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PHELPS *v.* HIGGINS.

5-47 257 S. W. 2d 25

Opinion delivered April 20, 1953.

J. Hugh Wharton and *Spencer & Spencer,* for appellant.

T. O. Abbott, for appellee.

WARD, J. This appeal challenges an instruction on adverse possession.

Appellee, John Higgins, is the owner and in possession of the east 40 feet of the north half of lot 2, block 1, Mahony Addition to the City of El Dorado, Arkansas, and appellant, Terrance R. Phelps, owns the property adjoining on the South. For many years there had been a hedge along the dividing line, which appellant caused to be cut down prior to the institution of this suit.

In his complaint, Higgins claimed the hedge was on his property and asked for damages against Phelps for the wrongful cutting. Higgins also alleged that he owned the land on which the hedge was formerly located by

reason of seven years' adverse possession. Phelps' answer denied the above allegations and affirmed that the hedge was on his own land.

On the issues thus joined, a jury trial resulted in a verdict for damages in favor of Higgins.

The trial court gave appellees' requested instruction No. 4, which reads as follows:

"If you find from a preponderance of the testimony in this case that the hedge and the fence in controversy was placed by the plaintiffs' predecessors in title at the location where it was cut and removed more than seven years prior to the date of cutting and had been continuously claimed by the plaintiffs and their predecessors in title to said property for more than seven years prior to the date of said cutting, then said hedge and the land on which said hedge and fence was located became the property of the plaintiffs by adverse possession and it would be immaterial in this case whether the defendant's line ran North of the hedge row and fence row."

To the above instruction appellant entered a timely objection on the ground that it allows a continuous *claim* [our emphasis] for seven years to ripen into title without the requirement of the other necessary elements of adverse possession, and brought same forward in his motion for a new trial.

None of the other instructions supplied the omission noted above. In our opinion the giving of instruction No. 4, under the circumstances, constitutes reversible error.

A well-established rule of law is that adverse possession, to vest title, must be open, notorious, hostile and continuous for a period of seven years. See *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002; *Ringo, Ex'r* v. *Woodruff,* 43 Ark. 469; *Young* v. *Knox,* 165 Ark. 129, 263 S. W. 52; and the recent case of *Berry* v. *Cato,* et al., 220 Ark. 36, 245 S. W. 2d 824, decided February 11, 1952. There are certain variations of the rule, just as well established, requiring, among other things, that the

claimant must intend to hold or acquire title and that his possession must not be permissive.

In this case the burden was on Higgins to prove his own title to the land on which the hedge was located. The proof was abundant, convincing, and, as we understand, admitted that the hedge was not on the land embraced in Higgins' record title. It was, however, a matter left to the jury. Consequently, appellee chose to also rely on adverse possession and with this choice also went the burden of proving all the necessary elements to the satisfaction of the jury.

In our opinion the evidence in this case did present a question for the jury regarding adverse possession, and the trial judge must have been of the same opinion or he would not have submitted the questioned instruction.

There was much proof to the effect that Higgins and his predecessors in title had claimed the hedge and treated it as their property for much longer than the required seven years notwithstanding the fact that it possibly was below the South line of said property, but there was also substantial proof to the contrary.

Two engineers surveyed the property in question and found the hedge was located on appellant's side of the record property line. Mrs. Speer testified she moved on appellant's property in 1932 and stayed there about 15 years, and the hedge was on the North side of appellant's property; that she cut the hedge two or three times and that the occupants of appellees' property raised no objections; and that she last cut the hedge in 1945, in the daytime, and, again, no objection was made. Frank Lawton said he bought the Phelps' property in 1932 at which time he cut the hedge, and no one questioned his authority.

Since the jury had no opportunity, under the court's instructions, to pass on all the questions of fact necessary to constitute adverse possession, the case is reversed and remanded for a new trial.

MILLWEE, J., not participating.

Opinion delivered April 20, 1953.

[redacted]

Eugene Coffelt, for appellant.

Eli Leflar, for appellee.

ROBINSON, Justice. The appellant, Mrs. Mabel Kyle, is contesting the will of her father, Robert Washington McConnell, who died on the 11th day of May, 1951, at the age of 81 years. The appellees, Donald G. Pate and Bessie Pate, are the beneficiaries under the will which was sustained by the probate court.

Testator McConnell moved to Arkansas from Montana about 1935 and bought a house and nine lots in the city of Rogers. His wife died in 1941. In 1948 his daughter, Mrs. Kyle, appellant herein, visited him at Rogers and at that time McConnell made a will in which Mrs. Kyle and her son Robert S. Kyle were named beneficiaries.

In November, 1949, the appellees herein, Donald and Bessie Pate, along with their five children, moved into

McConnell's home with him. On the 3rd day of January, 1950, McConnell and the Pates entered into a contract providing in effect that for the consideration of the Pates' continuing to live in McConnell's home and looking after him, and the payment by the Pates to McConnell of $2,100, payable in monthly installments, McConnell would leave the property to the Pates and also transfer to the Pates his 1932 model Chevrolet automobile. It was further provided that in the event of McConnell's death, the balance owed on the $2,100 should be paid to McConnell's daughter, Mabel Kyle, the appellant herein. On the same day McConnell executed a deed conveying the property to the Pates, reserving the right to make it his home for the balance of his life, and further providing that the grantees were to take care of the grantor in good and proper manner during the remainder of his life.

On the 18th day of April, 1950, the parties entered into a new contract in lieu of the one executed on January 3, 1950, the new contract being to the same effect as the old one with the exception that no monthly payments were to be made to McConnell during his lifetime, but upon his death the $2,100 was to be paid to Mrs. Kyle in monthly installments.

Mrs. Kelley, one of McConnell's neighbors, obtained from him the contract he had made with the Pates and sent it to Mrs. Kyle in Montana. Mrs. Kyle sent her 27 year old son to Rogers to see about the matter, and after he had been there for some weeks, Mrs. Kyle herself came to Rogers and a few days thereafter caused suit to be filed to set aside the contracts and deed. On June 14, 1950, a few days before the trial of the case, McConnell executed a new will naming the Pates beneficiaries thereunder. Upon a trial of the case the court entered a decree setting aside the contracts and deed for the reason that undue influence had been practiced upon McConnell, and for the additional reason that because of undue influence McConnell was incompetent to execute the instruments. The decree also provides: "The court further finds that the will of Robert W. McConnell wherein he willed his estate to the defendants,

Donald Pate and Bessie Pate, should be dissolved and set aside for the same reason that the will was obtained under undue influence, creating the plaintiff Robert W. McConnell incompetent at the time the instrument was executed." The suit was filed in the name of Robert W. McConnell by Mabel Kyle as next friend and Mabel Kyle in her own right.

On May 11, 1951, McConnell died and the will he had executed on the 14th day of June, 1950, was admitted to probate. Shortly thereafter Mrs. Kyle filed a petition stating that she desired to resist the probation of the will for two reasons, first that the will had been nullified by the decree of the Chancery Court on July 6, 1950; second, that the will was invalid because its execution had been obtained by undue influence practiced upon McConnell by the Pates, that duress and threats were used by the Pates in causing McConnell to execute the will, and that McConnell was incompetent at the time he signed the will.

After hearing all the evidence, it was the judgment of the probate court that the evidence was not sufficient to show that the testator was incompetent at the time of the execution of the will, or that the will was the result of undue influence.

There are two issues on appeal; first, did the Chancery Court have jurisdiction to declare the will void, and is the issue of the validity of the will therefore *res adjudicata?* Second, does a preponderance of the evidence show that the testator was incompetent at the time of the execution of the will or that the will was made as a result of undue influence? We will discuss the issues in the order named.

First, the Chancery Court did not have jurisdiction to adjudicate the validity of the will. In *Graham* v. *Graham,* 175 Ark. 530, 1 S. W. 2d 16, Chief Justice Hart said: "Even a court of equity could not set aside a will on the grounds alleged. The reason is that equity has no jurisdiction to set aside a will for fraud in obtaining it. *Ewell* v. *Tidwell,* 20 Ark. 136. In *Gray* v. *Parks,* 94 Ark. 39, 125 S. W. 1023, it was again held that

a court of equity has no jurisdiction to determine the validity of a will. The court said that the remedy at law for setting aside a will on account of any fraud or undue influence in procuring it was complete. The reason is that, under our Constitution, such jurisdiction is vested in probate courts. This rule was recognized in *Dunn* v. *Bradley,* 175 Ark. 182, 299 S. W. 370, where it was held that equity had jurisdiction to set aside the judgment of a probate court admitting a will to probate only where fraud was practiced upon the court in obtaining the judgment."

The Chancery Court not having jurisdiction to determine the validity of the will in the first instance, its action in that respect is not *res adjudicata. Axley* v. *Hammock,* 185 Ark. 939, 50 S. W. 2d 608. It is not necessary to decide whether the validity of a will can be contested during the lifetime of the testator.

Next, appellant contends a preponderance of the evidence shows that the testator was incompetent or that the will was the result of undue influence. The trial court held otherwise, and we do not find that the decision is contrary to the preponderance of evidence. The appellant, Mrs. Kyle, gave testimony from which there may be an inference that undue influence was used by the Pates; also some of the testator's neighbors gave similar testimony; however, appellee presented evidence of greater weight going to show that Mr. McConnell was of sound mind and his will was not the result of undue influence. Dr. Stewart M. Wilson, a member of the Benton County Medical Society, Arkansas Medical Society, American Medical Association, and American College of Physicians, at the request of the Chancery Court in 1950 examined McConnell and testified that Mr. McConnell's mentality and memory were unusually clear and that he was competent to handle his own affairs. Dr. Wilson said he thought McConnell knew what he was doing and that he could discover no evidence of any insanity.

Dr. R. M. Atkinson, who has practiced at Bentonville for 37 years, also examined Mr. McConnell on

July 6, 1950, and stated that he was exceptionally alert for a man of his age, and that in his opinion McConnell was able to handle his own affairs and make whatever disposition of his assets he might see fit. He had a mental capacity to know the nature and extent of his property, knew the close members of his family, and knew and understood the nature and consequences of his acts.

G. S. Seals, a member of the Arkansas Bar, talked with Mr. McConnell about two hours in June, 1950. Mr. McConnell told him that the Pates had been good to him; Seals testified that the condition of McConnell's memory was excellent, speaking without hesitancy, picking out precise words in a precise manner; that his mental condition was good.

Ray Harris, Cashier of the American National Bank, Rogers, testified that Mr. McConnell's mind was clear, that he discussed his affairs intelligently, that his memory was good, that he mentioned his relatives and was bitter toward his daughter, and that he wanted the Pates to get his property.

Mrs. Martha Hawkins, secretary to Mr. Claude Duty, attorney who prepared the will, testified that Mr. Duty dictated the will to her in his office in the presence of Mr. McConnell, that it was read aloud to Mr. McConnell, and that she and Mr. Duty signed as attesting witnesses. The Pates were present but offered no suggestions. By agreement it was stipulated that Mr. Claude Duty, attorney for Mr. McConnell, drafted the will and would testify that Mr. McConnell was of sound mind and acted without undue influence, fraud, or restraint.

In *Davault* v. *Parks,* 190 Ark. 370, 79 S. W. 2d 68, the Court quoted from *Alford* v. *Johnson,* 103 Ark. 236, 146 S. W. 516, as follows: "To establish a charge of fraud or undue influence in the execution of a will, it must be established: (1) That deception was practiced or influence exercised; (2) That the fraud or undue influence was effectual in misleading or coercing the testator in the execution of the will. The fraud or undue influence which is required to avoid a will must be direct-

ly connected with its execution and must be, not the legitimate influence which springs from natural affection, but the malign influence which springs from fear, coercion, or other causes that deprives the testator of freedom in the distribution of his property. Before a will can be invalidated upon the ground of undue influence, there must be testimony proving or tending to prove that the influence was of such character as to destroy the testator's free agency, in effect substituting another's will in the place of his own, and the influence must be directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life or that he was surrounded by them in confidential relations with them at the time of its execution."

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* STUPENTI.

5-75 257 S. W. 2d 37

Opinion delivered April 20, 1953.

Phillip H. Loh and *Rieves & Smith,* for appellant.

Hale & Fogleman, for appellee.

WARD, Justice. The only question presented on this appeal is whether the trial court, where the jury had rendered judgment for the value of land under an eminent domain proceeding, was correct in adding interest from the date of entry by the State.

On February 24, 1950, the Arkansas Highway Commission filed suit in the Circuit Court against appellee and other landowners to acquire a right-of-way for the purpose of constructing a highway, and, having made the required deposit in the registry of the Court, took possession of appellee's land on May 5, 1950.

Trial was had on June 24, 1952, resulting in a verdict for $9,500 in favor of appellee, and the Court added interest at 6% per annum from May 5, 1950. The jury's verdict read:

"We, the jury, find for the defendant, Umberto Stupenti, and fix the damages to his lands in the sum of $9,500."

Appellant does not question the principal judgment, but contends the Court erred in adding interest.

The transcript contains no bill of exceptions and the motion for a new trial raises only the question regarding interest in addition to the usual assignments that the judgment is contrary to the evidence and the law. Before the trial it was stipulated that appellee's land was in cultivation.

The principal contention made by appellant is that the State of Arkansas cannot be held to pay interest on its obligations unless bound by an act of the legislature or by a duly executed contract so authorized. Here it is conceded the State is not bound in either manner above stated.

Appellant insists, and it is not denied, that it stands in the same position as the State, itself, in regard to the question under consideration. See *Arkansas State Highway Commission* v. *Nelson Brothers,* 191 Ark. 629, 87 S. W. 2d 394.

In support of its position appellant relies principally on two decisions of this Court which we note below.

State v. *Thompson,* 10 Ark. 61. Thompson brought suit against the State to recover $500 which the Sheriff of Phillips County collected from him under a misapprehension of law, and paid into the State Treasury. In considering the allowance of interest on the claim the Court made this statement:

"Upon examination of the whole question, both as regards the liability of the State in her sovereign capacity, and of the several statutes on the subject, we are of the opinion that the State is not liable for interest in any case unless by express agreement she makes herself liable."

While the above quotation apparently supports appellant's position, the reasons assigned to support it are not applicable to the case under consideration. The Court reasoned that the State's method of paying its claims was "out of a common fund raised by taxation for that purpose, pointed out the manner of presenting and allowing them . . . and placed all claimants on an equal footing," and then stated it could "see no reason for placing one class of claimants in a better situation than another" simply because "the claimant had a right to resort to his suit against the State to establish the legality of the claim."

Jobe v. *Urquhart,* 102 Ark. 470, 143 S. W. 121. In this case the Board of Commissioners of the State Peni-

tentiary, acting under the authority of an Act of the General Assembly of 1897, purchased land for a prison farm from Urquhart. The negotiated contract provided for a down payment and the balance at later dates, and, although the legislative act did not so provide, the contract provided for the payment of interest on the deferred payments. Jobe, the State Auditor, refused to issue a warrant for the payment of interest and Urquhart brought suit. The Court reaffirmed the rule announced in *State* v. *Thompson, supra,* in these words:

"It is well settled both upon principle and authority that a State cannot be held to the payment of interest on her debts unless bound by an act of the Legislature or by a lawful contract of her executive officers made within the scope of their duly constituted authority."

