have been informed. His only financial advantage comes through dividends normally payable by the insurance company. Query: Has A committed a felony?

The McAmis complaint first identifies Vance Clayton as treasurer of state, J. Oscar Humphrey as auditor, Lee Roy Beasley as comptroller, Dean R. Morley as commissioner of revenues, and Carl Parker as state purchasing agent. It is conceded that at the time the questioned transactions occurred Truman Baker was a member of the state highway commission, Doyne Hunnicutt was an officer of the state police commission, J. T. McCool was a trustee of Arkansas A. & M. College, and

that Baker, Hunnicutt, and McCool had sold merchandise or rendered compensable services to an agency of the state other than the board or commission of which he was a member.

Baker is owner of a Chevrolet agency managed by Hunnicutt. Through Hunnicutt's activities motor supplies, equipment and materials were sold to state departments. An inventory showing substantial dealings by Hunnicutt and Baker upon the one hand and the state police department upon the other is attached as an exhibit and the sales are not denied.

McCool, as agent for Remington Rand, Inc., was instrumental in selling the department of revenues a variety of supplies, including the equipment and materials required to put into operation the Certificates of Title Act relating to automobile ownership.

The Fiser complaint names State Treasurer Clayton and includes as defendants Delta Products Company, Office Supply and Equipment Company, and Wright Service Company, Inc. Delta, operating in Mississippi county, had sold to Arkansas Tuberculosis Sanatorium a quantity of oleomargarine for which the sanatorium was charged $392.40. This sale was made pursuant to a contract made by the state purchasing agent after public bids had been invited through statutory advertisement. The purchasing agent's contract with Delta was void, says the complaint, because J. H. Crain owns stock in Delta and Crain was a member of the highway commission.

Office Supply & Equipment Company, according to the complaint, had sold $97.31 worth of merchandise to the revenue department, and McCool was an officer of the equipment company and owned stock in the corporation.

Wright Service Company supplied the highway department with automobile tires to the extent of $36.25, and, it is urged, although the purchase was made "in the manner prescribed by law at what is known as the

'state price,' which is a special price offered . . . and is lower than the usual retail market,'' yet J. Ed. Wright, then an officer of the selling corporation, was a member of the state racing commission ''and will benefit and profit directly or indirectly by said sale.''

The prayer in all of the cases was that (a) if the auditor had not converted the vouchers into warrants that he be restrained from doing so; or (b) if the warrants had been issued, the treasurer should be enjoined from paying them. As to some of the items in controversy it was stipulated that no effort to collect would be made until termination of the litigation.

Further transactions with Remington Rand were developed with proof showing a wide range of dealings, one of the billings being for $78,840.32. It was sought by the plaintiff in the Remington Rand-McCool dealings to show that the cost of Dexigraph paper used for filming was excessive and that non-competitive bids were accepted; also that I. B. M. machines were cheaper and more practicable. To these suggestions the defendants asserted that I. B. M. machines were installed on a rental basis; that while the prices charged for camera supplies, if considered alone, might be above the market price if it should be assumed that films and paper made by other manufacturers would be suitable, yet against this *prima facie* figure there were other considerations, such as installation of the necessary equipment and the right to its use while the certificates were being produced.

It is first argued that Act 214, if given the construction contended for by those seeking the injunction would impair § 18 of Art. 2 of our constitution, and § 3 of Art. 2; also that it would violate the Fourteenth amendment to the U. S. constitution. The reasoning is this: Following the substantive language of § 4 of Act 214 relied upon by those seeking the injunctions, § 5 provides that none of the Act's provisions shall apply ". . . to the offices and appropriations of the secretary of state, attorney general, auditor of state, treas-

urer of state, lieutenant governor, state land commissioner, supreme court, the supreme court clerk, the circuit or chancery judges and prosecuting attorneys, or the general assembly."

Attention is directed to the language of § 18, Art. 2 of the constitution and its mandate 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."

We have concluded that it is not necessary to say whether any of the constitutional provisions afford the relief requested. The answer to essential issues is found in the Act itself. Section 4 is subheaded, "Pre-Authorization of Expenditures." The pertinent portions of the section the plaintiffs sought to invoke begin with the fourth sentence of the fifth paragraph, (see p. 456 of the Acts of the Fifty-Fourth General Assembly, 1943) and are as follows:

"Neither the comptroller nor any member of his department, nor any officer, agent, or employe of any agency of the state making purchases shall be financially interested, directly or indirectly, in any contract or purchase order for any supplies, materials, equipment used by or furnished to any department or agency of the state government, nor shall the comptroller, any member of his department, or any agent or employe of any agency or department of the state, subject to the provisions of this Act, accept or receive, directly or indirectly, from any person, firm, or corporation to whom any contract or purchase order may be awarded, any rebate, gift, or otherwise any money or anything of value, or any promise, obligation, or contract for future reward or compensation. Any violation of this section shall be a felony and punishable accordingly."

Throughout the measure the term "agency subject to the provisions of this Act" repeatedly appears. It is contended that there was no intent to bring within the enactment duties incumbent upon the purchasing agent, and the same construction is urged in favor of agencies

required by prior laws to purchase through competitive procedure. We also pretermit a determination of this phase of the litigation.

We believe the answer is found in § 4, into which it is not reasonable to read a legislative intent to make felons of persons who in many instances had no effective means of ascertaining facts which would render illegal a course of conduct otherwise not forbidden. By this we do not mean to say that the general assembly is without power to prohibit the comprehensive transactions alluded to in § 4 in those cases where the means of obtaining information as to violations were charted; nor is the state without power to declare an office or position vacant where, without information upon the part of the officer or agent, the line of demarkation has been crossed.

The Act's primary function is clearly expressed in its title: "To provide for budgetary control, to require pre-purchase authority, and for other purposes." Section 1 relates to a budgetary system. Administrative machinery for quarterly allotments is contained in § 2, while § 3 authorizes shifting of personnel and the transfer and sale of state-owned equipment. Section 5 creates the exceptions heretofore referred to and authorizes inter-administrative appeals. The whole tenor of the Act is what its title discloses—budgetary control and pre-purchase authority. The title reference to "other purposes" must be relied upon if the highly penal parts of § 4 are to be construed as the Attorney General and assisting counsel believe they should be. We find no persuasive support for this view.

Of course the legislature, in exercising the state's police powers, has a wide discretion within which it may determine what the public interest demands, and what measures are necessary to secure and promote such requirements. The only limitation upon power to enact statutes tending to promote the health, peace, morals, education, good order, and welfare of the public is that the legislation must reasonably tend to correct some evil and promote some interest of the commonwealth not vio-

lative of any direct or positive mandate of the constitution, [or a mandate necessarily implied]. *Harlow* v. *Ryland,* 78 Fed. Supp. 488, 172 Fed. 2d 784. But this power—that is, the police power as the term is generally defined—is not without limitations. *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186.

We are not trespassing into an area of unreasonable deduction by assuming that the 54th General Assembly acted with full knowledge that its power to prescribe and proscribe was not absolute, hence we must assume that the promulgation of Act 214 was with full legislative understanding of its purposes and intents. The lawmaking body must have been aware of § 10 of Act 65 of 1929, Ark. Stat's. § 76-215 by which members of the highway commission are required to swear or affirm (in addition to the constitutional oath) that they will not be interested either directly or indirectly in any contract made by the state highway commission, nor in the purchase or sale of any material, machinery or equipment bought for or sold by the commission while a member of said commission; that they will not be interested otherwise than as an official of the state in adding any road to the state highway system, or in the improving of any road by the state highway commission; nor in the appointment of any person to any position in connection therewith; "nor will I ever use any information or influence that I may have by reason of my official position to gain any pecuniary reward or material advantage to myself, or disclose such information that it may be used by others. So help me God."

Here we find the policy-declaring power operating directly and through express language upon members of the highway commission; but nowhere is there a suggestion that a commissioner shall not own stock in a corporation or be interested in an enterprise that sells to *another* department of the state; nor would he *ipso facto,* (e. g.) become a criminal if Westinghouse Electric Company (in which he owned stock) should sell its product to the state hospital.

The phraseology of an Act is the fundamental guide to legislative meaning and purpose, but it is language of the Act as a whole that must be read, "and not the words of a section or provision in isolation." *Elizabeth Arden Sales Corporation* v. *Gus Blass Co.,* 150 F 2d 988, 161 A. L. R. 370, 326 U. S. 773. Again it has been said that statutes should receive a common sense construction, and where one word has been erroneously used for another, or where a word has been omitted and the context affords a means of correction, the proper word will be deemed substituted or supplied. *Page* v. *Highway No. 10 Water Pipe Line Improvement District No. 1,* 201 Ark. 512, 145 S. W. 2d 344.

The contentions made by strict constructionists might have this result: Suppose the Game and Fish Commission should contract with Arkansas Power & Light Company not only for its lighting but for some special supplemental, but necessary, service; and suppose one of the commissioners happened to own a share of stock in the power company: has the commissioner committed a felony? The same analogy might with reason be applied to contracts for telephone service or for any utilities where the transaction does not pass through the secretary of state—an exempted official.

It has long been the rule that penal statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed. *State* v. *International Harvester Co.,* 79 Ark. 517, 96 S. W. 119. See cases cited in West's Digest, Vol. 16, § 241.

It is urged by those who petitioned for injunctive relief that the criminal part of § 4 is not to be considered and that equity, independently of the felonious aspect, has jurisdiction to prevent payment of the questioned warrants and to restrain prospectively. *Ritholz* v. *Ark. State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410.

We dispose of the cases by holding that the language of § 4 is not sufficiently clear to justify us in saying that the legislative intent was to prohibit the member of one board or commission, officer, agent, or employe, from consummating commercial or business transactions with another agency; therefore there was nothing tangible to prohibit.

This is not to say that in different circumstances involving collusion in matters detrimental to the public welfare the conduct would not be restrained if sufficient colorable design should be revealed.

The Chancellor's findings that the purchase orders were entered and their functions concluded "contrary to the express provisions of § 4 of Act 214" are reversed, but the refusal to enjoin is affirmed for the reasons herein expressed.

Remanded, with directions to enter orders not inconsistent with this opinion.

Mr. Justice Holt concurs.

Federal Compress & Warehouse Company *v.* Call, Commissioner of Labor.

4-9977 254 S. W. 2d 319

Opinion delivered January 26, 1953.

Cockrill, Limerick & Laser and *Abner McGehee,* for appellant.

James M. Ramsey and *Luke Arnett,* for appellee.

Eichenbaum, Walther, Scott & Miller, amici curiae.

ED. F. MCFADDIN, Justice. Is there a final or appealable judgment here involved? Is this a suit against the State? These are the two questions to be decided.

For convenience, we refer to the parties as they were styled in the Chancery Court. One plaintiff is the Federal Compress & Warehouse Company, and the other plaintiff is the Rose City Cotton Oil Mill. These plaintiffs filed suit in equity against the defendants, Call, State Commissioner of Labor, and Adkins, Administrator of the Employment Security Division. The complaint, as amended, alleged: (a) that each plaintiff made payments pursuant to the Employment Security Law; (b) that Call, as Commissioner, had made an administrative ruling—Rule II (D) (2)—concerning seasonal workers, which was at variance with Ark. Stats. § 81-1104 (g); and (c) that Call and Adkins, acting under said allegedly void administrative ruling, and without notice to either of the plaintiffs, erroneously paid seasonal workers of each of the plaintiffs, sums for unemployment which, because of said allegedly void order, were charged against the experience contribution account of each of the plaintiffs, thereby resulting in increase of each plaintiff's contribution rate from 1% to 2.7%. The prayer of the complaint, as amended, was in 4 sections:

(1) for an immediate injunction against the defendants to prevent the destruction of certain records;

(2) for a permanent injunction restraining the defendants from enforcing the allegedly void administrative ruling;

(3) for a mandatory injunction requiring the defendants to make bookkeeping adjustments of the plaintiffs' experience contribution accounts to correct the result flowing from the allegedly void administrative ruling; and

(4) for an order enjoining the defendants from enforcing any further contributions against the plaintiffs until the correct bookkeeping balance had been equalized.

On motion of the defendants, the Chancery Court entered an order dismissing the complaint and amendment, in language and for the reasons stated in Topic I, *infra*. From such dismissal, plaintiffs appeal; and the two questions heretofore stated are argued in the briefs.

I. *Is There a Final or Appealable Judgment Here Involved?* The defendants moved to dismiss the complaint and amendment because it "is a suit against the State of Arkansas and in violation of § 20, Art. V, of the Constitution of Arkansas and cannot be maintained in this Court." The Chancery Court granted the defendants' motion and dismissed ". . . all that part of the complaint and amendment to complaint insofar as they relate to contributions paid by the plaintiffs prior to the hearing of this cause, and all that part of the complaint and amendment to the complaint which relate to the rates of contributions and payment of contributions in which plaintiffs seek mandatory injunctive relief . . . for the reason it is a suit against the State of Arkansas."

Defendants now insist that—due to the wording of the Chancery Court order as above copied—there are many "triable issues" in this case still remaining in the Chancery Court. But we fail to see what such issues are. We have heretofore listed the four matters for which the plaintiffs prayed relief. The dismissing of the complaint and amendment as to all prayed injunctive relief certainly disposed of all of the four points, and there are, therefore no "triable issues" undisposed of. We hold that the order of dismissal was final and appealable; and this holding as to finality makes it unnecessary to consider whether the order—independent of finality

—was appealable under § 27-2102 Ark. Stats., which concerns an appeal from an order refusing an injunction.

II. *Is This a Suit Against the State?* We answer the question in the negative, and we cite as authority for our holding the case of *Hickenbottom* v. *McCain, Commissioner of Labor,* 207 Ark. 485, 181 S. W. 2d 226. In the Hickenbottom case, it was sought to enjoin the Commissioner of Labor from enforcing the Act creating the Employment Security Division, on the claim that the Act was void. The Trial Court dismissed the complaint on the theory that it was a suit against the State in contravention of Art. 5, § 20, of the Constitution—the same Constitutional provision here urged by the defendants. We held that the Hickenbottom case was *not* a suit against the State; and Mr. Justice Frank G. Smith, in the opinion of this Court, quoted from *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, 134 A. S. R. 88, which after reviewing our cases involving suits alleged to be against the State, said:

" 'The only distinction found in these cases is that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, such as the taking or trespass upon the property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the state; and also where the officer refuses to perform a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases a suit against such an officer is not a suit against the state.' "

Justice Frank G. Smith then continued in the Hickenbottom opinion:

"The instant suit is predicated upon the theory and allegation that certain officers under the purported authority of an Act which is unconstitutional and, therefore, void, are about to take the plaintiff's property by imposing a tax, which when imposed becomes a lien upon it. But if the relief prayed is granted no obligation is imposed upon the state. It is, therefore, not a suit against the state. The opinion in *McCain, Commr.*

of Labor v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114, cites a number of cases to the same effect."

So, in the case at bar, there is the claim that Call, acting outside the letter of the Statute, has made a void ruling, and that under such ruling, he and his co-defendant are about to take the plaintiffs' property,[1] and it is sought to enjoin these defendants from proceeding under an allegedly void ruling. No money judgment is sought against the State—only the enjoining of allegedly void rulings, and the equalizing of bookkeeping matters, just as was authorized in *Call, Comm.* v. *Luten,* 219 Ark. 640, 244 S. W. 2d 130.

We hold that this is not a suit against the State. Therefore, we reverse the decree of the Chancery Court which dismissed the complaint and the amended complaint; and we remand the cause to the Chancery Court for further proceedings not inconsistent with this opinion. In the Hickenbottom case, we made final disposition of the case after we held that it was not a suit against the State; but in the Hickenbottom case only legal questions were involved, whereas, here, there are also fact questions as well as legal questions; and we remand the cause to reinvest the Chancery Court with full jurisdiction for all proper proceedings.

JUSTICE WARD not participating.

STALLINGS BROS. FEED MILL *v.* STOVALL.

4-9923 254 S. W. 2d 460

Opinion delivered February 2, 1953.

[1] i.e., by increasing the contribution rate to replenish the experience account of each plaintiff.

Goodwin & Riffel, for appellant.

Thad Tisdale, for appellee.

WARD, Justice. Jesse Stovall, appellee, on or about September 1, 1950, became acutely aware of an injury to his back, which injury he thought arose out of and in the course of his employment with appellant. His claim for compensation was disallowed by the Workmen's Compensation Commission. The Circuit Court, on review, reversed the Commission and Stallings Bros. Feed Mill, the employer, prosecutes this appeal to reinstate the Commission's findings.

The trial judge, in a comprehensive statement of his findings which evidences much care and ability, reached the conclusion that there was no substantial evidence to support the findings of the Commission. In reaching the conclusion he did the trial judge recognized the well-established rule that the findings of the Commission are tantamount to the findings of a jury on questions of fact and should, therefore, be sustained by this Court [as well as by a trial court] if they are supported by substantial evidence. The decision, therefore, for us to make is not what we would have done had we been members of the Commission, but it is whether the findings made by the Commission are supported by substantial evidence. Our conclusion is that the findings are so supported.

In view of the sole decisive question stated above, it will not be necessary to set out the evidence fully and particularly the testimony supporting appellee's view.

Jesse Stovall, age 50, had worked for Stallings Bros. Feed Mill about five years. At the time he became incapacitated, and for some time before, he was engaged

in delivering by truck 100 pounds sacks of feed to retail merchants. It was and had been a part of his duties to lift these sacks in order to load and unload his truck. On September 1, 1950, the day of the alleged injury, appellee, with a helper, as was usual, unloaded about 50 sacks at a retail store in Conway. In doing so he became aware of a pain in his leg—not too severe. Later he drove to Opal, noticing some pain on the way, and there made another delivery. While he was attempting to handle another sack the pain in his leg became so severe that he let the sack fall and he was unable to assist further in unloading. At this time he made mention of the pain for the first time to his helper. According to appellee he made other deliveries though he could not lift the sacks, finished his route, returned to appellant's place of business at Morrilton, and drove home where he was helped into the house. He has not worked since.

On October 17, 1950, an operation disclosed a protruding or ruptured dislocated disc between the fourth and fifth lumbar, which was removed. The doctor could not tell just how long the disc condition had *existed* but thought it was a gradual type caused by lifting over a period of time. There was medical testimony to the effect that the type of work appellee was doing could have produced the rupture with no history of previous injury; that the day the injury occurred was when the disc ruptured or an old condition was aggravated; and that the onset of appellee's disability was when he began having pain on September 1st.

Based on the above evidence it appears reasonable that the Commission was legally bound to award compensation. However there was other testimony which the Commission was obligated to consider and which it had the exclusive right to evaluate. The substance of that testimony is set out below.

On September 11th, appellee's employer made a report of the injury and in answer to the question "How did the accident happen?" he stated: "The man gave no history of a specific accident but in course of his work he developed pain in his hip to his ankle." In making

reports to doctors and investigators after the injury, and before the hearing, appellee failed to attribute his injury to lifting sacks on any particular occasion. On one occasion, at least, appellee was quoted as saying he had been lifting sacks for several years just as he did on September 1st; that his motions were the same; and that he recalled no unusual strain on the day of injury. On these occasions appellee is alleged to have made statements indicating he first noticed the pain while driving the truck on the day in question and that he noticed the pain before he left for work that morning.

In addition to the above, it is in evidence that appellee had trouble with his side or hip the year before; that he had been treated for kidney trouble; that a chiropractor had recommended treatment for a "catch" in his back in 1949 which he was unwilling or unable to take; and that he lost about thirty days work in the summer of that year.

In trying to apply the law as it has been developed by the decisions of this Court to the facts in this case, some interesting hairline questions can be raised. Without recapitulating our many decisions, it suffices here to point out that some cases indicate that no fortuitous incident in the nature of an accident is necessary to sustain an award by the Commission, while others indicate just the opposite. Some of the first class of cases are: *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *Sturgis Brothers* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; and *Quality Excelsior Coal Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38. Some recent cases which indicate there must be something in the nature of an accident before recovery can be sustained are: *Baker, et al.* v. *Slaughter,* 220 Ark. 325, 248 S. W. 2d 106; *Farmer* v. *L. H. Knight Co.,* 220 Ark. 333, 248 S. W. 2d 111; and *C. & B. Construction Co.* v. *Roach,* 220 Ark. 405, 248 S. W. 2d 368.

In this connection it is well to quote the definition of "injury" as it is set out in the 1948 Initiated Act No.

4, *Ark. Stats. (Supp.)* § 81-1302 (d), the pertinent part of which reads:

" 'Injury' means only accidental injury arising out of and in the course of employment. . . ."

The suggested inconsistency in our decisions is, we think, more apparent than real, and stems more from the detached significance attributable to certain words, used perhaps carelessly or unnecessarily, than from the result arrived at in the several cases. We are convinced, after much deliberation, that no clear-cut, practicable and workable rule can be spelled out for determining, in hairline cases, whether a state of facts constitutes an "accident" or "accidental injury" or does not within the meaning of the statute. This is just another way of saying that we conclude that each case must be decided, on this point, on the facts presented, and that the situation presents a question of fact to be determined by the Commission, being bound, of course, to apply the facts to the law.

Here the Commission found as a fact "that any condition from which this claimant suffered to the back and right leg and which caused disability subsequent to September 1, 1950, was not the result of an accidental injury arising out of and in the course of his employment with this respondent employer."

We cannot say the finding made by the Commission in this case was not supported by substantial evidence. Therefore, the trial Court must be reversed and the Commission's finding reinstated.

BODNER *v.* STATE.

4720 254 S. W. 2d 463

Opinion delivered February 2, 1953.

Sam Goodkin, for appellant.

Ike Murry, Attorney General, and *George Lusk, Jr.,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. October 29, 1951, appellant was found guilty in the Municipal Court of the City of Fort Smith, of illegally possessing intoxicating liquors for sale, and on appeal to the Circuit Court was found guilty by a jury April 22, 1952, and her punishment fixed at a term of six months in jail with recommendation that sentence be suspended pending good behavior. The trial court followed the jury's request.

It appears that on March 7, 1952, prior to the date of the suspended sentence, on petition of the Prosecuting Attorney, it was found by the Circuit Court that appellant's residence was being used in the sale of intoxicating liquors in violation of § 34-101, Ark. Stats. 1947, declared said premises a nuisance, and issued a restraining order against appellant (and her husband) from "conducting, maintaining, carrying on or engaging in the sale of intoxicating liquors at or upon the hereto-

fore described property, which is their dwelling, but permitted the defendants to reside upon the premises."

It further appears undisputed that on July 10, 1952, subsequent to the date of appellant's suspended sentence (April 22, 1952) and the date injunction was issued (March 7, 1952) appellant was convicted in the Municipal Court of possessing intoxicating liquors for sale on the same premises to which the injunction above applied.

July 15, 1952, trial was had in the Circuit Court on petition of the Prosecuting Attorney alleging, in effect, that appellant had violated the above injunctive order of March 7, 1952, and praying that she be required to show cause why she should not be judged in contempt and her suspended sentence above revoked. After a hearing, appellant appearing without counsel, the court found appellant guilty of contempt, that she had violated the injunctive order and "that the behavior of the defendant was of such a nature that the heretofore suspended sentence granted in the above mentioned cause is hereby ordered to be set aside; that said dwelling is being used as a place of business and the operation of the same is a nuisance; that the front door on said dwelling shall be nailed, securely closed and barred and that ingress and egress is prohibited through same and that the Sheriff take the proper procedure to carry out said order; that the defendant's heretofore suspended sentence of six (6) months is set aside and she be committed to the Sebastian County jail, Fort Smith, Arkansas, until further order of this Court, or until said sentence has been served."

For reversal, appellant contends "that the evidence was insufficient to hold her in contempt of court, and that the court abused its discretion in revoking her suspended sentence."

We do not agree. We find the evidence ample to support the court's findings that the injunction had been violated, that the suspended sentence should be revoked, and the judgment that followed.

In addition to the undisputed proof that appellant violated the injunctive order of March 7th when she was

convicted July 10, 1952, of possessing illegally intoxicating liquors for the purpose of sale, there was other evidence that subsequent to the date of the injunction a large number of automobiles, including taxicabs, came and went from appellant's premises at practically all hours; that twelve or fifteen cars would come and go within an hour, some staying for some ten or fifteen minutes, and others going in and leaving almost immediately. One of these cars which left appellant's house contained twelve cold cans of beer and a pint and a half of liquor and another six cans of beer and two half pints of liquor.

On June 29, 1952, on search of appellant's house, the officers found a five gallon can with ice and cans of beer, sitting in a back room. Beer was also found in a deep freeze, and altogether forty-nine cans of beer and one-half pint of whiskey were found in appellant's house. Four or five people were in the house at the time drunk and were later convicted in the Municipal Court. There was also testimony that appellant's place had a reputation of a "bootleg joint."

Without detailing more of the testimony, we conclude that the trial court by its action did not abuse the discretion accorded it in matters of this nature.

In the case of *Calloway* v. *State,* 201 Ark. 542, 145 S. W. 2d 353, there was involved, as here, the power of the Circuit Court to revoke a previous suspended sentence and order execution of the full sentence (§ 43-2324, Arkansas Stats. 1947). We there said: " 'The behavior of the defendant is a question of law to be passed on by the court, and the exercise of its discretion in this manner cannot be reviewed in the absence of gross abuse. . . .'

"In a very recent case, *Spears* v. *State,* 194 Ark. 836, 109 S. W. 2d 926, which dealt with the power of the circuit court under the provisions of § 4054 of Pope's Digest, we said: 'The next two grounds urged for a reversal may be considered together as they both challenge the sufficiency of the evidence to sustain the order of

revocation. This is a matter coming within the sound discretion of the trial court. *Denham* v. *State,* 180 Ark. 382, 21 S. W. 2d 608. Of course, such discretion could not be arbitrarily exercised without any basis in fact, but the statute itself confers the authority to revoke the suspension of sentence "whenever that course shall be deemed for the best interests of society and such convicted person".' "

Next appellant contends that she did not have proper notice of the "petition which sought a revocation of the suspended sentence." This contention is untenable for the reason that it appears that appellant was fully apprised of the hearing and its nature. She was present, acting as her own counsel, and made no objection. She was asked by the Court if she were ready for trial and she replied that she was. The record recites: "Defendant, Mary Bodner, appearing in person, without counsel, and all announced ready for trial after the court interrogated the defendant, Mary Bodner, as to whether or not she insisted on counsel representing her, to which she answered that she was ready for trial." The Prosecuting Attorney then stated to the Court that he was seeking a revocation of the suspended sentence and the padlocking of her home. "As I understand it, you are asking for this restraining order to be made permanent and also to consider the suspension, to revoke the suspension that was given her in reference to that city case? Mr. Gutensohn: That's right. The Court: Now Mary, are you ready to proceed on those questions? Mrs. Bodner: What do you mean? The Court: Are you ready to have a hearing on it now? Mrs. Bodner: Yes, sir, I guess so."

Affirmed.

BEAVER BAYOU DRAINAGE DISTRICT *v.* LEE-PHILLIPS DRAINAGE DISTRICT.

4-9973 254 S. W. 2d 465

Opinion delivered February 2, 1953.

David Solomon, Jr., and *Burke, Moore & Burke,* for appellant.

Daggett & Daggett, for appellee.

GEORGE ROSE SMITH, J. This is a petition filed in the circuit court by the appellee, Lee-Phillips Drainage District, asking authority to levy an annual tax for the purpose of cleaning out, deepening, and widening the district's drainage ditches. Ark. Stats. 1947, § 21-533. Included in the ditches to be rehabilitated is a portion of Lick Creek, which flows southward across the district's southern boundary. The petition is resisted by Beaver Bayou Drainage District, which lies just south of the petitioning district, and by the other appellants, who own land within the petitioning district, near its southern boundary. None of the appellants question the need for

renovating the Lee-Phillips drainage system, but they insist that the project should not be approved unless provision is also made for cleaning out the rest of Lick Creek, which flows for about five miles within the Beaver Bayou District before emptying into Big Creek. The circuit court rejected the appellants' protests and authorized the levy of taxes and the issuance of bonds, there being sufficient uncollected benefits to service the proposed bond issue. *Cox* v. *Drainage Dist. No. 27, etc.*, 208 Ark. 755, 187 S. W. 2d 887.

That the present controversy has arisen is due to the fact that the Lee-Phillips District discharges its waters into the drainage system of the Beaver Bayou District and to the circumstance that both systems need to be unclogged. Beaver Bayou, the older of the two districts, utilizes Lick Creek as a part of its drainage system. When Lee-Phillips completed its own drainage system in about 1919 the sole outlet for its waters was, and still is, Lick Creek. The record does not disclose just what arrangement was made between the two districts when Lee-Phillips first began discharging its waters into Lick Creek.

The appellants' proof, which is not contradicted, shows what will happen if Lee-Phillips is permitted to clean out its own ditches without at the same time removing obstructions in the lower reaches of Lick Creek. The work which Lee-Phillips proposes to do within its own boundaries will accelerate the southward flow of flood water within the district. When this mass of water reaches the southern border of Lee-Phillips its volume will be too great to be carried away by Lick Creek in its present clogged condition. Consequently the flood will spread out over the northern part of the Beaver Bayou District and will also back up for about a mile at the lower end of the Lee-Phillips District. Beaver Bayou says that it owns about 1,000 acres that will be so inundated, and the other appellants show that their property at the southern end of Lee-Phillips will also be flooded. Beaver Bayou and the appealing landowners have joined forces in insisting that Lee-Phillips should not be per-

mitted to clean out its own drainage system without at least contributing to the cost of similar work along the southern five miles of Lick Creek.

Before reaching the merits we mention a preliminary contention made by the appellants. The commissioners of Lee-Phillips published the statutory notice (Ark. Stats., § 21-533) that a hearing on the petition would be held on August 4, 1952, but the judgment recites that on that day the matter was recessed until August 15, when the case was actually heard. It is now contended that the notice is jurisdictional and should have been republished. We have held, however, that a hearing upon an original assessment of benefits may be continued to a fixed date, *Village Creek Dr. Dist., etc.,* v. *Ivie,* 168 Ark. 523, 271 S. W. 4, and the same principle permits what was done below.

On the merits we consider first the arguments presented by the appellant landowners. Although we have recognized that a drainage district in proceeding under this maintenance statute may incur a liability for damages, *Gray* v. *Doyle,* 167 Ark. 495, 269 S. W. 579, these appellants have not elected to assert a claim for damages, for they disclaim any desire to prevent the rehabilitation of the Lee-Phillips drainage system. Instead, they insist that the district should be required either to reassess the benefits against their lands or to clean out Lick Creek down to its confluence with Big Creek. As to the suggested reassessment of benefits it may well be true that the commissioners of Lee-Phillips might have chosen that course, as has been done in an analogous situation. *Drainage Dist. No. 18, etc.,* v. *McMeen,* 183 Ark. 984, 39 S. W. 2d 713. It may equally well be true that the power to unclog a channel beyond the district's borders is included in the broader authority to "extend" the ditches, which may involve the digging of an entirely new channel. Ark. Stats., § 21-533; *Lesser-Goldman Cotton Co.* v. *Cache River Dr. Dist.,* 174 Ark. 160, 294 S. W. 711. But the decision to pursue either of those courses is evidently a matter that lies within the discretion of the Lee-Phillips commissioners. We find nothing

in the drainage laws that empowers the circuit court to control the commissioners' discretion. Hence the trial court properly refused to grant the specific relief sought, and there was no proof of the landowners' damages in terms of money, even if that remedy had been asked.

With respect to the other appellant, Beaver Bayou Drainage District, the court below correctly held that he did not have jurisdiction of the controversy. This is a special proceeding in which the court is simply asked to approve the levy of a tax. Ordinarily the petition is filed in the county court and contemplates the adjudication of possible disputes between the petitioning district and its landowners. It happens that the petition is correctly filed in the circuit court when, as here, the petitioning district embraces land in more than one county, Ark. Stats., § 21-501, but the statute does not indicate that the suit is any less a special proceeding in the circuit court than it would be in the county court if a district lying within only one county were involved.

We do not regard the controversy between the two districts as falling within the scope of this special proceeding. Under the drainage law the jurisdiction of the county court (and of the circuit court when an intercounty district is concerned) is ordinarily limited to matters involving the internal affairs of the district. The county court can, for example, organize the district in the first instance (§ 21-501), appoint the commissioners (§ 21-505), review the assessment of benefits and the award of damages upon complaint of any owner of real property "within the district" (§ 21-515), approve changes in the plans (§ 21-517), and exercise other specified supervision over the district's affairs. But the statute does not confer upon the county court general jurisdiction of all cases to which a drainage district may be a party.

Here Beaver Bayou is manifestly not proceeding under § 21-515, since it neither owns land within Lee-Phillips nor seeks damages for the threatened injury. Beaver Bayou's only objective is to compel Lee-Phillips to share the expense of cleaning out that portion of Lick

Creek that lies within the Beaver Bayou District. Beaver Bayou may perhaps have a remedy without litigation if it made a supplemental assessment of benefits under § 21-531 when Lee-Phillips first utilized its neighbor's drainage system as an outlet. And if Beaver Bayou failed to assert its rights under that statute then the question of whether it can nevertheless require Lee-Phillips to bear part of the cost of maintenance within Beaver Bayou's own boundaries is one to be raised in a plenary suit brought in a court of superior jurisdiction. We find nothing in the drainage law to indicate that the legislature meant for such an independent cause of action to be litigated in this special proceeding. Hence the court correctly dismissed Beaver Bayou's intervention, this action being in the circumstances without prejudice.

Affirmed.

GRIFFIN SMITH, C. J., not participating.

PARKER, COMMISSIONER OF REVENUES *v.* MURRY, ATTORNEY GENERAL.

4-9970 254 S. W. 2d 468

Opinion delivered February 2, 1953.

O. T. Ward, for appellant.

Ike Murry, Attorney General, and *Wm. M. Moorhead,* Assistant Attorney General, for appellee.

J. Seaborn Holt, Justice. For the years 1948 to 1950, inclusive, Sidney S. McMath, the then Governor of Arkansas, duly filed his annual income tax returns with the appellant, Commissioner of Revenues of the State of Arkansas. Following the filing of the 1950 return, the Commissioner caused an examination and restatement of the tax due for each of the above years, found that additional taxes were due in the amount of $942.31, and made demand for payment of same. Mr. McMath paid this amount under protest and filed suit for its recovery, as was his right under the Revenue Act. On July 2, 1952, the Revenue Commissioner answered, denying every material allegation in the complaint.

On July 17, 1952, the Attorney General filed petition to intervene in the suit, alleging in part: "Ike Murry, Attorney General of the State of Arkansas, petitions the Court for entry of an order authorizing him to appear and defend this cause as official attorney for the defendant, Carl F. Parker, Commissioner of Revenues of the State of Arkansas; and as grounds therefor states: . . .

"3. Under the Constitution and laws of the State of Arkansas, petitioner, in his official capacity as Attorney General, is charged with the duty of acting as attorney for all State officials, departments, institutions and agencies in all litigation where the interests of the State are involved.

"4. Under the Constitution and laws of the State of Arkansas, the defendant, Carl F. Parker, Commissioner of Revenues, is required to certify the complaint

in this cause to the Attorney General for attention and defense. This he has failed and refused to do.

"5. The interests of the people of the State of Arkansas are directly involved in this litigation and can legally be protected only by the Attorney General of the State. The State of Arkansas is the real party defendant.

"6. O. T. Ward, who has heretofore purportedly appeared herein as attorney for the defendant, Carl F. Parker, is the attorney for the State Department of Revenues, having been appointed to such position under the laws of the State of Arkansas by and with the direct approval of the Governor, Sidney S. McMath, the plaintiff herein whose suit he is purportedly attempting to defend. Such is both contrary to law and to the public policy of the State of Arkansas.

"WHEREFORE, petitioner, Ike Murry, prays that this Court enter its order herein authorizing him, in his official capacity as Attorney General of the State of Arkansas, to forthwith appear and defend this cause as attorney for the defendant."

Appellant, Commissioner, in his response (after admitting certain allegations not in dispute) denied "each and every other allegation contained in intervener's petition" and further alleged "that there are other suits now pending filed by income taxpayers in this state, one in Pulaski County Chancery Court and one in Sebastian County Chancery Court and that many other such cases have been filed and determined by both the Chancery and Supreme Courts, that the said Ike Murry, as Attorney General, has never before made a request to be permitted to intervene or to assist in any way in any of said suits.

"Defendant further answering states that the plaintiff, McMath, filed his income tax returns and paid the tax reflected to be due the State therein for the years in question and that upon examination of said returns this defendant, as Commissioner of Revenues, restated said returns and recomputed the tax and assessed the plaintiff with the additional amount of tax here involved and

that the same was duly paid into the State Treasury and will remain therein until this Court is convinced by evidence to be produced by the plaintiff authorizing this Court to make proper determination herein.

"Defendant verily believes that this Court is capable of making its determination upon the proof to be presented before the Court in the trial of this cause and that the intervention of the Attorney General is not necessary."

A hearing was had in the Pulaski Chancery Court, First Division, which resulted in the following order, which recites in part: "The Court being well and sufficiently advised in the law and the facts herein, finds: That inasmuch as the Attorney General under the law is the legal representative of all Departments of the State Government, it is fitting and proper for the Attorney General to assist in the hearing of a Petition filed by the Governor for the return of Nine Hundred Forty-two and 31/100 Dollars ($942.31) assessed against him by the Commissioner of Revenues and paid by him, due to the fact that the Federal Government had called upon him and collected from him additional Income Taxes for the years in question in excess of Nine Thousand and No/100 Dollars ($9,000.00), but the Court does not find, nor presume that the said Carl F. Parker, as Commissioner of Revenues of this State, nor his attorney, O. T. Ward, has been, or will be negligent or fail to act properly in the preparation and presentation of said cause.

"It is therefore considered, ordered, adjudged and decreed that the Petitioner, Ike Murry, as Attorney General of Arkansas, be and he is hereby authorized, in his official capacity, to forthwith appear and aid in the defense of this cause, to be aided by O. T. Ward, Attorney for Carl F. Parker, the attorneys for the defendant, Carl F. Parker as Commissioner of Revenues of this State."

The cause is here both on appeal and certiorari.

At the outset, we are confronted with appellee's contention that the court's order, above, was not an appeal-

able order. We do not agree. In an exhaustive opinion on what is, and what is not, an appealable order, this court in *Flanagan* v. *Drainage District No. 17,* 176 Ark. 31, 2 S. W. 2d 70, said: "Section 2129 of C. & M. Digest (now § 27-2101 Ark. Stats. 1947) provides as follows: 'The Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of all inferior courts of the State,' etc. . . .

"This court, in *Campbell* v. *Sneed, supra* (5 Ark. 398), in giving its reasons for declaring such a judgment not final, said: 'Because it neither in form nor effect dismisses the parties from the court, discharges them from the action, *or concludes their rights in respect to the subject-matter in controversy in the case;* and no proceeding in court, not attended with at least one of these consequences, can, in our opinion, be considered as embraced by the law allowing "writs of error upon any final judgment or decision of any circuit court".'

"In *State Bank* v. *Bates,* 10 Ark. 631, we said: 'A judgment, to be final, must dismiss the parties from the court, discharge them from the action, *or conclude their rights to the subject-matter in controversy.*' . . .

"This court has never departed from the doctrine announced in *Campbell* v. *Sneed, State Bank* v. *Bates,* and *Tucker* v. *Yell, supra* (25 Ark. 420), to the effect that, *where a decree concludes the rights of the parties to the action in respect to the subject-matter in controversy in the case,* it is a final decree. That doctrine, announced so early has been reaffirmed expressly and in legal effect in all subsequent cases.

"In *Davie* v. *Davie, supra,* (52 Ark. 224, 12 S. W. 558), a leading case on the subject, it is said: 'An appeal is allowed also *where a distinct and several branch of the case is finally determined, although the suit is not ended*'."

So here, it appears to us that the trial court had finally determined that the Attorney General should be permitted, at his option, to intervene in the present suit, direct and control it, permitting counsel for the Revenue

Commissioner to assist. On this branch of the case, the order was final and left nothing remaining to be done.

Next, the Attorney General says "that he has the authority to control the litigation of any State department or agency when such appears necessary or desirable." We agree with this contention where the facts in a particular case make it appear that the Attorney General's intervention was "necessary or desirable," or stated another way, when the institution or agency "needs" the services of counsel and this "need" is certified to the Attorney General.

The primary and decisive question, therefore, is: Was there such "need" in the instant case? We hold that there was not.

Section 1, Art. VI of our Constitution created the office of Attorney General, and § 22 of Art. VI prescribes the duties of the Attorney General, as follows: "The . . . Attorney General shall perform such duties as may be prescribed by law . . ." It thus appears obvious that the official position of the Attorney General is a constitutional one, but that his duties are purely statutory.

Act 14 of the 1933 General Assembly provides: "The Attorney General shall be the attorney for all State Officials, departments, institutions and agencies, and whenever any officer or department, institution or agency of the State *needs the services of an attorney the matter shall be certified to the Attorney General* (emphasis ours) for attention," (now § 12-701, Ark. Stats. 1947).

Our Revenue Department was first created by Act 88 of 1925, under the title of Commissioner of Insurance and Revenue. No provision was made for counsel. By Act 115 of 1927, there was created the separate office of Revenue Commissioner, and thereafter in 1933, the Legislature provided for a "Legal Adviser for the Commissioner" and by Act 80 placed the Legal Adviser on an annual salary basis. Thereafter, the burdens and duties added to the office of the Revenue Commissioner had so

increased that the General Assembly of 1935, in order to define and set out his duties, passed Act 131, which provides: "SECTION 1. The Revenue Commissioner of the State of Arkansas is hereby given authority to promulgate any and all regulations, rules and orders which he may deem necessary to effectively collect all taxes, penalties, delinquencies, defaults and other monies required by law to be collected by the State Revenue Department, and suits may be filed in the name of the Commissioner of Revenues and at his instance to recover money due and payable to the State and collectible by him. Within ten days after any amount of money is due and payable the Revenue Commissioner shall take steps to collect the same. . . .

"SECTION 3. The Commissioner of Revenues shall employ such clerical and legal assistants as he may deem necessary for the proper function of the Revenue Department. The Commissioner of Revenues, if he deems necessary and if a saving of money can be had thereby, by and with the approval of the Governor, shall employ an attorney for the Revenue Department, which said attorney shall have the same qualifications as are now required for a circuit judge and whose salary shall be $4,200 a year to be paid in twelve monthly installments out of any moneys heretofore or hereafter appropriated for such purpose.

"SECTION 4. All laws and parts of laws in conflict herewith be and the same are hereby repealed.

"SECTION 5. It is hereby declared that certain defects in the law defining the duties of the Commissioner of Revenues of the State of Arkansas should be immediately corrected so that all litigation wherein the State of Arkansas is a party at interest can be more properly prosecuted; that this Act is essential to the immediate preservation of the public health, peace and safety; an emergency is hereby declared and this Act shall take effect and be in full force and effect from and after its passage."

The Legislative purpose and intent under this act appears clear. We take notice that the Legislature has

from time to time provided for counsel for other State agencies besides that of the Revenue Commissioner to effect greater efficiency and incidentally to take some of the burdens and duties off of the Attorney General. It is apparent to us that the Attorney General may intervene in a suit prosecuted by the Commissioner of Revenues, as here, when and only when, the Commissioner of Revenues needs his services and so certifies this need to the Attorney General, and that such was the intent of the Legislature. This need may arise, for example, when it is shown that the State's interests are being jeopardized by neglect, refusal to act, or inefficiency on the part of counsel representing the Revenue Commissioner. In the present case, there is absolutely no showing "of the need" contemplated under the law and no intimation of neglect, refusal to act, inefficiency, or lack of ability on the part of the counsel for the Commissioner or that he has or will shirk his duty to the people of the State of Arkansas. In fact, the trial court, in effect, so found.

Reversed and remanded with directions to dismiss the petition of the Attorney General.

Justice McFaddin not participating.

Meadows *v.* Costoff.

4-9843 254 S. W. 2d 472

Opinion delivered February 2, 1953.

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

Robt. J. White, for appellee.

ROBINSON, Justice. This appeal involves a divorced couple's title to certain personal property and the possession of real property which is an estate by the entirety.

The appellant, Thelma Costoff Meadows, and appellee, Charles Costoff, were married January 27, 1940, in Chicago, Illinois, when she was 22 years of age and he 45. At that time he had worked for a railroad company for twenty-seven years, owned a half interest in a house and lot in Illinois, and had accumulated about $1,700 in the bank. Subsequent to the marriage, he bought the other half interest in the above mentioned real estate for the consideration of about $1,800, of which $1,000 was paid from his own funds and the balance was borrowed. This property was deeded directly to him. Later he deeded it to a third person, who in turn deeded it back to the litigants herein, in order to create an estate by the entirety.

The record indicates that appellant had occasional employment, and she claims that she used her wages to help pay the balance owed on the real estate and that she also deposited her earnings in a joint savings account in a Chicago bank. In 1945 the couple moved to Arkansas where they had acquired real estate as an estate by the entirety, built a home and purchased about eighteen head of cattle. Appellant maintains she assisted in buying the cattle through her work of picking cotton and also in operating a restaurant.

Early in May, 1949, appellant told her husband that she wanted a divorce. He offered no resistance and a decree was granted her May 20, 1949. On June 15, 1949, she married her present husband, Heartsill Meadows, and moved to Lead, South Dakota. At the time of the divorce there was between seventeen and eighteen hundred dollars in the bank, about twenty head of cattle on

the farm and the furniture in the home. They had a balance due them on the Illinois property which they had sold and which was being paid them at the rate of $42 a month.

In the complaint wherein appellant sought the divorce, it is alleged, "There is no property settlement to be made"; and the decree repeats this language. In September, 1950, she moved back to Arkansas with her present husband and filed this suit, claiming to be the owner of half of the personal property and asked that all of the property, both real and personal, be sold and the proceeds divided between her and Costoff.

Act 340 of 1947, Ark. Stats., 34-1215, authorizes dissolution of estates by the entirety; but in *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, this court held: "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." Since an estate by the entirety in the present case was created prior to the passage of Act 340 of 1947, and the rights have become vested, the court could not dissolve the estate. Therefore, the court had the property's rental value appraised, gave appellee possession and required him to pay to appellant an annual rent in excess of the rental value fixed by the appraisers.

As to the personal property, the decree of the trial court gave appellant half interest in the proceeds of the sale of the Illinois property and rendered judgment against appellee for half of the payments he had received from that source. The chancellor also found that appellant was the owner of one refrigerator, one bedroom suite and one dinette suite, and that appellee was the owner of the other personal property.

We cannot say the chancellor's finding is contrary to the preponderance of the evidence. At the time appellant filed suit for divorce it was stated in the complaint, "There is no property settlement to be made"; and the court found this allegation to be true.

In all probability, when appellant received her divorce she knew that she was going to marry Meadows a short time later. In fact, they were wed in less than thirty days after the decree was granted, and she and Meadows promptly moved to South Dakota. It is not likely that at the time of her divorce, and in the circumstances, she would have left in her former husband's possession undivided personal property in which she owned a half interest. After her arrival in South Dakota she wrote several letters to appellee, and in none of them did she indicate that she owned or claimed any interest in personal property left behind. In fact, she made statements leading to the opposite conclusion. On one occasion she wrote: "Charles, don't let a certain person take you for your money. She isn't and don't care for you. She's after your money. I left the money and stock for you because I wanted you to be comfortable, and I would feel better this way." Again: "First of all I am returning your money. Thanks, we aren't rich, in fact we are poor, only what we manage for." And further: "As I've told you, Charles, get a woman close to your own age, and then you will thank me for letting you free. You have enough to offer a person that you both can live good on for as long as you live." And still further: "Heartsill and I are starting from the rock bottom, as they say."

When all of the evidence is considered, we cannot say the decree is contrary to a preponderance thereof.

Affirmed.

KROHN *v.* KROHN.

4-9966 254 S. W. 2d 453

Opinion delivered February 2, 1953.

Glenn F. Walther, for appellant.

Arthur G. Frankel, for appellee.

GRIFFIN SMITH, Chief Justice. Arthur S. Krohn's divorce action was dismissed, as was his wife's cross-complaint asking for maintenance money during separation.

The parties were married in 1921 and have two children, each being of legal age. Appellant at times lives with her married son who is a disabled veteran. The son has been told by physicians that amputation of an injured leg is necessary. Sometimes the son sends small monetary gifts to his mother, but the necessities incidental to his own household and the support of a wife and three children forbid material assistance.

In 1947 appellee filed divorce actions in Arkansas and in Illinois. He and appellant had been residents of Illinois for more than 25 years, but in the fall of 1949 they moved to Memphis, Tenn. Thereafter appellee, who was the cross-defendant in this action, again sought to establish a residence in Arkansas for divorce purposes. Krohn readily admitted that he came to Arkansas in 1947—the same year he attempted to procure a divorce in Illinois—but this suit, like the one in Illinois, was dismissed and he "returned" to Illinois. Appellant testified that at the time the proceedings in Illinois were dismissed her husband had agreed to pay separation maintenance on the basis of $80 per month, but the promise was not kept. Illinois residence property ill-suited to habitation was the only realty owned by either. Its value was not in excess of $550.

From Memphis appellee again came to Arkansas. This step was taken in 1950, but in the meantime he had worked as a rural mail carrier in Illinois, an employment

resulting in certain retirement or death benefits. In the event of Krohn's death a lump-sum would be paid to his wife. He intimated that because of this prospect Mrs. Krohn was resisting divorce.

When appellee came to Arkansas from Memphis in 1950 he procured employment as a taxicab driver at an average net weekly wage of $30, and he again undertook to gain matrimonial freedom. Mrs. Krohn came to Little Rock, met her husband, and the two spent a night together at a tourist court. There is testimony supporting inferences that Mrs. Krohn was advised to do this in order to meet her husband's accusations with evidence showing condonation. It appears that Mrs. Krohn had agreed not to mention the circumstances for the reason that her husband might be subject to indictment for perjury on testimony given in support of his divorce action. In any event the cause was dismissed. The chancellor summarized these maneuvers in the following comment from the bench: (Addressing appellant's counsel who had just said that Krohn admitted he made a false statement)—"Yes and I dismissed the case on account of it, but that is water over the dam. I thought it was about fifty-fifty: she lied to [her husband] about not telling it, and he lied to the court about not doing it."

The proceeding resulting in this appeal was initiated in 1951. The complaint alleged that the Krohns had lived together until September 28 of that year. Abuse, an attitude of contempt and studied negligence systematically and habitually pursued, were alleged. The answer and a categorical denial and cross-complaint charged desertion, abuse, etc., but asked that the suit be dismissed with appropriate directions for separate maintenance.

There is documented testimony strongly indicating that appellee had for a number of years been associating with a woman to whom he was engaged prior to his marriage to appellant in 1921. Letters bearing expressions of endearment disclose mutual affections substantially greater than a Platonic relationship, but the evidence as a whole follows the familiar pattern of accusation and denial.

Our view is that the chancellor felt that the parties were without equity because of the misrepresentations each had made. Appellant would distinguish in degree by calling attention to the fact that her assurances that certain matters would not be revealed were not made under oath, while appellee's false testimony was given in court.

We conclude that the chancellor did not abuse his discretion in declining to aid either, hence the decree is affirmed.

RICHARDSON AND SHOOP *v.* STATE.

4723 254 S. W. 2d 448

Opinion delivered February 2, 1953.

Harold C. Rains, Jr., Batchelor & Batchelor and *Robinson & Edwards,* for appellants.

Ike Murry, Attorney General, and *Dowell Anders,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. The appellants, Richardson and Shoop, were jointly charged, tried and convicted

of grand larceny. Richardson's motion for new trial contains eight assignments, and Shoop's contains fourteen assignments. We group and discuss all of these in convenient topic headings:

I. *Sufficiency of the Evidence.* The appellants were charged with feloniously stealing and carrying away from the field of Willis Arnold, 179 dozen ears of corn, of the total value of $44.75. It was shown that at 3:15 A.M. the Van Buren city officers found the two appellants and a third person in a parked car, which was loaded with freshly pulled corn. The appellants showed the result of recent drinking of intoxicants. They claimed they had purchased the corn from Logan Gentry. The person in the car with the appellants accompanied the officers to Willis Arnold's corn field. There, tire tracks showed where a vehicle had been parked, and footprints showed where persons had come from the corn field to the car. The officers testified (a) that the tire tracks in the field were similar to those made by the car in which the appellants had the corn; (b) that the shoe tracks in the field were similar to those of the appellants; and (c) that the corn found in appellants' possession was similar to the other corn still on the stalks in Arnold's field. We will discuss the competency of the officers' testimony on these points in Topic II, *infra.* The value of the corn found in the appellants' car was established at $44.75. Logan Gentry testified that he did not sell or give corn to the appellants.

Without stating all of the evidence in further detail, it is sufficient to say that, viewing it in the light most favorable to the State,[1] and holding the questioned evidence to be competent, as discussed in subsequent Topics herein, we hold the evidence sufficient to sustain the verdict against each appellant. See *Duty* v. *State,* 212 Ark. 890, 208 S. W. 2d 162; and *Jackson* v. *State,* 101 Ark. 473, 142 S. W. 1153.

II. *Testimony of Non-Expert Witnesses.* Appellants claim that the Trial Court committed error in al-

[1] This is our rule on appeal in criminal cases like this one. *Bedford* v. *State,* 187 Ark. 1162, 59 S. W. 2d 590; and *Dowell* v. *State,* 191 Ark. 311, 86 S. W. 2d 23.

lowing the officers, as non-expert witnesses, to testify as to the similarity (a) of the car tracks in the field to tracks made by appellants' car; (b) of the footprints in the field to appellants' footprints; and (c) of the corn found in appellants' car to the corn remaining on the stalks in Arnold's field.

In *Miller* v. *State,* 94 Ark. 538, 128 S. W. 353, in discussing non-expert evidence, we said:

"Furthermore, the opinions of ordinary witnesses, derived from observation, may be given in evidence in cases where, from the nature of the subject, the facts cannot be otherwise properly presented to the jury. 'Where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusions, judgment, or opinion.' 6 *Thompson on Negligence,* Sec. 7750.

"Frequently, the opinion of a witness as to the appearance of an object he has seen is the best and only evidence obtainable, and therefore such statements of the witness are admissible. 5 *Enc. Ev.* 677; *Lawson on Expert & Opinion Ev.* (2nd Ed.) 512. Thus it has been held that a witness may testify that spots and spatters on a thong were blood; and that blood seen by the witness was fresh blood. *Greenfield* v. *People,* 85 N. Y. 75; *State* v. *Bradley,* 67 Vt. 465; *People* v. *Loui Tung,* 90 Cal. 377. In the case of *Commonwealth* v. *Dorsey,* 103 Mass. 412, a witness was permitted to testify that certain hairs were human."

Again in *Trimble* v. *State,* 150 Ark. 536, 234 S. W. 626, in discussing non-expert testimony as to similarity to footprints, we said:

"Stokes, the person assaulted, was permitted to testify, over appellant's objection, that certain tracks which he found in his yard the next day after the shooting were

the same tracks which he had followed around his field—these last being tracks admittedly made by appellant. The objection to the question is that it called for the opinion of the witness upon a subject upon which he had not shown himself qualified to testify as an expert. We do not think the objection well taken."

In *Thurman* v. *State,* 211 Ark. 819, 204 S. W. 2d 155, many of our cases are listed. See, also, Annotation in 31 A. L. R. 204. In the case at bar, the witnesses testified as to their observations and methods of comparison —whether physical or mental; and the acceptance of the reliability of such testimony became a matter for the jury to decide. The Court committed no error in admitting any of such evidence.

III. *The Grade of Larceny.* The value of the corn found in appellants' car was shown to be $44.75, and this value was enough to make the offense grand larceny,[2] if the jury believed the corn was stolen from Arnold's field. It is practically undisputed that the corn found in appellants' possession was stolen;[3] but it is claimed that a portion of it was stolen from some one other than Willis Arnold. The effect of this contention is that if appellants were guilty of anything, they were guilty of a series of petty larcenies, rather than one act of grand larceny. It is true that appellant Shoop testified that some of the corn came from Osborn's field; and it is also true that some corn was stolen by some one from Wofford's field: but it was for the jury to decide from whom appellants stole the corn found in their possession. There was ample evidence to warrant the jury's verdict that all of the corn found in the appellants' car had been

[2] Act No. 243 of 1949 amended § 41-3907 Ark. Stats. so that the value of the stolen property must now exceed thirty-five dollars in order for the offense to be grand larceny.

[3] In the brief for Shoop there is this statement: ". . . if the defendants took corn of Mr. Arnold, they had also taken corn belonging to some other person too and there were two distinct larcenies, the number of pounds and value in each larceny not being in evidence and nothing from which the jury could determine the number of pounds or value in each larceny . . ." In the Richardson brief, there is this statement: "Other corn was missing in the bottoms that night, however, the jury and the officers saw fit to assume the corn came from Mr. Arnold's field."

stolen from the field of Willis Arnold. The value of that corn would make the offense to be grand larceny.

Conclusion

We have examined all of the assignments of error in the two motions for new trial and find them without merit. Therefore, the judgment against each appellant is affirmed.

GARNER *v.* LOWERY, COUNTY JUDGE.

5-106 254 S. W. 2d 680

Opinion delivered February 9, 1953.

Wood & Chesnutt and *Ray S. Smith, Jr.*, for appellant.

R. Julian Glover, for appellee.

GEORGE ROSE SMITH, J. This is a taxpayer's suit brought by the appellant to prevent the county judge and other officers of Garland County from issuing bonds for the purchase of a county hospital and from levying a tax for its maintenance. The chancellor sustained a demurrer to the complaint and dismissed the suit.

The complaint alleges that in 1952 the county court entered an order by which it authorized the purchase of property known as the Methodist Hospital of Hot Springs, subject to the approval of the electorate. Later on the court employed an architect to prepare plans, specifications, and estimates of cost in connection with the purchase of the property and the construction of extensions thereto. These plans having been approved, the following proposal was placed on the ballot at the 1952 general election and was decisively approved by the voters: "$600,000 bond issue for the acquisition of the property formerly known as the Methodist Hospital of Hot Springs for a hospital for Garland County, and the construction of extensions thereto."

The complaint states that the county then gave notice that it would offer for sale $600,000 of bonds bearing interest at not more than 2.75% per annum, the purchaser to have the privilege of converting the bonds to a lower rate of interest upon such conditions that the county would receive no less and pay no more than it would have received and paid at the interest rate specified by the bidder. The bonds were sold to the highest bidder, who offered $600,707 for a $600,000 issue bearing interest at 2.15%. At the buyer's request the county agreed to convert the bonds to an issue of $619,500, of which $429,500 will bear interest at 1.75% and $190,000 will bear interest at 2%. It is conceded that the county's total payments of principal and interest on the converted

issue will not exceed what it would have had to pay had there been no conversion; in fact, there will be a saving of about $500.

The appellant contends that Amendment 17 to the constitution does not authorize a county to issue convertible bonds. We are unable to discern such a prohibition in the language of the amendment. Section 6 of Amendment 17 contains only two restrictions upon the issuance and sale of the bonds: they may not bear interest at more than 5%, and they must not be sold for less than par. It is hardly necessary to say that both these safeguards must be observed, but within these limitations the bonds may be sold "upon such condition and in such manner" as the county court may deem proper.

Nor does the conversion privilege run counter to the spirit of the amendment when, as here, the fact of conversion entails no additional expense to the county. The opportunity to convert the issue to a lower interest rate is evidently deemed valuable by prospective bidders and no doubt often enables the county to obtain an increased price in the sale of its securities. In many instances the legislature has expressly authorized the conversion of public bond issues; see, for example, Ark. Stats. 1947, §§ 13-1204, 13-1232, 21-639, 80-1106, and 80-1123. Under such a statute we have held that a percentage limitation upon a school district's bonded indebtedness applies only to the bonds as sold and not to the bonds as converted. *Lakeside Spec. Sch. Dist. etc.* v. *Gaines,* 202 Ark. 778, 153 S. W. 2d 149. We reasoned that "the total amount of the converted bonds, principal and interest, is the equivalent of the total amount, principal and interest, on the bonds contracted to be sold at the higher rate." We are guided by the same thought in our interpretation of Amendment 17.

A further suggestion, not urged in the briefs but raised in our study of the case, is that the ballot's designation of a "$600,000 bond issue" must be taken as a limitation on the principal amount of the bonds, whether converted or not. This thought has a degree of plausibility only because it fails to take into account the fact

that language may be placed upon a ballot for either of two purposes. On the one hand the ballot title may constitute an affirmative expression of the voter's will, as when he approves the levy of a tax "not to exceed 1½ mills." That phrase had appeared on the ballot considered in *Cisco* v. *Caudle, County Judge,* 210 Ark. 1006, 198 S. W. 2d 992, and we held that the county could not exceed the specified millage rate even though Amendment 17 permits a levy as high as five mills. "The electors might not know what a hospital would cost, but they would know what they are willing to pay in taxes to get one."

On the other hand, a ballot title is often intended primarily to provide the voter with condensed information about the issue he is asked to decide. In the case at bar we think the wording of the ballot falls clearly within this second category. Under Amendment 17 it is not necessary for the ballot to apprise the voter that a bond issue is contemplated, much less to specify its exact amount. *Rogers* v. *Parker, County Judge,* 211 Ark. 957, 203 S. W. 2d 401. While this ballot described a $600,000 bond issue, the interest rate was not even mentioned. Had a conscientious voter made a careful study of the law he would have learned that the bonds had to be sold at par and that the county judge might approve an interest rate as high as five per cent per annum. The voter, having approved the exercise of this much discretion by the county court, could not reasonably complain because the bonds bore only 2.15% interest instead of the maximum of 5%. Nor could he object to a converted issue that results in no added obligation on the part of the county. In casting his vote the elector is concerned with the future tax burden that he is assuming, not with the question of what part of that burden is to be technically denominated as principal and what part as interest.

The complaint asserts two other grounds for injunctive relief, but they may be disposed of quickly. It is argued that since Amendment 17 authorizes only "the construction, reconstruction, or extension" of a courthouse, jail, or hospital, the purchase of an existing hos-

pital is not contemplated. Of course the power to construct does not necessarily include the power to purchase, but that liberal interpretation has often been approved when the legislative intent was evidently directed to the fact of acquisition rather than to the method by which that result might be reached. *Ostrander* v. *City of Salmon,* 20 Idaho 153, 117 P. 692; *Verner* v. *Muller,* 89 S. C. 545, 72 S. E. 393; *Seymour* v. *City of Tacoma,* 6 Wash. 138, 32 P. 1077. The history of Amendment 17 shows that its purpose is to permit acquisition rather than to lay down a distinction between construction and purchase. In its original form this amendment applied only to courthouses and jails, and it was enough to authorize their construction, since such specialized structures are not to be had in the open market. Amendment 25 extended that authorization to include county hospitals, but there is no reason to suppose that in the case of hospitals the county was to be allowed to build but not to buy.

The final contention is that the county acted prematurely in submitting to the voters the issue of a hospital maintenance tax along with the proposal to purchase the Methodist Hospital. Amendment 32 recites that such a maintenance tax may be levied whenever "there is located a public hospital owned by" a county, and it is argued that the county did not own the hospital when the maintenance tax was authorized. We must reject this legalistic argument, as we do not think that the framers of Amendment 32 meant for a county hospital, whether constructed or purchased by the county, to lie idle until the next election, when a tax for its upkeep might lawfully be levied.

Affirmed.

McFaddin, J., dissents in part.

ARKANSAS POWER & LIGHT COMPANY *v.* MORRIS.

4-9961 254 S. W. 2d 684

Opinion delivered February 9, 1953.

B. Ball, House, Moses & Holmes and *Thomas C. Trimble, Jr.,* for appellant.

Paul K. Roberts and *J. R. Wilson,* for appellee.

J. SEABORN HOLT, J. Arkansas Power & Light Company brought three separate condemnation suits to acquire rights of way 100 feet wide, along with the privilege to cut, or move, certain danger trees adjacent thereto. The cases were consolidated for trial below and are so presented here. Appellees have cross-appealed. The conclusions we have reached make it unnecessary, as later pointed out, to consider appellees' cross-appeal.

The jury awarded the Griffins $1,500 for right of way over their property aggregating 9.336 acres, at a

value of $160.66 per acre. In the Morris case, the award was for $1,000 for the right of way amounting to 7.174 acres, or $139.39 per acre. In the Harris case (involving the Neal heirs), the jury awarded $1,100 for the right of way, 8.827 acres, or $126.62 per acre.

There appears to be no dispute as to the applicable rules of law applied by the trial court in these cases. The rule was reaffirmed by this court October 6, 1952, in *Texas Illinois Natural Gas Pipeline Company* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477, where we said: "Under the law of this State, the owner of land is entitled to be paid the full value of the land embraced within the right of way easement, as if the fee had been taken even though the landowner, after the pipeline was constructed, had the right to continue using the surface of the right of way for farming or other purposes not inconsistent with the use of the easement. Appellant acquired by the condemnation proceedings the power to make such use of the right of way as its future needs required for the purpose for which the right of way was condemned. *Baucum* v. *Arkansas Power & Light Company,* 179 Ark. 154, 15 S. W. 2d 399.

"Appellees were entitled to recover, in addition to the value of the land actually taken, for any loss of crops, both on the right of way and off, caused by appellant, and for any damages to appellees' other land, and decreased market value that they might be able to show by competent proof."

The instructions appear not to be questioned. A large number of witnesses testified for the interested parties on the question of the amount of damages and were allowed to give their opinions on land values.

For reversal, appellant, Power Company, says: "The Griffin Case should be reversed because: (1) The opinion testimony of Aubert Moseley was erroneously admitted when he was not qualified to render opinion evidence in regard to land values. (2) The testimony of F. T. Dearmon, Joe Griffin and Willie B. Griffin in regard to damages should not have been admitted for the

reason that it did not conform to the proper measure of damages. (3) The verdict was against both the law and the evidence. (4) The Court erred in permitting attorney for Griffins to place before the jury inadmissible testimony by asking leading questions of the witness, Roy McKinney.

"The Morris Case should be reversed because: (1) The opinion testimony of the witness, George Cruce, was erroneously admitted when he was not qualified to render opinion evidence in regard to land values. (2) The verdict was against both the law and the evidence. (3) The Court erred in permitting counsel for Morris to place before the jury inadmissible testimony by asking leading questions of the witness, Roy McKinney.

"The Harris Case should be reversed because: (1) The opinion testimony of the witness, T. A. Carter, was erroneously admitted because he was not qualified to render opinion evidence in regard to land values. (2) The testimony of T. A. Carter in regard to damages should not have been admitted for the reason that it was not rendered in conformity with the proper measure of damages. (3) The verdict was against both the law and the evidence. (4) The Court erred in permitting counsel for defendants in the Harris Case to place before the jury inadmissible testimony by asking leading questions of the witness, Roy McKinney."

We have many times announced the rule that one of the tests of the qualifications of a witness is his knowledge of the facts about which he may testify in cases such as now presented and have said that the admissibility of such testimony is a matter resting largely in the discretion of the trial court.

"Whether or not the qualification of a witness with respect to knowledge or special experience is sufficiently established is a matter resting largely in the discretion of the trial court, whose determination is usually final, and will not be disturbed by an appellate court, except in extreme cases where it is manifest that the trial court has fallen into error or has abused its discretion, and

that prejudice to the complaining party has resulted even though the appellate court might have decided differently if the question had been presented to it in the first instance." *Firemen's Insurance Company* v. *Little,* 189 Ark. 640, 74 S. W. 2d 777.

Our rule is also well established that in testing the sufficiency of the evidence to support the jury's award in condemnation proceedings, such as we have here, the verdict must be viewed in the light most favorable to the appellee, and when sustained by competent evidence we do not interfere. *(Texas Illinois Natural Gas Pipeline Company* v. *Lawhon,* above.)

We do not attempt to detail the rather voluminous testimony of the various witnesses on the question of damages occasioned by the taking of property by appellant. It suffices to say that we have reviewed their testimony and have concluded that the trial court did not err or abuse its discretion, in the circumstances, in admitting expressions of opinion as to damages in each case. The testimony of the above witnesses (about which appellant specifically complained), we think, showed sufficient knowledge of the facts about which they testified to make their testimony admissible and properly submitted to the jury for what it might be worth.

In each instance, appellant was afforded the opportunity to cross-examine all of appellees' witnesses bearing upon their knowledge of the facts about which they testified relating to land values and the damages accruing, and this it did rather thoroughly and vigorously. In the very nature of these three cases before us the measure of damages in each is largely a matter of opinion of the witnesses.

What was said by this court in *Malvern & Ouachita River Railroad Company* v. *Smith,* 181 Ark. 626, 26 S. W. 2d 1107, in an opinion by Judge Frank Smith, applies with equal force here. We there said: "We think no error was committed in permitting the witnesses to express their opinion, where it was shown that they had some knowledge of the facts about which they testified.

The measure of damages in such cases is, of course, the difference in value of the land before and after the construction of the railroad, excluding any enhancement of value by the building of the railroad, and in the very nature of the case this is largely a matter of opinion, and whether a witness has such knowledge of the facts as to make his opinion of any value is a question largely within the discretion of the trial judge, and the value of such testimony may be tested by a cross-examination of the witness as to the facts upon which the opinion is based."

We conclude, therefore, that in each of the cases presented there was competent, substantial evidence to support the jury's verdict. The verdicts do not appear excessive.

Having reached this conclusion, appellees concede that their cross appeal passes out of the case. Appellees say: "A decision of the case on its merits from a strictly legal point of view should be affirmed on the main appeal . . . In the event the Court takes that view of the case, the appeal by the defendants (appellees) of course will pass out of the picture altogether."

Affirmed.

WILSON *v.* BORDER QUEEN KITCHEN CABINET COMPANY.

4-10,000 254 S. W. 2d 682

Opinion delivered February 9, 1953.

Franklin Wilder and *Gutensohn & Ragon,* for appellant.

Shaw, Jones & Shaw, for appellee.

ED. F. MCFADDIN, Justice. This is a Workmen's Compensation case, and involves the time limit for filing a claim.

On August 22, 1949, James Wilson, (hereinafter called "Claimant") was engaged in pushing a load of lumber for Border Queen Kitchen Cabinet Company (hereinafter called "Employer") when some part of the lumber or truck injured claimant's knee. He was promptly sent to Dr. Knight, who treated him that day and also on September 2nd and September 10th of 1949. An X-ray disclosed no bone fracture. On the last mentioned day, the Doctor told the claimant he need not return unless his knee troubled him further. The claimant resumed work on September 1, 1949, and received no compensation—other than the aforementioned medical services[1] for his injuries.

Claimant continued to work for the employer; and on October 17, 1951—after a lapse of more than two years from the last medical treatment—claimant reported to the employer that the old knee injury had been causing trouble all along and had become serious. The employer promptly sent the claimant to the same doctor who had treated him in 1949, and the doctor's 1951 report reads:

"Examination revealed the knee to be swollen. There was atrophy of the thigh muscles showing the patient was definitely favoring the knee and that it was giving him trouble. Also on examination I was able to elicit a definite click which is quite indicative of torn meniscus. X-rays revealed an area in the condyle of the femur apparently where a fragment of bone had become detached. I felt that the patient's knee should be operated on . . ."

Because of the lapse of more than two years—September 10, 1949, to October 17, 1951—between visits to the doctor and present claim of impairment, the employer's insurance carrier denied liability; and on facts

[1] By the provisions of § 81-1302 (i) and § 81-1311 of the Pocket Supplement of Ark. Stats. (containing the 1948 Act), "compensation" means not only the money allowance, but also includes hospital and doctor bills.

as hereinbefore detailed, the Workmen's Compensation Commission denied the claimant an award, saying:

"Upon consideration of all the evidence, it is our opinion that the claimant's right to compensation is barred because the claim was not filed within two years following the date of accident, or one year following the last rendition of medical treatment by the respondents."

The Circuit Court affirmed the Commission; and we agree that the Commission was correct. Our Workmen's Compensation Law of 1939 provided in § 18 (a)[2]:

"The right of compensation for disability under this Act shall be barred unless a claim therefor is filed within *one year after date of the injury . . .*" (Italics supplied.) Under that section, we decided such cases as *Sanderson* v. *Crow,* 214 Ark. 416, 216 S. W. 2d 796; *Donaldson* v. *Calvert,* 217 Ark. 625, 232 S. W. 2d 651; and *T. J. Moss Tie & Timber Co.* v. *Martin,* 220 Ark. 265, 247 S. W. 2d 198.

But at the 1948 General Election, the People adopted Initiated Act No. 4, which changed the previously quoted language of the 1939 Act so that the law on the same point[3] now reads:

"A claim for compensation for disability on account of an injury . . . shall be barred unless filed with the Commission within two years *from the date of the accident* . . . In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one year from the date of the last payment of compensation, or two years from the *date of accident,* whichever is greater." (Italics supplied.)

The present case is governed by the 1948 law. It will be observed that the 1939 law stated that the time for filing a claim ran from "the injury," whereas the 1948 law (Acts 1949, p. 1420) says the time for filing a claim runs from "the accident." This distinction was

[2] As found in § 81-1318 (a) of the 1947 Volume of Ark. Stats.

[3] See Sec. 18 (a) of Initiated Act No. 4 of 1949 which may be found in Sec. 81-1318 of the Cumulative Pocket Supplement of Ark. Stats.

pointed out in *Donaldson* v. *Calvert, supra.* In the case at bar the accident happened on August 22, 1949, and the last medical services were rendered on September 10, 1949. The claim was not filed until October 17, 1951, so it was clearly barred by the applicable statute.

Affirmed.

JUSTICE HOLT not participating.

SHELTON *v.* GASTON.

4-9972 254 S. W. 2d 679

Opinion delivered February 9, 1953.

E. H. LaMore and *Oscar E. Ellis,* for appellant.

ROBINSON, Justice. This suit involves an alleged conversion of several head of cattle. The action was tried before a jury which rendered a verdict for the defendant; and the plaintiff in the trial court is the appellant here.

Appellant, G. P. Shelton, contends that he is the owner of certain cattle which he turned over to Antone Westall under an agreement whereby Westall would receive one-third of the increase, as consideration for looking after the cattle. On the other hand, Westall contends that not only was he to get one-fourth of the in-

crease but was to be the owner of one-fourth of the entire herd, as consideration for his services.