Urquhart conceded the State was not bound by the unauthorized acts of its agents, and, also, that the legislative act in question did not expressly provide for the payment of interest, but contended that "this authority may be expressed or implied" and that it was implied in that case. In rejecting this contention the Court said:

"The General Assembly has plenary powers to contract for and create interest-bearing indebtedness on the part of the State, except to issue interest-bearing treasury warrants or scrip. But the authority to bind the State to the payment of interest on her indebtedness must be plainly expressed and not implied."

The rule announced above is sound within the scope of the cases announcing it, but we do not think it is applicable in the situation here presented. Although the exact question under consideration is before this Court for the first time, it has been considered by other jurisdictions.

Assuming, for the present, that appellee's property taken by the Highway Commission was, on June 24, 1952, worth the amount of the judgment rendered that day in his favor, he will be deprived of the use and rents for nearly two years unless the State is obligated to pay him the value thereof. To allow the State to escape this lia-

bility would be contrary to our State Constitution. Art. 2, § 22, reads:

"§ 22. *Property Rights — Taking Without Just Compensation Prohibited.*—The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

Just compensation means full compensation. While the real loss to appellee might well be described as the denial of the use of his land for the time stated, yet the universally recognized rule for measuring this loss is by calculation of interest on the value of the land. This conclusion is supported by many authorities.

Kimball Laundry Co. v *United States,* 338 U. S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765. Where the Government took over a laundry for war purposes on a rental basis, it was held liable for interest on past-due installments under Amendment No. 5 of the U. S. Constitution which provides that "private property shall [not] be taken for public use without just compensation."

James D. Smyth, Exr. v. *U. S.,* 302 U. S. 329, 58 S. Ct. 248, 82 L. Ed. 294. After recognizing the general rule contended for here by appellant the Court stated the apparent exception in eminent domain cases. It said:

"The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution."

Jacobs, et al. v. *U. S.,* 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142. Construing the language in the 5th Amendment to the U. S. Constitution, which is the same as used in our own Constitution, the Court said:

"The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added'."

Simms, et al. v. *Dillon, Judge,* 119 W. Va. 284, 193 S. E. 331, 113 A. L. R. 787. The Court, in refusing to hold unconstitutional an act of the Legislature because it did not provide for the payment of interest on the value of land between the date of entry and date of payment, said:

"Under the authority of these cases, it is not necessary to so provide in the statute setting up the eminent domain procedure, but such right to interest is implied, and it will become the duty of the court entering the final award to provide for the payment of interest at the legal rate during the time between the taking and the final payment of the money due."

Oklahoma City v. *Wells, et al.,* 185 Okla. 369, 91 P. 2d 1077, 123 A. L. R. 662. The Court in a well-considered opinion construed the Oklahoma Constitution which reads the same as our own in this connection, and held that interest was payable from the date of entry. After reviewing many authorities it said:

"As we view the law, the general rule is that under constitutional provisions such as ours, where land is actually taken for public use by the U. S. Government, a state or any subdivision thereof, or by a corporation having the right to exercise the power of eminent domain, without payment of compensation as required by the Constitution, interest should be allowed from the time of the appropriation or entry on the property."

That interest is payable on the value of property taken under eminent domain proceedings from the date of entry is stated as the general rule in 18 *Am. Jur.,* § 272 at page 912, and in 29 *C. J. S.,* § 176 at page 1053.

There are other grounds urged by appellant for a reversal which, we think, are untenable and need not be discussed at length.

It is insisted we should assume that if the bill of exceptions was before us it would show that interest was included in the principal judgment. The answer is that appellant is responsible for the entire record not being

here, and in its absence we can examine only what is before us. In *Norton* v. *Hickingbottom,* 212 Ark. 581, 582, 206 S. W. 2d 777, the Court said:

"It is quite probable that the jury did just what appellants claim; but the appeal is here without a bill of exceptions and our consideration extends only to the face of the record."

Moreover, appellee has volunteered to bring forward in his brief the instructions of the lower court and they fail to disclose that interest was included in the jury's verdict.

It is next urged by appellant that the judgment of the Court does not conform to the verdict, in violation of *Ark. Stats.,* § 29-109. It is conceded by appellant that this statute has not been literally followed by this Court and that in some instances interest may be added by the Court to the verdict of the jury, as in *Rogers* v. *Atkinson,* 152 Ark. 167, 237 S. W. 679; *Norton* v. *Hickingbottom,* 212 Ark. 581, 206 S. W. 2d 777, and other cases. It is insisted, however, that interest is never so added in a suit for damages.

While this action was in the nature of a suit for damages, it actually was an action to determine the value of land taken by appellant from appellee. Whatever damage resulted to appellee was done when appellant entered on May 5, 1950. The only thing the jury did was to establish the value [or damage to] of appellee's land as of that date, and, that having been done, it required only a mathematical calculation to determine the amount of interest due appellee. In the case of *Rogers* v. *Atkinson, supra,* the Court approved this statement:

"Where the successful party to an action is legally entitled to interest, it is an incident of the verdict establishing his claim, and, in case the jury fail to award interest, the court in rendering judgment may, if the amount of interest is ascertainable by mathematical calculation, add such amount to the verdict."

To the same effect is the recent case of *Boone* v. *General Shoe Corporation,* 219 Ark. 340, 242 S. W. 2d 138.

Finally, we see no merit in appellant's contention that interest, if any, should run only from date of entry [May 5, 1950] to the date when appellant made its deposit in the registry of the Court. This, of course, would result in no interest at all since the deposit was made March 27, 1950. In all events the proper date from which interest should be computed in this instance is the date of entry, as was done by the trial court. The deposit of $175,000 made by appellant on March 27, 1950, was for the benefit of not only appellee but for many other defendants joined in the condemnation proceedings, and it is not to be confused with a definite tender by appellant for appellee's specific land. The rule in this connection is well established as stated in Note C., 96 *A. L. R.* at page 202:

"A majority of the cases seem to hold that a deposit of the compensation award does not amount to a true tender or stop the recovery of interest on the final award."

We do not here hold that under certain circumstances a tender made to a landowner in a condemnation proceeding would not bar the recovery of interest thereafter.

Affirmed.

FORD *v.* STATE.

4726 257 S. W. 2d 30

Opinion delivered April 20, 1953.

Sims & Clarke, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. This case is here on a second appeal, *Ford* v. *State,* 220 Ark. 517, 248 S. W. 2d 696. On a second trial, a jury again found appellant, Ford, guilty of involuntary manslaughter and fixed his punishment at a term of eighteen months in the State Penitentiary. From the judgment is this appeal.

For reversal, appellant first questions the sufficiency of the evidence. While admitting that he killed Bunyan Wigley, appellant contends that he did so while performing his duty as Town Marshal of Monticello, that Wigley was the aggressor, was drunk at the time, attacked appellant with a knife and that he shot Wigley in his own necessary self defense. The evidence shows that Ford had observed Wigley who seemed to him to be intoxicated and ordered him home. A few minutes later, Wigley accosted Ford and wanted to know his authority for ordering him home. Immediately thereafter, Ford drew his pistol and shot Wigley five or six times, kill-

ing him on the spot. Wigley was shot at least three times in the back. While there was some evidence on the part of Ford that Wigley was advancing on him with a knife, it was a question for the jury to determine whether, in the circumstances, Ford was warranted in killing him in necessary self defense. It was all important to determine whether Ford had reasonable grounds to believe that the danger was so pressing that in order to save his own life or prevent bodily harm, it was necessary to kill Wigley. *Fowler* v. *State,* 130 Ark. 365, 197 S. W. 568.

On the plea of self defense, the court gave the following instruction which appears to be a fair exposition of the law applicable: "In ordinary cases of one person killing another in self defense it must appear that the danger is so urgent and so pressing that, in order to save his own life or to prevent himself receiving great bodily harm or injury, the killing of the other person is necessary; and it must appear also that the person killed was the assailant. But if the assault by the person killed is so sudden and so violent as to make it reasonably apparent that it would be as dangerous to retreat as not to retreat, then the killer would not be bound to retreat but to save his own life or prevent himself receiving great bodily harm, may stand his ground and repel the attack by force, even to the extent of taking the life of the assailant. But if one may safely retreat, at any time during the altercation, without immediately endangering his own life, or his bodily safety, it is his duty to retreat and not to take life; and if he does not, he cannot claim self defense."

We think the evidence, which we do not detail, while conflicting, when considered in its strongest light in favor of appellee, as we must, was substantial and sufficient to support the verdict. *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351.

There was no error therefore in the trial court's refusal of appellant's request for an instructed verdict of acquittal at the close of all the evidence for the reason that such verdict may be directed only when the evidence

raises no material question of fact for the jury's determination. *Ruffin* v. *State,* 207 Ark. 672, 182 S. W. 2d 673.

Appellant next contends that he was tried before a jury of only eleven jurors "contrary to Art. 2, § 7 of the Constitution of the State of Arkansas, and contrary to §§ 43-1901, 43-2108 and 43-2109 of Arkansas Statutes of 1947."

The answer to this contention is that appellant not only agreed in open court to be tried before a jury of eleven, but made no objections, saved no exceptions and did not assign this as error in his motion for a new trial. The applicable rule is announced in *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702; in this language: " 'On appeal from the circuit court, this court only reviews errors appearing in the record. The complaining party must first make an objection in the trial court, and this calls for a ruling on his objection. An exception must then be taken to an adverse ruling on the objection, which 'directs attention to and fastens the objection for a review on appeal.' The matters complained of, together with the objections and the exceptions to the ruling of the court, must be brought into the record by a bill of exceptions; and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error'."

Next appellant argues that it was error calling for reversal for the trial court and the prosecuting attorney to mention, over his objections, the first trial and reversal of this case. Appellant says:

"The court erred by explaining to the jury, on their *voir dire* examination, about the case having been previously tried, and, upon appeal to the Supreme Court, had been reversed, and been sent back to the lower court for a re-trial, saying among other things, 'The Supreme Court reviewed the case and, not on the facts, but reversed it because I did not permit a knife, that was found, to be introduced in evidence,' " . . . and "in allowing the attorney for the State to tell the jury, in his opening statement, that the case had been previously tried, a conviction had, and a reversal on appeal, among

other things saying: 'The Supreme Court made a finding contrary to the finding in this case, and, therefore, sent it back for trial. The Supreme Court did not rule on the facts in this case whatsoever, but sent the case back to be tried by a jury of this county'."

In *Stanley* v. *State,* 174 Ark. 743, 297 S. W. 826, we held: (Headnotes 2 and 3) "In a prosecution for murder, it was not error for the prosecuting attorney in his opening statement to tell the jury of a previous conviction and reversal by the Supreme Court. (3) Much discretion as to what may be stated by the prosecuting attorney in his opening statement is given to the trial court, which should always see that the prosecuting attorney acts in good faith in making his opening statement."

It further appears that here the trial court properly admonished the jury that: "What the other jury did does not concern you one bit in the world. You are instructed by the Court that you will completely disregard what they did and you will act upon the evidence that comes from this witness stand and the instructions of the court."

Appellant also contends that: "The Court erred by allowing Ray O'Neal to testify, over objection and exception of defendant, and stick tape on dummy or coat form proposing to show holes in body of Bunyan Wigley, before any evidence whatever had been introduced by the State to the effect that Wigley had been shot by Ford or anyone else. . . . State asked Ray O'Neal, before any evidence had been offered showing that Ford or anyone else shot Wigley, 'Did Bunyan Wigley die from the effects of the bullet holes that entered his body?' Over objections and exceptions of defendant. That was prejudicial error. . . . He certainly was not qualified as an expert and his opinion, based on hearsay, was inadmissible and prejudicial."

Ray O'Neal, an embalmer, embalmed the body of the deceased. The court, in the circumstances, did not abuse his discretion in permitting him to testify as to the position of the bullet holes he found in the body before any testimony had been introduced to the effect that

Wigley had been shot by Ford. The governing rule is stated by Mr. Wigmore in this language: "Now it is obviously impossible to present all the facts at precisely the same moment or in the testimony of a single witness. Hence, some of the connected facts must be allowed to be presented before the others, even though the former, standing alone, are irrelevant.

"Thus the fundamental rule, universally accepted, is that, with reference to facts whose relevancy depends upon others, the *order of presentation is left to the discretion of the party himself,* subject of course to the general discretion of the trial Court (*ante,* § 1867) in controlling the order of evidence. In other words, if an evidential fact offered *has an apparent connection* with the case *on the assumption that other facts shall also be proved,* it may be admitted. No objection, therefore, can be made merely on the ground that the other facts have not yet been evidenced. The possibility that the other facts may not be made good is a necessary risk to be taken; and in case of a failure to make them good, the subsequent striking out of the evidence now offered is regarded as an adequate remedy." *Wigmore on Evidence,* Third Edition, Vol. VI, page 504, § 1871.

Nor did the court err in allowing in evidence a coat form or dummy substantially identical with the torso of Wigley, in form and size, in demonstrating the location of the bullet wounds found in the body. Such demonstrations are competent evidence if made under "substantially identical conditions, not absolutely identical." *Houston* v. *State,* 165 Ark. 294, 264 S. W. 869.

The above question propounded to O'Neal was not improper or prejudicial, in the circumstances. It was not necessary that O'Neal be an expert in order to state his opinion as to the cause of Wigley's death. He was shown to be an embalmer whose business it was to handle dead bodies. On the day of the killing, and shortly thereafter, O'Neal took an ambulance and picked up the body which he found "lying in the door on East Gaines close to a cafe," and took it to the funeral home, where he examined it "from head to toe." He further testified:

"Q. Will you state whether or not Mr. Wigley died from the effects of bullet wounds that he received on that night? A. Yes, sir. . . . Q. In preparing a body that has bullet holes in it what is your usual and customary practice with respect to sealing those holes; just describe generally to the jury? A. We have a small instrument, a screw-type, that can be placed in small holes and some you have to sew, these don't fit. Q. In the small holes you use a little screw and in the larger ones you have to use something else? A. Yes, sir. Q. And you do say now that you sewed them up, the large holes? A. Yes, sir."

We think a sufficient foundation had been laid as to O'Neal's knowledge of proven facts to qualify him to express an opinion that Wigley died from the effect of the bullet wounds which he found in his body. There appears to be no evidence that Wigley died from any other cause. There was other evidence that Wigley died as a result of the bullet wounds. We do not think any prejudice could possibly have resulted.

Appellant further contends in his motion for a new trial that the court erred in giving instructions 1 to 16 inclusive and No. 18 over his "general objections and exceptions." The Bill of Exceptions reflects that appellant only objected to instructions 2, 3, 4 and 5 and to none of the others above mentioned. "A general exception to several instructions will not be entertained on appeal if any one of them are good." *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376.

We have examined all these instructions and others given by the court and find each to be correct.

The court did not err in refusing to give appellant's requested instructions 1, 2 and 3 for the reason that they were fully covered by other instructions given to the jury. A trial court is not required to repeat or multiply instructions on any particular point.

We have not overlooked other assignments of alleged errors by appellant but we find all of them to be without merit.

Affirmed.

TONNE, ADMINISTRATRIX *v.* KOLLMEYER.

5-69 257 S. W. 2d 270

Opinion delivered April 20, 1953.

Rehearing denied May 18, 1953.

James R. Hale and *Irving R. Kitts,* for appellant.

Greenhaw & Greenhaw, for appellee.