Westall, without the knowledge of appellant, sold one-third of the cattle to appellee, Carl Gaston. Soon after Shelton learned of the sale, he filed suit against Gaston for conversion. Upon trial the jury returned a verdict in favor of Gaston. On appeal Shelton claims the trial court erred in submitting to the jury the issue of whether a partnership existed between him and Westall.

Instruction C, given by the court, reads in part; "... there is evidence tending to show that the relationship of the witness, Antone Westall, and the plaintiff, G. P. Shelton, in connection with the cattle, was that of a partnership. If you believe, by a preponderance of the evidence, that a partnership and not a mere joint ownership, with regard to the cattle and the farm, existed between the plaintiff, G. P. Shelton, and the witness, Antone Westall, at the time the cattle were sold, by Westall, then in that event, Westall would have a right to sell the cattle ..." Instruction D defined a partnership. These instructions were given over the objection and exception of appellant.

There is no evidence in the record that justifies an instruction on a partnership. In fact, the record does not indicate that either side claimed a partnership existed.

From the pleadings in the case and the testimony of the witnesses, it appears that the only dispute between the parties is that appellant, Shelton, maintains Westall was to receive only one-fourth of the increase from the cattle as a consideration for looking after them, whereas Westall claims that he was to be paid, as such consideration, one-fourth of all the cattle.

Regardless of which one is correct in his contention, they would be co-owners and not partners. The Uniform Partnership Act, Ark. Stats., § 65-107 (2) and (3) provides:

"(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part

ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

"(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."

"In order to constitute a partnership it is necessary that there be something more than a joint ownership of property. A mere community of interest by ownership is not sufficient. This creates a tenancy in common, but not a partnership." *Garrett* v. *Roy Sturgis Lumber Company,* 201 Ark. 752, 146 S. W. 2d 701.

Reversed and remanded for a new trial.

MAY *v.* MAY.

4-9975 254 S. W. 2d 957

Opinion delivered February 9, 1953.

Richard W. Hobbs, for appellant.

WARD, Justice. On April 14, 1952, appellant filed suit against her husband, appellee, for a divorce. On May 13, 1953, appellee entered a special appearance challenging the jurisdiction of the court on the ground that appellant was not a *bona fide* resident and domiciliary of the State of Arkansas. On June 4, 1952, after a hearing on the issue thus raised, the trial court held for appellee, and appellant prosecutes this appeal.

The only question for this Court to decide is whether the decision of the trial court was against the weight of the evidence. The trial court found that the evidence failed to show appellant was a resident of Arkansas under the terms of the ninety days divorce law [*Ark. Stats.* § 34-1208], as heretofore interpreted by this Court, and we agree with this conclusion.

The only evidence in the record is the testimony of appellant and the exhibits introduced, and it shows substantially the following:

Appellant was married to appellee in Canada on October 11, 1941. She was at the time and is now a citizen of Canada, where her husband lives. About four and one-half months before her complaint for divorce in this case was filed, on January 6, 1952, she left Canada on a permanent visa and came to Hot Springs, Arkansas. On May 19, 1952, she filed in the United States District Court at Hot Springs a Declaration of Intention to become a citizen of this country. In this Declaration of Intention she stated, as she was required by law, that before she was admitted to citizenship here she would renounce all allegiance to any other sovereignty. She resided in an apartment, had a local bank account, had worked about two weeks at the local Merchant's Treas-

ury Chest, had registered at the local employment office for work, had paid a doctor bill for treatment, and had rented a typewriter for one month with which to practice typing.

There was other testimony indicating that she separated from her husband in April, 1951, and went to Nevada where she filed suit for divorce; that this action was dismissed and she returned to her husband but could not effect a reconciliation; that she was acquainted with a Walter Lowe in Jersey City, who had obtained a divorce in Hot Springs, but she had not seen him since August, 1951; that her mother had obtained a divorce in Reno; and that she inquired about a lawyer soon after arriving in Hot Springs, and within two weeks she consulted her present attorney about a divorce.

Appellant states that she prefers the United States over Canada, that she likes Hot Springs and intends to make it her home, and that she did not come here to secure a divorce.

In the light of the above we cannot say the Chancellor's finding was against the weight of the evidence. He had the appellant before him and so was in a better position than we are to determine the amount of credence to give her testimony. He was not compelled to treat her testimony as uncontradicted since she was, of course, an interested witness.

Since the decision rendered in the case of *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, it is well recognized that the requirements as to proof of residence in this kind of case are stricter than had previously been approved. As this opinion holds, it is necessary here that appellant must in fact and in truth be a *bona fide* resident of Arkansas and that such residence must be shown by overt acts sufficient to demonstrate a real and *bona fide* intent to acquire such a residence. Overt acts in this connection mean something more than acts consistent with a latent intent to reside some place temporarily. None of the things appellant has done here are calculated to make it particularly inconvenient or embar-

rassing, financially or otherwise, to leave Hot Springs at any time. These facts may be considered also in connection with the holding in *Kirk* v. *Kirk,* 218 Ark. 880, 239 S. W. 2d 6, where it was said "... that proof of residence must be corroborated the same as any other essential fact."

The one act of appellant shown here which might be considered "overt" and in some measure corroborative is, we think, not persuasive, for several reasons. We refer to the fact that she has applied for citizenship in the United States and that she says she has renounced citizenship in Canada. In the first place, her application for citizenship here was filed more than a month after her divorce suit was filed. In the *Cassen* case, *supra,* it was said: "This essential as to a *bona fide* residence must exist not only at the time the decree is rendered, but also must have existed at the time the suit was filed." Moreover, the matter of acquiring citizenship here, while ordinarily significant, is a process that extends over a period of years and may be withdrawn at any time. When appellant says she has renounced citizenship in Canada, she must be referring to the fact that in filing a Declaration of Intention to become a citizen of the United States, it was incumbent upon her to state that she would renounce citizenship in Canada before being granted citizenship here. Consequently, appellant's said act and assertion, like the other incidents shown by the record, cannot be said to be conclusive of her intent to become a *bona fide* resident of Arkansas.

In accordance with the views expressed above, the decree of the trial court is affirmed.

Robinson, Justice (dissenting). The majority opinion holds that the evidence in this case does not prove appellant is a resident.

The law provides that a person may maintain a suit for divorce in this State after a ninety-day residence has been established. If the evidence in this case does not prove residence on the part of appellant, then it is hard to understand how a person could ever prove themselves

to be a resident of the State after they have lived here only ninety days.

Appellant has applied for citizenship in the United States. If she is not a resident of Hot Springs, she is not a resident of the United States because she is not living anywhere else in this country. When the Federal court passes on her application for citizenship, no doubt it will hold that she was a resident of Garland County, Arkansas, at the very time this court is now saying she is not a resident.

In my opinion she has proven herself to be a *bona fide* resident of Garland County, Arkansas, and I therefore respectfully dissent.

MASSEY *v.* POTEAU TRUCKING COMPANY.

4-9991 254 S. W. 2d 959

Opinion delivered February 16, 1953.

Robinson & Edwards, for appellant.

Shaw, Jones & Shaw, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether—as a matter of law based, as it is contended, on undisputed facts—an injured workman who sought compensation under Act 319 of 1939, as amended, (and whose claim was rejected by the commission and circuit court) was an employe of a sub-contractor; or, conversely, was he engaged to do a specific task according to his own methods, without being subject to control except as to results? See *Ice Service Company* v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 411, cited in *Hobbs-Western Company* v. *Carmical,* 192 Ark. 59, 91 S. W. 2d 605.

Leonard W. Massey filed his claim alleging accidental injuries within the meaning of the Compensation Act while the relationship of employer and employe existed in respect of duties owed Poteau Trucking Company in 1950.

Ben M. Hogan Company held a state highway department contract to surface part of Highway 59 north of Van Buren. Arkhola Sand & Gravel Company maintained a mixing plant at Van Buren and sold the prepared asphalt to Hogan; and Hogan, in turn, arranged with Poteau to transport the mixture to the point of use. Necessarily, as construction progressed, distance from Arkhola to the point of application increased. Hogan's haulage commitment was to pay Poteau five and a half cents per ton mile. Nature of the so-called "mix" required prompt delivery, but Arkhola's production capacity varied as water content of the sand it utilized increased or decreased. Poteau, domiciled in Oklahoma, sent five of its trucks for use in delivering the material.

Certain local truckowners sought procurement of contracts when it became apparent that Poteau would be unable to handle maximum needs, and these truckers were at times permitted to participate in deliveries. One so employed was Massey, and the commission found from competent evidence that as owner of a truck he did public hauling.

The testimony indicates that the local truckowners persistently applied for positions at the chute where the mixture was supplied, and during a period of several days some were permitted to take loads—an operation supervised by a highway department inspector. An Arkhola representative acted with this employe. A requirement was that the inside of truck bodies be treated with a lubricant to prevent asphalt from adhering. Initially this lubricant was furnished by Arkhola, but when its supply became exhausted a drum belonging to Poteau was utilized. Another "must" was that each load be covered with a tarpaulin. In the case here Massey furnished his cover.

A commission finding is that Poteau did not repair any of the local trucks, but its auto mechanic supervised the five it owned and kept them in order. Drivers of these trucks were paid salaries computed on an hourly basis from which social security charges and other mandatory deductions are shown.

When appellant's truck was loaded he took it to scales maintained by the City of Van Buren. Through state arrangements local truckers would obtain triplicate tickets showing tonnage. A copy or original was delivered to Arkhola, Hogan, and the trucker. Massey forwarded his accumulated tickets to Poteau and received payment at four and a half cents per ton mile. This gave Poteau a *prima facie* profit of one cent per ton mile. Massey was paid $122.12 without deductions for social security or otherwise.

In addition to Massey's operations, six other truckers did hauling on the Hogan job, receiving pay checks from Poteau ranging from $69.11 to $646.48.

Massey's accident occurred late August 15th after he had delivered his load. In returning to Van Buren his truck slipped or skidded, then overturned. A sentence in the commission's statement of the case is that "The evidence is in conflict whether the claimant was on his way home or whether he was on his way back to the mixing plant". The factual finding is that Massey was not Poteau's employe when the injury occurred.

Was Massey an employe of Poteau, the sub-contractor?

The rule for determining which of the two relationships exists is that if there is nothing in the contract showing an intent upon the part of the employer to retain control or direction of the manner or methods by which the party claiming to be independent shall perform the work, and there is no direction relating to the physical conduct of the contractor or his employes in the execution of the work, the relation of independent contractor is created. The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employe shall work in the discharge of his duties, then the relation of independent contractor exists. *Moore and Chicago Mill & Lumber Company* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722.

A decision where the facts are strikingly similar to those here is *Wren* v. *D. F. Jones Construction Company,* 210 Ark. 40, 194 S. W. 2d 896. Wren's widow claimed compensation for her husband's death and the defending construction company denied that Wren was its servant. The court's opinion is summarized in Headnote No. 9: "Where the deceased was engaged to haul gravel for appellee at $3 per load, appellee loading the truck and showing the deceased where to dump the gravel, the finding by the commission that the deceased was an independent contractor is supported by substantial evi-

dence". The opinion calls attention to *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620, where it was said that in determining whether one claiming benefits is an employe or an independent contractor the compensation Act must be given a liberal construction in favor of the workman, "and any doubt is to be resolved in favor of [the claimant's] status as an employe rather than an independent contractor".—*Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674.

But we have consistently held that no rule of unvarying application can be formulated for ascertaining whether a workman is a servant or an independent contractor, "and each case must be determined upon its own peculiar facts".

Mr. Justice R. W. Robins wrote a strong dissenting opinion, pointing to his disagreement with the majority's findings in the Wren-Jones case. He was joined by Mr. Justice Millwee. The dissent emphasizes this court's duty to adjudge whether the evidence is undisputed, but in considering the factual structure, including reasonable inferences, there must be a "liberal" construction.

"Liberal construction", as judicially applied under legislative mandates dealing with remedial rights, has a somewhat dubious connotation. The phrase cannot, of course, mean that a court is to take liberties with what one litigant is entitled to at the expense of another, yet this would seem to be the meaning of language found in *Glen Falls Portland Cement Company* v. *Van Wirt Construction Co.,* 228 N. Y. S. 289, 299, 132 Misc. 95. The court there said: "The required liberal construction means a construction in the interest of those whose rights are to be protected". We prefer the more reasonable definition by Mr. Justice Fairchild of the Wisconsin Supreme Court, *State, ex rel. Mueller* v. *Common School Board,* 208 Wis. 257, 242 N. W. 574, who said that liberal construction consists in giving statutory words a meaning "which renders [the Act] effectual to accomplish the purpose or fulfill the intent which it plainly discloses".

Excerpts from selected cases dealing with liberal construction are to be found in Words and Phrases, v. 25, pp. 118-19. Some of the expressions are: "[The] term 'liberal construction' means to give statutory language its generally accepted meaning, to the end that most comprehensive application thereof may be accorded, without doing violence to any of its terms". *Maryland Casualty Co.* v. *Smith,* (Texas) 40 S. W. 2d 913. And again: "Liberal construction does not mean enlargement or restriction of any plain provision of law. If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction may be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice". *In re Johnson's Estate,* 33 P. 460, 466, 98 Cal. 531, 21 L. R. A. 380; *In re Jessup,* 22 P. 742, 745, 81 Cal. 408, 6 L. R. A. 594.

So here, in construing an individual's rights under the Workmen's Compensation Law, the clear purposes of the Act must be enforced, and the legislative intent should be ascertained from what is written; but where obscurity of expression and inept phraseology appear and a restrictive construction would have the effect of defeating praiseworthy purposes that undoubtedly actuated the lawmaking body, then resort may be had to the rule of liberal construction in furtherance of a composite whole.

Appellant's counsel discuss the testimony of Poteau's foreman to the effect that if Massey had refused to do something asked of him he would have been discharged. It has been held that "the right to hire and fire" may be *considered* in ascertaining whether the relationship is that of independent contractor or master and servant. However, it is not conclusive unless from all transactions the fact-finders decide that reservation of this right is tied with control of means or methods whereby the work is done, and then only if the right of discharge may in reason be said to influence physical operations. Here

the foreman thought that the duty enjoined upon Massey and other local carriers was of such a simple nature that directions were dispensed with—not even considered; and assuredly, when the truck overturned, Massey was in full control uninfluenced by any directions as to speed, road conditions, or other factors that conceivably could have contributed to the accident.

Section 6 of Act 319 of 1939 was discussed in an opinion written by Mr. Justice Leflar, *Brothers* v. *Dierks Lumber & Coal Co.,* 217 Ark. 632, 232 S. W. 2d 646. Although the decision was in 1950, the cause of action originated in May, 1948. Initiated Act No. 4, (now § 81-1306, Ark. Stat's, Supplement) became effective in 1949.

The record discloses an agreement that the Hogan Company and its liability carrier should be dismissed.

Initiated Act No. 4, Ark. Stat's, § 81-1306, makes the prime contractor liable where a sub-contractor fails to secure compensation. The section, in part, reads: "Any contractor or his insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employe of his sub-contractor may recover from the sub-contractor the amount of such compensation paid or for which liability is incurred. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such prime contractor. A claim for recovery, however, shall not affect the right of the injured employe or the dependents of the deceased employe to recover compensation due from the prime contractor or his insurance carrier".

With elimination of Hogan we deal only with Poteau and the compensation carrier. The case was tried upon the correct assumption that Poteau had a right to employ a servant or an independent contractor, and in view of facts to which the commission pointed we are unable to say there was no substantial basis for the determination

it made. This being true circuit court did not err in refusing to disturb the order.

Affirmed.

AMERICAN BUS LINES, INC., *v.* MERRITT.

4-9968 254 S. W. 2d 963

Opinion delivered February 16, 1953.

Wrape & Hernly, Rieves & Smith, Daggett & Daggett, Chandler, Shepherd, Haiskell & Williams and *J. H. Spears,* for appellant.

Matthews, Walsh & Thompson and *Barrett, Wheatley, Smith & Deacon,* for appellee.

ROBINSON, Justice. This appeal grows out of a lawsuit, in which appellee, Merritt, was awarded a judgment of $6,000 for property damage and $40,000 for personal injuries. Such damage and injuries resulted from a head-on collision between a truck owned and operated by Merritt, and a truck owned by appellant, Dacus Lumber Company, and driven by its operator, Sam Slayton. The collision occurred when Slayton attempted to go around an American Bus Lines passenger coach which had been stopped by the driver, Albert Earl Cooper, on a paved portion of the highway.

About 8:30 A.M. on November 22nd, 1951, a bus owned by appellant, American Bus Lines (hereinafter referred to as "the bus company"), was proceeding north on Highway 61, about three miles north of Marion, Crittenden County, Arkansas. The bus stopped to discharge two passengers. At the point where it stopped the hard-surfaced portion of the road is twenty feet in width, and the shoulder on the east approximately ten feet in width, four feet of which is gravel. The vehicle stopped just beyond the intersection of Highway 61 and a county road. The latter road to the west of the highway is gravel and widens out to approximately one hundred feet where it joins Highway 61. About fifty feet east of Highway 61 are the Frisco Railroad tracks which the county road crosses going east. The terrain is flat in the vicinity of the place where the bus stopped. However, there is a slight rise in the highway, reaching its high point about fifty feet south of the center of the intersection of the county road and Highway 61.

There is conflicting testimony of the witnesses as to the exact spot where the bus had stopped at the time

of the collision. One witness claimed the bus had stopped forty feet north of the center of the intersection between Highway 61 and the county road, another witness maintained it was sixty feet, and the driver of the bus stated it was a hundred and ten feet. But it is established that when the bus stopped it was partly on and partly off the pavement. A wine colored automobile, the driver of which was never located, stopped behind the bus. While the bus and the automobile were in that position, the Dacus log truck approached from the south, and the Merritt refrigerator truck approached from the north. The driver of the Dacus truck drove over to the west side of Highway 61, for the purpose of passing the automobile and the bus, and collided head-on with the Merritt truck, which was traveling south on its side of the highway. Both trucks were practically demolished. Slayton, the driver of the Dacus truck, was slightly hurt and Merritt, the driver of the other truck, was severely injured.

Dacus and Slayton filed suit in Crittenden County against Merritt, a resident of Florida, and also against the bus company and its driver, Cooper, alleging negligence on the part of the bus company and Cooper in stopping the bus on the paved portion of the highway, and alleging that Merritt was negligent in driving at a dangerous and reckless rate of speed. Merritt answered, denying the allegations of negligence on his part, and filed a cross-complaint in which he alleged that he had received severe injuries in the collision and that the collision was due to the joint negligence of the bus company because its driver, Cooper, stopped the bus on a paved portion of the highway, and negligence on the part of the Dacus Lumber Company and its driver, by reason of Slayton's driving over onto the west portion of Highway 61 at a rapid and reckless rate of speed. The bus company denied any negligence on its part.

It was stipulated that the damage to Merritt's truck amounted to $6,000. The jury returned a verdict for Merritt against the Dacus Lumber Company and its driver, Sam Slayton, and the American Bus Lines and its driver, Albert Earl Cooper, jointly, and fixed the

damages at $46,000, $40,000 of which was for personal injuries and $6,000 for property damage. The jury also apportioned the blame equally between Sam Slayton and the Dacus Lumber Company, on the one hand, and Albert Earl Cooper and the American Bus Lines, on the other hand. The bus company and its driver, Cooper, and the Dacus Lumber Company and its driver, Slayton, have appealed.

The bus company urges for reversal: that there is no substantial evidence to support a judgment against it; that the court erred in giving the jury an instruction regarding the statute about a vehicle stopping on the highway; that the court erred in giving Merritt's requested instruction number 2, which deals with the duty of those using the highway; that the court erred in refusing to give the bus company's requested instruction number 8, which deals with the momentary stopping of the bus on the highway; and it is claimed that the verdict is excessive.

The Dacus Lumber Company and its driver, Slayton, urges for reversal: that there is no substantial evidence to support the verdict against them; that the verdict is excessive; and that the court erred in failing to give their requested instructions numbers 3, 4 and 5, concerning the damages.

It is first contended by the bus company that there is no substantial evidence of any negligence on its part. But we do not agree. Negligence is the doing of that which an ordinarily prudent person would not do under the circumstances, or the failure to do that which an ordinarily prudent person would do under the circumstances.

The jury could have found from the evidence that the bus could have been driven entirely off the paved portion of the highway on the east side to discharge the passengers; or that the bus could have stopped about fifty feet before it reached the intersection of the county road, where there was more room on the shoulder to stop, and the bus could have been entirely removed from

the pavement before stopping; or that the bus could have been driven onto the west side of Highway 61, where there was ample space on the graveled portion of the county road for the bus to discharge its passengers, and that stopping the bus on the much traveled Highway 61, and consequently blocking a portion of the pavement and leaving less than twenty feet for other users of the road, was doing something that an ordinarily prudent person would not have done in the circumstances. Therefore, the court was justified by the evidence in the case in giving instruction number 2, which told the jury it was authorized to find against the bus company, in the event it should find the bus driver negligent in stopping the bus when and where he did stop it.

Appellant, bus company, stoutly complains of the court's action in giving instruction number one requested by Dacus, which is as follows:

"You are instructed that persons using the highways of this State are required to observe the laws with respect to traffic and highway usage in general. It is unlawful for them to do any act forbidden, or fail to perform any act required, by the highway traffic statutes of this State.

"You are further told that upon any highway outside of a business or residence district in this State no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of such highway, but in every event a clear and unobstructed width of at least twenty feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available for a distance of three hundred feet in each direction upon such highway.

"Therefore, if you find from a preponderance of the evidence that Albert Earl Cooper, while on duty for his employer, American Bus Lines, Incorporated,

stopped the passenger bus on the paved, improved, or main traveled part of Highway Number 61 when it was practical to stop it off such portion of said highway; or, if you find from a preponderance of the evidence that he stopped said bus in such position that there was not remaining a clear and unobstructed width of at least twenty feet of such highway opposite his bus for the free passage of other vehicles, then you are instructed that this is evidence of negligence on the part of the said Albert Earl Cooper and American Bus Lines, Incorporated, which may be considered by you, along with all other facts and circumstances revealed by the evidence, in determination of their ultimate liability or non-liability to all persons injured or damaged by their acts in this connection."

This instruction is based on Ark. Stats., § 75-647, which reads as follows:

"Stopping, standing, or parking outside of business or residence districts.—(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of 300 feet in each direction upon such highway.

"(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leave such disabled vehicle in such position."

It is the contention of the bus company that the above quoted statute is not applicable to a situation where there is only a momentary stop, as they say existed

when the bus stopped merely long enough to discharge two passengers. To sustain their position in this respect, they rely, to a large extent, on the case of *A. S. Barboro & Company* v. *James,* 205 Ark. 53, 168 S. W. 2d 202. The facts in that case are quite similar to the facts in the case at bar, but there is a distinction by reason of which the Barboro case is not controlling here. In that case the Barboro truck driver slowed down, with the intention of turning to his left, across the highway, for the purpose of going to a store located to the left. Here, the bus company's vehicle stopped on the pavement for the purpose of unloading passengers. It was held in the Barboro case that it was an error to instruct the jury with regard to the statute providing ". . . no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles. . . ." This court held that the statute was not applicable in the situation there presented.

A common sense interpretation must be placed on the statute. It was said in *Cohen* v. *Ramey,* 201 Ark. 713, 147 S. W. 2d 338: "The short or temporary stop that Flora Ramey made to allow two cars close to her to pass did not in any sense amount to a parking or stopping on the roadside. It was a momentary or temporary stopping and a thing she had to do before she could continue the turn to the east side of the road she was making. . . . She had the superior right to the use of the highway in the turning movement of her car. . . ."

To hold that the statute applies to a situation like the Barboro case would be placing a construction on the statute that was never intended. There it was necessary for the driver of the vehicle to turn to his left, across a highway, to reach his destination. Hence, to hold here, as we are doing, that the statute is applicable

does not impair the Barboro case because the factual situation is different. Barboro stopped to permit an approaching vehicle to pass him before he turned across the highway. He may have been negligent if he had done any less. Here, the exigencies of the traffic situation did not require the bus to stop at all. It merely stopped to discharge two passengers and, according to the evidence, it could have been completely removed from the paved portion of the highway in the situation that existed.

The statute provides: ". . . no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway *when it is practical to stop, park, or so leave such vehicle off such part of said highway*. . . ." (Italics our own).

Every case must be decided on its own facts; and in some cases, as here, it becomes a question for the jury as to whether it is practical to stop the vehicle off the highway. In others, as the Barboro case, where it is obvious that it would have been impractical to remove the car from the pavement before stopping to permit the passage of another vehicle before turning to the left, and where reasonable minds cannot reach any other conclusion, then it becomes a matter of law that the statute is not applicable. But here, where reasonable minds may differ as to whether it is practical to remove the vehicle from the pavement before stopping, it becomes a question for the jury, and the statute may be taken into consideration in determining whether there was negligence in stopping the bus on the pavement.

Also, appellant, bus company, cites Blashfield 2A, Permanent Edition, § 1197: "The words 'to park' or 'to stop' in a statute prohibiting the parking of cars in the highway, mean something more than a mere temporary or momentary stoppage on the road for a necessary purpose. Accordingly . . . stopping momentarily to permit a person to board or alight from a vehicle . . . does not constitute a violation of such a

statute. . . ." The only authority cited for that text is *American Company of Arkansas* v. *Baker,* 187 Ark. 492, 60 S. W. 2d 572. This case was decided in 1933 prior to the adoption of our present statute in 1937. The principal distinction between the two statutes is that the 1927 statute prohibited the "parking" or "leave standing" and also provided that fifteen feet of the main portion of the highway should be left unobstructed, whereas the 1937 statute provides that no person shall "stop, park or leave standing," and also provides for an unobstructed width of at least twenty feet.

Appellants recognize that the Baker case was decided prior to the adoption of our present statute which prohibits the stopping of a vehicle, as well as the parking or "leave standing" of such vehicle, but maintain that the Barboro case, which was decided subsequent to the passage of the 1937 act, is authority for the contention that the addition of the word, "stop," and the further provision for leaving twenty feet of unobstructed road instead of fifteen, were of no consequence. But the Baker case is only authority for the principle that the statute is not applicable where, as a matter of law, the exigencies of the situation excuse the stopping. In that case a truck had become mired in mud on a road covered by water and an accident occurred when another truck stopped on the highway in an attempt to aid the stalled vehicle. There the exigencies of the situation were such that the statute prohibiting parking or "leave standing" on the highway was not applicable; and it was so held in that case.

Blashfield also says: "Under the usual statute against parking, stopping, or leaving standing, the prohibition includes a temporary halt, unless the stop is justified. Such an act may not involve 'parking' but it is 'stopping' or 'leaving standing.' The fundamental problem is one of *justification.*" (Italics our own.) The text cites the Supreme Court of New Hampshire as follows: "The legislature intended to make illegal any voluntary stopping of a vehicle on the highway for any length of time, be that length of time long or short, ex-

cept, of course, such stops as the exigencies of traffic may require."

We have concluded that when all the facts and circumstances are taken into consideration, the court did not err by instructing the jury in regard to the statute prohibiting stopping on the paved portion of the highway.

As to the contention of Dacus Lumber Company that there is no substantial evidence of negligence on the part of its driver, Slayton, there is no merit to this claim. There was an attempt to show that the driver of the Dacus truck could not see the bus because of the slight rise in the highway, but this evidence is not convincing, nor would it be, even if true, a defense that would call for a directed verdict in favor of the Dacus Lumber Company and its driver. In fact, the evidence is overwhelming to the effect that Slayton was negligent and that his negligence contributed to cause the accident.

The evidence is equally as convincing that there was no negligence whatever on the part of Merritt, who was driving at a lawful and reasonable rate of speed, in a proper manner, on his own side of the highway when, without any warning, the Dacus truck turned out from behind the stopped bus and the wine colored automobile and met him head-on.

Also, the court correctly instructed the jury as to the measure of damages. Dacus and Slayton's instructions numbers 3 and 4 pertain to Merritt's duty to minimize his damages. There was no evidence that he had failed to minimize the damages, and instruction number 5 was so lengthy, involved and argumentative that the court was fully justified in refusing to give it.

The next point is that of appellants' claim of excessive damages. It is stipulated that the damage to Merritt's truck amounted to $6,000, so there is no issue on that question. However, the jury returned a verdict assessing the damages for personal injuries suffered by Merritt at $40,000, which appellants say is excessive.

According to the evidence, at the time of the collision Merritt was 36 years of age. He was engaged in the business of trucking, farming and ranching and his annual earnings were between $10,000 and $12,000. The nerve which controls the deltoid muscle in his left arm was permanently injured, with the result that he can no longer use that arm for manual labor. Shortly after the collision Merritt, who was rendered unconscious, was removed to a hospital at West Memphis. He was in a state of shock and had lost considerable blood. It was necessary to give him transfusions, consisting of five pints of blood and plasma. It was ascertained that he was bleeding internally and just as soon as the doctors felt it was safe to do so, they performed an operation, whereby a long incision was made enabling the physicians to explore the abdominal cavity. They discovered that the spleen was bleeding to such an extent that the hemorrhage could not be stopped without removing that organ, and this was done. In addition, they found it necessary to remove about fourteen inches of his intestines. As a result of this operation, adhesions may form which could cause considerable trouble. Some of his ribs and a shoulder blade were broken.

The only kind of work he knows how to do, trucking, farming and ranching, calls for hard labor. There is evidence to the effect that he has between a forty and fifty per cent disability which is permanent. He has an expectancy of about thirty-one years. According to the evidence, he had an income, as heretofore stated, of between $10,000 and $12,000 a year. If his earning capacity is diminished $3,000 per annum, which would be considerably less than forty or fifty per cent, as proven by the evidence, and his expectancy is multiplied by such diminished earning capacity and then reduced to its present value, it would amount to more than the $40,000 judgment, to say nothing of the pain and suffering which the evidence shows he has undergone.

Appellants have cited some cases where the judgments have been reduced when apparently the injuries were as severe as the one involved here. However, it is

a matter of common knowledge that the value of a dollar is much less today than a few years ago, and on the whole case we cannot say that the judgment is excessive or that there is any error.

Affirmed.

GRIFFIN SMITH, C. J., not participating.

HAERING OIL COMPANY, INC. *v.* BEASLEY.

4-9965 254 S. W. 2d 951

Opinion delivered February 16, 1953.

H. A. Tucker, for appellant.

Wootton, Land & Matthews, for appellee.

ED. F. MCFADDIN, Justice. After hearing all the evidence, the Chancery Court dismissed the plaintiff's case for want of equity; and the correctness of that ruling is the point at issue on this appeal.

Appellant, The Haering Oil Company, Inc. (hereinafter called "Haering"), was the Bulk Sales Agent,

originally for "Shell" petroleum products, and later for "Pan-Am" petroleum products. Appellee Beasley owned a filling station in Hot Springs; and in September, 1947, signed a contract with Haering to sell the products for which the latter was the Bulk Sales Agent. The said 1947 contract provided, *inter alia:*

"Duration of Agreement. This agreement shall remain in full force and effect for a period of (1) one year, beginning September 1, 1947, and ending August 31, 1948, and thereafter from year to year subject to termination by either party at the end of the first year or any subsequent year on thirty (30) days' prior written notice."

Beasley handled Haering's products until March 23, 1949, and then commenced handling "Lion" petroleum products. On March 21, 1950, Haering filed the present suit against Beasley, praying, *inter alia,* for damages for breach of contract: the theory being, that the contract could not be terminated except on August 31st of any year and that Beasley owed Haering damages from March 23, 1949, to August 31, 1949. Beasley's defense was that the contract had been terminated by mutual consent; and the decree of the Chancery Court so found.

According to the 1947 contract, Haering was to furnish equipment (consisting of hydraulic lifts, tanks, pumps and air compressor) to be used by Beasley for the sale of Haering's products; also Haering was to furnish all the petroleum products that Beasley sold at the filling station during the continuation of the 1947 contract. On February 22, 1949, Beasley wrote Haering:

"It is my desire to purchase all my petroleum products in the future from the Lion Oil Company.

"I will appreciate it if you will invoice all of your equipment at my place to the above company."

In accordance with the said letter, Haering (a) invoiced (*i. e.* sold) his equipment at the Beasley Service Station to the Lion Oil Company, and (b) discontinued supplying Beasley with petroleum products on March 23, 1949.

There was some office equipment not described in the 1947 contract, and Beasley returned this to Haering.

Thus by mutual consent, the 1947 contract was terminated by Beasley and Haering on March 23, 1949, even though it was not the anniversary date of the contract. It is evident that when Haering, in accordance with Beasley's letter of February 22, 1949, sold the equipment to the Lion Oil Company and ceased furnishing petroleum products to Beasley, Haering thereby agreed to the termination of the 1947 contract. There was mutuality in the cancellation. Haering's sale of equipment to the Lion Oil Company was entirely inconsistent with his present claims under the 1947 contract.

In *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379, we said:

"It is well settled that the parties to a contract may at any time rescind it in whole or in part by mutual consent, and the surrender of their mutual rights and the substitution of new obligations is a sufficient consideration."

In *Afflick* v. *Lambert,* 187 Ark. 416, 60 S. W. 2d 176, we said:

"It is therefore a well settled rule of this Court that any parties who can make a contract can rescind or modify it by mutual consent. If they are capable of making the contract in the first instance, they may by mutual consent modify it in any manner. Parties to a written contract may rescind it by oral agreement, or they may modify it by oral agreement. Black on Rescission & Cancellation, vol. 1, p. 20; 13 C. J. 593; 6 R. C. L. 914."

To the same effect, see *Myers* v. *Myers,* 211 Ark. 743, 202 S. W. 2d 596. See, also, 13 Am. Jur. 981 *et seq.*; 17 C. J. S. 878 *et seq.*; and discussion in Restatement of the Law of Contracts, § 406 *et seq.*

The Chancery Court found that Haering and Beasley terminated the 1947 contract by mutual consent. The decree is correct, and is in all things affirmed.

TOWNSON, EXECUTOR *v.* TOWNSON.

4-9974 254 S. W. 2d 952

Opinion delivered February 16, 1953.

[redacted]

Chas. F. Cole, for appellant.

W. D. Murphy, Jr., for appellee.

GEORGE ROSE SMITH, J. In this case the principal question is whether a widow, after having filed a declaration of her decision to take under her husband's will, may later change her mind and elect to renounce the will. The trial court permitted the appellee to alter her position, and by this appeal the executor asks us to reverse that decision.

The appellee's husband, J. H. Townson, died on February 12, 1951, and his will was admitted to probate. On February 15 Mrs. Townson filed with the probate clerk an instrument by which she declared that, with full knowledge of her right to a larger share in the estate, she elected to take only that property left to her by her husband's will. On August 9, 1951, Mrs. Townson filed a second pleading by which she undertook to rescind her earlier action and to renounce the will. In this pleading she asserted that her election to abide by the will was

not binding on her as a matter of law and that her signature to the first instrument had been obtained by fraud. A demurrer to this second pleading having been overruled, proof was taken on the issue of fraud. The court, without making an express finding upon the question of fraud, entered a judgment upholding the widow's right to renounce the will and claim dower.

We must, to begin with, sustain the appellee's motion to strike the bill of exceptions, for the reason that it has not been approved by the probate judge. The Probate Code provides that the procedure in the probate courts shall be the same as that in courts of equity, Ark. Stats. 1947, § 62-2004 (e), and under this provision we have held that a chancery statute enacted after the adoption of the Code is applicable in probate cases. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. Hence it was essential that the bill of exceptions be approved within the time allowed by Act 139 of 1951, Ark. Stats., § 27-1758. *Meadows* v. *Costoff, ante,* p. 273, 252 S. W. 2d 825.

In the absence of a bill of exceptions we are limited to the consideration of errors appearing on the face of the record, but the principal question in the case so appears. By demurrer to the widow's second pleading the executor challenged her right to rescind her election to take under the will, and all facts pertinent to this issue are admitted by the demurrer.

The Probate Code, while containing several sections governing a widow's privilege of renouncing her husband's will, is silent as to the legal effect of her filing an election to take under the will. We take this omission to be deliberate, since the filing of an election to take under the will is often of little consequence. That is, by taking no action at all the widow presumably expresses her satisfaction with the will; so the filing of an express statement to that effect, at least until it has been relied upon, brings about no change in her position.

We see no reason for the widow to be irrevocably bound by such an election. In the opposite situation, wherein the widow has first chosen to renounce the will,

the legislature has been liberal in permitting her to change her mind. Unless a distribution of the estate has been made in reliance upon her renunciation the widow may revoke her action at any time within the period originally allowed for her decision. Ark. Stats., § 60-506. This section is evidently designed to enable the widow to make her choice with the fullest possible information concerning the course that will be to her best interest. Since the widow is free to revoke her initial renunciation of the will, we think it plain that she is equally free to rescind her relatively unimportant decision to take under the will. There having been no distribution in reliance upon Mrs. Townson's first action the court below correctly allowed her to change her mind.

Affirmed.

SOUTHARK TRADING COMPANY *v.* PESSES.

4-9982 254 S. W. 2d 954

Opinion delivered February 16, 1953.

Jabe Hoggard and *Crumpler & O'Connor,* for appellant.

Stein & Stein and *J. S. Brooks,* for appellee.

J. Seaborn Holt, J. This action was begun in the Circuit Court by Southark Trading Company against appellees, Pesses and Miller, to obtain a judgment on two notes amounting to $1,409.30 (principal and interest), which had been executed by appellees to C. R. Olson and wife, and by them transferred and assigned to appellant, Southark. The cause was later transferred to equity. Pesses and Miller answered the complaint, admitting the execution of the notes, and in a cross complaint asked that C. R. Olson and wife be made defendants, and alleged that the two notes had been delivered to the Olsons in part payment of all the stock and assets of Concrete Products Company, a corporation owned by the Olsons, which had been purchased by appellees from Olsons and that following the purchase appellees were required to pay to the United States Government $1,172.02 on a deficiency assessment on income taxes levied against the corporation and this amount which they were required to pay should be offset against the amount they owed Southark on the two notes.

Trial resulted in a decree in favor of appellees. The findings of the court were, in part, as follows: "On April 15, 1949, in connection with the purchase of all stock of Concrete Products Company, a corporation, the Defendants, H. G. Miller and I. L. Pesses, executed and delivered to C. R. Olson and his wife, Kathryn I. Olson, a series of promissory notes evidencing a part of the purchase price of the stock of said corporation.

"That two of said notes of April 15, 1949, in the total principal sum of $1,224, which notes matured in the amount of $611 on September 15, 1950, and in the amount of $613 on October 15, 1950, were acquired previous to the filing of this suit by Southark Trading Com-

pany by endorsement from C. R. Olson and his wife, Kathryn I. Olson."

That Southark is entitled to recover from Pesses and Miller the amount of the two notes, $1,409.30, with interest from date of the decree.

"That, however, the Court finds that because of certain representations and statements made by the Cross-Defendant, C. R. Olson, to H. G. Miller and I. L. Pesses at the time of the execution of said two notes above described on April 15, 1949, and prior to said date, the Defendants, H. G. Miller and I. L. Pesses, as the successors of Concrete Products Company, a dissolved corporation, have been damaged in the total sum of $1,172.02 on account of a disallowance by the United States Government of a certain income tax refund claim made by Concrete Products Company previous to April 15, 1949, and by a levy on January 5, 1950, by the United States Government on a deficiency assessment for additional income taxes determined to be due and owing by Concrete Products Company, a corporation, for the tax year 1946.

"That the Plaintiff, Southark Trading Company, is not a holder in due course of the above mentioned notes of April 15, 1949, and did not acquire said notes prior to the maturity thereof and that the acquisitions of said two notes by Southark Trading Company was made subject to any defenses that H. G. Miller and I. L. Pesses might urge against said notes held by the Cross-Defendants, C. R. Olson and his wife, Kathryn I. Olson.

"That on account of the damages and loss sustained by Harry G. Miller and I. L. Pesses in the total sum of $1,172.02 above described, the said defendants, H. G. Miller and I. L. Pesses, are entitled to recoup and offset said damages in said amount against the judgment above granted against said defendants for $1,409.30 in favor of Southark Trading Company, the Court finding that said offset and recoupment allowed said defendants is to be offset against said judgment on said notes in favor of Southark Trading Company.

"That after allowing said offset and recoupment to the defendant against said judgment of the plaintiff there remains due the sum of $237.02 for which the Southark Trading Company shall have judgment against H. G. Miller and I. L. Pesses, with interest at 5% per annum from the date of this decree until paid."

For reversal, appellants argue, in effect, that the preponderance of the evidence is against the court's findings that Southark Trading Company was not a holder of the notes in due course and that C. R. Olson, to whom the notes were delivered in payment for his stock in the Concrete Products Company, by appellees, Pesses and Miller, had made certain false representations to appellees upon which they relied to their detriment. We hold that the findings of the trial court were not against the preponderance of the testimony.

Material facts appear not to be in dispute. On April 15, 1949, Pesses and Miller bought from C. R. Olson all of the stock and assets of Concrete Products Company, an Arkansas corporation, owned by C. R. Olson, giving him in payment $18,000 cash and a series of notes, including the two here involved. The sale which was completed by transfer of the corporate stock, in effect, amounted to appellees purchasing all assets of Concrete Products Company and acquiring these assets by transfer of the stock of the Corporation. The sale included accounts receivable, and among them Olson represented that there was a valid income tax refund of $605.73 from the United States Government to Concrete Products Company, which appellees would receive. Thereafter, Olson and wife sold and transferred the notes to appellant, Southark Trading Company. Olson was the owner of Southark and its president and manager at the time the notes were sold to Southark. He so testified. It is also undisputed that Pesses and Miller not only were denied the refund of the tax by the Government, but in fact were required to pay to the Government additional taxes owed by Concrete Products Company in the amount of $566.29. This latter amount, plus the $605.73 (total

$1,172.02), appellees, as indicated, claimed as a credit on their indebtedness to Olson.

We hold that the court correctly found Southark was not a holder, in due course, of the two notes, in the circumstances, that Southark therefore took title to the notes subject to all defenses available to the makers, and that Pesses and Miller were entitled to be credited $1,172.02 on their note to Olson.

Appellants also contend that appellees have waived all rights for damages. We do not agree. This contention appears to be based on the fact that appellees, after being notified that Concrete Products Company had been denied any tax refund from the Government, and after they had called on Olson to make good their promised refund ($605.73) and the deficit ($566.29), and he had refused, they thereafter "made payments to Olson on account of their indebtedness for the purchase of his corporate stock."

The rule appears to be well settled that in order to invoke the rule of waiver, as contended here, it is "essential to show that the defrauded party intentionally condoned the fraud, affirmed the contract, and abandoned all right to recover damages for the fraud, with full knowledge thereof. The affirmance must be equivalent to ratification. The question of outright waiver is one of intent; and it is essential to such waiver that the victim possess full knowledge of the fraud practiced upon him and that he intend to affirm the contract and abandon his right to recover damages for the loss resulting from the fraud." 24 Am. Jur., § 209, page 34.

We find no evidence that appellees intended to condone Olson's act and with full knowledge thereof, abandoned their rights to recover damages.

Affirmed.

BISHOP *v.* WILLIAMS.

4-9984 255 S. W. 2d 171

Opinion delivered February 16, 1953.

Rehearing denied March 16, 1953.

Virgil R. Moncrief and *John W. Moncrief,* for appellant.

Arthur R. Macom and *W. A. Leach,* for appellee.

GEORGE ROSE SMITH, J. This is an ejectment suit brought by the appellees to recover possession of a tract of land in Arkansas County. In our view the decisive issue is whether a deed executed by W. E. Meacham in 1916 vested the fee simple in the two grantees or merely gave them life estates with remainder to their heirs. The trial court, finding that life tenancies existed, entered judgment for the plaintiffs.

In 1916 Meacham conveyed ninety-five acres to two brothers, C. H. and C. F. Williams, the granting clause containing this language: "to have and to hold to them during their natural lives with remainder after their death to their heirs, the term heirs herein used is a

term of purchase and not of limitations." In the following year the Williams brothers divided the land by an exchange of deeds, C. H. receiving the tract now in controversy. C. H. conveyed this tract to R. C. Wills in 1926, and by later conveyances that title has passed to the appellants. C. H. Williams died in 1950, and his heirs now seek to recover the land upon the theory that C. H. had a mere life estate which terminated upon his death.

It is at once apparent that, standing alone, the grant to the Williams brothers "during their natural lives with remainder after their death to their heirs" would undeniably convey the fee simple by operation of the Rule in Shelley's Case. This fact is readily admitted by the appellees, but they insist that since the Rule necessarily involves the construction of the term "heirs" as a word of limitation rather than as one of purchase, the principle is rendered inapplicable by Meacham's recital that he used the term in the latter sense. By this recital, the appellees say, "the grantor has clearly shown his intention . . . to convey a life estate in the lands."

This argument is fallacious in that it assumes that the Rule in Shelley's Case is a rule of construction, designed to assist the court in determining the grantor's intention. But the contrary is true; the Rule is one of law, to be applied without regard to the conveyor's intention. Indeed, it is safe to say that in almost every instance the Rule has the effect of creating a fee when the grantor or testator meant to bring into being some other estate. For example, in the leading case of *Hardage* v. *Stroope,* 58 Ark. 303, 24 S. W. 490, the deed was to Tennessee M. Carroll for life and then to her bodily heirs in fee, and if she left no bodily heirs then according to the law of descent and distribution. Of course, the grantors did not mean for Mrs. Carroll to take the fee title; but, following a rule that has been in force for some six centuries, we held that to be the effect of their conveyance. Our cases have announced the doctrine so frequently that it has become a rule of property which we are not free to disregard.

We know of no jurisdiction in which the grantor's intention is permitted to defeat the application of the Rule. As Powell writes in his admirable work on Real Property, § 379, "the Rule in Shelley's Case is a rule of law which applies despite the conveyor's most explicit manifestation of his desire that it not apply." Illustrative cases included those in which the grantor, after having conveyed to A for life with remainder to his heirs, attempts to qualify his action by stating his intention to create a life estate only in the first taker. In such instances it is uniformly held that the grantee takes the fee simple. *Fowler* v. *Black,* 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; *Daniels* v. *Dingman,* 140 Iowa 386, 118 N. W. 373; *Edgerton* v. *Harrison,* 230 N. C. 158, 52 S. E. 2d 357; *Bullock* v. *Waterman St. Baptist Soc.,* 5 R. I. 273. The testator could hardly have been more emphatic than he was in *Lauer* v. *Hoffman,* 241 Pa. 315, 88 A. 496, 47 L. R. A., N. S. 676, where, after using words that came within the Rule, he added that "in no event whatever shall the fee simple vest [in my daughter]." Nevertheless it did.

In the case at bar it is plain that Meacham, after having created a fee simple by reason of the Rule in Shelley's Case, could not have rendered that action ineffective by adding that he intended for the Williams brothers to be mere life tenants. Nor could he achieve that result in a more roundabout way by asserting that the term "heirs" was used as a word of purchase. It has been pointed out that the Rule applies "even though the conveyor specifically provides . . . that the heirs shall take as purchasers." Rest., Property, § 312, Comment *k*. We adopted that view in the *Hardage* case, *supra,* when we approved this familiar language from the opinion in *Doebler's Appeal,* 64 Pa. St. 9: "It [the Rule] declares inexorably that where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs . . . as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder.

Wherever this is so, it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention."

We conclude that the effect of Meacham's deed was to convey the fee title to C. F. and C. H. Williams as tenants in common. They were then free to divide the property between themselves. Title to the tract allotted to C. H. has now passed to these appellants, who are clearly entitled to retain possession.

Reversed and dismissed.

ED. F. MCFADDIN, Justice (dissenting). The germane portions of the deed here involved read as follows:

"Know All Men By These Presents: That I, W. E. Meacham, a single man, for and in consideration of the sum of ($2,500) twenty-five hundred dollars, to me in hand paid by H. J. Williams, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto C. H. Williams and C. F. Williams, *to have and to hold to them during their natural lives with remainder after their death to their heirs, the term heirs herein used is a term of purchase and not of limitations,* the following lands lying in the county of Arkansas, State of Arkansas, to-wit: The Frl. N½ of NE¼, right bank of Bayou, and SW¼ NE¼ Section Seventeen (17), Township Four (4) South, Range Six (6) West, Northern District, Arkansas County, Arkansas.

"To have and to hold the same unto the said C. H. Williams and C. F. Williams *as above set forth* and unto their heirs and assigns forever, and all appurtenances thereunto belonging." (Italics my own.)

The majority opinion holds that the italicized words are without effect, because "the rule in Shelley's case applies"; and I cannot agree with that holding. For some time our Court has held that the intention of the parties, as ascertained from all the language of the deed, should govern in the construction of the instrument, rather than any hard and fast formulae anciently established. *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42;

Carter Oil Co. v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215; *Coffelt* v. *Decatur School District No. 17,* 208 S. W. 2d 1; *McBride* v. *Conyers,* 212 Ark. 1034, 208 S. W. 2d 1006. Here the grantor (in actuality the payor of the consideration, H. J. Williams, father of the life tenants) used an apt phrase to clearly and definitely express his intent to create a life estate only in the two sons of H. J. Williams, namely, C. H. and C. F. Williams.

In the italicized portion of the deed above, there are these words:

". . . the term heirs herein used is a term of purchase and not of limitations, . . ."

Thus, the deed itself described what was meant by the words "heirs"; and every time the word "heirs" appears in the deed, it means that the heirs of C. H. Williams and C. F. Williams take by purchase and not by limitations. The grantor used legal words to have a legal meaning, and I think we should give some effect to them: but the majority opinion is that when the "Rule in Shelley's case" enters, then the intent of a party goes out the window. I still believe that we should give effect to what was the clear intent of H. J. Williams in having this deed made as it was in 1916. . . .

My views find expression in the opinion of this Court in the case of *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379. In that case it was claimed that the rule in Shelley's case applied, but Justice HART used this language:

"The rule in Shelley's case is applicable only when the language used in the conveyance creates a limitation to the heirs of the grantor in general. If the limitation is to the heirs of the body of the grantee, the rule in Shelley's case does not apply."

Therefore, I dissent from the holding of the majority on the point at issue.

MATHEWS TRUCKING CORPORATION *v.* ZIMMERMAN.

4-9985 255 S. W. 2d 168

Opinion delivered February 16, 1953.

Rehearing denied March 16, 1953.

[redacted]

Rose, Meek, House, Barron & Nash and *Wootton, Land & Matthews,* for appellant.

G. W. Lookadoo and *Lookadoo & Lookadoo,* for appellee.

WARD, Justice. Lessie Mae Zimmerman and Mildred Zimmerman, appellees herein, were injured by colliding with a truck-tractor owned by Marion Coscia and driven by Jack Anderson on the night of Friday, March 16, 1951. Separate suits were filed and a recovery of $3,000 in each case was obtained against appellant, a foreign corporation, on the ground that Coscia was its employee.

Appellant does not question the negligence of Coscia [or Anderson] but contended in the lower court and contends here that Coscia was not, at the time of the accident, its employee or servant, but that he was on his own or was an independent contractor. Appellant also urges here that the judgment in favor of Lessie Mae is excessive.

The principal question presented is: Under the evidence, was Coscia, at the time of the accident, an in-

dependent contractor or was he a servant of appellant? The factual background, as reflected by the record, is substantially as set out below.

The Mathews Trucking Corporation is a common carrier of freight for hire, operating in and through several states under authority from the Interstate Commerce Commission, with one of its terminals in Memphis, Tennessee. Most, if not all, of its freight is carried in large trailer trucks, and it supplements its own trucking facilities by renting equipment from others, either by what is known as a permanent lease or a spot lease. A permanent lease may cover several months or even years while a spot lease covers one specific trip, and, in either event, the owner of the truck either drives it himself or furnishes the driver. Appellant always furnishes the lessor its I. C. C. card showing the number assigned it by the Interstate Commerce Commission. Appellant acknowledges that this arrangement makes it liable for the negligent operation of any said leased equipment when actually engaged in hauling for it. This case, however, does not fall within the situation just mentioned because Coscia was not at the time of the accident engaged in hauling freight for appellant.

On Friday, March 16, 1951, appellant had a shipment of freight, consigned to an eastern state, loaded on a trailer at Memphis and it wanted the shipment to go forward on the following Monday. However, for some reason, the loaded truck could not make the trip and it was necessary for appellant to obtain other equipment, and it accordingly contacted Marion Coscia.

Coscia was a spot lessor and as such had previously made many trips for appellant. At this particular time Coscia's tractor was in Memphis, but his trailer was in Fort Worth, Texas, where it had been left for repairs. All this was known to appellant.

When Coscia was contacted on Friday by Mr. Staley, manager of the Memphis office, he was informed of the situation and it was arranged for him to go to Fort Worth after his trailer and start the trip east on

Monday. What was said and done about engaging Coscia, and the surrounding circumstances, have a direct bearing on the question of his relationship to appellant.

Knowing, as stated, that Coscia's trailer was in Fort Worth, he was instructed to go after it and have it back in Memphis by Sunday so that the produce could be unloaded and reloaded on his trailer. In view of the distance to be covered and the short time available to return the trailer, it was recognized that an assistant would be needed to help Coscia do the driving, and so appellant made arrangements, or assisted Coscia in doing so, for the services of Jack Anderson, who was an employee of Bowman Transportation Company, located near appellant's place of business. It was the understanding between Coscia and Staley that Coscia would pay all the expenses, including Anderson's charges, incidental to returning the trailer. However, it was also understood by them that in order to reimburse or partially reimburse Coscia, he would receive 75% of the freight charges for the load to be hauled instead of 70%, as was the custom. Coscia was informed that appellant would have employees ready to load his truck on Sunday.

The above arrangements having been made, Coscia and Anderson left Memphis late Friday afternoon in Coscia's tractor for Fort Worth, and, while Anderson was driving, the accident occurred that night near Arkadelphia.

Under the instructions of the court the question was fairly presented to the jury to determine under all the evidence whether Coscia was, at the time of the accident, an independent contractor of appellant, a servant of appellant, or was on business for himself. The instructions also defined for the jury what constitutes an "independent contractor" and a "servant." We do not deem it necessary to set out the specific objections made by appellant to the different instructions for the reason that they were all, with the exceptions hereafter mentioned, directed to the contention that there was no substantial evidence showing Coscia was a servant, or that he was an independent contractor and appellant was not

liable. As to the latter, the jury was instructed that if it found Coscia was an independent contractor, appellant would not be liable.

We are unable to agree with appellant's principal contention. We have uniformly held that these are questions depending on facts and that the jury's determination is final if supported by substantial evidence. In this case we think there was substantial evidence to support the jury's finding.

One of the determining factors generally looked for to establish the relation of servant is the control the master exercises over his acts. Appellant ably argues that here it had no control over Coscia. The situation here, it is said, is like A telling B to mow his lawn and B injures C while taking his (B's) mower to A's house. We think elements are present in this case which distinguish it from the illustration. These elements are: (a) appellant was concerned that the shipment be made at the earliest possible moment; (b) it was to appellant's interest that the trailer be made available at the time specified; and (c) Coscia was being paid extra for the trip after the trailer. All of this, it seems to us, amounted to appellant exercising specific if not almost complete, control over the actions of Coscia from the time he left Memphis on Friday afternoon 'till he was to return on Sunday. At least the schedule required of Coscia left very little time for actions of his own initiative. Consequently we conclude that when the jury found Coscia was a servant of appellant, its decision was supported by substantial evidence.

In *Wright* v. *McDaniel,* 203 Ark. 992, 159 S. W. 2d 737, this rule was approved:

" 'The conclusion as to the relationship must be drawn from all the circumstances in proof, and where there is any substantial evidence tending to show that the right of control over the manner of doing the work was reserved, it became a question for the jury whether or not the relation was that of master and servant.' "

Many other decisions of our Court on this point are unanimously to the same general effect.

Judgment not excessive. Appellant contends that the judgment for $3,000 in favor of Lessie Mae is excessive and, in this connection, objects that the court's instruction permitted the jury to consider the effect of her injuries on her health.

We think the questioned instruction was justified because Lessie Mae testified that for some time she had headaches and that it hurt her head to comb her hair, that she couldn't play basket ball any more because her ankles turned easily, and that whereas her eyes had been perfect before the accident, she now had to wear glasses and couldn't read without them unless the writing was very large.

In addition to the above, there was other evidence regarding her injuries and the treatment thereof, and we are unable to say the verdict of the jury was excessive.

We have considered other objections raised by appellant relative to the admission of evidence regarded as hearsay and opinion evidence, and we are convinced there is no reversible error in the rulings of the trial court pertaining thereto.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

GILLESPIE *v.* PRAIRIE COUNTY EQUALIZATION BOARD.

4-9983 255 S. W. 2d 167

Opinion delivered February 23, 1953.

Wood & Smith, for appellant.

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

WARD, Justice. The County Equalization Board of Prairie County raised the assessments on property located in the City of DeValls Bluff belonging to appellants, and fixed the amounts as set out below:

Description	*Assd. Value (20% of value)*	*Value*
Glenn Hill— Lot 10 Block 11, DeValls Bluff, Ark.	$2,000	$10,000
Roy Hill— Lot 4, Block 43, DeValls Bluff, Ark.	2,000	10,000
C. E. McDuff— Lot 9, Block 11, DeValls Bluff, Ark.	2,000	10,000
J. R. Rhodes— Lot 7, Block 8, DeValls Bluff, Ark.	2,200	11,000
Gillespie— Lots 7, 8, 9, and 10, Block A, Maxwell's Add., DeValls Bluff, Ark.	1,400	7,000

The County Court and the Circuit Court, on successive appeals, refused to lower the assessments and so appellants have appealed to this Court.

Appellants make no contention that 20% is not the appropriate basis for assessment, and the only argument advanced here for a reversal is that their property was valued too high, and that the evidence does not support the judgment of the Circuit Court.

At one place appellants state that the issue before this Court is whether the Equalization Board has or has not placed an excessive value on their property, and again they ask us to reduce their assessments to conform to the evidence. If by this appellants mean we are to be guided by a preponderance of the evidence rule, they

are in error. On appeal in instances like this it is our duty to affirm the judgment of the trial court if it is supported by substantial evidence. *Doniphan Lumber Company* v. *Cleburne County,* 138 Ark. 449, 212 S. W. 308, was an appeal from the Circuit Court involving assessments and this Court there announced the rule applicable here as follows:

"Unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous, this court cannot reverse on appeal. The case falls within the general rule that the findings of the trial court will not be disturbed by this court on appeal where the findings are sustained by sufficient legal evidence." The above rule has been followed without exception in many decisions of this Court though not always in the same phraseology. In *Hayward* v. *Rowland,* 184 Ark. 766, 43 S. W. 2d 737, the Court said:

". . . it is only necessary in the instant case for us to examine the record sufficiently to ascertain whether the findings and judgment of the trial court are sustained by sufficient legal evidence."

Applying the rule announced above, we have concluded that the judgment of the trial court must be affirmed.

Appellants rely heavily on the testimony of Warren Baldwin, an experienced real estate man of Little Rock, who analyzed the type of construction and location of each building and gave it as his opinion that in each instance, which he described in detail, the property had a value of approximately one-half of that fixed by the Equalization Board. We deem it unnecessary to set out Mr. Baldwin's testimony in detail because we recognize his qualifications and the force of his testimony.

On the other hand, in view of our announced decision, we set out in more detail the testimony introduced by appellee to show that the judgment is supported by substantial evidence.

C. C. Hall, a member of the Equalization Board for fifteen years, says he made a detailed inspection of the

property belonging to Glenn Hill, Roy Hill and Carl McDuff, and each of said properties is worth $10,000 and he would pay that amount for them if he needed them, and that he considered the J. R. Rhodes property was not valued too high. J. H. Waggs, Chairman of the Board for twenty years, stated that in his opinion the Glenn Hill and Roy Hill properties were each worth $10,000, the McDuff property worth $11,000 and the Rhodes property worth $12,000, and that he had gone over the properties and discussed their values. J. H. Calhoun, a banker at DeValls Bluff, was familiar with loan values there and valued the Glenn Hill, Roy Hill and McDuff properties at $10,000 each. To the same effect was the testimony of Jim Crowley, who was in the business of making appraisements for loans in that vicinity, of C. R. Hartlieb, who was a banker at Hazen and had been in a bank at DeValls Bluff from 1941 to 1945, and of Mrs. E. B. Robinson, who has lived in DeValls Bluff all her life. John W. Bishop, a general contractor, testified he was familiar with the type of construction of the properties mentioned above and that in his opinion both the replacement and present values were greater than the values fixed by the Board.

The testimony regarding the Gillespie property, valued by the Board at $7,000, was not as voluminous or impressive, perhaps, as the testimony regarding the other properties, but we think it is ample to support the judgment of the trial court. C. C. Hall, J. H. Waggs and Mrs. E. B. Robinson all testified that they were familiar with this property and that it had a value of $7,000.

The judgment of the lower court is affirmed.

The *Chief Justice* not participating.

Opinion delivered February 23, 1953.

Rose, Holland & Smith and *Hardin, Barton & Hardin,* for petitioner.

Shaw, Jones & Shaw, for respondent.

WARD, Justice. On August 4, 1952, an automobile being driven by Jennings J. Stein collided with a truck being driven by Will Roy Nickles. As a result of the collision Nickles was killed and Stein [also his wife] was

injured. The collision occurred in Crawford County, but all the parties mentioned were residents of Sebastian County.

With the view, perhaps, to filing suit for damages against the estate of Nickles in Sebastian County, Stein filed a petition in the Probate Court of said County on August 29, 1952, to have one Lawson Cloninger appointed special administrator [under the provisions of the 1949 Probate Code, § 62-2210 *Ark. Stats.*] of the estate of said Nickles "for the purpose of receiving service of summons and defending causes of action, including petitioner's, arising out of said automobile accident." On the same date the petition was granted by a special Probate Judge in the absence of the regular Judge and letters were accordingly issued. No point is made that the special Judge was not qualified to act.

Also on the same day, August 29, 1952, the Steins filed a suit for damages against the special administrator [representing the estate of said Nickles] in the Sebastian County Circuit Court, and on the following day summons was served.

Thereafter, on September 12, 1952, the father of Will Roy Nickles, deceased, and the petitioner herein, filed a petition in said Probate Court to be appointed general administrator of his son's estate, which petition was promptly granted by the regular Probate Judge. On the same day, on petition of the general administrator, the Court also revoked the letters previously issued to the special administrator. On the same day the general administrator filed a suit in the Crawford County Circuit Court against Stein for the death of his son.

Thereafter, on September 18, 1952, the general administrator, by special appearance, filed a motion in the Circuit Court to quash the summons and service thereof on the special administrator in the said damage suit, on the ground that the appointment of the special administrator had been discharged in the manner above stated, and the Circuit Court therefore had no jurisdiction to try the case because there was no service on any proper party.

The Circuit Court overruled the motion, stating that the Probate Court had jurisdiction of the subject matter and the parties to make the special appointment for the purpose of receiving summons, that the appointment was cancelled by the later probate order, but that said cancellation did not affect the validity of the service which was had previously. Thereupon the petitioner filed in this Court a writ to prohibit further proceedings in the trial court.

The question here involved presents itself to this Court in the following form: Did the probate order of September 12th have the effect of voiding the original appointment *ab initio* as of August 29th or as of the date the last order was made on September 12th? Likewise, the answer to the above question depends, we think, on the answer to another question: Did the Probate Court have jurisdiction to make the first appointment? It is our opinion that the last question must be answered in the affirmative and that therefore it must follow that the revocation of the special letters of administration was effective as of September 12th and not as of August 29th.

The section of our Probate Code [62-2210 *Ark. Stats. Supp.*] providing for the appointment of a special administrator is here set out:

"*Special Administrators.*—For good cause shown a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or a general administrator, with or without the removal of the executor or general administrator. A special administrator may be appointed without notice or upon such notice as the court may direct. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appointment. The special administrator shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority . . ."

It is perfectly clear, we think, from the above statute that the Probate Court had jurisdiction to appoint a special administrator on August 29th, even before the expiration of the thirty days' period in which the near of kin had a preference to be appointed general administrator. It is ably argued that the above section never contemplated the appointment of a special administrator solely for the purpose of service in order to fix venue in a damage suit. We agree with this contention and think the regular chancellor was correct when he made the cancellation order on September 12th. Since both orders were apparently made at the same term of court, the Probate Judge had a right to revoke the first order for cause or on his own initiative.

Conceding, however, that the sole and obvious purpose of having a special administrator appointed on August 29th was to fix venue in the damage suit and that the Special Probate Judge should not have made the appointment for that purpose at that time, it does not force the conclusion that there was a total lack of jurisdiction, either of the subject matter or the party. Many situations can be envisioned where it would be proper and well within the spirit of the statute for the court to appoint a special administrator within the thirty days' preferential period mentioned above—for example, to preserve perishable property or to protect a right which was about to be cut off by the lapse of time.

Since we hold the court had jurisdiction of the subject matter and the party to make the said appointment on August 29th, it follows from principles fully supported by authority that the special appointment, being voidable and not void, was revoked as of September 12th, and that the service on the Special Administrator on August 30th was and is good.

In support of the above see: *Bivin* v. *Millsap,* 228 Ala. 136, 189 So. 770; *Commonwealth to Use of Colonial Trust Co. of Reading, et al.* v. *Gregory, et al.,* 261 Pa. 106, 104 Atl. 562; *Buckner's Adm'rs* v. *Louisville & N. R. Co.,* 120 Ky. 600, 87 S. W. 777; and *McFarland's Adm'r* v. *Louisville & N. R. Co.,* 130 Ky. 172, 113 S. W. 82.

The distinction between void and voidable orders, in this connection, is clearly stated in a note in 180 Ala. 159, 60 So. 277, 43 L. R. A., N. S., at page 634, as follows:

"As is pointed out in the earlier note, questions as to the validity of the acts of executors and administrators arise in two classes of cases, those in which the appointment was for some reason absolutely void, in which case the acts of the administrator or executor are a nullity, forming one class, and cases wherein the appointment was merely voidable, in which case acts done in good faith prior to the revocation of, and pursuant to the power granted, by the letters, have in general been considered valid and binding upon the estate, forming the second class."

In *Robertson's Succession,* 49 La. Ann. 80, 21 So. 197, it was held that unless the appointment of an executor is absolutely null and void, acts done by him in such capacity are legal and binding, it being said that mere irregularity of the appointment of an executor will not vitiate acts done under it.

In *Buckner* v. *Louisville & N. R. Co.,* 120 Ky. 600, 87 S. W. 777, where the appointment of administrator was merely erroneous, and not void, it was held that, up to the time of the termination of his office, he had all the authority that would have been possessed by an administrator rightfully appointed, and that consequently he could bind the decedent's estate, and could bind the estate in any manner in which a legally appointed guardian could bind it.

The above announced principle of law has also been recognized by this Court in the case of *McDonald* v. *Fort Smith & Western Railroad Company,* 105 Ark. 5, 150 S. W. 135. In this case the Court, discussing void and voidable judgments said:

"When a judgment is not a mere nullity, but only contains some defect which may become fatal and render it invalid, then it is only voidable, and, until it is actually annulled, it has all the force and effect of a perfectly valid judgment. Until by a proper proceeding such judg-

ment is reversed or vacated, it will be effective as an estoppel or as a source of title. A judgment rendered by a court without jurisdiction is void; and to have such jurisdiction the court must have jurisdiction both over the subject-matter of the suit and the parties thereto."

The above decision has been cited with approval many times, though not on the exact point here involved, and has never been overruled.

Section 72 of the Probate Code [§ 62-2203 *Ark. Stats. Supp.*] if not conclusive is persuasive of the position we take that the August 29th order was effective until revoked on September 12th. The last sentence in this section reads: "The removal of a personal representative after letters have been duly issued to him does not invalidate his official acts performed prior to removal."

The Probate Code [§ 62-2003 s. *Ark. Stats. Supp.*] defines "personal representative" to mean "administrator," and we think it includes a "special" administrator as well as a "general" administrator.

Cases relied on by petitioner. Petitioner, to support his contention in opposition to the conclusion above reached, cites several decisions of our Court and quotes language from two of them which might seem to substantiate his position. We think, however, an analysis of these cases shows they do not support petitioner's view.

In *Underwood* v. *Sledge,* 27 Ark. 295, the writer of the opinion was commenting on the fact that the county court had revoked an order made two days before [during the same term] and used certain language which we set out below exactly as quoted in petitioner's brief:

". . . when such revision is had, the action of the court and the record stands precisely as if no such former mistake or erroneous judgment had ever been given or entered . . . and when an order or judgment of a court is set aside, at the same term of the court at which it was rendered, the whole suit or matter stands precisely as

if no such consideration had been had or entered of record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated."

In this case the county court passed an order to appoint a county attorney and the members of the court, of whom *Sledge* was one, elected him to the said office with a salary of $1,500 a year. Two days later the same court revoked the first order, using this language: ". . . the same is rescinded, and for naught held as though no action had been taken therein." The trial court held *Sledge* was entitled to the office and salary. This court reversed the trial court, as we understand, on the grounds that (1) the county court had a right to revoke the first order made at the same term, and (2) *Sledge* had no vested right in the office but only such right as the revoked order gave him. The language of this court quoted above was applicable to the situation under consideration and it should be so construed and limited.

The other case cited and quoted in full by petitioner is *State* v. *Doss,* 70 Ark. 312, 67 S. W. 867, which cites the *Sledge* case, *supra.* Here again the opinion must be read in connection with the facts, which were as follows: In 1899 the White County Court made an order prohibiting the sale of liquor within three miles of a certain church; on January 9, 1901, the same Court entered an order revoking the first order; and on the same day a license was issued to Doss permitting him to sell liquor for the year 1901 within the prohibited territory; on March 18, 1901, a petition was filed in said Court [same term] alleging a fraud had been practiced on the Court when the January 9, 1901, order was made, and the Court revoked the last-mentioned order; and Doss was tried for selling liquor on July 5, 1901. The Court, in holding Doss was not protected by the license issued to him, held: (1) The County Court had a right on March 18th to revoke the order previously made on January 9th because both were made at the same term; (2) When the January 9th order was revoked it left the 1899 order in full force; and (3) the license granted under the revoked or-

der never had any validity and there was no foundation in fact for such license. It must be conceded that the language in this opinion lends support to petitioner's contention here, but we think it must be distinguished or overruled. We, of course, don't know what view the Court might have taken if Doss had been charged with selling liquor before the January 9th order was revoked, but it might be supposed that a different result would have been reached and different language used. Also, the Court may have taken the view that the January 9th order, being secured through fraud on the Court, was void and not merely voidable. Under this view the case harmonizes with the rule we approve; otherwise, the language used [but not the result reached] cannot be justified by later decisions of this and other courts as set out above.

Sufficiency of Service. Petitioner makes another contention in support of the requested writ. In the Circuit Court he moved to quash service on the Special Administrator on the ground that the return simply showed service on "Lawson." The trial court overruled petitioner's motion to quash, and, we think, properly. The summons designated "Lawson Cloninger, Special Administrator of the estate of Will Roy Nickles, deceased." Cloninger was present in court and was on the witness stand when the return was introduced. No contention is made regarding his identity or that he was not actually served. The deputy sheriff who made the return was likewise in court as a witness and he stated that he served the summons [with the party properly designated] on and delivered a copy to Lawson Cloninger. Under the above circumstances it was a question of fact for the court to determine whether service was had on the proper person and in the proper manner, and we cannot say the trial court committed error in this instance.

We have carefully considered some other contentions made by petitioner, but in none of them do we find any error by the trial court.

The respondent argues that the writ of prohibition is not the proper remedy here. We have decided the case on its merits but it is our opinion, since a jurisdictional question was raised, that the remedy employed is not improper under the holding in *Gainsburg* v. *Dodge, Chancellor,* 193 Ark. 473, 101 S. W. 2d 178.

The writ is denied.

Justice McFaddin, concurs.

ARKANSAS ELECTRIC COOPERATIVE CORPORATION *v.* ARKANSAS-MISSOURI POWER COMPANY.

4-9847 255 S. W. 2d 674

Opinion delivered February 23, 1953.

Rehearing denied March 30, 1953.

Fitzhugh & Cockrill, for appellant.

P. A. Lasley, House, Moses & Holmes, Herbert L. Branan, Rainey, Flynn, Green & Anderson, Wallace

Townsend, Richard L. Arnold, O. D. Longstreth, Jr., Dave E. Witt and *Joseph Brooks,* for appellees.

George Rose Smith, J. This is an application by Arkansas Electric Cooperative Corporation (Arkansas Electric) for a certificate of convenience and necessity by which Arkansas Electric would be authorized to construct a 30,000 kilowatt (KW) steam-powered generating plant near Ozark, Arkansas, and 544 miles of sixty-nine kilovolt (69 KV) transmission lines. The application is opposed by four intervening private utility companies and by two labor organizations. After hearings extending over a period of several months the Public Service Commission, by a vote of two members to one, granted the requested certificate. On appeal its action was reversed by the Pulaski Circuit Court, which adopted the views expressed by the dissenting commissioner.

Arkansas Electric is a federated cooperative formed by representatives of three distribution cooperatives which are engaged in the business of supplying electric power to their members in western Arkansas. Arkansas Electric, as well as its component cooperatives, was organized under the Arkansas Electric Cooperative Corporation Act, being Act 342 of 1937, Ark. Stats., 1947, §§ 77-1101 *et seq.* Heretofore the distribution cooperatives have purchased their power from one or more of the intervening utilities.

Arkansas Electric was created for the purpose of building the proposed steam generating plant and transmission lines. Having no funds of its own it intends to accomplish its objectives by means of contracts which it has made with two federal agencies, the Rural Electrification Administration (REA) and the Southwestern Power Administration (SPA). REA is an agency of the Department of Agriculture, created by 7 U. S. C. A., §§ 901 *et seq.* SPA is an agency of the Department of Interior created by executive order of the Secretary.

The various contracts which Arkansas Electric has with REA, with SPA, and with its own component cooperatives were all made with reference to one another

and together form a comprehensive plan for the construction and operation of the generating plant and transmission lines. REA has agreed to lend Arkansas Electric $10,558,000, which will be used to build the proposed facilities. This loan is to be repaid over a period of thirty-five years.

It is shown by the record that the present demands of the members of the three distribution cooperatives involve the consumption of only about a third of the power that can be produced by a 30,000 KW generating plant. There is evidence, however, that by 1959 the demands of these consumers will have increased to approximately the capacity of the plant. In the meantime the plant cannot be economically operated merely to serve the three component corporations, since the overhead expense would be so great that the cost of the power would be far in excess of the figure at which the cooperatives can buy energy from the intervening companies. And even if the needs of Arkansas Electric's consumers were today equal to the output of the proposed plant it is admittedly undesirable for a supplier of power to depend upon a single generator, since interruptions of service will unavoidably occur as a result of breakdowns, necessary maintenance, etc. In fact, it is not contended by Arkansas Electric that the project would be either economically feasible or in the public interest if its sole purpose were to supply the present needs of the three distribution cooperatives.

SPA's participation in the project is intended to meet the objections just mentioned. SPA, being already engaged in the sale of electricity and being in control of an extensive system of high voltage transmission lines, is in a position to market that part of the plant's production not needed by the component cooperatives. Moreover, SPA has at its disposal tremendous quantities of hydroelectricity generated at dams built by the United States; so SPA need not fear outages resulting from temporary shutdowns of the steam plant.

Arkansas Electric and SPA have entered into two contracts, referred to as the power contract and the lease

contract. Both agreements recite SPA's desire to obtain "the benefits . . . arising out of the integration of steam generated power and energy with its hydro power and energy." To this end the contracts simply incorporate the steam plant and transmission lines into SPA's present hydroelectric system. By the power contract Arkansas Electric agrees to sell to SPA the entire output of the steam plant for a period of forty years. SPA agrees to pay in monthly installments a minimum of $900,000 a year for the plant's output, it being broadly true that the minimum payments must be made whether or not the plant is actually operated or produces any electricity. By the contract SPA obtains in practical effect complete control of the plant for forty years. It is given the right to decide when and how the plant shall be operated, how much power shall be produced, how the records shall be kept, etc. Arkansas Electric's principal duty will be to operate the plant in obedience to SPA's instructions.

In addition to making the minimum annual payments SPA agrees to supply the present demands of Arkansas Electric's consumers and to meet their future demands if SPA "has available such additional power capacity." These sales are to be made at SPA's Rate Schedule A—a rate tentatively approved by the Federal Power Commission and subject to revision by that body. All other power generated by the plant may be sold by SPA to other customers of its own.

By the lease contract Arkansas Electric leases to SPA for forty years the 544 miles of 69 KV transmission lines, these lines to be completely maintained and controlled by SPA. The rental is not fixed in dollars and cents but is to be so calculated that it will exactly repay that part of Arkansas Electric's REA loan that is allocable to the transmission lines. SPA has the option at any time of purchasing the lines by paying the remaining REA balance so allocable to the lines. In the event of such a purchase SPA is relieved of any duty to reserve transmission capacity to meet increased demands of Arkansas Electric's consumers. If SPA has

not bought the lines before the expiration of the lease it may then do so for ten dollars. Thus it will be seen that the lease contract is in substance an installment sale of the property to SPA. Both the power contract and the lease are conditioned upon the making of federal appropriations to discharge SPA's obligations, and SPA is relieved of all liability if Congress should ever fail to make such appropriations.

We have attempted to state only the broad outline of these agreements, each of which is a long and technical document. Much is made in the briefs of various options to cancel, fuel clauses, ratchet provisions, and other details that we do not regard as essential to the decision of what we consider to be a relatively simple case.

At the hearings before the Commission Arkansas Electric offered a great deal of evidence to show that this State has an inadequate supply of electric power, that additional generating facilities are needed in the region to be served by Arkansas Electric, that the cost of the proposed facilities will not exceed the amount of the REA loan, and that the end result will be cheaper electricity than that now supplied by the intervening utilities. The latter adduced an imposing volume of proof to rebut the applicant's contentions. The majority members of the Commission decided the fact questions in favor of Arkansas Electric.

It is insisted by the appellees that many of the Commission's findings of fact are contrary to the undisputed proof, but we find it unnecessary to determine these issues. In our opinion the case is controlled by either of two independent issues of law: First, under the Arkansas statutes can Arkansas Electric legally sell power to SPA? Second, under federal legislation can SPA legally bind itself to the performance of its contracts with Arkansas Electric? The Commission expressed the view that both questions should be answered in the affirmative.

Despite the fact that these two inquiries are judicial questions they are properly raised in this administrative proceeding. The Commission must often determine questions of law that are pertinent to its final legislative decision. *Southwestern Gas & Elec. Co.* v. *City of Hatfield,* 219 Ark. 515, 243 S. W. 2d 378. The basic issue is that of public convenience and necessity, which has been described as "what will conduce to the general public welfare." *Abbott* v. *Public Utilities Com'n,* 48 R. I. 196, 136 A. 490; see also *Ark. Express, Inc.* v. *Columbia Motor Transport Co.,* 212 Ark. 1, 205 S. W. 2d 716. If the entire arrangement between Arkansas Electric and SPA is contrary to law, if the proposed construction is vulnerable to being halted at any time by reason of its being illegal, the public interest demands that the project not be undertaken. Of course Arkansas Electric counts on the expected revenue from SPA for assistance in the discharge of the REA loan, but if that source of income should be withdrawn the burden of meeting the indebtedness falls upon the members of the three component cooperatives. The public welfare would not be furthered by permitting these cooperatives to assume the burden of an undertaking that might at any moment become a complete loss to every one concerned. It is evident that the two issues we have mentioned are inherent in any consideration of the ultimate question of the public convenience and necessity.

First: Do the Arkansas statutes authorize Arkansas Electric to sell its electricity to SPA? The language of our rural electrification legislation is so completely free from ambiguity that this question can be answered only in the negative. Section 4 of Act 342 (Ark. Stats., § 77-1104) permits a cooperative to transmit, distribute, sell, furnish, and dispose of electric energy "to its members only." Section 12 (§ 77-1112), defining eligibility for membership, reads: "All persons in rural areas proposed to be served by a corporation, who are not receiving central station service, shall be eligible to membership in a corporation. No person other than the incorporators shall be, become or remain a member of a

corporation unless such person shall use or agree to use electric energy or, as the case may be, the facilities, supplies, equipment, and services furnished by a corporation. A corporation organized under this act may become a member of another such corporation and may avail itself fully of the facilities and services thereof."

The statute could hardly be more explicit in its declaration that a cooperative can sell power to its members *only* and that its membership is limited to persons in rural areas who agree to *use* electric energy. The legislative design is evidently to bring the advantages of electricity to farmers and to residents of communities having a population of not more than 2,500. § 77-1102 (8). This interpretation has been uniformly followed by the Commission, for since the inception of the rural electrification program it has adhered to a policy of assigning rural territory either to a cooperative exclusively or to a private utility exclusively. We are told that heretofore neither has attempted to invade the other's province. We too have recognized the legislature's dominant intention, by our holding that a cooperative's right to serve an area terminates upon its annexation by a city of the designated size. *Farmers Elec. Coop. Corp.* v. *Ark. P. & L. Co.,* 220 Ark. 625, 249 S. W. 2d 837.

SPA is a "person" within the statutory definition, § 77-1102 (5), but there its eligibility to membership ceases. SPA is not in a rural area, it is not without central station service, and it does not propose to use this power as a consumer. To the contrary, SPA's Administrator testified below that he intends to resell this power to cities and towns, to large manufacturing concerns, and to any one else who buys power "in wholesale quantities"—a term which the witness considered not restricted to wholesale, as distinguished from retail, transactions. Furthermore, SPA expects to number among its customers persons and municipalities who are already being served by the intervening utilities. In short, the effect of the SPA-Arkansas Electric alliance will be the sale of cooperatively generated power to persons not in rural areas, to persons who are receiving

central station service, and, in the case of SPA itself and its municipal patrons, to persons who propose not to use the energy as consumers but to resell it at wholesale or retail. We think it too plain for argument that the proposal violates not merely the letter of the law but its spirit as well.

Arkansas Electric does not intimate that any express language in the statute qualifies SPA for membership in a cooperative, but it is insisted that since the Act is to be liberally construed, § 77-1135, the project should be approved either as being incidental to Arkansas Electric's effort to serve its component corporations or as merely involving the disposal of surplus power. Neither argument is tenable. Liberal construction comes into play when the statute is silent upon a particular point or when the legislative intent is not easily ascertainable. Here there is neither silence nor uncertainty. Those to whom a cooperative may sell its wares are described in language too specific to be misunderstood. We are not authorized to press liberality of construction to the point of actually amending the statute.

Nor do these contracts involve the mere disposition of a surplus, as was the situation in *McGehee* v. *Williams*, 191 Ark. 643, 87 S. W. 2d 46. What Arkansas Electric proposes to do is to sell its entire output to SPA for forty years and to sell its transmission lines to SPA outright. The generating plant would have a capacity of triple the present needs of Arkansas Electric's legitimate consumers, and the 69 KV transmission lines would have a carrying capacity of more than four times the future needs of those consumers, under even the most optimistic estimates of future growth. In truth, if there is here any sale of surplus power it lies in the resale by SPA to Arkansas Electric, since the bulk of the power must evidently be sold elsewhere.

Second: Has Congress authorized SPA to acquire a source of steam-generated power and to integrate that power into its own hydroelectric system? To answer this question we must study in some detail the history of federal hydro power.

This power is generated at dams which were built for the dual purpose of flood control and the production of electricity. It has been the practice of the Corps of Engineers, in recommending to Congress that a certain dam be authorized, to propose a multi-purpose dam only if the sale of its electric energy could be expected to repay that part of the costs of construction allocable to the structure's function as a source of power. *Cf.* 16 USCA § 590z-1 (a, v). In other words, when the Corps has been able to say that the use of the dam for the generation of electricity, in addition to its use for flood control, would pay for itself, a multi-purpose dam has been recommended; otherwise not.

Thus in each instance it has been necessary for the Corps to estimate the price at which the hydro power could be sold in a competitive market. In making this estimate the Corps had to take into account the fact that hydro power, in competing with steam power, has at once a marked advantage and a marked disadvantage.

The advantage of steam power lies in its dependability as a source of what is called "firm" power in the industry. The owner of a 30,000 KW steam plant knows that except for breakdowns and other necessary interruptions he can operate his plant night and day and can supply his customers at any time with the maximum amount of electricity that the plant can generate. The proprietor of a hydroelectric plant does not have this same assurance, for his ability to supply firm power depends upon weather conditions. In times of abundant water he can deliver the full capacity of his generators, but during a drought he must operate at a reduced schedule to conserve his water supply. In this respect SPA is under yet an additional handicap, for the upper levels of its reservoirs must be ready to receive flood waters, flood control being a primary purpose of the dams. Hence SPA cannot keep its reservoirs bankful the year around, to the detriment of flood control. Consequently SPA might be able to produce at times a maximum of 25,000 KW of hydroelectric power and yet not be able to contract safely for the delivery of more than 5,000

KW of firm power throughout the year. Herein lies the great disadvantage of hydro power.

On the other hand, hydro power enjoys an advantage denied to steam power. This advantage derives from two facts: One, electricity cannot be stored once it has been created, and, two, the demands of consumers are not uniform throughout the year or even throughout the day. A householder may need only a trickle of electricity at night, to run his refrigerator and his clocks, but a few hours later he may consume quantities of electricity for lighting, heating, and cooking. As a result a supplier of power invariably has periods of peak demand and periods of minimum demand. Yet, because electricity cannot be held in storage, the supplier must have available enough power to satisfy the maximum demands of his patrons, even though he may be called upon for that maximum for only thirty minutes during the day, month, or year.

It is here that the producer of hydro power enjoys his advantage in the competitive market. The owner of a 100,000 KW steam plant is limited to the acquisition of customers whose peak demands will not at any moment exceed the capacity of the generator. But as business increases the supplier reaches a point at which he can meet all his customers' needs except in the short intervals of maximum demand. In the absence of an outside source of electricity the supplier would be forced to install another generator, which might operate so rarely that the additional power so generated would be extremely expensive. This additional power, called for only in periods of maximum consumption, is known as peaking power; and hydro plants are best able to furnish it. For, unlike electricity, the water behind the dam can be stored and used to turn the generators only when the need for electricity is greatest. Hence the owner of a steam plant can profitably afford to pay a premium price for peaking power—a price in excess of that at which he retails the energy to his own customers—as long as the cost of the peaking power is below what it would be if he chose the alternative of installing another generator.

Thus hydro power is at a competitive disadvantage if sold as firm power but brings a high return if sold as peaking power.

These facts were fully understood by the Corps of Engineers when it recommended that Congress authorize the multi-purpose dams from which SPA now derives its power. In estimating that the generating facilities at the dams would pay for themselves the Corps assumed that the electricity would be sold at the favorable prices commanded by peaking power. Hence when Congress appropriated funds for the construction of these dams it did so upon the assumption that the current would be sold as peaking power rather than as firm power. It is of course apparent that the decision to sell energy as peaking power involves at the same time the decision to sell at wholesale rather than at retail, since the retail consumer is not confronted with the problem of installing added generators.

Congress next expressed its views in the Flood Control Act of 1944, the basic law under which the Department of the Interior sells hydro power through its agent, SPA. Section 5 of that Act (16 USCA § 825s) reads:

"Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of

such power shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All monies received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts."

It will be seen that this statute contemplates the sale of hydroelectric power only; that is, power "generated at reservoir projects." Further, the Secretary is authorized to construct or acquire *only* such transmission lines and related facilities as may be necessary to make the power available in *wholesale* quantities to specified purchasers. The language of this statute does not in any way suggest that Congress meant for the Department to "firm up" its hydro power by the acquisition of steam power and thereby enable itself to enter the competitive retail market. On the contrary, the legislative history of the Act, as reflected by Congressional committee reports, the debates on the floor, and the amendments that were accepted or rejected, shows beyond question that Congress was anxious to avoid setting up "a public power trust which would be unduly competitive with established private power utilities." Senate Report No. 1030, 78th Cong., 2d Sess.

Although the legislative branch of the national government had, in the two ways mentioned above, indicated its belief that federal hydro power should be sold as peaking power, the executive branch was of the opinion that this energy should be buttressed by steam-generated electricity and marketed as firm or base loading power. To this end the Department of the Interior submitted to Congress in 1946 a comprehensive plan for the expenditure over a period of years of $200,000,000 for the construction of steam plants. An initial appropriation of

$23,000,000 was requested for the year 1947. The House Appropriations Committee disapproved the request, and on the floor of the Senate the chairman of the Senate committee reported that it was the committee's judgment "that if the power was to be firmed up by steam plants it should be done by appropriate legislation . . . and not on an appropriation bill." Congressional Record, June 20, 1946, p. 7324. The requested appropriation was refused.

To this point the intention of Congress can hardly be said to be open to question. Arkansas Electric insists, however, that by the creation of what is known as SPA's "continuing fund" Congress has authorized SPA's participation in projects like the one now before us. This continuing fund can be understood only by an examination of its history.

In 1943, as part of the First National Defense Supplemental Appropriation Act, 57 Stat. 611, 621, Congress created the continuing fund. Having required that all receipts from the sale of power be paid into the Treasury, Congress provided working capital by directing the Secretary of the Treasury to set up and maintain from such receipts a continuing fund of $100,000 to enable SPA's Administrator "to defray emergency expenses and to insure continuous operation." Of course this language did not contemplate the acquisition of steam-generated power.

Next came the execution of what are called "wheeling" contracts. Prior to the making of these contracts SPA's hydro power had been sold as peaking power to private utilities. Yet § 5 of the Flood Control Act, quoted above, states that preference should be given to cooperatives and to public bodies. In its effort to carry out this mandate SPA proposed to construct its own transmission lines by which it could serve these preferred consumers, and under the statute it undoubtedly had authority for such construction. Private utilities opposed this move, and out of this controversy came the wheeling contracts, which were thought to be a satisfactory solution to the dispute.

A wheeling contract is simply an agreement that is intended to enable SPA to serve its preferred patrons by utilizing the transmission lines of a private company rather than by building duplicating lines of its own. The first wheeling contract was executed in 1947 between SPA and the Texas Power & Light Company. By that contract the company bought the entire output of SPA's 35,000 KW generator at the Denison dam. The company agreed, however, that if SPA should obtain contracts to supply preferred customers which the company could serve over its own lines the company would carry or "wheel" power to such customers, on behalf of SPA, to the extent of 20,000 KW hours. In other words, the company bought the 35,000 KW output but agreed to sell back to SPA up to 20,000 KW hours and to transmit that energy to SPA's preferred patrons. Other wheeling contracts were made with other private companies.

It will be seen that since under these contracts SPA became a purchaser as well as a seller, there was a possibility that it might need funds to meet its obligations. Upon this basis SPA in 1948 and 1949 asked Congress to increase the continuing fund to $300,000. This request was approved in 1950, the statute reading in part as follows: ". . . and said fund of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies." 16 USCA § 825s-1. It is this language on which Arkansas Electric relies in contending that Congress has empowered SPA to participate in the project now before us.

The wording of the statute is open to either of two interpretations. In authorizing the payment of costs in connection with "the purchase of electric power and energy and rentals for the use of facilities" for its trans-

mission, Congress may on the one hand have meant to enable SPA to perform its obligations under the wheeling contracts or, on the other hand, have meant to authorize the purchase of steam-generated power. The whole history of federal hydroelectric power leads us to think that the former interpretation is correct, and the legislative background of the 1950 amendment dispels all doubt. As originally introduced, this amendment would have permitted the continuing fund to be used to cover "all costs in connection with the purchase of electric power and energy and rentals for the use of transmission lines and appurtenant facilities *of* public bodies, cooperatives, and privately owned companies." H. R. 3838. The italicized word "of" is of vital importance, since it might be construed to authorize exactly what is proposed in this case.

Senator Kerr offered an amendment to the bill, by which the word "to" was substituted for "of," and in speaking in favor of this amendment Kerr said: "The purpose of the clarifying amendment with reference to the continuing fund is to make it crystal clear that there is no purpose, desire, nor authority for the Administrator to rent any generating facilities with the money in the so-called continuing fund." Cong. Rec., 81st Cong., 1st Sess., p. 12,253. Kerr's amendment was adopted, and it was in that form that the bill became law. We need not prolong this opinion by quoting the many other excerpts from the Congressional Record that might be cited to show beyond question that Congress has invariably refused to permit SPA to enter the competitive retail market by firming up its hydro power with steam power.

In spite of this overwhelming evidence of the legislative intention Arkansas Electric contends that SPA is already purchasing steam-generated electricity under its wheeling contracts. In a sense this is true, since under such a contract the private company is not required to wheel to SPA's customer the identical current that the company received from SPA; it may substitute steam power of its own making and divert the hydro power to

some other consumer. But in principle this argument fails. Electricity is a fungible commodity which has the same characteristics whether it was created by the force of steam or the force of water. Under the Texas wheeling contract, for example, SPA may be called upon to supply the company with electric power to the extent of 35,000 KW, and SPA may in turn demand that its preferred customers be furnished with not more than 20,000 KW of like energy. This arrangement is evidently a true exchange of power, since it obviously makes not the slightest difference to any one whether the current delivered by the company had its origin in a steam plant or in a hydro plant. The point is that SPA acquires no new source of energy under its wheeling contracts, since the private company sells back to SPA only a *part* of the volume that it receives from that agency. In the case at bar the situation is wholly dissimilar, involving not the mere exchange of current for that already available to SPA but the acquisition of steam power over and above the resources that SPA might otherwise have had at its disposal.

To sum up our discussion of the federal law: Congress has in no fewer than three ways expressed its belief that SPA's proper function is to sell hydro power in wholesale quantities rather than to sell at retail by the integration of steam power. First, the dams were originally approved upon the assumption that the current would be marketed as peaking power, which is necessarily a transaction at wholesale. Second, the Flood Control Act refers only to hydro power and specifically directs that the sales be in wholesale quantities. Third, when SPA proposed a comprehensive plan for the construction of steam plants Congress rejected the proposal. Opposed to this settled legislative policy is only the suggestion that by creating the continuing fund Congress meant to enable SPA to purchase steam-generated electricity and thereby to become a vendor of firm power. It is perfectly clear, however, that the appropriations to the continuing fund have been intended to permit SPA to perform its wheeling contracts and do not represent a departure from the policy implicit in the permanent

legislation. We are not convinced that Congress, by the approval of appropriation measures which are effective for only a year, has thereby decided to authorize the expenditure of the continuing fund for purposes completely at variance with the general laws.

We conclude that the SPA-Arkansas Electric contracts are contrary to federal law as well as to our own Act 342. The judgment of the circuit court is accordingly affirmed.

Griffin Smith, C. J., concurs. *McFaddin, J.*, joins in the first ground for affirmance but thinks the majority's discussion of the federal law to be inappropriate.

HARGIS, ADMINISTRATRIX *v.* HARGIS.

4-9988 255 S. W. 2d 663

Opinion delivered February 23, 1953.

Rehearing denied March 30, 1953.

Spencer & Spencer, for appellant.

DuVal L. Purkins, for appellee.

GRIFFIN SMITH, Chief Justice. W. C. Hargis, Sr., formed a partnership with his two sons—James V., and W. C., Jr.—January 1, 1948. James died July 1, 1950, and the question to be determined is what interest his estate has in profits realized from the automobile business subsequent to creation of the interest-sharing relationship.

In 1928 the elder Hargis and his brother, Bernie, were partners owning Hargis Bros. Sales & Service. Bernie retired from the enterprise early in 1946 and W. C., Senior, conducted the business as sole owner until the contract with his sons was executed. At that time the investment account stood at $201,651.93. Neither son acquired a proprietary interest in the physical property. The father was to be paid "approximately" $8,500 per year at $700 per month; W. C., Junior, had a drawing account of "approximately" $5,500, and James was to receive $5,000. Each was forbidden to withdraw "assets in excess of his salary", or assets in anticipation of profits to be earned, without written consent of all.

Early in 1949 agents of the U. S. department of internal revenues made inquiries to determine whether tax returns had been properly made. At a later date they began checking books and other records. James, who had been afflicted with heart trouble for twenty years—or, as the father testified, since he was six or

seven—was ill when the revenue accountants began their work and was not informed that it was being done.

In consequence of revenue audits it was ascertained that unpaid taxes, penalties, and interest for 1945, 1946, and 1947, amounted to $122,760.50, and that the 1948 deficiency was $7,406.57. These assessments have been paid, but the senior Hargis insists that participating profits earned after the father-and-son partnership was created should be treated as assets available not only for payment of the 1948 debt, but for the 1945-'6-'7 obligation as well. A further insistence is that $11,644.37 paid to an accounting firm for checking with the government men and effectuating a settlement should be taken from accumulated profits of the two sons.

Appellant, who sued to establish her dead husband's interest, contends that preponderating testimony shows that earnings apportionable to James for 1948, 1949, and 1950 amounted to $30,069.56. She concedes that James' estate should pay its part in proportion to the ratio of division, which was a third to each of the partners from 1948 profits, and 26% to W. C., Junior, for 1949 and 1950. Since for these two years the father took 50%, the remaining 24% went to James.

The contract does not provide what the shares shall be, but each of the interested parties concurred in the percentage arrangements shown on the books. We think the lower court correctly treated these credits as amounts mutually agreed upon for each of the years involved. It was further shown that profits were realized from business operations other than the automobile agency and were entered on the books without objection by either of the three. In these circumstances it would not be equitable, after the death of one partner, for the survivors to make a different determination. Each of the three was competent to handle business affairs, and if they chose to mingle outside income with partnership assets and apportion profits in a manner then mutually satisfactory, equity would be ill-served by permitting a substituted method when to do so would have the effect of reducing the dead son's credit balance.

When it became apparent that agents of the bureau of internal revenues were likely to demand that W. C. Hargis, Sr., amend his tax returns, a firm of certified public accountants (Fred Rogers & Co. of Little Rock) was employed by W. C., Senior and Junior, to represent the partnership in reaching settlements. A great deal of this work went back to 1945. The accountants were paid $11,644.37, and it is urged that this is partly chargeable to James. It was also shown that the agreed tax settlement involved a restatement of physical values, including automobile parts and accessories. Under the new reckoning $42,000 was added to the inventory.

The Rogers audit—supported, as we think, by the weight of evidence—shows that profits credited to James' account over the three-year period were $30,069.56, aside from withdrawals. However, a tax deficit of $6,568.28 for 1948 was established. Since each partner is chargeable with the full amount assessable as taxes, and since the 1948 profits were evenly split, the accountants extended a charge of $2,282.94 against James' credit. This was $121.78 more than W. C., Junior, paid, and $158.76 in excess of the father's payment. But no point is made of these slight variations, and we treat the item of $2,282.94 charged to James as correct, thereby reducing the credit balance to $27,786.62. From this there should be deducted interest paid on James' third of the 1948 deficiency, $285.74, leaving $27,500.88.

The seventh section of the partnership contract anticipates the death or legal disability of one or more of the three. An obligation is imposed upon the active partner or partners to continue the business until December 31st following such death or disability. At that time the survivors had a right to purchase the outstanding interest at not more than 10% above the outgoing partner's proprietary interest, "as shown by the balance of his capital account after the books are closed Dec. 31".

The court found that it was "likely probable" that all parties to the litigation were in better financial position than would have been the case had liquidation occurred.

The Chancellor rejected contentions of the surviving partners that income tax deficiencies for 1945 and 1946 should be ratably charged against James' interest. But a different rule was applied to the 1947 obligation. This tax, said the Chancellor, did not mature until January 1, 1948, and the obligation, as such, first attached March 15—the final day for making a return unless additional time should be granted. Because James acted as bookkeeper for his father during 1947 when the tax was earned, and due to the further fact that he served in the same capacity for the first two and a half months of 1948, it was the court's belief that he knew of the deficiencies; or, if he did not actually know of them, he was charged with such knowledge.

In his opinion the Chancellor calls attention to the Uniform Partnership Act, Ark. Stat's, § 65-117, and the obligation of a person "admitted into an existing partnership". Such admitted partner is charged with obligations "of the partnership" arising before his admission; but the liability in point of satisfaction extended only to partnership property. This statute, said the Chancellor, subjected the interest of James V. Hargis "to his share" of the 1947 tax. The court was also persuaded that 26 USCA, § 311, "does the same thing".

In ascertaining James' proprietary interest the court charges his book credits with 24% of $53,847.51, or $12,923.40. The opinion, however, does not disclose details showing how the book credit was arrived at. As we have heretofore mentioned, testimony of E. Ray Kemp, one of the accountants employed by W. C. Hargis, Junior and Senior, was that $27,500.88 remained after James' share of the 1948 tax deficiency had been charged to him. But the Chancellor construed the accountant's statement to be that $23,384.12 "represents the capital account of James V. Hargis, . . . *as related to the automobile and garage business*". So it appears certain that outside transactions were eliminated, although they passed through the partnership books and were treated as earnings of the three associates. The trial court's construction must be rejected and the earnings from these

sources will be made to conform to what the partners apparently intended when the profits were realized.

After deducting $12,923.40 from $23,384.12, the remainder of $10,464.72 was adjudged to be the value of James' interest as of Dec. 31, 1950. Interest at 6% for 16 months was ascertained. This, with the capital account, increased the credit to $11,297.57, for which judgment was given.

In reaching this result the Chancellor rejected defendant claims that James' balance should be charged with tax deficiencies due by W. C. Hargis, Sr., for 1945 and 1946. Rejected, also, was a contention that $7,181.16 should be taken from the 1948 credit because, for income tax purposes, the inventory account had been increased. There is testimony by Kemp that "in a way" James received the benefits of this writeup. But there is no showing that particular items of the inventory were undervalued; nor does the abstract show *how* the enhanced capital structure was dealt with by the partnership.

It must be remembered that all physical properties belonged to the father, and it follows that if particular items were not undervalued when the balance sheet was completed December 31, 1947, then any increase in the inventory could have come from purchases made in subsequent years. These purchases, if paid for, represented new assets, but payment presumptively came from partnership funds in which James had an interest, thereby reducing his proportionate earnings to the extent that profits in hand were converted into physical property—assets owned exclusively by W. C. Hargis, Sr. In the uncertain state of the record touching this point we are not at liberty to substitute a suggested result.

Attention is called to testimony that during James' illness his father paid certain personal bills on the son's account. This was a matter susceptible of either of two constructions: First, the father's intention at the time was no doubt one of indifference regarding repayment, constituting an informal gift; or there could have been

a mental reservation to ask for an accounting. This was not done and we prefer to believe that the father was not concerned with repayment. The net worth of the business after all taxes, interest, penalties, and audit charges had been met was well over $125,000. A profitable going agency emerged from the tax-paying ordeal and there is no suggestion of financial necessity such as might, on purely equitable grounds, prompt a Chancellor to direct restitution.

Our conclusion is that profits earned by James during 1948 could not be primarily charged with individual tax obligations his father owed for 1947 and preceding years when he was sole owner of the business. The defendant's appeal from the Chancellor's finding that any sum was due is dismissed. The decree as it affects the appellant is modified by eliminating the charge made against James' interest for his father's personal taxes, penalties, interest, etc., covering 1947, and by holding that income from all sources placed on the partnership books must be treated as the parties themselves fixed the pattern.

The result is that appellant should have judgment for $27,500.88, with interest and cost. With these directions the cause is remanded for the purpose of ascertaining dates of payments and computing the net amount for which judgment should be rendered.

Mr. Justice McFaddin thinks the decree should be affirmed.

Sequoyah Feed & Supply Company, Inc., *v.* Robinson.

4-9979 255 S. W. 2d 425

Opinion delivered February 23, 1953.

Greenhaw & Greenhaw and *Pearson & Pearson,* for appellant.

Price Dickson, Rex W. Perkins, Jeff Duty and *E. J. Ball,* for appellee.

ED. F. MCFADDIN, Justice. This case stems from the financial dealings of J. A. Robinson and Pillsbury Mills, Inc.; and certain background facts must be recited for an understanding of the controversy. As hereinafter referred to:

(1) "Robinson" is J. A. Robinson, a resident of Northwest Arkansas;

(2) "Pillsbury" is Pillsbury Mills, Inc., a corporation engaged in the manufacture and sale of various kinds of grain products;

(3) "Sequoyah" is Sequoyah Feed & Supply Company, Inc., an Arkansas corporation, engaged in the retail sale of feed and grain products in Fayetteville, and other places in Northwest Arkansas;

(4) "Cotton" is Cotton Produce Company, a partnership composed of Robinson, Ashworth and Weir, doing business at Huntsville, Arkansas, and engaged in raising chickens for the commercial market; and

(5) "Bank" is the First National Bank, of Huntsville, Arkansas.

Background Facts.

Beginning in March, 1945, Robinson acted as commission agent for Pillsbury in the sale of its products to dealers; and payments were due to Robinson from Pillsbury when, as, and if the dealers paid Pillsbury. Later Robinson organized Sequoyah, which acted as a dealer for Pillsbury products in several communities near Fayetteville. All of the stock in Sequoyah was owned or controlled by Robinson, who also organized "Cotton" as a partnership at Huntsville. This partnership owed the Bank a note for $7,000.

In June, 1950, an audit disclosed that Robinson was individually indebted to Pillsbury in excess of $93,000, and that Sequoyah was indebted to Pillsbury in excess of $84,000. Because of this indebtedness a contract (in two parts) was made on August 5, 1950, by the terms of which:

(a) Robinson transferred all of the outstanding certificates of stock of Sequoyah to three officials of Pillsbury;

(b) Robinson also transferred other assets to Pillsbury and to Sequoyah;

(c) Pillsbury released Robinson from the $93,000 personal indebtedness;

(d) Sequoyah became an endorser on the $7,000 note that Cotton owed to the Bank;[1] and

(e) Robinson continued as a broker of Pillsbury products on a commission basis and agreed that all commissions due him by Pillsbury, in excess of $700 per month, might be retained by Pillsbury and applied on any amount that Sequoyah should pay as endorser on the note of Cotton to the Bank, as aforesaid.

Cotton continued in business in Huntsville and became indebted to Sequoyah on open account in the sum of $5,062.24; also Robinson, while subsequently engaged in growing chickens in Fayetteville, became indebted to

[1] The security of the note was later strengthened by the Bank taking a mortgage on all of the chattel property of Cotton.

Sequoyah in the sum of $7,181.71, which was secured by a chattel mortgage. Then events began to happen in chronological order, as follows:

(1) On February 5, 1951, Pillsbury terminated the commission agency contract with Robinson;

(2) On April 21, 1951, Sequoyah notified the Bank (in accordance with § 34-333 *et seq.*, Ark. Stats.) that Sequoyah desired to be released from its endorsement of Cotton's $7,000 note to the Bank;

(3) On April 23, 1951, Sequoyah filed suit against Robinson in the Washington Chancery Court seeking judgment for the said $7,181.71 and foreclosure of its mortgage. Sequoyah also had a writ of garnishment served on Pillsbury to cover any amounts that Pillsbury might owe Robinson, and this garnishment was later renewed;

(4) On April 24, 1951, Sequoyah filed the present action in the Madison Circuit Court against Cotton seeking judgment for $5,062.24 due on open account; and Sequoyah had garnishment served on the Bank;

(5) Because of § 34-333 *et seq.*, Ark. Stats., the Bank took charge of all of Cotton's chattel property covered by the mortgage. Then, on May 5, 1951, Cotton, Robinson, and Sequoyah stipulated that the Bank might sell all the said chattels and apply the proceeds on the $7,000 note, and that "the other parties hereto, to forthwith pay to said Bank the remaining sum due thereon." The Bank sold the chattels and Sequoyah then paid the Bank $4,902 balance due on the endorsement. Pillsbury then paid Sequoyah that amount out of the retained commission account of Robinson, under the terms of the said August, 1950, agreement. By February, 1952, additional amounts had become due to Robinson from Pillsbury in the sum of $4,433.87, but this was covered by the writ of garnishment issued by the Washington Chancery Court in the said case of Sequoyah v. Robinson.

This Lawsuit.

As aforesaid, on April 24, 1951, Sequoyah filed this action in the Madison Circuit Court against Cotton to

recover judgment of $5,062.24 on the open account, and caused a writ of garnishment to be served on the Bank. Robinson and Ashworth[2] filed answer denying all the allegations of the complaint, and also filed cross-complaint against Sequoyah and Pillsbury for $25,000 damages for breach of contract as distinguished from tort. The basis of the damage claim against Pillsbury was that Pillsbury was all the time indebted to Robinson and withheld payment with the result that the entire business of Cotton had been taken by the Bank under its mortgage and sold for a grossly inadequate sum. The basis of the damage claim against Sequoyah was that Sequoyah had assumed and agreed to pay the $7,000 note of Cotton to the Bank, and that the failure of Sequoyah to make such payment had damaged Robinson and Ashworth. Sequoyah and Pillsbury filed separate denials to the cross-complaint and the case was tried to a jury in March, 1952.

At the conclusion of the trial, the Court:

(a) Directed a verdict for Sequoyah against Cotton for $5,062.24 due on open account; and the judgment rendered on that verdict is not questioned on this appeal;

(b) Directed a verdict for Robinson against Pillsbury for $4,433.87; and the judgment rendered on that verdict is one of the issues to be subsequently discussed; and

(c) Submitted to the jury the question of the damages claimed by Robinson and Ashworth; and the jury returned a verdict for them and against Sequoyah for $6,336; and the judgment rendered on that verdict is to be subsequently discussed.

I. *The Judgment for Robinson Against Pillsbury for $4,433.87.* This judgment was based on the *verdict directed by the Court;* and the correctness of such verdict and judgment is the point now at issue. In Robinson's and Ashworth's cross-complaint against Pillsbury, they sought $25,000 damages from Pillsbury because of its failure to pay—out of Robinson's retained commis-

[2] Weir did not file answer or cross-complaint.

sions—the $7,000 note that Cotton owed the Bank. There was no allegation or prayer in their cross-complaint that judgment be rendered for Robinson against Pillsbury for the balance of such commissions. The omission of such allegation and prayer was possibly because the pleaders knew that in the case of Sequoyah v. Robinson, filed in the Washington Chancery Court (and hereinafter referred to as the "Washington Chancery suit") one day prior to the present action, not only had a writ of garnishment been served on Pillsbury, but also Robinson had cross-complained against Pillsbury for damages. The fact of such suit and garnishment was shown in the evidence in the present case.

At all events, it was not until Robinson had completed his testimony in the present case that he asked to be allowed to amend the pleadings to conform to the proof. This motion was granted by the Court over Pillsbury's objections; and thereupon, Pillsbury offered in evidence the entire file of pleadings from the Washington Chancery case. The Court refused to admit such introduction, and we hold such refusal was error.

If the Court had permitted such introduction,[3] the Court would have found that in the Washington Chancery case involving $7,181.71, not only had a writ of garnishment been served on Pillsbury, but furthermore Robinson had—in the Washington Chancery case—cross-complained against Pillsbury for damages.[4] This cross-

[3] The file is brought into the present record by Pillsbury's offer to prove.

[4] The cross-complaint of Robinson against Pillsbury in the Washington Chancery case contained this paragraph:

"This defendant further pleading states that the exact amount of commissions due to this defendant are unknown in view of the fact that he does not have access to the records of either Pillsbury Mills, Inc., or Sequoyah Feed & Supply Company, Inc., in connection with the amount of feeds and supplies and baby chicks shipped, but he alleges that said commissions are far in excess of the amount sued for by the plaintiff herein, and that by reason of the fraudulent scheme of Pillsbury Mills, Inc., to deprive this defendant of the full benefits of his contract entered into with Pillsbury Mills, Inc., that he has been damaged in the sum of $25,000, for which amount he is entitled to judgment, and that in addition thereto he is entitled to have the claims of Sequoyah Feed & Supply Company, Inc., against him extinguished, cancelled, and held for naught, and all funds impounded under writs of garnishment in this cause released to him."

complaint against Pillsbury had been filed by Robinson in the Washington Chancery Court on October 12, 1951, and Pillsbury had joined issue[5] by answer filed on February 22, 1952, which was prior to the motion to amend the pleadings in the case at bar, as such motion was made at the trial which began on March 10, 1952. If the record had been allowed to be introduced in evidence, then Pillsbury would have had before the Court facts on which to base a plea of abatement because of prior suit pending. See *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467; *Wilson* v. *Sanders,* 217 Ark. 326, 230 S. W. 2d 19; and other cases collected in West's Arkansas Digest "Abatement & Revival," Key No. § 8 *et seq.*

But there was further error by the Trial Court in directing a verdict for Robinson against Pillsbury when the evidence had already been disclosed that the Washington Chancery case (filed by Sequoyah against Robinson) was filed prior to the present case, and involved in excess of $7,100, and that Pillsbury as garnishee only held $4,433.87 belonging to Robinson. When a garnishment has already been obtained in one jurisdiction and the defendant in that action later sues the garnishee in another jurisdiction, then in the absence of a governing statute, there are three lines of holdings as to what should be the course of procedure in the second action: (1) some courts hold that the proceedings in the second action may be abated until the termination of the garnishment proceedings; (2) other courts hold that trial of the second action should be continued to await the termination of the garnishment proceedings; (3) and other courts, while proceeding to judgment in the second action, suspend execution until the termination of the garnishment proceedings.[6]

A study convinces us that the better reasoned cases support the second holding. Applied to the case at bar,

[5] In the Washington suit, Pillsbury filed petition and bond for removal to the Federal Court, but Robinson's motion to remand to the Chancery Court was duly granted.

[6] The diversity of holdings is discussed in 5 Am. Jur. 32. See, also, 38 C. J. S. 423. As affecting suits in separate States, see the Annotation in 91 A. L. R. 959. See also Annotation in 166 A. L. R. 272.

this means that the cross-complaint of Robinson against Pillsbury for $4,433.87 should have been continued until the termination of the garnishment proceedings in the Washington Chancery Court.[7] Robinson filed no pleading in the Madison Circuit Court seeking the $4,433.87 judgment. He waited until the evidence was completed and then asked that the pleadings be amended to conform to the proof. In view of the state of the record we hold that the Madison Circuit Court should have continued the claim of Robinson v. Pillsbury for the $4,433.87 until the garnishment proceedings had been concluded in the Washington Chancery Court. That Court first acquired jurisdiction. There were several interveners in the Madison Circuit Court case, and at the beginning of the present trial on March 10, 1952, the Court specifically reserved certain phases of the issues involving the interveners for later developments. The Robinson v. Pillsbury item of $4,433.87 should likewise have been so reserved.

Therefore, we reverse the judgment in favor of Robinson and against Pillsbury for $4,433.87 and remand that angle of the controversy to the Madison Circuit Court with directions that an order of continuance be entered to await the final outcome of the garnishment proceedings in the Washington Chancery Court.[8]

II. *The Judgment Against Sequoyah for $6,336.00.* The Circuit Court submitted to the jury the questions: (a) whether Sequoyah and/or Pillsbury had unlawfully damaged Robinson and Ashworth by refusing to pay the said $7,000 note due by Cotton to the Bank; and (b) if so, then how much damages should Robinson and Ashworth recover from either Sequoyah or Pillsbury? Under such instruction, the jury returned a verdict for Robin-

[7] The record of the Washington Chancery case does not disclose that Robinson superseded the garnishment in that case by executing bond under § 31-515 Ark. Stats. Whether the execution of such a bond would have allowed Robinson to proceed against Pillsbury in this Madison Circuit Court case, is a question we do not decide.

[8] In our own case of *St. L. I. M. Ry.* v. *Richter*, 48 Ark. 349, 3 S. W. 56, the garnishment issued in another case was *after* the initiation of the principal suit. Yet even in that situation, we stayed execution awaiting the outcome of the garnishment case.

son and Ashworth against Sequoyah *alone* for $6,336; and Sequoyah challenges such verdict and judgment.

We hold that the Trial Court was in error in submitting to the jury any question about Sequoyah being liable in damages, because the uncontradicted proof negatives such a question. In Robinson's contract of August 5, 1920, Sequoyah became merely an endorser[9] on Cotton's note to the Bank. As an endorser, Sequoyah had the right to notify the Bank (as it did under § 34-333 *et seq.*, Ark. Stats.) that Sequoyah desired to be released from the said endorsement. Even if Pillsbury had retained money from Robinson's commissions to protect Sequoyah, still Sequoyah had a right to obtain a release from the endorsement. Sequoyah and Pillsbury were and are separate corporations; and the Court did not proceed on the theory of "piercing the fiction of the corporate entity," because the Court declared the law to the Jury: ". . . You are instructed that Sequoyah Feed & Supply Company is a corporation, and that Pillsbury Mills, Inc., is a corporation, and that each is a separate and distinct entity and person from the other."

Furthermore, after the Bank seized the mortgaged chattel property of Cotton in order to sell the same and determine the balance of Sequoyah's endorsement liability, Robinson, Ashworth and Cotton signed a stipulation with Sequoyah, dated May 15, 1951, reading in part:

"WHEREAS, The First National Bank of Huntsville, Arkansas, is the owner and holder of a certain promissory note executed by Cotton's Produce and en-

[9] The contract provided:

"Sequoyah will assume the liability of Huntsville as endorser on a $7,000 note payable 6 months from date, which is the primary obligation of Cotton Produce Company, a partnership composed of Robinson, Tommy Weir, and 'Cotton' Ashworth. Robinson agrees that to the extent of any amount paid by Sequoyah on that obligation, all commissions due or to become due to him from Pillsbury may be applied on the liability of Cotton Produce Company to repay Sequoyah the amount so paid. Robinson further agrees that any commissions earned by him and payable on or after the date of this agreement, and before maturity of the note, in excess of $700 per month may be retained by Pillsbury until the note is paid or until Sequoyah is released from all liability thereon, as security for the obligation of Cotton Produce Company to repay Sequoyah any amount paid by Sequoyah on the note, and applied as payment of such obligation if and when payment is made by Sequoyah."

dorsed by Huntsville Hatchery & Feed Co.,[10] Sequoyah Feed & Supply Co., all of said indorsers being liable to said bank for the payment thereof, said note bearing date of Jan. 17, 1951, and for the principal sum of $7,000, . . .; and Whereas, the payment of said note is secured by a certain chattel mortgage bearing the same date as said note, and default in the payment of said note has been made, and all parties hereto and below signed in person or by their duly authorized agents being desirous of avoiding unnecessary expenses in said matter, . . .

"Said Bank will cause to be advertised a sale of all of said mortgage property . . . that out of the proceeds of such sale said bank shall deduct all actual and necessary expenses and costs of such procedure and sale and apply the balance on and to the payment of said note, or credit such sum thereon, the other parties hereto to forthwith pay to said bank the remaining sum due thereon."

This stipulation admitted (a) that Sequoyah was an *endorser* of Cotton's note, (b) that the mortgaged chattels could be sold, (c) that the proceeds could be applied on the note, and (d) that the determined balance would then be paid. This stipulation—and its execution was freely admitted by all parties—constituted a complete waiver of any potential damage claim against Sequoyah, as later asserted by Robinson and Ashworth. In view of this stipulation, the Trial Court, instead of submitting to the Jury the damage claim of Robinson and Ashworth against Sequoyah, should have instructed a verdict in favor of Sequoyah for such damage claim. Such an instructed verdict was requested by Sequoyah. Therefore the damage judgment against Sequoyah is reversed, and on remand, the Trial Court will set aside such judgment.

Conclusion

The Trial Court ordered that certain funds that had been garnished in the hands of the Bank, would be held until further orders. There were several interventions in the case which, as previously mentioned, were left for

[10] Huntsville Hatchery & Feed Co. was a trade name of Sequoyah.

further consideration. As between Sequoyah and Cotton, the garnishment of the Bank was good; but we forego any discussion of the garnishment because there may be some rights of the interveners yet to be adjudicated.

LIPSMEYER *v.* FARMERS TRACTOR & IMPLEMENT CO.

4-9992 255 S. W. 2d 165

Opinion delivered February 23, 1953.

Johnston & Rowell, for appellant.

Phillip H. Loh, for appellee.

ROBINSON, Justice. This is a suit on an open account and title retaining note. The defendant alleges a breach of warranty as a defense.

The Farmers Tractor & Implement Company, appellee herein, sold a tractor and other farm implements to the appellant, Joe H. Lipsmeyer. The total of principal and interest amounted to $2,675.68, of which $501.50 was charged on open account. Two title retaining notes were executed by Lipsmeyer for the balance of the purchase price, one in the sum of $500, due September 4, 1951, and another in the sum of $1,674.18, of

which $837.09 was due October 4, 1951, and a like amount due on October 4, 1952. Lipsmeyer paid nothing on the open account, defaulted in the $500 payment due September 4, 1951, and in the $837.09 payment due October 4, 1951. On October 29, 1951, the implement company filed suit on the note and open account and asked judgment for the full amount of $2,675.68. Judgment was rendered for the plaintiff and Lipsmeyer has appealed.

The implement company sells Ford tractors and had been attempting to sell one to Lipsmeyer for some time. In March, 1951, it took one of the tractors to Lipsmeyer's farm and left it there for him to test, so that he could determine whether it was suitable for his purposes and whether he wanted to buy it. Lipsmeyer had the tractor in his possession, with full opportunity to test it in any manner he might desire, for two or three weeks, after which time he made the purchase and executed the notes, as above stated.

As a defense to this suit, Lipsmeyer claims that the implement company made certain warranties as to the quality of the machinery and the work it would do; and he further maintains that the machinery was defective and did not have the capacity to do the work, as provided by the warranty. But the conditional sales contract provides: "No warranties, express or implied, and no representations, promises or statements have been made by Seller unless written hereon by Seller." There are no warranties written on the sales contract.

Perhaps this case is controlled by *Hignight* v. *Blevins Implement Co.,* 220 Ark. 399, 247 S. W. 2d 996; *Pate* v. *J. S. McWilliams Auto Co.,* 193 Ark. 620, 101 S. W. 2d 794, and *Kern-Limerick, Inc.* v. *Mikles,* 217 Ark. 492, 230 S. W. 2d 939, wherein it was held in similar circumstances that the plaintiff was entitled to a directed verdict. However, we do not need to pass upon the issue of whether a directed verdict would have been proper here, for the reason that after all the issues were submitted to the jury on instructions given by the court, there was a verdict for the plaintiff for the full amount

sued for; and there is substantial evidence to sustain the verdict.

Appellant also assigns as error the court's refusal to give his requested instruction number 11 which pertains to the measure of damages, in the event the jury found there had been a breach of warranty by the seller; but, since the jury found there was no breach of warranty, there could be no error in the court's refusal to give the instruction.

Affirmed.

LONG-BELL LUMBER COMPANY *v.* AUXER.

4-9987 255 S. W. 2d 163

Opinion delivered February 23, 1953.

Rose, Meek, House, Barron & Nash, for appellant.

Fitzhugh & Cockrill, Talley & Owen and *Wright, Harrison, Lindsey & Upton,* for appellee.

J. SEABORN HOLT, J. Appellant, Lumber Company, (plaintiff below) brought this suit to foreclose an alleged materialman's lien in the amount of $9,414.96 ($4,544.96 of this amount being for materials furnished and $4,870, cash furnished for labor to Auxer, the contractor), on property owned by Peter J. Heyburn and wife in Jacksonville, Arkansas.

The defendants below (appellees here), were in three groups, (1) Peter Heyburn and wife, (2) Joe

Auxer (who died October 14, 1950), his wife, Jessica, and a minor son, Bennie, and (3) Victor Howard, Trustee, Adams & Howard Company, Inc., and the Community Savings Bank of Rochester. All defendants answered with general denials and presented a common defense.

A trial resulted in a decree for the defendants and a dismissal of appellant's complaint.

In brief, the facts were to the following effect: Appellant, Long-Bell, a supplier of building materials, verbally contracted with Joe Auxer to furnish him both materials and money to pay labor in building a house which Auxer had contracted to build for the Heyburns. Materials were supplied by Long-Bell to Auxer on the Heyburn job between April 22, 1950, and July 8, 1950, in the amount of $4,544.96, and in addition Long-Bell advanced cash to Auxer in the amount of $4,870 for his labor used on the job.

It also appears that Long-Bell, between July 20, 1949, and April 29, 1950, had furnished Auxer on another construction job, known as the Elmore job, and entirely separate from the Heyburn job, materials and cash in the amount of $14,068.99, the last material being furnished on this Elmore job approximately seven days after the Heyburn job was begun.

It appears undisputed that on June 9, 1950, appellee, Heyburn, gave his check for $3,000 to Auxer on his contract with Auxer, and on the same day, Auxer gave his personal check to Long-Bell for $3,000 which Long-Bell, on its own motion applied, not on the Heyburn job, but on the Elmore job. On August 9, 1950, the Heyburns borrowed $9,450 from Adams & Howard Co., Inc., executing a note and a deed of trust as security with Victor Howard, Trustee. The note and deed of trust were later assigned to the Community Savings Bank of Rochester. The permanent financing of this loan was handled by appellee, Adams & Howard Co., Inc., and James Rhodes, manager of this company's Little Rock office, on August 9, 1950, disbursed the proceeds of the Heyburn loan by check for $9,450, payable to Mr. Hey-

burn, his wife, and Auxer, and on the following day, August 10, 1950, the evidence shows Auxer delivered his check for $3,191.64, out of these Heyburn funds, to Long-Bell, which was credited to the Elmore job. It thus appears that a total of $6,191.64, which was more than enough to pay for all materials furnished on the Heyburn job, was credited on the Elmore job out of money paid to Auxer by the Heyburns.

Appellant contends: (1) "That it did not know that the money applied on the Elmore account was paid to Auxer by Heyburn, that by the exercise of reasonable diligence it could not have learned that fact, that Auxer made payment to appellant and directed application of payment to the Elmore job." The contention is also made: (2) "With reference to the advances made by appellant to Auxer for the payment of labor, appellees contend that under the statute appellant is not entitled to a lien therefor. Appellant contends that it is entitled to a lien on the theory that the laborers paid from the advancements had the right, if not paid, to establish liens, and that plaintiff, in discharging the obligations to the laborers, is entitled to subrogation."

— (1) —

Our rule is well settled that, in circumstances such as are presented here, if Long-Bell knew, or by the exercise of reasonable diligence, or care, should have known the source of the money which Auxer paid to it, then it was obligated to credit the Heyburn job therewith. We think the preponderance of the testimony shows that Long-Bell did know that the source of the Auxer payments in question was Heyburn money.

Burton Dougan, an officer of Beach Abstract & Guaranty Co. of Little Rock, and agent for a title insurance company, testified that his company issued on August 15, 1950, Mortgagee's Title Insurance policy in favor of Heyburn and Adams & Howard Co., Inc.; that in early October, 1950, he first heard of appellant's lien claim on Heyburn's home. He notified Rhodes and they, together with Auxer, went immediately and consulted

Mr. Ellis, manager of Long-Bell, at his office. Relative to this meeting, Mr. Rhodes testified: "Q. What was your purpose in contacting him? A. Mr. Auxer had told us that he had paid the Heyburn material bill in full and we went to Long-Bell . . . with the idea of talking to Mr. Ellis about the case. Q. Did Mr. Ellis at that time tell you what the status of the account was? A. He did; he told us there was a balance of a little over ninety-four hundred dollars. Q. Did you talk to him? I say did you—did you and Auxer talk to him about why the money from Dr. Heyburn was not applied on the Heyburn account? A. Yes, sir, we did. Q. What did he say about that? A. Mr. Ellis told us he knew the money came from the Heyburn job; since he was not specifically told by Mr. Auxer to apply it on the Heyburn job he applied it on the oldest account, which was the Elmore job."

On the same point, Mr. Dougan testified. "Q. Did you discuss with him the status of Auxer's account with Long-Bell Lumber Company? A. No, sir, we discussed with him the status of the Heyburn account. Q. That was Auxer's account with Long-Bell? A. That is right, excuse me. Q. Discussed the amount of the bill that was owned on what he was contending was the Auxer job? A. That is true. Q. During the conversation with Mr. Ellis, was anything said with reference to the source of the money that Auxer paid Long-Bell that was applied on what is known as the Elmore account? A. Yes, sir. Q. What statement did he make you with reference to his knowledge of the source of the money? A. Mr. Ellis—I asked him the specific question if he didn't know where that money came from and he said 'Yes, I knew it came from this last job but we applied it on the oldest account, the oldest account that this contractor owed'."

Mr. Ellis denied the testimony of Rhodes and Dougan.

Mr. Spotts, treasurer of Little Rock Abstract Company, (a competitor of Beach Abstract & Guaranty Company of which Dougan is an officer) in charge of the

Loan Closing and Title Department of his company, testified that he disbursed the loan made by his company on the Elmore job, to Elmore and Auxer, but that before the proceeds of this loan were paid to them on May 12, 1950, either Auxer or Elmore furnished him (as was the policy of his company) a written statement from Long-Bell to the effect that all materials on the Elmore job had been paid for in full. He further testified that several days later Mr. Ellis called him on the phone and after he told Ellis of the disbursement to Auxer and Elmore, on the strength of the above statement, Ellis said the statement "was in error" and that he "did not remember" having called Mr. Spotts.

We think the testimony of these witnesses was ample to show that Long-Bell did know that Heyburn money was being improperly applied in payment of the Elmore job and was sufficient to support the trial court's findings denying appellant's right to a lien on the Heyburn home for materials furnished.

— (2) —

Appellant next contends that it should have a lien on the Heyburn job for money furnished Auxer for labor performed thereon. We do not agree.

On this issue, appellant frankly admits that under our present laws and numerous decisions of this court, beginning with *Bank of Commerce* v. *Lawrence County Bank,* 80 Ark. 197, 96 S. W. 749, and in many subsequent decisions, and as late as *Wyatt Lumber & Supply Company, Inc.* v. *Hansen,* 201 Ark. 534, 147 S. W. 2d 366, it would not be entitled to such lien for cash furnished a contractor for labor. However, we are urged to "reexamine the entire question and to depart from these cases, if necessary, to protect the materialman who does in fact advance its funds to pay labor on the job." This we decline to do. The relief sought appears to direct itself to the Legislature.

Affirmed.

George Rose Smith, J., not participating.

CITY OF WEST HELENA *v.* BOCKMAN.

4-9997 256 S. W. 2d 40

Opinion delivered March 2, 1953.

Rehearing denied April 13, 1953.

James P. Baker, Jr., and *John L. Anderson,* for appellant.

John C. Sheffield, for appellee.

J. SEABORN HOLT, J. Dr. James Bockman, appellee, a practicing physician, has, since 1937, operated a Clinic in a structure within that part of the City of West Helena (population 7,000) designated, by a Zoning Ordinance, (No. 494 enacted April 17, 1951) as Residential Zone "A". The building housing his Clinic is one story, on a lot 66 ft. x 132 ft., and consists of six rooms—an X-Ray room, a laboratory, examining room, one bath room, two

waiting rooms (one for white and the other for Negro patients), and a porch, 21 ft. x 8 ft. Appellee's residence is in another part of the city.

Dr. Bockman made proper application, in accordance with provisions of the Zoning Ordinance, for a permit to expand and enlarge his present building beyond its present foundation "to take care of expansion in business" by adding another room, 16 ft. x 25 ft. on the south side, within eight feet of the property line, his purpose being to enlarge his waiting rooms and add a separate rest room and toilet for Negro patients.

When appellee was denied the requested permit, first by the Building Inspector, then by the Appeal Board, and finally by the City Council, and had exhausted his administrative remedies, he appealed to the Chancery Court and some twenty-five property owners were permitted to intervene and joined in the City's contention that appellee's application should be denied for the reason that his proposed enlargement of his building would be for a nonconforming use not permitted under the Ordinance and alleged more specifically, in effect, that "the terms of the Ordinance are fair and equitable and in conformity with established building codes; that such nonconforming use, if permitted, would result in a diminution of the value of their property and endanger the public health, safety and welfare, and that neither the terms of the Ordinance or the actions of the Officials of the City of West Helena were arbitrary, illegal, or unreasonable."

The trial court found the issues in favor of Dr. Bockman and "that the denial of the permit of the plaintiff in the circumstances is unreasonable, arbitrary, discriminatory and void; and that the plaintiff is entitled to the relief prayed."

This appeal followed.

The rule appears to be well settled that, in general, the enactment of Zoning Ordinances is constitutional. However, such ordinances being in derogation of the common law, must be reasonable and not arbitrary, must

not unreasonably deprive the property owner of the use of his property, and their enforcement must not be arbitrary, capricious or unreasonable. We said in *City of Little Rock* v. *Sun Building & Developing Company,* 199 Ark. 333, 134 S. W. 2d 582:

"In all the cases in which zoning ordinances have been upheld, it is recognized that such legislation frequently, if not generally, operates to reduce the value of property the use of which is restricted. But these cases are to the effect that such damage does not constitute the taking of private property within the inhibition of the Constitution (Art. 2, § 22) against the taking of private property for public use without making compensation therefor, and that it is not required that the owner be compensated for this loss of value. The theory is that the owner of such property is sufficiently com pensated by sharing in the general benefits resulting from the exercise of the police power. . . . This power may not be arbitrarily used, and must in all cases bear a definite relation to the health, safety, morals and general welfare of the inhabitants of that part of the city where the property zoned is situated."

Here, it appears that the house in question is located in Residential Zone "A" under the terms of the Zoning Ordinance, and was owned and occupied by Dr. Bockman as a Clinic at the time the Ordinance was en acted. He has not used it for residential purposes for several years. It appears undisputed that, under the terms of the Ordinance, Dr. Bockman's use of the property is a nonconforming one.

Section 2 provides: "USES: In each zone as herein established, land and structures may be used only for purposes specified in Section 7 of this Ordinance."

Section 3 provides: "NONCONFORMITY USES: Any use or structure existing at the time of enactment or subsequent amendment of this Ordinance, but not in conformity with its provisions, may be continued with the following limitations: Any use or structure which does not conform to this Ordinance may not be: 1.

Changed to another nonconformity use . . . 3. Extended except in conformity to this Ordinance."

Nor is the proposed use a permitted one as provided in Section 7: "USES AND REQUIREMENTS WITHIN THE ZONES: 1. RESIDENTIAL ZONE 'A' A. PERMITTED USES: In Residential Zone 'A' as hereinabove created and defined, the following uses shall be permitted: Detached one-family dwellings, church, school offering general education course, library, general purpose farm, garden, nursery, private club not conducted for profit, municipal recreation or water supply use; and accessory use."

The "accessory use" referred to in Section 7, as defined in Section 7, "G", could not apply to Dr. Bockman for the reason that he does not make his residence in the structure. This section provides: "G. ACCESSORY USE DEFINED: The phrase 'accessory use' as herein used shall include: Structures and uses (such as private garages and coal sheds) customarily incidental to and on the same lot with a permitted use; customary home occupation, such as offices of a doctor and dressmaker, incidental to a permitted use, provided such occupations are conducted in the main building and only by a person resident in said building."

Section 7, "C" provides: "In Residential Zone 'A', all uses not specifically permitted, or permissible, upon approval of the Appeal Board shall be prohibited." Section "D" provides: "MINIMUM YARD SPACE REQUIREMENTS: In Residential Zone 'A', all structures shall have yard space of not less than 20 feet depth in front of said structure, and 20 feet depth in the rear. All structures shall have side yard space of at least 10 feet on each side."

It is undisputed that the proposed expansion would be within eight feet of the south property line, contrary to the limit of ten feet in said Section "D". It also appears that the City offered to permit appellee to enclose the porch and use it for an additional waiting room space and for toilet or bathroom purposes.

When all of the facts are considered, we have concluded that when the City denied appellee a permit to expand his structure for a nonconforming use to within eight feet of the property line on a small, crowded lot, in a growing residential section, it acted within its proper police powers to protect the health, safety, morals and general welfare of its inhabitants, did not act in an arbitrary or unreasonable manner, and that the preponderance of the testimony is against the trial court's finding to the contrary.

Accordingly, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

STATE *v.* DUNCAN.

4728 255 S. W. 2d 430

Opinion delivered March 2, 1953.

Ike Murry, Attorney General and *George E. Lusk, Jr.,* Assistant Attorney General, for appellant.

S. M. Bone, for appellee.

WARD, J. Denver W. Duncan, appellee, was charged by information with the crime of feloniously selling four bales of cotton upon which the Farmers Home Administration, a government agency, held a chattel mortgage, with intent to defeat said mortgage and the debt thereby secured. The information (in its entirety) properly charged appellee with the crime of selling mortgaged property under the provisions of *Ark. Stats.,* § 41-1928 which reads as follows:

"It shall be unlawful for any person to sell, barter, exchange or otherwise dispose of, or to remove beyond the limits of this State or of any county in which a landlord's or laborer's lien exists, or in which a lien has been created by virtue of a mortgage or deed of trust, or to which title has been retained by the vendor, any property of any kind, character or description, upon which a lien of the kind enumerated above exists or to which title still remains in the vendor: provided, such sale, barter, exchange, removal or disposal of such property be made with the intent to defeat the holder of such lien or title in the collection of the debt secured by such mortgage, laborer's or landlord's lien or retention of title."

To the above information appellee filed, and the trial court sustained, a demurrer on the ground that the Circuit Court had no jurisdiction. The reasons assigned for the lack of jurisdiction in the state court were: that the information charged appellee with cheating and defrauding the United States Government, and that therefore the United States courts have exclusive jurisdiction. The

Federal statute covering the act which appellee is charged with committing is § 658, 18 U. S. C. A., 1951 Supp., which reads as follows:

"Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, the Farm Credit Administration, any Federal intermediate credit bank, or the Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any production credit association organized under sections 1131-1134m of Title 12, or in which a Production Credit Corporation holds stock, any regional agricultural credit corporation, or any bank for cooperatives, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The issue thus raised being one which, as the Attorney General certified, affects the correct and uniform administration of the criminal laws of this state, this appeal is properly prosecuted.

It is stated by appellee and admitted by appellant that the acts alleged to have been done by appellee constitute an offense against the United States Government under § 658, *supra*. The only material difference between the State statute and the Federal statute is the punishment prescribed by each.

Appellee argues that neither the Act of Congress setting up the Farmers' Home Administration nor the Act creating the offense here involved gives any jurisdiction to the state court to enforce the Federal penal act. This contention is true but it does not reach the issue here involved. The attempt by the State here is not to enforce the Federal statute but to enforce the State statute. The fallacy in appellee's argument is that it is not necessary, in this instance, for Congress to specifically grant jurisdiction to the state courts.

There are numerous cases which hold that the same acts, constituting an offense under State and Federal statutes, can be prosecuted in both courts where there was no specific delegation of jurisdiction to the state court by the Congress. Some of these cases are: *Cross* v. *State of North Carolina,* 132 U. S. 131, 10 S. Ct. 47, 33 L. Ed. 287; *Pettibone, et al.* v. *United States,* 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419; *Crossley* v. *State of California,* 168 U. S. 640, 18 S. Ct. 242, 42 L. Ed. 610; *Sexton* v. *California,* 189 U. S. 319, 23 S. Ct. 543, 47 L. Ed. 833; *United States* v. *Holt, et al.,* 270 F. 639; *Ex Parte Hollingsworth,* 83 Tex. Crim. R. 400, 203 S. W. 1102; and *State* v. *Frach,* 162 Ore. 602, 94 P. 2d 143.

The general rule is well stated in the *Pettibone* case, *supra,* where it was said:

"While offenses exclusively against the State are exclusively cognizable in the state courts, and offenses exclusively against the United States are exclusively cognizable in the Federal courts, it is also settled that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government."

We are not unmindful of the general Federal statute, § 3231, 18 U. S. C. A., which reads:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

The above statute, however, is interpreted to apply to violations charged under the Federal statute and not to apply to a charge under a State statute, as is the case here. Also, the above portion of the statute must be read in connection with the rest of the statute, which is:

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

In the case of *United States* v. *Holt, supra,* the Court recognized the import of that portion of the Federal stat-

ute last copied above and quoted with approval from another case the following:

" 'The jurisdiction of the state court over the crime of extortion, when perpetrated under the circumstances stated in the indictment, is at least concurrent with that of the courts of the United States.' "

Immediately following the above, the opinion further states:

"The conviction by the state court was sustained as a proper exercise of the sovereign powers of the state; but the power of the federal government to proceed to punishment for the offense against its sovereignty was entirely unaffected."

Except in special instances, such as where the Federal Constitution grants exclusive jurisdiction to the Congress or where the offense is not covered by State statute, the general rule is that when acts are made an offense by both State and Federal statute, the offense may be tried in either or both jurisdictions. The sound reason for such a rule is particularly apparent in all matters affecting the morals and general welfare of the people. In the case of *State* v. *Frach, supra,* the court quoted with approval from *Wharton's Commentaries on American Law,* in part, as follows:

"(2) It is as much to the public interest and as essential to the public welfare of the people of this state that persons, who, within this state, steal the property of the United States, should be prosecuted and punished for the crime as it is if the property stolen belonged to a private individual, and hence, in prosecuting and convicting the defendant for a crime committed within the state in violation of the criminal statute of this state, the state, through its courts, was merely exercising a power which, under the federal constitution, is reserved to the several states."

Since the appeal herein reaches this Court on a demurrer to the information, appellee has not been placed

in jeopardy. See *State* v. *Sherman,* 71 Ark. 349, 74 S. W. 293.

Reversed and remanded for a new trial.

WOODRUFF ELECTRIC COOPERATIVE CORPORATION
v. WEIS BUTANE GAS COMPANY.

5-3 255 S. W. 2d 420

Opinion delivered March 2, 1953.

John D. Eldridge, Jr., and *Norton & Norton,* for appellant.

Mann & McCulloch, Daggett & Daggett and *Wright, Harrison, Lindsey & Upton,* for appellee.

WARD, Justice. This appeal involves a question of venue, and that in turn calls for a determination of what constitutes the principal place of business of a corporation.

On February 27, 1951 a truck belonging to Weis Butane Gas Company and driven by its employee, Woodrow James (the two appellees), collided in Lee County with a truck belonging to Woodruff Electric Cooperative

Corporation (appellant) and driven by its employee. As a result of the collision and the damages claimed by both sides, two suits were filed. Appellees sued appellant in Lee County, and appellant sued appellees in Woodruff County.

It is recognized by both parties that, under § 27-611, Ark. Stats., the venue for these suits could be in the county where the collision occurred or in the county where either party, in this instance, had residence, since under the decision in *East Texas Motor Freight Lines, Inc.* v. *Wood,* 218 Ark. 211, 235 S. W. 2d 882, the venue statute before mentioned applies to corporations. It is likewise recognized by both parties that, under the rule announced in *Healey & Roth* v. *Huie, Judge,* 220 Ark. 16, 245 S. W. 2d 813, venue would attach in the case where service of summons was first had. In this case service was first had in Woodruff County, and appellant claims that county as its principal place of business and, therefore, its residence.

Appellees, defendants in the Woodruff County suit, filed a motion, sustained by the trial court, to dismiss on the ground that appellant's "principal office and principal place of business" was not in Woodruff County. Appellant prosecutes this appeal from the order of dismissal.

The exact question here presented for our determination is this: Where a corporation has designated a principal office or place of business in its articles of incorporation and has in fact established and still maintains an office at such designated place, can it change its *situs* (for the purpose of venue under § 27-611, Ark. Stats.) to another county by establishing and maintaining in the latter county another office and place of business without amending, for that purpose, its articles of incorporation? In our opinion it cannot do so. The facts in this case are not involved and are not disputed.

Appellant was organized in the year 1939 under Act 342 of 1937 to operate only in Woodruff County. Pursuant to § 6 (5) Augusta, Woodruff County, was desig-

nated as its "principal office." An office was in fact established at Augusta and is still maintained with two or three employees, where current bills are paid, equipment is stored, and a radio transmitter is maintained. Letterheads of the company's stationery show "Augusta, Arkansas" and the company maintains a bank account in that city.

Some years after its incorporation appellant was authorized to do business in several other counties in addition to Woodruff County, and about 1944 or 1945 it established, and has ever since maintained, an office or place of business at Forrest City in St. Francis County where it was also authorized to do business. There is no question about the office in Forrest City being more elaborate than the office in Augusta, or about more of the company's business being transacted there. The Forrest City office has approximately 30 employees, and all the company books are kept there.

Section 26 of said organization Act 342 provides for the articles of incorporation to be amended as to provisions "included in original articles." Under this section the stockholders, in 1945, made an effort to amend the articles of incorporation so as to move the company's principal office to Forrest City, but the effort failed when put to a vote.

Although the exact question before us has never been passed on by this court, we think the answer is obvious from the holding and reasoning in the case of *Home Fire Insurance Co.* v. *Benton,* 106 Ark. 552, 153 S. W. 830. While this case involved the determination of the *situs* of a corporation for taxation purposes, we see no logical reason why the principles announced there should not apply to the issue here under consideration.

The essential facts in the *Home Fire* case were: The company had designated (in articles of incorporation) and actually established its office or place of business at Fordyce, Dallas County, in 1905. In 1911 the stockholders passed a resolution declaring that the place of business and domicile be moved from Fordyce to Rison in

Cleveland County, and all requirements of § 870 of Kirby's Digest relative to filings in Cleveland County and the Secretary of State's Office were complied with. However, the company actually retained its office in Fordyce and did not move any physical equipment or office functions to Rison. When the question later arose as to which town was the company's *situs,* this court held that two things were necessary before the company could change its *situs* from Fordyce to Rison: (a) It must make the change on paper, *i. e.,* as provided by said § 870, and (b) It must actually establish an office at Rison. Since it failed in (b), no change was effected.

Applying the same rule and reasoning announced above it follows here that appellant's *situs* or place of business is still in Augusta because requirement (a) was not complied with. Long before this suit arose appellant recognized the necessity of complying with § 26 of Act 342 before it could make a change because, as stated before, it made an attempt to comply but failed.

We believe the determination here arrived at is commendable from a practicable standpoint. By requiring a corporation to change its articles of incorporation (and file the change with the Secretary of State and in the pertinent county) before changing its *situs* it enables anyone interested to determine such a change by a reference to the records and it also prevents the possibility of the corporation from covertly and suddenly changing its *situs* to suit its immediate purpose. It is not at all difficult to envision some corporation with places of business in several counties so nearly equal in physical equipment and/or office functions that a close question could arise as to which constituted the principal office. In such instances the determining factor should be intent. The legislature has provided a method by which that intent can be and, we think, must be expressed, that is, by amending its articles and making the necessary filings.

Appellees have very ably presented certain contentions, which we will presently examine, calling for a conclusion different from the one we have reached.

It is stated that the *Home Fire* case, *supra,* holds that the "paper designation" of a principal place of business is *prima facie* evidence only, and that here the evidence (of a change) overcomes the *prima facie* showing. We agree that the cited case contains the expression attributed to it and also agree that there is sufficient evidence to sustain the trial court on the fact question. However, the statement in the *Home Fire* case must be interpreted in the light of the facts and holding there as against the facts here. There it was correct to say the "paper change" made a *prima facie* case, and that it was overcome by the facts. Here there is no "paper change" indicating a removal to Forrest City and therefore no *prima facie* showing of such change. The *prima facie* showing here is the original articles which designate Augusta and there is actual evidence to sustain it, *i. e.,* there is an office at Augusta.

Another contention by appellees is to this effect: That we have said (in *East Texas Motor Freight Lines, Inc.,* v. *Wood, supra*) that a corporation is like unto a person or individual; that we have held, as in *Missouri Pacific Ry. Co.* v. *Lawrence,* 215 Ark. 718, 223 S. W. 2d 823, 12 A. L. R. 2d 748, a person can have a "domicile" in one place and a "residence" in another, depending on the facts; and that here, even though the record domicile of appellant might be in Augusta, the evidence shows its residence to be in Forrest City.

The above contention is, we think, untenable in this instance. In the first place there is no compelling or logical reason for carrying the similarity of a "person" to a "corporation" to such limits. In the second place there appears no good reason why a corporation should have a domicile at one place and a residence at another, particularly when limited to the scope of the issue here considered. In the *Home Fire* case, *supra,* it was said: "The terms 'domicile' and 'principal place of business,' as used in the statutes and decisions, are synonymous," and we would, in this connection, add the word "residence." In *Fletcher Cyclopedia Corporations, Permanent Ed.,* Vol. 9, § 4372, it is stated that it is generally

held that the residence of a corporation for the purpose of venue is its principal place of business or principal office.

It follows from the views above expressed that the trial court should have overruled appellees' motion to dismiss, and this cause is accordingly reversed and remanded.

The Chief Justice not participating.

LAYNE-ARKANSAS COMPANY *v.* HENDERSON.

5-2 255 S. W. 2d 423

Opinion delivered March 2, 1953.

Joseph Morrison, Bridges, Bridges, Young & Jones and *Henry W. Gregory, Jr.,* for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

George Rose Smith, J. This is a suit by the appellee to recover for serious personal injuries sustained when he fell from a rice combine which the appellant was transporting by truck. The jury's verdict for the plaintiff, in the sum of $24,000, is not questioned as being excessive. It is contended, however, that the proof fails to show negligence on the part of the defendant and that even if negligence existed the plaintiff cannot recover for the reason that he was either an emergency employee of the defendant or a mere volunteer who assumed the risk of the injury that occurred.