GEORGE ROSE SMITH, J. In 1951 Arthur Tonne was killed in a collision between his car and a truck owned by the appellee, Monkem Company, and being driven by its employee, the appellee Kollmeyer. This is a suit by Tonne's administratrix to recover for his wrongful death and for the damage to the car. Trial before a jury resulted in a verdict for the defendants.

The appellant, complaining only of errors in the court's instructions, elected not to have the testimony included in the bill of exceptions. This practice, although seldom followed, is to be encouraged as a method of reducing the expense of litigation and of eliminating from the transcript matters that are not essential to the disposition of the appeal. Our rules and our cases ap-

prove the practice, Supreme Court Rule 15; *Fisher* v. *Ark. P. & L. Co.,* 202 Ark. 433, 150 S. W. 2d 959; but, as we held in the case cited, if an instruction would be a correct declaration of law upon any state of facts we must, in the absence of the testimony, presume that proof was offered which made the giving of the instruction proper.

At the outset the appellees say that they were entitled to a directed verdict; so the appellant could not have been hurt by the giving of erroneous instructions. *Hignight* v. *Blevins Implement Co.,* 220 Ark. 399, 247 S. W. 2d 996. With the testimony not before us we have no way of knowing whether there was any question for the jury, and had the trial court directed a verdict we would have presumed that the evidence justified that action. But here the judge felt that the case was one for the jury, and fairness to the trial court and to the appellees does not require us to go to the length of presuming that the judge made an error in submitting the case to the jury. Rather, if the appellees intended to make this argument for affirmance they could, under Rule 15, have brought up the testimony themselves and have recovered the additional cost if their position proved to be well taken.

Over the plaintiff's objection the court modified an instruction on circumstantial evidence by adding a proviso that the conclusion from the facts proved must be inferable "to the exclusion of every other reasonable hypothesis." This qualification is common enough in criminal cases, but in a civil case such a charge is inherently wrong for the reason that it requires the facts to be proved beyond a reasonable doubt. *Cloar* v. *Consumers' Compress Co.,* 150 Ark. 419, 234 S. W. 272. An inherently erroneous instruction is reached by a general objection; so we need not consider the appellees' contention that certain specific objections made after the trial came too late.

Reversed and remanded for a new trial.

SHELLNUT *v.* ARKANSAS STATE GAME & FISH COMMISSION.

4-9994 258 S. W. 2d 570

Opinion delivered April 20, 1953.

Rehearing denied June 22, 1953.

Donald S. Martz and *Joe W. McCoy,* for appellant.

Ed E. Ashbaugh, for appellee.

ED. F. MCFADDIN, Justice. The question here presented is the power of the appellee, Arkansas State Game & Fish Commission, to enforce its "Special Regulation" of October 23, 1950, insofar as affects the lands of these appellants.

Background Facts.

The Arkansas General Assembly of 1927 enacted Act No. 95, which, by its caption, provided for "the establishment and operation of Game and Fish Refuges. . . ."[1] This Act (hereinafter called the "1927 Act") authorized the establishment of a Game and Fish Refuge under certain circumstances, when requested by owners of at least 640 acres. Section 2 of the 1927 Act provided that the landowners so consenting to the establishment of the Refuge would surrender all rights to regulate hunting on said lands, and that such agreement, signed by the landowners, would continue in force for an uninterrupted period of not less than five years. Section 7 of the 1927 Act gave the Commission authority to provide rules and regulations governing such Refuge, and made any violation of the regulations to be punishable as a misdemeanor.

In 1930, the Game & Fish Commission (hereinafter called "Commission")[2] duly established a Game Refuge of several thousand acres in Grant County. Even though the Refuge was stocked with deer, other wild life was also protected. The lands owned by the appellants herein (being 21 tracts and totalling approximately 858 acres) were not a part of the Game Refuge proper, but were lands leased to the Game Refuge for a 10-year term,

[1] The 1943 General Assembly adopted Act No. 146 "to codify the existing game and fish laws that apply to the State as a whole;" and Sec. 15 of the said 1943 Act contains the provisions of Act No. 95 of 1927. Sec. 15 of Act No. 146 of 1943 is found in § 47-701 Ark. Stats.

[2] Act No. 133 of 1917 created the "State Game and Fish Commission." In the 1927 Act, the name was "State Game and Fish Commission." In Constitutional Amendment No. 35, the name is "Arkansas State Game and Fish Commission." We disregard the difference in names, and merely say "The Commission."

under the provisions of § 2 of the 1927 Act. These leases were renewed in 1940 for another 10-year term. But in 1950 when the leases expired, these appellants refused to again lease their lands to the Commission for Refuge purposes.

In the meantime, the Commission had, on April 15, 1931, under the authority of § 7 of the 1927 Act, promulgated certain rules and regulations governing lands in, or leased to, a Game Refuge, and these rules are hereinafter referred to as the "1931 rules."[3] In 1950 when the appellant landowners refused to renew the leases of their lands to the Game Refuge, the Commission ascertained that appellants' lands were entirely surrounded by lands that were a part of the Game Refuge; and the Commission then adopted its "Special Regulation" of October 23, 1950, here at issue, and which reads:

"All lands located within the boundaries of a State Game Refuge that are completely surrounded by other lands on which petition and agreement have been presented to the Commission for establishment of said State Game Refuge, and approved by the Commission, shall be and are hereby closed to all types of hunting. The same regulations shall apply to said lands as set up in rules and regulations approved April 15, 1931, under authority of Act 95 of the 1927 Acts of the General Assembly."

[3] Sec. 1 of these rules reads: "There shall be no hunting or carrying of firearms on a state game refuge except as provided in these rules and regulations, and the hunting, shooting, killing, trapping, injuring or taking of any game bird, game animal or song or insectivorous bird, or the destroying or disturbing of the nests or eggs of any game or song or insectivorous bird, is prohibited."

Sec. 4 reads: "Minks, skunks, opossum, fox or rabbits, caught in the act of destroying crops, poultry or livestock, may be killed at any time by persons living within the game refuges, provided such killing is reported to a keeper of the refuge, and the unskinned carcass of such animal is turned over to such keeper, and rabbits may be trapped or killed in any garden or orchard which bears evidence of injury by such animals."

Sec. 5 reads: "Permits in writing may be secured from the Game and Fish Commission by those owning lands and living within game refuges authorizing the trapping of all classes of vermin thereon at such times and in the manner prescribed by the Commission."

This Case.

On November 9, 1950, the appellants filed in the Pulaski Chancery Court this present suit against the Commission,[4] setting forth the background facts substantially as heretofore detailed, and alleging that the said "Special Regulation" of October 23, 1950, was violative of Art. 2, § 22, of the Arkansas Constitution. The prayer of the complaint was that the Commission be enjoined from enforcing its said regulation of October 23, 1950, insofar as concerned the lands of these appellants.

The cause was heard on January 3, 1952, on oral testimony, which developed, *inter alia,* that some of the appellants' lands involved in this suit were used for home and farm purposes; that because of the 1950 "Special Regulation" and the 1931 rules, such parties were unable to protect their gardens, crops, and orchards from destruction by marauding deer;[5] that as a result, the use of the lands was restricted, and the value of the lands was materially reduced; that one of the appellants, Shellnut, had tried without success to get the Commission to satisfy his claims while his lands were under lease; and that the failure of the Commission to do so was a factor in the refusal of such landowner to renew his lease at its expiration in 1950.

The Chancery Court denied the appellant landowners any relief, and they have appealed. We hold that the landowners are entitled to relief.

Even though Constitutional Amendment No. 35 gives broad powers to the Commission, nevertheless, the Commission is subservient to, and bound by, Art. 2, § 22 of the Constitution, which reads:

". . . private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

[4] Originally the Executive Secretary of the Commission was sole defendant. Later the Commission was made a party.

[5] It is informative to note the success of this State Game Refuge Legislation. It is stated in the briefs that in 1930, a conservative estimate was that there were less than 500 deer in the entire State of Arkansas; that through this system of Game Refuges, beginning with the 1927 Act, the deer population in Arkansas has been increased to an excess of 75,000.

It is not necessary that the property should be completely taken in order to bring the case within the protection of this Constitutional guaranty.[6] It is only necessary that there be such serious interruption of the common and necessary use of the property as to interfere with the rights of the owner. See *Pumpelly* v. *Green Bay Co.,* 13 Wall. (80 U. S.) 166, 20 L. Ed. 557.

The effect of the Commission's "Special Regulation" of 1950 was to seriously restrict the appellants' use of their lands, and was, therefore, violative of the quoted Constitutional provision. Under the 1927 Act, the Commission had the right to enforce its 1931 rules on lands within the Game Refuge, or on lands of owners who had leased their lands to the Game Refuge. When in 1950 the appellant landowners refused to renew their leases to the Game Refuge, then the Commission's attempt to enforce its 1931 rules on the appellants' lands constituted a damaging of private property for public use, within the Constitutional inhibition hereinbefore quoted.

If the Commission considered the appellants' land to be necessary for the Game Refuge, then the Commission could have proceeded by eminent domain to acquire the plaintiffs' lands, or an easement thereon.[7] Nothing in the case of *Hampton* v. *Arkansas State Game & Fish Comm.,* 218 Ark. 757, 238 S. W. 2d 950, prevents the Commission from exercising eminent domain when the purpose of the taking is the *protection* of wild life, rather than its *destruction,* which latter was the situation in the Hampton case. In the case at bar, the Game Refuge is for the preservation of wild life. In the Hampton case,

[6] Under this Constitutional guaranty, we have held that dumping sewage into a stream and polluting the waters thereof was a damage to a lower riparian owner, and such owner was entitled to recover damages, under the quoted Constitutional provisions. See *McLaughlin* v. *Hope,* 107 Ark. 442, 155 S. W. 910, 47 L. R. A., N. S. 137. Again, we held that the pollution of the air over private property by offensive odors escaping from a sewer tank, was a damage to adjacent residential property, within the quoted Constitutional provision. See *Sewer Dist.* v. *Fiscus,* 128 Ark. 250, 193 S. W. 521, L. R. A. 1917D, 682.

[7] Sec. 8 of Amendment No. 35 says in part: "Said Commission shall have the power to acquire by purchase, gifts, *eminent domain,* or otherwise, all property necessary, useful, or convenient for the use of the Commission in the exercise of any of its duties . . ." (Italics our own.)

the proposed activity was the killing of wild life. The Commission's "Special Regulation" of 1950 was an attempt to impose an easement or servitude on the appellants' lands, without the consent of the landowners, and without complying with the eminent domain provisions of our Constitution. In short, under the facts here shown, the Commission was damaging the appellants' property without due compensation, and, therefore, the 1950 "Special Regulation" was violative of Art. 2, § 22 of the Constitution, insofar as the rights of the appellant landowners were concerned.

In this Court, the Commission argues that under Constitutional Amendment No. 35, the Commission has the authority to "divide the State into zones";[8] and that the "Special Regulation" of 1950 is valid under such authority. We find it unnecessary to discuss the zoning power of the Commission, because it is self evident that the Commission's "Special Regulation" of 1950 was not a zoning plan,[9] but was a plan for a perpetual easement or servitude, and was violative of the Constitutional provision previously quoted.

The Commission urges that the appellants have proceeded in the wrong forum: that is, the Commission says that the appellants should have proceeded at law instead of in equity. The appellants counter with the answer that their remedy at law was inadequate and incomplete. The facts show that the Commission made its "Special Regulation" of 1950 without notice to these landowners;

[8] Sec. 8 of Amendment No. 35 reads in part: "The Commission shall have the exclusive power and authority to issue licenses and permits, . . . , *and shall have the authority to divide the State into zones,* and regulate seasons and manner of taking game, and fish, and furbearing animals therein, and fix penalties for violations. *No rule or regulation shall apply to less than a complete zone,* except temporarily in case of extreme emergency." (Italics our own.)

[9] The Commission's witness, L. G. Polk, testified, *inter alia*:

"Q. Your testimony is then, the state has not been zoned, has it?

A. No, sir, not specifically, no sir."

and again:

"Q. The commission has never seen fit to call it a zone by resolution?

A. Not by name.

Q. Or number?

A. No sir."

and that they did not learn of this regulation until the Commission proceeded to attempt to enforce it against the appellants and their lands. The appellants then immediately filed this suit and obtained a temporary injunction, which remained in force until shortly before the trial of this cause.

The rule is that equity does not act when the remedy at law is adequate and complete; but here, there is evidence that gardens, orchards, and crops could have been hopelessly and permanently destroyed, except for the injunction granted by the equity court. When a State Agency acts illegally, it is subject to be restrained by suit in equity. *Federal Compress Co.* v. *Call,* 221 Ark. 537, 254 S. W. 2d 319. In *Jenson* v. *Radio Co.,* 208 Ark. 517, 186 S. W. 2d 931, we said:

"The general rule of equity jurisdiction in suits to restrain acts of public officers is stated in 28 Am. Jur. 356, as follows: 'There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public corporations or of public officers, boards, or commissions which are *ultra vires* and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority, or which constitute a violation of their official duty, whenever the execution of such acts would cause irreparable injury to, or destroy rights and privileges of, the complainant, which are cognizable in equity, and for the protection of which he would have no adequate remedy at law. An injunction to prevent an officer from doing that which he has no legal right to do is not an interference with his discretion.'

"This court held in the case of *Rowland* v. *Saline River Railroad Company,* 119 Ark. 239, 177 S. W. 896, that injunction is the proper remedy to curb the abuse of power of the railroad commission in the issuance of an arbitrary and unreasonable order. Injunction will issue to prevent a public official from unlawfully assuming power over property in such manner as to infringe upon or violate the rights of a citizen. *Noble* v. *Union River Logging Railroad Company,* 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123."

Without laboring the point, we conclude that equity had jurisdiction to restrain the Commission from the enforcement of its 1950 "Special Regulation," insofar as concerned the lands of these appellants, since the order was—under the facts here shown—violative of Art. 2, § 22 of the Constitution. The decree is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE and Justices HOLT and ROBINSON dissent.

ON REHEARING

GEORGE ROSE SMITH, J., on rehearing. In its petition for rehearing the appellee construes our opinion to mean that every landowner has the right to hunt upon his own property the year around and that the Commission can curtail that right only by condemning the fee simple title to the land. It was not our intention to lay down such a rule, nor do we think our opinion susceptible of that construction.

It must be remembered that Act 95 of 1927 contemplates voluntary action on the part of the landowners. Under that Act the owners of not less than 640 acres may request the Commission to declare their lands a game refuge. Quite evidently the landowners could establish a refuge without the Commission's assistance were it not for the settled American rule that it is not a trespass for anyone to hunt upon unenclosed wild lands. *Bizzell* v. *Booker,* 16 Ark. 308. One of the effects of Act 95 is to permit landowners desiring a game preserve to avoid the effect of this common law principle by asking the Commission to declare hunting upon their lands to be unlawful.

In 1930 a 30,000-acre refuge was established by voluntary action under Act 95. The Commission approved this sanctuary with the knowledge that its leases would expire in ten years, and in 1940 the leases were renewed upon that same understanding. In 1950, however, the appellants refused to continue the refuge for another ten years, and the Commission adopted its Special Regulation, which had the effect of subjecting the

appellants' property to the same restrictions that would have been imposed had they leased their lands to the Commission for another ten years.