The rice combine, which is owned by the plaintiff's father, is a threshing machine so large that it cannot easily be carried on the highways. In July of 1951 the elder Henderson, desiring to move the combine from the community of Yoder to his home some miles away, employed the defendant to transport the machine. According to the defendant's proof the rules of the Highway Department require that an escort car travel immediately ahead of a truck carrying such bulky machinery. The defendant makes an additional charge for its services when it provides the escort, but it says that in this instance Henderson agreed to send his son, the plaintiff, to perform that duty.

On the day of the move the plaintiff helped the defendant's driver, A. W. Berryman, in loading the combine upon the defendant's truck and trailer. The plaintiff, in his father's truck, then escorted the other vehicle until the entrance to the Henderson farm was reached. There, by Berryman's testimony, the two men alighted and discussed the fact that their pathway into the farm was obstructed by a tree and a telephone wire that were too low to afford clearance for the projecting parts of the combine.

Henderson testified that he climbed up on the upper deck of the combine in order to lift the branches and wire over the projections, but he first warned Berryman to

wait and give him sufficient time for these maneuvers. Both men agree that Berryman then drove the truck slowly forward and that Henderson succeeded in lifting all the branches out of the way. According to Henderson, after the trailer passed beneath the tree Berryman speeded up, and before Henderson had time to turn around he was struck across the shoulder by the telephone wire and thrown to the ground. Although Berryman denies having increased his speed he admits that he watched Henderson through the rear window until the last branch was cleared; he then turned his attention to the road ahead, drove twenty feet farther, stopped, got out of the truck, and still did not know that Henderson had fallen until he heard the cries of Henderson's mother, who had seen the broken telephone wire and assumed that her son had been electrocuted. On this proof the jury were warranted in concluding that Berryman was guilty of negligence in increasing his speed and in relaxing his vigilance before Henderson passed safely under the wire, the presence of which was admittedly known to Berryman.

In spite of its carelessness the appellant argues that it cannot be held liable for mere negligence, since Henderson was a volunteer to whom the appellant owed no higher duty than to refrain from injuring him after his peril was discovered. Typical of the cases cited are *Railroad Co.* v. *Dial,* 58 Ark. 318, 24 S. W. 500; *Henry Quellmalz etc. Co.* v. *Hays,* 173 Ark. 43, 291 S. W. 982; and *Armour & Co.* v. *Rice,* 199 Ark. 89, 134 S. W. 2d 529. In all those cases the plaintiff sought the protection accorded by law to an employee but failed to show that his employment had been authorized by any one empowered to bind the master to such a contract. Consequently, as we said in the *Dial* case, the plaintiff was "technically a trespasser," and the only duty owed to him was "not to injure willfully, wantonly, or by gross negligence." In the case at bar the plaintiff was by no means a trespasser; even the defendant says that it reduced its fee in view of the elder Henderson's agreement to supply the escort. Young Henderson's action in climbing upon the combine to assist Berryman was not

gratuitous or officious conduct by which Henderson assumed all the risk except that incident to the driver's recklessness. The jury were justified in believing that Henderson's perilous position was within the contemplation of the parties to the contract, and if so he was entitled to rely upon Berryman for the exercise of ordinary care.

An alternative contention is that Henderson became an emergency employee of the defendant and is therefore restricted to his remedies under the Workmen's Compensation Act. Among several answers to this argument two will suffice. First, when the person rendering assistance has an interest for his own employer in relieving the emergency condition, he does not ordinarily become an emergency employee of the person whom he assists. *Transport Co. of Texas* v. *Ark. Fuel Oil Co.*, 210 Ark. 862, 198 S. W. 2d 175. Second, even if this defense had merit it was neither pleaded nor proved below. In general an employer is not affected by the compensation law unless he has five or more regular employees. Ark. Stats. 1947, § 81-1302 (c). The appellant offered no direct proof that it had the required number of employees, but we are asked to comb the record for random references in the testimony to a total of five separate persons who worked for the appellant, to find as a matter of fact that all were regularly employed, and then to presume that the appellant had complied with the statute by obtaining coverage. Apart from the obvious weaknesses in this chain of inferences we think it enough to say that this defense was not asserted below and cannot be relied upon here.

There are other suggested reasons for reversal, but they do not merit discussion. Affirmed.

ROBINSON *v.* GULLEY.

4-9995 255 S. W. 2d 438

Opinion delivered March 2, 1953.

Barrett, Wheatley, Smith & Bacon, for appellant.

Douglas Bradley, for appellee.

GRIFFIN SMITH, Chief Justice. Mandred Robinson, common ancestor of those claiming under the decree, owned forty acres and other lands in Craighead county. Most of the forty was planted to rice, but there was some timber. Mandred agreed to sell to his son Hervey the specific tract in question. A deed was executed, but no consideration was paid by Hervey and it was undelivered when Mandred died in 1929 survived by three other children—Henry, Charles, and Belle.

Hervey remained in possession until he died in 1937. His widow, Dovea, was appointed administratrix; thereupon a petition was filed in probate court reciting that Hervey had agreed to convey to Henry the interest he (Hervey) had in other ancestral lands—lands owned by Mandred at the time of this death. An order directed execution of a deed consonant with the oral agreement, and this was done. A later order resulted in the execution of a deed to replace one found to have been made

by Hervey to Charles in fulfillment of an agreed division of Mandred's lands. The division referred to is said to have been evidenced by a deed executed in 1936. It was lost.

A deed prepared at a time not disclosed described the forty acres and named Charles and Belle as grantors to Hervey. They were joined by their consorts. This transaction occurred shortly after Hervey's death and the deed was not signed by Henry.

After Hervey's death, which occurred February 19, 1937, a fourth child was born. On February 19, therefore, his family consisted of the widow and three minor children. April 3, 1937, the widow, Dovea, having been appointed administratrix, executed a deed to Henry conveying the forty acres. Henry remained on the land until this possessory action was filed by Ludean Gulley, Hervey's oldest daughter. She sued in her own right and as next friend of the three minor children. An accounting of rents and proceeds from the sale of timber was asked; also that title be quieted. Charles and Belle had formerly disclaimed any interests.

The Chancellor found that Mandred's heirs had joined in a family settlement in 1936, prior to Hervey's death. By this settlement Hervey acquired the interest of his brothers and sister in the disputed acreage in exchange for conveyances of Hervey's interest in other property. Rents and profits were computed and charged against Henry, with allowances for taxes and improvements. Neither party challenges correctness of the amount of this determination.

Henry concedes that the deed by Hervey's widow could not convey interests of the minor children, but insists that it effectively transferred dower rights. He also disputes the family settlement. Henry denies liability for rents, insisting that his status is that of a cotenant upon whom no demand for participation was made. Further, he seeks to impose the bar of statutory limitation upon Ludean, who became eighteen more than three years before suit was filed.

Appellees counter with the contention that no dower interest was assigned Dovea, hence there was no transfer to her, and Henry acquired nothing. They discuss Henry's status as a co-tenant, insisting that as to the disputed interest it is dependent upon acquisition of the dower rights or failure of the family settlement. If dower were not conveyed, or if the family settlement took place, Henry has no interest upon which his prayer for partition can rest, nor can he escape accounting for rents and the sale of timber.

The plea of limitation is met by argument that until shortly before Ludean's suit was filed there was no notice that Henry claimed adversely; on the contrary the presumption would be that he held as guardian of Hervey's minor children. Henry is charged with fraudulent conduct in accepting Dovea's deed forty-three days after Hervey's death—a deed purporting to convey the widow's rights and those of her children; and it is urged that his conduct justifies avoidance of the transaction. The deed is not abstracted and related facts are not before us.

It is not necessary to examine the evidence to determine whether fraud on Henry's part is shown. Circumstantial considerations supported by documentation are sufficient to sustain the Chancellor's conclusions that agreements were reached in 1936 under which the children of Mandred Robinson disposed of their allocable rights to the estate, including forty acres intended for Hervey.

Mandred and Hervey jointly operated the rice farm during the father's lifetime. At his death Hervey continued to use it, then parted with title to other property as to which (but for the family settlement) he would have inherited from Mandred. The background of events strongly indicates inter-party discussions and mutuality involving persons and subject-matter. Henry's claim that, irrespective of other factors compounding the deed received from Dovea, he is nonetheless entitled to partial ownership through inheritance, cannot be sustained in opposition to the family settlement.

Appellees are correct in contending that limitation does not apply until there is notice of an adverse claim. There is nothing conclusive of the proposition that Henry's possession was of a character to charge his minor niece with knowledge that his use of the farm and timbered area was hostile to her, thus imposing the duty of acting within three years after reaching legal age. Further, if Henry did not acquire title under Dovea's deed, and if he had parted with a prior interest by reason of the settlement in 1936, he was not a co-tenant. Whether there was demand by others who might claim as co-tenants touching rents and timber rights becomes unimportant.

The court found that the defendant's receipts from timber sales amounted to $200 and that he had collected rents aggregating $450 prior to 1949. Rents for 1949, '50, and '51, were in the court's registry. Judgment was rendered for $650, less tax payments and improvements of $476.80. Net amount found to be due (exclusive of impounded funds) was $173.20.

While the account as thus cast is not questioned as to the amount, it is inferentially argued that Henry's accountability should be reduced by a sum equal to earnings of Dovea's dower interest supposedly conveyed by her deed to Henry.

There is no proof that dower was assigned and no evidence supporting a supposition that dower attached to the particular property conveyed. The mere fact that Dovea was Hervey's widow is not sufficient to create a presumption that a one-third life interest had been set apart for her in lands owned by Hervey, or that this particular tract had been so designated. In this litigation Henry was charged with the burden of establishing identity of Dovea's dower, and this he failed to do; nor was any computation touching the value of such suggested interest attempted. It would be impossible (assuming that such interest existed) to determine the ratio it bore to the totals involved in charges and credits dealt with by the Chancellor.

Since the case was not presented on the theory that dower, if transferred, should be evaluated in mitigation of Henry's liability for rents and profits, the variation should not be imposed on appeal.

Affirmed.

Justice George Rose Smith dissents.

RAWLS *v.* TANSIL.

5-7 255 S. W. 2d 973

Opinion delivered March 2, 1953.

Rehearing denied April 6, 1953.

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

David Solomon, Jr., and *D. S. Heslep,* for appellee.

ED. F. MCFADDIN, Justice. Appellee, Mrs. Tansil, recovered judgment for personal injuries which she sustained when she fell into a hole in the floor. The judg-

ment was for $2,500.00: and being apportioned $2,250.00 against Rawls and $250.00 against Mrs. McDaniel. This appeal is by Rawls alone, and it is claimed that the matters herein discussed necessitate a reversal.

I. *Sufficiency of the Evidence.* Appellants, a partnership hereinafter called "Rawls," are plumbing contractors. In November, 1951, they were engaged in installing a floor furnace in the living room of a boarding house operated by Mrs. Katie McDaniel in Helena. When the noon hour arrived, Rawls' workmen had cut the hole in the floor but had not completed the installation. Instead of covering the hole with boards or other over or near the hole. Mrs. McDaniel placed a paper substantial covering, the workmen merely placed a chair over the hole. There was evidence that when Mrs. Tansil fell into the hole, the chair had been moved so that an unguarded hole was covered by a newspaper; and Mrs. Tansil testified that it was not unusual for a newspaper to be on the floor. The facts (a) that Mrs. Tansil was a regular table boarder at Mrs. McDaniel's; and (b) that Mrs. Tansil fell in the hole and received injuries, were admitted. We hold that a question was made for the Jury as to Rawls' negligence. Likewise any question of Mrs. Tansil's contributory negligence was a question for the Jury.

II. *Excessiveness of the Verdict.* The Jury awarded Mrs. Tansil $2,500.00; and it is claimed that the amount is excessive. Mrs. Tansil, a lady of 68 years, earned her livelihood by serving as attendant for a family in Helena. On November 19, 1951, she sustained the injuries here involved. She testified as to her injuries:

"This leg was hurt and this hand was skinned and my side was bruised up and I stayed taped up about three weeks. It felt like broken ribs, it probably pulled the muscles. As a result of this the leg is dead, when I sit very long I can't get right up, if I do I will fall."

Dr. Connerly, who treated Mrs. Tansil and whose professional qualifications were admitted, testified that Mrs. Tansil came to him immediately after sustaining her injuries; that he treated her for a period of three

or four months; that he strapped her chest and treated the injury on her shin; that it was necessary to drain the fluid from the shin injury; and that the shin injury is permanent. Dr. Connerly also testified that the trauma suffered by Mrs. Tansil aggravated a dormant arthritis condition, and that the suffering of pain will continue permanently. In addition to pain and permanent injury, Mrs. Tansil has been obliged to pay drug bills and doctor bills. In view of all the foregoing, we conclude that the verdict is not excessive.

III. *Apportionment of Damages.* The Court instructed the Jury that if damages were awarded Mrs. Tansil, then the Jury would determine the apportionment, if any, as between Mrs. McDaniel and Rawls. The Jury apportioned $250.00 against Mrs. McDaniel and $2,250.00 against Rawls. The latter complains: saying that the workmen covered the hole with a chair, and that Mrs. McDaniel placed the paper over the hole. Even so, it was for the Jury to decide whether the primary and greater fault was the failure of the appellants' workmen to place boards over the hole. As between the tort feasors, the apportionment was for the Jury to decide; and under the facts in this case, we cannot say that the apportionment was wrong.

IV. *Plaintiff's Instruction No. 6.* This was an Instruction explaining to the Jury the nature of the case and the theories of the parties. Regarding this Instruction, appellants' only argument in the brief is contained in the following sentence: "Considering all the other instructions, we think this instruction abstract and misleading." Since all the other Instructions are not contained in the appellants' abstract,[1] and are not supplied by appellee, we would be obliged to explore the transcript to find out what they were. The Instruction here questioned was not inherently erroneous, and was not abstract or misleading.

Affirmed.

[1] On page 146 of C. R. Stevenson's Volume on Supreme Court Procedure, revised in 1948, many cases are cited to sustain the following text: "All instructions must be set out in the abstract and when not set out, errors will not be considered unless the instructions are so inherently defective that they could not be cured by others . . ."

PAUL *v.* CAMDEN MOTOR COMPANY, INC.

4-9996 255 S. W. 2d 418

Opinion delivered March 2, 1953.

L. B. Smead and *James M. Rowan, Jr.,* for appellant.

J. Bruce Streett, for appellee.

J. SEABORN HOLT, J. Appellant, Paul, brought suit against appellee, Camden Motor Company, Inc., to recover $1,000 for four months rent due him on a building leased to appellee. Appellee answered, admitting owing the amount claimed, and in a cross-complaint, alleged that appellant had breached a written lease contract under the terms of which appellee occupied appellant's building, to appellee's damage in the amount of $3,680, and sought judgment against appellant for $2,680, representing the damages of $3,680, less the $1,000 due appellant.

Trial by agreement before the court resulted in a judgment for appellee for $2,680 "as damages suffered by it as a result of the breach of the lease contract."

For reversal, appellant contends that the judgment was contrary to the law and the evidence. We do not agree.

Without attempting to set it out in detail, in effect, the evidence disclosed that on April 29, 1949, Paul, in writing, executed a two year lease to appellant, said lease to begin January 14, 1950. The consideration was $3,000 a year, payable $250 monthly, and under its terms appellant agreed to place the premises in a suitable state of repair fit for the use contemplated, that is, the operation by appellee of an automobile agency, garage, repair shop and filling station, and specifically appellant agreed to repair the roof, to enclose the front with glass (at a cost of approximately $1,500) in order to provide an adequate display and showroom, to paint and repair the walls and ceiling, to put the elevator and wiring in first class condition, and further agreed to commence all alterations and repairs without delay, except the glass enclosure, which was to be done after January 14, 1950, without interruptions or delay.

There was evidence that appellant failed and refused to make the repairs called for, and on June 14, 1950, rent was due appellant in the amount of $1,375. In full settlement of this rent, appellant accepted $900 for all rent due to July 14, 1950. By this settlement appellee was partially reimbursed to the extent of $475 for repairs appellant had failed to make. It appears also that by this same settlement appellant, Paul, acknowledged in writing that he was not relieved of his obligation to enclose the front of the building with glass as provided in the lease.

Thereafter, for July and August appellee paid the rent under protest, informing appellant that he had not provided an adequate showroom and the glass front. For the following months, September, October, November and December, appellant continued in refusing to carry out his contract to make the repairs and appellee withheld rentals for those months, amounting to $1,000, as indicated above.

On December 14, 1950, Paul informed appellee that he was cancelling the lease contract, and on December 30, 1950, appellee informed Paul that it had elected to cancel the lease because of the violation of its terms by Paul.

In the meantime, appellee's franchise with the Ford Motor Company for the sale of Lincoln and Mercury automobiles in Camden and surrounding territory had become jeopardized and it rented another building to which it moved January 13, 1951, with a $25 per month increase, amounting to $300, for the year 1951. There was no evidence that this increased rental was unreasonable in the circumstances. There was substantial evidence that appellee suffered damages, or a loss, of $900 as a result of expenditures for improvements it made in Paul's building in reliance on a two year lease, $936 (testimony of Mr. Jacks) resulting from the necessity to wash, dust and polish cars because of the absence of an enclosed showroom or front, $300, the cost "to move all of our parts and shop equipment plus our Neon signs that we had on the outside of the building," before the expiration of its lease, $1,300 for new improvements in its new location, the Shirey building, which it was necessary to expend, or a total of $3,736.

It appears from appellant's abstract that he did not at the trial offer any objections to testimony introduced on the above items or to any orders of the court except to make a brief summary of the judgment. There was also evidence admitted without objection that appellee might have lost, in addition to the above, more than $5,000 on the sale of automobiles.

In the circumstances, the primary and decisive question is the proper measure, and amount, of damages recoverable.

As to the item of profits on sale of cars, the authorities generally seem to agree that profits that have been prevented or lost as a natural consequence of a breach of contract may be recovered as an item of damages. This court announced the rule in *Black* v. *Hogsett*, 145 Ark. 178, 224 S. W. 439, in this language:

"The principle touching the question of profits as an element of damages is well settled. The rule is that where one party to a contract is prevented from performing the same by the fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made, had the other party carried out his contract. The rule that damages which are uncertain or contingent can not be recovered, does not apply to uncertainty as to the value of the benefits to be derived from performance, but to uncertainty as to whether any benefit would be derived at all. If it is reasonably certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover." (Citing cases.)

Whether the trial court took into account the item of alleged loss of profits on car sales as a part of appellee's damages, the judgment does not disclose; however, we hold on the facts presented here that any such claimed profits were entirely too speculative, contingent, and uncertain to merit consideration. We do not mean to hold, however, that under no factual situation could the item of such profits on such loss of sales of automobiles be properly considered.

We hold on the facts presented that there was substantial evidence of damages to appellee to support the amount awarded by the trial court to it on the other items above, without taking into account any amount for loss of profits on car sales.

Affirmed.

RESOLUTE INSURANCE COMPANY *v.* MIZE.

4-9976 255 S. W. 2d 682

Opinion delivered March 2, 1953.

Rehearing denied March 30, 1953.

Josh W. McHughes, for appellant.

Henry E. Spitzberg, for appellee.

ROBINSON, Justice. This is a suit on a policy of automobile collision insurance. There was a judgment in favor of the policyholder, and the insurance company has appealed.

On April 3, 1950, the appellant, insurance company, issued its policy of collision insurance to appellees on a G. M. C. truck. The policy provided a $5,000 limit of liability with a $250 deductible clause. About a year later, while the policy was in full force and effect, the

vehicle was involved in a collision and it was considerably damaged. The cause was submitted to the court, sitting as a jury, and there was a judgment for the policyholder in the principal sum of $3,800 and interest, a twelve per cent penalty was added, as provided by statute, and $750 was assessed as attorney's fee.

Appellant urges for reversal: that appellees breached the contract by placing a mortgage on the property; that the trial court erred in its refusal to permit appellant to amend the answer to allege the policy was void because appellees used the truck as a public or livery conveyance; that appellees refused to allow the truck to be repaired; that appellees could not recover more than the lowest estimate to repair the truck and that the judgment here is in excess of that amount; and that the judgment is excessive and no attorney's fee or penalty should be allowed.

The policy provides: "This policy does not apply: (a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor; (b) under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrances not specifically declared and described in this policy; . . ."

Appellees were engaged in hauling produce. The evidence shows that in September, 1950, they planned to go to California for the purpose of hauling tomatoes. Since there was a possibility that they might encounter some difficulty on such a long distance trip and would be in need of additional funds, they made arrangements with a Mr. Howard Halley, whereby they gave him a mortgage on the truck to secure an indebtedness of $3,500. No money was actually received by them at that time nor at any other time. The plan was to give the mortgage so that they would be in a position to obtain the money from Mr. Halley if and when it was needed. It was never needed and therefore never obtained.

In the early part of April, 1951, the truck was damaged. Appellant claims that the policy was rendered void because of the giving of the mortgage. But the provision of the policy relied on by appellant does not say the policy is void in the event a mortgage is given. It merely provides that the policy does not apply while the automobile is *subject* to a mortgage. It cannot be said here that the truck was subject to any mortgage at the time it was damaged. It is true that Mr. Halley held what purported to be a mortgage; but he had given no consideration for such, the appellees did not owe him a dime on any mortgage, and he held no enforceable obligation. Before it can be said that the truck was subject to a mortgage, someone would have to hold a mortgage that could be enforced. Mr. Halley could not enforce such an instrument when nothing had been paid as consideration for the note secured by the mortgage. In *Lavender* v. *Buhrman-Pharr Hardware Company,* 177 Ark. 656, 7 S. W. 2d 755, it was said: "Certainly the loan company could not collect the note given for the loan nor foreclose the mortgage given to secure the payment thereof, when it had never in fact made such loan by delivering the money to the makers of the note and mortgage."

Appellant cites *Rhea* v. *Planters' Mutual Insurance Association,* 77 Ark. 57, 90 S. W. 850, but in that case the policy provided that if the property should become encumbered by a mortgage, or if the interest of the owner should become anything less than a perfect legal title, the contract of insurance would be "absolutely null and void." To the same effect are *German-American Insurance Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428, and *The Aetna Casualty & Surety Company* v. *Jackson,* 203 Ark. 839, 159 S. W. 2d 461. In all those cases the policy provides that it shall be void by reason of the giving of a mortgage. Here the policy does not provide that it shall be void if a mortgage is given; it merely provides that the policy shall not apply while the automobile is subject to a mortgage, and it cannot be said that the truck involved in this litigation is so encumbered.

Furthermore, even if it could be said that the language of the policy made it void by the execution of what purported to be a mortgage, the insurance company waived such alleged forfeiture by its action in connection with the claim. About two days after the collision, an adjuster who investigated the loss learned from Louis Mize, one of the appellees, the facts about the purported mortgage and notified the appellant, insurance company. Subsequently, the appellant, through its agents, sought permission to take the truck to Tulsa for repairs.

Mize testified that at the request of the insurance company's agent, he obtained estimates of the cost of repairs from Lewis-Diesel Engine Company, International Harvester Company and Summers-Corbin Garage; that he went to considerable trouble to get these estimates and deliver them to the insurance company's agent; that practically all of his time during a three-day period was used in securing the estimates and conferring with appellant's agent; that although the insurance company had knowledge of the mortgage, nothing was said to him about it, and the insurance company made no claim of a forfeiture of the policy because of the mortgage.

In the case of *Security State Fire Insurance Co.* v. *Harris,* 220 Ark. 900, 251 S. W. 2d 115, this court said that although a sole ownership clause in a fire insurance policy is valid and voids a contract if the ownership is otherwise, ". . . it is equally well settled that this clause may be waived by the insurer as when it has been informed of the nature of the title (*State Mutual Insurance Co.* v. *Latourette,* 71 Ark. 242, 74 S. W. 300), and when it requests proof of loss with knowledge of violation of the sole ownership provision."

In *German Insurance Co.* v. *Gibson,* 53 Ark. 494, 14 S. W. 672, the court said: "An insurance company can take advantage of the breach of any condition contained in its policies and claim a forfeiture, or waive the forfeiture; 'and it may do this by express language to that effect, or by acts from which an intention to waive may

be inferred, or from which a waiver follows as a legal result.' This is an unquestioned right, and the exercise of it is always encouraged by the courts."

In *Planters' Mutual Insurance Co.* v. *Loyd,* 67 Ark. 584, 56 S. W. 44, it is stated: ". . . when the insurer, with knowledge of any act on the part of the assured which works a forfeiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived."

In *Washington County Farmers Mutual Fire Insurance Company* v. *Reed,* 218 Ark. 522, 237 S. W. 2d 888, this court quoted with approval from *National Surety Company of New York* v. *Fox,* 174 Ark. 827, 296 S. W. 718, 54 A. L. R. 458: "Forfeitures are not favored in law, and any agreement, declaration or course of action on the part of an insurance company which leads the insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by conformity on his part will estop the insurance company from insisting upon forfeiture."

After appellees made the trip to California they made one or more trips with the truck to some other State hauling produce for hire. At the trial when this fact was brought out, appellant asked permission to amend the answer and deny liability because of the provision in the policy that it did not apply while the automobile was in use as a public or livery conveyance. The court properly denied the motion that the defendant be permitted to amend its answer since there was no evidence in the record to the effect that the truck was being used in such manner at the time of the collision; and the fact that the truck had been used to haul for hire several months prior to the collision would not be material.

In *Globe & Rutgers Fire Insurance Company* v. *Pruitt,* 188 Ark. 92, 64 S. W. 2d 91, this court quoted and approved the following statement of the law from *North*

River Insurance Company of New York v. *Lloyd,* 180 Ark. 1030, 23 S. W. 2d 988: "The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance, which works a forfeiture thereof, merely suspends the insurance during the violation, and that, if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture thereof."

The next assignment of error alleged by appellant is that the policy gives the insurer the right to repair the truck, that it had offered to make such repairs and appellees had refused to permit same to be made, and, as a result of such refusal, the insurance company is relieved of liability. The policy provides: "The company may pay for the loss in money or may repair or replace the automobile." Several estimates were made of the cost of repairing the truck. The Lewis-Diesel Engine Company of North Little Rock submitted an estimate of $4,219.07, the International Harvester Company of North Little Rock submitted an estimate of $4,910.34, the Summers-Corbin Garage of Little Rock submitted an estimate of $2,395.95, and the Southwestern Auto of Tulsa, Oklahoma, submitted an estimate of $1,849.61. The insurance company offered to have the truck repaired by the Tulsa concern. This offer was refused by appellees, and the insurance company made no offer to have the truck repaired elsewhere.

Although a policy may not designate the time in which the option to repair must be exercised, the courts have held a reasonable time prevails. "Such option, where no other time is stated in the policy, must be exercised within a reasonable time, which will depend in any instance upon the circumstances of the particular case." *Blashfield Encyclopedia of Automobile Law and Practice,* Volume 6, Section 3819. "Where no time is fixed

by the policy for the exercise of the insurer of its option, it must give notice thereof within a reasonable time, and if it does not make its election in apt time, and give the insured notice, the right to rebuild or repair does not exist." 29 Am. Jur. 945.

We think the same rule should apply as to where the repairs must be made. Obviously, it would not be unreasonable to take a car from Little Rock to North Little Rock for repairs, or perhaps to remove a car to another State, as from West Memphis to Memphis, or from Texarkana, Arkansas, to Texarkana, Texas; but, on the other hand, it could be wholly unreasonable to require that the automobile be taken to a distant point in another State when there are ample facilities locally to make the repairs. Each case of this kind depends on its own particular facts in that respect. There are many reasons why appellees would not want their truck taken to Tulsa for repairs, and it is shown that there are reliable concerns in Little Rock equipped to make such repairs. There is substantial evidence to sustain the finding of the trial court, sitting as a jury, that the request to take the truck to Tulsa, Oklahoma, for repairs was unreasonable.

Appellant's next contention is that the policyholder could not recover more than the lowest estimate to repair the truck. Upon finding that the policyholder was justified in refusing to permit the truck to be taken to Tulsa for repairs, and there was no offer to repair the truck elsewhere, then the measure of damages was, as this court has held many times, the difference in the market value of the vehicle immediately before and after the collision. *Kane* v. *Carper-Dover Mercantile Company,* 206 Ark. 674, 177 S. W. 2d 41, and *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593.

Appellant claims that in fixing the damages at $3,800, the court failed to take into consideration the $250 deductible feature of the policy. But the evidence is clear to the effect that if the $250 deductible feature had not been taken into consideration, the judgment would have been for $4,050. Hence, the court was not in

error in allowing the twelve per cent penalty and reasonable attorney's fee.

Finding no error, the judgment is affirmed.

ARKANSAS FUEL OIL COMPANY *v.* GAYLORD.

5-9 255 S. W. 2d 666

Opinion delivered March 2, 1953.

Rehearing denied March 30, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

Ernest Briner, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellant for specific performance of a contract by which the appellee agreed to sell to the appellant certain property in the city of Benton. The agreement which the appellant seeks to enforce was in the form of an option to purchase and was contained in a lease which expired on April 11, 1951. The chancellor, finding that the appellant had failed to complete the purchase during the term of the lease, dismissed the complaint. The only question now presented is whether the trial court was correct in holding that the entire transaction had to be consummated before the expiration of the lease.

As of April 11, 1936, Mrs. Gaylord leased the property to the appellant for ten years; later on the lessee exercised an option to extend the lease for an additional

five years. The instrument provides that the tenant has the privilege of purchasing the property for $12,000 in cash "at any time during the term of this lease, or any extension thereof." Upon the exercise of this option to purchase the landlord is required to prepare and submit to the tenant's attorneys an abstract of title and to take any steps necessary to correct defects in the title. If the lessor fails to clear the title within a reasonable time the lessee may do so and deduct the expense from the purchase price.

On February 27, 1951, which was forty-three days before the end of the term, the appellant notified Mrs. Gaylord that it elected to purchase the property, Mrs. Gaylord promptly submitted an abstract of title, which was found to disclose the usual minor defects. While this curative work was being done the appellant had the lots surveyed and discovered that a neighboring dwelling owned by Mrs. Gaylord encroached upon the leasehold premises to the extent of 1.8 feet.

On March 9 the appellant by letter requested Mrs. Gaylord to move the encroaching dwelling. In her reply Mrs. Gaylord asked for leniency, saying: "I do feel that the few inches the building is over the line is not too compulsory or needful as to make me move the building at this time. Isn't there some way you can figure out for me to acquire these few inches or at least let the building remain as is until you people definitely decide to build?" In response to this plea the appellant sent its division manager to see Mrs. Gaylord, and on April 4 he recommended to the company's Shreveport office that Mrs. Gaylord be given an easement permitting the encroachment.

On April 11 the appellant instructed its attorneys to prepare the suggested easement. The next day the company sent the purchase money to these attorneys, who informed Mrs. Gaylord on April 14 of its availability. She did not call for the money, however, and when a formal tender was made not later than April 20 she refused it as being too late.

We think the chancellor erred in his conclusion that the appellant's demand for performance, made nine days after the end of the term, came too late. It is of course true that in a case of this kind time is of the essence "in the exercise of the option." *Smith* v. *Carter,* 213 Ark. 937, 214 S. W. 2d 64. Hence, as we indicated in that case, the tenant cannot exercise the option after the landlord has terminated the lease on account of its breach by the tenant, nor can the latter extend the time by holding over and paying rent.

Here the facts are materially different. This appellant exercised its option to purchase on February 27, more than six weeks before the term expired. The parties could have fixed a definite time for the completion of the transaction, as was done in *Indiana & Ark. etc. Co.* v. *Pharr,* 82 Ark. 573, 102 S. W. 686, but instead they plainly contemplated some flexibility in the time allowed for bringing the matter to a conclusion. Mrs. Gaylord was required to perfect her title within "a reasonable time," and upon her failure to do so the purchaser was to be permitted to assume that burden and to charge the expense to her.

There is not the slightest proof that the appellant was dilatory in its efforts to consummate the purchase. It is fair to say that the principal cause for the delay beyond April 11 lay in Mrs. Gaylord's understandable unwillingness to remove her encroaching dwelling. Had that building been moved immediately after the company requested that action on March 9, there is no reason to believe that all other details would not have been satisfactorily taken care of well before April 11. Undoubtedly Mrs. Gaylord was entitled to expect that the negotiations be carried forward without unreasonable delay, but in this respect we perceive no default on the purchaser's part.

Reversed.

Opinion delivered March 9, 1953.

[redacted]

Claude F. Cooper and *Gene Bradley,* for appellant.

A. F. Barham and *Henry J. Swift,* for appellee.

J. SEABORN HOLT, J. Appellants question the judgment of the trial court sustaining appellees' demurrer to their complaint, on the ground that it failed to state facts sufficient to constitute a cause of action. The suit was in ejectment.

All allegations contained in the complaint that are well pleaded must be presumed to be true. It alleged, in effect: "That it is a partnership composed of E. R. Jones and Lee Wilson & Company, a corporation, doing business as Delta Lumber Company, with its principal place of business at Blytheville, Arkansas. That it is the owner in fee and entitled to the immediate possession of the following described land located in the Chickasawba District of Mississippi County, Arkansas: Lot Five (5) Block Seven (7) Chicago Mill and Lumber Company's Third Addition to the City of Blytheville, Arkansas.

"That on the 6th day of July, 1926, said Enoch Chappel A.M.E. Church, acting through its then trustees executed and delivered to East Arkansas Lumber Company their deed of trust securing an indebtedness of $6,527.25 of even date therewith; . . . a copy of which is marked Exhibit 'A' and made a part hereof."

That on September 20, 1930, said deed of trust was foreclosed, the lot sold to East Arkansas Lumber Company, and deed to it made and approved by the Court. Copies of the Deed of Trust as Exhibit "A," the Foreclosure Decree as Exhibit "B," and the Commissioner's Deed and order approving same as Exhibit "C," were all made a part of the complaint.

The complaint further alleged: "That on November 22, 1932, in the District Court of the United States for the Eastern District of Arkansas, Western Division, said East Arkansas Lumber Company was adjudged bankrupt by order of said court, . . . which is attached hereto and marked Exhibit 'E' and made a part hereof.

"That after notice to creditors, the Referee in Bankruptcy sold all of the assets of said bankrupt at public sale to J. E. McCadden, and the said J. E. McCadden as Trustee assigned, all his rights to said bidder to East Arkansas Builders Supply Company; said sale was by order of said U. S. District Court confirmed . . ., a copy of which is marked Exhibit 'F' and made a part hereof.

"That on May 21, 1947, by Quitclaim Deed, . . . East Arkansas Builders Supply Company conveyed said realty to Delta Lumber Company, a partnership composed of E. R. Jones and Lee Wilson & Company, a copy of said deed is attached hereto and marked Exhibit 'G' and made a part hereof."

In Exhibit "E" above, adjudicating East Arkansas Lumber Company a bankrupt, a receiver was appointed for the assets and properties of the estate of said bankrupt, and the said bankrupt was directed to turn over all of its assets wherever located to its receiver.

Exhibit "F" above, and as indicated made a part of the complaint, contains this recital: "Application having been made by the Trustee herein for the sale of the following described property to-wit:" Then follows some five pages of listed and described assets grouped under three divisions, A, B, and C, and the further recital: "And notice of the proposed sale having been given thereon, as provided by Section 58-A (4) of the Bankruptcy Laws of 1898 and no objection having been made to said sale and the same having then taken place and all the property (except the list hereinabove designated as list 'C') having been sold to J. E. McCadden, trustee, and the said J. E. McCadden, trustee, having assigned his rights under said bid to the East Arkansas Builders Supply Company, a corporation organized under the laws of the State of Arkansas; all the property hereinabove described and designated as List 'C' having been sold to Irving K. Weil, . . . now, on motion of the said Emmet Morris, trustee, it is ordered that such sales be and the same are hereby confirmed."

As above alleged in the complaint, on May 21, 1947, East Arkansas Builders Supply Co. executed a Quitclaim Deed to the above Lot 5, Block 7, to appellant, Delta Lumber Company.

On the above undisputed record we hold that the trial court correctly sustained appellees' demurrer.

As indicated, this is an ejectment suit, and before appellant can recover, he must show a *prima facie* title to the lot, here in question, in accordance with the provisions of § 34-1408, Ark. Stats. 1947, which provides: "Hereafter in all actions for the recovery of lands. . . . the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff."

Under this statute, the recitals in the complaint do not give appellants the right to recover. All the allegations of the complaint may be true and yet make no *prima facie* right in appellants entitling them to recover. It appears clear that appellants' claim to title must rest on the provisions of the order declaring East Arkansas Lumber Company bankrupt (Exhibit "E") and the order of sale and confirmation (Exhibit "F") of certain assets of the bankrupt to McCadden, trustee, and from McCadden to East Arkansas Builders Supply Company, which in turn conveyed the lot here in question by Quitclaim Deed to appellant, Delta Lumber Company. Nowhere in either of these exhibits is Lot 5, Block 7, here in question, included, listed, described, or sold to any one, nor do these instruments contain any provision selling all of the property in the hands of the trustee, whether described therein or not. Appellant's grantor, East Arkansas Builders Supply Company, therefore had acquired no title to the lot here in question to convey. Under the above statute, his right to recover must be founded on the written instruments exhibited and made a part of the complaint. These exhibits became the foundation of his cause of action, in the circumstances.

We held in *McAlister* v. *Harness,* 110 Ark. 293, 161 S. W. 185: (Headnote) "EJECTMENT—COMPLAINT—NECESSARY ALLEGATIONS.—Where plaintiffs' complaint in an action in ejectment does not set out how, or by what right they claim possession of the land in controversy, the complaint will be held bad under Kirby's Digest, § 2742, (now § 34-1408, above) which requires plaintiffs in an action in ejectment to set out in their complaint facts, showing *prima facie* title in themselves."

Affirmed.

WARD, Justice, dissenting. My dissent to the majority opinion is based on the following:

1. As the opinion shows, an affirmance could not be justified without taking into consideration the exhibits to the complaint.

2. This being a suit in ejectment in circuit court the exhibits to the complaint cannot be considered as a part of the pleadings.

In *Cairo & Fulton Ry. Co.* v. *Parks,* 32 Ark. 131, the sufficiency of a complaint in ejectment was tested by demurrer and the court held an exhibit to the complaint was no part of the pleadings. The court said: "Counsel are mistaken in supposing that the deed, though referred to as an exhibit, thereby becomes a part of the pleadings; such is not the case."

Foster v. *Elledge,* 106 Ark. 342, 153 S. W. 819, was an ejectment suit in circuit court. At page 345 the court said: "The exhibits to the pleadings are not evidence in the case, as such exhibits, and, upon the trial, as already said, the burden of proof would have developed upon appellee to show that the lands had passed by proper conveyance away from the ancestor of the appellants, . . ."

Judge ROBINSON joins in this dissent.

THOMPSON, COMMISSIONER OF REVENUES *v.* CHADWICK.

4-9998 255 S. W. 2d 687

Opinion delivered March 9, 1953.

Conley F. Byrd, for appellant.

Atlee Harris and *Henry S. Wilson,* for appellee.

ED. F. MCFADDIN, Justice. This appeal involves certain provisions of the Gross Receipts Act (Act No. 386 of 1941), as now found in § 84-1901, *et seq.,* Ark. Stats.

Carl F. Parker,[1] as Commissioner of Revenues of the State of Arkansas, filed this suit in the Crittenden Chancery Court against the appellee, R. E. Chadwick, doing business as "Buck's Coffee Shop" in West Memphis. The complaint alleged that John J. Donau owned and operated Buck's Coffee Shop until April 10, 1951, that in such operation he became liable to the State for $487.84 for gross receipt tax which remains unpaid; that Donau sold the business and fixtures of Buck's Coffee Shop to Chadwick on April 10, 1951; and that the State has a lien on the fixtures (by § 84-1913 Ark. Stats.) for the said unpaid tax. The prayer of the complaint was that the State's lien on the fixtures be foreclosed.

In his answer, Chadwick admitted buying the coffee shop and fixtures; but (a) denied the indebtedness of Donau to the State, and (b) denied that the fixtures were subject to any lien. Chadwick also pleaded that the State had issued him a permit under the Gross Receipts Act and had thereby waived any lien.

The cause was heard *ore tenus,* and after the plaintiff (State Commissioner) had introduced all desired evidence, Chadwick moved that a decree be entered

[1] Carl F. Parker was Commissioner of Revenues until some time in January, 1953. Horace E. Thompson, as his successor in office, has been substituted as appellant on request duly made in this Court.

against the State. This was treated by the Court and the parties as a demurrer to the evidence, within the purview of *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. The Court sustained the motion and dismissed the complaint, so the question now before us is whether the State made a case, even viewing the evidence most favorably to the State.

As previously stated, the Arkansas Gross Receipts Act (Act No. 386 of 1941) may be found in § 84-1901 *et seq.,* Ark. Stats. Portions of the Act germane to this controversy are as follows:

Sec. 84-1906 says that taxpayers shall render monthly returns and remittances to the Commission.

Sec. 84-1910 allows the Commissioner to determine the tax after the return is made and to make assessment.

Sec. 84-1911 says the Commissioner shall give the taxpayer notice in writing of his intention to assess an amount in addition to the amount remitted. The taxpayer has 20 days in which to demand a hearing.

Sec. 84-1913 provides that when a taxpayer desires to discontinue business "by sale or otherwise," such taxpayer shall make a final return and remittance of all unpaid or accrued taxes; and then provides:

"In the case of a sale of any business, the tax shall be deemed to be due at the time of the sale of the fixtures and equipment incident to such business and shall constitute a lien against the stock and such fixtures and equipment in the hands of the purchaser thereof or any other third party until such tax is paid. The Commissioner shall not issue a permit to continue or conduct said business to the purchaser thereof until all tax claims due the State of Arkansas hereunder have been settled and paid."

The facts in this case establish that on May 7, 1951, Donau made a final return to the Commissioner covering the period from November 1, 1950, to April 10, 1951, showing tax due of $534.84; and Donau made remittance for

that amount. The return stated that it is a final return and that the business was sold on that date. Likewise on May 7, 1951, Chadwick applied to the Commissioner for a permit for Buck's Coffee Shop—the same name and address as the business that Donau had operated. The Commissioner issued a retailer's permit to Chadwick on May 24, 1951.

As above quoted, the law provides that the Commissioner shall not issue a permit to the purchaser until all tax claims of the State of Arkansas against the seller have been paid. So the Commissioner had from May 7th to May 24th to determine whether Donau had paid all taxes due the State. If the Commissioner had been dissatisfied or uncertain as to the correctness of Donau's return, then a permit should not have been issued to Chadwick until all doubts had been removed as to the full payment of tax by Donau. Tax acts are to be construed most strongly against the Sovereign and most liberally in favor of the taxpayer. *Cook* v. *Ark. Mo. Power Corp.*, 209 Ark. 750, 192 S. W. 2d 210; *Cook* v. *Southwestern Hotels*, 213 Ark. 140, 209 S. W. 2d 469. Statutes imposing burdens and liabilities unknown at common law are strictly construed in favor of those upon whom the burden is sought to be imposed. *State* v. *International Harvester Co.*, 79 Ark. 517, 96 S. W. 119. See, also, 50 Am. Jur. 424 wherein the holdings from many jurisdictions are summarized:

"Statutes are generally subject to a strict construction where they interfere with private property rights, or are in derogation of rights of individual ownership. This is true of statutes regulating or restraining the disposition of property, or divesting title against the owner's will, or authorizing invasions of the rights of property for private convenience or profit. In such cases, all doubts are resolved in favor of the property owner."

In applying the foregoing rules to the case at bar, we observe: that Chadwick continued to operate the business after obtaining his permit, and it was not until October 9, 1951, that there was any attempt made by the Commissioner of Revenues to claim that Donau had not paid

in full. On the last mentioned date, it is claimed that a notice was mailed to Donau that he owed an additional tax of $487.84. There is a pencilled page in the transcript made by some unidentified person; and that is all the information there is about the $487.84. It is now claimed that this was a "*determinaiion*" under § 84-1910 Ark. Stats. There is no proof that Donau ever received the notice; and it is not even claimed that such a notice was ever given to Chadwick. He was entitled to notice under § 84-1911 Ark. Stats. and an opportunity to have a hearing, before an assessment of $487.84 could have been legally made so as to create a lien on his fixtures.

The Trial Court was correct in granting the motion to dismiss, and the decree is affirmed.

Justice George Rose Smith concurs.

J. Seaborn Holt, J., dissenting. I think the decree should be reversed.

As I construe the majority view, it, in effect, holds that the State of Arkansas, through its Revenue Commissioner, has waived any right it may have to collect the tax in question. This the Revenue Commissioner could not do. As I read the record, substantial evidence had been presented by the appellant, Revenue Commissioner, at the time he rested his case, to support his contention that the tax was due, demanded, and unpaid, and therefore under our rule in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, the trial court erred in sustaining appellee's motion to dismiss appellant's complaint.

The law also appears to be well settled in many decisions of this court that in circumstances such as are presented here, the Revenue Commissioner, representing a State Agency, could not waive any rights that the State may have to enforce payment of this tax. The State is not and could not be estopped by his action. We said in *Southwestern Distilled Products Company, Inc.* v. *State, ex rel., Humphrey, State Auditor,* 199 Ark. 761, 135 S. W. 2d 166:

"The then revenue collector had no authority to supersede, modify or change the law by regulation or by

a promise to exempt appellant from the payment of the tax. It was his duty to levy and collect the tax. The State of Arkansas is not estopped by the unauthorized act of the revenue office to levy and collect the tax. . . . 'The doctrine of estoppel is not applicable to and cannot be applied against the State.' . . . 'A public officer cannot ratify expressly his own unauthorized act, and surely cannot do so by mere implication. . . . Estoppels do not generally bind a State; that is, estoppel by conduct of its own officers. Clearly, the State cannot be estopped by unauthorized acts of its officers.' "

This holding was reaffirmed in *Superior Bath House Company* v. *McCarroll,* 200 Ark. 233, 139 S. W. 2d 378; *Hollis & Company* v. *McCarroll, Commissioner,* 200 Ark. 523, 140 S. W. 2d 420, and *Terminal Oil Company* v. *McCarroll, Commissioner of Revenues,* 201 Ark. 830, 147 S. W. 2d 352.

It seems to me that if the majority opinion stands, it may open the door to possible tax evasions.

Justice WARD concurs in this dissent.

BERRY *v.* FINKBEINER.

5-16 255 S. W. 2d 690

Opinion delivered March 9, 1953.

Brooks Bradley, for appellant.

Owens, Ehrman & McHaney, for appellee.

GRIFFIN SMITH, Chief Justice. The litigation had its inception in Leroy Berry's petition for an injunction to prevent Chris E. Finkbeiner from trespassing upon designated property.

Berry is the owner of Lot 10, Block 17, Mountain Home Addition to Little Rock. Finkbeiner owns Lot 9 of the same block, immediately west. The plaintiff alleged that Finkbeiner had appropriated a small strip extending north and south between the adjoining lots, in width varying from two feet on the north to three and four-tenths feet at an arbitrary terminus on the south half of Berry's lot. The prayer was that title be quieted in the plaintiff and that he have $1,500 to compensate damages. From a decree in Finkbeiner's favor Berry has appealed.

Appellee acquired Lot 9 in 1947 by deed from his father, who had owned it for about fifteen years. There is comprehensive evidence that when appellee's predecessor in title acquired the lot a north-south fence was the line of demarkation. Around this fence blackberry vines, honeysuckle, saplings and other voluntary growth had accumulated, spreading in either direction, the effect being that an area substantially broader than the space occupied by the fence was affected. Actual condition of the fence over a period of years is not disclosed, but in 1948 or a little later appellee had it rebuilt. Finkbeiner's testimony includes an unequivocal claim to the disputed strip, and this is true irrespective of evidence convincing the Chancellor that the true lines as projected when the addition was created were at variance with contentions that the fence correctly delineated ownership. This narrowed the substantive issue to adverse possession resting upon a factual determination whether the new fence was built on the line of the old structure. It was not, of course, necessary that appellee's claim should have subsisted for seven years if his predecessor in title claimed to the old fence in derogation of contentions advanced by owners of the adjoining lot. This is true be-

cause "tacking" is permitted. *Horseman* v. *Hincha,* 138 Ark. 415, 211 S. W. 385. The principle has been consistently given effect.

The evidence was presented orally, affording the Chancellor an opportunity to observe the witnesses and appraise their attitudes and demeanor. Appellee's hostile claim is definitely established by preponderating testimony unless we follow appellant's suggestions and discount the effect of emphatic statements made by witnesses shown to have been connected with appellee through employment; or, secondarily, it is insisted that we draw adverse inferences from appellee's failure to call other witnesses who were his employes and who were shown to have been available.

We agree with the Chancellor that location of the new fence on the line of the old was established, and that all requirements necessary to show title through adverse possession were met.

Affirmed.

REDDMANN *v.* REDDMANN.

5-1 255 S. W. 2d 668

Opinion delivered March 9, 1953.

L. A. McLin, for appellant.

Frierson, Walker & Snellgrove, for appellee.

ROBINSON, J. Appellants filed this suit, alleging that appellees had wrongfully constructed certain levees which blocked the natural drainage of the area involved, and prayed for a mandatory injunction requiring the removal of such alleged obstructions. The defendants denied impeding the natural drainage and pleaded the statute of limitations. The chancellor held there had been no stoppage of the natural drainage by defendants.

The transcript contains a thorough and exhaustive opinion of the chancellor, showing that all the facts in the case were taken into consideration, and, since after an examination of the record, we agree with the conclusion reached by the chancellor, we set out here the parts of the opinion necessary to an understanding of the case:

"The plaintiff, Jones, is the owner of a tract of land in Section Twenty-one directly south of the 160-acre tract belonging to the defendants in Section Twenty-one. The plaintiff, Brinkerhoff, is the owner of 160 acres of land south and southeast of the 80-acre tract of land owned by the defendants and located in Section Twenty-two. All other lands involved are to the east and southeast of the defendants' lands.

"The defendants have owned and farmed to rice, since 1937, the 160-acre tract of land located in Section Twenty-one. Immediately east of the 160-acre tract, but in Section Twenty-two, is a more recently acquired property of the defendants, the same being known as the Meister land.

"All lands involved in this litigation are west of Crowley's Ridge. What is known as Town Creek, Pat

Denver Creek, and Ainsworth Creek, have, for many years, drained a portion of Crowley's Ridge, and some distance east of the lands in question have converged and continued west for some distance as a well defined stream. It appears from the testimony that when this stream reached the flat lands west of the ridge, it left its well defined banks and spread out over the flat lands, following the lowest portions thereof in a generally westerly direction, until they reached L'Anguille River.

"It is conceded that about the year 1910, Drainage District Number 3, known also as L'Anguille Drainage District, was organized, and certain ditches constructed west of L'Anguille River. L'Anguille River itself became a part of this drainage system, and a ditch was constructed, presumably straightening and widening that river.

"About 1918 a lateral ditch in this drainage district was constructed, and this ditch intercepted the creek coming from the ridge at a point about 220 yards east of its western terminus. This lateral ditch was constructed to flow due north and with the fall toward the north, so as to drain the waters into an east and west lateral which ran directly into L'Anguille River. There was also a lateral coming from the north of the east and west lateral forming a 'T', thus leading to the naming of the three laterals mentioned as one lateral under the name of 'T-Lateral'.

"The testimony shows that when the T-lateral was constructed the end of Town Creek, 220 yards west of the beginning of the T-lateral, was filled in, but that Mr. Meister, who then owned the 80-acre tract in Section Twenty-two now belonging to the defendants, removed that obstruction so that as the flood waters receded, they would run back into Town Creek; thence northeast into the T-lateral, and by that system of drainage into L'Anguille River.

"The defendants constructed a dike, or levee, on the east and south sides of the 160-acre tract of land and used those levees, or dikes, since 1937. After acquiring

the 80-acre tract to the east, the defendants constructed a levee on the east and south sides of that tract and built another levee on the east side of the 160-acre tract which, together with the levee that was already there, has since been used as a flume.

"It is the contention of the plaintiffs that there is a well defined water course running in a southeasterly direction from the mouth of Town Creek to a point near the south line of the 80-acre tract; thence in practically a due westerly direction to a point in the southeast corner of the 160-acre tract; thence in a northwesterly direction across the entire 160-acre tract to the northwest corner thereof, and from there in a northwesterly direction to L'Anguille River.

"The defendants deny that such a water course exists, or ever existed, and, in addition thereto, plead the three-year statute of limitations. From the view taken by the court, it is unnecessary to discuss the statute of limitations.

"The plaintiffs in their brief, notwithstanding the usual and commendable enthusiasm in the interest of their cause, have been unusually frank in their statements. For instance, they call attention to the fact that it is conceded by all witnesses that Town Creek and its tributaries drain a portion of Crowley's Ridge and lands west thereof through a well defined channel, and that said well defined channel extends west 220 yards past the intersection of the south end of the T-lateral and Town Creek. They then state:

" 'From this point to the northwest corner of the northeast quarter of said Section Twenty-one there is no well defined ditch with banks, but after reaching said northwest corner of the northeast quarter of Section Twenty-one there is a well defined channel with ditch and banks northwest, then southwest, into L'Anguille River.'

"Thus it will be seen from the plaintiffs' own statement that they do not contend that there is a well defined channel over and across any part of the defendants'

land, but that the well defined channel disappears east of the defendants' land and does not reappear until after it passes out the northwest corner of defendants' lands.

"This is substantiated by plaintiffs' own witness, Darrell W. Fox, a surveyor who surveyed the lands in question and filed as Exhibit '1' to his deposition a plat thereof. At page 8 of the transcript, Mr. Fox testified that he showed a 'creek, ditch or slough' with double lines. It is significant to note that, in tracing the so-called water course across the defendants' lands, he used only a single line throughout the entire length thereof. And at page 54 of the transcript, he described the so-called water course as a 'sway.' Again, at page 9, he testified that the land in question was practically flat.

"Much stress is placed upon the fact by the plaintiffs that the witness, Fox, testified that water was running across defendants' land at the time his survey was made, and they further stress the fact that the defendant, Reddmann, admitted this. Nowhere in the record, insofar as the court's investigation has disclosed, is it shown just when this survey was made; that is, what time of the year. This, of course, would have quite a bearing in this connection. It is significant, however, to note that the engineer or surveyor's plat was dated March 3rd, 1950.

"Again, in the plaintiffs' brief it is stated that, from the proof and plats filed, there seems to be two sources of water coming from the east: one, Town Creek and its tributaries, being carried by a well defined ditch to a point 220 yards west of the south end of the T-lateral and there 'flattening out' over a depression from one hundred to four hundred feet wide, and for a distance of five thousand feet, at which point it again gets in a well defined ditch and flows from there to L'Anguille River; the other source they say originated on the Bob Lamb and John Gant lands, which are east of the Brinkerhoff land. They say that this water, part of which may come from Town Creek, is gathered in a well defined channel on the Gant and Lamb property

and carried south to Highway 14, where it connects with Ditch Number 10 extended south by means of a culvert under the highway. It appears that, because of the fact that Ditch Number 10 is so grown up, it only carried, after big rains, a portion of this Gant and Lamb water, and the balance of it is forced west on to the Brinkerhoff and Jones land.

"It is quite apparent to the court that the purpose of the construction and creation of the T-lateral and of Ditch Number 10 was to carry the water of Town Creek. Of course, as long as the water is within the confines of the banks of the creek and lateral, it is the stream of water leading to L'Anguille River. When it overflows its banks, the water coming therefrom is overflow water, or flood water, or excessive rain water, as it is referred to throughout the plaintiffs' brief and reply brief. It is not the duty of a landowner to provide a means by which flood water may be carried over and across his lands.

"Many cases of a similar nature appear in the official reports of our Supreme Court, and quite a few cases are cited by both parties to this litigation in their briefs. The court is of the opinion, however, that this case is controlled by the ruling laid down in the case of *Leader* v. *Mathews,* 192 Ark. 1049, 95 S. W. 2d 1138, and referred to in the more recent case of *Dent* v. *Alexander,* 218 Ark. 277, 235 S. W. 2d 953, wherein it was said:

" 'A landowner has the right to defend himself as against a common enemy without rendering himself liable for damages, unless he *unnecessarily* injures or damages another for his own protection. A landowner is under no duty to receive upon his land surface water from the adjacent property, but in the use or improvement of it he may repel such water at his boundary.'

"That the defendants have used the 160-acre tract of land as a rice farm for some fourteen or fifteen years is unquestioned. And the use of the very part of the land claimed to be a water course for such purpose absolutely destroys the contention that it is a natural water

course. And the most that can be said is that in the case of overflows, or excessive rains, the water naturally follows the contour of the land, and if unobstructed would recede over this 'sway,' as indicated by plaintiffs' witness.

"There is yet another reason why the plaintiffs should not be permitted to prevail, and that is shown by the supplement to the plat filed by the witness, Fox. In this plat he projects the so-called water course from the northwest corner of defendants' lands over and across sections 16 and 17, and into L'Anguille River. This plat shows that there are two obstructions across this so-called water course in section 16.

"Apparently there has been no maintenance work done in the drainage district in question for a period of some thirty-four years, and it can be readily understood that the system has deteriorated to such an extent that flood waters inundated all of the property in question more frequently than it was ever anticipated."

The decree is correct, and is therefore affirmed.

PASKLE *v.* PASKLE.

4-9955 255 S. W. 2d 671

Opinion delivered March 9, 1953.

Claude F. Cooper, for appellant.

Ward, Coleman & Mayes, for appellee.

GRIFFIN SMITH, Chief Justice. Willard Paskle and his wife, Dorothy, separated in June, 1951, and were di-

vorced a month later. They had two children—Brenda Rebecca, three years of age, and Linda Rosetta, age two. Sole custody was awarded the father. The mother has married and contends that her new husband is financially able to support the children in circumstances advantageous to them, and that he is anxious that the two little girls be restored to their mother who brought this action. The children are now in their paternal grandmother's home through arrangements made by the father.

The Chancellor found that changed conditions were not sufficient to justify revocation or modification of the custody order. The respondent (father) did not introduce testimony in contradiction of a *prima facie* showing made by the petitioner (appellant), hence correctness of the determination must meet the test of Act 470 of 1949, Ark. Stat's, § 27-1729. (See Supplement). *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. We reverse and remand in order that the Chancellor may have the cause fully developed.

CITY OF BLYTHEVILLE *v.* PARKS.

5-123 255 S. W. 2d 962

Opinion delivered March 9, 1953.

Elbert Johnson and *Oscar Fendler,* for appellant.

Bruce Ivy, for appellee.

WARD, J. The City of Blytheville, Arkansas, voted a $100,000 bond issue "for the purpose of acquiring additional land for the municipal airport." The issue here involved is whether the proposed use of the proceeds of the bonds violates Section 5, Article 12 or Amendment 13 of the Constitution of Arkansas.

The bonds have been sold and arrangements made to buy the land, but pending further procedure Ira Parks, appellee, a citizen and taxpayer of Blytheville, filed a complaint in Chancery Court challenging the proposed purchase on the grounds above indicated. The City filed an answer, the taxpayer filed a general demurrer, and the trial court sustained the demurrer.

The complaint and the answer, together with the exhibits attached to each, set out all the facts essential to the issue, and the parties agreed that these statements, unless contradicted in the pleadings, would be considered as true. The question presented here is purely a question of law.

Facts. In 1947 the U. S. Government permitted the City to use its Army Airport consisting of about 2,600 acres, and in 1949 the Government executed a deed to the City with the right to recapture. Since 1947 the City has made substantial improvements on the grounds and buildings. In 1952 representative citizens of Blytheville, knowing that the Government was in need of suitable air fields, conceived the idea of having the Government reactivate the former air base, believing it would result in much profit to the City and at the same time contribute to the war effort. The plan was fostered by the Chamber of Commerce and other civic organizations and citizens and, after negotiating with Government representatives, it resulted in a "Resolution" being adopted by the City and said civic organizations. The Resolution was to the effect: (1) The City would donate the fee title to the former Army Air Field to the Government; (2) The City would acquire and donate to the Government land for expansion; (3) The Government would have exclusive use of the Air Field; and (4) The City would do certain other things not pertinent to this decision.

Pursuant to the above, it was ascertained that 192 acres would be needed for Government purposes; options, which expire March 14, 1953, were obtained to purchase the required land; the City passed Ordinance No. 535 calling for an election to be held on a proposed bond issue; and the issue was approved by a vote of more than two to one. Wide publicity in the City newspapers regarding the plan in detail was given before the election.

The Government agreed that the deed conveying the 192 acres to it would contain a reverter clause, reading as follows:

"... should the land cease to be required for military airport purposes as determined by the Head of the Governmental Department or Agency having jurisdiction over said land, all title conveyed herein to the lands described above shall revert to the City of Blytheville, Arkansas, its successors or assigns."

A copy of the proposed deed, containing the above reverter clause, was made an exhibit to the answer.

If the City is allowed to complete its plan, land other than the 192 acres will be purchased out of the proceeds of the bond issue to provide an "Air Field for commercial and private owners of planes," and, in addition, the City is assured "that commercial aircraft transporting passengers and freight will have use of the original Air Field as extended during all reasonable times." No commercial airlines now use the airport.

Application of the law. The bond issue was voted pursuant to Amendment No. 13, which authorizes cities of the first and second class, with the consent of the qualified electors, to issue bonds "for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality."

Amendment 13 takes the place of § 1, Art. 16 of the Constitution, and the first paragraph in each reads the same, as follows:

"Neither the state or any city, county, town or other municipality in this state shall lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution in 1874, and the State shall never issue any interest-bearing treasury warrants or script."

While the above paragraph was mentioned by the trial court in its findings, there seems to be no serious contention that it alone supports the decision reached, and this is our view.

There is another clause in the amendment which appellee strongly insists invalidates the proceedings contemplated by the City, which reads as follows:

"No municipality shall ever grant financial aid toward the construction of railroads or other private enterprises operated by any person, firm or corporation, and no money raised under the provisions of this amendment by taxation or by sale of bonds for a specific purpose shall ever be used for any other or different purpose."

We agree with appellee and the Chancellor that this court has plainly held that where bonds are voted for a specific purpose the proceeds cannot be used for a different purpose. We note below a few such cases, all involving this language in Amendment 13.

City of Stuttgart v. *McCuing,* 218 Ark. 34, 234 S. W. 2d 209. Bonds voted to construct certain streets were paid out, leaving a balance unexpended, and the City sought to place the money in a different fund to be used on streets. This court said it was in violation of the specific purpose clause.

Sanders v. *Green,* 213 Ark. 943, 214 S. W. 2d 67 held that bonds voted to remodel a city hospital could not be used for a different purpose. It was stated that the funds, as originally voted, became a trust fund in the hands of the City to be used for the purpose designated.

To the above effect are *Yancey* v. *City of Searcy,* 213 Ark. 673, 212 S. W. 2d 546, and *City of West Memphis* v. *Jordan,* 212 Ark. 739, 208 S. W. 2d 164.

In our opinion the above rule, though clearly announced, does not constitute a bar to the consummation of the City's undertaking herein, for the following reasons:

First: The City is not, as contended by appellee, donating the land to the Government. We make this statement for two reasons: (a) There are many benefits which the City would expect to receive if the plan goes

through, such as accrue as a result of an increase in business and population. That these are desirable considerations from the City's viewpoint is attested by the activities of Chambers of Commerce everywhere. In the case of *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848, at page 444, it was said: "If the county has the power to take the public advantage into consideration at all, it has the right to base the conveyance entirely upon that as the moving consideration." It was held that public advantage did constitute consideration. (b) Appellee seems to have overlooked the very important fact that, while the 192 acres were being deeded [or donated] to the Government, the deed provided that the land would be returned [greatly improved] to the City when the emergency passes. It seems to us this, in effect, is not different from a lease by the City to the Government for the period of emergency. We cannot assume that our sovereign Government will fail to live up to its obligation or that it will act arbitrarily in doing so, nor can we assume the emergency will not pass within a reasonable time. It is not contended the City has no power to lease the property. In *Halbut et al.* v. *Forrest City,* 34 Ark. 246, p. 256, we find this statement:

"Where the town may be authorized to rent a building for its own use, it will not vitiate the contract to allow it to be used for other purposes of a public nature."

Second: The crux of appellee's contention and of the trial court's finding is: For the City to deed this property [192 acres] to the Government would be diverting the funds for a purpose not set forth in the ordinance. In the beginning we are impressed with the fact that the prohibition is against using *funds* for a different purpose. Here the funds will be spent for the land, and the *land* will be *diverted*—not the *funds.* However, the distinction may not be sound, so we will consider *land* and *funds* as the same in this instance.

We are not convinced that the plan here proposed constitutes a diversion of funds, or that the funds will

be used for any purpose other than the one specified in the ordinance. As has been pointed out, the purpose for which the money was voted was to acquire a municipal airport. If this plan materializes, what will the City receive for its money? We list below what the evidence substantiates:

(a) The City will have an air field for its all-purpose use. Land, other than the 192 acres, will be acquired out of the bond issue for such use. There is nothing to indicate this will not be ample for all present demands.

(b) For the City's benefit, commercial aircraft transporting passengers and freight can use the entire base at all reasonable times. This is an added service to the City which it has not enjoyed before.

(c) When the emergency is over the City will have for its exclusive use all the land it is now buying plus, perhaps, millions of dollars' worth of installations and improvements which it could, otherwise, never hope to obtain. In addition to the above, there is a probability the Government will turn over to the City the 2,600-acre Army Airport, greatly improved, just as it formerly did.

As it appears to us, there will be no diversion of funds for a different purpose. All the money will be spent for the original purpose—to secure the best possible airfield for the City. It must be conceded, of course, that the *method* of achieving the purpose was not embodied in the ordinance, but such designation was not practicable nor was it required by law. While we think the fact that the citizens of Blytheville were apprised of the *method* before they voted makes no difference in the legal aspect of this case, it can be a matter of pride to the promoters that nothing has been concealed.

We are unable to find anything in § 5, Art. 12 of the Constitution that prohibits the City from proceeding with the plan outlined. It reads as follows:

" § 5. *Political subdivisions not to become stockholders in or lend credit to private corporations.*—No

county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its cerdit to, any corporation, association, institution or individual.''

In support of its contention to the contrary, appellee cites *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180; *City of Little Rock* v. *Community Chest,* 204 Ark. 562, 163 S. W. 2d 522, 142 A. L. R. 1072; and *City of Fordyce* v. *Dallas County,* 195 Ark. 552, 113 S. W. 2d 500.

Our consideration of these opinions convinces us they are not applicable here. The City is not making itself a partner with nor lending its credit to the United States Government.

We agree with the Chancellor that Act 13 passed by the 1953 General Assembly could give to the City no power prohibited by the Constitution.

Reversed.

In view of the emergency existing an immediate mandate shall issue.

GRIFFIN SMITH, Chief Justice, concurring. I agree with the result for these reasons: We should conclusively presume good faith upon the part of the government. Advantages, from a municipal standpoint, are greater—rather than less—than would flow from an airfield exclusively operated by the City. The coöperative plan is one affecting every person who bears allegiance to our national institutions.

Experience teaches that a condition of war, or what is sometimes termed the emergency of war, invariably terminates; and, while the transaction between Blytheville and the federal government is in terms a transfer, the overall plan contemplates usage during a period of stress, with reliance upon sovereign integrity for eventual restoration. In these circumstances I am willing to say that the spirit of Amendment No. 13 is not violated.

GEORGE ROSE SMITH, J., dissenting. We are told in the pleadings and in the briefs that this proposal is approved by the chamber of commerce, by luncheon clubs,

and by other civic organizations in Blytheville. But, as I see it, their blessing is not enough. The plan must also be sanctioned by Amendment 13 to the Constitution, and that authority is not to be found.

The majority give rather less consideration to the constitutional issue than to the practical benefits that may be expected to accrue to the city and its businessmen. While I do not regard these practical benefits as being of great importance, it is nevertheless true that we can examine the basic question with more detachment if we first note that this particular proposal is not essential to the realization of these benefits. For example, the majority say that as a result of this plan the city will have an airport of its own, since the bond issue will be used to purchase land in addition to that being donated to the army. The short answer to this argument is that the city should confine itself to acquiring that other land, instead of spending 80% of the bond proceeds upon the property that is to be given away. Again, the majority say that the city will regain the property "when the emergency is over," under the reverter clause. That may be a possibility, even a probability, but it is not a certainty. As a matter of fact the reverter provision makes no reference to an emergency; it merely provides for a reversion "should the land cease to be required for military airport purposes" as determined by the federal government. It is quite apparent that the field might be used as a permanent military installation, in which case it would never revert.

When these makeweight reasons are laid aside the real issue emerges as this: Does Amendment 13 authorize the levy of a property tax for the purchase of land that is to be given to the United States for use as a military airbase? One has only to read the amendment to see that this scheme is not within its purview. Amendment 13 permits a city to levy a property tax for the acquisition or construction of streets, parks, flying fields, sewers, fire fighting apparatus, city halls, auditoriums, libraries, hospitals, waterworks, and other enumerated facilities. The point is that these are all commonplace municipal

functions and have been so considered for a good many years. It was not necessary to amend the Constitution merely to enable a city to pave a street or build a city hall. What the amendment did was to authorize the levy of a special tax so that the city could supply ordinary public services that might otherwise have been beyond its means.

One of the projects named in the amendment is "the purchase, development and improvement of public parks and flying fields." To me it seems too clear for dispute that the sole purpose of this clause was to empower a municipality to issue bonds for the acquisition of a municipally owned and municipally operated airport. I do not suppose that the majority would contend that the city of Blytheville could, under Amendment 13, gird itself for war by the construction of a military airstrip of its own. Still less do I see how the city can proceed under this amendment to acquire land for the declared purpose of donating it to the government for military use.

LOOMIS *v.* LOOMIS.

5-13 255 S. W. 2d 671

Opinion delivered March 9, 1953.

Harry T. Wooldridge and *Palmer Danaher,* for appellant.

Reinberger & Eilbott, for appellee.

George Rose Smith, J. In 1937 the appellee was granted a divorce in California. The decree awarded her the custody of the parties' minor child and directed the appellant to pay $25 a month for the child's support. In the court below the appellee filed a complaint seeking to recover delinquent payments totaling $1,475. Trial without a jury resulted in a judgment for the plaintiff for $1,250. For reversal the appellant contends that he should have been given credit for numerous overpayments made prior to the date of his last actual payment, which was about May 1, 1945. By cross-appeal the appellee insists that the judgment should have included interest from the date on which this suit was filed.

The proof shows conclusively that the appellant paid or allotted to the appellee more than an average of $25 a month during the period between the entry of the decree in 1937 and his discharge from the army on May 1, 1945. These overpayments fall into two categories. First, the appellant was a soldier in World War II and made a monthly allotment of $42 for the support of his son. We considered an identical situation in *Hinton* v. *Hinton,* 211 Ark. 159, 199 S. W. 2d 591, and rejected the husband's contention that credit for such overpayments should be projected beyond the date of his military discharge. In that case the decree required the husband to pay $20 a month, and had he been credited with the full amount of the $42 allotment his liability would have been satisfied for a period extending even

beyond the date of trial. We held, however, that the military allowance extinguished the husband's obligation only to the date of his release from the army, and thereafter he was required to resume payment in accordance with the decree. On this point that case is controlling.

Second, during the first four or five years after the divorce the appellant often spent for the benefit of his child more than the exact amount required by the decree. From time to time the appellant paid pressing bills owed by his former wife, made gifts to his son, paid medical expenses, and in other ways did more than the court had directed. At the trial he produced canceled checks for these outlays and insisted that he was entitled to credit for each one.

We think this issue was one of fact for the trial court. There is certainly nothing in the law to prevent a divorced father from being more generous in the maintenance of his child than the court has ordered. Cf. *Wood* v. *Wood,* 219 Ark. 942, 245 S. W. 2d 575. On the other hand a father might refuse to make any prepayment except upon the explicit understanding—and for the sake of the child's security we think it should be pretty explicit—that the excess should be applied in satisfaction of future obligations. Here the appellant testified that he often warned the appellee that she would eventually have to account for all sums received, but the appellee is just as positive in her assertion that there was never any understanding that payments in excess of $25 a month were to be treated as advances. The appellee's testimony is substantial evidence supporting the finding of the circuit court.

The appellant also contends that his duty to maintain his son was temporarily suspended by reason of the boy's having obtained employment and supported himself for a few months before coming of age. This is not a circumstance that we may properly consider in giving effect to the California decree. If a foreign judgment is not subject to modification or recall as to past-due installments we must give it full faith and credit. *Barber*

v. *Barber,* 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 82. It is settled in California that the courts cannot modify maintenance or alimony payments that have already accrued. *Parker* v. *Parker,* 203 Calif. 787, 266 P. 283; *Keck* v. *Keck,* 219 Calif. 316, 26 P. 2d 300. It is therefore beyond our power to reduce the judgment on the ground now asserted.

By cross-appeal the appellee, though not asking for interest on each installment from its due date, does insist that she is entitled to interest from the day on which this suit was filed. Had she recovered the full amount sued for we do not suppose that her claim to interest as well would be questioned. But she asked judgment for fifty-nine delinquent installments, and the court found that in 1943 the appellant made nine monthly payments of $25 without realizing that his obligation was being satisfied by a government allotment. To rectify this mistake the court credited the appellant with $225 and entered judgment for only $1,250. The question is whether this partial finding in favor of the defendant precludes the plaintiff from recovering interest on the balance due her.

We think it does not. The familiar rule that interest is not allowed on unliquidated demands does not mean that the defendant must in every instance know before the trial the exact amount he must pay if he loses. The rule applies principally to those cases in which the defendant is not in default for the reason that the extent of his liability can be determined only by litigation, as in a suit for personal injuries or for recovery upon *quantum meruit. Saliba* v. *Saliba,* 178 Ark. 250, 11 S. W. 2d 774, 61 A. L. R. 1348; *Carter* v. *Bartholomew Rd. Imp. Dist.,* 156 Ark. 413, 246 S. W. 487; Sutherland on Damages (4th Ed.), § 347.

Yet when the defendant is actually in default there are many instances in which interest is allowed even though the precise extent of his liability is not determined until the trial. For example, a defendant's liability for breach of a contract to pay a definite sum of money may be uncertain, for the default may have saved the

plaintiff the expense of full performance on his own part, and that saving may be a matter for the jury to determine. In spite of this uncertainty interest is recoverable from the date of the breach. Rest., Contracts, § 337, Comment *h*.

We recognized the principle, without stating it in so many words, in *Rogers* v. *Yarnell,* 51 Ark. 198, 10 S. W. 622. There a mutual account between the parties had extended over a period of thirteen years before coming to an end in 1884. The account was so involved that a master was appointed to arrive at the net balance due either to the plaintiff or to the defendant. Judge Cockrill carefully explained why interest is not allowed upon each item in such an account, but in remanding the case in 1888 we directed that the master determine the correct balance and allow interest on the balance so found from January 1, 1885. The latter date was evidently that on which the losing party could be said to be in default, although the amount of his liability was determined only after prolonged litigation.

In the case at bar the appellant was undoubtedly delinquent in the payment of the maintenance installments, and under the above principles the appellee is entitled at least to what she asks—interest from the date on which suit was brought.

Affirmed on direct appeal; reversed on cross-appeal.

BENNETT *v.* STATE.

4718 255 S. W. 2d 968

Opinion delivered March 16, 1953.

Cole & Epperson, for appellant.

Ike Murry, Attorney General, and *Wm. M. Moorhead, Assistant Attorney General,* for appellee.

GRIFFIN SMITH, Chief Justice. Ed Bennett was indicted for selling beer without a license. Upon conviction he was fined $400. The crime is a misdemeanor.

Appellant's summary of error is: (a) There was no substantial evidence connecting Bennett with the sale; (b) evidence was lacking to show that the defendant had not been licensed, and (c) there was nothing upon which the jury could have found that the beverage claimed to have been sold was alcoholic and intoxicating within the meaning of § 48-503, Ark. Stat's. Objections were made to certain testimony, and to remarks of the court.

Over objections by the defendant pertinent parts of the applicable statute were read to the jury, including § 48-513 providing that any person who shall brew or manufacture any liquor as defined by the statute without having procured a permit from the commissioner of revenues "authorizing the brewing, or manufacture, or the sale of such liquor, shall be deemed guilty of a misdemeanor", etc.

The factual background relied upon by the state is that Bennett owned the place of business where it is alleged the beer was sold and that Dessie Banks sometimes works for him. The employer-employee relationship is, we think, established by the defendant's admission, although the extent of her authority is not conceded.

Mary Mitchell testified that on March 22, 1952, she bought a can of beer at defendant's establishment, the sale having been made by the Banks woman.

Mose Ledbetter, a state witness, had formerly traded at Bennett's place, where whiskey and beer were sold. His last purchase was four weeks before the trial. He had bought beer from the defendant after March 22d. The court directed the jury to consider evidence of the last sale for the sole purpose of determining whether Bennett's reputation was that of a bootlegger. On cross-examination there were admissions from which an inference of prejudice against the defendant might arise, but credibility was a matter for the jury's determination. Other testimony supported the state's contention that the defendant was engaged in the illicit sale of intoxicants.

A. B. Lea, who testified for the state, was asked whether, before trial, the sheriff had attempted by inference to suggest what Lea's statements should be, whereupon the Court commented: "The question would indicate that the sheriff mistreated him—it would lead me to believe that the sheriff forced [the witness] to tell something, or he would give him 'treatment' until he made the statement. If that is true, this court is interested in that". One of the defendant's attorneys then said: "For the benefit of the record I want to say that the Court has apparently misinterpreted my question. I want to bring out what facts I can from cross-examination of the witness, and I believe the remarks of the Court just made in the presence of the jury are prejudicial to the defendant and I want to move for a mistrial".

Following a colloquy regarding this motion the Court refused to declare a mistrial, but added: ["The defendant's attorneys] had this witness on cross-examination. I am going to let [them] bring out anything that might show that this witness has been mistreated". There was no further attempt to enlarge the scope of inquiry. We agree with the trial judge that prejudice was not shown.

There was substantial testimony that as an employee of the defendant Dessie Banks made the sale charged in the indictment, and since the jury believed this witness the judgment cannot be reversed for want of evidence.

It is urged that the state did not prove a negative—that is, that Bennett had not been licensed to sell intoxicants. The right to sell beer, whiskey, or wine, derives from legislative authority; otherwise it is non-existent. One who engages in the traffic is a mere licensee who must recognize the state's power to regulate. Although the defendant testified, he did not claim to have a liquor or beer license. He had been convicted in Federal court, fined $500, and sentenced to prison for two years. The evidence fails to show whether the sentence was suspended. In that case, as in the transaction here, he was accused of dealing in liquor, but said he wasn't guilty.

It has been held that the right to deal in liquor is an affirmative defense; therefore the state would not be required to prove that the defendant was not licensed. *Evans* v. *State,* 54 Ark. 227, 15 S. W. 360; *Josey* v. *State,* 88 Ark. 269, 114 S. W. 216, 44 L. R. A., N. S. 463.

Other matters were brought forward in the motion for a new trial, but we do not regard any of them as prejudicial.

Affirmed.

WALLACE *v.* WELLS.

4-9990 255 S. W. 2d 970

Opinion delivered March 16, 1953.

Surrey E. Gilliam and *Melvin E. Mayfield,* for appellant.

Phillip Carroll, James B. Gannaway and *Malcolm W. Gannaway,* for appellee.

ED. F. MCFADDIN, Justice. The question now presented is whether the Circuit Court was correct in holding that the appellant's remedy was a claim under the Workmen's Compensation Law, rather than an action at law for damages.

Appellant, Bobby Lynn Wallace, was employed by appellee Wells at the latter's service station in El Dorado; and in the course of such employment, Wallace received serious and painful burns on August 25, 1948. Wells carried Workmen's Compensation Insurance, and had Wallace hospitalized and treated for many months, and voluntarily[1] paid him the amounts prescribed under the Workmen's Compensation Law. During all of such time, Wallace was a minor; but as soon as he had his disabilities removed, he brought this action at law for damages. Wells filed a motion to dismiss the complaint, alleging that the Wallace-Wells relationship had all the time been governed by the Workmen's Compensation Law; that Wells carried Workmen's Compensation insurance; and that Wallace had received compensation in the sum of $1,817.40.

Wallace resisted the motion to dismiss, and the Circuit Court heard the evidence offered by the parties on the motion. After hearing all such evidence, the Court

[1] There was no claim filed by or for Wallace with the Workmen's Compensation Commission.

held that Wallace's remedy was a claim under the Workmen's Compensation Law, and not an action at law for damages, as was attempted. Accordingly, the Court entered judgment dismissing Wallace's action, and this appeal challenges the correctness of such ruling.

Although many other questions are argued in the briefs, we conclude that the determinative question is whether Wells was an employer legally covered by the Workmen's Compensation Law. If he was, then Wallace's remedy is under that law, because it provides:

"The rights and remedies herein granted to an employee subject to the provisions of this Act . . . shall be exclusive of all other rights and remedies . . ."[2]

Wallace claimed that Wells was not legally covered by the Workmen's Compensation Law because—as Wallace claimed—Wells did not have five or more employees, as required by § 81-1302, Ark. Stats.; nor had Wells complied with the notice provision for employers of less than five men under § 81-1308, Ark. Stats.

On the issue of the number of persons that Wells employed at his filling station, a considerable amount of evidence was offered by both sides. Wells testified: that he operated a service station in El Dorado; that during the week days he had three or four employees at the station; that on all week ends—*i. e.,* Saturdays and Sundays—he had five employees at the service station; and that five employees were regularly employed for Saturdays and Sundays. Here is his testimony:

"Q. Now, Mr. Wells, in August 1948 how many regular employees did you have working at your station?

"A. Over the week ends, over Saturdays and Sundays, I had five (5); and during the week it would vary from three (3) to four (4).

"Q. But you did have five (5) on Saturdays and Sundays?

[2] This is from § 81-1304 Ark. Stats.

"A. On Saturdays and Sundays I had five (5) men, excluding myself.

"Q. That were regularly employed?

"A. Yes, sir.

"Q. And those men that came on Saturdays and Sundays came every Saturday—

"A. Every Saturday and Sunday.

"Q. Did they work on other days through the week, at irregular times?

"A. At irregular times, when we needed them."

Wells named the five employees as Roy Nichols, Otis Turner, James Nichols, Occie Roberson and Bobby Lynn Wallace, the appellant. It was testified that an additional employee, named Peyton Kemp, worked for a short time. Thus the effect of Wells' testimony is that he had five persons regularly employed at his filling station, although all of them did not work every day of the week.

To overcome the testimony of Wells as to the number of employees, Wallace took several courses. He contended: (a) that five persons were employed only on Saturdays and Sundays, and that he was injured on a Wednesday when there were only three employees on duty; (b) that at the time of Wallace's injury, one of the five employees, James Nichols, was actually on duty with the National Guard for 15 days summer training; (c) that even though James Nichols received his pay from Wells during the period of such absence, nevertheless, James Nichols was not actually working on August 25th; and (d) that Wells' tax returns to the Employment Security Division of Arkansas for the quarter of July, August, and September, 1948, showed that for the entire quarter, Wells paid each of the five employees total wages, as follows:

"James DeWitt Nichols.....$480.00
Charles Otis Turner..... 180.00
Occie B. Roberson..... 240.00
Te Roy Nichols..... 120.00
Bobby Lynn Wallace..... 135.00"

From all of the foregoing, Wallace argued, and urges here, that some of the employees were not working all of the time and, therefore, Wells did not have five employees when Wallace was injured.

We have detailed enough of the facts and contentions to demonstrate that there was a sharply disputed question of fact as to whether Wells had five employees regularly employed in the course of business so as to be legally covered by the Workmen's Compensation Law. The Circuit Court's judgment necessarily was based on a fact finding that Wells actually had five employees; and such fact finding is as binding on appeal as is a fact finding by a jury. It has long been the rule that when the trial judge decides a fact question, either interlocutory or preliminary to the trial, such decision will be sustained on appeal if there is any substantial evidence to support it. *Blass* v. *Lee,* 55 Ark. 329, 18 S. W. 186; *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 2d 462; *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187; *Shephard* v. *Hopson,* 191 Ark. 284, 86 S. W. 2d 30; *Halliday* v. *Fenton,* 164 Ark. 11, 260 S. W. 961; *Scroggin & Co.* v. *Merrick,* 176 Ark. 1205, 5 S. W. 2d 344; *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368.

But appellant says that there is no evidence to support the fact finding, since the evidence discloses that appellant was injured on a Wednesday, and Wells does not claim to have had as many as five employees except on Saturdays and Sundays. This brings us to a determination of the question, whether in order to be legally covered by the Workmen's Compensation Law, it is necessary that the employer have five employees on duty at all times.

Our 1939 Workmen's Compensation Law, as now found in § 81-1302 Ark. Stats. (and the Act in effect when Wallace was injured), reads:

"(c) 'Employment' means every employment carried on in the State in which five (5) or more employees are regularly employed in the same business. . . ."

Professor Larson, in his two-volume commentary [3] on the Workmen's Compensation Law, commenting on regular employment of a minimum number of employees, states the holding:

"The commonest problem under the usual wording of statutes conferring this type of exemption is the question whether the employer 'regularly' employs more than the minimum number. Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer cannot be allowed to oscillate between coverage and exemption as his labor force exceeds or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the act, he remains there even when the number employed temporarily falls below the minimum. In such a case, the fact that the number working at the exact time of injury was below the minimum is of course immaterial."

One of the leading cases on the regularity of employment required to bring the employer under the Workmen's Compensation Law is *Mobile Liners* v. *McConnell,* 220 Ala. 562, 126 So. 626. In that case, several men were employed as "checkers," not every day, but only on days when a vessel was in port, and that was from two to five days a week. The Alabama Court held that these "checkers" could be counted in determining the number of employees under the Workmen's Compensation Law. The Court said:

"The word 'regularly' is not synonymous with 'constancy.' There are businesses of importance which employ numbers of men *regularly,* who employ none of them *continuously.* And a number of businesses, as this, will require a large number of employees, nearly all or a large number of whom are employed only *periodically,* for the reason that the needs of the business require their services only at intervals or periods, whenever the business is in active operation."

[3] This is "The Law of Workmen's Compensation", by Arthur Larson, professor of Law, Cornell Law School. The volumes were published by Matthew Bender & Co., in 1952.

In 81 A. L. R. 1232 there is an Annotation entitled:

"Workmen's compensation: continuity and duration of employment required by provision of act making its applicability depend on number of persons employed."

The subject is also discussed in 58 Am. Jur. 639 and in Schneider's Workmen's Compensation Text, Permanent Edition, Vol. 2, § 592. Our own cases of *Brooks* v. *Claywell,* 215 Ark. 913, 224 S. W. 2d 37, and *Feazell* v. *Summer,* 218 Ark. 136, 234 S. W. 2d 765, while not directly in point, nevertheless clearly indicate the trend of decisions regarding the number of employees and regularity of employment. We hold that Wells had five men regularly employed, although some of them worked only two days a week. The fact that five men were "regularly employed in the same business"[4] is the determinative factor.

We therefore conclude that there was substantial evidence to sustain the Trial Court in the judgment that appellee regularly employed more than five men, and that appellant's remedy is a claim under the Workmen's Compensation Law and not an action at law for damages.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

MOTHERSHEAD *v.* DOUGLAS.

5-29 255 S. W. 2d 953

Opinion delivered March 16, 1953.

[4] These words are from our Statute previously quoted, Sec. 81-1302.

R. W. Tucker, for appellant.

Chas. F. Cole, for appellee.

J. Seaborn Holt, Justice. This is the fourth appearance of some phase of this litigation before this court, *Mothershead* v. *Douglas,* 215 Ark. 519, 221 S. W. 2d 424, opinion June 13, 1949, *Mothershead* v. *Douglas,* 219 Ark. 457, 243 S. W. 2d 761, opinion October 22, 1951 and *Mothershead* v. *Ponder, Chancellor* (Mandamus), 220 Ark. 816, 250 S. W. 2d 121, *Per Curiam* opinion June 30, 1952.

The decree from which is this appeal (for convenience we number the paragraphs) recites: "(2) And the Court being well and sufficiently advised in the premises entered judgment in favor of the Intervener's, John L. Mothershead, Russell E. Egan, Elizabeth Egan, Anity Cissell, Nellie M. Cissell, Pat Rose Egan, Randall F. Egan, Norma B. Allen, for themselves and for the use and benefit of all other stockholders of the Polk-Southard Mining Co., a corporation, and against E. P. Douglas in the sum of $42,500.00, as directed by the Supreme Court in its opinion of October 22nd, 1951, and the Mandate issued thereon. It is further ordered and directed by this Court that said judgment be, and the same is hereby credited with the sum of $19,000.00, plus interest thereon at six per cent (6%) per annum from January 24, 1948, until October 7th, 1948, amounting to $810.67, making a total credit of $19,810.67 on said judgment, and leaving a balance due thereon of $22,689.33.

"(3) It is further ordered that said judgment should be credited with an amount equal to the proportionate part of the capital stock in the Polk-Southard Mining

Company held and owned by E. P. Douglas, J. Ray Nuckolls, Harry C. Hummel, Walter E. Shutt, Maurice L. McNaught, Marshall C. Shutt and Wm. A. Bickel, that such stock held by said parties bears to the total amount of the outstanding capital stock of the Polk-Southard Mining Company. It is further ordered and directed that this cause be continued to permit said plaintiffs to introduce satisfactory evidence as to the total amount of the outstanding stock of the Polk-Southard Mining Company, and the amount of such capital stock held and owned by these plaintiffs. It is further ordered and directed that the judgment entered herein shall bear interest from this date until paid at the rate of six per cent (6%) per annum.

"(4) It is further ordered and directed that title to all properties formerly owned by the Polk-Southard Mining Company, as evidenced by the proof heretofore adduced in this cause, be and the same is hereby vested in the plaintiff, E. P. Douglas.

"(5) It is further ordered and directed that the Clerk of this Court shall pay to L. G. Potter, as a fee for his services as Receiver, from the monies held by him in escrow, the sum of $200.00; and also to pay all costs of this action out of the funds so held by him in escrow. It is further ordered and decreed that all costs herein be adjudged against the plaintiff, E. P. Douglas. It is further ordered and directed that after the payment of above Receiver's fee and costs, that the Clerk of this Court retain the balance of the funds now held by him, to be applied on amount of judgment."

We have concluded that the above decree should be affirmed with the following modifications:

The decree (paragraph (2)) should be against not only "E. P. Douglas" but against all of the other plaintiffs, H. C. Hummell, W. E. Shutt, M. C. Shutt, J. R. Nuckolls, W. A. Bickel, C. F. Pennington and Maurice L. McNaught, for $42,500 less $19,810.67, or for $22,689.33, with interest thereon from October 7, 1948, until paid.

The record, when this case was before us in our original opinion, above, 215 Ark. 519, 121 S. W. 2d 424, shows that the property here involved was sold to and confirmed in E. P. Douglas and the other above named plaintiffs on October 7, 1948, and therefore the interest (as indicated) must be computed from that date.

The title to the property of Polk-Southard Mining Co. should have been vested in all of the plaintiffs and not in Douglas alone and paragraph (4) of the decree should be modified accordingly.

Also, paragraph 5 in which all costs are adjudged against Douglas should be modified to assess the costs against all of the plaintiffs herein and not against Douglas alone.

It will be noted in paragraph (3), above, the court "ordered and directed that this cause be continued to permit said plaintiffs to introduce satisfactory evidence as to the total amount of the outstanding stock of the Polk-Southard Mining Company, and the amount of such capital stock held and owned by these plaintiffs."

What credit, if any, therefore that may be allowed the plaintiffs (appellees here) on the judgment against them herein for any stock held by them has not yet been determined by the trial court and is not an issue here.

As modified, the decree is affirmed.

BRUNO *v.* BRUNO.

5-10 256 S. W. 2d 341

Opinion delivered March 16, 1953.

Rehearing denied April 20, 1953.

Milton McLees, for appellant.

O. W. (Pete) Wiggins, House, Moses & Holmes and *William M. Clark,* for appellee.

WARD, Justice. The suit for divorce brought by appellee against appellant presents for our consideration, on this appeal, the force and effect of an alleged "ceremonial" marriage of the two parties in 1946 in the state of New York.

First, a summary of the factual background to this proceeding will help to clarify that which follows. In 1944 appellee, Frances Riffle Bruno (then Frances Shelby) was married to Roy E. Shelby and was living with him in Little Rock.

In the latter part of 1944 Roy E. Shelby entered the Army, and in October, 1944, he was sent overseas, leaving his wife in Little Rock. About the same time appellant, Vincent Bruno, who lived with his wife, Rose, in Milford, Connecticut, was sent to an army camp near Little Rock. Within a few weeks after appellant's arrival in Little Rock, he and appellee became acquainted and started going together. Following this they consorted regularly, each knowing full well the marital

status of the other. Eleven months after appellee's husband left, she gave birth to a child which she says is the son of appellant. Appellant was discharged from the Army in November of 1945 and apparently returned to Little Rock. He stayed with appellee until after Xmas, and then went to his home and wife in Milford, Connecticut. On February 27, 1946, appellee secured a divorce from Roy E. Shelby and on Easter Sunday that year she landed in the City of New York, with the child above mentioned, to visit appellant where he was then living with his parents. The reason why appellant was at that time living with his parents and not with his wife at Milford was, he says, because appellee sent a telegram to him at Milford asking what to do about the boy, and the telegram was read to his wife over the phone. Appellee admits sending the telegram to Milford. The facts are in dispute as to whether appellant invited appellee to New York and sent her the money to make the trip, or whether the trip was her own idea. At any rate appellee stayed with appellant in his parents' home from Easter 'till July 14, 1946, during which time they lived together as man and wife.

Some few weeks after appellee arrived in New York, according to her testimony, she and appellant were married in a "ceremony" which took place one Monday night in the basement of a restaurant. Appellant denies that any such ceremony took place.

Following the alleged marriage and for some months thereafter appellant, appellee, and the child all lived together in Little Rock up until shortly before this proceeding was begun on July 12, 1951, during all of which time appellant and appellee lived together ostensibly as man and wife. Apparently nothing was left undone by either party to let their friends and neighbors think they were husband and wife.

Some difficulty, not clearly established by the evidence, arose and appellee filed suit for divorce against appellant. Appellant defended on the ground that they were never legally married and that, therefore, an action for divorce would not lie. The lower court was of the

view that the evidence was sufficient to establish a marriage in New York, and granted a divorce to appellee. Other matters were involved in the trial court's finding but they will be discussed later.

Much could be said pro and con in regard to the fact question of whether any marriage "ceremony" took place in New York, and the same could be said about the legal effect of such "ceremony" if it in fact occurred. If the "ceremony" did not in fact take place then, of course, appellee's suit should have been dismissed. On this point, however, we are of the opinion that the chancellor's finding was not against the weight of the evidence, but, in view of the decision hereinafter announced, it is not necessary to elaborate on the questions above suggested.

We have come to the conclusion that this cause must be reversed because the evidence, as we see it, fails to show appellant was divorced from his wife, Rose, when the "ceremony" took place in New York. We arrive at this conclusion after carefully considering all the evidence introduced on this point, some of which will be set out, and after giving appellee the benefit of all legal presumptions to which she is entitled. It must be conceded that if appellant was married to Rose when he married appellee, then the second marriage was a nullity and appellee never was the legal wife of appellant. See *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759.

The evidence fails to support a finding that appellant was divorced from Rose when the ceremony took place in New York. The undisputed evidence shows that appellee knew that appellant was not divorced when she went to New York on Easter Sunday, 1946, and she also knew that Rose was living in Milford, Connecticut, because she had sent a telegram there and she later learned Rose read the telegram. Appellee knew, some weeks after arrival, that appellant was not divorced because she said appellant's sister told her so, and she admits knowing this to be a fact. It is impossible to determine just how many days this was before the ceremony be-

cause appellee did not remember when it took place, but by the most favorable calculation it could not have been many days. During these intervening few days appellant didn't leave New York and it is not contended he made any effort anywhere to get a divorce, excepting only a circumstance we now discuss. Appellee testified that while she was in New York appellant told her he had a Mexican divorce from Rose. Appellant denies making this statement and the circumstances do not corroborate appellee. Appellee testified she had announced her intention of returning to Little Rock when appellant mentioned the Mexican divorce. When asked, on cross-examination, to explain, she answered:

"A. He said he was going to some friend of his that he knew that would give him a Mexican divorce and I don't even know this friend. I believe it is Cafairo—something like that. I tell you I am under oath, I don't really know but that is what he told me."

Some days later, she testified, he told her on Saturday night he had a Mexican divorce and the "ceremony" took place the following Monday night.

There is other testimony which tends either to discredit appellee's testimony regarding the Mexican divorce or to show she didn't have much faith in the verity of appellant's alleged statement. Appellant testified, not denied, that after they returned to Little Rock they went to Hot Springs to see a lawyer about getting a divorce from Rose. One of appellant's employees said that shortly before this suit was filed appellee told him that she thought she would succeed in getting appellant to marry her if she treated him right. Also, shortly before the filing of this suit appellant went to Alabama, evidently with appellee's knowledge and consent, and secured a "purported" divorce from Rose.

Appellee explains these inconsistencies by saying their purpose was to avoid all possibilities of error and to have another marriage ceremony in her own religious faith.

In our judgment the testimony falls far short of proving appellant was divorced from Rose when the ceremony took place in New York.

Appellee contends, however, that this determination of the issue is not fair to her because it deprives her of certain presumptions of law. One presumption, plainly recognized in many of our decisions, is to the effect that where a man and woman have lived together for any considerable time, holding each other out to the public as husband and wife, a strong presumption arises that they were lawfully married and the burden is on the one claiming otherwise to prove there was no such marriage. It is not necessary to discuss the application of this presumption here because this decision gives her the full benefit of it inasmuch as the ceremony or marriage is treated as an established fact.

Another presumption, more applicable here, is to this effect: Generally, it is held that where a man and woman are married and it is later discovered that one of them has a living former spouse it will be presumed, in the absence of proof to the contrary, that the former spouse had been divorced at the time of the said marriage. The basis of this presumption seems to be twofold. First, there is a presumption against deliberate bigamy and, second, public policy forbids illegitimizing innocent children born in wedlock. See *Lathan* v. *Lathan,* 175 Ark. 1037, 1 S. W. 2d 67; *Estes* v. *Merrill,* 121 Ark. 361, 181 S. W. 136, and *Brotherhood R. R. Trainmen* v. *Merideth,* 146 Ark. 140, 225 S. W. 337. The first and last cases above cited also hold that the burden of disproving the validity of a marriage is on the one attacking it. It was also stated in the *Lathan* case that the presumption of legality of a marriage increases with the lapse of time.

The principles announced above when properly applied to the facts of this case fail, in our judgment, to justify a finding that appellant was divorced from Rose when he "married" appellee in New York. Certainly there was no considerable lapse of time [to strengthen the presumption] between the date when appellee admits

she knew appellant was not divorced and the date when she says they were married. Any Mexican divorce which appellant might have tried to secure during the short interval in which he was never out of New York would manifestly have been illegal, and the purported marriage a few days later would raise no presumption of an illegal divorce. In this same connection and under circumstances more favorable than appellee's position here, in *Orsburn* v. *Graves,* 213 Ark. 727, 210 S. W. 2d 496, it was stated: ". . . there is no inference or presumption that an illegal divorce was procured." In the same case it was held that where cohabitation began in adultery, subsequent living together as husband and wife did not raise a presumption of the validity of a former marriage.

Under the peculiar circumstances of this case, it is questionable whether the burden was on appellant to prove there was no divorce from Rose when he married appellee, but it is not necessary to pass on that question because, in our opinion, such burden, if any existed, has been overcome by the evidence.

Under the holding in *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, cited above, and in the case of *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412, the marriage between these parties in New York was void because appellant at the time had a living wife from whom he was not divorced. Under the holding in the last cited case appellee is entitled to no part of appellant's property as his wife.

However, under the holding of the *Cooper* case and under § 61-104, *Ark. Stats.,* the two children are legitimatized as a result of the ceremonial marriage, and can inherit from their father.

It would be in order, if requested, for the trial court to nullify the ceremonial marriage and declare the children to be legitimate, and this cause is remanded so that such action may be taken.

Reversed and remanded.

The Chief Justice and Justice Robinson dissent.

GRIFFIN SMITH, Chief Justice, dissenting. The factual background, when weighed by the preponderating evidence rule, is not the test here. The testimony abundantly supports appellant's assertions that her husband told her he was divorced. We may even disregard these statements and assume that he did not mention the subject: still public policy demands that when a wedding occurs each party be legally competent to contract. In the majority opinion it is conceded that a factual issue was presented when contradictory statements of the wayward couple relating to the New York ceremony was presented; but the former spouse of neither is complaining, and admittedly the situation is one where a party to a crime, if such occurred, asks a court of equity to relieve him from the consequences of his own wrongdoing.

No documentary evidence supports appellant on the vital issues, hence we have the word of philandering Jimmie to weigh against the declarations of an imprudent and from the worldly standpoint immoral mother. Man's measure of condemnation has ever been severe, but the tenets of equity, based upon precepts of Christianity, have measurably ameliorated the masculine concept of a double standard through substitution of forgiveness and a kindly spirit. It is not a waste of time to read the Gospel According to St. John, chapter four, and consider the situation of the Woman at the Well.

Where children are involved and the result of ignoring the presumption to which reference has been made is to brand them with the social status of illegitimacy, I would accept the presumption as an attribute of Right, and compel the admitted father to recognize his children without painting them with the brush of parental wrong.

The record conclusively shows that this unfeeling father pursued the willing Mrs. Shelby almost from the hour of their first meeting. Her physical attractions were the consummation of desire. The possessory urge was of such a nature that social conventions were disregarded. Now, with passion satiated, the object of his solicitude becomes the Woman of Samaria.

5-23 256 S. W. 2d 330

Opinion delivered March 16, 1953.

Rehearing denied April 20, 1953.

Ben B. Williamson, for appellant.

Chas. F. Cole, for appellee.

J. SEABORN HOLT, Justice. Appellants and the Robinsons entered into the following contract: "This contract entered into on this the 15th day of March, 1950, by and between A. T. Robinson and Grace Robinson, parties of the first part and Darrell Lancaster and Naomi Lancaster, parties of the second part, Witnesseth:

"That the party of the first part hereby agrees to sell and execute a Warranty Deed to the parties of the second part to the following lands in Stone County, Arkansas, to-wit: (describing them) for a consideration of the sum of Four Thousand Five Hundred & No/100 ($4,500.00) of which the sum of $1,500 is being paid as

of this date, and the balance in annual installments of $325.00 and interest at 6%, beginning with the first installment on the 15th day of March, 1951, and the same amount on the 15th day of March each year thereafter until the full amount of $3,000.00 plus interest is paid.

"The party of the second part after having read the terms of this contract hereby agrees to make the down payment of $1,500.00 and the balance as shown above. It being understood that the Deed and Abstract be held by the party of the first part until all payments be made, then to be delivered by the parties of the first part to the parties of the second part. It being further understood that in the event of failure of the parties of the second part to make either of the payments on or before the due date, all become due and payable and this contract becomes null and void and the Deed reverts to the party of the first part, after a period of 30 days of grace has been given. Party of the first part to pay taxes for 1949. Future taxes and insurance to be paid by party of the second part. (Signed) A. T. Robinson, Grace Robinson, Darrell Lancaster, Naomi Lancaster."

Material facts appear not to be in dispute. On January 9, 1951, after the execution of the contract and the down payment of $1,500 by the Lancasters, the Robinsons sold and assigned their interest in the property to Von R. Rosa under a written agreement, which in part provided: "In order for said Von Rosa, as assignee of said contract to carry out the terms thereof, it is necessary that legal title to said lands be conveyed to him in order that he may convey same to said William Darrell Lancaster and Naomi Lancaster upon the compliance with the terms of said contract;

"Now, therefore, we, the said A. T. Robinson and Grace Robinson have this day executed and delivered to said Von Rosa our deed to the lands aforesaid; and I, the said Von Rosa hereby agree to hold same according to the terms of said contract, and upon payment to me of the purchase price therefore as set out, to execute my

Warranty Deed to said lands conveying same to said William Darrell Lancaster and Naomi Lancaster."

The Lancasters held possession and received rent from the property until May, 1951, in the amount of $280, and on this date Rosa took possession. The Lancasters failed to pay the first installment due March 15, 1951, or within the thirty days grace period thereafter. (In fact, they did not pay the second installment when it became due.)

The Lancasters brought the present suit against the Robinsons to recover the $1,500 down payment, alleging that the Robinsons had breached their contract, "that under said contract, the deed and abstract were to be held by defendants until the purchase price was paid in full, at which time the deed and abstract were to be delivered to the plaintiffs (Lancasters). Complaint further alleges that the said A. T. Robinson and wife failed and refused to comply with their part of the contract by executing the deed, aforesaid, and thereafter, on January 9, 1951, without the knowledge and/or consent of the plaintiffs, conveyed said lands to one Von R. Rosa and Grace Rosa for a consideration of Three Thousand Dollars ($3,000) cash in hand."

The Robinsons answered with a general denial and alleged that appellants had breached the contract by failing to pay the first installment.

The present suit was filed March 15, 1951. December 22, 1951, appellee, Rosa, filed motion to be made a party defendant, and on March 19, 1952, the trial court properly granted this motion and allowed Rosa to intervene as a necessary party in interest. See § 27-814, Ark. Stats. 1947, and our holding in *Harrison* v. *Knott,* 219 Ark. 565, 243 S. W. 2d 642.

The case was, by agreement, tried in vacation and final decree was entered of record on May 23, 1952, in favor of appellees. The trial court found that the Lancasters had paid the $1,500 on the contract but had failed to pay the first installment due March 15, 1951, had failed

to pay taxes and keep the property insured as provided in the contract. The decree provided in part: "That on or about the 9th day of January 1951 the defendants, A. T. Robinson and Grace Robinson, assigned and transferred their rights in the sales agreement aforesaid, to the defendant, Von R. Rosa for the consideration of $3,000.00 and at the same time conveyed the lands aforesaid to the said Von R. Rosa. That said Von R. Rosa entered into a written agreement with the said A. T. Robinson whereby he held said lands subject to the terms and provisions of said sales agreement, specifically agreeing to convey said lands to the plaintiffs upon payment to him of the balance due on the purchase price of said lands; that the said Von R. Rosa held title to said lands subject to the terms of said sales agreement.

"That in order to adjudicate the rights of all necessary parties, and in order to do equity herein, the said Von R. Rosa was made a party hereto on March 19, 1952.

"The Court further finds that the defendant, Von R. Rosa, has had possession of said property since May, 1951; that a fair rental value of said property is $20.00 per month; that said Von R. Rosa has paid all taxes and insurance on said property since acquiring said sales agreement and title to said lands; that said Von R. Rosa holds same as a mortgagee in possession.

"It is therefore by the Court considered, ordered and decreed that plaintiffs' prayer for judgment in the sum of $1,500.00 for the initial payment made on said lands, and for $1,500.00 for breach of contract, be, and the same is hereby dismissed; that the defendant Von R. Rosa, as the present owner of said sales agreement and rights thereunder, is given judgment in the amount of $3,000.00, being the balance due on the purchase price of said lands; it is further ordered by the Court that the terms of said sales agreement shall be reinstated providing the plaintiffs pay to the defendant Von R. Rosa, the payments due thereunder for March 15th, 1951 and for March 15th, 1952, plus interest on the total unpaid balance of $3,000.00 at 6% per annum, less the fair rental

value of said property from May 1st, 1951; plus the taxes on said property for 1950 and 1951, and the insurance premiums for the insurance on said property with interest at 6% per annum; and upon payment in full of said sum of $3,000.00 the defendant, Von R. Rosa, is ordered and directed to execute a warranty deed to said plaintiffs in accordance with the terms of said sales agreement.

"In the event the plaintiffs fail to pay the sums adjudged by them to be paid herein, within *60* days after the date of this order, then and in such event, said sales agreement and contract is declared to be null and void, and the rights of said plaintiffs under said contract, and their equity and rights in said lands thereunder are forever foreclosed and barred."

We think the preponderance of the testimony is not against the findings of the trial court. The Robinsons, as indicated, assigned the contract of sale on January 9, 1951, to Von Rosa. This they clearly had the right to do under § 68-801, Ark. Stats. 1947. Such is the effect of our holding in *Corcorren* v. *Sharum,* 141 Ark. 572, 217 S. W. 803, wherein we held: (Headnotes 1 and 2) "1. VENDOR AND PURCHASER—EXECUTORY CONTRACT.—One purchasing land by an executory contract became the equitable owner. 2. VENDOR AND PURCHASER—ASSIGNMENT OF CONTRACT.—An executory contract for the purchase of land is assignable in equity and under Kirby's Dig., § 509, (now § 68-801, above) making all agreements in writing for the payment of money or property or both assignable."

The record reflects that prior to the entry of the above decree, May 23, 1952, and the intervention of Rosa, the Court on the evidence then before it indicated that its findings and conclusions would be in favor of the Lancasters for $1,500 less $280 rent and that they were entitled to a lien on the property.

As we have indicated, these findings were made during the vacation period. Thereafter, and within this vacation period, the court, after allowing Rosa to intervene, reopened the case and in effect reversed its earlier

conclusions by the above final decree of May 23, 1952, which was and is the only final decree made by the court. Section 22-433, Ark. Stats. 1947, provides for vacation decrees, but such decrees do not become final, effective and appealable until filed with the clerk for entry on the record.

In construing the above statute, we said in *Red Bud Realty Company* v. *South,* 145 Ark. 604, 224 S. W. 964: "Under this statute (now § 22-433, Ark. Stats. 1947) a vacation decree does not become effective until it is signed and entered of record, and until it is so entered, it cannot be appealed from, therefore, the time allowed for taking an appeal runs from the date of entry. In this respect a vacation decree differs in effect from one rendered in term time. In the very nature of things, a judgment pronounced by a judge in vacation does not, before entry, have the force and effect of a judgment pronounced by a court duly assembled at the time and place prescribed by law, unless the statute in express terms gives it such force."

Courts have the power "to amend, vacate, or correct decrees rendered in vacation before the expiration of the term of court," *Ingram* v. *Board of Commissioners of Street Improvement District No. 5,* 197 Ark. 404, 123 S. W. 2d 1074.

In view of the equities involved, we modify the decree by directing that appellants be allowed sixty days from the date of this opinion within which to comply with said decree. As so modified, the decree is affirmed.

Opinion delivered March 16, 1953.

Rehearing denied April 20, 1953.

Joseph Morrison, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant was injured and his truck damaged when he undertook to cross St. Louis Southwestern Railway Company tracks in front of a mainline passenger train.

A "blinker" warning is maintained at the Main Street crossing in Stuttgart where the collision occurred. It was alleged that the railway company failed to operate the electrically-controlled flashlight system in such

manner as to warn the plaintiff of an approaching train in sufficient time; that the company negligently failed to sound the locomotive whistle or ring the bell; that in passing through Stuttgart a local ordinance limiting the speed of trains to 20 miles per hour was violated; that the plaintiff was familiar with the flashlight system and depended upon it, to his injury. The demand was for $25,000 to compensate personal injuries and $1,475 for truck damage. From a jury verdict and the court's judgment in favor of the defendant Browder has appealed.

Although there was no specific allegation of discovered peril, testimony was introduced from which the jury could have drawn an inference, hence the complaint will be treated as having been amended.

Appellant's contentions he says are decisive go to alleged errors in instructions given or refused. It is argued that physical facts, (as disclosed by a chart used when the appeal was orally presented) when considered in connection with undisputed distances and the existence of a building it is claimed must have partially obstructed Browder's view to his left whence the train came, are so clearly contrary to the jury's findings as to negative fair consideration, revealing a verdict unsupported by substantial evidence. A careful examination of the record, however, shows that all essentials were disputed in circumstances where the fact-finders had a right to consider the interest, preferences, prejudices, and credibility of those who testified.

It is not contended that the blinker system was out of order. On the contrary appellant's position is that because the accident happened as it did the contact mechanism which starts the flashlights must have been installed so near the crossing that one approaching the tracks did not have sufficient clearance after the warning was given. Excessive speed of the train is emphasized by testimony that the truck was carried about 200 feet and that the train did not stop within the distance operatives testified that it could be halted through use

of the emergency brakes if the speed had not been in excess of 20 miles per hour.

It is accepted law that violation of a safety measure is not negligence *per se,* but only evidence of negligence. *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S. W. 2d 840, cited in *Missouri-Pacific Railroad Co.* v. *Dalby,* 199 Ark. 49, 132 S. W. 2d 646.

Whether the traffic signal was sufficiently "spaced," in point of automatic contact with the engine which brought it into play, went to the jury on testimony of a witness who saw the lights flashing, but crossed ahead of the train. He looked back and noticed that Browder was attempting to cross, and felt that he would be hit.

It is earnestly insisted that prejudice to the plaintiff resulted from the court's failure to give certain instructions—particularly No's 5, 3, and one that bore no number.

The unnumbered instruction would have told the jury that the railroad company was under a duty not to wilfully and wantonly injure a person on its tracks after the peril had been discovered, or after it should have been discovered through exercise of reasonable care. There was no evidence of wilful or wanton negligence and the instruction was properly refused.

Plaintiff's requested Instruction No. 5 required train operatives to maintain a lookout for persons and property on the railway; declared the law to be that if through failure to keep such lookout a person should be killed or injured, or property damaged, the company would be liable, ". . . notwithstanding the contributory negligence of the person injured, where if such lookout had been kept [such operatives] could have discovered the peril of the person so injured in time to have prevented the injury by the exercise of reasonable care after discovery of such peril, and the burden of proving shall devolve upon said railroad to establish the fact that this duty to keep such lookout has been per-

formed." Only a general objection was made to the court's refusal to give this instruction.

Plaintiff's Instruction No. 6 told the jury that the burden of proving contributory negligence was upon the railway company, ". . . and if you find that the . . . defendant . . . has failed to prove by a preponderance of the evidence . . . that the plaintiff was guilty of contributory negligence, *then you will find for the plaintiff on the question of contributory negligence.*"

This instruction, it will be noted, served two purposes: It told the jury that the burden was upon the railway company to establish the plaintiff's contributory negligence; and it also directed a finding in the plaintiff's favor on the single issue of contributory negligence unless the defendant had produced preponderating evidence that the plaintiff was guilty of such negligence; and, furthermore, the instruction was "binding" on that issue.

Now turning to Instruction No. 10, given at the defendant's request, we find this language: "If you find that as plaintiff approached the crossing the signal lights were working, or that a warning was given by the blowing of the whistle or the ringing of the bell on the engine, and that if plaintiff had looked he could have seen the approaching train and could have stopped his truck in time to have avoided the collision, and that he failed to exercise such care and caution, *your verdict must be for the defendant.*"

This, of course, was a binding instruction and, on the issue of negligence, it does not take into account the degree of defendant's negligence, discovered peril, speed of the train, etc.

We have held that a so-called binding instruction that omits an essential element is not cured by giving correct instructions dealing with the phase in controversy. *Missouri Pacific Railroad Co.* v. *Burks,* 196 Ark. 1104, 121 S. W. 2d 65. But in *Hearn* v. *East Texas Motor Freight Lines,* 219 Ark. 297, 241 S. W. 2d 259, it was

said that instructions must be considered as a whole, and if, when so considered, the legal issues presented are properly explained, no prejudice results.

In the Hearn case a binding instruction dealt with violation of a safety statute. The appellant insisted that the direction, "*and if you find that the plaintiff was guilty of any negligence, however slight, your verdict must be for the defendant,*" omitted an element essential to a proper statement of the rule of contributory negligence—that to defeat recovery the claimant's negligence must have caused or contributed, in some degree, to his own injury.

The opinion continues with the statement that contributory negligence was succinctly defined *in a previous instruction,* for "after digressing from this particular definition only momentarily, and without material deviation from the related issues, the court gave Instruction No. 5 [the one complained of]. This was followed immediately by further admonition which defined ordinary care and connected it with the facts in issue. . . . We conclude, therefore, that failure to fully redefine contributory negligence in appellee's Instruction No. 5 was not error."

In the case at bar we have a somewhat stronger case in that appellant himself had been given a binding instruction dealing with contributory negligence in which he omitted any mention of the defendant's degree of care. The Hearn case is cited in *Kendrick* v. *Rankin,* 219 Ark. 736, 244 S. W. 2d 495, where the facts were different.

There was no error in refusing Instruction No. 3, offered by the plaintiff. Its substance was covered by defendant's Instruction No. 8. Other errors are commented on, but we are unable to say that any was prejudicial, hence the judgment must be affirmed.

GEORGE ROSE SMITH, J., dissenting. I think the giving of Instruction No. 10 was error, for it is a binding charge which entirely ignores the doctrine of comparative negligence. Under this instruction the jury were directed to find for the defendant if the plaintiff could have seen the train in time to stop, without regard to the possibility that the negligence of the train crew might have exceeded that of the plaintiff.

We did not go that far in the *Hearn* case, cited by the majority. There the questioned instruction mentioned the defense of contributory negligence but did not restate in detail all the elements of that defense, those matters having been covered in other instructions. Our premise was that "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." But, since the issue of contributory negligence was not ignored in that case, we held that in view of the instructions as a whole "failure to fully redefine contributory negligence in appellee's Instruction 5 was not error." The difference is that here Instruction No. 10 completely disregarded the rule of comparative negligence, and by the express language of the *Hearn* opinion reversible error was committed.

ROBINSON, J., joins in this dissent.

SEATON *v.* SEATON.

4-9999 255 S. W. 2d 954

Opinion delivered March 16, 1953.

Carl Langston and *Wayne Foster,* for appellant.

Otis Nixon, for appellee.

George Rose Smith, J. In March, 1949, the appellant, Ala Merl Seaton, obtained a divorce in the Pulaski Chancery Court. The decree gave her the custody of the couple's two children and directed the appellee to pay her $100 a month, allocated as $30 for alimony and $35 each for the maintenance of the children. On March 28, 1950, the court entered an order relieving the appellee of further liability for alimony, and on April 13 of that year the court made a second order by which custody of the children was transferred to the appellee, who was also excused from making additional payments for their support. In her present complaint the appellant asserts that the two modifying orders were void and that she is entitled to judgment for alimony and maintenance for the period that has elapsed since the orders were entered. The chancellor refused the relief sought.

With respect to the order of March 28 Mrs. Seaton contends that the original award of alimony was based upon a property settlement made by the parties, that the court was thereafter without jurisdiction to modify the contract, and that therefore the order terminating the

appellee's liability for alimony is void on its face. In support of this argument the appellant relies on *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938, and *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439.

Those cases do not govern this one. Our decisions have recognized two different types of agreement for the payment of alimony. One is an independent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bachus* case, it does not merge into the court's award of alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.

The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree upon "the amount the court by its decree should fix as alimony." *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102, which construed an agreement of the first type, and *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the *Holmes* case we held that the second type of contract does not prevent the court from later modifying its decree.

In the case at bar the agreement was oral. The decree recites that an agreement has been made that the husband shall pay $100 a month, allocated as we have stated, and "This agreement is approved by the court and is hereby made a consent decree." There is much similarity between this case and both the *Holmes* and

McCue cases, but we think that in principle the present agreement is governed by the *Holmes* opinion.

There is also another reason for holding that Mrs. Seaton is bound by the first modifying order. She appeared at that hearing, resisted her former husband's application for relief, and prayed an appeal, which was later abandoned. The order is therefore *res judicata* of Mrs. Seaton's right to enforce the original decree, and that is all she seeks to do here. The modifying order may have been error that could have been corrected by appeal, but it was not void.

The appellant attacks the second amending order upon the theory of unavoidable casualty, in that she had no notice of the hearing at which this order was entered. Ark. Stats. 1947, § 29-506. These are the facts: Seaton first applied for a discontinuance of alimony upon the ground that Mrs. Seaton was employed and for relief from maintenance of the older child upon the ground that the girl, contrary to his wishes, was being educated in a parochial school. The court granted the first prayer for relief on March 28 but reserved judgment on the second issue until the end of the school year. A few days later Mrs. Seaton moved with the children to California, where she has lived ever since. She says that before leaving Arkansas she consulted her then attorney, Kenneth Coffelt, who told her that there was no law to prevent her moving to California. Coffelt testified to the same effect, but added that he cautioned Mrs. Seaton that her departure would probably result in the court's refusing to enforce the maintenance payments.

Thereupon the appellee filed a petition asserting that Mrs. Seaton's conduct had deprived him of his right of visitation and that he should be given custody of the children and relieved from further maintenance payments as long as Mrs. Seaton kept the children out of the State. Notice of the proposed hearing upon this motion was served on Coffelt, but he did not attend the hearing and is not shown to have notified Mrs. Seaton that it was to take place. Mrs. Seaton now says that

service of notice upon her attorney was insufficient to make the order of April 13 binding upon her.

Inasmuch as the statute does not specify the notice to be given upon an application of this kind the rule is that the procedure chosen must be "reasonably calculated" to afford the opposite party an opportunity to be heard. *Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851. In the circumstances of this case we think the method selected was sufficient. It is common practice to notify opposing counsel alone when an interlocutory matter is to be heard in a pending case. Even though Mrs. Seaton had left the State she had good reason to anticipate further proceedings in the case. She knew, for instance, that the matter of the child's attendance at a parochial school was still before the court. She knew also that her departure would prevent the children's father from having them in his home overnight every Wednesday, as the original decree had provided. She could expect that Seaton would complain of his loss of visitation privileges, and she had been warned by her lawyer that her decision to leave endangered enforcement of the maintenance decree. With all these facts before her it would certainly have been prudent for her to leave a forwarding address with her attorney.

Nor do we perceive that any other form of notice would have been better calculated to inform Mrs. Seaton of the proposed hearing. The alternative would have been the publication of a warning order and the appointment of an attorney *ad litem.* It is doubtful that such an attorney could successfully have communicated with Mrs. Seaton. The appellee testified that after Mrs. Seaton went to California he tried to obtain her address from her mother, but the information was withheld. Later on he went to California in an effort to find the children, but Mrs. Seaton's brother, who lived there, was evasive as to her whereabouts. Thus had an attorney *ad litem* sought to get in touch with Mrs. Seaton his best source of information would probably have been Coffelt himself. The procedure chosen reached the same result by a more direct route.

It is not inappropriate to add that we do not mean to foreclose forever the possibility of Mrs. Seaton's obtaining legal custody of her children, and an award of maintenance, in addition to the actual custody she now enjoys. The issue of custody is of course a continuing one that the court may reconsider from time to time. It is evident from this record that when Mrs. Seaton first left the State the appellee was anxious that the children be returned. He has since remarried, however, and there is some reason to infer that he is now well content to continue as the technical custodian of the children while at the same time being relieved of any obligation for their support. There must evidently be some balancing of the equities when a mother thinks it for the children's best interest that she seek employment in another State, while the father prefers that he be able to visit his daughters close at hand. These are matters that have not yet been fully developed in the course of this litigation, and our decision is without prejudice to Mrs. Seaton's right to present this issue to the chancellor.

Affirmed.

ED. F. MCFADDIN, Justice (dissenting). My dissent goes to the question of the legality and sufficiency of service on Mrs. Seaton. The majority opinion says, *inter alia:*

"Notice of the proposed hearing upon this motion was served on Coffelt, but he did not attend the hearing and it is not shown to have notified Mrs. Seaton that it was to take place. Mrs. Seaton now says that service of notice upon her attorney was insufficient to make the order of April 13 binding upon her.

"Inasmuch as the statute does not specify the notice to be given upon an application of this kind the rule is that the procedure chosen must be 'reasonably calculated' to afford the opposite party an opportunity to be heard. *Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851. In the circumstances of this case we think the method selected was sufficient. It is common practice to notify opposing counsel alone when an interlocutory matter is

to be heard in a pending case. Even though Mrs. Seaton had left the State she had good reason to anticipate further proceedings in the case."

In the case cited in the above quotation—*Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851—we specifically pointed out that the petitioner did receive actual notice of the hearing. But in the case at bar, the petitioner did not have actual notice. Therefore, I think the statutory method of publication of warning order and appointment of an attorney *ad litem,* or the statutory method of non-resident service,[1] should have been followed in the case at bar as a jurisdictional prerequisite to the rendering of a decision in a matter as serious as depriving a mother of her children and the money for their support. I submit that some statutory method of obtaining service—rather than mere "common practice"—should have been pursued before such an order could have been legally made.

The majority opinion says—in the last paragraph—that Mrs. Seaton may still petition the Pulaski Chancery Court for a change of the challenged order. I think it would be far more just and proper to hold that the questioned order was void because of insufficient notice on Mrs. Seaton; and then Mr. Seaton would be required to be the moving party in any further proceedings. Why cast the burden on Mrs. Seaton, when she received no notice of a hearing on the order here involved?

CHETOPA STATE BANK *v.* MANES.

4-9946 255 S. W. 2d 957

Opinion delivered March 16, 1953.

[1] Section 27-354, Ark. Stats., concerns constructive service; and § 27-339, Ark. Stats., concerns non-resident service. Neither statute was followed in this case.

J. L. Bittle, for appellant.

G. P. Houston and *Gordon Armitage,* for appellee.

Ed. F. McFaddin, Justice. Appellant, Chetopa State Bank, of Chetopa, Kansas (hereinafter called "Bank") filed this action in replevin to repossess a Chevrolet Coupe from appellee, Manes.[1] From a jury verdict and judgment for Manes, the Bank prosecutes this appeal.

On April 3, 1950, M. M. Weaver and Wanda Weaver, his wife, were residents of Chetopa, Kansas. They obtained a loan from the Bank for $743.50, secured by a chattel mortgage on the Chevrolet Coupe here involved. The mortgage was duly filed and recorded in the County Clerk's Office, as required by the Kansas law.[2] The latter part of April or early May, 1950, the Weavers

[1] M. M. Weaver and Wanda Weaver were made defendants and summoned constructively. Their whereabouts are unknown and their connection with the case appears in this opinion.

[2] Sec. 58-301 *et seq.* of the General Statutes of Kansas of 1949.

secretly drove away from Kansas in the Chevrolet Coupe, and did not return. In late May, 1950, the Weavers were in Arkansas, and sold the Chevrolet Coupe to Frank Carder, an automobile dealer in Searcy, Arkansas, and exhibited and surrendered to him a Kansas Certificate of Title to the car, showing no lien claim of any kind.[3]

Carder sold the Chevrolet Coupe to Barger, who had the car registered under the Arkansas Title Certificate Law (Act 142 of 1949) and obtained an Arkansas Title Certificate which showed no liens on the car. Barger then sold the Chevrolet Coupe to the Appellee, Manes, who had the title transferred to himself and holds an Arkansas Title Certificate, dated July 20, 1951, showing a clear title.

As aforesaid, the Circuit Court trial resulted in a Jury verdict for Manes, because the Trial Court, over the Bank's general and specific objections and exceptions, instructed the Jury:

". . . You are further instructed that the law of the State of Arkansas provides that one who holds a lien against an automobile in the form of a vendors lien or chattel mortgage or conditional sales contract or other lien shall file and register such lien with the State Revenue Department of the State of Arkansas, and that if and when such lien holder does file his evidence of his lien or claim against the automobile with the Revenue Department from that time on, notice to everybody that such lien exists, and the law further provides that if such lien or claim is not filed with the State Revenue Department that it is not

[3] The Kansas Statute on Certificate of Title of Automobiles is Sec. 8-135 of the General Statutes of Kansas of 1949. In studying this case we have examined the following cases from Kansas. *Sorensen* v. *Pagenkopf*, 151 Kans. 913, 101 Pac. 2d 928; *Hess-Harrington* v. *State Exchange Bank*, 155 Kans. 118, 122 Pac. 2d 739; *Citizens State Bank* v. *Farmers Union*, 165 Kans. 96, 193 Pac. 2d 636; *General Motors Acceptance Corp.* v. *Davis*, 169 Kans. 220, 218 Pac. 2d 181, 18 A. L. R. 2d 808; *Peabody State Bank* v. *Hedinger*, 170 Kans. 237, 224 Pac. 2d 1014; *Rauh* v. *Dumler*, 170 Kans. 698, 228 Pac. 2d 694; see, also, Case Note on p. 273 of Feb. 1951 issue of the *Journal of the Bar Association of Kansas*. Our opinion herein is predicated on the statement contained in the appellant's brief, and uncontradicted by the appellee, to the effect that the recording of the mortgage in Kansas fully established the Bank's lien, and that the Bank was not required to have the Title Certificate show the existence of the chattel mortgage.

notice to third persons dealing with reference to such automobile. So, gentlemen, if you find from a preponderance of the evidence in this case that the plaintiff does hold a valid unpaid chattel mortgage against this automobile and that there is an unpaid balance of some amount on said indebtedness then you will find for the plaintiff for the possession of said automobile or for the balance due on the indebtedness unless you further find from a preponderance of the evidence that the plaintiff has not and did not file evidence of his claim or lien with the Revenue Department of the State of Arkansas. *In the event you find from a preponderance of the evidence the plaintiff did not file evidence of its indebtedness with the State Revenue Department and that this automobile was purchased by the defendant without such evidence having been filed with the Revenue Department by the plaintiff, then you will find that the defendant was an innocent purchaser of the automobile and that the lien of plaintiff is not binding upon him.*"

We have italicized the concluding portion of the Instruction to call attention to the fact that it was in effect a peremptory instruction for the defendant, since there was no claim that the Bank had ever filed evidence of its Certificate of Indebtedness with the Revenue Department of Arkansas.

It is asserted by Plaintiff and not denied by Defendant that the filing of the mortgage in Kansas perfected the Bank's lien, and that the Bank's mortgage was good in Kansas, even against an innocent purchaser. We held in *Nelson* v. *Forbes & Sons,* 164 Ark. 460, 261 S. W. 910, and reaffirmed in *Hinton* v. *Bond Discount Co.,* 214 Ark. 718, 218 S. W. 2d 75,[4] that "a chattel mortgage, executed and valid in another State, and properly recorded there, will be enforced in Arkansas on removal to this State, even against an innocent purchaser." So

[4] Another case in which *lex loci contractus* was applied is that of *Pruitt Truck & Implement Co.* v. *Ferguson,* 216 Ark. 848, 227 S. W. 2d 944. We there said: "The Arkansas law of Conflict of Laws necessarily recognizes the validity of foreign-created titles in chattels brought into this State, and under our law not even a sale to a *bona fide* purchaser here will cut off such a prior legal title."

the Bank in the case at bar contends that it is entitled to recover the car against Manes.

But Manes relies on Act 142 of 1949, which is the Arkansas Motor Vehicle Registration and Certificate of Title Act, and claims that such Act became effective after *Hinton* v. *Bond Discount Co., supra,* and changed the rule of law stated in that case. Manes claims that the provisions of Act 142 of 1949 are mandatory; that the Bank was required to have the foreign vehicle registered in this State to perfect its lien; and that Manes is entitled to prevail because he purchased the car in reliance on an Arkansas Title Certificate which showed no lien.

We are thus brought squarely to the question, whether a prior lien on a motor vehicle good in the State where the parties lived and the transaction occurred, is superior to an after acquired title when the car is brought into Arkansas and a Title Certificate obtained from the Revenue Department of this State which shows no lien. We have never decided the precise question, since Act 142 of 1949 is a comparatively recent statute, but Courts of other States have decided cases involving somewhat similar questions; and there is a diversity of holdings.[5]

The leading case on one side is that from the Supreme Court of Florida in *Lee* v. *Bank of Georgia,* 159 Fla. 481, 32 So. 2d 7, 13 A. L. R. 2d 1306, in which it was held that a prior mortgage duly recorded in Georgia, and covering an automobile, was *inferior* to the after acquired title in Florida, when the purchaser relied on a title certificate issued by the Florida Motor Vehicle Commission.

The leading cases on the other side are from Arizona, Ohio, and North Carolina. The Supreme Court of Arizona, in *Ragner* v. *General Motors Acceptance Corp.,* 66 Ariz. 157, 185 Pac. 2d 525, held that a prior chattel

[5] In 13 A. L. R. 2d 1338, there is an Annotation entitled: "Effect of local statute requiring filing or recordation of lien on automobiles; certificate of title acts"; and other cases are collected in the said Annotation.

mortgage on an automobile, duly recorded in Texas and Louisiana, was *superior* to a title subsequently acquired in Arizona, in reliance on a title certificate issued by the Arizona Highway Department and showing no liens. The Court of Appeals of Ohio, in *Associates Discounts Corp.* v. *Colonial Finance Co.,* 88 Ohio App. 205, 98 N. E. 2d 848, reached the same conclusion on the law as did the Arizona Court. A result in accord with the Arizona holding was also reached by the Supreme Court of North Carolina in the case of *Friendly Finance Corp* v. *Quinn,* 232 N. C. 407, 61 S. E. 2d 192. Likewise, a result in accordance with the Arizona holding was reached by the California Court of Appeals in *Atha* v. *Bockius,* 232 Pac. 2d 312.[6]

We feel constrained to follow the holdings from Arizona, Ohio, and North Carolina, as previously mentioned, and the references to those cases dispense with reiterating all the reasons for our holding. It is clear that the purpose of our Certificate of Title Act (Act 142 of 1949) was to protect the owners of automobiles against fraud. If evidence of title has been procured through fraud and deception, the title of the subsequent innocent holder for value, which arose therefrom, can have no greater solemnity than the source from which it sprang. If Instruction No. 1, as given by the Court in this case, should be declared to be the law, then the purpose of Act 142 of 1949 would not be to protect the owner of the automobile against fraud, but to allow a title certificate to have the effect of a negotiable instrument.[7] The very purpose of said Act 142 would be overridden and it would protect a title acquired through misrepresentation and fraud, and leave the rightful owner empty handed.[8]

[6] Even though there was an issue of subrogation in the California case which led to a remanding of the cause, nevertheless the holding on the priority of the earlier out-of-state lien was in accord with the Arizona holding.

[7] In *Blaylock* v. *Herrington,* 219 Ark. 939, 245 S. W. 2d 576, we held that a title certificate was not a negotiable instrument.

[8] We have borrowed language from the Ohio Court in making the above statements.

Accordingly, we hold that Manes' title certificate issued by the State of Arkansas was not in itself sufficient to overcome the Kansas mortgage relied on by the appellant Bank; and the Instruction given by the Trial Court and previously copied was erroneous; and for that reason the judgment is reversed and the cause is remanded.

In view of the possibility of another trial, we think it only fair to state further facts reflected by the record so that our holding here will not foreclose other issues that were in the case. The facts showed that when Weaver and wife obtained the $743.50 from the Bank, they mortgaged not only the Chevrolet Coupe here involved, but also a Chevrolet pick-up truck; and that the Bank repossessed the mortgaged truck, sold it, and applied the proceeds on the Bank's note and thereby reduced the balance to $71.50; that Carder contacted the Bank and was advised that the balance due on the Chevrolet Coupe was only $71.50; that Carder did not pay this amount, since he relied on the Kansas Title Certificate which Weaver had, showing no lien; that later the Bank admitted that another party had a mortgage on the pick-up truck claimed to be superior to the Bank's mortgage; that the Bank paid $400 to satisfy such outstanding mortgage on the pick-up truck, and added the $400 and interest to the $71.50 balance, which had been previously quoted to Carder; and that the Bank delayed some time before filing the replevin suit and then claimed a lien on the Chevrolet Coupe for an amount in excess of $471.50. Thus, besides the question of the Arkansas Title Certificate herein decided, there are other questions in this case; i.e., (a) whether the Bank acted with due diligence and is entitled to full relief; or (b) should be estopped to claim more than the $71.50 which it represented to Carder; or (c) should be estopped for failure to hold the Kansas Title Certificate, rather than trust it to the Weavers. The effect of these facts and others is not decided in this opinion, as it is confined to the error of the Court in giving the Instruction previously copied.

Reversed and remanded.

The Chief Justice not participating.

BARNES *v.* REBSAMEN MOTORS, INC.

5-19 255 S. W. 2d 961

Opinion delivered March 16, 1953.

Tilghman E. Dixon, for appellant.

Talley & Owen and *Wayne W. Owen,* for appellee.

GEORGE ROSE SMITH, J. This is a suit to disaffirm a contract by which Jerrell Barnes, the appellant, purchased during his minority a car from Rebsamen Motors, Inc. It is shown that young Barnes bought the car on an installment basis, that he became delinquent in his payments, and that the seller and the finance company repossessed the vehicle. The plaintiff sues to recover the total amount of his payments. After trial the chancellor dismissed the complaint for want of equity.

The plaintiff's right to recover is clear enough unless the record discloses some flaw in his cause of action or some defense entitling the appellees to prevail. The trial court assigned no reason for denying relief, but the appellees suggest two theories for affirmance of the decree.

First, it is said that the chancellor may have found that Barnes was of age when the contract was made. The preponderance of the evidence is decidedly to the contrary. We have not only the plaintiff's own testimony

but also a certified copy of his birth certificate, the latter being made *prima facie* evidence by statute. Ark. Stats. 1947, § 82-505. Against this testimony there is only proof that this minor misrepresented his age when he bought the car and again falsified it when he obtained a marriage license a few months later. We have held that it is error for the chancellor to credit such misrepresentations in disregard of positive proof of the infant's true age. *Foreman* v. *Dickinson,* 177 Ark. 121, 6 S. W. 2d 829.

Second, it is said that since Barnes is shown to have had a job the court may have found the automobile to be a necessary. One who seeks to recover upon a contract made with an infant or to defend the minor's suit to disaffirm has the burden of proving that the article sold was a necessary. *Moskow* v. *Marshall,* 271 Mass. 302, 171 N. E. 477; *International Text-Book Co.* v. *Connelly,* 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. N. S. 1115; *Crandall* v. *Coyne Electrical School, Inc.,* 256 Ill. App. 322. Here the defendants fell perceptibly short of sustaining this burden. The record does not even tell us the nature of Barnes' employment, much less the extent to which a car was needed in its performance. There are only a few inconclusive statements from which an inference might be drawn either way, such as that the plaintiff had worked for four years, that his employer lent him the money for the down payment on the car, and that whether he bought another car depended upon whether he returned to work. On the other side is Barnes' testimony that his employer furnished him a car whenever transportation was needed on the job and that the vehicle now in question was used solely for pleasure. We conclude that the weight of the evidence shows the car not to have been a necessary.

Reversed.

Griffin Smith, Chief Justice, dissenting. This *infant* who disaffirms his contract is five feet and eleven inches tall and weighs 145 pounds. He had previously owned two cars, was married, and worked at Helena, where his employer supplied a car for local necessities.

However, he lived at Sheridan and used the car to make week end visits home. Barnes admitted that in making the purchase he told the seller he was over 21 years of age—a deception used for the purpose of persuading the seller to part with the property. Duplicity, however, appears to have been a chronic habit, for in procuring marriage license April 26, 1952, his age was given as 23 and his prospective bride was 24. Appellant had been working for four years, and was therefore, "a man of his own."

My own view is that if employment took him away from home for the week and his use of the car was to spend Saturday night at Sheridan, the transportation was a part of his business arrangements and the car was used for business purposes.

The habit of fabricating an applicable story for the purpose of getting relief from an honest obligation is entirely too prevalent. Here is a case where any court could, as the Chancellor must have found, say that the buyer's use of the car and his conduct in getting it should bind the contract.

EVANS AND FOUST *v.* STATE.

4727 255 S. W. 2d 967

Opinion delivered March 16, 1953.

Eugene Coffelt and *Ed Jackson,* for appellant.

Tom Gentry, Attorney General, and *Thorp S. Thomas,* Assistant Attorney General, for appellee.

ROBINSON, Justice. Appellants Lennie Evans and Doc Foust were convicted on the charge of cutting down and destroying trees valued at more than $10 on lands belonging to Roscoe C. Hobbs. Since there must be a reversal, it is only necessary to deal with one of the assignments of error, as the other points are not likely to arise in a new trial.

The principal witness for the State was Clyde Edmondson, a youth 17 years of age. Neither of the defendants took the witness stand.

The prosecuting attorney, in his closing argument to the jury, said: ". . . and you had been called in here to testify, and placed under bond, you would begin to search your mind and to place in your mind indelibly where you were on that occasion, and what you were doing. These boys are hauling timber all the time. Where were you on the 16th, gentlemen, if you were not where this little boy says you were?" It is obvious that the prosecuting attorney was asking the defendants where they were on the 16th if they were not where Clyde Edmondson had testified he saw them; and when the prosecuting attorney said: "That is what I say I would have introduced by these witnesses if I had called them here, wouldn't you?", it is clear that he was referring to the defendants' not taking the stand, and was improper argument. It is not necessary to decide here whether the error was one that could be cured by an admonition of the court, as no such admonition was given.

In *Perry* v. *State,* 188 Ark. 133, 64 S. W. 2d 328, the prosecuting attorney in his argument to the jury said: "In fact, the defendant has not denied a single, solitary

iota of evidence that has been given against him from the stand here today." Mr. Justice BUTLER, speaking for the Court on that case, said: "The necessary effect of this language was to direct to the jury's attention the failure of the defendant to testify. This Court in *Bridgman* v. *State,* 170 Ark. 709, 280 S. W. 982, said 'This Court is committed to the rule that under § 3123 of Crawford & Moses' Digest (§ 43-2016, Ark. Stats.) it is improper and presumptively prejudicial for the prosecuting attorney to call the attention of the jury to the failure of the accused to testify. *Lee* v. *State,* 73 Ark. 148, 83 S. W. 916; and *Starnes* v. *State,* 128 Ark. 302, 194 S. W. 506'."

In many instances counsel for the defendant in a criminal case has quite a problem in deciding whether to put the defendant on the witness stand. It is risky either way. On the one hand, usually the defendant will not make a good witness; often it is the first time that he has been in a court room. His very life may be at stake; he is under terrific pressure. He is inclined to be nervous, which the jury may attribute to guilt; and the very fact that he is the defendant may cause the jury to regard with suspicion anything he has to say. On the other hand, if he is not placed on the witness stand, the jury may regard his failure to testify as indicating guilt and that he dares not face cross-examination.

Our law wisely provides that the failure of a defendant to testify shall not create any presumption against him. The prosecuting attorney should carefully refrain from using any words or gestures which would be calculated to call to the jury's attention the fact that a defendant has not testified.

Reversed and remanded for a new trial.

Opinion delivered March 23, 1953.

Walter M. Purvis and *U. A. Gentry,* for appellant.

H. A. Tucker, for appellee.

ROBINSON, Justice. This appeal involves title to property in the Town of Lonsdale, Arkansas. In 1921 the appellee Will Lowe purchased lots 21, 22, 23, and 24 in Block 7 in the Town of Lonsdale, Garland County, and occupied the property with his wife until 1925, when they moved to Hot Springs. They separated in 1933 or 1934 and were divorced in June, 1937, at which time they were still living in Hot Springs. The divorce decree provides "that the plaintiff and defendant are the owners of Lots 21, 22, 23, and 24 in Block 7 in the Town of Lonsdale, Arkansas, and that the plaintiff is entitled to the use and occupancy of said premises during her lifetime . . . that the plaintiff Jennie Lowe be and she is hereby awarded the use and occupancy for herself and children of the premises above set forth for her natural life."

Following the divorce, Mrs. Lowe moved onto other property belonging to her divorced husband; and Lowe collected the rents on the Lonsdale property until about

1943 when Mrs. Lowe took charge of that property. In July, 1943, Mrs. Lowe conveyed by warranty deed the Lonsdale property to the appellant herein, D. W. Pierce. A few days later Pierce moved onto the property and occupied it until 1948, when he rented it to Oliver Burks, who occupied the property paying rent to Pierce until 1951. During this period Lowe claims that about two months' rent was paid to him.

On March 2, 1951, Pierce, who had conveyed an undivided interest in the property to others, along with his grantees, filed this suit claiming to be owners of the property by reason of the deed from Mrs. Lowe and by adverse possession, and asked that title be quieted in them. Lowe was made a defendant. He answered denying the allegations of the complaint, and by way of cross complaint alleged that he is the owner of the property, and asked that the deeds from Mrs. Lowe to Pierce and from Pierce to others be cancelled as a cloud upon his title. The decree of the Chancellor quieted and confirmed the title in Lowe.

Lowe contends that his former wife had no interest that she could convey, and that her interest in the property was in the nature of a homestead right which she had abandoned.

It is our conclusion that at the time of the conveyance from Mrs. Lowe to Pierce, she owned a life estate in the property. The divorce decree provides "that the plaintiff Jennie Lowe be and she is hereby awarded the use and occupancy for herself and children of the premises above set forth for her natural life." "The words 'use and occupation' properly state the nature of the enjoyment of property by a tenant for life." *Faxon* v. *Faxon,* 174 Mass. 509, 55 N. E. 316.

Ark. Stats., § 34-1214, which applies to the division of property between the parties in divorce cases, 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 of

an estate of inheritance at any time during the marriage for her life."

In *Frazier* v. *Hanes,* 220 Ark. 765, 249 S. W. 2d 842, this Court said: "It was stipulated, however, that an order of the Sebastian Chancery Court was made in said suit of *Hanes* v. *Hanes* whereby Mr. Hanes gave possession of the home to Mrs. Hanes for her natural life. . . . Under the order of Sebastian Chancery Court in the maintenance suit, Mr. Hanes delivered possession of the home to Mrs. Hanes for her life. She thus became a life tenant; and limitations did not commence to run in favor of these appellants until the death of the life tenant. See *Cox* v. *Britt,* 22 Ark. 567; *Gallagher* v. *Johnson,* 65 Ark. 90, 44 S. W. 1041; and *Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718."

Mrs. Lowe under the decree in the divorce case became the owner of a life estate which she conveyed to Pierce. The remainderman has no right of entry until the death of the life tenant; therefore possession cannot be adverse to the remainderman during the lifetime of Mrs. Lowe. *Hayden* v. *Hill,* 128 Ark. 342, 194 S. W. 19; *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809.

Reversed.

HERPIN *v.* WEBB.

5-27 256 S. W. 2d 44

Opinion delivered March 23, 1953.

Hebert & Dobbs, for appellant.

Richard M. Ryan, H. A. Tucker and *M. C. Lewis, Jr.,* for appellee.

George Rose Smith, J. The appellee brought this suit in ejectment after an unsuccessful attempt to recover possession by unlawful detainer. *Webb* v. *Herpin,* 217 Ark. 826, 233 S. W. 2d 385. In her complaint the plaintiff deraigns title from the estate of her deceased husband, John L. Webb. By answer the defendants asserted that they had contracted to buy the land from John L. Webb, that all payments had been made, and that they were entitled to a deed from the plaintiff in her capacity as executrix.

To this answer the plaintiff filed a reply alleging (a) that Webb's contract with the defendants was not signed by the plaintiff and is not binding on her, (b) that the contract was terminated by agreement in 1943, and thereafter the Herpins occupied the land as tenants, and (c) that if it be found that the contract was not terminated in 1943 the defendants breached the agreement in 1950 by refusing to make payments that were due, thereby forfeiting their rights. To this reply the defendants filed a plea of limitations, averring that even though the plaintiff did not sign the contract her right to assert a dower interest was barred seven years after her husband executed the agreement.

At the beginning of the trial the defendants requested a ruling upon their plea of limitations. The judgment recites that "certain stipulations having been made

between the parties as to title and other matters, the court overruled defendants' plea of the statute of limitations." The attorneys who were then representing the Herpins elected to stand upon the plea and refused to defend the case. Judgment was entered for the plaintiff, but there was no motion for a new trial.

In the absence of such a motion we consider only errors appearing on the face of the record. Hence we are limited in this case to an examination of the pleadings and the judgment. Since the judgment recites that the plea of limitations was overruled after certain stipulations had been made as to the title, we may assume that these stipulations included matters of fact that eliminated the question of limitations. And, apart from the stipulations, the defendants' insistence that the court rule upon their plea at the beginning of the trial was in effect a request that the plea be treated as a demurrer to the plaintiff's reply. So treated, the plea was properly overruled, for the statute of limitations can be raised by demurrer only when the adversary's own pleading shows his cause of action to be barred. *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S. W. 867. Here the demurrer admitted the truth of allegations (b) and (c) of the plaintiff's reply; so it cannot be said that that pleading affirmatively shows that the suit was brought too late.

Affirmed.

GAMBLE *v.* JOHNSON.

5-8 256 S. W. 2d 46

Opinion delivered March 23, 1953.

Jackie L. Shropshire and *J. R. Booker,* for appellant.

Talley & Owen and *John P. Streepey,* for appellee.

Ed. F. McFaddin, Justice. Appellees, Johnson and wife, brought suit to quiet title to the land here involved; and the appellants (heirs of J. N. Peters) resisted the suit. From a decree quieting appellees' title, there is this appeal.