We adhere to the view expressed in our original opinion, that such action on the part of the Commission is in effect the condemnation of the appellants' hunting privileges, for which compensation must be made. Of course, the State has the power to regulate the taking of game, but in doing so it cannot arbitrarily discriminate among its landowners. *Lewis* v. *State,* 110 Ark. 204, 161 S. W. 154. For example, a nonresident owner of land in Arkansas cannot be prohibited, by reason of his nonresidence, from hunting upon his own land if a resident landowner would have that privilege in the same circumstances. *State* v. *Mallory,* 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773. Here, the Commission's attempt to compel the appellants to submit to restrictions that are to be voluntarily assumed under the statute is *prima facie* an arbitrary action, so that the Commission has the burden of demonstrating the validity of its conduct.

The Commission presents a twofold argument in its effort to uphold its Special Regulation. First, it is said that the appellants' refusal to lease their lands created an emergency, which may be met by special regulations as provided by the sixth paragraph of § 8 of Amendment 35. But the trouble is that this particular regulation is not an emergency measure; by its terms it will continue in force as long as the surrounding area constitutes a game refuge. A different question might be presented had the Commission temporarily prohibited hunting pending the institution of an action for the condemnation of the hunting rights of the appellants.

Second, it is said that the entire 30,000-acre sanctuary constitutes a zone, so that the Commission may issue hunting regulations under the above paragraph of the amendment. But, as we pointed out in the first opinion, this Special Regulation does not purport to be a zoning plan. It applies only to lands surrounded by an existing refuge and might therefore affect tracts of only a few acres.

Nevertheless the Commission argues that the Special Regulation, when considered together with the voluntary leases by other landowners, has the practical effect of establishing a 30,000-acre zone. Had the Commission undertaken to adopt a uniform regulation applying alike to all lands within the area no doubt there would be a presumption in favor of the validity of its action, casting upon the aggrieved landowner the burden of showing that no zone is involved. But the Commission has not so acted, and we think it has the burden of proving its contention. The amendment itself does not define the word zone. To say the least, a zone must be of sufficient size to bear a reasonable relationship to the purpose for which the zone is declared to exist. If, for example, the zoning regulation is intended to further the propagation of deer, the constitution clearly means that the restricted area must be large enough for the accomplishment of that purpose. In the trial court the Commission offered no proof on this particular point; so we have no evidence on which to sustain the argument now advanced.

Rehearing denied.

Robinson, Justice, dissenting. Amendment No. 35 to the Constitution gives the Game & Fish Commission authority to establish zones and regulate the seasons and the taking of game and fish therein. Under this amendment the Commission should be allowed to zone any area of the State and prohibit hunting in such zone, provided it does not act in an arbitrary manner.

It can not be said the Commission acted arbitrarily in this instance. The area in which an attempt is being made to protect the wild game consists of over 30,000 acres which has been used as a game refuge for more than a decade. Appellants own only a small portion thereof. As a result of such protection, the wild life, especially deer, have become numerous. In this refuge the Commission has in effect established a zone where no hunting is allowed.

If the Commission can not zone this particular thirty odd thousand acres as a refuge, just where can zones

be established to protect the game? The establishment of refugees has caused the deer population of this state to multiply by the thousands; now, instead of the area involved here being a refuge inuring to the benefit of the whole state, it will be a slaughter pen to be operated by a few who will enjoy it.

I respectfully dissent.

The Chief Justice and Mr. Justice HOLT concur in this dissent.

IN THE MATTER OF THE INTEGRATION OF THE BAR.

5-166 259 S. W. 2d 144

Opinion delivered April 27, 1953.

Rehearing granted July 6, 1953.

GEORGE ROSE SMITH, J. A substantial majority of all the actively practicing lawyers in the State have petitioned this court to create an integrated bar association. It is our conclusion that the proposal should be approved.

The conception of an integrated or unified bar originated in the American Judicature Society in 1914. This form of bar organization has, with comparative rapidity, won widespread public approval and now exists in the majority of the states. Its distinguishing characteristic is the requirement that every attorney be a member of the organization and be a contributor to its support.

In a number of states the bar has been integrated by rule of court, upon the theory that the supervision of the practice of law is so essentially a judicial function that the courts are free to act without statutory authority. Full discussions may be found in *Petition of Florida State Bar Ass'n,* 40 S. 2d 902; *Re Integration of Nebraska State Bar Ass'n,* 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151; and *Integration of Bar Case,* 244 Wis. 8, 11 N. W. 2d 604, 12 N. W. 2d 699, 151 A. L. R. 586. This is not a controverted issue in the present proceeding, for we have this express language in our constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys-at-law." Amendment 28. It is well known that this amendment was prepared and sponsored by the advocates of integration.

Amendment 28 was adopted in 1938, but we have heretofore been reluctant to create an all-inclusive bar association, as it has not previously been demonstrated that a majority of lawyers favored the step. In the face of the present petition it is no longer possible to believe that the move is not desired by most of those who will be directly affected. It appears from the information accompanying the petition that there were 1,129 lawyers engaged in the active practice when the petition was cir-

culated. Of these, 803 signed the petition, and of the 326 who did not join in the movement only 61 affirmatively offered objections. Thus the proposal is endorsed by more than 71% of the practicing lawyers and is opposed by less than 6% of them.

Yet the petition was presented primarily to practicing lawyers only. Our roster of licensed attorneys includes about a thousand people who do not actually practice law, and when the petition was received it was felt that the sentiment of the active bar alone should not be taken as conclusive in a matter affecting every one having a license. In order to give every licensed attorney an opportunity to express his preference we instructed the clerk of the court to mail a ballot to each of the 2,371 licensed attorneys whose names are on our rolls. The response was relatively light, as less than half took the trouble to sign and mail the postcards that were provided. It would not have been surprising had the vote been against integration, for the inactive attorneys might have attached primary importance to the fact that the proposal would increase their annual contribution for ostensibly belonging to a profession which is not their livelihood. Even this ballot, however, favored integration by a vote of 592 to 455. This vote, although small, is certainly large enough to be representative and confirms the petitioners' belief that the majority of lawyers will welcome the move.

In a matter that is of more direct concern to the bar than to the bench we are naturally inclined to give effect to the wishes of a clear-cut majority of our practitioners. Nevertheless the decision involves the exercise of judicial discretion, and we should not be willing to approve the petition if it were shown that the plan is not to the best interest of the public and the bar. That showing has not been made by the few lawyers who responded to our invitation to file briefs in the case.

Unquestionably the experience gained in other states is the best guide for determining whether the plan will be beneficial in Arkansas. We are much impressed by the fact that no state having an integrated bar has ever

returned permanently to the alternative of a voluntary association that is supported only by those lawyers who are willing to devote their time and effort to projects that are really the responsibility of the bar as a whole. Oklahoma went back to the old system temporarily when the statute integrating the bar was repealed, but the arrangement had proved so popular that it was reinstated by rule of court. In the Florida case cited above it was said: "Letters received from the States in which the integrated bar has been tested, recommend it as a vast improvement over the voluntary association and proclaim that they would under no circumstances return to the old system."

The few opponents of the present petition object mainly to the fact that membership in the organization is to be compulsory; this is said to be akin to a closed shop, to be undemocratic, and to border on socialism. It seems evident, however, that some degree of compulsion is implicit in the language of Amendment 28, which directs this court to make rules regulating the practice of law. Any form of regulation imposes at least some restraint on the persons whose conduct is regulated, and if we were required to wait for complete unanimity among the members of the bar there would obviously be no need for the rules when finally adopted.

Furthermore, this proposal is clearly one that affects the public interest, and it is a commonplace truth that in such matters every individual cannot enjoy completely unrestricted freedom of action. The integration plan does not compel any attorney to attend the meetings of the association nor control in any other way his own free choice of conduct. All that he is required to do is to contribute a small sum annually, tentatively suggested as five dollars, to assist the association in performing its duty to the public. There are undoubtedly many ways in which the law and the administration of justice—matters of vital concern to every attorney—may be improved. We do not think it unreasonable to require every attorney to assume at least a minimum share of the collective responsibility.

At this time we express our approval of the request for an integrated bar. This petition, as the first step toward integration, asks only that certain changes be made in Rules 6 and 10. The suggested amendments would still leave open a number of issues, such as the procedure by which the new organization is to be brought into being, the manner in which its constitution or governing rules are to be prepared and adopted, the status of licensed attorneys not actively engaged in the practice of law, and the exact annual license fee that should be imposed to support the association. To the end that integration may be accomplished by January 1, 1954, we request the sponsors of this petition and all other interested attorneys to submit detailed recommendations to the court by October 1 of this year.

GRIFFIN SMITH, Chief Justice, dissenting. What has so frequently been referred to as the genius of the American people, of which Arkansas is truly typical; —the spirit of our political, social, and professional institutions;—the concept upon which human dignity reposes, being intrinsic attributes fervently thought to have become inseparably associated with independence and man's right to achieve his own destiny within appropriate boundaries;—these virtues, disclosing the aptitude of spirited people to intuitively and accurately distinguish correct conduct as opposed to enslaved error, and to engage in a chosen calling unhampered by the retarding clutch of coercion,—all were so universally recognized, and had become so much a part of nearly the whole of those whose names spell character and trustworthiness on the Rolls of our Certified Bar, that this Court's overreaching writ of paternalism will come in the nature of a profound shock to lawyers who had little reason to *fear*, and small ground to *suspect*, that upon the vote of twenty-five per cent of more than 2,300 licensed attorneys the remaining seventy-five per cent would, by juridical fiat and transfusion, be maneuvered into a position where plenary command and supervisory authority would merge into a process of unappealable decision.

Since the morning of recorded Time there have been two conflicting and violently contending theories of control: One functions through understanding, cooperation, liberty of thought, and a willingness to conform to accepted rules of conduct. The other theory relies upon force, capricious will, dogmatic expedition of purpose, and the tyranny coexisting with entrenched power.

Accumulated discontent ushered in an historic transaction in 1215. From the thirteenth century until 1933 progressive thought carried with it a recognition of nonmolestation when the law itself was not infringed. Freedom is the culmination of self-determination and man's right to act for himself as one capable of constructive reflection in a society dedicated to intellectual development.

From enshrined moorings of safety long cherished we are rapidly becoming a nation governed by miscellaneous boards and commissions; by inquisitorial agencies operating under a flimsy pretext of legal authority approvingly referred to as the Rulemaking Power. It often feeds on sensation, acquires strength through publicized inquisition, is tolerated because of the law's delay, and it supplies within the social structure at the national level a refuge for intellectual introverts who are lacking in the capacity to succeed upon their own merits, and therefore envy without reason the person who has.

. . . . .

The stratocratic command addressed to attorneys begins with an assertion that ". . . a substantial majority of all the active practicing lawyers . . . have petitioned this court to create an Integrated Bar. . . . Authority for the procedure is to be found in Amendment No. 28 to the Constitution."

That there *was* a majority petition is an unassimilated conclusion. It rests upon the proposition that certain attorneys in most if not all of the seventy-five counties—*attorneys selected by the proponents of integration*—were permitted to give *ex parte* information regarding activities of their brethren at the Bar.

For example, *A* receives a letter asking for a list of the "active" practitioners in town or city *B*. *A* compiles this list, omits whom he pleases, and replies that *we* are the ones who are to be considered. By this process more than half of the enrolled attorneys were relegated to inactivity by this combination of physical and psychological overture attending inquiry. The result, in effect, was repeatedly rejected by the Court.

It was of small concern that old-timers who appeared in court only occasionally, or the newly-licensed ones who had not then been afforded the opportunity to make an impression in this highly competitive field, were treated as discarded superannuates or fledglings by chance. By whatever method the result was achieved, (and this is said without the slightest intent to impugn the motives or asperge the sincerity of any individual or group) it differed one-half from the list maintained by this Court—the list of men and women in respect of whose qualifications the Supreme Court as a constitutional tribunal had said were worthy. It is significant that when the Clerk of this Court sent ballots to *all* who had been certified, *including the majority upon which reliance is now placed,* less than six hundred expressed a preference for regimentation.

Some of the members of this Court have not forgotten the oral presentation when integration was requested under authority of Amendment No. 28. One of the State's foremost advocates—a man who had participated in promulgation of the Amendment and whose precise phraseology was accepted by those who at election pressed the issue, was asked why, if Amendment 28 conferred integration authority, some language affirmatively expressive of that purpose was not included; and he answered—with that commendable frankness and straightforwardness for which he was known—that the matter was intentionally left out through fear that the people would not adopt the Amendment. We are now supplying the calculated omission thought by the advocates of Amendment 28 to be too risky for popular scrutiny.

The Arkansas Bar Association was conceived by men of professional vision who as leaders felt that by voluntarily coming together and by holding annual conventions matters of mutual interest could be discussed. Its freedom from judicial molestation has been complete. There was no domination by individuals who in consequence of an election under the Constitution were distinguished by the recorded insignia of office. This is as it should be.

But under today's decree the majority of this Court is saying or clearly implying that no person heretofore trusted with a certificate of enrollment may continue to practice law unintegrated. Rules must be made, a superintending board or instrumentality of control established, dues in whatever sum thought appropriate will have to be paid, a financed secretariat will no doubt be created—all under penalty of disbarment for obstinate independence. All this because ballots signed by less than a fourth of the 2,300 men and women we have said were morally fit to represent clients and sufficiently versed in the law to earn reasonable fees—all because this minority has been given a value so chimerically inflated as to dwarf the conception of self-determination.

Ed. F. McFaddin, Justice (Dissenting). In ordering the integration of the lawyers of Arkansas, the majority of this Court is taking a long step down the road toward a judicial regimentation of the legal profession in this State; and I cannot agree to that step. Hence this dissent, and some of the reasons that impel it.

The attempted justification for such integration is found in the first sentence of the majority opinion, which reads:

"A substantial majority of all of the actively practicing lawyers in the State have petitioned this Court to create an integrated bar association."

The fact—if it be a fact—that a majority of the actively practicing lawyers in the State have asked for this integration is indeed a poor justification for judicial action. Courts do not decide cases according to popular will; nor

may Courts submit pending problems to voting to determine how a case should be decided. (*Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662, 158 A. L. R. 179.) Even when both parties desire a decree annulled, the Court still has discretion to refuse the prayed relief. (*Dunn* v. *Dunn,* 222 Ark. 85, 257 S. W. 2d 283.) Even when the Attorney General of Arkansas offers to confess error in a criminal case, this Court still examines the record to see if the confession is well taken, and in some instances, has refused to receive the confession of error. *Skaggs* v. *State,* 88 Ark. 62, 113 S. W. 346.

So, if *all* the lawyers licensed to practice by this Court had requested integration, nevertheless this Court should consider whether discretion would be abused in granting the request, even assuming the Court has the constitutional right to decree integration. In short, this Court cannot, like Pilate, wash its hands of responsibility by saying a "substantial majority" has asked that we do this.

When we consider this matter on its merits, stripped of the alleged "majority petition" argument, we find that this Court, by a majority of the Justices, is now compelling all licensed attorneys in this State to join a compulsory bar association. Under the sugar-coated word "integration," the majority is accomplishing a judicial regimentation of the legal profession. We have never had such a compulsory bar association in Arkansas, so this is certainly a drastic change. In considering any change, it is wise to always consider the proposal under three points:

(a) the existing evil;

(b) the proposed remedy; and

(c) will the proposed remedy alleviate the existing evil without causing other and greater evils? Unless any proposed change can pass the test of the three points above, then the change should not be made; so I present my views under these three points.