In 1932, J. N. Peters owned the 40 acre tract herein called "the land." E. S. Jones sought to foreclose a mortgage Peters had given him on the land; and, in order to get money to pay the Jones debt and also a debt to Howard Billing, Peters executed, acknowledged and delivered to Howard Billing an instrument in all respects a warranty deed, except that, after the description of the land, there was this language:

"It is understood and agreed that if the said J. N. Peters pays back the said Five Hundred Fifteen and 66/100 Dollars, with all taxes that become due on said land and interest at 8% from this date, within two years from this date, this deed shall become null and void; otherwise to remain in full force and effect."

This instrument was dated August 16, 1932, and duly recorded the same day. Peters continued to live on the land until Billing sold it to Warren in 1938, at which time Billing gave Peters $200 in cash and considered the aforementioned debt of $515.66 to be cancelled. Peters then moved off the land and never made any claim to it

thereafter, although he continued to live in the same community until his death in 1950.

Warren and wife purchased the land from Billing in 1938, fenced it, improved it and exercised full ownership. In 1949, Mrs. Warren, as survivor by the entirety of the Warren title, conveyed the land to Johnson and wife (the present appellees) by general warranty deed. The Johnsons made extensive improvements and exercised full ownership and their title was never questioned. In 1951, when Johnson was preparing to sell the land, someone questioned the Peters- Billing instrument, and Johnson brought this suit to quiet his title against the appellants who are the heirs of J. N. Peters.

The appellants, in resisting the suit, claimed: (a) that the 1932 instrument from Peters to Billing was a mortgage, rather than a deed; (b) that Billing became mortgagee in possession; and (c) that Warren and Johnson, as grantees holding under Billing, likewise are mortgagees in possession. On these claims appellants seek to recover the land, relying on such cases as *Lesser* v. *Reeves,* 142 Ark. 320, 219 S. W. 15, and *Green* v. *Gilbert,* 169 Ark. 537, 276 S. W. 8.

Even assuming that the 1932 instrument from Peters to Billing was a mortgage, nevertheless the appellants cannot prevail in this suit: because Billing did not take the land from Peters as a mortgagee in possession; rather Billing acquired *the title* from Peters. When Peters surrendered possession, Billing paid him $200 in cash for the land in addition to considering as cancelled the $515.66 and interest and taxes. It is shown that the $200 was a fair payment for the Peters equity within the rule of *Green* v. *Gilbert, supra.* It is true that Billing received no written conveyance from Peters in 1938 when the $200 was paid and Peters delivered possession of the premises to Billing; but title to real estate can pass—as it did in this case—with possession, even in the absence of a written instrument.

In *McKenzie* v. *Rumph*,[1] 171 Ark. 791, 286 S. W. 1022, Mrs. E. M. Neeley held a vendor's lien on certain land which J. T. Neeley had purchased from her. When J. T. Neeley was unable to pay the balance of the purchase price, he orally agreed to surrender possession and reconvey the land in satisfaction of the balance due. He did actually surrender possession, but died without making a written conveyance. Years later it was claimed that the title of J. T. Neeley had not been extinguished. In holding that J. T. Neeley's title rights had been extinguished, we said:

"The statute of frauds is pleaded to defeat this reconveyance. But we think the statute was met by the actual surrender of possession under the parol agreement to reconvey. That agreement was fully consummated by the surrender of possession, and the conveyance was therefore valid. *Phillips* v. *Jones*, 79 Ark. 100, 95 S. W. 164; *Bostleman* v. *Henkel*, 152 Ark. 628, 239 S. W. 30; *Freer* v. *Less*, 159 Ark. 509, 252 S. W. 354."

Likewise in *Riley* v. *Atherton*, 185 Ark. 425, 47 S. W. 2d 568, the mortgagor delivered the property to the mortgagee in satisfaction of the debt, and it was entirely oral. Even though we held the evidence in that case to be insufficient, nevertheless we recognized the rule of the validity of such parol transfer by using this language:

"It is not claimed that there was any written agreement between appellees and the bank by which a delivery of the property to the bank was accepted in satisfaction of the mortgage debt, and it is conceded that such an agreement could rest in parol. This court has so held with reference to chattel mortgage indebtedness. *Fincher* v. *Bennett*, 94 Ark. 165, 126 S. W. 392; *Horton* v. *Thompson*, 124 Ark. 545, 187 S. W. 627; *Ribelin* v. *Loyd*, 148 Ark. 487, 230 S. W. 556. The reason for the rule is, as stated in the case last cited, that 'a mortgage is a mere security for a debt, and the property may be released from the mortgage by parol agreement, as well as by a

[1] This case is cited in an Annotation on "Oral Land Contract," in 101 A. L. R. 1003.

written one.' In this and in many other States a mortgage is considered security for the debt merely, and not the principal obligation. An oral agreement to satisfy therefore does not fall within the statute of frauds.''

Earlier cases likewise recognized that the mortgagor could transfer the land to the mortgagee in satisfaction of the debt by delivering possession under an agreement. To such effect is *Garretson* v. *White,* 69 Ark. 603, 65 S. W. 115. See, also, 37 Am. Jur. 412 *et seq.* We have frequently held that a Court of equity will decree specific performance of a verbal contract for sale of land when purchaser has entered into possession and paid the agreed consideration. See *Webb* v. *Marlar,* 83 Ark. 340, 104 S. W. 144; *Kellums* v. *Richardson,* 21 Ark. 137.

Thus we hold that Billing did not become a mortgagee in possession, but became the purchaser of Peters' title when he paid Peters the $200 and took possession of the land in 1938; and that appellees, as grantees from the Billing title, should have their title quieted.

Another reason for holding against the appellants is because of the laches of their ancestor, J. N. Peters. He surrendered possession of the land and accepted the payment of the money from Billing, as aforesaid. Peters then continued to live in the same locality from 1939 until his death in 1950. He knew that Warren and Johnson were each occupying and improving the property, yet he never made any claim of any kind. He therefore was guilty of laches and was barred by estoppel. But there is no necessity to develop further the matter of laches, since the other ground as previously developed, disposes of appellants' case.

Affirmed.

FLOYD *v.* DILLAHA.

4-9958 256 S. W. 2d 48

Opinion delivered March 23, 1953.

Barber, Henry & Thurman, for appellant.

Frances D. Holtzendorff and *Chas. B. Thweatt,* for appellee.

GRIFFIN SMITH, Chief Justice. Carrie Wilkins died in 1951. A little less than two months before this event she executed a will by which all of her property was to pass to a sister, Mrs. Inez Floyd. The will was probated without notice, the petition showing a "probable value" of $35,000.

In mid-July Mrs. Harriet Ella Dillaha and others petitioned the probate court to declare the will invalid, alleging mental incapacity of the testatrix and the undue influence and fraud of Inez Floyd in procurement of its execution. The court found against the first contention, but avoided the will upon the ground that Mrs. Floyd had unfarily dealt with her sister. Others who joined in the petition were Mrs. Ophelia Harrison, a sister, and four nieces and nephews.

Carrie Wilkins, who was 66 years of age when she died, was reared near Jacksonville, Ark., where she grew up with Inez and other members of the family. Prior to 1908 the two sisters came to Little Rock and obtained employment with the same establishment. After living with an aunt for a short period they procured rooming quarters on West Markham street, then moved to Tenth street near Battery, remaining together until Carrie married. Within two or three years she moved to St. Louis, then to Chicago where she resided for many years. Carrie became ill in 1945 and called Mrs. Floyd by telephone, asking her to come to Chicago. This she did, remaining for three months, or until Carrie seemingly regained her health. In the meantime Carrie had procured a divorce.

When Mrs. Floyd visited Carrie she ascertained that her sister was operating a business known as All-American Sales Company. After returning to Little Rock Mrs. Floyd claims to have kept in touch with her sister by telephone and correspondence. In May, 1950, Carrie informed Mrs. Floyd that she was ill and was compelled to sell her business. Later Carrie telephoned Mrs. Floyd that the sale had been consummated, but she asked Mrs. Floyd to come to Chicago to assist in packing

personal belongings. The two made the trip to Little Rock in Carrie's car.

Mrs. Floyd testified that shortly after coming to Little Rock Carrie told her she had some money in Chicago, and "she wanted me to have it transferred down here". Carrie had a pass book showing what the Chicago balance was. The sisters drove to the Worthen Bank where Carrie gave Mrs. Floyd the pass book, but remained in the car. Mrs. Floyd discussed the transaction with a bank official, who prepared a check for Carrie's signature. This was taken to the car, where Carrie signed it. Mrs. Floyd did not remember the amount deposited at Worthen's through this transfer, but thought it was a little more than thirty thousand dollars.[1] Carrie told her that the business had been sold for $10,000. The cash payment was $2,000 with the remainder payable $2,000 per year. In addition, Carrie owned "accounts receivable" representing sums owed by customers. Government bonds payable to "Inez Floyd or Carrie Wilkins", amounting to $15,000, were immediately purchased. Other business transactions followed.

Mrs. Floyd owned her home, debt free, at 1111 Louisiana street, and had been renting rooms for twenty-eight years. She bought "1107", but at the time did not want Carrie to "go into anything" until she had been in Little Rock long enough to make up her mind; so Mrs. Floyd borrowed $15,000 from Carrie in order that the two might have a comfortable home. This, she thought, was preferable to borrowing from a loan company. The debt-free property she lived in before Carrie left Chicago was worth $40,000—just a year before Mrs. Floyd had been offered that amount for the house and furnishings.

"I was going to pay Carrie interest [on the $15,000]", said Mrs. Floyd, "and she was very happy over [the arrangement?], but about the first of October, after we moved over to 1107 at her request, she said, 'O, Inez! Let's go 50-50!' And I said, 'Is that what you

[1] The bank statement, filed as an exhibit, shows $31,433.65 to have been deposited June 9, 1950, representing proceeds of check drawn on Lakeview Trust & Savings Bank, Chicago.

want to do?', and she said 'yes—we will just be 50-50 on everything',—meaning the ownership together''.

Mrs. Floyd gave emphasis to the fact that she borrowed $7,000 at one time and $5,000 at another to improve the property at 1107. A mortgage was executed covering the rooming house at 1111 Louisiana street, the proceed of which was deposited in Worthen's Bank. Bonds aggregating $15,000 were cashed to pay these mortgages. When the bonds were sold the check was made payable to the sisters jointly. Mrs. Floyd took the check to Carrie, had her endorse it, paid the mortgages, and gave the difference of about $3,000 to Carrie.

While construction on the ''1107'' property was in progress Carrie insisted on sitting in the hall of the rooming house at 1111 so she could observe the work. According to Mrs. Floyd, Carrie contracted a cold as a result of this exposure and had to go to a hospital.

Mrs. Floyd said that ''to begin with'' she took Carrie to visit other relatives, ''but they didn't seem to care too much about our visits''. Some of these kin, however, would frequently visit Carrie.

This background history is shown in order to establish relationship of the sister-brother group and the nieces and nephews at the time Carrie became ill.

Mrs. Dillaha testified that Mrs. Floyd and Carrie did not get along together until the latter acquired money; that they quarreled frequently. These statements were supported by other witnesses. Some of the evidence was to the effect that Mrs. Floyd called Carrie by telephone and wrote frequently when it became known that she had money:—''She talked so nice and wrote such sweet letters that Carrie thought Inez had changed''. There was abundant testimony that Carrie was fond of her other relatives, although that issue was disputed.

Mrs. Harrison's version of the personal relationship was that before Carrie went to the hospital she would not talk unreservedly if Mrs. Floyd were present; Carrie was not ''free'' to use the telephone or call relatives;

abusive language of an extremely harsh nature was used by Mrs. Floyd during discussions and arguments with Carrie, and threats were made by the dominant sister that she would have Carrie confined in State Hospital. Included in threats alleged to have been made by Mrs. Floyd (but based, seemingly, upon hearsay and not controlling) was that when the basement at 1107 was completed Carrie would be confined there "and no one would know what became of her".

A great deal of testimony went to Mrs. Floyd's refusal to coöperate in seeing that Carrie received appropriate medicines—drugs called for by prescriptions and thought to be essential to the patient's well-being or recovery. It is in evidence that she suffered from rheumatoid arthritis, rheumatic heart disease, with edema; was considerably overweight because of excessive fluid in the bodily tissues, experienced great difficulty in breathing while in a prone position, and her legs and hands were severely swollen. Dr. Blakely characterized Carrie's improvement while in the hospital as "miraculous" and attributed this temporary buildup to use of some of the new drugs. She recovered sufficiently to walk without crutches.

Appellant calls attention to the rule that, while statements and declarations of the testator, whether made before or after execution of the will, are competent for the purpose of testing mental capacity if in point of time they were made with reasonable proximity to such execution, yet they are not to be received as direct or substantive evidence of undue influence. When so offered they come within the hearsay rule. *Mason* v. *Bowen,* 122 Ark. 407, 183 S. W. 973; *Milton* v. *Jeffers,* 154 Ark. 516, 243 S. W. 60.

The undue influence that will avoid a will must be directly connected with its execution—the procuring cause. *Miller* v. *Carr,* 94 Ark. 176, 126 S. W. 1068. The principle goes back to *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590 and earlier. In the Campbell case it was said that undue influence sufficient to avoid a will is not the influence which springs from natural affection, or

is acquired by kind offices, but it is such as results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of property; and it must be directly connected with the execution of the will and specially directed toward the object of procuring a will in favor of particular parties.

In the Mason-Bowen case Judge Hart cited *Hobson* v. *Moorman,* 115 Tenn. 73. There Mr. Justice McAlister of distinguished judicial fame reviewed holdings of the Tennessee courts prior to 1905. The opinion is cited in 3 LRA (NS) 749 under the single headnote: "Antetestamentary declarations of a testator are not admissible as substantive evidence of undue influence in the making of a will". The editorial notes include many decisions where the line between substantive and hearsay testimony is finely drawn.

Judge McAlister called attention to Wigmore's exhaustive treatise on the Law of Evidence, v. 3, § 1734, where the declarations of testators are divided into seven classifications. He then quotes from the fifth classification (§ 1738) to the effect that ". . . The testator's assertion that a person, named or unnamed, has procured him, by fraud or by pressure, to execute a will or to insert a provision, is plainly obnoxious to the hearsay rule, if offered as evidence that the fact asserted did occur. . . . But these utterances may be, nevertheless, availed of as evidence of the testator's mental condition . . . if the latter fact is relevant. Though the issue is as to his mental condition, with regard to deception or duress at the time of execution, yet his mental state, both before and afterwards, is admissible as evidence of his state at . . . that . . . time. Thus the question is reduced to a simple one, namely, What particular mental conditions of the testator, thus evidenced, are material as being involved in the broader issue of deception or undue influence? There are here recognized by the courts two distinct sorts of mental condition. The existence of undue influence or deception involves incidentally a consideration of the testator's incapacity to resist pressure and his susceptibility to deceit, whether

in general or by a particular person. This requires a consideration of many circumstances, including his state of affections or dislikes for particular persons benefited or not benefited by the will, of his inclinations to obey or to resist these persons; and, in general, of his mental and emotional condition, with reference to its being affected by any of the persons concerned.

"All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue. This use of such date is universally conceded to be proper . . . 'But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay' ".

Elliott on Evidence, v. 1, § 5333, says that declarations of a testator may be received to corroborate direct testimony, ". . . . and in cases where fraud is the issue the statements of the testator are often admissible as declarations of a state of mind. So, also, in a case of undue influence".

In *Holloway* v. *Parker,* 197 Ark. 209, 122 S. W. 2d 563, 119 ALR 1359, a will alleged to have been forged was the subject of litigation. Declarations of the decedent were admitted partly upon the ground that the proponent had opened the door to such testimony through introduction of evidence as to the relations and state of feelings between the decedent and her relatives. The opinion, however, stated the court's preference not to rest the decision on that procdure alone. The rule was then announced that the declarations of a decedent on the issue of the genuineness of an instrument thereafter offered for probate as a will would be admissible when offered in addition to other evidence that the will is not genuine or that it is not properly executed.

Citation of the Holloway case must not be construed to mean that a will contested under an allegation of forgery and one questioned upon the issue of undue

influence are tested in all respects by the same rule; but here, as in the Holloway-Parker controversy, Mrs. Floyd introduced witnesses who told of conversations with the testator. Her exact language was quoted—statements relating to what it is claimed was the personal and business relationship between the two. This testimony was unquestionably competent in establishing Carrie's mental capacity; but it is so inextricably interlaced with the issue of undue influence that the Chancellor could not possibly consider it for one purpose without a reckoning of its value on the second count.

One witness, who spoke of discussions with Carrie, quoted her as saying, "Well, I hope my relatives will be satisfied. They tried to make me make a will while I was in the hospital and I didn't see fit to, and now I have made it and I hope they will be happy". There was further testimony to the effect that Carrie said she was tired of being annoyed by her relatives "who had never seen fit to visit her before, and about all they are interested in was, 'What do you own, Carrie?' and, 'Have you made a will'?" She was then quoted as having said: "I didn't see fit to tell them because it wasn't any of their business. I thought I could make a will as I wanted to".

We conclude that influence was an issue injected into the trial by Mrs. Floyd, and now she is not in a position to complain when the same type of testimony came from others. But while this is true it is appropriate to say that appellant's attorneys were not, in any respect, connected with the pressure program found by the Chancellor to have diverted Carrie's course from a normal and natural purpose not to prefer one class of kin to another. The attorneys who drew the will had nothing whatever to do with the disposition their client made of her property, and her competency to execute the document was sustained by the Chancellor insofar as mentality was concerned.

A great deal of testimony centers around Mrs. Floyd's persistent policy of personal direction respecting her sister's property and incidental conduct. This testi-

mony is of a pattern calculated to divert the testatrix from a rational course of conduct. It appears to have been the trial court's view that preponderating evidence showed that Carrie, while sick, virtually helpless, and despondent, reacted to plans prepared by Mrs. Floyd substantially in advance of her sister's last illness. A review by detail would serve no useful purpose.

The judgment avoiding the will is affirmed, but the cause is remanded to the Probate Court for such procedure as may be necessary in view of the resulting status of intestacy.

PORTER-DEWITT CONSTRUCTION COMPANY, INC., *v.* DANLEY.

5-12 256 S. W. 2d 540

Opinion delivered March 16, 1953.

Rehearing denied April 27, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

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

ROBINSON, Justice. This lawsuit grows out of a head-on collision between an automobile owned and operated by appellee, Hale Danley, who was the plaintiff in the trial court, and a truck owned and driven by one Edd White. The complaint alleges that White, at the time of the collision, was acting as agent, servant, and employee of the defendant Porter-DeWitt Construction Company, Inc., a Missouri corporation authorized to do business in Arkansas. Both White and Porter-DeWitt were made defendants. There was a jury verdict in the sum of $5,500 in favor of Danley as against Porter-DeWitt, but there was a verdict in favor of White as against Danley's complaint. When the jury returned a verdict in favor of White and a verdict against White's principal, Porter-DeWitt, counsel for Porter-DeWitt moved for a judgment in favor of that company notwithstanding the verdict. This motion was overruled and Porter-DeWitt has appealed. There is only one issue to be decided: Did the trial court err in overruling Porter-DeWitt's motion for a judgment notwithstanding the verdict?

There are several allegations of negligence in the complaint. It is alleged that Porter-DeWitt was negligent by employing an incompetent driver in White; that the truck was overloaded; that the driver of the truck was required to run on a certain schedule; that the brakes on the truck were defective; that the driver of the truck was permitted to travel on the wrong side of the road; that there were improper side boards on the truck; that there were no signs warning the public of the work that was being done on the road. It was further alleged that the truck was operated by White on the wrong side of the road without keeping a proper lookout

for other persons and vehicles using the highway, and that the truck was operated at a high and dangerous rate of speed. There is no substantial evidence in the record to sustain any allegation of defendants' negligence except the allegation that White, the driver of the truck, was negligent in driving on the wrong side of the highway and in failing to keep a proper lookout for other users of the road. It is contended by appellee Danley that White, appellant's truck driver, was encouraged by appellant to drive on the wrong side of the road; and that for this reason the appellant was negligent independently of White's negligence; but the record does not sustain this claim.

We set out here in full all of the evidence that can possibly be construed as pertaining to White's driving on the wrong side of the road:

White's testimony—was hauling gravel five miles from the crusher:

"Q. Mr. White, you had been working on this job for 3 weeks approximately. Was it customary for the operator of the truck to pass on any particular side of the road? A. We did. It wouldn't make any difference. Q. Tell the jury just how and in what manner the truck operator used that road. A. We met and passed on either side of the road. The loaded truck took the good side of the road and the empty truck took the opposite. Q. That had been customary for as long as you had been on that job? A. Yes, sir, or any other job. Q. You had had previous experience as a truck driver before you accepted this employment? A. Yes, sir."

Had approximately 6 tons on the truck.

"Q. On this morning, on June 9, 1951, did you have an accident? A. Yes, sir. Q. Do you know approximately what time that accident occurred? A. No, I don't. Q. Where did that accident occur? A. It occurred just as I entered No. 7 highway. New No. 7 highway."

"Q. As you came down the hill that morning immediately before this accident, how fast were you traveling? A. Well, I couldn't say for sure. I figure around 20 to 25 miles an hour. Q. As you approached the intersection, did you apply your brakes? A. Yes, sir. Q. And slowed down? A. Yes, sir. Q. Edd, tell the jury in your own words, from the time that you reached the intersection, what happened as you saw it, just in your own words. Just go ahead and tell them in detail what happened in this accident. A. Just before I got to the intersection of No. 7 highway, just a very short distance there that I could see, I could see a pretty good ways down the road. I seen a car coming. He darted—he was driving in the middle of the road and he darted to the left hand side of the road and I took the left hand side of the road, and when we got a shorter distance apart, he whirled right back to the left hand side of the road. Q. What position with reference to the highway did you hit? Did you hit on the left hand side? A. Yes, sir, we hit on the left hand side of the road."

"Q. Edd, was it customary for the people working on that project to give way for trucks? A. Yes, it was."

He thought the car he was meeting was that of the time-keeper.

"Q. Had the time-keeper gotten out of your way in the past? A. Yes, sir."

Cross-examination. Had worked for the defendant company about three weeks. Mr. Dark was superintendent of the job.

"Q. Did you meet Mr. Dark on the road going and coming? A. Yes, sir. Q. Did Mr. Dark give you the best part of the road? Did he go on the other side of the road? A. I passed him on the good side of the road. Yes, sir. Q. In other words, if you were going toward Russellville and you met Mr. Dark, and Mr. Dark was on the right hand side of the road, he would go on the left hand side and give you the right hand side? A. I think so."

He saw the approaching car and thought it was the time-keeper.

"Q. And you thought that the time-keeper would give you the good side of the road? A. I thought that he would give me that side. Q. That was the side that you were traveling on? A. Yes, sir. Q. And you were traveling on the left hand side of the road? A. Yes, sir. Q. Going toward Russellville? A. Yes, sir. Q. (quoting witness from a signed statement) I thought it was the time-keeper and released the brake. A. I think I did. Q. You said 'I thought it was the time-keeper and I released my brakes,' didn't you? 'He whipped it to the left side, then turned back to his side, and I hit him. I was never unconscious and turned the switch off.' Did you sign that statement? A. Yes, sir."

"Q. Did you give any signal, blow any horn? A. No, sir. Q. Did you give any signal before you got to No. 7? A. No, sir. Q. You didn't give any signal then? A. No, sir. Q. But when you thought it was the time-keeper, you released your brakes and hit him head on? A. Yes, sir."

Mr. Melville E. Dark's testimony—was superintendent of construction for Porter-DeWitt on Route 7.

"Q. Did you know that these men were traveling down the south or wrong side of the road hauling this stone when they came off of Highway 16 into No. 7? A. No, sir, I don't think that they were. Q. You don't think that they were traveling the wrong side or left side of the road? A. No, sir. Q. Although you were on the road? A. Yes, sir. Q. They were traveling on the best side of the road from there on down to Freeman Springs where you were putting the rock? A. There was no best side of the road for that long distance. Q. There was no best side? A. No, sir. That would be determined by the construction going on at that time. There were periods when dirt was being hauled or topping being shifted on perhaps the east side of the road or the west side of the road. At the times they were hauling dirt, which included rocks at times, the traffic necessarily had to take the opposite side, whether it

would be the east side or the west side. Q. Did you yourself—for instance, you were traveling north and saw a truck coming, did you give the road to the man loaded with the truck and take the other side of the road? A. I personally? Q. Yes, sir. A. I have."

The evidence in the case and pictures that were made a part of the record show conclusively there was no good or bad side of the road at or near the point where the collision occurred; and there is no substantial evidence tending to prove that the defendant, Porter-DeWitt, advised or encouraged the drivers of the trucks to travel on the wrong side of the road at the place where the collision occurred, since there was no good or bad side of the road at that point. White testified, "The loaded truck took the good side of the road and the empty truck took the opposite." It is obvious that he was referring to the point where the rock was being dumped, which was a long distance from the place of the collision. Undoubtedly at the place where the rock was being unloaded there would be a good and bad side of the road; and it was usual and customary on the job for the loaded truck to take the good side. Not only was this the practice on the job under consideration, but on other jobs, as shown by the testimony of White:

"Q. Tell the jury just how and in what manner the truck operators used that road. A. We met and passed on either side of the road. The loaded truck took the good side of the road and the empty truck took the opposite. Q. That had been customary for as long as you had been on that job? A. Yes, sir; or any other job. Q. You had had previous experience as a truck driver before you accepted this employment? A. Yes, sir."

Mr. Dark, superintendent of construction for Porter-DeWitt, testified on cross-examination:

"Q. They were traveling on the best side of the road from there on down to Freeman Springs where you were putting the rock? A. There was no best side of the road for that long distance. Q. There was no best side? A. No, sir. That would be determined by the

construction going on at that time. There were periods when dirt was being hauled or topping being shifted on perhaps the east side of the road or the west side of the road. At the time they were hauling dirt, which included rocks at times, the traffic necessarily had to take the opposite side, whether it would be the east side or the west side."

It is apparent that by the above statement the witness meant that when the rock or dirt was actually being placed on the east or west side of the road, the traffic would necessarily have to take the opposite side.

The effect of the jury's verdict was to say that White, the agent, was guilty of no negligence or that plaintiff Danley was guilty of contributory negligence; but that the principal Porter-DeWitt was negligent, and as to such principal, plaintiff Danley was guilty of no contributory negligence. In this situation the great weight of authority is that the verdict cannot stand.

In *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, this Court quoted with approval from a California case (*Bradley* v. *Rosenthal,* 154 Calif. 420, 97 Pac. 875) as follows: "Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility and may be availed of by the principal for that purpose." See, also, *Stanton* v. *Arkansas Democrat Company,* 194 Ark. 135, 106 S. W. 2d 584.

"Where the relation of the parties is such that an issue found for one defendant necessarily inures to the benefit of his co-defendant, as where a defendant's culpability is the sole predicate for his co-defendant's liability, judgment cannot be entered for the former and against the latter." 49 C. J. S. 84.

In a note on the subject in 78 A. L. R. 365, 15 R. C. L. 1027, is quoted: "Where the relations between two par-

ties are analogous to that of principal and agent, or master and servant, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action against the other." See, also, *Southern Railway Company* v. *W. J. Harbin,* 135 Ga. 122, 68 S. E. 1103, and note thereto, 30 L. R. A., N. S. 404.

In *Chesapeake & Ohio Railway Company* v. *Williams' Administratrix,* 300 Ky. 850, 190 S. W. 2d 549, the court said: "We have noted the jury found in favor of the individual defendants, the members of the train crew. The Company's liability was based on the doctrine of *respondeat superior* and was therefore derivative, since it was based upon the charge of negligence on the part of the train crew. A finding that the servant is guilty of no negligence conclusively establishes non-liability of the master. *Louisville & N. R. Co.* v. *Farney,* 295 Ky. 8, 172 S. W. 2d 656, and cases cited therein. When the jury returned a verdict in favor of the individual defendants, the court should have set aside the verdict against the company and entered judgment in its favor."

In *Rogina* v. *Midwest Flying Service,* 325 Ill. App. 588, 60 N. E. 2d 633, the plaintiff sought to recover for the death of her intestate in an airplane crash, and there the court said: "It is our conclusion that the doctrine of *respondeat superior* arises in this case and the jury having found the defendant, Herman A. Maurer, not guilty of any negligence which was the approximate cause of Herman J. Rogina's death, then Maurer's principal, the Midwest Flying Service, Inc., cannot be legally liable for Rogina's death."

Mississippi River Fuel Corp. v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255; *American Company of Arkansas* v. *Baker,* 187 Ark. 492, 60 S. W. 2d 572, and *Missouri Pacific Railway Company* v. *Morrison,* 186 Ark. 689, 55 S. W. 2d 933, are cited by appellee as authority for the contention that a verdict can be sustained against a principal although there was a verdict in favor of the agent

whose alleged negligence caused the injury. Those cases are distinguishable from the case at bar. *Mississippi River Fuel Corporation* v. *Senn,* and *American Company of Arkansas* v. *Baker,* are cases where an employee was suing an employer that was a corporation, and the negligence of a fellow-servant was involved. This situation called for the application of the Comparative Negligence Statute, Ark. Stat., § 81-1202. The statute is not applicable in cases such as the one here where a third party is suing an employee and his principal. The case of *Missouri Pacific Railway Company* v. *Morrison* is not applicable because in that case contributory negligence on the part of the plaintiff was a complete defense to the engineer, but would not be a complete defense for the railway company because of Ark. Stat., § 73-1004.

Appellant's motion for judgment notwithstanding the verdict should have been granted. Therefore the cause is reversed, with direction to set aside the judgment and for proceedings consistent with this opinion.

Ed. F. McFaddin, Justice (dissenting). The law is that the master may be held liable, even if the servant be released, provided the master was guilty of negligence independent of that of the servant. In the case at bar, I think the record discloses sufficient evidence of independent negligence of the master to support the jury's verdict, even with the servant released.

The complaint alleged that the Porter-DeWitt Construction Company was negligent in that it sanctioned the acts of the driver, Edd White, in driving on the wrong side of the road. That allegation related to the act of independent negligence of the master. The majority opinion, with becoming candor, quotes from Edd White's testimony, as follows:

" 'Q. What position with reference to the highway did you hit? Did you hit on the left-hand side?

" 'A. Yes, sir, we hit on the left-hand side of the road.

" 'Q. Edd, was it customary for the people working on that project to give way for trucks?

" 'A. Yes, it was.'

"He thought the car he was meeting was that of the time-keeper.

" 'Q. Had the time-keeper gotten out of your way in the past?

" 'A. Yes, sir.'

"Cross-examination. Had worked for the defendant company about three weeks. Mr. Dark was superintendent of the job.

" 'Q. Did you meet Mr. Dark on the road going and coming?

" 'A. Yes, sir.

" 'Q. Did Mr. Dark give you the best part of the road? Did he go on the other side of the road?

" 'A. I passed him on the good side of the road. Yes, sir.

" 'Q. In other words, if you were going toward Russellville and you met Mr. Dark, and Mr. Dark was on the right-hand side of the road, he would go on the left-hand side and give you the right-hand side?

" 'A. I think so.'

"He saw the approaching car and thought it was the time-keeper.

" 'Q. And you thought that the time-keeper would give you the good side of the road?

" 'A. I thought that he would give me that side.

" 'Q. That was the side that you were traveling on?

" 'A. Yes, sir.

" 'Q. And you were traveling on the left-hand side of the road?

" 'A. Yes, sir.' "

And again:

" 'Q. Tell the jury just how and in what manner the truck operators used that road.

" 'A. We met and passed on either side of the road. The loaded truck took the good side of the road and the empty truck took the opposite.

" 'Q. That had been customary for as long as you had been on that job?

" 'A. Yes, sir; . . . ' "

In the light of the foregoing testimony, I think the act of independent negligence consisted in having Edd White drive the truck on the wrong side of the road, and therefore, there was evidence legally sufficient to support the finding of the jury that the Porter-DeWitt Construction Company was liable to Danley for such negligence.

ROY *v.* BENNETT.

5-5 256 S. W. 2d 39

Opinion delivered March 23, 1953.

Norton & Norton, for appellant.

Harold Sharpe, for appellee.

J. SEABORN HOLT, J. This litigation involved the distribution (and apportionment) of funds approximating $3,287.86 of the Bennett Drug Store, now remaining in the registry of the court, following a receivership. The

record shows that on June 26, 1950, appellee, Bennett, and W. J. Roy and his son, Dr. J. M. Roy, entered into a partnership, evidenced by the following Bills of Sale: "By James T. Edgar to Paul Bennett, June 26th, 1950, for $30,000 cash in hand paid, the merchandise, fixtures, accounts, etc., of Jim Edgar's Drug Store; and on the same day, by Paul G. Bennett to W. J. Roy and J. Max Roy, for $15,000 cash in hand paid, 'an undivided one-half interest in and to' the same personal property."

Mr. J. W. Roy died intestate July 4, 1951, and thereafter appellant, Mrs. Roy (his widow) acquired her son's one-fourth interest, succeeded to the interest of her husband, J. W. Roy, and the business was thereafter continued in Forrest City, Arkansas, as a partnership between her and Bennett on a 50-50 basis, without any change.

On petition of Mrs. Roy, on November 2, 1951, a manager was by agreement placed in charge of the business and on November 24, 1951, on petition of Mrs. Roy and her son, Dr. Roy, as administrator for his father's estate, a receiver was appointed for the Bennett Drug Store, and by proper procedure, its property was sold to appellant for $32,500.

Just what is the interest of Mrs. Roy and that of Bennett in this money in the liquidation of the partnership is the primary question here.

It is undisputed that Mr. Roy and his son, Dr. Roy, put $15,000 in cash into the partnership at its inception by borrowing this amount from a bank (evidenced by their personal note) and that Bennett put in a like amount, $15,000, $10,000 of which he borrowed from Mr. Klinke in Memphis, giving his personal note therefor, endorsed by Dr. Roy. The principal ($15,000) of the Roy note was repaid to the bank, but interest in the amount of $900 was paid out of partnership funds. Bennett's $10,000 note, with interest, to Klinke was fully paid in installments from *partnership funds.*

Mrs. Roy, appellant, earnestly contended below, and argues here, that she and Bennett, under the recitals in

the above Bills of Sale and the evidence, were equal partners and each was to share in all profits and losses on a 50-50 basis, and that in the final distribution of assets, each should bear the losses only on this basis, and that the trial court erred in charging to Mrs. Roy 58.42% (based on her capital investment) of the losses and 41.58% to Bennett (based on his capital investment). We think the preponderance of the testimony supports appellant's contention.

Appellee, Bennett, contended for a 50-50 sharing of all assets after debts were paid on the ground that it was agreed that what each had borrowed to put into the business was to be repaid out of earnings, if any, and that each would share not only 50-50 in the losses but equally in the assets remaining after all debts were paid. He says: "That as the owner of a 50% interest in the partnership drug store, he is entitled to one-half of the funds on hand after the payment of all debts."

Mr. Bennett testified: "Q. On the note is your signature and that of Dr. Roy. It was your understanding that the money from the drug store was to have been paid on the Klinke indebtedness? A. That the money is to be refunded to me and the $900 interest paid to the Bank of Eastern Arkansas for the money they borrowed. Q. The $900 interest to the Bank was ultimately to be shouldered by the drug store, and the $5,000 to you and the $10,000 to Klinke? A. When the $15,000 was paid to the Bank, then I would get my $5,000. Q. The drug store was to pay the actual cost of it out of the profits. A. Dr. Roy understood about the $10,000."

It is undisputed, however, as indicated, that the business produced no profits, but only losses, that Mrs. Roy, with proceeds from her husband's life insurance, personally paid the $15,000 note to the bank and that only $900 interest on this note was paid from partnership funds (optimistically it would appear). It also appears undisputed that the $10,000 note of Bennett (principal and interest) and $110 for a vacuum cleaner were paid from partnership funds, and not by him personally.

In the circumstances, Bennett should be held personally liable to the partnership for his $10,000 note (principal and interest) and the vacuum cleaner which were paid out of partnership funds just as Mrs. Roy should be and was charged with the $900 interest payment above. The remaining undistributed assets, after court costs have been paid, should then be paid on the basis of 50% thereof to Mrs. Roy and 50% to Bennett.

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

REECE, ADMINISTRATOR *v.* WEBSTER.

4-9841 256 S. W. 2d 345

Opinion delivered March 23, 1953.

Rehearing denied April 20, 1953.

D. S. Plummer, for appellant.

Daggett & Daggett, for appellee.

ARCHER WHEATLEY, Sp. Justice. July 17, 1951, Nathaniel Reece, age 16, lived with his father, Aron Reece,

on land occupied by Bill Webster. A tractor belonging to Bill Webster and operated by his brother, Oscar Webster, exploded as Nathaniel Reece walked past it on the farm road leading to Reece's home. As a result of this explosion, burning gasoline was thrown upon Reece inflicting burns of such serious nature that he died therefrom 46 days later.

Suit was filed by Aron Reece as Administrator of the estate of Nathaniel Reece and individually, to recover damages, it being alleged that the explosion was due to the negligence of Bill Webster as the owner of said tractor through the faulty operation thereof by his servant. There was the specific allegation:

". . . and specifically alleges the negligence of the said Bill Webster, his servants, agents and employees in permitting raw gasoline to accumulate on or about the tractor when in operation, that when volatilized by the heat of the tractor, it would produce a powerful and dangerous explosive, producing the results herein alleged."

The case was tried before a jury and resulted in a verdict for the defendant.

Evidence was introduced by the plaintiff tending to show that there was a sediment bulb in front of the tractor motor; that there had been a defect in this bulb as a result of which gasoline dripped. There was no expert testimony showing the damage to the motor, nor was there any suggestion of any kind that the accident could have been caused in any manner other than that gasoline dripped from the sediment bulb on to the hot motor.

The Complaint contained only the one specific allegation of negligence and did not leave any doubt with respect to the cause of the explosion.

The plaintiff asked the Court to give three instructions on the doctrine of *res ipsa loquitur*. The Court refused these requests saying that he did so because, "The proof in this case conforms to the allegations in the Complaint, which are allegations of specific acts of negligence and that the application of the doctrine of

res ipsa loquitur would mean giving the jury an alternative if they did not believe the testimony of the plaintiff as to specific acts of negligence."

The three instructions requested, read as follows:

No. 2

"You are instructed that if you find from a preponderance of the evidence that the defendant owed a duty to the plaintiff and his intestate to use care and an explosion occurred, causing injury, and the explosion is caused by the thing or instrumentality that is under the control and management of the defendant, his servants, agents or employees, and the explosion is such that in the ordinary course of things it would not occur if those who had the control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the explosion occurred from lack of proper care."

No. 4

"If you find from a preponderance of the evidence that the tractor exploded and caused the injuries complained of; and you further find from a preponderance of the evidence that there was no negligence on the part of Aron Reece or his intestate Nathaniel Reece and that the instrumentality causing the explosion was in the exclusive control and possession of the defendant, Bill Webster, his servants, agents or employees and you find from a preponderance of the evidence that the explosion is such that in the ordinary course of things it would not have occurred if those who had the control and management use proper care, then, in the absence of evidence to the contrary, you are instructed that the mere fact of the explosion of the tractor 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 that he was free from negligence and upon the failure of the defendant to meet that burden of proof you will be warranted in finding for the plaintiff."

No. 5

"You are instructed that if you find from a preponderance of the evidence that the tractor exploded and caused the injuries complained of and that the explosion and injury is such that in the ordinary course of things would not occur, if those who had such control and custody use proper care and you find by such preponderance of the evidence that the control and custody of the tractor was in the defendant, his servants, agents or employees, 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."

The doctrine of *res ipsa loquitur* was developed to assist in the proof of negligence where the cause of an unusual happening connected with some instrumentality in the exclusive possession and control of defendant could not be readily established by the plaintiff. The theory was that since the instrumentality was in the possession of the defendant, justice required that the defendant be compelled to offer an explanation of the event or be burdened with a presumption of negligence.

The various Courts of the country have not been in agreement with respect to either the necessities of pleading or the effect with respect to burden of proof in cases of this kind. The rule in Arkansas, however, seems to be well established to this effect:

(1) The fact that a specific allegation of negligence is pleaded does not prevent the application of the doctrine of *res ipsa loquitur*. *Biddle, et al., Receivers* v. *Riley,* 118 Ark. 206, 176 S. W. 134, L. R. A. 1915F, 992; *Johnson* v. *Greenfield,* 210 Ark. 985, 198 S. W. 2d 403.

(2) The effect of the doctrine where applicable does not shift the burden of proof on the whole case from the

plaintiff to the defendant, but simply requires the defendant to go forward with the production of testimony. In other words, the effect of the doctrine is to facilitate the proof of negligence by the plaintiff by adding a presumption to his other proof. There is an extended discussion of this feature in *Coca-Cola Bottling Company of Helena* v. *Mattice,* 219 Ark. 428, 243 S. W. 2d 15.

Returning to the instructions requested in this particular case, we find that the second paragraph of requested instruction No. 4 was specifically disapproved in the Mattice case. On the other hand the Court there stated that it found no objection with an instruction identical with requested instruction No. 5 in this case. (The writer is unable to see sufficient difference in the two instructions to justify the approval of the second one.) There was, therefore, no error on the part of the learned Trial Judge in refusing requested instruction No. 4. Instructions Nos. 2 and 5 were in proper form if the circumstances called for their use.

Appellants' counsel very frankly and ably states another rule governing the doctrine of *res ipsa loquitur* as follows:

"Of course, in cases where the plaintiff has full knowledge and testified to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all of the facts and circumstances attendant upon the occurrence clearly appear—then the doctrine would not apply."

In this case, we think not only the complaint, but also the testimony showed a specific act of negligence, which was the use of a tractor with a leaky sediment bulb. There is no suggestion either in pleadings, proof or argument, that there was any other possible contributing factor to the explosion. Under these circumstances the case of *Southwestern Gas & Electric Company* v. *Deshazo,* 199 Ark. 1078, 138 S. W. 2d 397, is controlling. The Court there used the identical language above quoted from appellants' brief.

We therefore conclude there was no error in refusing the requested instructions.

Affirmed.

Mr. Justice HOLT and Mr. Justice MILLWEE dissent; Mr. Justice McFADDIN concurs; the Chief Justice not participating.

FELDMANN *v.* KINSLOW.

5-20 256 S. W. 2d 327

Opinion delivered March 23, 1953.

Rehearing denied April 20, 1953.

E. L. Hollaway, for appellant.

Reece Caudle and *Richard Mobley,* for appellee.

WARD, Justice. Appellees, T. A. Kinslow and Imogene Kinslow [husband and wife] in April, 1950, sold their home to appellants, Karl Feldmann and Olga Feldmann [husband and wife] for $4,500. Appellees' property was equipped for raising chickens and the said sale and purchase price included 7 brooders, 7 automatic waterers and 100 feeders, as is evidenced by the "Agreement of Sale" entered into April 3, 1950, by the parties hereto and a real estate agent, J. H. Roper. The transaction was consummated on April 11, 1950, when appel-

lants executed and delivered to appellees a mortgage securing the payment of four notes of the same date totaling $4,500. The first three notes were for $1,000 each and the other note was for $1,500, all with interest at 6% per annum from date. The first note was due April 1, 1951, and the others were due one, two and three years thereafter. The mortgage provided that if any note [with no mention of default in interest] was not paid when due, all the notes would become due and payable at the option of the holder. In addition to the land, the mortgage covered an ice cream box and a cold drink box.

On May 3, 1951, appellees filed a complaint to foreclose the mortgage, alleging appellants had failed to pay the first note due April 1, 1951, and also the interest on all the notes, and asked for judgment in the amount of $4,500 on the notes and in the amount of $286.50 for accumulated interest.

Appellants filed an answer and two amendments thereto in which they pleaded, in substance, that while they signed the notes and mortgage, they had paid $1,000 on the purchase price of the land and, therefore, only owed a balance thereon of $3,500. The answer [and amendments] also set out that appellants, in connection with the real estate transaction, had bought a stock of merchandise [at invoice price of $1,751.67] which was in a building on the land, that they had purchased some other items from appellees, which will be mentioned later, and that they had paid for all these in addition to the $1,000 on the land.

Appellees filed no reply to the allegations in the answer and amendments thereto.

The trial court found that appellants were due a credit of $279 for snuff sold and $339.37 for payments to the Arkansas Valley Feed Mill, and, deducting the total of these two credits from $4,500, gave judgment against appellants for the difference of $3,881.63 as principal and $468.67 for interest, and ordered a sale of the property.

We have concluded the chancellor's findings are against the weight of the evidence, and since the decision we make depends upon the evaluation of the evidence, we will discuss it in some detail.

Although this suit started as a foreclosure proceeding, as above stated, and although appellees filed no denial of the allegations in appellants' answer and the amendments thereto, in order to rebut the testimony of appellants as to certain payments, appellee, T. A. Kinslow, entered in the record, as an exhibit to his testimony, a statement which will clarify our further observations and which we copy in full below. We have numbered the different items for clarity and convenience:

(Exhibit A)

1.	Total Real Estate	$4,500.00
2.	Stock of Merchandise	1,751.67
3.	Ice Cream Box	300.00
4.	Cold Drink Box	200.00
5.	Oil for Broiler House	147.00
6.	Stoves for House and Store	50.00
7.	Lumber across the road	175.00
8.	Scales, Knives, Tire Gauge, Rug for House, Hot Patch Machine and other items	76.37
		$7,200.04
9.	Paid by Real Estate Mortgage	$4,500.00
10.	Cash	2,000.00
11.	Snuff resold	204.67
12.	Paid Arkansas Valley Fee	203.37
13.	Traded out in Store	292.00
		$7,200.04

It will be seen from the above that appellees now claim that the total purchases made by appellants amounted to $7,200.04, or $2,700.04 more than the price of the land. All of these items except 1 and 2 are disputed by appellants. It is our conclusion that the evidence

shows appellees have sought to overcharge appellants in the sum of $580 arrived at by items as follows:

Item 3—Ice cream box, $300. Although the testimony is in dispute, we think $200 was a fair valuation. The positive testimony was that appellants had paid $221 for the box and that it had been used since.

Item 4—Cold drink box, $200. The evidence indicates that the Coca-Cola Company valued the box at $120 and we accept that figure. By appellants' testimony we have valued this item and the one before too high.

Item 5—Oil for broiler house, $147. Convincing testimony clearly indicates there could not have been more than 200 gallons and that the price was 14 cents per gallon. We think it could not have been worth more than $28.

Item 6—Stoves for house and store, $50. Evidence indicates these were worth not more than $13.50 and that appellants have already paid for them.

Item 7—Lumber across the road, $175. Positive evidence shows the value could not have been more than $20.

Item 8—Scales, knives, etc., $76.37. The best evidence shows these items were of much less value and we accept appellants' statement that they have been paid for.

The other items on Exhibit "A" show total payments of $7,200.04, but we think the evidence shows a larger amount.

Items 9 and 10 are not challenged by appellants.

Item 11—Snuff resold, $204.67. We accept the finding of the chancellor that the amount should be $279.

Item 12—Arkansas Valley Fee, $203.37. We accept the finding of the chancellor that the amount should be $339.37.

Item 13—Traded out at store, $292. This item is not challenged by appellants.

In addition to the above the evidence shows that appellants made other payments as follows:

1. The 18 sheet inventory in T. A. Kinslow's handwriting shows: cash $5.00 and a payment of $380.

2. A check in evidence shows a payment to T. A. Kinslow of $10 on April 8, 1950.

It will be seen from the above that appellants have paid an excess of $605.33 over what appellees gave them credit for. This amount added to the overcharge of $580 gives appellants a total credit of $1,185.33.

This result leads us to a consideration of another phase of the case, and to our final determination.

Appellants strongly contend, and we agree, that when the first payment of $1,000 was made on April 4, 1950, by check to J. H. Roper, the real estate agent, it was to apply on the purchase price of the real estate, thereby leaving a balance of only $3,500. The "Agreement of Sale", referred to above, states that $1,000 was to be paid down and the balance would be $3,500. It is true appellants signed the notes and mortgage for $4,500, but they claim they did not fully understand and relied largely on Mr. Kinslow, who was a preacher and their pastor. This contention is not unreasonable in view of the fact that appellants are both old, are of German nationality, and speak and understand our language with difficulty. We are finally convinced that the real estate notes should be credited with $1,000 because otherwise there would be an overpayment by appellants, by approximately the same amount, on the other items purchased from appellees.

Our final conclusion is that the first note for $1,000 due April 1, 1951, has been paid and that the foreclosure was premature. It is true that we have found from the evidence that appellants are due credits in excess of $1,000, but our holding is that it merely cancels the $1,000 note. We do this for two reasons. First, it is impossible to tell from the state of the record exactly what the excess should be to a mathematical certainty, and, second, if appellants have overpaid on any purchases, it results

from their own mistake and they have not asked for any such recovery.

It follows, of course, that appellants owed no interest on the first note for $1,000 which was paid at the time of its execution but are obligated to pay interest on the remaining three notes.

Reversed for further proceedings not inconsistent with this opinion.

The Chief Justice concurs in part and dissents in part.

GRIFFIN SMITH, Chief Justice, concurring in part and dissenting in part. I would not object to sending the cause back for further development of matters that are somewhat obscure. However, I dissent from the majority's specific findings in respect of credits that are directed to be given, believing that the ends of justice would be best served through remand of the entire cause.

TROTTER *v.* HUDSON.

5-33 256 S. W. 2d 330

Opinion delivered March 23, 1953.

Rehearing denied April 20, 1953.

E. V. Trimble, for appellant.

Hendrix Rowell, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants, husband and wife, to quiet their title to a three-foot

strip on the west side of a lot in Pine Bluff. At the close of the plaintiffs' testimony the chancellor sustained a demurrer to the evidence and dismissed the suit.

The proof shows that in 1947 the appellants and the appellee both claimed title to this land. This dispute was settled by the appellants' purchasing this and other property from the appellee, the unpaid purchase price being evidenced by promissory notes and secured by a vendor's lien. None of the notes were paid, and in 1952 the appellants conveyed the property back to the appellee as consideration for the cancellation of the notes. The appellants offered no proof of fraud or mistake in connection with either deed. Instead, their theory is that the second conveyance operated merely to cancel the first, leaving them free to assert the same claim of title that led to the dispute in 1947. It is evident, however, that the 1952 deed conveyed to the appellee whatever title the appellants then had, including their original claim. That deed therefore precludes them from maintaining this suit.

Affirmed.

ROLAND *v.* TERRYLAND, INC.

5-36 256 S. W. 2d 315

Opinion delivered March 30, 1953.

Harold L. Hall, Elmer Schoggen, John M. Lofton, Jr., and *Owens, Ehrman & McHaney,* for appellant.

Martin K. Fulk, House, Moses & Holmes and *E. B. Dillon, Jr.,* for appellee.

J. Seaborn Holt, Justice. Appellees, Terryland, Inc., and William Burleson, its truck driver, sued Tom Rowland, driver of a school bus belonging to Parkdale School District and also sued Great American Indemnity Company direct, the District's liability insurance carrier (under § 66-517, Ark. Stats. 1947), for property damages to Terryland's truck and for personal injuries to Burleson, resulting from a collision of the school bus and the truck.

The complaint alleged the negligence of Tom Roland to be that he was driving at a dangerous and excessive speed, failed to stop at a stop sign, as required by law, failed to yield the right of way and keep a proper look-out, and that his negligence was the sole cause of the collision, etc.

Appellants answered separately with a general denial and specifically defended on the grounds that Burleson carelessly and negligently struck the school bus, that he was driving his truck at an excessive rate of speed, "failed to keep a proper look-out, . . . failed to yield the right of way to the said Tom Roland and that he failed to deviate from the path in which he was driving when a collision was imminent, and that the contributory negligence of Burleson barred appellees' right to recover."

Appellants, School District and Roland, filed a cross-complaint against appellees and alleged negligence of Burleson (driver of Terryland's truck) in effect in the terms as set out above in their answer and further "that said school bus was upon the highway directly in front of the truck a sufficient distance to permit the said Burleson in the operation of the said truck to have seen the school bus in time to have stopped or checked his speed and avoided the collision, and that he negligently failed to do so," and sought damages to the bus and for personal injuries to Roland.

Appellees, in reply, interposed a general denial and alleged that any damages suffered by appellants were due "solely as a result of the recklessness, carelessness and negligence of Tom Roland," in driving at an excessive speed, failing to stop at a stop sign immediately prior to the collision, failing to yield the right of way, and to keep a proper look-out.

A jury trial resulted in a verdict for appellee, Terryland, in the amount of $1,850, and for $25 for Burleson. This appeal followed.

The collision occurred in the intersection of State Highway 8 (surfaced with gravel) and U. S. Highway 165 (with a "black top" surface) in Ashley County. It appears that the only eye witnesses were Burleson, Roland and Mrs. Claude Everett.

Burleson testified that on August 20, 1951, at about 11 o'clock in the morning, as he drove from Wilmot into Portland and Parkdale, when he reached the intersection of the two highways, "the speed limit is 45 miles an hour—I had already slowed down, and I saw the school bus when he was about—he was just passing the stop sign. The stop sign is about 40 feet from the highway. In driving that route every day most all cars pull past the stop sign and stop before entering the highway. This driver of the school bus didn't stop, and when he came past the stop sign and entered the highway, I blew my horn and hit my brakes and hit him. I was on the right hand side of the road going north, and the school bus was

going east. I knew the stop sign was there and I had met traffic there frequently in the past.

"I was about 90 feet down the highway when he passed the stop sign and about 35 to 40 feet—he had gotten to the highway and I hit the brakes. The countryside is level, but there is an upgrade between the highway and the stop sign on No. 8. I estimated the speed of the bus when I saw it going past the stop sign at about 25 miles per hour, and I slammed on my brakes as quickly as I could get to them.

"I was talking to Tom (Roland) about a week after the accident and he said it was his fault and he had no business pulling out on to the highway."

Mr. Everett testified when Roland passed him going into the intersection, he did not stop at the Stop Sign and was going about thirty or thirty-five miles per hour when the collision occurred. Mrs. Everett corroborated this testimony.

Roland testified: "Q. Are there any markings or places that you can tell about how far away the truck was when you observed it as you started across the highway? A. When I started across the highway I looked and saw him coming pretty briefly and *I tried to beat the rap on across the highway.*"

Appellants first question the sufficiency of the evidence and contend "Burleson was guilty of negligence which caused or contributed to this accident," and therefore appellees cannot recover. We do not agree.

Without attempting to detail the testimony, it suffices to say that when all the facts are viewed in the light most favorable to appellees, as they must be, they were substantial and sufficient to support the jury's verdict.

But, appellants earnestly contend that the doctrine of discovered peril having been applied in this case, the trial court erred in giving appellees' instruction No. 2, in that it ignored the issue of discovered peril, which doctrine the court applied in certain other instructions, that

it "is a binding instruction and permits a recovery by the appellees on the sole finding that the appellant, Tom Roland, was guilty of some act of negligence which proximately caused the accident," and further that it was in conflict with other instructions.

More succinctly stated, appellants say that "the error committed by the court is not in his failure to recognize and instruct on the question of discovered peril, but in his error in giving a binding instruction which omitted this defense."

The doctrine of discovered peril, or the last clear chance doctrine, insisted upon here by appellants as applicable, would, if applied, presuppose the negligence of Tom Roland.

In a recent case, *Shearman Concrete Pipe Company* v. *Wooldridge,* 218 Ark. 16, 234 S. W. 2d 382, we defined it in this language: "The so-called 'discovered peril doctrine' or 'the last clear chance doctrine,' which doctrine, most succinctly stated, is that the contributory negligence of the plaintiff does not preclude a recovery for the negligence of the defendant when it appears that the defendant, by exercising reasonable care and prudence *after discovering* the perilous condition of the plaintiff, could have avoided the injurious consequences to the plaintiff."

We have concluded that on the facts presented, the discovered peril doctrine has no place or application in this case, but that the simple question of negligence and proximate cause should be applied. Under many of our decisions, we have held that a party relying on this doctrine has the burden of showing that while he (Roland here) was negligently in a perilous position, the defendant discovered his perilous position, and after such discovery failed to prevent injuring him by using reasonable care. Here, under this doctrine, Burleson, Terryland's driver, would be under no duty to Roland until Roland had entered the intersection and placed himself in peril. Roland was driving approximately twenty-five miles per hour from the stop sign (50 ft. from the

edge of Highway 165) when he entered the intersection. Obviously then Roland was going about 36 feet per second and would have been in peril about one-half second from the time he entered the intersection until struck, or about 1½ seconds from the time he covered the distance from the stop sign to the point of impact. This short space of time was not sufficient here to give Burleson time to appraise the situation and time thereafter to do something about it. He appears to have done all he could within this fraction of a second to avoid the impact.

In *Houck* v. *Marshall,* 198 Ark. 938, 132 S. W. 2d 181, where facts similar in effect were present, in denying the application of the discovered peril doctrine, we said: "Under the facts in the instant case we are of the view that the discovered peril, or the last clear chance doctrine, does not apply . . . We think this is a case wherein the simple question of negligence and proximate cause should be applied.

"Here we have the drivers of two automobiles approaching each other on a twenty-foot gravel roadway, one on the wrong side of the road, and each car continuing without stopping until a collision occurs. . . . In the instant case the driver of each car had a right to assume that the other would try to avoid a collision. . .

" 'When, however, the *continuing negligence* of the injured person in failing to discover his own danger and move out of the danger zone stands over against the *continuing negligence* of defendant for failing to discover the situation and avert the accident, it is difficult to understand how the doctrine of last clear chance may be applied consistent with the proximate cause view.' "

In the more recent case of *Strickland Transportation Company* v. *Gunter,* 175 F. 2d 747, United States Circuit Court, 8th Circuit, wherein there was involved a collision between a pick-up truck and a large transportation truck (belonging to Strickland), the doctrine announced in the above case (*Houck* v. *Marshall*) was reaffirmed. In this Federal case, it appears that Strickland's driver saw the pick-up truck at a distance of some

500 feet, but testified that he could not avoid the collision. The Circuit Court, after taking notice of the necessary elements in a discovered peril case, found that they were lacking in the Strickland case and that the defendant there had not discovered the peril of the plaintiff in time to act and had not failed to act reasonably after the discovery. It was there held: (Headnote 2) " 'Discovered peril,' within doctrine of discovered peril as applied in Arkansas, means peril that is actually discovered and not peril that might have been discovered." (Headnote 3) "Doctrine of 'last clear chance' or 'discovered peril' under Arkansas law is not applicable unless person charged actually discovered peril of person in time to avoid his injury by exercise of ordinary care and use of means then at his disposal," and in the body of the opinion, this language was used:

"The combined speed of the colliding vehicles was at least 60 miles an hour or 88 feet a second. Not more than 6 seconds passed between the transport driver's first sight of the pick-up truck and the collision. Under the Arkansas rule, he can not be charged with negligence in failing to discover the peril of Gunter at the instant he saw the lights of the pick-up truck coming around the curve. He was at least entitled to some time to appraise the situation, and, afterwards, the time in which to avoid the accident with the means at his disposal. Under the evidence the jury was not justified in finding that he had either."

Having concluded that appellees were not entitled to invoke the doctrine of discovered peril, it must follow that the court did not commit error in omitting this defense in instruction No. 2. It is not necessary to cover all issues in one instruction. This instruction permitted a finding for appellees ending with these words: "Unless you further find that the plaintiff, Burleson, was also guilty of negligence which was the proximate cause of the collision."

We think this instruction broad enough to include all elements of negligence alleged against Burleson and was not inherently wrong.

The rule is that "instructions given to the jury should be complete, and should cover all material issues supported by the evidence adopted. . . . However, it is not necessary that the law applicable to all questions in a case be stated in each instruction in a series, it being sufficient if all, when considered as a whole, state the law correctly. . . . Where instructions separately present every phase of the law as a whole, each instruction need not carry qualifications explained in others." 53 Am. Jur., § 547, page 435.

We said in the recent case of *Hearn* v. *East Texas Motor Freight Lines,* 219 Ark. 297, 241 S. W. 2d 259: "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."

Other instructions fully covering all issues were given by the court.

Appellants also contend that the court erred in giving appellees' instruction No. 5, and their own instruction No. 2, after modification. Specifically, the objection to both was that they made available to appellees the defense of contributory negligence of appellants, which they alleged appellees had not pleaded. The record reflects, however, that appellees did in effect plead this defense of contributory negligence in their reply to appellants' cross-complaint.

Appellees alleged: "If either of said cross complainants sustained any damage as a result of the collision described in the pleadings in this action, such damage occurred solely as a result of the recklessness, carelessness and negligence of Tom Roland, who was then acting in due course and scope of his employment as an agent, servant and employee of Parkdale School

District for its use and benefit," and specifically that Roland was driving the school bus at a dangerous rate of speed, failed to stop at a stop sign, failed to yield the right of way and to keep a proper look-out. Clearly this reply was more than a general denial, and all specific allegations of negligence on the part of Roland, in effect, charged what amounted to contributory negligence on the part of Roland.

"In construing a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties," § 27-1150 Ark. Stats. 1947.

Finding no error, the judgment is affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* BYARS.

5-32 256 S. W. 2d 738

Opinion delivered March 30, 1953.

Rehearing denied May 4, 1953.

Phil H. Loh, III, William L. Terry and *Clyman E. Izard,* for appellant.

Franklin Wilder, Robinson & Edwards and *Batchelor & Batchelor,* for appellee.

ROBINSON, Justice. This appeal grows out of an eminent domain proceeding wherein Crawford County and the Arkansas State Highway Department, appellants, acquired lands owned by the appellees, W. B. Byars and wife, Willie Catholene Byars, and Tony Christello and wife, Mardelle Christello, for a highway right-of-way. 9.405 acres were taken from the Byars; and from the Christellos 9.073 acres plus 1.316 acres and lots combined, which includes a portion of 10 lots in Monte Vista Subdivision to Alma, Arkansas, totalling a little over ten acres taken from the Christellos. The cases were consolidated and a jury gave the Byars a verdict in the sum of $25,000 and the Christellos $21,500. One witness for appellants testified that there had been an enhancement in value of the farms by reason of the location of the new road, and other witnesses for appellants estimated Christello's damages to be from $275 to $2,218.10; and damages to Byars from $846.27 to $4,499.25. The principal issue on appeal is whether the verdicts are excessive.

We will first discuss the Christello lands. The farm consists of 400 acres which Christello purchased in 1946 for the consideration of $17,500; and included in the purchase price was what is known as the Canyon Club, which he sold shortly thereafter for $7,800, resulting in the 400-acre farm actually costing him $9,700, or about $25 per acre. In 1949 he bought the Monte Vista Subdivision consisting of 198 lots as platted, for the consideration of $5,000. The witness Christello testified that he did not know how many lots were in the subdivision, that he had never counted them; but the plat introduced in evidence shows 198 lots. He also testified that there was other consideration, but was vague and indefinite as to what the other consideration consisted of and never did say

exactly what it was. No lots have been sold from this subdivision.

The 400 acres is divided by U. S. Highway 64, which henceforth will be referred to as old 64. 80 acres are located north of old 64 and do not join any of the other Christello property; about 180 acres are located south of old 64 and are not connected in any manner with the other lands except by a culvert under old 64, used as an underpass. This leaves approximately 140 acres in one block north of old 64, on which are located the improvements.

Old 64 swings sharply southwest a short distance before it reaches Christello's improvements, going in front of the buildings. The new road which is being built on lands taken from Christello continues westward at this point so that the new road will go to the rear of the improvements, severing the approximate 80 acres on which the improvements are located from an approximate 55 acres which will now be north of new 64. Old 64 is not being vacated or abandoned. So far as the farm land is concerned, it will be damaged to the extent of the loss of the 9 and a fraction acres, plus the severance from the 55 acres.

The right-of-way of the new highway is 200 feet in width. It crosses about 60 acres of Christello's farm land. It will be necessary to move a four-room tenant house and a barn, and to replace a dug well, which the Highway Department agrees to do. The Highway Department also agrees to construct new fences bordering the right-of-way where it crosses Christello's lands, and agrees to build an underpass under the right-of-way whereby livestock can be moved from the severed 55 acres to the acreage south of new 64 containing the improvements.

The farm is used for grazing from 50 to 100 head of livestock, and for raising hay. In addition to the farm land, a portion of 10 lots in Monte Vista Subdivision bordering on the right-of-way are being taken. The jury awarded the Christellos $21,500 as damages.

The situation of the Byars property is not so complicated. Byars raises livestock and has been in that business since 1948. His farm consists of 438 acres. All the land is in one block north of old 64, which runs in front of his improvements, but new 64 goes to the rear of the improvements and will sever about 16 acres of land on which the improvements are located from the other 422 acres. 9 and a fraction acres are being taken from Byars.

He bought 181 acres on which the improvements are located in 1948 at the cost of $25,000. Later he bought 80 acres from a Mr. Herrin for $1,600, 30 acres from George Wofford for $600, 156.56 acres from a Mr. Hawkins about two months before the trial for $2,664, and 40 acres from M. D. Wagnon for $1,900. Apparently he bought 487 acres for $31,764 or approximately $65 per acre, but sold a portion thereof leaving him now owning 438 acres. Of this 438 acres, about 156 acres were bought two months before the trial for a little over $17 an acre. He has been damaged by the loss of the 9 and a fraction acres, plus the severance of the 16 acres on which are located the improvements from the 422 acres. The Highway Department has agreed to build new fences bordering the right-of-way, build an underpass suitable for moving livestock from the property on which the improvements are located to the other portion, and to move whatever buildings it may be necessary to move. There was a jury verdict for Byars for damages in the sum of $25,000.

Is there substantial evidence to support the verdicts? If so, according to many, many decisions of this court the judgments must be affirmed and evidence must be viewed in the light most favorable to the appellee. On the other hand, if there is not substantial evidence to support the verdicts, the judgments must be reversed. We have reached the conclusion that there is no substantial evidence in the record to support either verdict.

There was no evidence introduced tending to prove the damages except the opinions of witnesses as to the value of the land taken and as to the market value of the properties before and after the taking. Where a witness

gives his opinion as to damages, such testimony must be considered in connection with related facts upon which the opinion is based. *St. Louis Southwestern Ry. Co.* v. *Braswell, Administrator,* 198 Ark. 143, 127 S. W. 2d 637.

To completely abstract here all of the testimony in the case would unduly extend this opinion, but the witness Christello testified that he had been running from 50 to 100 head of cattle on his place, that he cannot afford to run more; but gives no estimate as to the number of cattle the place will carry; says that he also cuts hay, but gives no indication of the amount of hay the place will produce or the value of the hay he has grown; says that he has a tenant house and barn that will have to be moved (but the Highway Department has agreed to move these structures); says that he has water piped to the various pastures (but the Highway Department has agreed not to disturb the water supply); says that 2½ acres of land that will border the right-of-way on the north is shaped so that the place where it joins the other lands will be only 10 feet in width (there is no showing that all the stock that could ever graze on this 2½ acres could not pass through a place 10 feet in width); says he has approximately 200 acres north of the new highway (the fact is that 80 acres of this alleged 200 acres is not connected with the other portion of the farm in any manner whatever and will not be affected to any extent by the new highway; and other than this 80 acres he will have only approximately 55 acres north of the new highway); states that the place is worth $65,000 (this would be approximately $162.50 an acre), and after the taking it will be worth only $40,000 (the so-called Block A is a strip of ground 105½ by 172 feet which was across the road from the Monte Vista Subdivision and connected to his 80 acres, which will be taken by the new right-of-way). He values one lot in Monte Vista Subdivision at $2,000, another at $5,800, and another at $5,800, although he paid only $5,000 for the entire 198 lots in the addition. Christello is in the insurance business and owns ½ interest in an office building in Fort Smith. He says that his pasture land alone is worth $1,200 an acre, but does not give

the number of head of stock the land will graze. He claims that the drainage will be impaired by the new right-of-way, but his testimony is not clear or convincing on that point.

W. D. Byars is a stock raiser and has been engaged in that business since 1948. 9 and a fraction acres of his land are being taken. He considers his farm worth $85,000; that it will be worth only $40,000 after the right-of-way goes through. His improvements will be on about 16 acres of ground separated from his other land by the highway right-of-way; a couple of his outbuildings will have to be moved (the Highway Department has agreed to do this); he claims there will be a drainage problem, but it appears that the highway right-of-way will improve the drainage rather than impair it; he values his pasture land at $1,000 an acre; however, there is no showing whatever as to any qualities of the land that would cause it to be worth such a figure; in fact, he bought 156.56 acres of his 438 acres about two months before the trial for a little over $17 per acre.

In addition to the testimony of Christello and Byars as to the alleged damages which they have suffered, Boyce Wofford who is in the produce business gave his opinion that Byars' place before the taking was worth $75,000, and after the taking will be worth from $40,000 to $45,000; Fred Vinsent, a farmer, gave his opinion that before the taking Byars' place was worth $75,000, and afterwards $35,000; Clarence Brown, a cattleman, gave his opinion that the Byars place before the taking was worth $75,000 and the taking of the 9 acres had depreciated it 50%; Sam Woods in the real estate business at Fort Smith gave his opinion that the Byars place was worth $75,000 before the taking and $45,000 afterwards. W. D. Arnold, a farmer, gave his opinion that before the taking the Byars place was worth $75,000 and afterwards $40,000 to $45,000; L. E. Ritchey, a grocerman, gave his opinion that before the taking the place was worth $75,000 and afterwards $40,000 to $45,000; W. R. Cole who lives near Alma gave his opinion that the place was worth $75,000 to $80,000 and had been reduced to $45,000; Ver-

non Humphrey in the automobile business gave his opinion that before the taking the place was worth $75,000 and $48,000 afterwards. It is significant that all the above witnesses had the same opinion as to the exact value of the property before the taking. In addition, Donald M. Roderick, a real estate broker, gave his opinion that the Byars place was worth $65,000 before the taking and $45,000 afterwards.

Clarence Brown also gave the opinion that the Christello property was worth $65,000 before the taking and $35,000 afterwards; Sam Woods said the Christello place was worth $60,000 before the taking and $30,000 afterwards. Roderick gave his opinion that the Christello property was worth $55,000 before the taking and had been damaged $25,000. Arnold gave his opinion that the Christello place was worth $65,000 before the taking, $40,000 afterwards; W. R. Cole who says he lives around Alma, gave his opinion that the Christello place was worth $65,000 to $70,000 before the taking and had been reduced to $33,000. Humphrey gave his opinion that the place had been reduced from $65,000 to $32,500 by the taking.

There is no showing that any of the farm lands involved are suitable for any purpose except the production of livestock and hay. Yet not a single witness, including the owners themselves, gave any testimony whatever as to the number of livestock that the lands will support or the amount of feed that can be grown thereon. In determining the value of a livestock farm, one cannot ignore such material facts and arrive at an intelligent opinion.

Whether there is substantial evidence to support a verdict is not a question of fact, but one of law. Because a witness testifies as to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion. In *Missouri Pacific Transportation Co.* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958, this Court said: "Juries are not permitted to base their verdicts on speculation and conjecture, and as

to whether there is any substantial evidence to support the verdict is a question of law and not of fact." In *Sadler, Trustee,* v. *Scott,* 203 Ark. 648, 158 S. W. 2d 40, the Court quoted with approval from *St. Louis Southwestern Ry. Co.* v. *Braswell, Administrator,* 198 Ark. 143, 127 S. W. 2d 637, as follows: "All judges, both trial and appellate agree that to support a verdict the evidence must be of a convincing nature, imparting the qualities of reasonable certainty . . . it would seem, however, that in any view to be taken the issue is whether the evidence *is* substantial and *who* is to judge of that quality. If this is not a question of law, then substantiality loses its significance, with the result that *any* testimony may suffice. If we acquiesce in this construction, there is an abdication of judicial responsibility." It was further said in the Braswell case, "Books on evidence, and the cases, have much to say about 'speculation' and 'conjecture.' It is urged by those who adhere to the theory that the reasonableness of testimony, the probability of its truthfulness, the conclusions to be drawn from it, the inferences attaching to physical conditions, and to the attending circumstances, are matters of sole consideration of the finders of facts, and that a verdict based upon *any* evidence found by a jury to be sufficient to sustain its actions, should not be disturbed on appeal.

"The difficulty is in differentiating between *any* evidence and substantial evidence. . . . Must appellate judges close their eyes and their minds to the obvious fact that in a particular case the evidence, from its very nature, could not have been convincing, though it produced a given result? Shall we affirm that such evidence was *necessarily* substantial because it was favorably acted upon by the jury?"

In *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 952, 251 S. W. 2d 477, a pipeline company sought to take a right-of-way across a 150-acre farm. There was a verdict of $4,500 which this Court reduced to $3,000. There the Court said, "After a careful review of the testimony of all the witnesses giving their opinions as to the depreciation value of this 150-acre farm, we have con-

cluded that in no instance has a witness, by competent, testimony, stated substantial facts upon which to base such opinion as to decreased value . . . it is true that one or more witnesses for appellee placed the damage at a sum equalling the verdict returned by the jury; but the cross-examination of these witnesses fails to show any fair or reasonable basis for the opinion."

In the *City of Harrison* v. *Moss,* 213 Ark. 721, 212 S. W. 2d 334, appellee Moss in a condemnation proceeding was given a judgment in the sum of $8,000 for 21.13 acres of land. This Court said, "When his testimony is tested by his cross-examination as to the facts forming the basis of his opinion, we conclude there is no reasonable basis to support a verdict in excess of $6,500."

In the case at bar, there is no showing that any of appellee's witnesses took into consideration the potentiality of the farms in producing those things raised thereon, namely livestock and feed. Therefore there was no sound basis for the opinion the witnesses gave as to the value of the farm and damages thereto.

Appellant urges error of the trial court in overruling a motion for continuance and in not granting a new trial because of certain answers given by a witness on cross-examination, which the trial court told the jury not to consider; but these points are not likely to arise in another trial.

Reversed and remanded for new trial.

HOLT, J., not participating.

ED. F. MCFADDIN, Justice (dissenting). I respectfully dissent because—as I see it—the majority opinion of this Court shows that it has invaded the province of the jury.

Our Constitution says, in Art. 2, § 7:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; . . ."