(a) *"The Existing Evil."* The majority opinion states that we have 2,371 attorneys licensed by this

Court.[1] The proponents of integration say that *all* the licensed lawyers should be required to contribute to the support of the bar association. My investigation discloses that there are 1,070 lawyers who are, at the present time, members of the voluntary bar association.[2] So really the "existing evil" is that only 1,070 lawyers are supporting the voluntary bar association, and, therefore, that association cannot extend its activities as much as some desire.

(b) *"The Proposed Remedy."* To remedy the aforesaid "evil," it is proposed that the Arkansas Supreme Court compel every lawyer licensed by this Court to pay an equal pro rata part of all of the expenses of the compulsory bar association. Polish and paint the proposal as much as you will, the hard fact remains that this "integration" is a form of taxation which will be required for the privilege of being a licensed attorney; and the tax money is to go for enlarging and expanding of various activities.[3]

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[1] Some time has elapsed since the petition for integration was filed by 803 lawyers, which petition stated that there were only 1,129 lawyers engaged in the active practice in this State. Some time has also elapsed since the Clerk of this Court mailed ballots to each of the 2,371 attorneys licensed by this Court and received returns from 592 favoring integration and 455 opposing it. But for the purposes of this opinion, I treat all of the figures as current figures, just as did the opinion of the majority of this Court.

[2] I use the term "voluntary bar association" to indicate the present Bar Association, which has been in existence since 1899. I use the term "compulsory bar association" to indicate the one that this Court is about to create in granting this petition for integration.

[3] Part of the argument advanced by the proponents of the integrated bar, as filed in this Court, reads as follows:
"Some benefits to be derived are:
"1. A central office can be maintained at Little Rock with a paid, full-time secretary to assist lawyers over the state in their practice, to eliminate needless trips to Little Rock.
"2. Standard legal forms can be furnished. In Oklahoma, the annual dues of $10.00 cover both the Law Review subscription and weekly advance sheets of the Supreme Court opinions. We pay each year a license fee of $1.00, bar association dues, $6.50, plus $12.50 for the Reporter, or a total of $19.00.
"3. Much can be done to curtail the unauthorized practice of the law. Sound public relations can be developed, to eliminate certain prejudices against lawyers.
"4. Since no segment of lawyers can control the integrated bar, representative officers can speak for a unified bar.
"5. Needed projects can be undertaken. The bar will be able to do its work better, and the public will benefit by an effective organization. . . ."

I am a member of the present voluntary bar association, and have paid my dues ever since becoming a member, shortly following World War I. I have paid my dues voluntarily; and I do not think that others should be required to pay who do not so desire. Compulsion is a poor substitute for voluntary action, regimentation is the direct antithesis of Democracy: yet compulsion and regimentation constitute the proposed remedy in this case.

(c) *"Will the Proposed Remedy Alleviate the 'Existing Evil' Without Causing Other and Greater Evils?"* The proposed remedy will alleviate the "present evil": yes, it will get the money to operate a greatly expanded machine, because when the Supreme Court orders every licensed attorney to pay a certain amount of money at stated intervals, then the attorney must pay such amounts or lose his license: so it is clear that the compulsory tax will bring in the money. But that is only a small part of the question we now are considering.

The large question is, "*. . . will the proposed remedy cause other and greater evils?*" I am convinced that it will. The very word "compulsory" bar is obnoxious to the legal profession, and the fact that it is a *compulsory bar* is sufficient in itself to be a preponderating evil.

According to the majority opinion, there are 1,129 lawyers actively engaged in the practice in this State. We now have 1,070 members of the Bar Association of Arkansas, our present voluntary bar, which has been in existence since 1899.[4] Our voluntary bar association has had a steady growth.[5] Each year when we meet in annual session—usually at the Arlington Hotel in Hot Springs—we have the feeling that we are attending as voluntary members because we love our profession, and not because some court order has compelled us to be members. If a court can compel a lawyer to join an asso-

[4] On Page 266 of Vol. 6 of the Arkansas Law Review, there may be found the name of every President of the Association from 1899 to 1952.

[5] The membership figures of the voluntary bar association, as furnished me, for the past several years are as follows: March 10, 1953, 1,070 members; Jan. 18, 1952, 939 members; June 27, 1951, 925 members.

ciation, then a court order can compel a lawyer to attend the meetings. What kind of meetings would those be in a free and Democratic country?

When this Court requires every lawyer to join the compulsory bar, then every substantial thing that the compulsory bar may hereafter do will, likewise, be subject to the approval or disapproval of this Court. Thus there may be assumed by this Court the responsibility to see that all those whom we compel to be members of the compulsory bar will be accorded fair and equal treatment. In the light of the foregoing, the following matters occur to me:

(1) The proposed constitution of the integrated bar, after it shall have been adopted by the bar, will undoubtedly be submitted to this Court for final approval.

(2) This Court may make a requirement that all attorneys be afforded an equal opportunity to participate in the drafting of the constitution; or if the constitution be adopted by a few lawyers (appointed in some manner not yet determined) and then submitted to the entire bar for adoption or rejection, even then the constitution will undoubtedly be submitted to this Court for final approval.

(3) This Court should see that a place of meeting be fixed for the compulsory bar at which all members of the compulsory bar may be in attendance without violating any of our racial segregation laws.

(4) This Court should see that all sections of the State are afforded equal representation on the governing board of the compulsory bar.

(5) Finally, this Court should consider what is its wish and pleasure about the continuation of the present voluntary bar of Arkansas. Will the Court forbid lawyers from joining a voluntary bar? What is the advantage of having a compulsory bar if there is also to be a voluntary bar?

When the Court considers every one of these matters and acts on them, where is any freedom left to the lawyers?

The foregoing are only a few of the evils that are inherent in the "proposed remedy" of integration. I submit that these evils are far greater than the present one, where 1,070 lawyers are in a fine voluntary bar association, and only 592 lawyers of the entire 2,319 licensed by this Court have voted for integration. Under the proposal, the lawyers lose their freedom and become subject to judicial rule. Under the constitution of the present voluntary bar, judges cannot hold office in the association, and that is a wise provision. But, under the integrated bar proposal, the Supreme Court Justices become the rulers of the bar.

I cannot agree to this proposal for an integrated bar.

ON REHEARING

George Rose Smith, J., on rehearing. Two principal points are made in the various briefs filed in support of the request for a rehearing. First, it is said that a bar association is a labor union and that therefore an integrated bar would be a closed shop, in violation of Amendment 34 to the constitution. This argument is wholly without merit. Labor unions are organized primarily for the purpose of bargaining with management in the matter of wages, hours of employment, working conditions, etc. A professional organization such as a a bar association does not represent its members in these matters and bargains with no one. It is obviously not a labor union.

Second, it is said that most of the members of the bar are opposed to integration. This, if true, is a valid argument, for our opinion of April 27 was occasioned by the fact that far more than half of our active attorneys were urging us to integrate the bar. As we then said: "In a matter that is of more direct concern to the bar than to the bench we are naturally inclined to give effect to the wishes of a clear-cut majority of our practitioners."

After the announcement of our first opinion the Arkansas Bar Association, which had sponsored and circulated the petition for integration, adopted at its annual meeting a resolution which in effect requests us to reject its petition. More than half of the sixty-three lawyers whose names appear on the principal brief on rehearing had signed the petition for integration. Acting upon the assumption that such complete changes of position were not lightly decided upon, we directed our clerk again to submit the question to all licensed attorneys. In this poll the vote was 489 for integration and 1,003 against it, confirming the stand now taken by the Bar Association.

We reaffirm the principles approved in our original opinion, and in accordance therewith we again give effect to the view that prevails among a decided majority of our attorneys. The petition for rehearing is granted, and the petition for integration is denied.

GRIFFIN SMITH, C. J., and MCFADDIN and MILLWEE, JJ., concur.

ED. F. MCFADDIN, Justice (concurring). I heartily concur with the result finally reached in this matter: we now have a unanimous Court denying the Petition for Integration of the Bar.

Since this matter of integration has been pending for so long a time, I desire to place of record some facts that may not have been mentioned; and I now list them in chronological order:

1. The records of this Court show that on June 26, 1944, a Committee composed of J. D. Head of Texarkana, J. F. Loughborough of Little Rock, and Abe Collins of DeQueen, presented to this Court the motion of the Arkansas Bar Association requesting that this Court order the integration of the Bar. That motion was taken under consideration.

2. Because many lawyers were in the Armed Forces in 1944, this Court decided to await their return before dealing with the matter of integration. Then in 1947,

1948 and 1949, petitions were circulated[1] favoring integration; and in 1950 the said petitions were filed in this Court, purporting to be signed by 803 attorneys. These are the petitions mentioned in the majority opinion of this Court of April 27, 1953. Oral arguments were heard in 1950 for integration, and briefs pro and con were directed to be filed by September 30, 1950.

3. In the fall of 1951, this Court conducted a ballot by mail on this matter of integration: a ballot was sent to each of the 2,371 attorneys enrolled in this Court. The result of that ballot was: 592 for integration and 455 against integration; showing that only 1,047 of the 2,371 attorneys voted on the question.

4. The Court kept the matter of integration in reserve; and on April 27, 1953, there was delivered the majority opinion which ordered integration. Petitions for rehearing were duly filed. Four printed briefs containing the names of several scores of attorneys and several County Bar Associations, were filed in opposition to the ordered integration. No brief was filed favorable to integration during this time for rehearing.

5. The Bar Association of Arkansas—the voluntary Bar of this State—met in annual session on May 15, 1953, and by vote of 195 to 165 adopted the following Resolution:

"WHEREAS, on April 27, 1953, the Supreme Court of Arkansas, in its opinion In the Matter of the Integration of the Bar (No. 166), by a divided court expressed its 'approval of the request for an integrated bar,' the 'distinguishing characteristic' of which is that every attorney must be a member of an all-inclusive bar association and contribute to its support, and

"WHEREAS the Bar Association of Arkansas, in annual convention assembled—believing (1) that the majority of the practicing lawyers in this State are opposed to an integrated bar, (2) that membership in a bar association should be voluntary, not compulsory, (3)

[1] That the petitions were circulated during 1947, 1948 and 1949 is stated in a letter sent by Honorable Abe Collins to the Justices of this Court under date of April 22, 1950.

that no lawyer should be compelled, over his objection, to support the activities of a bar association, (4) that the Supreme Court of Arkansas, under Amendment No. 28 to the Constitution of Arkansas, has ample power to regulate the 'practice of law and the professional conduct of attorneys-at-law' and has effectively exercised that power by establishing the Bar Rules Committee, which has given general satisfaction, and (5) that there is no necessity or occasion for the integration of the bar, —considers that the Supreme Court of Arkansas erred in said opinion, and

"WHEREAS said opinion of April 27, 1953, is now pending on rehearing,

"NOW, THEREFORE, BE IT RESOLVED that the Bar Association of Arkansas, believing that every licensed lawyer in this State is a party to this proceeding, urges the Supreme Court of Arkansas to reconsider its opinion in this matter and, on re-hearing, to reverse said opinion and rescind its approval of the request for an integrated bar."

6. The Justices, making the majority opinion, decided to again submit the question of integration to all the enrolled attorneys of this Court. The result of such June, 1953, ballot by mail was: opposed to integration, 1,003; favorable to integration, 489. With these results, the previous majority, that made the opinion of April 27, 1953, has joined the previous minority; and we now have a decision by a unanimous Court denying the integration of the Bar. So after nine years—June, 1944, to July, 1953—this Court has reached a final decision on this matter of integration.

In the foregoing I have given only a factual and chronological listing of events. In the supplemental opinion on rehearing it is stated that the previous majority reaffirms "the principles approved in our original opinion." I reaffirm the statements contained in my original dissent. The resolution of the Bar Association

of Arkansas—as heretofore copied—contains the arguments against integration which seem to me to be correct.

MINOR W. MILLWEE, Justice (concurring). I fully agree with what is said in the supplemental opinion. As one of the four judges who joined in the two separate orders for a poll to ascertain the sentiment of Arkansas lawyers on the question of integration, I feel constrained to add a few words.

It has been my conviction from the beginning that the matter of integration should be determined in accord with the will and wishes of a majority of the legal profession. So I proudly bear up under the censure of my dissenting brethren for my belief that the matter should be resolved by the hallowed democratic principle of majority rule. This court follows that principle in passing on matters which involve grave questions including the right to life itself. Our legislatures, state and national, pursue it in making the laws under which we must all live. In my humble opinion, the adherence by some governments to the reverse of that great American principle is the fountain head of many of the ills that beset mankind today.

I entertain no strong feelings for, nor pet prejudice against, integration. Perhaps I am too naive, but it simply had not occurred to me that I should drop the role of judge, assume that of an advocate and be guided by personal feelings in a matter of such vital concern to the lawyers of Arkansas.

Nor do I concur in the strange concept that an election is meaningless insofar as the will of the majority is concerned unless everybody eligible to do so sees fit to cast a ballot. This idea seems to find more favor in certain foreign jurisdictions where every voter is forced to cast a ballot—and only one way. Under our democratic system, we accept as decisive the verdict of a majority of those who, being afforded full opportunity to do so, voluntarily cast their ballot upon an issue.

I am still of the opinion that Amendment 28 to the State Constitution imposes upon us both a power and a duty to act in the premises. To me it seems fundamental that such action should be resolved solely in compliance with the will of the bar and in total disregard of any bias of this bench. It is clear from the poll last taken that a majority of the lawyers of Arkansas do not favor integration at this time. I gladly and respectfully accede to and proclaim their wishes.

HOPE COCA-COLA BOTTLING COMPANY, INC. *v.* JONES.

5-85 257 S. W. 2d 272

Opinion delivered April 27, 1953.

Graves & Graves, for appellant.

Tompkins, McKenzie & McRae, for appellee.

ROBINSON, Justice. Appellee drank a portion of a bottle of Coca-Cola which she claims contained a dead mouse. She filed suit against appellant Hope Coca-Cola Bottling Company and asked damages in the sum of $5,000. There was a jury verdict in her favor for $3,000 which the trial court reduced to $750.

On appeal appellant contends that there is no substantial evidence to sustain the verdict; that the court erred in giving instruction No. 4 because it ignored the defense of contributory negligence; that the court erred in modifying instruction No. 12; and that the $750 judgment is excessive.

On Monday, March 24, 1952, appellee, an employee of Shanhouse, a garment manufacturing concern in Hope, Arkansas, purchased a Coca-Cola which had been bottled by the defendant. The Coca-Cola, having been in the refrigerator over the week-end, was frozen. Upon taking a swallow out of the bottle, appellee noticed a peculiar taste and remarked about it at the time, but could not see the contents clearly due to its frozen condition, and thought perhaps for this same reason the taste was unusual; also her friends told her probably something was wrong with her taste. But after taking a couple more swallows, she concluded that something definitely was wrong with the drink, set it aside, and got a cold drink of another kind. When the Coca-Cola had thawed out, it was discovered that it contained a dead mouse.

Shortly thereafter appellee became ill and was unable to work for the greater part of the balance of the day. She was taken to a hospital, where a doctor saw the Coca-Cola and mouse and gave her something to make her vomit. She remained at the hospital from about 1:00 until about 4:15. During that time she got very sick and fainted. She was not able to go to work the next day; and on Thursday, still being unable to work, she went to Dr. Hesterly who gave her some medicine. She went back to work on Friday; but Saturday her joints began to swell and ache, and she broke out in a rash. Her eyes were swollen and her gums so sore she couldn't chew anything. She was running a temperature, had a rigor, and stayed in bed two weeks. The rash on her body remained over a week; during that time she was running a fever and Dr. Hesterly was attending her. Her joints swelled in the evenings, and she suffered considerable pain. Also her feet swelled. After staying in bed for two weeks, she had fever blisters all over her lips and had lost about 20 pounds; but she got up and attempted to go back to work. She had never had any trouble of that kind before, no swelling of the joints, no rash, in fact no serious illness; she is 37 years of age. She was actually disabled about three weeks; she earned

$30 per week. In the circumstances as shown by the record, we can not say that a $750 judgment is excessive.

One of the points made by appellant is that since the appellee kept the bottle with its contents in her possession from the time she purchased it to the day of the trial without having it analyzed, there is no substantial evidence that it was unfit for human consumption. The mouse was rotten and had a very foul odor.

Appellant relies to a large extent on the case of *Coca-Cola Bottling Co.* v. *Wood,* 197 Ark. 489, 123 S. W. 2d 514; in that case the bottle of Coca-Cola contained a rusty and corroded Coca-Cola bottle top. No showing was made that there was anything in connection with the bottle top that would be injurious to a person. Although a doctor did testify that in his opinion the bottle cap would cause gastritis, no reasonable basis for the opinion was shown. There was other testimony to the effect that an analysis had been made of a similar bottle cap and it contained nothing that would be injurious in the circumstances.

Appellant cites other cases of similar import: *Jonesboro Coca-Cola Bottling Co.* v. *Hambrooke,* 206 Ark. 385, 175 S. W. 2d 387, where the Coca-Cola contained a bobby pin; and *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Bell,* 197 Ark. 671, 109 S. W. 2d 115, where plaintiff was given a judgment in the sum of $7,500 on the contention that a girl 13 years of age contracted amoebic dysentery from drinking a Coca-Cola containing a fly. Laboratory tests were made of the contents of the bottle and no harmful germs found. In reversing the judgment, the Court said the mere presence of the fly was not sufficient to show it contained the amoebic germ.

We think the case at bar, where the plaintiff is not contending she contracted any specific disease but was merely made sick for a period of three weeks by drinking part of a bottle of Coca-Cola containing a dead mouse, is in a different category from those cases cited. Here Dr. Hesterly testified: "Assuming that she drank from it and the mouse was in there, it could have caused

the condition she had." This testimony is uncontradicted.

Appellant contends that instruction No. 4 given by the court was error because it ignored the defense of contributory negligence. But the instruction provides: "If you further find the presence of the mouse in the bottle rendered the contents of the bottle poisonous, deleterious and unfit for human consumption *and that the plaintiff in the exercise of ordinary care* (our italics) and without knowing the contents of said bottle were poisonous, deleterious and unfit for human consumption, etc." We think this language was sufficient to embrace the theory of contributory negligence. Moreover, there is no substantial evidence in the record of any negligence on the part of the plaintiff.

Next, appellant complains of the modification of instruction No. 12. However, the Court merely added "provided they use due care," and we do not see how this was in any way prejudicial to appellant. We find no error.

The judgment is therefore affirmed.

Mr. Justice McFaddin not participating.

YOUNG *v.* WESTARK PRODUCTION CREDIT ASSOCIATION.

5-70 257 S. W. 2d 274

Opinion delivered April 27, 1953.

Bates, Poe & Bates, for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

G. V. Head, Amicus Curiae.

WARD, Justice. Appellants, as residents of Scott County, had for several years borrowed money from the Westark Production Credit Association. The Credit Association is an agricultural credit agency created under the Farm Credit Act of 1933, 12 U. S. C., § 1131 *et seq.,* and makes short-time loans to farmers under the terms of that Act and its own bylaws, rules and regulations promulgated thereunder.

On October 27, 1950, appellants gave to the Association their note [due November 5, 1951] for $6,400 to take up a balance which they owed it and to obtain additional funds, and secured the note by a mortgage on their farm and a chattel mortgage on approximately 70 head of livestock, certain feed, farm implements and a truck.

Although not mentioned in the note or the mortgages, an officer of the Association arranged a suggested schedule of payments in 1951 as follows: April, $250; July, $1,000; and in November, $1,105, $2,500 and $1,500. In each instance the number and kind of livestock were indicated to be sold to make the payments. Also, though not mentioned in the note or mortgages, there was an

understanding, as contended by appellants, that the Association would advance them additional funds from time to time to buy feed for livestock. On December 6, 1950, the Association advanced appellants an additional $400 on their note, and in like manner $600 was advanced on January 15, 1951.

On January 28, 1952, appellants still owed a balance of $4,363.01 on their total indebtedness of $7,400 and interest, and on February 1, 1952, the Association filed suit to foreclose.

By way of answer and cross-complaint appellants raised the following defenses:

(a) They were required to purchase 122 shares of stock at $5 par value per share in the Association;

(b) The Association promised to accept the stock at par value on any balance of indebtedness;

(c) The Association had refused to furnish them with a copy of its by-laws;

(d) They had paid into court the amount sued for, and asked to have value of stock [$610] offset against balance of indebtedness; and

(e) The Association had promised to make additional advances to buy feed for stock and failed to do so, forcing them to sell at a loss of $500.

Appellee denied making the promises with reference to offset of stock and additional loans and further stated that, had such a promise been made with reference to an offset, it would have been ultra vires under § 1131g and 1131e, Title 12 U. S. C. of an Act of Congress June 16, 1933, and denied being under any obligation to make advances.

Appellants contend for two items of relief, both of which were denied by the trial court. One is to have the value of their stock offset against the balance of their indebtedness, and the other is to recover $500 damages.

Stock Offset. It appears to us that if appellants are to prevail on this item they must do so on one of three

grounds: (a) the Farm Security Act of 1933 heretofore mentioned requires such offset; (b) the by-laws of the Association require it; or (c) the Association is bound [to grant such offset] by promises made by its officers to appellants. We do not think appellants' contentions can be sustained on either ground.

(a) The pertinent parts of the Farm Security Act are found in 12 U. S. C., § 1131.

Subsection "g" reads:

"Borrowers shall be required to own at the time the loan is made, class B stock in an amount equal in fair Book value (not to exceed par), as determined by the Association to $5.00 per $100.00 or a fraction thereof, of the amount of the loan. Such stock shall not be cancelled or retired upon payment of the loan but may be transferred or exchanged as provided in § 1131e of this title."

Subsection "e" reads:

"No class B stock or any interest therein or right to receive dividends thereon, shall be transferred by act of parties or operation of law except to another farmer borrower or an individual eligible to become a borrower, and then only with the approval of the directors of the association."

From the above it clearly appears that the administrative act not only does not compel or authorize the retirement of stock upon payment of a loan but actually forbids it.

(b) The provision of the by-laws on which appellants rely for an offset is § VI (I)3, which reads as follows:

"Any stockholder who becomes ineligible to borrow from the Association because of a change in its territory, because he changes his farming operations to the territory of another Association, or because of his application for a loan which the association is not authorized to make, may with the consent of the Board of Directors, surrender his class A or class B stock for retire-

ment and cancellation at the fair book value thereof (not to exceed par); *provided* that such consent may not be given by the Board of Directors until notification has been received by the association that a loan to the holder of said stock has been approved by another association created under the Farm Credit Act of 1933. In no case shall the aggregate fair book value (not to exceed par) of the stock so retired and cancelled exceed the value of the class B stock to which the holder has subscribed in the other association."

Appellants contend that they became ineligible to borrow from the Association and, therefore, under the above-quoted section, they should have been allowed to offset their stock, but we do not agree. The section reveals three things that make a borrower ineligible, viz: (1) if the Association changes its territory; (2) if the borrower changes his location; or (3) if the Association is not authorized to make the kind of loan he wants. It is only under the last-mentioned circumstance that appellants base their claim to ineligibility. The facts on which appellants rely, in our opinion, do not justify their contention in this connection. On October 27, 1950, appellants borrowed $6,400; on December 6, 1950, they were advanced an additional $400; and on January 15, 1951, they were advanced another $600. Both of these advances were made in connection with the original loan and were secured by the same mortgages. On March 3, 1951, the Association refused appellants' application for an additional advance of $350, and it is this refusal which appellants say rendered them ineligible. We do not think this state of facts brings appellants' contention within the spirit or the meaning of § VI (I)3 quoted above. It is self evident that appellants were eligible for the original loan of $6,400 and it would be unreasonable to say they could change their status at any time [during the life of the original loan] by making demands for additional advances which the Association did not wish to make and which it was not legally bound to make.

There is another good reason why appellants could not demand an offset in the manner here attempted even

if they were otherwise within the above section of the by-laws, which section states that stock may be surrendered "with the consent of the Board of Directors." No such consent was here shown.

(c) Appellants insist they were entitled to the offset because the Association had [through its officers] promised it. We do not think the testimony justifies this conclusion. Aside from the testimony of appellant, Young, which was indefinite on the specific terms of an offset, appellants rely principally on the testimony of a former secretary of the Association. In effect he stated the Association had always retired stock [of a borrower] when it could not meet the member's credit requirement, but he also stated there were rules to govern and that it was necessary for the Board of Directors to act. It is, moreover, apparent from the testimony of appellant, Young, that he must have been familiar with the operations of the Association and also that stock in the Association was not always retired when a loan was paid by one of its members. He had done business with the Association over a period of 10 or 12 years, during which he had paid off numerous loans without having his stock retired. The by-laws of the Association were a part of his loan transaction. In *Arkansas Cotton Growers' Co-op. Ass'n* v. *Brown,* 168 Ark. 504 (at p. 513), 270 S. W. 946, 1119, this Court said:

"In fact, it is settled law that the by-laws of a corporation evidence the contract between it and its members or stockholders and govern the transactions between them."

The law presumes that appellants knew the provisions of the by-laws of the Association. See *Benes* v. *Supreme Lodge,* 231 Ill. 134, 83 N. E. 127, 14 L. R. A., N. S. 540; *Bookman* v. *R. J. Reynolds Tobacco Co.,* 138 N. J. Eq. 312, 48 Atl. 2d 646; and *Holford* v. *National Aid Life Association,* 177 Okla. 284, 58 Pac. 2d 588.

Appellants say they were not given a copy of the Association by-laws but it does not conclusively appear that they made demand for a copy and that the Association wilfully or fraudulently refused to comply.

Damages. It is the contention of appellants that they should have been awarded damages because the Association had promised to furnish ample money [under the original loan agreement] to feed out all his hogs and that it failed to carry out this agreement, forcing them to sell part of their hogs early and at a loss of $500. We do not agree with this contention.

The original loan for $6,400 was made October 27, 1950, and advances thereunder were made of $400 and $600 on December 6, 1950, and January 15, 1951, respectively. Although the Association was not bound by the original loan note or the mortgages given as security or by any other writing to make unlimited advances, or any advances, to appellants, they again contend that the Association was bound to do so by oral promises of certain officials.

Even if such promises had been made they could not bind the Association. The matter of extending credit involved questions of judgment and discretion, and parol evidence was not admissible to vary the written contract. See *Zearing* v. *Crawford, McGregor & Camby Co.,* 102 Ark. 575, 145 S. W. 226, and *Lane* v. *Smith,* 179 Ark. 533, 17 S. W. 2d 319.

Moreover, the testimony does not justify the conclusion that unlimited credit was promised, even though it be conceded that some advances were contemplated. Appellants rely strongly on a letter written January 10, 1951, by the Assistant Secretary-Treasurer in which it was said to Mr. Young: "In the event you should need additional funds, we would be pleased to have you communicate with us." Just five days later $600 was advanced to appellants, but, as we think, this letter was not a definite promise to advance appellants $350 more on March 3, 1951, or any other sums.

The record shows that on January 20, 1951, the Association wrote Mr. Young to the effect that he would not be advanced any more money and that he would be expected to meet his payments schedule. He therefore knew it would be useless to apply for additional funds in March.

In accordance with the views expressed above, the decree of the trial court is affirmed.

BROACH *v.* MCPHERSON.

5-53 257 S. W. 2d 565

Opinion delivered April 27, 1953.

Rehearing denied June 1, 1953.

Paul K. Roberts, for appellant.

Edwin E. Hopson, Jr., Virgil R. Moncrief and *John W. Moncrief,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellant sued for overtime, pay differential, and the incidents allowable in appropriate circumstances under the Fair Labor Standards Act of 1938, as amended. See 29 U.S.C.A. §§ 206-207. This is a second appeal. *Broach* v. *McPherson,* 220 Ark. 457, 248 S. W. 2d 355. An instructed verdict for the defendant was given and the action reversed under a finding that issues of fact were (a) whether the defend-

ant McPherson owned the mill, and (b) whether substantial parts of the mill's production entered interstate commerce.

On retrial a jury found in McPherson's favor and Broach has again appealed.

It is now certain that McPherson was an owner of the rice mill and there is no substantial testimony showing that an appreciable part of the mill's product did not enter into commerce among the states: indeed, the conclusion is inescapable that it did. But a new defense has been interposed. The present contention is that Broach, who admittedly served as a night watchman, was employed in two capacities—first as watchman for the mill, and secondly as watchman for the drier. Although the records did not distinguish for the first two weeks, and there was nothing on the pay envelope (containing cash and currency) showing that parts of appellant's services were apportioned to the mill and parts to the drier, McPherson testified that in employing appellant this was mentioned; and inasmuch as the drier received rice from local patrons and serviced it as a commodity distinct from the mill proper, two sets of accounts were maintained.

But even so, railroad shipments of milled rice disclosed that most of it went into interstate commerce, hence mill employees were within the Fair Labor Standards Act. In other words, the drier and mill, being integrated, were essential or useful one to the other. The extent to which this inter-relation went is not shown except by the testimony of appellee's accountant who said that he had made an abstract of book entries. At best, the bookkeeping was arbitrary, as shown by the transcript:

Testimony of S. L. Toole: "On [the first and second] payrolls fifty cents an hour appears. Then Mr. McPherson told me he had hired Mr. Broach at a certain price to do two jobs at different prices: one would be on the mill and the other would be on the drier. . . . Then Mr. McPherson said to me, 'I guess the best way

to break it down—pay him 77 hours. I am certain it will take more time for him to watch the drier and tool shed than the mill because, if I remember correctly, I think there are only two [punch-clock recording] stations in the mill—I won't say about that.' So I decided then I would give him three days a week as time on the mill and four days a week as time on the drier, and that is why I broke it down that way.''

In examining the transcribed testimony it is difficult to determine with complete accuracy what part of the statement was made by the witness and what part by McPherson. But appellant was not consulted regarding this apportionment of time, and during the entire period of his employment the milling company's pay envelopes were used. The present contention is that through some process not susceptible of explanation appellant is charged with knowledge that the gross amount was apportionable thirty-three hours per week for mill work at 75 cents, and forty-four hours assignable to drier duty at 31 cents. The witness admitted that during the time appellant worked ''there'' until the day of his leavetaking he did not see him.

It is not seriously disputed that a large part of rice dried at the so-called segregated installation passed to the mill, and necessarily, under any reasonable inference deducible from the evidence it became a commodity in interstate commerce.