Under this salutary provision, this Court has always held—even in eminent domain proceedings—(a) that the

jury's verdict will not be disturbed on appeal if supported by substantial evidence; and (b) that in viewing the evidence—to see if it is substantial—we view it in the light most favorable to the appellee. *Texas, etc. Ry. Co.* v. *Eddy,* 42 Ark. 527; *Springfield, etc. Ry. Co.* v. *Rhea,* 44 Ark. 258; *Fayetteville, etc. Ry. Co.* v. *Combs,* 51 Ark. 324, 11 S. W. 418; *Cloth* v. *Chicago, etc. Ry. Co.,* 97 Ark. 86, 132 S. W. 1005, Ann. Cas. 1912C, 1115; *Stuttgart, etc. Ry. Co.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511; *Griffin* v. *Searcy County,* 150 Ark. 423, 234 S. W. 270.

Notwithstanding the foregoing well established rules, this Court, in the present majority opinion, has proceeded to weigh the evidence as though the majority were an appellate jury instead of an appellate court. At least seven witnesses testified as to the value of each condemned tract before the taking and after the taking. The names of these witnesses, their occupations, and the values each gave, are detailed in two paragraphs of the majority opinion, and then immediately follows this paragraph in the majority opinion:

"There is no showing that any of the farm lands involved are suitable for any purpose except the production of livestock and hay. Yet not a single witness, including the owners themselves, gave any testimony whatever as to the number of livestock that the lands will support or the amount of feed that can be grown thereon. In determining the value of a livestock farm, one cannot ignore such material facts and arrive at an intelligent opinion."

Thus, the majority acted as a jury in testing the credibility of the witnesses and the weight to be given their testimony. And even in acting as a jury, the majority adopted the wrong test for a jury to use: the test of the damages in an eminent domain proceeding is not what the lands are worth for livestock and hay, but the most valuable purpose for which the land can be used. In *Ft. Smith, etc. District* v. *Scott,* 103 Ark. 405, 147 S. W. 440, we said:

"The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes, comprehending its availa-

bility for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring most in the market."

Not only did the majority apply the wrong rule for the jury, but the majority also invaded the trial court's authority. The majority opinion says the witnesses who testified as to the value of the land did not state how much feed the land would grow and how many livestock the land would support. It is *"new law"* for the Supreme Court to pass on such matters. Here is what we have heretofore said regarding the qualifications of witnesses to testify as to values. In *Ft. Smith, etc. District* v. *Scott, supra,* we said:

"The sole question here was the market value of the land, and the witnesses gave their opinions as to that value, basing them on different facts and reasons in support thereof. It is true, some of them had no knowledge of the sale of lands under like conditions for bridge site purposes, nor information as to the prices realized at such sales, nor were they expert engineers, but all who testified were intelligent men, long familiar with the lands taken and the locality and neighborhood where they were situated, knew their value for some purpose, and in giving their opinion as to the most valuable purpose for which they were adapted and could be used they stated their reasons for so doing. Their knowledge of the facts upon which their opinions were based and the reasons therefor and the value and weight thereof could have been and were 'readily and satisfactorily tested by cross-examination,' as said in *Texas & St. Louis Rd.* v. *Kirby,* 44 Ark. 103.

"The jury were capable of determining, and it was within their province to determine, the weight that should be accorded to the opinions of the witnesses, and we do not think there was any abuse of the discretion of the trial court in permitting the estimates of the witnesses and the reasons therefor to be submitted to the jury, or that any prejudicial error was committed in the introduction of the testimony."

And in *McDonough* v. *Williams,* 86 Ark. 600, 112 S. W. 164, we said:

"The question whether a witness has shown sufficient knowledge concerning the value of property to give him a definite opinion on the subject is a matter, to some extent, within the sound discretion of the trial judge, and this court will not reverse for alleged error in this respect unless an abuse of such discretion appears. *St. Louis, Ark. & Tex. Rd.* v. *Anderson,* 39 Ark. 167; 17 Cyc. 30. No abuse of the court's discretion is shown here."

Here the trial judge held the witnesses to be competent: yet the majority is reweighing all their evidence. I have no desire to prolong this dissent: my purpose is to show that the majority has reversed the jury verdict and thereby substituted the views of the majority for those of the jury on the matter of the weight of the evidence and the credibility of the witnesses.

GLUCKMANN *v.* ANDERSON.

5-41 256 S. W. 2d 319

Opinion delivered March 30, 1953.

Shaw, Jones & Shaw, for appellant.

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

ROBINSON, Justice. There was a collision between an automobile driven by appellant, Morton Gluckmann, and one operated by appellee, H. P. Anderson, who filed suit for damages and recovered a judgment in the sum of $2,750.

There are two issues on appeal. First, is there any substantial evidence of negligence on the part of appellant Gluckmann? Second, does the evidence show that as a matter of law Anderson is guilty of contributory negligence?

Appellant Gluckmann was driving south on Highway 71 about 3 miles north of Alma, and when he reached a point approximately in front of a mercantile establishment known as Dean's Market, he ran into the side of an automobile driven by appellee Anderson. North of the point where the collision occurred there is a decided dip in the highway; there is a conflict in the evidence as to just how far north of the point of collision is the bottom of the dip. There is evidence which indicates it is 100 feet, whereas there is other evidence indicating it is 300 feet. From the pictures introduced at the trial, it appears that it would be very difficult for one sitting in an automobile at the place of collision to see a car approaching from the north when it was at the bottom of the dip, or for one in an automobile at the bottom of the dip to see a car on the highway at the point of collision.

Anderson testified that he had stopped at Dean's Market, which is on the west side of the highway; that when he was leaving there he saw two cars approaching from the north and waited for one of them to pass, and then attempted to cross over to the east half of the concrete highway as he wanted to go north. Gluckmann testified that he was going not over 50 miles per hour, and as he came out of the dip and reached the crest of the hill, he saw Anderson's automobile on the pavement headed east about 100 feet away, that he swerved to the left, and that when he finally hit Anderson's car he was headed east. There is substantial evidence to show that Anderson had passed over the west half of the highway and was on the east half headed north when Gluckmann struck him.

The evidence would justify a jury in finding that if Gluckmann had continued on his own side of the road, the collision would not have occurred; and that he was negli-

gent in not doing so; and from the testimony we cannot say as a matter of law that Anderson was guilty of contributory negligence.

Affirmed.

SYKES *v.* CAMPBELL.

5-30 256 S. W. 2d 320

Opinion delivered March 30, 1953.

J. B. Milham, for appellant.

Max M. Smith, for appellee.

WARD, Justice. The principal question involved on this appeal is the mental capacity of Edgar Hunter to convey his property in return for services to be rendered by appellants.

Mr. and Mrs. Hunter, who were elderly and unable to properly look after themselves, lived at New Edinburg on a small farm which belonged to Mr. Hunter. In addition to the farm there was certain personal property consisting of household goods and a small amount of money about which there is some question as to ownership. Mrs. Hunter owned four cows in her own right, but there is also a question about what disposition, if any, was made of them before her death on October 27, 1951.

In June, 1951, Mrs. Hunter wrote her foster daughter, Mrs. Sykes, who was living with her husband in Illinois, to the effect that if she and her husband would come to New Edinburg and take care of her and Mr. Hunter they would, at the deaths of her and Mr. Hunter, get the farm and household furniture. Appellants, Mr. and Mrs. Sykes, moved into the Hunter home in the early part of July, 1951, and now contend they accepted and have complied with all the provisions of the offer made by Mrs. Hunter, and further contend that Mr. Hunter verbally consented and agreed to the arrangement. On November 5, 1951, Mr. Hunter purported to execute a will and an "agreement" by which Thelma Sykes was to get all his property.

Later Mr. Hunter was officially adjudged insane and this suit was filed January 29, 1952, by appellants against his heirs and guardian to enforce the terms of the first contract and also the "agreement."

The trial court dismissed appellants' complaint on the ground that Mr. Hunter was mentally incapable of making the alleged contract or the "agreement" and that he had been mentally incompetent at least since June 10, 1951. If Mr. Hunter was incompetent on June 10, 1951, he could not have consented to the terms contained in Mrs. Hunter's first letter to Mrs. Sykes which was dated June 20, 1951, and, of course, was not capable of executing the will and "agreement" which are dated November 5th, but which appellants allege were executed September 10th.

The testimony regarding Mr. Hunter's mental capacity was sharply conflicting, but we cannot say the finding of the chancellor on this issue was against the weight of the evidence. Lay witnesses testified that Mr. Hunter was able to drive a car some and do ordinary chores although he was old and in feeble health, and that in their opinion he had mental capacity to consent to the contract and execute the "agreement." On the other hand a large number of lay witnesses held a contrary view and gave facts upon which such views were based. Two doctors testified.

Dr. Holder, whose qualifications were admitted, had known Mr. Hunter for fifteen years and had treated him several times up to 1949. He stated the nature of Mr. Hunter's mental weakness was senile psychosis. He testified, in part, as follows:

"Q. Would you say whether or not, in your opinion, he had sufficient mental capacity within the last 18 months to understand and appreciate ordinary business transactions? A. No sir."

. . . .

"Q. In your opinion, can you say, would he have had sufficient mental capacity to make a contract, make a will, or any other instrument disposing of his property any time within the last 18 months? A. No, sir. Q. Was his type of mental condition a progressive condition? A. Yes, sir."

Dr. Carnahan, a psychiatrist and assistant superintendent of the State Hospital, whose qualifications were also admitted, examined Mr. Hunter December 11, 1951, and made a report of his findings the following day, which, among other things, showed the following:

"V. *Sensorium and Intellectual Resources:* The patient's orientation was nil. He neither knew the time, place, nor person. Memory, both remote and recent, was nil; retention and recall were nil; counting and calculation were nil; grasp of general information was nil; judgment was nil.

"VI. *Insight:* Entirely lacking."

Dr. Carnahan stated that Mr. Hunter was suffering from a major mental illness, senile psychosis, which was progressive, and, in addition, gave the following answers to the questions set out below:

"Q. Basing your answer on your examination of Mr. Hunter, and your findings at that time, and your knowledge of that type of illness, state whether or not, in your opinion, Mr. Hunter would have been capable of making contracts, executing wills, and disposing of his property generally, at that time? A. He definitely

would not have been capable at that time. Q. Basing your answer upon your knowledge of this type of mental diseases, in your opinion, would he have been capable of making such contracts at any time within a period of 12 months prior to the date of your examination? A. It is impossible to say exactly, but it is very improbable he would have been competent. He would not have been competent six months prior to my examination, and based on my examination of him, I would say it is questionable about whether he would have been competent for a longer period before. But definitely, not competent for six months prior to my examination. Q. At any time? A. At any time, yes, sir."

Some other issues were raised but, in view of the decision we have reached, it would serve no useful purpose to discuss them in detail. They are:

One: After the decision of the lower court Mrs. Sykes filed a claim in probate court in the matter of the guardianship of Mr. Hunter for services rendered and money spent in his behalf, and appellees have filed a motion here to dismiss this appeal on that ground. We have chosen to make our decision on the merits and so do not pass on the motion.

Two: Mrs. Sykes contends that in any event she is entitled to all personal property of Mrs. Hunter, deceased, since she was bound by their agreement. We agree that the offer of Mrs. Hunter expressed in two letters was accepted by appellants moving into the Hunter home and rendering the enumerated services, but we are unable to tell exactly what the personal property consists of at this time or at the time of the hearing. While the letters only mentioned household goods [in addition to realty], yet Mrs. Sykes testified that her foster mother told her she would give her all her personal property, and we treat the pleadings as amended to that extent. Only three items of personalty are mentioned, as discussed below:

Household Goods: We find no testimony describing this item in detail or to show who owned it, but numer-

ous articles are listed in the inventory filed in the guardianship estate of Mr. Hunter.

Money: There is inconclusive testimony regarding a small amount of money either on hand at the death of Mrs. Hunter or in the bank at New Edinburg, or both. The inventory above referred to shows $158.03 in said bank but does not show in whose name or names. It appears that $1,000 was deposited in the bank several months previously in the joint account of Mr. and Mrs. Hunter, but the disposition of this deposit is not shown.

Cows: While, as before stated, Mrs. Hunter had four cows, yet it appears she sold three before her death. The evidence does not show what disposition was made of the proceeds. Also, some cattle is listed in the said inventory.

It is our decision that appellants are entitled to whatever personal property Mrs. Hunter had at the time of her death, and this cause is remanded so that the trial court may entertain further proceedings in this connection.

Affirmed as above indicated and reversed in part for further proceedings not inconsistent with this opinion.

EDMONSON *v.* SANSING.

5-19 256 S. W. 2d 323

Opinion delivered March 30, 1953.

F. O. Butt and *John H. Shouse,* for appellant.

Henley & Henley, for appellee.

George Rose Smith, J. This is a suit by the appellants, Joe and Clyde Edmonson, to quiet their title to a 180-acre farm that was owned by the plaintiffs' brother Claude at his death intestate in 1951. Claude Edmonson was also survived by another brother, seven sisters, and the children of a deceased sister, all of whom were defendants below. The plaintiffs claimed title under an alleged oral contract by which Claude agreed to leave them all his property in return for the rendition of certain services during the rest of Claude's life. The chancellor dismissed the complaint for want of equity.

It has long been the rule that both the making and the performance of a parol contract for the conveyance of land must be proved by clear and convincing evidence. *Lay* v. *Lay,* 75 Ark. 526, 87 S. W. 1026. This rule is a practical precaution that has been widely adopted in various situations involving such an opportunity for fraud that it is desirable to require a standard of proof more strict than the mere preponderance of the testimony. Wigmore on Evidence, § 2498.

Counsel for the appellants do not seriously question the wisdom of requiring cogent evidence in a case of this kind; but they think the rule erroneous for the reason that it is "judge-made" law, resting upon neither the constitution nor a statute. We have not the slightest hesitancy in approving a doctrine that depends upon judicial precedent rather than upon legislation. The Arkansas legislature has never attempted to codify the entire body of the law or even any substantial part of it. Consequently most cases must be decided by common law principles if they are to be decided at all; it is seldom that the mere reading of a statute furnishes a conclusive answer to the questions presented.

As a matter of fact, this case is a good example of the fallacy in the appellants' argument; for they themselves are relying solely upon judge-made law. The only pertinent statute, the Statute of Frauds, requires that con-

tracts for the sale of land be in writing. Ark. Stats. 1947, § 38-101. To escape the statutory requirement of a written memorandum the appellants depend upon the familiar doctrine of part performance—a purely judge-made rule that was evolved many years ago by courts of equity. This exception to the statute is, and should be, safeguarded by the requisite of clear and convincing proof. We see no reason to abandon that safeguard by substituting the alternative rule that the chancellor be guided by the mere weight of the evidence, a standard that is also of entirely judicial origin.

On the merits the appellants' proof lacks both clarity and conviction. Some years before 1940 Claude Edmonson suffered a brain injury that resulted in his having occasional convulsive seizures. These attacks, which came without warning, were sometimes light and sometimes severe. The more serious seizures caused him to fall and to remain unconscious for an hour or two; the mild attacks were hardly noticeable.

According to the plaintiffs, in 1940 Claude proposed the contract on which this suit is based. By this agreement the plaintiffs bound themselves to the performance of rather vague duties. They were to give Claude "all attention we possibly could when it was necessary." They were also to supply financial aid "according more or less to our financial conditions." There is not much proof that any material pecuniary assistance was ever rendered, as Claude successfully managed his own affairs except during the brief duration of his attacks. Clyde Edmonson produced a check or two to show that he paid medical expenses for his brother, but it was later shown that these checks were drawn against a joint account which was opened in 1944, to which Claude contributed $3,300 and Clyde contributed nothing.

The services rendered by Joe and Clyde did not noticeably exceed the standard of conduct that might be expected among brothers. There was, according to the plaintiffs' own proof, little that any one could do for Claude during an attack. Clyde said that one of the most

important things was to put a pillow under the victim's head; Joe's wife testified, "There wasn't anything you could do about it. . . . We were advised to remove his teeth the first thing, if we could get them; then lay him down if he was not already down; that's what we would do." There is abundant evidence that other members of the family, and strangers as well, often ministered to Claude when neither of the plaintiffs was present at a seizure. Clyde, it is true, lived in Claude's home from time to time and was able to give aid during those visits, but he was then being supported at Claude's expense or was engaging in business ventures which Claude financed by mortgaging his property to a bank. Too, Clyde spent fifteen months in the state of Washington, leaving Joe to discharge the duties required by the contract.

There are other facts that make doubtful the existence of the agreement. Such a contract would indicate that Claude had great confidence in his brothers' reliability, but at Claude's death there was pending a suit in which he was attempting to recover delinquent rent owed by Clyde. Clyde's explanation is that his duty to pay the rent in cash was satisfied by the performance of services for Claude, most of these services being the same as those required by the contract now in issue. After Claude's death there was a family meeting at which neither Joe nor Clyde even hinted that the estate belonged to them exclusively. There is, on the contrary, evidence that Joe expressed his hope that the estate be settled as soon as possible so that a needy sister might receive her share. At this meeting neither plaintiff objected to an informal arrangement by which the oldest sister, Ada Sansing, was put in charge of the estate, nor do they now desire an accounting for the management of what they say to have been their property all along. There is also the fact that the plaintiffs introduced checks written by Claude in purported payment of board accruing during prolonged visits in Ada's home. Mrs. Sansing denied having charged her brother for his meals, and when the bank's photographs of the checks were examined during a recess in the trial

it was found that the notations of "Board" had been added after the instruments were paid by the bank.

There is also much testimony supporting the plaintiffs' position. The strongest circumstance in their favor is the fact that Claude did at one time execute a will leaving all his property to Joe and Clyde, although the appellees established a credible reason for the making of this will and for the fact that it was not in existence when Claude died. There might be some doubt as to where the bare preponderance of the evidence lies, but we are all of the opinion that the appellants' proof lacks that high degree of persuasiveness that is required in a case of this nature.

Affirmed.

JONES *v.* BURGETT.

5-25 256 S. W. 2d 325

Opinion delivered March 30, 1953.

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

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

ED. F. MCFADDIN, Justice. This is a suit seeking to set aside a decree on the claim of the unauthorized appearance of counsel.

On June 20, 1945, the Chancery Court of Johnson County entered a decree quieting the title of Mrs. Burgett (the present appellee) to certain lands as against J. B. Roberts, Ida Bell Roberts, H. B. Covington, Hazel Covington, C. W. D. Jones, Minnie Jones, *Robert H. W. Jones and Mattie Jones.* We will hereinafter refer to that suit as the "1945 case." The decree of the Johnson Chancery Court in that case was affirmed by us in *Roberts* v. *Burgett,* 209 Ark. 536, 191 S. W. 2d 579.

It will be observed that Robert H. W. Jones and Mattie Jones, his wife, (the present appellants), were listed as parties in the 1945 case. On November 17, 1951, the said Robert H. W. Jones and Mattie Jones, his wife, filed the present suit in the Johnson Chancery Court, seeking to vacate the said decree rendered against them in the 1945 case. In the present suit, Jones and wife alleged: that they had lived in Kansas for many years; that they were neither personally nor constructively summoned in the 1945 case; that they did not enter their appearance in the 1945 case; that they did not authorize any attorney to appear for them; that they did not know, until 1951, that judgment had been rendered against them in the 1945 case; and that they had a meritorious defense to the 1945 case.

Mrs. Burgett (plaintiff in the 1945 case and appellee here) resisted the present suit: she pleaded the decree in the 1945 case as *res judicata,* and also pleaded laches and estoppel. The Court heard the evidence offered, and in a carefully prepared opinion found: (a) that Mr. and Mrs. Jones were represented by a duly authorized attorney in the 1945 case; and (b) that Mr. and Mrs. Jones had no meritorious defense to the 1945 case. A decree was entered in accordance with such findings and the petition to vacate was dismissed. The said Robert H. W. Jones and Mattie Jones, his wife, prosecute the present appeal, and will be herein referred to as "Appellants."

We find it necessary to discuss only the issue first mentioned by the Chancellor—*i. e.,* the appellants were represented by a duly authorized attorney in the 1945

case. The evidence in the present suit showed that Robert H. W. Jones and Mattie Jones, his wife (the present appellants) had known C. R. Starbird since the childhood days of the parties; that C. R. Starbird is, and has been for many years, a regularly practicing attorney in Arkansas; that when Mrs. Burgett filed the 1945 case, she attempted to summon the present appellants constructively, by having a warning order published and an attorney *ad litem* appointed;[1] that Mrs. Jones came to Arkansas on account of the death of a relative, and while here, visited with Mr. Starbird. Mrs. Jones denied that she employed Mr. Starbird to represent appellants in the 1945 case, but he testified that he was so employed and that he corresponded with the appellants about the case. At all events, Mr. Starbird, a regularly practicing attorney, filed a pleading for Mr. and Mrs. Jones in the 1945 case, and had their testimony taken by deposition.

The agreement to take the depositions of Mr. and Mrs. Jones was dated October 28, 1944, and contained a caption of the case showing *Robert H. Jones and Mattie Jones* listed as defendants, along with the other defendants in the 1945 case. Mr. Starbird[2] wrote Mr. and Mrs. Jones as to the depositions; and Mr. Jones admits paying $10.25 for the cost of taking the depositions in Kansas. In those depositions taken in the 1945 case, Direct Interrogatory No. 2, propounded to Mr. Jones, read as follows:

"Are you the same Robert H. Jones named as defendant in a case in the Johnson Chancery Court filed by Rhoda M. Jones Burgett, and mentioned as an heir at law of H. W. Jones, late of Johnson County?"

Mr. Jones answered that Interrogatory, "Yes." Mrs. Jones' deposition was taken at the same time and place that Mr. Jones' deposition was taken, and she undoubtedly knew of the above Interrogatory and answer.

Thus, despite all protestations to the contrary, the foregoing Interrogatory and answer show that if Mr.

[1] There was no report of the attorney *ad litem*.

[2] When the 1945 case was appealed to this Court, the appellants were represented by the firm of Wilson & Starbird, since the partnership of the lawyers had been formed.

Jones thoughtfully answered the copied Interrogatory, then he knew that he was a party to the 1945 case and that Mr. Starbird was representing him. There are many other circumstances in the case all going to show that Mr. and Mrs. Jones authorized Mr. Starbird to enter their appearance in the 1945 case; and because of such factual matters, they are necessarily bound by the result of that case.

In *Williams* v. *Alexander,* 140 Ark. 442, 215 S. W. 721,[3] the claim was made that the appearance of counsel had not been authorized; and Mr. Justice HART, speaking for this Court, said:

"The records of a court regular upon their face have a large degree of sanctity attached to them and are not to be lightly overcome. Hence where the appearance of the parties is entered by regular practicing attorneys, the evidence of a want of authority must be clear and satisfactory in order to warrant a court of equity in relieving the party against the judgment. *Wheeler* v. *Cox,* 56 Iowa 36, 8 N. W. 688, and *Harshey* v. *Blackmarr,* 20 Iowa 161, 89 Am. Dec. 520, and *Winters* v. *Means,* 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489."

And in concluding the opinion, Justice HART used this language:

"When the whole record is read and considered together, we are of the opinion that the appellants have not made out their case by that clear and satisfactory proof which is required in cases of this sort."

The foregoing quotations fully and completely express our views in the case at bar.

Affirmed.

[3] This case is cited along with cases from many jurisdictions in an Annotation in 88 A. L. R. 12, entitled: "Attack on domestic judgment on ground of unauthorized appearance for defendant by attorney."

5-11 256 S. W. 2d 545

Opinion delivered March 30, 1953.

Rehearing denied April 27, 1953.

[redacted]

Chas. C. Wine and *T. B. Vance,* for appellant.

Smith & Sanderson, for appellee.

ED. F. MCFADDIN, Justice. This is a suit between rival title claimants for a tract of 360 acres in Miller County. The appellant (defendant below) claims under a State tax title; and the appellee (plaintiff below) claims under an Improvement District foreclosure title—*i. e.,* from Miller Levee District No. 2,[1] and also Drainage District No. 6[2] of Miller County. The Chancery Court held the Improvement District title to be superior, and from that decree appellant brings this appeal.

Appellant claims his title as follows:

(a) that the land forfeited to the State on November 2, 1936, for the taxes of 1935;

[1] Miller Levee Dist. No. 2 was created by Act 69 of the General Assembly of 1911; and that Act was amended by Act No. 71 of 1913, Act No. 25 of 1917, and Act No. 123 of 1921.

[2] Drainage District No. 6 was created under the General Drainage District Law of the State.

(b) that the State tax title was confirmed on September 25, 1939, pursuant to Act No. 119 of 1935 (see § 84-1315, *et seq.*, Ark. Stats.);

(c) that the State issued its deed to John N. Watkins, as purchaser of the State's title on February 11, 1942; and

(d) that appellant, Terry,[3] claims by mesne conveyance from Watkins.

Appellee claims his title as follows:

(a) that on October 26, 1933, Miller Levee District No. 2 obtained foreclosure decree for the delinquent benefits due the District in 1931;

(b) that the land was sold to the District under said decree on September 8, 1934, the sale being approved on September 18, 1934;[4]

(c) that the title remained in the District, thereafter, until 1945;

(d) that on October 6, 1945, the Miller Levee District conveyed the land to appellee, Starks; and

(e) that on October 8, 1945, the Drainage District No. 6 conveyed the land to appellee, Starks.

The land has been used for pasture purposes; and even though both parties claim pedal possession, the evidence shows that neither party has had possession of such character and continuity as to be entitled to prevail under the 7-year statute (see § 37-101, Ark. Stats.), so this is a suit to determine whether the State tax title or the Improvement District foreclosure title is the superior.

We have some Legislative enactments, and also several cases bearing more or less directly on the questions

[3] Terry, as defendant, was joined by his wife and some mineral holders as co-parties, but for convenience, we refer to the case as though Terry were the sole party.

[4] Likewise, Drainage District No. 6 foreclosed its delinquent 1931 benefits, obtained a decree on September 17, 1934, purchased at the Commissioner's sale on October 19, 1934, and the sale was approved on November 22, 1934. There were foreclosures by the two Improvement Districts in succeeding years, but appellee's title originates from the said sales for the 1931 delinquencies.

here at issue. Some such are Act No. 329 of 1939, now found in § 20-1146, Ark. Stats.; *Watson* v. *Anderson,* 201 Ark. 809, 147 S. W. 2d 28; *Central Clay Dist.* v. *Raborn,* 203 Ark. 465, 157 S. W. 2d 505; *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579; *Terry* v. *Drainage Dist.,* 206 Ark. 940, 178 S. W. 2d 857; *Duncan* v. *Board of Directors of Newport Levee District,* 206 Ark. 1130, 178 S. W. 2d 660; *Deniston* v. *Burroughs,* 209 Ark. 436, 190 S. W. 2d 623; *Hubble* v. *Grimes,* 211 Ark. 49, 199 S. W. 2d 313; and *Rouse* v. *Teeter,* 214 Ark. 488, 216 S. W. 2d 869.

The appellant, Terry, emphasizes: that the land forfeited to the State for the 1931 taxes and so remained until October 8, 1935, when E. E. Scott redeemed the land; and that when Scott redeemed the land for the 1931 taxes, he necessarily did not pay the State and County taxes for 1935, because they were not due until 1936. Therefore, appellant says: that the 1935 taxes became delinquent and the land was forfeited to the State on November 2, 1936; that the State had the 1935 sale confirmed by decree of September 25, 1939, under Act No. 119 of 1935; and that the State conveyed to Watkins on February 11, 1942, a title that had been confirmed for the 1935 taxes.

But here is the answer to the appellant's argument: when Scott redeemed on October 8, 1935, the Improvement Districts had already completed their foreclosure proceedings—the Levee District sale was on September 8, 1934, and the Drainage District sale was on October 19, 1934.[5] These Improvement Districts purchased the land *before* the State's lien for 1935 taxes could have become legally affixed, because, at that time, the lien for 1935 taxes would affix on the first Monday in June, 1935.[6] When Scott redeemed from the State on October 8, 1935, such redemption constituted payment[7] of all taxes prior to 1935, and allowed the Improvement District sales of

[5] In *Gailey* v. *Ricketts,* 123 Ark. 18, 184 S. W. 422, we held that when a sale was confirmed the purchaser's rights related back to the day of the sale.

[6] This was provided by § 13770, Pope's Digest. For change of date, see § 84-107, Ark. Stats.

[7] Redemption is payment. See *Mabrey* v. *Millman,* 208 Ark. 289, 186 S. W. 2d 28.

1934 to antedate by several months the State tax lien, which could not affix until the first Monday in June, 1935. Act No. 329 of 1939, now found in § 20-1146, *et seq.*, Ark. Stats., has been held to be both retroactive and curative,[8] and provides that an Improvement District can foreclose while the title is in the State, so the Improvement District sales were valid. Furthermore, our cases hold that when an Improvement District purchases property at its own foreclosure sale, the State cannot tax the property until the Improvement District parts with title. In *Lyle* v. *Sternberg,* 204 Ark. 466, 163 S. W. 2d 147, we said:

"This court has ruled that when a drainage or improvement district acquires title to lands before the lien for state and county taxes becomes fixed, they are exempt from taxation or assessment for state and county taxes as long as the lands remain the property of said district as during that time they are held by the drainage or improvement district as *a governmental agency* and for *governmental purposes.* This rule is sustained by the cases of *Miller* v. *Henry,* 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754; *Robinson* v. *Ind.-Ark. Lbr. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426; *Crowe* v. *Wells River Savings Bank,* 182 Ark. 672, 32 S. W. 2d 617; and *Little Red River Dr. Dist. No. 2* v. *Moore,* 197 Ark. 945, 126 S. W. 2d 605. Under the rule thus announced the lands were not subject to be assessed for state and county taxes for the year 1928 and were erroneously forfeited and sold to the State and appellant acquired nothing from the State under her deed of date January 23, 1939."

Thus the State could not legally tax the land for the 1935 taxes because the title was then in the Improvement Districts, by virtue of the 1934 sales; and with the "power to sell" defeated, the 1939 confirmation (under Act No. 119 of 1935) was of no force. See *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409, 147 A. L. R. 1132.

As regards delinquent State taxes and delinquent Improvement District benefits on the same land, the rela-

[8] We so held in *Watson* v. *Anderson,* 201 Ark. 809, 147 S. W. 2d 28.

tive rights of the State and the Improvement District are not reciprocal[9] because:

(a) by Statute (§ 20-1146, Ark. Stats.) an Improvement District can maintain and consummate its foreclosure proceedings and purchase the land even while it is forfeited to the State for prior State taxes;[10]

(b) but, on the other hand, if the Improvement District purchases the land at a foreclosure sale prior to the date the State tax lien affixes, then the land is in effect owned by the public and is not subject to State taxes until the Improvement District parts with title.[11]

Therefore, the Chancery decree was correct; because when Scott redeemed from the 1931 tax forfeiture, such redemption gave time priority to the Improvement District foreclosure sales which placed the title of the property in the Districts, and such priority prevented the State from taxing the lands for 1935.

Affirmed.

CROSSETT HEALTH CENTER *v.* CROSWELL.

4-9989 256 S. W. 2d 548

Opinion delivered March 30, 1953.

Rehearing denied April 27, 1953.

[9] There is an article by G. D. Walker in 1 Ark. Law Review, p. 37, entitled "Effect of Forfeiture for State and County Taxes," wherein this point is carefully discussed.

[10] This is the plain language of Act No. 329 of 1939, which we have held to be both curative and retroactive. See *Watson* v. *Anderson*, 201 Ark. 809, 147 S. W. 2d 28.

[11] In addition to *Lyle* v. *Sternberg, supra*, see, also, *Rouse* v. *Teeter*, 214 Ark. 488, 216 S. W. 2d 869.

Leffel Gentry, for appellant.

A. James Linder and *Switzer & Switzer,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellee as a patient at Crossett Health Center was operated upon July 6, 1948. Intestinal adhesions and other ailments were encountered. Steel wire was used in closing the operational wound. Discomfort resulted to such an extent that an effort was made to remove the wire. Pain and general debility continued. The Health Center treatment was unsatisfactory and in consequence of what the patient said was a refusal of the Center to further coöperate she went to Louisiana. At Bastrop Dr. J. N. Jones operated. He removed a small piece of the suture wire from an intestine, but testified that it had not fully penetrated, hence serious infection such as peritonitis had not developed. It was Dr. Jones' belief that the persistent pain experienced by the patient could have been caused by the wire, and very probably was.

Mrs. Croswell sued for $130,885.85—thirty thousand for pain and suffering, $50,000 because as a result of the mistreatment she became a drug addict, $50,000 to

compensate humiliation because of arrest by federal narcotic agents, conviction, and a three-year suspended sentence, and $885.85 for medical and hospital expenses. From a judgment for $1,885.85 the Health Center has appealed.

The operation for removal of wire occurred August 8, 1948. The original complaint was filed April 30, 1951, and in order to avoid application of the two-year statute of limitations raised by demurrer, an amendment was filed July 7, 1951, alleging that the faulty work had been concealed.

Dr. W. R. Cothern, who assisted the director-surgeon with the operation, was named as a co-defendant, but the jury found in his favor. It is insisted on appeal (1) that the court erred in not sustaining the defendant's demurrer, which was renewed after the amendment was filed, and (2) the Health Center is a benevolent and charitable association and is not answerable for the torts of its agents.

First—The Statute of Limitation.—Act 58 of 1945, Ark. Stat's, § 37-205, reads: "All actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanataria, shall be commenced within two years after the cause of action accrues. The date of the accrual of the cause of action shall be date of the wrongful act complained of, and no other time".

We have said in effect that fraudulent concealment will toll the statute, although the case in which the language was used held that the action was barred. See *Steele* v. *Gann,* 197 Ark. 480, 143 S. W. 2d 520, 120 A. L. R. 754, decided under Act 135 of 1935, which allowed three years.

Admittedly the operation in the case at bar was performed more than two years before suit, hence the demurrer should have been sustained unless conduct amounting to fraudulent concealment prevented appellee, as a reasonable person, from knowing that some of her

continuing ills were traceable to appellant's failure to remove the wire.

The Act of 1935 fixed the time of accrual of the cause of action as "the date of the wrongful act complained of *and no other time*". Regardless of this language, construction given the Act in the Steele-Gann case recognizes an exception where fraudulent concealment has prevented the injured person from seeking redress. The identical sentence found in Act 135 of 1935 is in the enactment of 1945.

Dr. Cothern testified that the last time he saw Mrs. Croswell was March 21, 1949. At that time the following indorsement was made: "Pain in the abdomen; temperature 99; abdomen distended, but is soft with no definite areas of tenderness". This date substantially coincides with statements by Mrs. Croswell that she was refused readmittance to the Health Center; and, inferentially, this refusal continued until other physicians were consulted.

A comparatively modern case (1931) dealing with fraudulent concealment is *Schmucking* v. *Mayo,* 183 Minn. 37, 235 N. W. 633. There, as here, a demurrer was overruled and the defendant appealed. The gist of the opinion is that when, through fraudulent concealment by the tortfeasor, a party against whom a cause of action exists prevents the person alleging injury from obtaining knowledge thereof, the statute of limitation will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence. "This," says the opinion of Chief Justice WILSON, "is the rule apart from any statute."

To the same effect is *Johnson* v. *Nolan,* 105 Calif. App. 293, 288 Pac. 78, and other cases cited in 74 A. L. R. 1317. See, also, 144 A. L. R. 209, 151 A. L. R. 1035.

Burton v. *Tribble,* 189 Ark. 58, 70 S. W. 2d 503, is to the point. There an abdominal operation was performed and the surgeon negligently left a ball of gauze within the cavity. In holding that an action brought

seven years later was not barred as a matter of law, it was said:

"... Appellee's acts of leaving the ball of gauze in appellant's abdominal cavity and his failure to apprise appellant thereof were such fraudulent concealments and continuing acts of negligence as toll the statute of limitation until appellee performed his duty of removing the foreign substance or appellant learned or should have learned of its presence."

The opinion also called attention to the fact that by its demurrer the appellee had admitted negligence. In the case at bar an answer was filed after the demurrer to the amended complaint had been overruled, hence the cause was tried on its merits rather than upon admissions of the demurrer.

Our conclusion is that there was sufficient evidence of appellant's failure to exercise appropriate diligence to ascertain why the patient's suffering continued, therefore the issues were properly presented to the jury. That the wire could have been found is attested by the fact that Dr. Jones discovered it without unusual difficulty, and it is fairly inferable that its existence would have been disclosed by X-ray.

Second—Claim of Immunity as an Institution of Charity.—We have held that agencies, trusts, etc., created and maintained exclusively for charity may not have their assets diminished by execution in favor of one injured by acts of persons charged with duties under the agency or trust. *Woman's Christian National Library Association* v. *Fordyce,* 79 Ark. 532, 86 S. W. 417, and *Fordyce* v. *Woman's Christian National Library Association,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S. 485. The last case was distinguished in *Morris* v. *Nowlin Lumber Co.,* 100 Ark. 253, 140 S. W. 1. The Library Association permitted a judgment to go against it on a claim predicated upon negligence of its trustees. The decision, written by Special Judge U. M. Rose, is that the Association's property could not be sold under the execution for the nonfeasance,

misfeasance, or malfeasance of its agents or trustees. A public charity is a public trust, "and is bound to apply its funds in furtherance of the charity, and not otherwise. . . . To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." 79 Ark. 550, 96 S. W. 160.

In *Arkansas Midland Railroad Co.* v. *Pearson,* 98 Ark. 399, 135 S. W. 917, 34 L. R. A., N. S. 317, we held for the appellant railroad company on the proposition that where it gratuitously assumed to collect and preserve a fund deducted from the salaries and wages of its employees and to provide hospital accommodations and medical attention for its injured personnel, without any profit or gain, such company would not be responsible for the negligence of physicians and surgeons employed at the hospital, provided it used ordinary care in their selection. On the other hand, it was stated that the railroad company was not conducting a charity, "for only those employes who had contributed the fees deducted from their wages for its maintenance were entitled to enter there for treatment, [and] . . . certainly the railroad company that assumed gratuitously to collect and preserve such funds and provide hospital accommodations and competent physicians and surgeons to operate it, without any profit or gain or hope thereof therefrom, should not be required to pay damages for such negligence or malpractice, it being no part of its business under its charter to maintain a hospital. At most it can only be considered a trustee for the proper administration and expenditure of such fund, and should be held only to ordinary care in the selection of competent and skillful physicians to administer relief and provide attention to sick and injured employees".

Crossett Health Center was created under authority of §§ 2252 to 2259 of Pope's Digest, now §§ 64-1301, *et seq.,* Ark. Stat's. The preamble to its articles of incorporation expresses interest of Crossett Lumber Company in the hospital and health facilities of Crossett and Ashley

county and the surrounding territory. The lumber company was willing to make substantial contributions toward the realization of these ends, having indicated that with the organization of a benevolent agency devoted to such objects it would donate lands for a hospital site and give to the organization "the present furnishings of its privately owned hospital in Crossett, together with a sum of money". It was "particularly provided" that the incorporated association should have and exercise the powers conferred by §§ 6 and 7 of the Act of February 3, 1875. These sections, copied here in a single paragraph, are: "Any such corporation shall have power to raise money in any manner agreed upon in its constitution or articles of association. . . . Such corporation shall have such powers of suing and being sued, buying, holding and selling property, real and personal, and of otherwise carrying out the purposes and objects of their organization as are possessed by other corporations and which may be necessary to their efficient management and the promotion of their purposes".

Judge Rose, at page 566 of the Arkansas Reports, (v-79) commented on the statutory authority for suit, drawing a distinction between the right to sue and the power to execute in satisfaction of the judgment.

The concluding sentence in § 2 of Art. 1 of the Charter is: "This Foundation and its hospital and other property shall not be operated for profit and no part of such net earnings as it may have shall ever inure to the benefit of any member, individual, partnership, association, or corporation".

Members originally named were E. C. Crossett, J. W. Watzek, Jr., and A. R. Watzek, "and those to whom they may assign said memberships; and in case of death of any member his or her membership shall pass to a person to be selected and designated by the remaining member or members". Assignment of membership is forbidden unless the assignee shall be approved "by the vote of the two other members". By supplemental proceedings January 23, 1951, § 1 of Art. 3 was amended.

In its original form the governing body, as distinguished from members or memberships, consisted of not less than five nor more than seven persons, including the three individuals currently holding membership in the Foundation. The amendment authorized a governing body of not less than seven nor more than fifteen, including the three members.

Article 4 relates to operation of the Foundation and is copied in the margin.[1]

Cases from other jurisdictions are divided respecting immunity of charitable and benevolent organizations from execution, the theory of those holding against execution being that the property is dedicated to a particular purpose and is therefore held in trust. In the Fordyce-Library Association case attention was called to four divergent theories announced by courts relative to liability: (1) Cases holding that the property of a charity can not be sold under execution; (2) cases construing charities unfavorably and assimilating them to private corporations organized for profit; (3) cases holding that trustees of a charity, though not answerable for the negligence of its agents, are liable for want of ordinary care in their selection of servants or employes, and (4) cases holding that on a judgment against a charitable organization the grounds and building of the defendant can not be sold under execution, but that any

[1] Art. IV, § 1. The Board of Governors shall adopt and from time to time revise rules and regulations in the matter of the conduct of the affairs of this Foundation and for admission to and the use of the facilities and services which it will offer in and through its hospital and/or other facilities, and shall adopt, and from time to time revise, a plan of operation providing for dues, fees, or assessment-paying subscribers and their rights as such subscribers and shall adopt and from time to time revise schedules of charges for services that it may render to such subscribers to its plan. It may also adopt and from time to time revise rules and regulations and schedule of charges for services it may render to non-subscribers to its plan and it may make arrangements for such of these as are unable to pay full charges. It may provide for the employment of or contract with doctors, nurses, attendants, and such other employees as in the judgment of the Board of Governors may be deemed necessary, meet and proper. The Board of Directors shall have full and unlimited authority to carry out the objects and purposes of this Foundation and to exercise any and all powers vested in this corporation in the establishment, construction, maintenance, and operation of said hospital and related and connected facilities.

of its unappropriated funds may be applied to the satisfaction of a judgment.

Court decisions rendered since 1906 vary somewhat in the application of reasoning, but generally the differences pointed to by Judge ROSE are the fundamental distinctions.

Arkansas Baptist College v. *Wilson,* 200 Ark. 1189, 138 S. W. 2d 376, was decided in 1940 under the Act of 1935. It was held that where the articles of association of a college conferred power upon trustees to acquire property, sue and be sued, and contract in the corporation's name, its personal property could be sold in satisfaction of a judgment on contract. By way of dictum the opinion says: "If this were an action to recover for the tort of the trustees, then appellants would be protected under the doctrine of *Fordyce* v. *Woman's Christian National Association*".

A review of all of the cases dealing with liability of a benevolent medical center for the torts of its agents would serve little purpose; nor does space permit us to summarize the so-called leading cases. In Arkansas we are committed to the rule that an organization maintained exclusively for charitable purposes will be protected against execution, in contradiction of the doctrine *respondeat superior.*

But the question arises, Is every organization that is created by proceedings appropriate to bring it, prima facie, within the purview of a benevolent entity for incorporation purposes a charitable institution in fact, intended for the public good to the exclusion of private interests, however meritorious such private ends may be?

In the case at bar appellee paid approximately $500 for the operation and hospitalization incidental to the transaction complained of, and more than $800 for the Louisiana operation and treatment. She was an employee of Crossett Paper Mill. The court sustained an objection to Mrs. Croswell's testimony regarding payments to the Health Center on the ground that the complaint did not ask recovery of that sum. We think, how-

ever, that the answer was competent on questions touching her status as a paying or charitable patient, inasmuch as a defense involves factual considerations.

Article 6 of the charter relates to dissolution or liquidation of the corporation. In that event the assets remaining after debts have been paid ". . . shall be distributed by the board of governors in any manner consistent with the laws of Arkansas".

The right to amend the articles of incorporation is reserved to members of the Foundation—the three incorporators.

Our conclusion is that the plan of organization—an admirable one in the circumstances and commendable from the standpoint of those who promoted the project—falls somewhat short of purely benevolent and charitable purposes essential to clothe its property with trust attributes. Crossett Lumber Company and the paper mill are enormous projects tremendously beneficial to the state. These vast operations necessarily require the employment of hundreds of men and women who are subject to the ordinary risks of industrial operations such as are carried on. If, like the library association in the Fordyce case, membership were required, thereby eliminating commercialized transactions; or if, like Pearson, against whom dues were assessed by Midland Railway for administration in trust,—in any case where the purpose is disassociated from considerations gainful to the promoters in point of convenience, operation, and employer-employee relationship, and where the original capital and earnings are dedicated to benevolence,—in such circumstances we would say that the trust assets cannot be diminished by execution.

But in the case at bar there are factors sufficient for the jury to find that the Medical Center was not a trust involving dedication of its property to the public. It is significant, however, that no instructions were requested by the defendant touching this issue. On the other hand Instruction No. 11 given at the defendant's request discloses the Center's theory: "Even though

you may find that the surgeon or the assistant surgeon failed to exercise the care required of either of them in the performance of either of the operations upon the plaintiff and that this caused the loose wire to be in the plaintiff's abdomen, nevertheless the plaintiff's cause of action would be barred by the statute of limitations unless you find from a preponderance of the evidence that the surgeon or assistant surgeon discovered, or in the exercise of ordinary care should have discovered, the presence of the said wire in the plaintiff's abdomen".

We think the factual issues were presented under correct instructions. Because we cannot agree with appellant that the cause was barred by limitation, or that evidence was sufficient to establish its immunity as a benevolent charity within the meaning of our statute and decisions, the judgment must be affirmed.

George Rose Smith, J., dissenting. I think the appellant's request for a directed verdict should have been granted, for the suit is barred by the statute of limitations. This is not a case in which the wrong to the plaintiff was fraudulently concealed, as there is no evidence that Dr. Cothern or any other agent of the hospital knew that a piece of wire had been left in the plaintiff's body. There could be no conscious concealment of a fact which was unknown to the defendants.

The court relies on *Burton* v. *Tribble,* where we held that, regardless of the physician's actual knowledge, he is under a duty to know whether a foreign object has been left in the wound, and on the basis of this imputed knowledge he is under a continuing duty to inform the patient of his carelessness. We distinguished a number of contrary holdings in other jurisdictions by pointing out that they were based on specific statutes requiring an action for malpractice to be brought within a certain period of time after the infliction of the injury. "But," we said, (in 189 Ark. 58, 70 S. W. 2d 505) "we have no such statute in this State."

That case was decided in 1934. At the next session of the legislature Act 135 of 1935 was adopted. Both that

Act and the present law provide: "The time of the accrual of the cause of action shall be date of the wrongful act complained of and no other time." In view of the specific language in the *Burton* case, which was undoubtedly known to the General Assembly, it is perfectly plain that the legislative intent was to change the rule of that case by supplying the omission that we had mentioned. There being no fraudulent concealment on the part of the appellant, it is our duty to give effect to the plain terms of the statute, however much we may doubt its wisdom. Holding this view, I express no opinion on the second point covered by the majority.

HOLT, J., joins in this dissent.

DAVIDSON *v.* RHEA.

4-9935 256 S. W. 2d 744

Opinion delivered April 6, 1953.

Eugene Coffelt, Hubert L. Burch and *Chester Leonard,* for appellant.

Price Dickson, Jeff Duty and *Rex W. Perkins,* for appellee.

BELOIT TAYLOR, Special Justice. In the general election for municipal offices held in Fayetteville, Arkansas,

a city of the first class, on November 6, 1951, only one name, that of the appellee, was printed on the official ballot as a candidate for mayor. One hundred seventy-seven (177) ballots were cast in the municipal election. Upon each of ninety-one (91) of the ballots there was written in, or attempt was made to write in, the name of Arthur B. Davidson, Arthur Davidson, A. B. Davidson, or some variant spelling of one or the other of said names. The writing in or attempt to write in was below the name of P. M. Rhea in the blank space provided on official ballots following the name of the nominees for each office, or was done by striking out the name of P. M. Rhea and substituting Davidson therefor. The remaining eighty-six (86) ballots were cast for P. M. Rhea for mayor.

The returns of the election officials in the several voting precincts contained a tabulation of the write-in votes for appellant Davidson; and on November 9, 1951, appellee filed suit in the Washington Circuit Court alleging illegality of ballots counted for appellant Davidson by the election officials, seeking to have the ballots impounded and to have the election commissioners enjoined and restrained from certifying appellant Davidson as the mayor-elect of Fayetteville. A temporary restraining order issued. Thereafter, a petition for a writ of prohibition was lodged in this court. That petition was by this court treated as *certiorari,* but inasmuch as there was involved the validity of an election, the proceedings theretofore had were ordered to be dealt with as an action in the nature of an election contest and the cause was remanded with direction to the trial court to determine "(a) for whom, in fact, the votes for Davidson, were intended to benefit; (b) whether any of the 174 votes was illegally cast; and (c) whether it was lawful for an elector to write in the name of a person in the blank space on the ballot provided for that purpose." See *Per Curiam* order of this Court in *Davidson* v. *Cummings, Judge,* of Nov. 26, 1951.

Pursuant to that mandate of this court such proceedings were had. The court found, *inter alia,* that (1)

but for § 1 of Act 105 of 1935, seventy-eight (78) of the otherwise valid votes in the mayor's race should be counted for A. B. Davidson and seventy-nine (79) for P. M. Rhea; but (2) that said Act 105 of 1935 prohibiting "write-in" ballots in municipal elections in cities of the first class was and is constitutional and was and is in force and effect, not having been repealed by Act 353 of 1949. From the court's order and judgment declaring the appellee the legally elected mayor of the City of Fayetteville as a result of the aforementioned election, there is this appeal.

Appellants, in support of their appeal, urge reversal on the grounds (1) that the court erred in counting certain votes which they allege were illegally cast for appellee Rhea; (2) that the court erred in invalidating certain votes which they contend were legally cast for appellant Davidson, (3) and that the court erred in declaring that "write-in" votes were illegal in cities of the first class.

If it be found that the trial court correctly declared all write-in ballots illegal, then such finding is dispositive of this appeal. Accordingly, we shall consider whether § 1 of Act 105 of 1935, appearing as § 19-1001 Arkansas Statutes, 1947, is constitutional and, if so, whether it is repealed by § 9 of Act 353 of 1949 appearing in the Cumulative Pocket Supplement to Arkansas Statutes 1947 as § 3-826. The 1935 enactment under examination reads as follows:

"In all general elections held in cities of the first class for the election of officials of said cities of the first class no ballots shall be counted for any person whose name is written in thereon, and only votes cast for the regularly nominated and/or otherwise qualified candidates and whose names are printed on the ballot as candidates in such election in cities of the first class shall by the judges and clerks be counted."[1]

[1] Senate Bill No. 330 passed by both houses of the 1953 Legislature and vetoed by the Governor applied not only to cities of the first class, but as well to cities of the second class and incorporated towns in which there is little if any likelihood that an organized "write in" campaign could be resorted to with such secrecy as to take advantage of the unsuspecting and therefore non-voting electorate.

It is contended by appellant that this section is in conflict with Art. 3, § 2, of the Constitution of Arkansas, adopted September 7, 1874, which provides:

"*Elections shall be free and equal.* No power, civil or military, shall ever interfere to prevent free exercise of the right of suffrage; or shall any law be enacted whereby the right to vote at any election shall be made to depend upon any previous registration of the elector's name; or whereby such right shall be impaired or forfeited, except for commission of a felony at common law, upon lawful conviction thereof."[2]

As background for subsequent discussion we quote with approval from *Jones* v. *Smith,* 165 Ark. 425, 264 S. W. 950, the following: "The Constitution does not specify the method of conducting an election, except that the election shall be by ballot, that the election officers shall be sworn not to disclose how any elector shall have voted, except when required to do so in a judicial proceeding, and that each ballot 'shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters opposite the name of the elector who presents the ballot.' Art. 3, § 3. Aside from those constitutional restrictions, the Legislature has power to devise the method for conducting an election, and to provide for election officers charged with the duty of complying with the constitutional requirements, . . ." and from *John Oughton, et al.* v. *Hugh Black, et al.,* 212 Pa. St. 1, 61 Atl. 346, where the court in considering the "free and equal" election provision of the Constitution of the State of Pennsylvania, stated: "By declaring that elections shall be free and equal the constitutional guaranty is not only that 'the voter shall not be physically restrained in the exercise of his right by either civil or military authority,' *Com.* v. *Reeder,* 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141; but it is that by no intimidation, threat, improper influence, or coercion of any kind shall the right be interfered with. The test of the constitutional freedom of elections is the

[2] Amendments No. 8 and No. 39 are germane to this section but not here involved.

freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience as he may have had it properly enlightened. . . . Each individual voter as he enters the booth is given an opportunity to freely express his will with no one by him to influence or intimidate him, and from the face of the ballot he is instructed how to mark it. . . . This is the right given to every elector, and, therefore, is an equal one."

There is not unanimity of opinion upon the question of the constitutionality of an act such as is here in question and, while there are authorities adopting the opposite view, we are disposed to adopt the reasoning of the Supreme Court of South Dakota in the often cited case of *Chamberlain* v. *Wood,* 15 S. Dak. 216, 88 N. W. 109, 56 L. R. A. 187, in which the court stated: "The constitutional convention and the legislature are equally the representatives of the people, and the written constitution marks only the degree of restraint which, to promote stable government, the people impose upon themselves; but whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. The legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution: *Commonwealth* v. *Reeder,* 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141. Unless, therefore, the legislature is inhibited from enacting the law we are considering, it is as much the will of the people as though expressed in the constitution. Let us ask, therefore, what provision is there in the constitution inhibiting the lawmaking power from providing when, how, and under what regulations and conditions the elector may exercise the right of suffrage. The constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right; nor has it inhibited the legislature from prescribing such rules, regulations, and conditions as it might deem proper and for the public interests. The law-making power has taken the elector at the point where the constitution has left him, and has provided

when, in what manner, and under what restrictions he may exercise the right of suffrage, and in so doing has provided: 1. That he must exercise that right by using an official ballot; 2. That he must designate in the manner specified his choice of candidates whose names are upon the official ballot, and whose names can only be placed there by a compliance with the law; 3. It has, in effect, denied to the elector the right to write the name of a candidate for whom he desires to vote upon the official ballot, or otherwise deface the same, . . . The law, in form, applies equally to all electors without discrimination, and one elector, therefore, possesses all of the rights, and no more of every other elector. The legislature therefore, having in effect limited the right of the elector to voting for candidates whose names are printed on the official ballots, he can only exercise the right in the manner prescribed. But the elector is not thereby necessarily deprived of the right of suffrage, as he has the same right as any other elector to secure the printing of the name of his candidate upon the official ballot in the manner prescribed by law—namely, by nomination of some political party, or by securing the signatures of twenty electors, in the case of a county office, to a certificate. This may occasion the elector some inconvenience and labor, but these constitute no objection to the law."

In the same vein is the case of *State ex rel. Phelan* v. *Walsh,* 62 Conn. 260, 25 A. 1, 17 L. R. A. 364, in which the court upheld a statute which in effect prohibited the writing of the name of another person in pencil or the use of a sticker to substitute the name of another for the printed name of a candidate on the ballot.

Appellant impliedly suggests but does not seriously urge possible conflict between the statute under consideration and Art. 3, § 1, of our Constitution. It is our opinion that this contention is completely answered and swept away by the reasoning of the line of cases to which *Chamberlain* v. *Wood, supra,* and *State ex rel. Phelan* v. *Walsh* belong and which it is our decision to follow. In Louisiana, where the Constitution of 1879 did not

contain the usual "free and equal" election provision but did have a provision of like effect, as Art. 3, § 1, of our Constitution, the Supreme Court of that State had no difficulty in upholding a statute providing: "That all the names of persons voted for shall be printed on one ticket or ballot of white paper of uniform size and quality to be furnished by the Secretary of State." *State ex rel. Mize* v. *McElroy,* 44 La. Ann. 796, 11 So. 133, 16 L. R. A. 278.

It is our conclusion that § 1 of Act 105 of 1935 stands the test of constitutionality and, having so concluded, we turn next to the question of whether it was repealed by Act 353 of 1949.

Appellant contends that the whole field of election laws has been considered and is embodied in the 1949 enactment which he refers to as "The Election Code of Arkansas" and that as a consequence the prior statute of 1935 is repealed. In our opinion, the whole subject matter to which the 1949 act relates was the form and marking of the ballot. The title of that act, instead of being "The Election Code of Arkansas," as appellant apparently believes and would have this court believe, is "An Act to Prescribe the Form of Ballots for all Elections, to Prescribe the Method of Marking Ballots, and for Other Purposes."[3]

Section 9 of the act provides: "In all elections, except Primary Elections, at the bottom of each list of names for each position or office appearing on the ballot there shall be a blank line, or lines, for possible write-in votes for that position or office. There shall be no write-in votes in Primary Elections." According to our interpretation "for possible write-in votes" means for use to write in the name of a person whose name is not on the ballot if in the particular election in which the voter seeks to cast his vote it is possible—"possible" meaning permissible under the regulations legally ap-

[3] "The Election Code of Arkansas," containing 387 sections and covering 115 pages, was offered by bills in both houses of the Legislature in the 1949 session—Senate Bill 312 and House Bill 414. Neither passed either house.

plicable to such election. This section does not confer on the voter any right to vote by writing in the name of one whose name does not appear on the ballot. It only recognizes that that right presently exists or may at some future time exist in some elections other than Primary Elections. If the Legislature had intended to provide for write-in voting in all elections it could have done so by simple language such as used in § 3-913, Arkansas Statutes, 1947. If it had so intended, instead of the phrase "for possible write-in votes" the Legislature would have resorted to direct simple language such as used in § 3-913, Arkansas Statutes, 1947, and said "upon which the voter may *write the name of any person for whom he may wish to vote whose name is not printed on the ballot where he would have it or not printed on the ballot at all*" or words of unequivocal meaning to that same effect. (The italicized words are those of § 3-913.)

This court in the case of *Wilburn* v. *Moon,* 202 Ark. 899, 154 S. W. 2d 7, held that write-in votes were legal in Primary Elections. The Legislature by this 1949 enactment specifically states that "There shall be no write-in votes in Primary Elections." It would appear paradoxical to conclude that by the last ten words of one sentence ("for possible write-in votes for that position or office") the Legislature intended by inference to permit write-in voting in all General Elections thereby increasing the field in which write-in ballots were legal when in the next sentence ("There shall be no write-in votes in Primary Elections") it so directly, succinctly and unequivocally prohibits "write-in" voting in Primary Elections. The weakness of appellant's argument is most manifest when, as is common knowledge, in off year elections, especially in the absence of interest in some issue on the ballot as distinguished from the selection of officials, there are many times more votes cast at the Primaries in which nominees on the ballot are usually selected than there are votes cast at the General Election. In view of *Adams* v. *Whittaker,* 210 Ark. 298, 195 S. W. 2d 634, and *Fisher* v. *Taylor,* 210 Ark. 380, 196

S. W. 2d 217, this court cannot consider General Elections as expressive of the will of the electorate to the exclusion of the expression resulting from our Primary Elections.

We arrive at the inescapable conclusion that the Legislature intended, as the title states, "to prescribe the form of ballot," and through uniformity avoid confusion in the preparation of ballots in the several types of elections and to provide lines so that the voter could without difficulty write in names in such elections as "write-ins" were legal. Our interpretation permits both statutes to stand, which is as it should be. *Faver* v. *Golden, Judge,* 216 Ark. 792, 227 S. W. 2d 453.

It follows that the judgment of the court below is affirmed.

GRIFFIN SMITH, Chief Justice, and HOLT, J., dissent.

NEILL *v.* NEILL.

5-49 257 S. W. 2d 26

Opinion delivered April 6, 1953.

Rehearing denied May 11, 1953.

A. A. Thomason and *Henry B. Whitley,* for appellant.

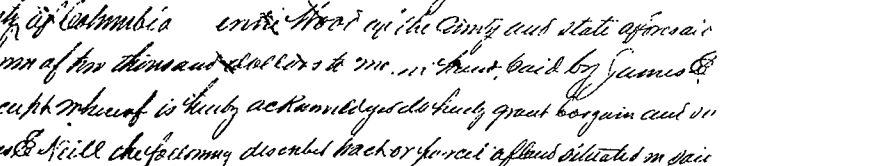
Harry Crumpler and *W. A. Eckert, Jr.,* for appellee.

Griffin Smith, Chief Justice. Appellants, who were plaintiffs below, sought to have a trust declared in respect of 320 acres formerly owned by James E. Neill, who died intestate in 1901, leaving a widow and ten children, one of whom was J. A. Neill who became a well-known physician and surgeon. Dr. Neill was the oldest child and had been practicing his profession about eighteen months when his father died. James E. Neill's widow died in 1906. Six of the ten children were living when this suit was brought. Four were minors when their father died. Before taking medical courses Dr. Neill attended Hendrix College and Draughon's Business College. He became a stockholder in Bienville Lumber Company and was physician and surgeon for that organization, with headquarters at Laberta, La.

Shortly after James E. Neill died one of his sons, W. B., or "Bert" Neill, was made administrator of the estate, the purpose—as expressed by a sister who was a plaintiff in this action—being to collect and distribute insurance amounting to $800. There are frequent references to a contention that W. B. filed but one report and that the administration has not been closed. The controversy does not involve the insurance money or other personal property; nor does it question disposition of a separate tract of 120 acres owned by James E. Neill, and a lot in the town of Waldo.

Controversial Issues.—The land embracing 320 acres was purchased by appellants' ancestor in 1873. At that time the St. Louis Southwestern Railway had not been

built through Columbia county and the town of Waldo did not exist. The acreage acquired by James E. Neill, however, is near Waldo. The amount paid for the acreage is a matter of dispute. In copying the deed record the clerk thought the consideration was $10,000, but by agreement a photostatic copy has been brought up—the original deed having been lost. The work is typical of the care exercised by skilled penmen of that period; and, although the written word might be mistaken for "ten", we feel certain that "two" was intended. The letter following t does not resemble an e, as will be seen from the inset plate.



Through January, 1909, and until September 26, 1913, Dr. Neill procured deeds from eight of his brothers and sisters, each of whom was of full age when the deed was executed. The amounts ranged from $912.82 paid W. B. Neill to a low of $600 to four others. One was paid $623.33, another $700, and another $800. In procuring some of the deeds Dr. Neill called personally; other deeds were sent by mail and so returned. The total paid for eight of the ten shares was $5,436.15. There was testimony that in one or two instances some of the money was withheld to be paid to another, but no contention is made that this was contrary to wishes of the parties. There was testimony that Dr. Neill sold or permitted to be sold $2,000 worth of timber from the place.

Dr. Neill did not acquire the interest one of his sisters would have inherited had she not predeceased her father. She left two children. Their guardian petitioned for partition and in consequence of a settlement the children received the separate tract of 120 acres heretofore referred to.

About 1915 the Bienville Lumber Company moved to Mississippi and Dr. Neill went along, residing at Forest. He died Sept. 4, 1942, survived by his widow. The following April W. B. Neill bought the land (less half the minerals) from Dr. Neill's widow and children, paying $20 per acre, or $6,400. For a number of years Dr. Neill experienced nervous attacks and at times was unable to attend to business, although a deposition by one of his attorneys spoke of the affliction as intermittent. The attorney said that prior to the nervous seizures Dr. Neill was a highly intellectual—even brilliant—man, and that he had the full confidence of all who knew him. His death is referred to as having occurred "on the Bahama Islands". He was adjudged incompetent in 1931, and again in 1939.

W. B. Neill testified that he remained on the farm for a long time after his father died, took general control, helped rear the younger children, and permitted them to buy anything reasonable and charge the amount to his account. This continued until he married and it became apparent that the arrangement could not continue indefinitely. One of the brothers, "Ed", refused to help with farming operations and there was general dissatisfaction on that account. After marrying W. B. moved "to town", but told his mother and a sister they were welcome to live with him as long as they wanted to.—"Ed was old enough and big enough to take care of himself. I had looked after him for four years, so I thought he should take care of himself". But his mother and a sister went to live with Mrs. Fincher, one of the girls who had married. After four months, according to W. B., Mrs. Fincher got tired of her mother "and threw her things out and sent her to my house to die".

This arrangement continued during the brief remaining period of Mrs. Neill's lifetime. Dr. Neill (according to W. B.'s testimony) concluded that this brother had faithfully discharged his obligations and that from a credit standpoint matters stood in W. B.'s favor. The Doctor thereupon suggested that W. B. return to the farm and operate it for a few years, rent-free. Dr. Neill paid the taxes. Before Dr. Neill bought the several interests Mrs. Fincher was dissatisfied. She insisted that the property be divided, but wanted 32 acres (a tenth) "right up here nearly to town". Dr. Neill offered her ten acres. When Mrs. Fincher failed to get the full acreage she began trying to sell her interest. It was then, according to W. B., that Dr. Neill concluded to buy the outstanding shares, the purpose being to keep the property intact. Mrs. Fincher's version of this transaction was that she begged for ten acres "as my part of the 320-acre estate".

If the Chancellor, or we, could accept Mrs. Fincher's version of why the various brothers and sisters sold to Dr. Neill the situation would resolve itself into one wherein the dominant brother—the older member of the family whom all others had been taught to "look up to" and obey with implicit faith, bought the individual shares with no idea of personal profit and with complete disregard concerning recoupment of the money thus expended. The Doctor's plan, according to Mrs. Fincher and those who supported her testimony, was to acquire the estate, keep it in repair, pay taxes, and depend upon rentals for reimbursement; then, as a final gesture to family loyalty and affection, he would will the property to each interest-holder. Her brother did not, in so many words, say that he was holding the property in trust, or that he intended to keep a promise made to his father—that the land would be retained intact for all of the children,—"but all through the years he said things that would indicate he had nothing else in mind".

Mrs. Fincher was questioned regarding a lease executed by Dr. Neill's widow and children conveying an undivided fourth interest in minerals pertaining to

the 320-acre tract. This lease was in the name of Lester A. Fincher as trustee. Mrs. Fincher strongly asserted that she had been "double-crossed" by her son and others; that as soon as she ascertained what had occurred she demanded that the title be "put back in L. E. Fincher's name".

Before W. B. concluded his purchase Mrs. Fincher had undertaken to buy the land from Dr. Neill's widow and children, and at one time the widow had agreed to sell to her. In explaining why she attempted to purchase the property at a time when she was claiming an undivided interest in trust, Mrs. Fincher said that her trip to Mississippi was in response to a letter from Mrs. Neill. She did not tell the Doctor's wife that her purpose was to acquire the property for the benefit of herself and her brothers, sisters, nieces and nephews:—"I didn't think about it and didn't see where it was necessary". Oil and gas royalties were at one time selling for $50 per acre. Mrs. Fincher had not tendered mineral or royalty deeds to others she now says were owners of the land, but she was "looking after their interests".

Further testifying, W. B. said that he had given three of his five children small homesite tracts and had sold other parts of the property to them. These children had built homes on the lands. Of the original 320 acres, 66 were undisposed of.

Not all of the descendants of the common ancestor joined in demanding distribution. Mrs. John P. Cox, James E. Neill's daughter and therefore W. B.'s sister, wrote from Hope that she unequivocally sold her interest to Dr. Neill. The transaction was voluntary, and "there was no expectation whatsoever that my part of the J. E. Neill estate would ever be reconveyed to me". In another letter she said: "I do not own any part of that land; and furthermore I do not think it right to bring suit against my brother Bert. . . . I refuse to go to court or be a party to defeating [my brother's claim]".

The complaint was filed March 20, 1950—more than 36 years after the last of the eight deeds was executed

and 43 years after delivery of the first. It is urged that Dr. Neill's nervous condition was of such a nature that those presently claiming or their predecessors were reluctant to discuss business with him for fear of adding irritation to an existing illness. There is evidence, however, that the Doctor was employed by the Lumber Company during the greater portion of this time, and it is inferable that after the first adjudication of insanity in 1931 and before the second commitment in 1939 he had lucid intervals. The Doctor was represented by competent counsel, including Hon. Percy M. Lee, now a distinguished member of the Mississippi Supreme Court.

It is convincingly shown that Dr. Neill did not leave a will, and it is equally clear that his course of conduct was one dominated by a desire to deal fairly with his brothers and sisters. That he should have intended to will the home place to those from whom he purchased is not inconceivable, but if this purpose actuated his conduct in procuring the deeds his failure to leave some memorandum expressive of that intent is contrary to life habits, methodical training, and a course of fair dealings.

Mrs. Fincher, quite obviously, was in a sense the agent of other members of the family in provoking the litigation. The testimony of most of those associated with her is of a pattern conforming to her theory that an implied, constructive, or resulting trust came into being with assurances by Dr. Neill that the overall purpose in procuring deeds was to keep the farm intact and return it to his brothers and sisters or their heirs when his own course had been run.

The Chancellor's views were that the amounts paid to the various grantors were substantial. In the short opinion there is no suggestion that the trial court believed the payments to have been inadequate or that they were made in circumstances leading a reasonable person to believe that the transactions were other than buy and sell on unconditional bases. The rule is that implied, constructive, or resulting trusts must be established by clear and convincing evidence—something more than a preponderance. *Barger* v. *Baker,* 218 Ark. 457, 237 S. W.

2d 37. The case cites *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793, where it was said that the evidence must be "full, free and convincing".

Tested by this rule the Chancellor correctly dismissed the cause for want of equity.

Affirmed.

SMITH, ADMINISTRATOR *v.* RUDOLPH, ADMINISTRATOR.

5-61 256 S. W. 2d 736

Opinion delivered April 6, 1953.

Rehearing denied May 4, 1953.

O. W. (Pete) Wiggins and *Melbourne M. Martin,* for appellant.

Quinn Glover and *Rose, Meek, House, Barron & Nash,* for appellee.

J. SEABORN HOLT, J. Mary Elizabeth Smith and Lilburne C. Smith were married December 4, 1950. A

decree of divorce was granted to Mary Elizabeth in Pulaski County (their residence at the time) January 29, 1952, and also the care and custody of their only child (a little girl) Janet Elizabeth, who was about three and one-half months old. February 14, 1952, Mary Elizabeth and her mother left Gurdon for Arkadelphia (Clark County), in an automobile owned by F. H. Rudolph (Mary Elizabeth's father) and on the way, another car going in the opposite direction, collided with the Rudolph car, killing Mary Elizabeth and seriously and permanently injuring her mother.

March 25, 1952, on an unverified petition of appellant alleging that Mary Elizabeth, at the time of her death, was a resident of Pulaski County, the Pulaski Probate Court appointed appellant administrator of her estate and at the same time approved a contract of employment entered into between appellant and his attorneys. Thereafter, on April 4, 1952, appellee, F. H. Rudolph, in a verified petition, applied for letters of administration in the Clark Probate Court on the estate of his daughter, Mary Elizabeth, alleging that, at the time of her death, she was a resident of Gurdon in Clark County. The Clark Probate Court granted his petition and appointed him administrator.

April 9, 1952, appellee, F. H. Rudolph, intervened in the Pulaski Probate Court proceedings asking that the order above appointing appellant, Lilburne C. Smith, administrator, be vacated and set aside for the reason that, at the time of her death, Mary Elizabeth was a resident of Gurdon, Clark County, and that the Pulaski Probate Court was without jurisdiction.

Upon a hearing, the Pulaski Probate Court held that at the time of Mary Elizabeth's death, she was not a resident of Pulaski County, but in fact a resident of Clark County and that the Pulaski Probate Court was without jurisdiction to appoint appellant administrator. Accordingly, the Court voided its previous order of March 25, 1952, and also voided the attorneys' contract. This appeal followed.

As we view this record, the primary and decisive question presented is that of jurisdiction, which depends on the residence of Mary Elizabeth at the time of her death.

Section 62-2102, Ark. Stats. 1947, a. (1) provides: "The venue . . . for administration shall be: (1) In the county in this state where the decedent resided at the time of his death." Therefore, if Mary Elizabeth were in fact a resident of Clark County at the time of her death, then the administrator of her estate must be appointed in Clark County. The probate court of any other county would have no jurisdiction other than ancillary. The above provision of the statute is mandatory. *Shelton* v. *Shelton,* 180 Ark. 959, 23 S. W. 2d 629, and *Watson* v. *Lester,* 182 Ark. 386, 31 S. W. 2d 955.

Here, the Pulaski Probate Court, on a direct attack by appellee (Rudolph) on its jurisdiction, found that Mary Elizabeth was a resident of Clark County at the time of her death and that the Clark Probate Court was the only court having jurisdiction.

We have concluded that the preponderance of the testimony is not against the court's finding and judgment.

The evidence shows that at the time that Mary Elizabeth procured her divorce decree, her father sent a truck to Little Rock for her possessions and a car for her. She immediately removed everything she possessed to her father's home in Gurdon, where she lived until her death. Mary Elizabeth's aunt, Miss Edna Rudolph, testified that when Mary Elizabeth left Little Rock she told her she was going to reside with her parents. Mrs. Bates of Morrilton testified Mary Elizabeth told her in a letter that she was going to live with her parents. Mrs. Keyes of Gurdon, a former schoolmate of Mary Elizabeth, and Mrs. Jean H. Rudolph, an aunt, tended to corroborate the above testimony. Mary Elizabeth's Income Tax Return, filed January 21, 1952, gave her home address as "c/o F. H. Rudolph, Gurdon, Arkansas." In an application for "Federal Employment" about January 17, 1952, Mary Elizabeth gave her address as "care

of F. H. Rudolph, Gurdon, Arkansas," and expressed her desire for employment at "Camp Chaffee, Arkansas." She gave as a reason for wanting employment "necessary to support self and daughter," and in answer to the question: "If you will accept appointment in certain locations only, give acceptable locations," she wrote: "In State of Arkansas outside Pulaski County."

Residence being a matter of intention, we hold, as indicated, that the preponderance of the testimony is not against the court's finding that Mary Elizabeth was a resident of Clark County at the time of her death.

But, says appellant, F. H. Rudolph, Mary Elizabeth's father was a disinterested party and disqualified to act as administrator of his daughter's estate. We do not agree. Section 62-2201, Ark. Stats. 1947, a. enumerates all persons qualified to serve as an administrator under four subdivisions, No. (4) providing: "To any other qualified person." Div. b. enumerates in six subdivisions: "All persons who are disqualified to serve" and appellee, we hold, does not fall within any of the disqualifications. We hold that appellee here, in the circumstances, is qualified to serve as administrator in the Clark Probate Court under a. (4) above. It follows, therefore, that, as a legally appointed administrator, it is his duty, in his official capacity, to assemble all assets of his daughter's estate, institute any and all litigation for the benefit of such estate, and administer thereon as the law directs.

Affirmed.

Justice George Rose Smith not participating.

Chicago Mill & Lumber Company *v.* Fulcher.