But assuming that this was not shown and that McPherson's recollection of his conversation with appellant when the contract of employment occurred is correct, and that McPherson told Broach that he was to nightwatch for the mill and drier, there is no substantial testimony that Broach received instructions to do other than watch the mill and the drier plants—activities so closely related when the nature of the employment is considered as to preclude any theory of contractual segregation, apportionment, or pro rata of time.

A recent case construing the Fair Labor Standards Act is *Alstate Construction Company* v. *Durkin, Secretary of Labor,* 345 U. S. 13, 73 S. Ct. 565. A district

court action was brought against Alstate by the Wage and Hour Administration to enjoin the company from violating overtime and record-keeping provisions of the Act. Alstate is a Pennsylvania road contractor engaged in building, repairing, and reconstructing highways, etc. The company also maintains manufacturing plants at three points in Pennsylvania where a bituminous concrete road surfacing mixture is prepared, called amesite. Most of the material is applied to roads by Alstate's own employes or by customers who make independent purchases. Slightly more than 85% of the work involved in Alstate's operations in the Durkin suit was on interstate roads, railroads, or for Pennsylvania companies producing goods for interstate commerce, while a little less than 14% was done on projects that did not relate to interstate commerce. The opinion states that Alstate made no attempt to segregate payments to its employes "on the basis of whether their work involved interstate or intrastate activities."

In citing *Overstreet* v. *North Shore Corporation,* 318 U. S. 125, 63 S. Ct. 494, 87 L. Ed. 656, and *Pedersen* v. *Fitzgerald Construction Co.,* 318 U. S. 740, 63 S. Ct. 558, 87 L. Ed. 1119, attention was called to the court's holding (in the Overstreet case) to the effect that interstate roads and railroads are indispensable instrumentalities in the carriage of persons and goods that move in interstate commerce, and "We then held that because roads and railroads are in law and in fact integrated and indispensable parts of our system of commerce among the states, employes repairing them are in commerce. Consequently he who serves interstate highways and railroads serves interstate commerce. By the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce. We therefore conclude that Alstate's off-the-road employes were covered by the Act because engaged in 'production of goods for commerce'."

A dissenting opinion by Mr. Justice Douglas, concurred in by Mr. Justice Frankfurter, takes an opposite view:—"The court reasons that if the man who is build-

ing or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the man who produces the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel?"

The dissenting opinion is copied from to show how the two minority justices interpreted the court's opinion.

It is appellee's contention that justification for his apportionment of appellant's hour-time is found in exemptions, § 213(a) (2), 29 U. S. C. A., applicable to any employe engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or in other provisions from which congressional intent may be inferred. A 1945 case in which exemptions are discussed is *Phillips* v. *Walling, Administrator,* 324 U. S. 490, 65 S. Ct. 807, 89 L. Ed. 1095. A headnote to the case in 157 A. L. R. 876, is: "Exemptions from the operation of the Federal Fair Labor Standards Act must, in view of its humanitarian and remedial character, be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of congress." While the Phillips-Walling case is not indentical with the litigation at bar in all of its factual aspects, the policy pronounced by congress has been stanchioned by U. S. decisions that adhere tenaciously to the liberal construction in favor of the worker mentioned in the Phillips case, and it is our duty to follow these decisions.

Appellant was unquestionably employed to night-watch the rice mill—an instrumentality of interstate commerce. No effort was made to show that he was not, at all times—even while punching the recording clock at the drier—under continuing duty to supply what protection should be necessary to see that the mill was not molested. The mere fact that a watchman was employed is conclusive of the proposition that McPherson regarded as essential the security thus afforded.

We conclude, therefore, that as a matter of law appellee could not privately instruct his bookkeeper to make the apportionment of time in a manner depriving appellant of rights afforded by the Fair Labor Standards Act when in fact the watchman's duties were continuous. There was never a time when he was not under an employment obligation to guard the mill, irrespective of the superimposed activity respecting the drier.

The judgment is reversed. The cause is remanded with directions to render judgment pursuant to the federal statute.

Mr. Justice George Rose Smith, Mr. Justice Paul Ward, and Mr. Justice Sam Robinson dissent.

Arkansas Power & Light Company *v.* Butterworth, Administratrix.

4-9885 258 S. W. 2d 36

Opinion delivered April 27, 1953.

Rehearing denied June 15, 1953.

Barrett, Wheatley & Smith, House, Moses & Holmes and *William M. Clark,* for appellant.

Elsijane T. Roy, Reid & Roy and *Frierson, Walker & Snellgrove,* for appellee.

ROBINSON, Justice. The Northern Rice Milling Company was a partnership composed of J. D. Butterworth, now deceased, and Harry W. Cormier. About 1:00 A. M. on November 10, 1948, a rice mill belonging to the partnership was destroyed by fire. This suit was filed on August 16, 1950, by Frances M. Butterworth, Administratrix of the estate of J. D. Butterworth, Harry W. Cormier, and also eleven insurance companies under subrogation clauses in policies of fire insurance. It is alleged that the fire was caused when an excessive voltage of electricity entered the mill due to the negligence of the defendant. There was a judgment for the plaintiffs in the sum of $256,898.48.

The defendant company owned and maintained a transformer station on the mill property near the main building for the purpose of reducing the line voltage from 13,800 down to about 250 volts. About 11:30 A. M. on the 9th day of November, 1948, there was apparently a flash-over from the primary line, where it was at-

tached to the bushing on the top of one of the transformers, to the transformer case. At this time the fuses at the lightning arrestors on the cross arm of the primary pole burned out. An employee of the Arkansas Power & Light Co. put in new fuses and switches at the top of the pole and told the mill operators that the condition had been remedied. At that time one motor was started in the mill to test the flow of electricity, and it seemed to be working all right. Some work was being done in the mill; the employees were cleaning up and some repair work that required the use of an electric welding machine was being done. Also all of the machinery was oiled. Subsequently, about midnight, the electric motors were turned on, and after they had been running for an hour or so, it was discovered that the mill had caught fire.

A few days later an inspection was made by employees of the Arkansas Power & Light Co. to determine if there was any defect in the transformer station. At that time the only apparent damage they found was that a portion of the bushings on top of the transformers had been chipped off. Just what caused this is uncertain, and the evidence is conflicting as to whether it would be a serious defect. Subsequently others, apparently employees of the insurance companies that carried the insurance on the mill, made an investigation to determine if there was any defect in the electrical apparatus making up the transformer station. The transformers were removed and brought to Little Rock where they were thoroughly examined at the Fagan Electric Company by representatives of the insurance companies.

Appellees contend that the bushings on the transformers were defective; that the fuses at the lightning arrestors were not of the size or kind required; and that the transformer station was not properly grounded. Appellant denies it was in any manner negligent or that the fire was caused by electricity. Without abstracting here the testimony in the case which is voluminous, suffice it to say that the evidence is sufficient to make it a jury question as to whether the fire was caused by excessive voltage.

Likewise there is evidence to the effect that regardless of anything else, if the transformer station had been properly grounded, excess current could not have gotten into the mill. There is also evidence to the effect that if the electric system in the mill had been sufficiently grounded, no excessive current could have entered the building. This evidence was sufficient to send the case to the jury on the questions of negligence on the part of the power company and contributory negligence on the part of the mill owners.

There are two errors for which the cause must be reversed. First, the court erred in submitting to the jury the issue involving the doctrine of *res ipsa loquitur* under Instruction No. 5 as follows: "The burden rests upon the plaintiffs to prove by a preponderance of the evidence that the defendant was negligent and that the fire and their losses therefrom were the direct and proximate result of the negligence of the defendant. However, if you find from a preponderance of the evidence that the fire was caused by high voltage from the defendant's power lines entering the rice mill, and that the instrumentality or thing which caused the loss was under the control and management of the defendant, and that no damage would have occurred in the ordinary course of events, if the defendant in the control and management of its appliances had used proper care, then the happening of the loss gives rise to a presumption of negligence on the part of the defendant, and the burden shifts to the defendant to account for the cause of the loss by showing that it was not caused by lack of care on defendant's part."

The courts have repeatedly held that the doctrine of *res ipsa loquitur* does not apply where the instrumentality which may have caused the damage was not in the exclusive control of the defendant. In *Coca-Cola Bottling Company* v. *Hicks,* 215 Ark. 803, 223 S. W. 2d 762, it is said: "There are statements in the decisions of this State, and other states, that for *res ipsa loquitur* to apply it must be shown that the injury complained of was caused by an agency or instrumentality under the exclusive control and management, at the time of injury,

of the one whose liability is asserted." In speaking further of the *res ipsa loquitur* doctrine in the same case, it is said: "The scope of this permissible inference must be carefully limited to exclude cases where the circumstances of the injury do not tend substantially to prove that negligence in the defendant, and in nobody else, caused the plaintiff's injury. To make certain that the injury has not been caused by somebody else through some intervening negligence, it is ordinarily required that the instrumentality causing injury [must] have been in defendant's exclusive possession and control up to the time of the plaintiff's injury."

In *Oklahoma Gas & Electric Company* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550, it is said: "To say that appellee's intestate came to his death by reason of appellant's negligence would require speculation not only as to the amount of current which proved fatal but also as to the method by which such alleged extra charge entered the house. Neither allegation is established by any direct testimony, and *res ipsa loquitur* can not be applied as a rule of law in a case where it is shown that the result, in this case death, might have been brought about by one of two or more speculative theories, neither of which is included or excluded by any affirmative evidence."

Here only a portion of the instrumentality was under the control of the defendant. It had the exclusive control of the transformer station and the wire up to where it entered the plaintiff's mill; but from that point on all of the wiring, switches, fuses, motors, lights, welding apparatus, and grounding facilities were exclusively under the control of the plaintiffs. The case of *Southwestern Gas & Electric Co.* v. *Deshazo,* 199 Ark. 1078, 138 S. W. 2d 397, is directly in point as to the *res ipsa loquitur* feature of the case. In that case three farmers cut a tree growing near a high voltage line of the Southwestern Gas & Electric Co. The tree fell on the line and broke it, causing it to sag; whereby it came in contact with a telephone wire going to a switchboard where Mrs. Deshazo was the operator. Excessive high voltage passed from the electric line to the telephone wire and

injured her. This Court said: "We think it may be announced that the only instance in which the rule of *res ipsa loquitur* applies must be that the act or thing causing the injury must have been under the exclusive control and management of the one charged. . . . Certainly the electric company had no control over the office of the telephone company nor the grounding of any of the wires." Likewise in the case at bar, the defendant electric company had no control over the wires in the mill or the grounding of the electric system therein. Therefore it did not have exclusive control of the instrumentality or thing from which the fire may have developed; hence the doctrine of *res ipsa loquitur* is not applicable.

Next, although during the trial of the case plaintiffs had contended that if through defendant's negligence excessive electricity got into the mill and caused the fire, contributory negligence would be no defense and had been over-ruled on that point, the court at their request, over objections of defendant, gave the following instruction No. 6: "The defendant has pleaded contributory negligence as a defense in this case and has offered evidence that the interior wiring in the rice mill was defective. The owners of the rice mill were not required by law to anticipate negligence on the part of the defendant or to take any precaution to protect their property against possible negligence of the defendant. Therefore, if you find from a preponderance of the evidence that the defendant negligently allowed high voltage to enter the rice mill and that this high voltage caused the fire, you should not find the plaintiffs guilty of contributory negligence on account of any failure on their part to anticipate or prevent it, even if you should find that the owners of the mill failed to safeguard it against the entry of high voltage. In other words, no defects in the interior wiring would justify you in finding contributory negligence on the part of the plaintiffs if the fire was caused by negligence of the defendant in allowing high voltage to enter the mill and if the fire would not have occurred without high voltage. The plaintiffs can be charged with contributory negligence only if by some act or failure to act they failed to use that care

which a reasonable, prudent person would have used in the circumstances, and then only if the fire would not have occurred without the act or failure of the plaintiffs contributing thereto. In determining whether the plaintiffs exercised reasonable care the question is whether a person of ordinary prudence, without expert knowledge, would have acted as they did, and they were not contributorily negligent unless they knew, or by reasonable care should have known, of the danger. You are further told that on the issue of contributory negligence, the burden rests upon the defendant, and it must prove contributory negligence by a preponderance of the evidence in order to avoid liability for its negligence, if you find that the defendant was negligent."

This instruction tells the jury that if through defendant's negligence high voltage got into the mill and caused the fire, then contributory negligence on the part of the plaintiffs was no defense. This was error. In support of the instruction appellees cite *Arkansas Power & Light Co.* v. *Jackson,* 166 Ark. 633, 267 S. W. 359. However, in that case there was no evidence of contributory negligence. The court said: "Under the undisputed evidence, the deceased was guilty of no negligence and no attempt was made to show that he was guilty of any negligence." Whereas in the case at bar there is evidence that excessive voltage could not have got into the mill if the wiring therein had been properly grounded, and the jury could have found that the operators of the mill were negligent in failing to so ground the wire. Ralf Toensfeldt, an electrical engineer, witness for the plaintiffs, testified to the effect that if the mill building had been properly wired and grounded, excessive current could not have entered. Clarence H. LeVee, also an electrical engineer, testified that if the mill had been wired in accordance with the National Electric Code, no excessive voltage could enter it.

In *Arkansas General Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S. W. 2d 178, there was evidence that the high line had broken and fallen across the house wire. Also there was evidence that pennies were in the fuse

box in the house. The court held there was evidence of negligence and contributory negligence. The Court said: "If they (the electric company) negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damage for the wrong done, *if the party injured is guilty of no culpable negligence contributing to the injury.*"

The principal case relied on by appellee on the question of contributory negligence is that of *Southwestern Gas & Electric Co.* v. *Murdock,* 183 Ark. 565, 37 S. W. 2d 100. There it was held that the evidence was not sufficient to show contributory negligence where one was injured in handling an extension cord when he knew it would shock him slightly while carrying 110 volts; but the case specifically recognizes that if the injured party was negligent, he can not recover. It is merely held in the circumstances of that particular case there was no contributory negligence, the same as the holding in *Arkansas Power & Light Co.* v. *Jackson.* But here, in the face of the testimony that the wiring in the mill should have been properly grounded and that an excessive current of electricity could not have gotten into the building if it had been so grounded, we can not say as a matter of law there was no contributory negligence.

In the Murdock case, the court said: "Appellant cites numerous cases to support his contention that appellee can not recover if he was guilty of any negligence. It is unnecessary to discuss these authorities but sufficient to say that this court has many times held in actions of this character that, if the injured party was guilty of negligence which in any way contributed to his injury, so that but for his contributory negligence the injury would not have happened, he can not recover."

Where there is substantial evidence of negligence contributing to cause the damages, such contributory negligence is a defense. The effect of Instruction No. 6 given by the court is to the contrary. The instruction says: "In other words, no defects in the interior wiring would justify you in finding contributory negligence on the part of the plaintiffs if the fire was caused by negli-

gence of the defendant in allowing high voltage to enter the mill, and if the fire would not have occurred without high voltage."

Electrical engineers testified that if the wires in the mill were properly grounded, excessive electricity could not enter. This evidence made a question for the jury as to whether the wiring facilities in the building were sufficiently grounded; and, if not, did the failure to make the proper ground amount to negligence on the part of the mill owners. If so, such negligence would be a defense to the power company.