4-9934 256 S. W. 2d 723

Opinion delivered April 6, 1953.

Daggett & Daggett, for appellant.

Dinning & Dinning, for appellee.

JESSE TAYLOR, Special Justice. Wiley Fulcher was in the employ of Chicago Mill & Lumber Company on November 20, 1947, on which date Fulcher sustained an accidental injury arising out of and during the course of his employment. At the time of his injury Fulcher was 58 or 59 years of age. He had worked for the Chicago Mill & Lumber Company for about thirteen years and had lost no time from work because of illness. Fulcher was injured when a load of lumber slipped off the loading jack and hit his right leg causing a large laceration just above the ankle. He was treated by Dr. George R. Storm, of Helena, Arkansas, from the date of the injury until April 18 or 19, 1948, when Dr. Storm released Fulcher as cured and able to return to work. Fulcher returned to work immediately and worked until May 18, 1948. He returned for further treatment of his leg by Dr. Storm on May 15, 1948, at which time there had developed an ulcer (sometimes referred to in the testimony as a running sore) at the point of the original injury and the foot and part of the ankle were swollen. Fulcher was treated by Dr. Storm from May 15, 1948, to May 4, 1949, when Fulcher's right leg was amputated below the knee. The leg refused to heal, then on August 22, 1949, Fulcher's leg was amputated between the knee

and the hip and then on September 14, 1949, he was released from further treatment.

Fulcher was paid compensation through May 6, 1949, and his medical and hospital bills through May 6, 1949, have been paid by Chicago Mill & Lumber Company. The average weekly wage of Fulcher and the rate of compensation payment is not in dispute. On May 6, 1949, Chicago Mill & Lumber Company (hereinafter referred to as appellant) ceased paying compensation. Appellant contended there was no causal connection between the original injury and the amputations.

After the testimony of the injured Fulcher and the testimony of six doctors and having before it the hospital records the Workmen's Compensation Commission found against Fulcher and denied his claim. Upon appeal to the Circuit Court that court reversed the Commission and found for Fulcher. We are asked by the appellant to reverse the Circuit Court and to sustain the finding of the Commission.

Our Court has said that the Compensation Commission's duty on conflicting evidence is to answer factual questions and to base its decision upon a fair preponderance of the evidence and having done this an award or rejection will not be judicially nullified if on appeal substantial testimony in favor of the determination is found. *Stout Lumber Co.* v. *Wells,* 214 Ark. 741, 217 S. W. 2d 841.

Further, upon appeal we must weigh the testimony in its strongest light in favor of the Commission's finding. *Sherwin-Williams Company* v. *Yeager,* 219 Ark. 20, 239 S. W. 2d 1019.

Findings of fact of Workmen's Compensation Commission must be given the same effect as a verdict of a jury, hence Circuit Court and the Supreme Court on appeal will not set aside Commission's finding based upon substantial evidence. *Fordyce Lumber Co.* v. *Shelton,* 206 Ark. 1134, 179 S. W. 2d 464.

The finding of the Commission was that there was no causal connection between the claimant's injury on

November 20, 1947, and the amputations of his right leg in May and in August, 1949. The question before this court is whether or not there was substantial evidence in the record to support the finding of the Commission.

Fulcher testified as to the date, time and nature of his injury, which are not in dispute. He had worked for the Chicago Mill & Lumber Company about thirteen years; had lost no time because of illness prior to the injury; he did not know that he was suffering from high blood pressure or hardening of the arteries; his left leg had never given him any trouble; the injury to his right leg was about two or three inches above his ankle on both the outside and inner-side of his leg.

Dr. George R. Storm testified as follows: He first treated Fulcher for his injury on November 21, 1949, the injury being a laceration five or six inches long on his lower right leg above the ankle; that he treated him twice in November, 1947, twelve times in December, 1947, eight times in January, 1948, eight times in February, seven times in March, five times in April and on or about the 18th of April he released him to return to work when the wound was completely healed; he next saw Fulcher on May 15, 1948, when his right foot and lower leg had an ulcer about an inch long and a quarter of an inch wide. He was then treated with bed rest and hot applications and improvement was shown to a time just prior to the amputation, when it would not respond to treatment; the ulceration came back across the foot, his second and third toes turned black and he developed gangrene; that there was no connection between the original injury and the ulcer; that the claimant's lower right leg had become green and the gangrenous condition resulted from high blood pressure and arteriosclerosis.

He stated that Fulcher had hardening of the arteries (arteriosclerosis) and high blood pressure which resulted in a decrease of blood supply in the extremity of his leg and that, in turn, brought on the gangrenous condition which necessitated amputation; that there was no connection between the ulcer and the original wound; that

the first amputation below the knee was at the request of Fulcher although Dr. Storm wished to amputate *above* the knee, that the first operation did not relieve the gangrenous condition but that the second one did. Dr. Storm further testified there are two sorts of gangrene—wet and dry. Wet gangrene shows trauma within 24 hours to a week; dry gangrene is a slow process—a drying up of the tissues because of decreased blood supply. Gangrene resulting from an old sore would occur at the site of the sore. In this case the gangrene causing the operation was on the foot and extended up the leg; there was no causal connection between the injury of November 20, 1947, and the gangrenous condition of May, 1949; the gangrenous condition which necessitated the amputations resulted solely from a condition of high blood pressure and arteriosclerosis.

Dr. C. P. McCarty testified that he examined Fulcher at the request of Dr. Storm in May, 1949, at which time he found Fulcher had gangrene in the foot and a marked condition of arteriosclerosis and high blood pressure and the patient would have died if it had not been for the amputation. He states that after the first amputation the tissues below the knee did not have a proper blood supply and did not heal, that the second amputation was above the knee where there was a greater supply of blood and after the amputation the leg healed. He stated that the injury was on the outside of the right lower leg and would not have affected the blood supply above the knee nor below the knee and that the gangrene resulted from an occlusion or stoppage of the blood supply. In his opinion the injury of November 20, 1947, was not a causative factor in the amputations caused by gangrene. He says that when he examined Fulcher before the amputation, gangrene was evident in the toes and that the ulcerated condition on the ankle was not gangrenous. He further states if gangrene had resulted from the injury or the ulcer it would have been wet gangrene and would have developed immediately, not fourteen months after the injury.

Dr. Frank M. McAdams also testified in behalf of the appellant and stated that in practice and in experience he had seen cases of gangrene caused by arteriosclerosis in older people where there was no injury at all; he further stated that arteriosclerosis may involve one part of the body only; a person could have one good leg and one bad one, and that blood vessel disease only might result in gangrene at the foot or leg, that ulceration is usually the first sign of gangrene. He stated that traumatic injury was not the cause of gangrene in this case, that an insufficient blood supply to keep tissues below the knee alive explains the gangrene and necessitated the amputation; that an injury to the lower leg would not affect the blood supply above the site of the injury and that for gangrene to occur secondary to an injury it would be necessary for the large blood vessel to be completely severed or occluded from such an injury; in his experience in Wade's Clinic at Hot Springs he knows of at least a dozen patients who have had amputations of the leg due to arteriosclerosis without history of any previous injury to the leg. He stated that no living person can look at a man whose leg has been amputated and tell why it had to be cut off.

It will be noted that Dr. Storm, Dr. McCarty and Dr. McAdams all testified before the Workmen's Compensation Commission and were cross-examined by members of the Commission.

On behalf of the claimant Dr. William A. Ellis first testified that he had never known gangrene to develop from arteriosclerosis; that gangrene developed because of loss of circulation to tissues; that the condition of arteries had nothing to do with it, and gangrene would not have developed but for the original wound. In his opinion there was a festering sore, together with the impairment of the circulatory system, that caused the gangrene and he was more inclined to think the injury interrupted the blood supply and that arteriosclerosis had not progressed to last stages when he examined the claimant.

Dr. Allen E. Cox testified that he has spent 56 years in the practice of medicine, is surgeon for the Illinois Central Railroad and Missouri-Pacific Railroad and has been a member of the medical association for 50 years and has treated arteriosclerosis for which there is no known cure, its natural course being to grow progressively worse from year to year. He stated extreme cases of arteriosclerosis develop into gangrene from stoppage of blood in the arteries; stated if flesh becomes infected or an ulcer forms that would interfere with the flow of blood to that part, and that a wound in that part of the body (lower leg) would be more difficult to heal. Stated that gangrene developed when blood supply was shut off and if it had not been for the original wound the gangrene would not have developed. He also stated that trauma is the most frequent cause of gangrene and that in his opinion both arteriosclerosis and the wound were factors in the gangrene and he further stated that unless both factors were present it is to be doubted that gangrene would have developed; he said Fulcher could have had gangrene irrespective of the wound. Asked if as a result of the 42 treatments Dr. Storm discharged the patient on April 17, 1948, pronouncing the trauma of November, 1947, as completely healed, he would be inclined to agree with Dr. Storm's diagnosis he stated he would. Asked, "If in June, 1949, Drs. Storm and McCarty performed an amputation on the patient's leg at a point four or five inches below the knee and thereafter found it necessary to perform a second operation, amputating at a point above the knee, based upon their findings and their treatment of the claimant subsequent to the first amputation for the reason that the blood supply down to the point of the original amputation was failing to allow the stump to heal, and that a gangrenous condition was beginning to appear in the leg down to the point of the original amputation, you would be inclined to agree with Drs. Storm and McCarty that those operations were not due to the original trauma, wouldn't you?", he answered that he would be inclined to agree with them and he further stated that the injury at a point

two inches above the ankle could not have affected the blood supply in the upper portion of the leg.

Dr. J. W. Nicholls testifying in behalf of the complainant stated he had not seen the claimant prior to the amputation. He stated that he had never heard of arteriosclerosis causing gangrene and that improper circulation caused the muscles to dry for lack of blood to feed the muscles and that it could be caused by traumatism, but further stated that one don't have insufficient blood to a part from arteriosclerosis. He also stated that a chronic ulcer can heal without much circulation, and get gangrenous and that arteriosclerosis will not cause the swelling of a leg. He further stated that with high blood pressure and arteriosclerosis no one portion of the body is more adversely affected than the other and that the disease of arteriosclerosis progresses sometimes rapidly and sometimes slowly. He said hypertension and high blood pressure are synonymous and arteriosclerosis and hypertension are also synonymous. He further stated that the cause of the first amputation in healing was lack of a supply of blood in the capillaries at the site of the amputation and that deficiency was caused by gangrene.

Of the six doctors who testified only Dr. Storm was acquainted with the injury from its inception. Dr. C. P. McCarty was called in by Dr. Storm before the amputation and made an examination of the claimant before the amputation. Dr. McAdams, Dr. Ellis, Dr. Cox and Dr. Nicholls had not examined or observed the claimant prior to the amputation.

In *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82, this court held that the Circuit Court did not have the legal right, upon an appeal from a finding of fact made by the Workmen's Compensation Commission, to set aside such finding of fact merely because in the opinion of the court that finding was contrary to the weight of the testimony.

To reverse the Commission's rejection of compensation the Circuit Court must have found that refusal

to make an award was not supported by substantial evidence.

We said in *Fordyce Lumber Co.* v. *Shelton,* 206 Ark. 1134, 179 S. W. 2d 464, "The effect of our decision is that the Commission's finding of fact must be given the same force and effect as the verdict of a jury, or of the Circuit Court setting as a jury, and consequently the Circuit Court and this court on appeal will not set aside the Commission's finding when based upon substantial testimony." If the findings of fact made by the Commission are supported by any substantial evidence such findings will not be disturbed by either the Circuit Court or this Court on appeal. *Simmons National Bank* v. *Brown,* 210 Ark. 311, 195 S. W. 2d 539.

We have gone to considerable lengths to set out the evidence produced by both claimant and respondent. There was substantial evidence to support the finding of the Commission against the claimant.

In *Starrett* v. *Namour,* 219 Ark. 463, 242 S. W. 2d 963, we said: "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 finding, and a careful study of the record discloses there was such evidence."

The judgment of the Circuit Court is herewith reversed with direction to that court to revise its judgment to show affirmance of the factual finding of the Commission.

Justices MILLWEE and ROBINSON dissent; the Chief Justice not participating.

Opinion delivered April 6, 1953.

[redacted]

U. J. Cone and *A. D. Chavis,* for appellant.

Harry T. Wooldridge and *Palmer Danaher,* for appellee.

ROBINSON, Justice. This is a lawsuit over the title to the north half of lot 12 in the southeast quarter of the southwest quarter of section 15, township 6 south, range 9 west, Jefferson County, Arkansas. Lot 11 was also mentioned in the complaint filed by appellant Chavis, and appellee Jackson made no claim of ownership as to that lot. Therefore title thereto was vested in appellant by decree of the Chancery Court.

Appellee Chris Jackson is 63 years of age and has lived all of his life on the above-described portion of lot 12, having inherited it or an interest therein from his father. The property forfeited to the state for failure to pay taxes for the year 1941. On April 12, 1945, appellant Chavis obtained a state deed to the property. In November, 1950, Chavis filed an unlawful detainer suit in Circuit Court against Jackson, and asked for possession of the property. Jackson answered denying that Chavis was the owner, and alleged that Chavis represented that he had a state deed; that they entered into an agreement whereby for the consideration of $150

Chavis agreed to deed the property to Jackson; and that the entire $150 had been paid. The answer also alleged that the tax sale was void and asked that the case be transferred to equity and title to the land be vested in appellee Jackson.

On a trial of the issues, there was considerable conflict in the testimony of the parties. Chavis testified that he agreed to convey the property to Jackson for the consideration of $350; that it was further agreed Jackson would make a down payment of $150 and pay the balance in monthly installments; that Jackson was unable to make the $150 down payment and it was then agreed that Jackson be permitted to continue to occupy the premises on a rental basis.

On the other hand, Jackson testified that the entire consideration for a deed from Chavis was $150. Chavis had paid $1.98 for the state deed.

By way of corroboration of his testimony Chavis introduced as a witness Sammy Lewis, who testified that he is a barber and real estate salesman; that at one time he was in Chavis' office with Jackson (he does not remember the date) and at that time Chavis tried to sell Jackson the property and Jackson said he would come back.

In support of Jackson's testimony to the effect that for the consideration of $150 Chavis agreed to give him a deed to the property, there were introduced in evidence numerous receipts acknowledging payments from Jackson to Chavis. The first receipt is dated May 4, 1945, and reads: "Received of Chris Jackson $20.00 on his lots—11 & N ½ Lot 12, in 15—6—9. Bal. $130." Thereafter each of the receipts reads: "Received of Chris Jackson on lots." Not in any receipt is anything mentioned about rent, and the first receipt shows a balance due of $130.

These written receipts, along with the testimony, constitute evidence which is clear, cogent, and convincing that the payments were not by way of rent, but were made on an agreed purchase price.

Next, appellant contends that Jackson's claim that there was an agreement whereby Chavis would deed the property to Jackson for the consideration of $150 is barred by the statute of frauds; that the receipts are not sufficient memorandum to take the transaction out of the statute of frauds; and furthermore that the receipts do not contain a sufficient description of the property. According to the evidence, Jackson was in possession of the property at the time Chavis obtained the deed from the state, and he has at all times since then had actual possession. He paid the purchase price, paid the taxes for one year, and put a new roof on the house. This was sufficient to render the statute of frauds inapplicable. In *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 164, Mr. Justice McCulloch, speaking for the Court, says: "The complaint in this case alleges that the plaintiff remained in possession of land, paid part of the purchase price and a portion of the taxes, and made valuable improvements. These acts, taken together, constituted such part performance as took the case out of the statute of frauds."

The view we are taking of the case makes it unnecessary to decide the question of validity of the tax sale.

Affirmed.

State *v.* Bradshaw.

4733 256 S. W. 2d 556

Opinion delivered April 6, 1953.

Ed E. Ashbaugh, for appellant.

S. J. Reid, for appellee.

Ed. F. McFaddin, Justice. Informations were filed in the Justice of the Peace Court, charging the appellees with having committed misdemeanors—*i. e.,* hunting in a State Game Refuge. The appellees were tried and fined, and then appealed to the Circuit Court. In that Tribunal, the appellees moved to dismiss the charges, claiming that the lands on which they were hunting were not in fact lands within a State Game Refuge. After hearing evidence, the Circuit Court sustained the motion, and entered judgment dismissing the charges.

Since the misdemeanors, of which the appellees were charged, related to the game and fish laws, Honorable Ed E. Ashbaugh, as attorney for the Arkansas State Game & Fish Commission, has undertaken to appeal the Circuit Court judgment to this Court. But there are fatal defects in this attempted appeal. Section 43-2733, Ark. Stats., prescribes the essentials for an appeal by the State in a misdemeanor case such as the one here. The section reads:

"Misdemeanors—Appeal by State.—When the prosecuting attorney prays an appeal, the clerk shall forthwith make and certify a complete transcript of the record and transmit the same to the attorney general, or deliver it to the prosecuting attorney for that purpose; and if the attorney general, on inspecting the same, believes it proper to take the appeal, he shall do so by filing the transcript in the Clerk's office of the Supreme Court in sixty (60) days after the judgment. (Crim. Code, § 342; C. & M. Dig., §§ 3425, 3426; Pope's Dig., §§ 4268, 4269.)"

In the case at bar, the prosecuting attorney *did not* pray an appeal: on the contrary, the record affirmatively shows that the prosecuting attorney concurred in the decision of the Circuit Court. Furthermore, there is

entirely absent from the record anything to indicate: (a) that the Attorney General has ever inspected the record; (b) that he believes an appeal should be taken; or (c) that he has filed the transcript in this Court. The concurrence of these three essentials is required by the quoted Statute. In *State* v. *Hamilton* (Case No. 4447, our *per curiam* order of January 20, 1947)[1] there was an attempt by counsel other than the Attorney General to appeal a criminal case to this Court, and we refused to consider the case because the Attorney General had not taken the appeal. In the case at bar, the essentials of § 43-2733, Ark. Stats., as previously mentioned, have not been observed, so this case is dismissed as improperly appealed.

LUCAS COUNTY BANK OF TOLEDO, OHIO *v.* AMERICAN CASUALTY COMPANY.

5-40 256 S. W. 2d 557

Opinion delivered April 6, 1953.

[1] See the book, "Supreme Court Procedure," by Stevenson, Revised Edition 1948, p. 92.

Wood & Smith, for appellant.

Gannaway & Gannaway, for appellee.

WARD, Justice. Involved here are the rights of a mortgagee to collect on an insurance policy covering an automobile.

Facts. One R. F. Wood gave a mortgage on his automobile to appellant bank in August, 1949, to secure a loan which was unpaid in the amount of $538.07 at the time this action was instituted. Wood moved from Ohio to Little Rock in the latter part of 1949, and on May 1st of 1950 he procured, at the request of appellant, a policy from appellee insuring his car against theft [and other liabilities]. The face of the policy contained the following clause: "(f) Loss payee: Any loss under coverages D, E, F, G, H and I is payable as interest may appear to the named insured and Lucas County Bank, Toledo, Ohio." It is conceded that loss by theft is included in the previous clause.

While Wood was in Little Rock he lived with a woman to whom he was not married, and on July 25, 1950, she took the car without Wood's knowledge or consent and disappeared. In response to letters about overdue payments on the loan, Wood wrote to appellant's attorneys in Little Rock on August 14, 1950, and informed them of the disappearance of the car. Although the Little Rock attorneys promptly relayed this information to appellant, it did not notify or make demand on appellee until November 14, 1950. The depositions of appellant and Wood explained the delay in giving notice to appellee on the ground that they did not realize the car had actually been stolen by Wood's mistress. Appellant explained that it had reason to believe Wood was just trying to evade payments on his note and that it had, during the elapsed time, made a faithful effort to locate the car and the woman and had spared no expense or effort in doing so.

On January 22, 1951, appellant filed suit against appellee, alleging its interest and attaching the policy as

an exhibit to the complaint, and prayed judgment for $538.07 with interest from August 1, 1950. Appellee filed a general denial and later, over the objections of appellant, was permitted to file an amended answer in which it was stated the insured and plaintiff had not complied with the provisions of the policy regarding notice and proof of loss, and that the plaintiff had no greater rights under the policy than the insured had. We note here that we find the court did not abuse its discretion in allowing appellee to amend its answer. No prejudice was shown by appellant and the case was not decided until fourteen months after the amended answer was filed.

Findings by the trial court. Both parties waived a jury and the trial court made the following findings of facts:

"1. Plaintiff delayed an unreasonable length of time in reporting the loss to defendant, and making claim for said loss after having knowledge thereof.

"2. Plaintiff, as mortgagee, is barred by the failure of Robert F. Wood, the insured and mortgagor, to make a timely claim under the policy."

Accordingly, the trial court dismissed appellant's complaint.

The Policy. The pertinent provisions of the policy are set out below:

Under the heading "CONDITIONS" paragraph 11 reads:

"11. *Named Insured's Duties When Loss Occurs*—Coverages D, E, F, G, H, I and J:

"When loss occurs, the named insured shall:

"(a) . . .

"(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

"(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property."

Under the same heading paragraph 14 reads:

"14. *Payment for Loss; Action Against Company* —Coverages D, E, F, G, H, I and J:

"Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy."

Law and Conclusions. The loss payable clause we are dealing with here is commonly called an "open" clause and differs materially from the "standard" mortgage clause, as is well established by many decisions. The essential element of a standard mortgage clause is that it, in effect, provides that the policy, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, whereas the open clause contains no such provision. See *Germania Fire Insurance Co.* v. *Bally,* 19 Ariz. 580, 173 Pac. 1052, 1 A. L. R. 488. In *Fulmer* v. *East Arkansas Abstract & Loan Co.,* 173 Ark. 668, 293 S. W. 1018, it was stated that, under an open clause, the rights of the mortgagee were no greater than those of the insured. However, in view of the holding in *Insurance Underwriters' Agency of the Insurance Company of Penn.* v. *Pride,* 173 Ark. 1016, 294 S. W. 19, we do not hold here that appellant had no right to give the notice

provided for in the policy, but it is clear that he had no greater right, and hence no longer time, to give the notice than R. F. Wood had. A decision on this point is unnecessary and immaterial here because, as indicated above, the trial court held that appellant had not given notice to appellee within a reasonable time.

The pivotal question presented, therefore, resolves itself into a question of fact, which was decided by the trial judge sitting as a jury. We deem it unnecessary to set out the evidence in more detail than already given because it is obvious that there is substantial evidence to support the finding of the trial court.

Affirmed.

The Chief Justice not participating.

TOWNES *v.* MCCOLLUM.

5-138 256 S. W. 2d 716

Opinion delivered April 9, 1953.

Mann & McCulloch, for appellant.

Harold Sharpe and *Glenn F. Walther,* for appellee.

George Rose Smith, J. This is a suit by the appellants, three taxpayers, to enjoin the Board of Election Commissioners of St. Francis County from holding an election to determine whether horse racing is to be permitted in the county. The statute provides that such an election may be called upon the petition of 15% of the qualified electors in the county. Ark. Stats. 1947, § 84-2721. Here the complaint attacks the sufficiency of the petition, upon the ground that the names of 159 specified persons were placed on the petition by someone other than the persons themselves. It is further alleged that unless restrained the Board will unlawfully call the election and that the expense thereof will be paid with public funds, constituting an illegal exaction within Article 16, § 13, of the constitution. In the court below the St. Francis Valley Turf Association, Inc., intervened and demurred to the complaint. The chancellor sustained the demurrer and dismissed the suit.

We think the demurrer should have been overruled, for the complaint states a cause of action. The statute requires that fifteen per cent of the voters petition for an election of this kind. The demurrer admits the insufficiency of the petition in this case. This being true, the election has not been properly called and should not be conducted at public expense.

It is argued, however, that the plaintiffs' remedy is against the county clerk, under the Initiative and Referendum Amendment and its enabling legislation. Amendment No. 7; Ark. Stats., § 2-310. There is nothing in this contention. This proposed election is to be held not under the power of initiative or referendum but under the au-

thority of the statute regulating horse racing, Act 46 of 1935. With respect to similar statutory elections, such as local option elections under the liquor law, the governing procedure is that provided by the statute rather than that contained in Amendment No. 7. *Johnston* v. *Bramlett,* 193 Ark. 71, 97 S. W. 2d 631. The horse racing statute does not prescribe the method for testing the validity of the petition and thus leaves the contestants free to select any appropriate procedure.

It is also suggested that the plaintiffs had an adequate remedy at law by asking the circuit court for a writ of *certiorari* to review the clerk's or the board's determination that the petition is sufficient. The adequacy of the legal remedy is immaterial, however, when a taxpayer seeks protection against an illegal exaction; for the constitution itself confers the right to injunctive relief. For example a statute which attempts to abolish the remedy by injunction and to substitute a remedy at law is unconstitutional. *McCarroll* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977; see also *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875.

Reversed, with directions that the demurrer be overruled. The mandate will issue immediately.

Griffin Smith, Chief Justice, concurring. I entirely agree with the majority to the extent it has gone, but would add that I am still of the view that pari-mutuel gambling as legislatively and judicially sanctioned is violative of § 14, Art. 19, of the Constitution:—"No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." See *Longstreth* v. *Cook,* 215 Ark. 72, 220 S. W. 2d 433, and the dissenting opinion, p. 83 of the Arkansas Reports.

The majority there rested its determination upon the chimerical assertion that pari-mutuel betting is a game of skill. As the dissenting opinion asserts, the result in point of profit or loss is so interlaced with chance that not even the management can tell, until the final bet is in, what the lot of the ticket-holder will be. Owners of the fran-

chise and the state take their trim before the element of risk arises, then pass on to the reckless, to those who are not concerned with the value of money, and to society's element that basks in the grand parade, whatever of skill either the novice or the turf sharpshooter may possess.

A convincing demonstration of this so-called *applied skill,* repeatedly overtoned in the majority's opinion in *Longstreth* v. *Cook,* is found in financial returns for the past six years, including 1953. The state's "take" in half a dozen years has been $4,306,652.80, while owners who have operated with such consummate finesse received $7,274,701.81. Thus, during the brief period in question, the public has paid $11,581,354.61 for access to the venture of glamouring skill and the authorized bookmakers have apportioned the remainder of $70,758,566 so hopefully donated to the goddess of skill.

I would reëxamine the Longstreth-Cook decision in the light of known factors and overrule its intrusion upon the Constitution.

ED. F. MCFADDIN, Justice (dissenting). My dissent is because a court of equity, in the absence of a constitutional provision, is not the proper forum in which to seek to enjoin an election.

In invoking equitable jurisdiction to enjoin an election, the plaintiffs (appellants here) had to decide whether or not such desired relief came under Constitutional Amendment No. 7. If the appellants had claimed that Constitutional Amendment No. 7 allowed this suit, they could well have quoted the sentence in § 16[1] of Amendment No. 7:

"The sufficiency of all local petitions shall be decided in the first instance by the County Clerk or the City Clerk, as the case may be, subject to review by the Chancery Court."

The case of *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. 2d 68, supports the claim that equity had jurisdiction to deter-

[1] In the dissenting opinion to *Dixon* v. *Hall,* 210 Ark. 891, 198 S. W. 2d 1002, the sections of Amendment No. 7 were numbered.

mine the sufficiency of the petition under Constitutional Amendment No. 7. But in claiming Amendment No. 7 to be applicable, the inevitable consequence would have been that the County Clerk of St. Francis County was a necessary party to this proceeding. In *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, and in *Shepard* v. *McDonald,* 188 Ark. 124, 64 S. W. 2d 559, we held that the Secretary of State was a necessary party under a statewide petition: so it would certainly follow that the County Clerk is a necessary party under a countywide petition. The appellants did not make the County Clerk a party to this suit, so if appellants had claimed that Constitutional Amendment No. 7 applied, then the appellants would have lost the case because of a defect of necessary parties.

So the appellants claim that Constitutional Amendment No. 7 has no application. But they are then instantly confronted with the established rule that, in the absence of a constitutional provision, equity does not take jurisdiction in election matters,[2] particularly when there is an adequate remedy at law.[3] The appellants had a complete remedy at law. When the petitions were presented by the County Clerk to the Board of Election Commissioners, these appellants could have appeared there and challenged the sufficiency of the petitions. If the County Board had decided against the appellants, then they could have gone to the Circuit Court by certiorari. Section 22-302, Ark. Stats., says:

"Issuance of writs of certiorari—Temporary restraining orders.—Said circuit courts shall have power to issue writs of certiorari to any officer or board of officers, city or town council, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding or ordinance, and to hear and determine the same; application for such writ may be made to the court or the judge thereof in vacation on reasonable notice;

[2] In 19 Am. Jur. 138, many cases are cited to sustain the statement: "Thus, the writ of injunction will not issue for such a purpose as the restraining of election officers from holding an election."

[3] On existence of legal remedy as precluding relief in equity, see 19 Am. Jur. 109.

and a temporary restraining order may be granted thereupon on bond and good security being given, in a sum to be fixed by the court or the judge in vacation, conditioned that the applicant will perform the judgment of the court."

Thus the appellants had a perfect right to go into the law court and have a writ of certiorari issued against the Board of Election Commissioners.[4]

But instead of following the remedy at law, the appellants have gone into equity, claiming that they want to prevent the expenditure from the public revenue. It seems clear to me that the appellants are not seriously concerned with trying to save the public revenue: they are merely rendering lip service to the "public revenue" allegations. What the appellants want to do is to prevent the election. The cases on equity's refusal to enjoin an election are legion. In 33 A. L. R. 1376, there is an Annotation on the subject, "Power to Enjoin Holding of an Election"; and cases from a score of jurisdictions are cited to sustain this general rule:

"In general, in the absence of some special reason, such as the holding of an election without apparent authority of law, on questions affecting personal or property rights and involving the expenditure of funds other than the cost of the election, the courts have denied their power to enjoin the holding of elections."

Likewise in 70 A. L. R. 733, there is an Annotation containing cases decided subsequent to the first Annotation, and many later cases are cited, all supporting the rule previously stated.

[4] There is nothing in *Graves* v. *McConnell*, 162 Ark. 167, 257 S. W. 1041, which would prevent certiorari from issuing to the Board of Election Commissioners in the case at bar. *Graves* v. *McConnell* held that certiorari would not issue to the Board of Election Commissioners because in that case, the questioned act was a mere ministerial act. In the case at bar, the election officials, in passing on the sufficiency of the petitions, would have been acting in a *quasi* judicial capacity, and certiorari would have been the proper remedy. In *Veterans Taxicab Co.* v. *City of Ft. Smith*, 213 Ark. 687, 212 S. W. 2d 341, we held that certiorari was the proper remedy. See, also, *Williams* v. *Dent*, 207 Ark. 440, 181 S. W. 2d 29.

The majority is directing a court of equity to try a case in which is involved the sufficiency of a petition for a countywide election, a matter that could and should have been tried in a law court.

Therefore, I dissent.

MADSEN *v.* BRADLEY.

5-18 256 S. W. 2d 728

Opinion delivered April 13, 1953.

Ed B. Cook, for appellant.

Gene Bradley, for appellee.

MINOR W. MILLWEE, Justice. On November 12, 1951, appellee obtained a default judgment in the sum of $347.59 against appellant in the Court of Common Pleas for the Chickasawba District of Mississippi County. After ordering judgment for the amount stated with interest and costs, the judgment concludes, ". . . for which execution shall issue." On November 17, 1951, the court clerk issued and the sheriff levied an execution upon appellant's personal property.

Appellant's motion to quash the execution on the ground that it was issued prematurely under our statute (Ark. Stats., § 30-102) was denied by the common pleas court.

The order of the circuit court on appeal, also overruling the motion to quash, recites: "And the court further finds that while the execution was issued within less than ten days from the date of the judgment, and that there was no application or petition to the court for issuing such execution in less than the required ten days, and that there was no hearing, and no notice of any hearing, of any application or petition, that the provision in the judgment, 'for which execution shall issue,' complied with § 30-102, Arkansas Statutes Annotated."

Section 30-102, supra, reads: "No execution shall issue on any judgment or decree, unless ordered by the court, until after the expiration of ten (10) days from the rendition thereof." The question presented is whether the proviso of the common pleas judgment meant that an execution might be issued immediately within the ten-day period, as the trial court found, or whether it meant that execution might issue in due course after expiration of the statutory period.

In construing the statute we have held that an execution, when ordered by the circuit court, might be issued upon a judgment immediately after its rendition. *Lowenstein* v. *Caruth,* 59 Ark. 588, 28 S. W. 421. A justice of the peace is without authority to issue an execution within ten days unless the plaintiff make oath that defendant is secreting or fraudulently disposing of his property. (Ark. Stats., § 26-1005). Here we are dealing with the judgment of a court of somewhat similar jurisdiction, but the act creating the Common Pleas Court of Mississippi County provides that the procedure shall be the same as in circuit court with certain minor exceptions. Act 452 of 1917.

The ten-day period provided by the statute was apparently designed to allow a defendant time to stay the judgment or the issuance of an execution thereunder.

While a close question is presented, we think a judgment should plainly show the court's intention to deprive a defendant of the time allowed by the statute and that the judgment herein does not measure up to this test. The appellant challenged the voidable execution in a timely manner.

The judgment is accordingly reversed and the cause remanded with directions to sustain the motion to quash.

HOPE BRICK WORKS *v.* CALL, COMMISSIONER OF LABOR.

5-43 256 S. W. 2d 729

Opinion delivered April 13, 1953.

Weisenberger & Wilson, for appellant.

Luke Arnett, for appellee.

Reid & Roy, Amici Curiae.

WARD, Justice. This appeal calls for an interpretation of the words "last employment" as used in the Em-

ployment Security Act as found in *Ark. Stats. (Supp.)*, § 81-1106 (a), which is set out as follows:

"81-1106. *Disqualification for benefits.*—If so found by the Commissioner, an individual shall be disqualified for benefits:

"(a) *Voluntarily leaving work.* If he voluntarily and without good cause left his *last employment.* Such disqualification shall be for ten [10] weeks of unemployment as defined in Subsection (i) of this Section." [emphasis supplied.]

Subsection (i) mentioned above reads:

"(i) *Week of unemployment defined.* A week of unemployment as used in this Section shall mean a week during which such individual would be otherwise eligible for benefits."

Facts. One Mark Phillips, a negro, who had been employed by appellant, Hope Brick Works, for about 20 years, voluntarily quit work in the early part of October, 1951. Soon thereafter he secured employment with the Clary Multiplier Corporation at Los Angeles and worked from October 14, 1951, to December 28, 1951, when he again quit voluntarily. In a short time he returned to his home at Hope and applied for work with appellant, his former employer, but he was not re-employed. Then, in the latter part of January, 1952, he obtained employment with the Union Compress & Warehouse Company at Hope.

Claimant says that when he accepted the last-mentioned employment he knew the job would only be for a week or so, and it is admitted that he did work only one week, or until January 29, 1952. It is also admitted that he worked with the Compress as long as work was available.

Phillips filed his initial claim for benefits on January 30, 1952, which was the day following the last day of his employment with the Compress.

The Question. The practical question presented is: Was Phillips entitled to draw benefits immediately, *i.e.*,

at the end of his normal waiting period, or was he still under the disqualification [10 weeks of unemployment] imposed under Subsection (a) because he had voluntarily left his employment with appellant and the Multiplier Company in California? The technical or legal question is: Under Subsection (a) was Phillips' "last employment" with the Compress Company or was it with appellant [or the California company]?

Trial Court's Decision. The trial court held that Phillips was entitled to draw compensation at once and was, therefore, under no disqualification as a result of his having previously voluntarily quit his employment. The trial court based its decision on the following determinations: (a) Phillips' employment at the Compress was *bona fide;* (b) therefore, that was his "last employment" within the meaning of the law [Subsection (a)]; and (c) under § 81-1106, cited above, the Commissioner could exercise his discretion in applying the disqualification of ten weeks' unemployment.

The result reached by the trial court was the same as reached by the Board of Review and other departmental agencies.

Our Conclusions. We are unable to agree with the trial court. We think it is clear that the statute [§ 81-1106], quoted above, leaves nothing to the discretion of the Commissioner in the matter of imposing or not imposing the disqualification once he has determined that claimant voluntarily left his employment. Under an earlier statute [now repealed] which fixed the disqualification period from one week to five weeks, the Commissioner was, of course, charged with a discretion in fixing the period of time, but such is not the case under the present statute.

The questions raised by "last employment" and "*bona fide* employment" are more difficult. They are necessarily related and we shall discuss them together.

We think the key to the issue is to be found in Subsection (g) of said § 81-1106, which reads:

"(g) *Disqualification satisfied by employment.* Any week of disqualification under the provisions of Subsections (a), (b) and (c) of this section shall be satisfied by a week of employment which occurs subsequent to the week in which the disqualifying act occurred and in which he has earnings in an amount equal to his weekly benefit amount."

It is difficult for us to give meaning and effect to the above-quoted subsection and at the same time harmonize it with the conclusion reached by the trial court. We recognize that in a literal sense Phillips' last employment was with the Compress, but we do not think such a literal interpretation is compatible with the spirit and purpose of the quoted sections or of the entire Act.

Earlier, we left undecided whether the ten weeks' disqualification should be imposed on the termination of claimant's employment with appellant or his later employment with the California company. This question is not material here except to illustrate our viewpoint. We think that since, as indicated by the record, claimant took the latter employment as a permanent job and quit it voluntarily, the ten weeks' disqualification should be imposed on that incident. We therefore agree that claimant's employment in California could not be treated as a part "satisfaction" [under (g)] of a disqualification imposed on quitting [voluntarily] his job with appellant in early October.

Then, if we give meaning to subsection (g), we must determine what kind of employment claimant could engage in which would work a "satisfaction," in whole or in part, of his disqualification. It appears that the Act contemplates such work as would be of a temporary nature, or perhaps such work as the Commissioner might determine was not suitable to claimant's ability or fitness.

Again, we think there is little doubt about Phillips' job with the Compress being a temporary job. He said, himself, he knew it would be and later developments proved it to be so. We recognize that in such instances the Commissioner must first decide whether the employ-

ment is permanent or temporary, but his decision is always subject to review.

It is our conclusion that Phillips' work with the Compress was temporary and therefore cannot be considered his last employment in the sense that he became immediately eligible to draw benefits, but that said period of employment, in conformity with the regulations of the Commissioner, could only effect a satisfaction of the same period of his disqualification.

We think our conclusion is equitable and reasonable. If an employee quits a permanent job in order to take a better job which he thinks will be permanent, and then loses his second employment through no fault of his own, he should not be penalized. However, after quitting a permanent job, he should not be allowed to take a job which he knew would last only one or two days and thereby absolve himself from the imposed disqualification. After all, no money penalty is imposed by a disqualification, but only a postponement of the time when benefits may be received.

Reversed.

Justices McFaddin and Millwee not participating.

Turner *v.* Turner.

5-50 257 S. W. 2d 271

Opinion delivered April 13, 1953.

Rehearing denied May 18, 1953.

Richard W. Hobbs and *Wilson, Abramson & Maroun,* for appellant.

Gaughan, McClellan & Gaughan and *L. B. Smead,* for appellee.

ROBINSON, Justice. This is an appeal from a decree dismissing a complaint seeking to vacate an order annulling a marriage between the appellant, Margaret Lamprecht Turner, and A. B. Turner. A. B. Turner lives at Camden; appellant was working at the naval base there when she and Turner went to Hot Springs where they were married in June, 1951.

On August 16, 1951, appellant sued Turner for divorce in the Garland Chancery Court; later she dismissed that action. Subsequently on September 7, 1951, the Probate Court of Ouachita County adjudged A. B. Turner to be incompetent and appointed as his guardian his brother, M. L. Turner. October 12, 1951, the guardian filed a petition in the Ouachita Chancery Court alleging that A. B. Turner was incompetent at the time of his marriage with appellant, and asked that the marriage be annulled. Appellant was served with a summons; and the next day, upon the payment to her of $6,000 and the transfer to her of a Cadillac automobile, she signed an answer, entry of appearance, and waiver. The petition to annul the marriage was granted by the court and appellant returned to the home of her parents in Connecticut.

On January 4, after the expiration of the term of the court at which the annulment of the marriage was ordered, appellant filed a complaint asking that the order

of annulment be set aside. The complaint alleges that M. L. Turner is not the legal guardian of A. B. Turner because requirements of the statute regarding the giving of notice in the proceedings for the appointment of a guardian were not complied with; also that the execution of the purported answer, entry of appearance, and waiver in the annulment action was obtained by duress, threats, and misrepresentation as to the contents of the petition for annulment.

The grounds for vacating a decree subsequent to the term at which it was rendered are set out in Ark. Stat., § 29-506. Here the complaint to set aside the decree alleges no grounds authorized by the statute. The assertions of duress and misrepresentation practiced upon the petitioner are not allegations of fraud within the meaning of the statute.

In *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517, Mr. Justice FRANK SMITH speaking for the Court said: "But we think there was no such fraud as required the court to vacate the decree on that ground. The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself. *Scott* v. *Penn,* 68 Ark. 492, 60 S. W. 235; *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937; *James* v. *Gibson,* 73 Ark. 440, 84 S. W. 485; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; *Parker* v. *Bowman,* 83 Ark. 508, 104 S. W. 158; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250; *Williams* v. *Alexander,* 90 Ark. 591, 119 S. W. 1130; *Pattison* v. *Smith,* 94 Ark. 588, 127 S. W. 983; *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10; *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. 2d 1088."

After the expiration of the term, a judgment can be set aside or vacated for fraud only where the fraud has

been practiced upon the court. Here there is no allegation or evidence of such fraud.

Affirmed.

CASTEEL *v.* K. LEE WILLIAMS THEATRES, INC.

5-60 256 S. W. 2d 732

Opinion delivered April 13, 1953.

Gordon B. Carlton, for appellant.

Collins, Core & Collins, for appellee.

J. SEABORN HOLT, J. Appellant, David Casteel, sued appellee, K. Lee Williams Theatres, Inc., to recover a cash prize of $70, which he alleged was due him under the provisions of § 84-2209, Ark. Stats. 1947, which provides: "The method of business advertising now or hereafter to be conducted in this State by the giving away of prizes consisting of money or other thing of value, where no payment of money or other thing of value is required of participants in such awards, whether such advertising plan be entitled, 'Bank Night,' 'Buck Nite,' or any other name whatsoever is hereby declared to be a legal form of advertising." Appellee denied any liability and a trial

resulted in a judgment in appellee's favor. This appeal followed.

The record discloses that after appellant had offered his testimony and rested his case, appellee, without offering any evidence in defense, asked for an instructed verdict in its favor, whereupon appellant's counsel stated to the court: "Your Honor, my recollection is that the defendant asked for a directed verdict, and the plaintiff joins him in that request and the effect of it is to take it from the jury and authorize the Court to render a decision."

It thus appears that both parties waived any further testimony, asked for instructed verdicts, and agreed that the court should decide the case. The court then directed a verdict for appellee.

In these circumstances, our rule is well settled that if there is any substantial evidence to support the judgment of the trial court, we must affirm.

"Where both parties have offered their testimony, and each requests the court for a directed verdict and requests no other instruction, the trial court may treat the case as having been withdrawn from the jury and submitted to the court sitting as a jury, and the judgment of the court, pronounced under the circumstances, has the same effect as if the jury itself had decided the case." *Holloway* v. *Parker,* 197 Ark. 209, 122 S. W. 2d 563, 119 A. L. R. 1359, and in *Stewart* v. *Hedrick,* 205 Ark. 1063, 172 S. W. 2d 416, we held: (Headnote 1). "Where both parties request instructed verdicts, there being no other request for instructions, and the case is withdrawn from the jury the judgment rendered by the court will be affirmed if there is any substantial testimony to support it."

After a review of all the testimony, we have concluded that there was some substantial evidence to support the judgment of the court.

Appellant lived with his family on a farm about three and one-half miles from Horatio. He and his wife had been regularly attending appellee's theatre (Horatio

Theatre) "approximately once a week" for a year and "Q. And you had been attending approximately once a week? A. Yes. Q. Had they been having bank night practically during all that time? A. During a part of it. Q. How long had they been having it? A. Probably since it was put in. Q. Probably the whole year? A. Yes."

On the night of August 28, 1951 (Tuesday), appellant and his wife attended the theatre. He registered for the drawing and received a number. The following night, (Wednesday), as was the custom, there was a drawing and appellant's name was announced as the winner. He was not present. He did not learn this until "after midnight sometime" on Thursday night following. He had left home in his truck with cattle for Texarkana, Arkansas, about 6:30 A.M. on Thursday morning and on his return that night "after midnight" was informed by his wife that he had won the prize and further that she had that day gone to the theatre and tried to collect the award for him from the cashier and "Q. Did you tell her (cashier) who you were? A. I didn't tell her who I was, but said I heard my husband's name was called for the money. Q. She didn't ask you if you were David Casteel's wife. A. No. . . . I was never personally acquainted with Mrs. Pride, but I worked in Horatio several years. . . . And you stated you understood your husband won the award the night before? A. Yes. Q. What did she say to you? A. Nothing, only I asked if I could sign for the money and she said no, he had to sign for it in person."

Immediately on receiving this information from his wife, appellant got in his truck, after midnight, and drove to the home of Mrs. Pride, the cashier, in Horatio, approximately three and one-half miles, and "Q. Did you identify yourself? Tell her who you were. A. Yes, I told her I had come to claim the award. Q. What did she tell you about the money? A. That I was too late. She said you had to call for it in twenty-four hours."

Appellant stoutly denied that he knew of any twenty-four hour rule prior to learning of it from Mrs. Pride.

Just as the weight and sufficiency of competent evidence is for the jury's determination in jury trials, so here, where the trial court stands in place of the jury, that same power rests with the court.

In viewing the testimony, we must give to it its strongest probative force in favor of appellee and if we find any substantial evidence to support the judgment, we must, as indicated, affirm it.

Here, we think the trial court was warranted in finding from appellant's testimony and actions that he must have known of the rules (among them being the twenty-four hour rule) governing the drawings and winners. He and his wife had been regular attendants at the theatre at least once a week for a year or more and he knew that the drawings had occurred every Wednesday night over that period. He also knew how the drawings were conducted. We attach much significance to the fact that appellant, within an hour or so after his return to his home from Texarkana on Thursday night, after the twenty-four hour period had obviously expired, and without waiting for the daylight hours of the following day, drove in his truck some three and one-half miles to Horatio, to the home of Mrs. Pride, aroused her, and demanded the award. Appellant offered no explanation of this rather unusual haste. A fair inference would appear to be that he did know of the twenty-four hour rule.

We do not consider the validity of the above section since that question is not presented.

Affirmed.

Justice MILLWEE not participating.

ROBINSON, Justice, concurring. The majority holds that when the defendant asked for an instructed verdict at the finish of plaintiff's testimony, the trial court was authorized to take the case from the jury at that point because the plaintiff also at that time asked for an instructed verdict. This Court invokes the rule which applies when both parties have put on all their evidence and each has asked for an instructed verdict, and no other

instructions are requested; but in my opinion an entirely different situation is here presented.

The defendant did not waive his right to proceed with the evidence because of his request for the directed verdict. His motion at that point was in effect a demurrer to the evidence. If the court had not granted the motion, defendant would not have been precluded from proceeding to introduce his evidence. Instead of counsel for the defendant waiving his right to put on any evidence and submitting the case to the court, counsel objected to the court doing anything at that point other than passing on the motion for a directed verdict for the defendant on the ground that plaintiff had not made a case sufficient to go to the jury.

But appellant is in no position to complain of the Court's action in taking the case from the jury and deciding it on the facts. When counsel for defendant moved for a directed verdict at the close of plaintiff's testimony, counsel for plaintiff said: "Your Honor, my recollection is that the defendant asked for a directed verdict and the plaintiff joins him in that request and the effect of it is to take it from the jury and authorize the court to render a decision."

It is well established that upon the doctrine of invited error, a party cannot complain of an alleged erroneous action of the trial court, if he himself has endorsed such action. *Missouri Pacific Railroad Co., Thompson, Trustee* v. *Gilbert, Adm.*, 206 Ark. 683, 178 S. W. 2d 73.

I concur in the result reached by the majority.

Mr. Justice George Rose Smith joins in this opinion.

WARNER *v.* WARNER.

5-54 256 S. W. 2d 734

Opinion delivered April 13, 1953.

Alonzo D. Camp, for appellant.

Laurence J. Berger, for appellee.

George Rose Smith, J. Fred Myrick, as the father and next friend of Jessie Pearl Warner, filed this suit to annul his daughter's marriage to the appellant. At the close of the plaintiff's proof the defendant demurred to the evidence. The demurrer having been overruled the defendant offered no evidence and now appeals from a decree in favor of the plaintiff.

Marshall Warner and Jessie Pearl Myrick were married by a justice of the peace on August 3, 1952, Marshall then being twenty-one and Jessie Pearl sixteen. When the bride's parents learned of the wedding four days later this suit was brought. The complaint alleges that Jessie Pearl is a minor not legally competent to be married and that the marriage is void. The defendant's answer is a general denial, except that the fact of marriage is admitted.

At the trial both Mr. and Mrs. Myrick testified that they had not consented to their daughter's marriage. This evidence was objected to by the defendant, upon the ground that "the complaint does not set forth any allegation with reference to the consent of the parents one way or another." The chancellor overruled the objection. It is now insisted that the court was not warranted in annulling the marriage for lack of parental consent, since that defect in the nuptial contract was not specifically pleaded.

We think the chancellor acted correctly. When a girl under eighteen has been married without her parents' consent the chancellor may set aside the marriage contract. Ark. Stats. 1947, § 55-102; *Mitchell* v. *Mitchell,* 219 Ark. 69, 239 S. W. 2d 748. This complaint alleges that Jessie Pearl is under eighteen and that the marriage is void. If the defendant was in doubt as to the ground of invalidity that was being relied upon he should have asked that the complaint be made more definite.

Thus the evidence of nonconsent was admissible under a liberal construction of the complaint. And even if we construe that pleading as narrowly as the appellant would have us do, still the overruling of the objection was in effect an exercise of the court's discretion to treat the complaint as amended to conform to the proof. *St. Louis, I. M. & S. Ry. Co.* v. *Bearden,* 107 Ark. 363, 155 S. W. 499; *Smith* v. *Moschetti,* 213 Ark. 968, 214 S. W. 2d 73. It is altogether unlikely that the plaintiff's proof came as a surprise to the defendant, but if so it was his duty to assert that fact and to ask for a continuance so that the Myricks' testimony might be rebutted. In the absence of a plea of surprise the technical objection to the evidence is without merit.

Affirmed.

MILLWEE, J., not participating.

IN RE ALTHEIMER'S ESTATE.

5-45 256 S. W. 2d 719

Opinion delivered April 13, 1953.

Sam M. Levine, Bridges, Bridges, Young & Jones and *Hillsman Taylor,* for appellant.

Henry E. Spitzberg, Amicus Curiae.

GRIFFIN SMITH, Chief Justice. The appeal is from an order of Jefferson Probate Court rejecting the will of Belle M. Altheimer. The petition to probate was filed in December, 1951, by Elsie J. Selig and R. S. Barnett, Jr. The two are co-guardians of Ben J. Altheimer, Jr., mentally incompetent.[1] He is in an institution in California.

Mrs. Altheimer's will was executed October 21, 1914, in Chicago. Her death occurred in Wisconsin in November, 1951. Her husband, Ben J. Altheimer, Sr., was successful in Arkansas business enterprises. He died in 1946.

Formality essential to execution of the will must be tested by the laws of Illinois. They do not materially differ from ours. Proof of execution, however, is referable

[1] The appeal of Elsie J. Selig has been dismissed at her petition.

to our statutes because proponents seek to have it initially probated in this state.

After providing for the payment of debts and making a small bequest to an old friend, Mrs. Altheimer directed, by Item IV, that the residue, including all rights and interests accruing under the will of her father, should go to her husband and son, but in trust for the uses and purposes later mentioned.

With these subsequent provisions we are not presently concerned. But it is not inappropriate to say that whether the will is probated or rejected the incompetent son is cared for. He is without issue. No one suggests that this status may change. The will (Item X) makes reference to the laws of Illinois, and it is contended by appellants that when Ben J. Altheimer, Jr., dies intestate —and they say intestacy is inevitable—the property will be distributed under the law of Illinois. They refer, no doubt, to Ch. 3, Art. 2, § 162, sixth subdivision, Illinois Revised Statutes, 1951, the provision being that when there is no surviving spouse, descendant, parent, brother, sister, or descendant of a brother or sister of the decedent, the entire estate shall go in equal parts to the nearest kindred of the decedent in equal degree (computing by the rules of the civil law) and without representation.

In the appeal the lower court was not called upon to construe the will; nor are we. The single issue is whether the proof offered was sufficient to justify an order admitting it to probate.

Pertinent parts of the Probate Code of 1949 are §§ 56 and 57, Ark. Stat's, §§ 62-2117 and 62-2118, vol. 5, pocket supp. The procedure outlined by § 62-2117 (2) contemplates that one or both of the attesting witnesses (who if living and available would be called) may be dead or beyond continental limits of the United States, or incapacitated. In either of the indicated circumstances the will may be established by testimony of at least two credible disinterested witnesses by proving the handwriting of the testator, "and such other facts and circumstances, including the handwriting of the attesting witnesses whose

testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence."

Section 62-2118 refers to the preceding procedure in respect of the testimony of subscribing witnesses and undertakes amplification by providing that the testimony of subscribing witnesses "shall not exclude the production of other evidence at the hearing on the petition for probate; and the due execution of the will may be proved by such other evidence."

Comments by the committee charged with the duty of drafting the Probate Code are printed as footnotes by the compilers of Arkansas Statutes. Following § 62-2118, which contains Bobbs-Merrill's bracketed citation to § 62-2117, there are references to Wigmore on Evidence, v. 5, 3d ed., and to *Rogers* v. *Diamond,* 13 Ark. 474. They are the drafting committee's authority for the comment that "Common law rules as to the proof of the execution of wills are assumed to be in force without the necessity of any statute. Thus, if attesting witnesses are not available, it is possible to prove the genuineness of their signatures and to raise a presumption that the will was duly executed."

A primary hearing resulting in an indication by the court that evidence in support of the petition to probate was insufficient, was followed by a second sitting. The cumulative testimony was this:

There were two attesting witnesses, Nathan Kahn and Maurice Markowitz. Each resided in Chicago when the will was executed. Kahn testified by deposition and affirmed all substantial facts. The testatrix, he said, appeared to be of sound mind, and the will was executed without apparent influence, fraud, or compulsion. Mrs. Altheimer subscribed in his presence and in the presence of Markowitz. The witnesses affixed their names in the presence of the testatrix and in the presence of each other. The instrument was the identical paper the two had seen Belle M. Altheimer sign. Kahn is not related to

any of the beneficiaries under the will, nor is he otherwise concerned with the subject matter.

Maurice A. Riskind and Julian Harris of Chicago testified by deposition that they and Maurice Markowitz had been law partners. Markowitz is dead. Each of the first six pages of the seven-page document was indorsed "Belle M. Altheimer," and the initials "M. M." and "N. K." on each page were identified by Riskind and Harris. The indorsement "M. M." was by Markowitz.

Executors of the estate of Ben J. Altheimer, Sr., found letters in Altheimer's desk. Seemingly they were written in 1914 by Mrs. Altheimer to her husband. Because of a lapse of 37 years and the admitted fact that soon after 1914 Mrs. Altheimer became mentally incompetent, it was not possible (according to proponents of the will) to find recent samples of her chirography; but two bank officials with experience in observing and comparing signatures testified to their belief that the person who wrote the letters executed the will.

Seven deeds in which husband and wife joined between 1904 and 1916 were offered for comparison purposes. Six had been of record for more than thirty years. A power of attorney executed by Belle M. Altheimer July 11, 1914, in favor of her husband—and utilized by him for a number of years—was introduced. Mrs. Altheimer's signature there was similar to the one on the will.

It was shown that Mrs. Altheimer was in a Michigan sanatorium at Battle Creek in 1914, but there is no testimony that the institution was an asylum for persons mentally afflicted. Mrs. Selig, however, testified that her understanding was that Mrs. Altheimer had been confined thirty-seven or thirty-eight years. She said that after 1914 Mrs. Altheimer was brought back to Chicago, but "I would say she was first confined in 1914 in Battle Creek. At that time she could write, but after she was confined in Wisconsin . . . I don't think there would be any specimens of her handwriting."

If it be true, as Mrs. Selig thought, that Mrs. Altheimer's confinement extended over a period of 37 or 38

years, the testatrix was necessarily under restraint when the will was executed, and if the maximum estimate be correct the confinement existed at the time witnesses verified her signature to the will. One of these witnesses was definite in his recollection of essential facts, and handwriting experts gave credit to the signature of the dead witness. The trial court was faced upon the one hand with the recollection of a witness who obviously endeavored to give the facts as she remembered them, and upon the other hand by the will itself, the personal testimony of one of the witnesses, the verification of handwriting by competent witnesses, and by presumptions attending execution of deeds subsequent to the period mentioned by Mrs. Selig.

It is our view that the two sections of the probate code thought by the trial judge to be in conflict were intended to be read together. Section 62-2117(2) expressly authorizes the testator's handwriting to be proved if neither of the attesting witnesses is available within the meaning of the section. Authenticity may be supplied by two credible witnesses who are disinterested, and by whom verity of the testator's handwriting may be established. Here we have the deposition of one of the attesting witnesses, proof of the handwriting of the second witness, documents bearing the established handwriting of the testatrix, some of which fall within the ancient document rule, and an absence of factual data other than the recollection of Mrs. Selig whose testimony even if it stood alone would be inconclusive.

There can be little doubt that the intention of § 62-2118 is to broaden the base of investigation in those circumstances where the attesting witnesses cannot be produced. The two sections should be read together in such a way as to permit the establishment of a will by any legally admissible evidence in those cases where the attesting witnesses are dead or where they are not available.

There is another consideration that should not be overlooked. It is not inconceivable that one or both of the witnesses to a will might—for a consideration, or

through prejudice or preference—recant. Are we to say that in an eventuality of that kind the testator's wishes are to be thwarted through straight-laced construction of statutory language designed for an entirely different end? The answer is easily pronounced.

There were interventions and other procedural actions that do not, at this stage of the controversy, need discussion.

The evidence was sufficient to require that the will be probated, hence the judgment is reversed and the cause remanded with directions to enter an appropriate order.

Mr. Justice MILLWEE not participating.

DOWELL, INCORPORATED *v.* PATTON.

5-52 257 S. W. 2d 364

Opinion delivered April 13, 1953.

Rehearing denied May 18, 1953.

Mahony & Yocum, for appellant.

Crumpler & O'Connor and *Jabe Hoggard,* for appellee.

J. SEABORN HOLT, J. This litigation was instituted following a collision between an automobile owned and operated by appellee, Patton, and appellant's truck, operated at the time by one of its employees. Appellee sued for damages to his automobile, for personal injuries, and loss of time. A jury trial resulted in a verdict for appellee in the amount of $1,920. From the judgment is this appeal.

For reversal, appellant argues two points. "1. The trial court erred in excluding from the jury the evidence showing plaintiff's, Patton's, interest in this case. 2. The trial court erred in refusing to give defendant's, Dowell's, requested instruction No. 13 and in modifying it and giving it as the court's instruction No. 13." We hold that both of these contentions are untenable.

1.

The record shows that Patton testified in chambers (away from the jury) before the trial judge, in effect, that (quoting from appellant's abstract): "He limited his claim for recovery for personal injuries largely to 15 days of lost time from work (15 days at $28 per day or $420 as testified to before the jury), and that the balance of any recovery would be for injuries to his automobile of which he claimed $50, the balance $1,450 to go to the Home Insurance Company under his $50 Deductible Insurance Policy with it and its payment to him."

Dowell offered the above testimony along with a receipt from the Home Insurance Company showing part payment to Patton on his claim against that company. Dowell claimed that this testimony was competent for the purpose of showing appellee's, Patton's, interest in the suit and as effecting his credibility as a witness. The court held this evidence incompetent in the circumstances and we think correctly so.

The Home Insurance Company (appellee's collision insurance carrier) had settled part of the loss with appellee. The insurance company was not a party to the

suit and did not ask to be made a party, nor was there any request that it be made a party. It was not a necessary or indispensable party, but was not an improper party, and could have been made a party. Appellee was the real party in interest, and appellant was not concerned with any rights or interest of appellee in appellee's insurance contract with the Home Insurance Company. In circumstances similar in effect, in the recent case of *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566, we said:

"The sounder reason and better view supports what appears to be the majority rule, that where, as here, an insurance company has only partially reimbursed an insured for his loss, the insured is the real party in interest and can maintain the action. . . . Appellee's action was a single cause of action, that he was the real party in interest, and that appellant was not concerned with any rights or interests of appellee in the insurance contracts here. . . . 'Under statutes providing that every action must be prosecuted in the name of the real party in interest, it is generally held that if the insurance paid by an insurer covers only a portion of the loss, the insurer is not the real party in interest, but rather, the right of action against the wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name. This rule has been said to rest upon the theory that the insured sustains toward the insurer the relation of trustee, and also upon the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong.' . . .

" 'Where the action is brought by insured in his own name against the wrongdoer to recover the full amount of the loss, he sustains toward insurer the relation of trustee, in respect of such portion of the amount recovered as the former under his contract has been compelled to pay.' . . . Appellee, insured, holds the proceeds of his judgment against appellant as trustee and must account to the insurance companies as their interests may appear."

2.

Appellant requested the following instruction (No. 13): "You are instructed that the collision involved occurred within the corporate limits of the City of El Dorado, Arkansas, and that the speed limit for said time and place for motor vehicles as fixed by an ordinance of said city was a maximum speed of 25 miles per hour. The undisputed testimony is that the plaintiff was driving at a rate of speed in excess of 25 miles per hour, and this is a circumstance for you to take into consideration in determining whether the plaintiff was guilty of negligence that caused or contributed to the cause of the collision."

The court refused the instruction in the form offered and over appellant's objections gave a modified form as follows: "Court's instruction No. 13—You are instructed that the collision involved occurred within the corporate limits of the City of El Dorado, Arkansas, and that the speed limit for said time and place for motor vehicles as fixed by an ordinance of said city was a maximum speed of 25 miles per hour; so, if you find from a preponderance of the evidence that the plaintiff was driving in excess of the maximum speed by said city, such act on the part of the plaintiff is a circumstance for you to take into consideration in determining whether the plaintiff was guilty of negligence that caused or contributed to the cause of the collision."

Appellant objected generally and specifically in this language: "That the evidence is undisputed that the speed at which the plaintiff (Patton) was driving exceeded 25 miles per hour, and the Court should instruct the jury, as a matter of fact, that the plaintiff was exceeding the maximum speed limit as fixed by the City Ordinance of El Dorado and not leave it to the jury to determine whether or not plaintiff was exceeding such speed limit."

We do not agree that the evidence is undisputed that appellee was driving at a speed of twenty-five miles per hour at the time of the collision. What was undisputed

(in fact stipulated) was that the collision occurred within the corporate limits of the City of El Dorado and that speed in excess of twenty-five miles per hour was forbidden by a City Ordinance. Appellee testified: "Q. At approximately, when you first saw this truck, approximately what rate of speed were you traveling? A. About forty-five (45) miles an hour. . . . Q. How far were you from this truck when you noticed, or saw him start cutting across to make his left turn? . . . What distance were the two cars apart—these two vehicles apart? A. Oh, I would say 50 or 75 yards, something like. . . . Q. Did you—when you saw this vehicle, or truck, cutting across, and when you first saw it—state whether or not you did anything to check the speed of your automobile? A. Certainly; I applied the brakes."

This evidence was sufficient to warrant the giving of the modified instruction on the issue of appellee's speed at the time of the collision, and we find no error.

Affirmed.

George Rose Smith, J., dissenting in part. I agree that the proof of Patton's settlement with his insurer was properly excluded, although my reasoning is not quite that of the other members of the court. Dowell argues that Patton's pecuniary interest in the case affected his credibility and that therefore the jury were entitled to know that Patton had only fifty dollars at stake. Even so, the exclusion of the evidence was favorable to Dowell as far as credibility is concerned, since proof that Patton had only a nominal interest in the verdict would increase rather than decrease the likelihood of his being believed. It is plain enough that the evidence was offered in the hope that the jury might have some bias against insurance companies, and it was rightly rejected for the same reason that proof of a defendant's insurance protection is inadmissible.

I think, however, that Instruction 13 should not have been modified. We have repeatedly held that an issue should not be submitted to the jury when the facts are undisputed. For example, when the uncontradicted evi-

dence shows that an employee was warned of a certain danger, it is reversible error for the court to submit the failure to warn as a basis for a finding of negligence. *El Dorado & Bastrop R. Co.* v. *Whatley,* 88 Ark. 20, 114 S. W. 234, 129 Am. St. Rep. 93.

The majority opinion recognizes this rule but avoids its application upon the premise that the evidence of Patton's excessive speed is not undisputed. I wholly disagree with this view. The speed limit was twenty-five miles an hour, and Patton admits that he was traveling at about forty-five when he saw that a collision was imminent and applied his brakes in a vain attempt to stop. The majority's position is that if Patton's last-minute efforts to stop succeeded in reducing his speed to the legal limit at the moment of impact, then the jury were warranted in disregarding altogether the undisputed fact that Patton was speeding when he realized that an accident was about to take place. The question, however, is that of proximate cause, and I think this instruction erroneous for the reason that it permitted the jury to ignore an element of causation as to which the evidence was not in conflict.

FOSTER *v.* CRABTREE.

5-38 256 S. W. 2d 722

Opinion delivered April 13, 1953.

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

Rose, Holland, Holland & Smith, for appellee.

Ed. F. McFaddin, Justice. Appellants (plaintiffs below) sought to cancel a stone quarry lease which they had executed to appellee, Crabtree (defendant below). The lease, dated May 8, 1951, provided, *inter alia,* that Crabtree: (a) would develop the quarry without subleasing it; (b) would pay royalty of 20c per ton on all "normal" stone sold, and 10c per ton on all waste stone; (c) would furnish Foster copies of all weight tickets; (d) would pay royalty semi-monthly; and (e) would agree to cancellation of lease if he did not fulfill the said agreements.

On January 11, 1952, this suit was filed, in which the plaintiffs claimed that the defendant had breached the lease in these particulars: (a) violation of the provision against subletting; (b) failure to weigh the stone removed; and (c) failure to properly account for, and pay royalty on stone removed. Upon issues joined, the Chancery Court heard the evidence, and found that the plaintiffs had failed to establish any breaches of the lease. From a decree for defendant, there is this appeal, urging the points now to be discussed.

I. *The Claim That Crabtree Breached the Provision Against Subletting.* In the Trial Court, the burden was on the appellants, as plaintiffs, to prove any claimed breach. See *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W.

740; and see also 9 Am. Jur. 400. In this Court, the burden is on the appellants to establish that the Trial Court's finding is contrary to the preponderance of the evidence. *Wheeler* v. *Wendleton,* 209 Ark. 601, 191 S. W. 2d 952.

As regards subletting, the appellants have failed to discharge either of these burdens. The only proof even tending to show a subletting was that some parties obtained stone from the quarry through a contract with Crabtree, whereby such parties furnished their own equipment and men. But even so, it was the Crabtree quarry, and appellee continued in active charge of it. In short, no subletting was established.

II. *The Claim That Crabtree Breached the Provisions Relating to Weighing, Accounting, and Paying for Stone Removed.* The bulk of the testimony was offered on this point, and it would unduly prolong the opinion to detail all such evidence. There was a positive showing that the weighing provision was complied with. Crabtree offered day-by-day records of each removal of stone from the beginning of operations on May 25, 1951, to February 20, 1952, which was shortly before the trial. These records showed the weight and destination of all stone removed. A total of these weights was 1,543½ tons, which, at 20c per ton (the royalty price stated in the contract) is $308.70.

Then, as regards accounting and paying, Crabtree proved by Foster's signed receipts [1] that Crabtree had paid Foster a total of $348.90 during the same period of time. This included $20 for waste rock and an overpayment of approximately $20 which came about because of fractional tonnage weights existing at various royalty paying periods. When Crabtree offered these records and the said receipts, establishing the foregoing facts, the appellants failed to disprove the correctness of such accounting; and the Trial Court properly refused to cancel the lease on the grounds claimed by appellants.

III. *The Claim That the Lease Was Void.* This point is argued in this Court because of testimony that

[1] There was one receipt for $5.50 not signed by Foster; but his failure to sign it was explained.

appellant, R. Z. Foster, was suffering from senility. No allegation in the complaint referred to such senility; but —assuming without deciding that we should in a case like this one treat the complaint as amended to conform to the proof—nevertheless, the evidence is entirely too meager to support appellants' present contentions. The doctor, who testified, admitted that Mr. Foster's mental condition might change from time to time. The attorney who drew the lease, and was paid by both parties, frankly testified that Mr. Foster fully, intelligently, and completely discussed all the terms of the lease before it was signed.

The decree is in all things affirmed.

THOMPSON, COMMISSIONER OF REVENUES, *v.* CLARK.

5-77 257 S. W. 2d 42

Opinion delivered April 20, 1953.

O. T. Ward, for appellant.

Joe W. McCoy and *William C. Gilliam,* for appellee.

GRIFFIN SMITH, Chief Justice. The matter for determination is whether the trial court was justified in instructing the jury to return a verdict for the defendant.

The commissioner of revenues alleged non-payment of two checks issued by Sam R. Clark for obligations incurred under a sand and gravel permit issued September 1, 1950, responsive to an application of August 29, 1950. The checks are dated September 25, 1951—nearly thirteen months after the permit (referred to by appellee as a contract) was executed. One check is for $1,327.35, the other for $200.60. The larger remittance is endorsed: "State royalty on material removed by the Arkansas Aggregate Company from Ouachita river lease owned by Sam R. Clark, and as per [the Revenue Department's] audit Sept. 10, 1951." The smaller check bore a like endorsement except that it applied in payment of severance tax.

The permit was issued under authority of Act 321 of 1937. For background information see Acts 138 of 1915, 296 of 1917, 212 of 1929, and 149 of 1935.

Sam R. Clark is general manager for Malvern Sand and Gravel Company. Bill Borhem and Wayne Clark are referred to as residents of Memphis and operated in this state as Arkansas Aggregate Company.[1] Sam R. Clark (not to be confused with Wayne Clark, mentioned in connection with Arkansas Aggregate) testified that Borhem's company took the gravel for which payment was intended when the two checks were issued; that the department of revenues caused an audit to be made and that George Adams, in charge of the royalty and severance tax division "convinced him" that the payments

[1] Records in the office of the Secretary of State show the incorporation of Arkansas Aggregate Company, with William Borhem as an officer. His address is given as Malvern.

were due. He had told Borhem not to touch the river gravel. Wayne Clark received similar directions. Appellee testified that his attorney was not available when the demand for payment was made, but that he stopped payment on the checks upon advice of counsel. The checks were held by the payee for approximately six weeks. During this period the commissioner of revenues wrote appellee that a hearing would be held in the commissioner's office November 9th, 1951, to determine whether it was feasible to issue a permit to *Clark Equipment Company*. Appellant's brief, p. 37, parenthetically refers to Arkansas Aggregate Company as the Clark Equipment Company, but appellee mentions "the two companies" — Arkansas Aggregate and Clark Equipment. Appellee also says that the checks represent amounts due "on sand and gravel so removed *by these two stranger companies.*" Sam R. Clark testified that "The Arkansas Aggregate Company, or Bill Borhem's company, removed the gravel."

While the checks were being held—and, as Commissioner Dean R. Morley testified, for the purpose of determining where the equities were, and with the reservation that if territory should be taken from appellee payment would not be urged—the Clark Equipment Company is said to have become bankrupt. Morley very frankly testified that Arkansas Aggregate's attempts to obtain space on the river "down there" involved considerations of a conflicting nature — "evidence both ways," as he expressed it. After personally inspecting the premises he was still undecided, and the hearing was not held. On November 7th, 1951, the commissioner wrote Sam R. Clark and Malvern Sand and Gravel Company that the Clark Equipment Company had informed the state that its representative would not be present for the scheduled hearing on the 9th, "due to the fact that they have ceased their operations on the Ouachita River."

Following receipt of this information the checks were deposited, and were returned with the notation that payment had been stopped.

We think the court erred in directing a verdict. The checks, admittedly based upon an audit, were evidence, *prima facie,* that appellee had acknowledged the debt. The applicable statute prohibits, in general, the taking of sand or gravel, but permits the commissioner of revenues, with the attorney general's consent, to define the limits of the area of the beds and bars of rivers, lakes, etc., "from which any one person, firm, or company, corporation, or association, shall be permitted to *exclusively* take . . . sand and gravel."

The defendant, as a witness, was an interested party, hence his testimony cannot be regarded as uncontradicted. But the broader ground upon which our opinion rests is that under the statute there is an implied covenant upon the part of the lessee to exercise reasonable care to protect the lease against trespassers. Morley testified that his department knew that mining operations were being engaged in by Arkansas Aggregate, but he did not admit knowledge that such operations were objectionable to appellee.

In *Morley, Commissioner,* v. *Berg,* 218 Ark. 195, 235 S. W. 2d 873, it was said that the commissioner, in granting a lease, was under a duty to exercise reasonable judgment in fixing the total area, "neither granting so little as not to make the lessee's investment for equipment worthwhile, nor granting so much as to be clearly beyond the lessee's capacity to develop the leasehold within a reasonable time." It was then stated that after the original area had been defined the commissioner could not arbitrarily abrogate the state's contract by cancelling the lease in whole or in part as long as the lessee performs his duty. "But," says the opinion, "it does not follow that later events may not warrant a reconsideration of the area to be held exclusively by the lessee. . . . We have pointed out that since the principal consideration to the lessor is the expectation of receiving royalties, there is an implied obligation on the part of the lessee to develop the entire property so that the lessor may obtain the expected income that induced him to grant the lease."

In the case here the commissioner, in asking that a hearing be had, no doubt observed the general rule an-

nounced in the opinion to which reference has been made, hence the mere suggestion that the subject-matter be reviewed was not a threat of illegal cancellation. We also think that by analogy the rule requiring a lessee to develop an area assigned to him in order to provide the lessor with royalties reasonably to be expected, requires the lessee to exercise proper care to prevent depletion by trespassers. Here the appellee was in possession of all rights affording him legal relief against unwarranted invasion, such as he now complains of. Seemingly he felt that a mere expression of disapproval would be sufficient. That it was not effective, subsequent developments demonstrated—with the result that state property worth $1,527.95 has been taken.

The judgment is reversed and the cause is remanded with directions that a new trial be had.