For the errors in giving Instructions Nos. 5 and 6 the cause is reversed and remanded for a new trial.

Mr. Justice Millwee not participating.

PAUL WARD, Justice, dissenting. In my opinion the trial court committed no error in giving instructions No. 5 and No. 6, set out in the majority opinion, and that, therefore, the conclusion reached by the majority is untenable.

It must be kept clearly in mind that this case was tried in the lower court, by both appellant and appellee, on two general theories, viz: (a) The fire was caused by low or ordinary voltage, and; (b) by high voltage. It must further be kept in mind that the two instructions under consideration deal only with high voltage and have nothing whatever to do with low voltage, and that the majority opinion find no error with instructions dealing with low voltage.

Instruction No. 5. The reasons given by the majority, and the authorities cited in support, are to the effect that the doctrine of *res ipsa loquitur* "does not apply where the instrumentality which may have caused the damage was not in the exclusive control of the defendant [appellant]." In this case I can not understand how the majority arrive at the conclusion that appellant was not in exclusive control of the high voltage. It is obvious to me that the mill operators were in no way in control of high voltage that might be transported

over appellant's own lines, and I doubt if the majority would contend that, under the law, they were charged with any control or that they were under any legal duty to defend against it. The mill just happened to be there when the high voltage entered. If a tractor explodes and hurls the engine against a person and kills him he would have just about the same control over the engine as the mill owners had over the high voltage in this instance.

Instruction No. 6. The majority object to this instruction because, in effect, it deprived appellant of the defense of contributory negligence on the part of appellee IN SO FAR AS HIGH VOLTAGE WAS CONCERNED.

Obviously the only basis for the majority's position is that appellee was negligent in not maintaining a proper ground [for high voltage] at the mill. It must be conceded that if appellee was guilty of any negligence in this respect the burden was on appellant to prove or, at least, offer evidence tending to prove it. If I am not misinformed as to what the record shows there is no evidence of any negligence in this respect on the part of appellee. Apparently the majority concede so much because they say ". . . there is evidence that excessive voltage could not have got into the mill if the wiring therein had been properly grounded . . ." This is drawing the line pretty thin to justify a reversal in this case because, by the same token, if appellant had maintained a proper ground at the transformer no high voltage would or could have ever reached the ground maintained by appellee. To have permitted the jury to inquire into the negligence of appellee under this state of facts would amount to submitting a puzzling question not susceptible of an intelligent solution.

4729 257 S. W. 2d 278

Opinion delivered April 27, 1953.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. The appellant was charged with, and convicted of, the crime of carnal abuse (§ 41-3406 Ark. Stats.). The motion for new trial contains seven assignments, which we group and discuss:

I. *Sufficiency of the Evidence.* Assignments 1, 2, and 3 present this issue. The age of the girl was shown to be 13 years, and a physician testified as to a physical examination of her. Appellant's signed confession was introduced as to the crime charged. The girl was called as a defense witness, and admitted the crime had been committed by the appellant. The evidence is sufficient to sustain the verdict. See *Wadlington* v. *State,* 216 Ark. 914, 227 S. W. 2d 940; and *Clack* v. *State,* 213 Ark. 652, 212 S. W. 2d 20.

II. *Instructed Verdict.* In Assignment No. 6, the appellant complains of the refusal of the Court to give an Instructed Verdict at the close of the State's case. The appellant did not stand on his motion: instead, he

offered evidence which, with the other evidence, was sufficient to sustain the conviction, as we stated in Topic I.

Our cases hold that when the defendant offers evidence after the refusal of such a motion, then the sufficiency of the evidence is determined by all of the evidence, and not merely that portion which has been presented when the motion was denied. *Grooms* v. *Neff,* 79 Ark. 401, 96 S. W. 135; *Ft. Smith Cotton Oil Co.* v. *Swift & Co.,* 197 Ark. 594, 124 S. W. 2d 1; *Rice* v. *Moudy,* 217 Ark. 816, 233 S. W. 2d 378. While the cited cases are civil cases, the same rule applies in criminal cases. See *Robins* v. *U. S.,* 8th Circuit, 262 Fed. 126; and see also Annotation in 17 A. L. R. 925, where cases from many jurisdictions are cited to sustain the statement:

"In jurisdictions where it is held to be the duty of the court, in a proper case, to direct an acquittal, it is the general rule that, if the entire evidence is sufficient to sustain a conviction, the introduction of evidence by the defense, after the court has refused to direct a verdict of acquittal at the close of the prosecution's case, amounts to a waiver of the motion to direct."

III. *Instructions.* In Assignments 4 and 5, appellant complains of the refusal of the Court to give his requested instructions Nos. 1 and 2; and in assignment No. 7, appellant complains of the action of the Court in giving instruction No. 7. Our study discloses that instruction No. 7 covers the same matter as the refused instructions. There was no error in the Court's rulings regarding any of these instructions.

Affirmed.

UPSHAW *v.* WILSON.

5-55 257 S. W. 2d 279

Opinion delivered April 27, 1953.

Neill C. Marsh, Jr., for appellant.

Thomas Compere and *DuVal L. Purkins*, for appellee.

George Rose Smith, J. This is a bill in equity filed by the appellee to quiet his title to an undivided interest in an eighty-acre tract, to cancel certain deeds as clouds on the title, to require an accounting for timber wrongfully sold, and to obtain a sale of the land and a division of the proceeds according to the respective interests of the parties. The chancellor, finding that the appellee owns an undivided eight-elevenths interest in the land and that the appellant owns the other three-elevenths, quieted their title in that proportion, subject to a mort-

gage held by the Federal Land Bank, and granted the other relief sought by the plaintiff.

It is first contended by the appellant that he has acquired title to the entire tract by adverse possession. The chancellor was right in rejecting this contention. The proof is that this land was owned by the appellant's mother, Fannie Upshaw, at her death intestate in 1934. Mrs. Upshaw was survived by her husband, E. D. Upshaw, by ten living children, and by the descendants of an eleventh child who had predeceased Mrs. Upshaw. In 1937 eight of the children conveyed their eight-elevenths interest to E. D. Upshaw, who in turn conveyed to the Farmers Bank & Trust Company, and that interest is now owned by the appellee Wilson.

After deeding the land to the bank E. D. Upshaw remained in possession until the spring of 1946. It is familiar law that a grantor's continued possession after his conveyance is presumed to be permissive rather than adverse, and here there is ample evidence that E. D. Upshaw's retention of possession was in fact permissive. Upshaw made his tax and mortgage payments through the bank, settled his accounts with the bank annually, and does not appear to have in any way asserted a claim hostile to the bank's title. In 1945 the appellant obtained deeds from the other heirs of Fannie Upshaw, but he did not go into possession until the spring of 1946. Thus his possession, even if adverse, had not continued for the necessary seven years when this suit was filed in 1951.

In two respects the appellant questions the sufficiency of the acknowledgments to the deed by which eight of his brothers and sisters conveyed to their father in 1937. First, it is said that Garland Upshaw, one of the grantors, is not shown to have appeared before the notary who took his acknowledgment. The recorded deed recites Garland's appearance, however, and in his testimony the notary did not mention Garland's name nor state affirmatively that this grantor did not acknowledge the execution of the instrument. It follows that the *prima facie* verity of the public record has not been

overcome. *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30. Second, the certificate of Eliza Upshaw's acknowledgment does not recite that she was examined in the absence of her husband. The transaction took place, however, on September 20, 1937, which was after the effective date of the statute dispensing with the necessity of a married woman's separate examination. Act 44 of 1937; Ark. Stats. 1947, § 49-201.

Complaint is made that the appellant was not given sufficient notice that the deposition of F. N. Pugh was to be taken by the plaintiff. The purpose of the notice is to enable the adverse party to be present, and here it appears that the appellant's attorney attended the taking of the deposition and freely exercised his right of cross-examination. Nor is it shown that any protest was made until the testimony was offered in evidence. We are unable to see how the appellant can be said to have been prejudiced by the fact that the deposition was taken upon fairly short notice.

It is finally insisted that the appellant was not given credit in the decree for all the tax and mortgage payments that he made between 1945 and 1952. The appellant, having failed to offer proof of the amount of his tax payments, asks that the cause be remanded for that purpose; but in the absence of special circumstances it is not our practice to prolong litigation by affording an opportunity for the taking of proof that should have been introduced before the parties rested their case. As to the mortgage payments, the chancellor found that the appellant had paid $277.57 to the Federal Land Bank. Inasmuch as the mortgage included 120 acres in addition to the 80 acres now in controversy, the chancellor charged the appellee with eight-elevenths of two-fifths of the total payments, being $80.74. The figure $277.57 seems to be the result of a miscalculation, as the records of the Land Bank show that the appellant's payments came to $430.97; and by the formula used below $125.37 should be charged to the appellee. The decree, with this slight modification, is affirmed, the appellee to recover his costs in this court.

Opinion delivered April 27, 1953.

[redacted]

Bobby Steel, for appellant.

Tom Kidd and *Shaver, Tackett & Jones,* for appellee.

J. SEABORN HOLT, J. This appeal presents a contest between the parents of Charles Allen Self, over his custody. Appellant, Nancy Self, and appellee, Charles Self, were married in Maryland April 11, 1945. Charles Allen was born to them and is now seven years of age. They were divorced March 29, 1951, and the court awarded custody of this child to its mother for ten months of each year (the school term) and the father for two months (the vacation period).

Appellee brought the present suit July 3, 1952, asking that the above decree be modified and that he be

given the child's custody with visitation privilege only to the mother. October 13, 1952, after a hearing, the trial court modified its former decree, "that is just turning the present arrangement around," by giving custody of the child to the father for the ten months' school term and to the mother the two months' vacation period.

Both parties have remarried since the divorce, Nancy for a second time, and appellee, now 37 years of age, to his third wife, who is 20. Nancy is living in New York. Nancy's husband is regularly employed and earning approximately $4,000 a year. He is fond of this little boy and is willing to care for him, according to appellant's testimony.

Appellee has been in the military service for the last ten years, has re-enlisted, and holds the rank of master-sergeant, and is also earning about $4,000 a year. Being in the military service, he is subject to orders and frequently moves from place to place and is now stationed in Texas. Appellee has a daughter by his first wife and she has been given its custody without any objections on his part.

The trial court found both parties to be suitable and fit to have the custody of Charles Allen and (quoting from its findings): "Both this father and this mother are all right as far as being moral and Christian and law-abiding people. . . . This little boy is a smart little boy. The mother had him in school in New York last year and he was one of the best in his class, and the father has him in school in Texas this year and he is in the upper third of his class. . . . I predict that the day will come when both the father and the mother, regardless of where the child lives meanwhile, are going to be proud of this boy. He is as fine a child as the Court has seen recently."

The mother's devotion and love for this little boy appears to be unquestioned. The question that confronts us is: Have there been such changed conditions, affecting the welfare of Charles Allen, that would warrant the court's action in modifying the decree, as above indicated?

We have concluded, after reviewing the record, that this question must be answered in the negative, and that the preponderance of the testimony is against the Chancellor's findings. The burden was on appellee, who sought the change, and we hold that he has failed to meet this burden.

His reasons for seeking the boy's change of custody, and a modification of the decree, are given in his own words as follows: "At the time of the decree I was single (and had no place to leave the child but with my parents), since then I have married a good woman. She loves the child and is willing to take care of it and I think it best for the child to be in my care. . . . Q. The only conditions that have changed is the fact that you have remarried and have a wife that can assist you in taking care of the child? A. Yes. Q. And that is all? A. I feel that the child does not get the love and affection he should from his mother. I think he gets better care from my wife and myself. He has gained weight. Q. Are you supporting your first child by your first wife? A. She did not ask for it."

When the custody of a child of the tender age of this little boy is involved, which we think requires that care, love and attention that a natural mother would be more likely to bestow, she should be, and is preferred over the father unless the evidence shows her to be unsuitable and unfit. As indicated, there appears to be no question as to her fitness in this case.

" 'It is the well settled doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity.' . . . This court has always been reluctant to deprive a child of tender years of the care and affection of his mother. (Citing many cases)." *Reynolds* v. *Tassin,* 209 Ark. 890, 192 S. W. 2d 984.

"We have many times said in cases of this kind that the custody of infant children is not awarded by way of

reward to one parent or punishment to the other, but that the controlling consideration in all cases would be the welfare of the child.

"In the case of *Thompson* v. *Thompson,* 209 Ark. 734, 192 S. W. 2d 223, it was held, to quote a headnote: 'The father of a five-year-old child procured a divorce from the child's mother on his cross-complaint. Held, that in the absence of testimony showing the mother to be an unfit person, she should have the custody of the infant.' " *Nutt* v. *Nutt,* 214 Ark. 24, 214 S. W. 2d 366.

" 'While any order as to custody of a child is subject to future modification by the court making it, the rule, uniformly adhered to by us, is that before such modification may be made it must be shown that, after the making of the original order, there has been such a change in the situation as to require, in the interest of the minor, the change to be made, or it must be shown that material facts affecting the welfare of the child were unknown to the court when the first order was made.' . . . 'The party seeking a modification of a divorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification.' " *Roberts* v. *Roberts,* 216 Ark. 453, 226 S. W. 2d 579.

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

DUNN *v.* DUNN.

5-65 257 S. W. 2d 283

Opinion delivered April 27, 1953.

Ed B. Cook, for appellant.

Ed. F. McFaddin, Justice. The question here presented is whether the Chancery Court *must,* at all events, annul a divorce decree on joint petition of the parties (filed in accordance with § 34-1217 Ark. Stats.), without the Court being free to exercise its judicial discretion.

On October 16, 1952, Albert Dunn and Josephine Dunn, filed in the Poinsett Chancery Court, their petition, which, omitting only signatures and verification, reads as follows:

"Come now Albert Dunn and Josephine Moore Dunn, Plaintiff and Defendant in the above styled cause, and respectfully petition this court to annul the decree of divorce entered therein on 23 June, 1952, and recorded in Chancery Record Book 'Q,' at page 321, clerk's office at Harrisburg, Arkansas, as so made and provided for by section 34-1217, Arkansas Statutes Annotated."

The Chancery Court denied the said petition, in an order reading as follows:

"Comes on to be heard before the court, on this 20th day of October, 1952, the petition of Albert Dunn and Josephine Moore Dunn, to annul the decree of divorce entered in the above styled cause on 23 June, 1952, and recorded in chancery record book number "Q" at page

321, clerk's office at Harrisburg, Arkansas, as so made and provided for by section 34-1217, Arkansas Statutes Annotated; and the court, after hearing upon said petition, *finds that the circumstances are such that the petition should be denied.* "It is therefore, by the Court, considered, ordered, adjudged and decreed that said petition be, and the same is hereby denied. And the petitioners objected and excepted to the action of the Court in denying said petition and their exceptions are hereby noted of record; and thereupon the said Albert Dunn and Josephine Moore Dunn prayed an appeal to the Supreme Court of the State of Arkansas, which is hereby granted." (Italics our own.)

The transcript before us does not contain a copy of the original divorce decree. The certificate of the Chancery Clerk inferentially states that no evidence was heard in the present case, although the above quoted order recites that the Court "finds that the circumstances are such that the petition should be denied." We presume "the circumstances" relate to the date and facts surrounding the granting of the original divorce, as well as the lapse of time between the decree and this petition for annulment.

In this Court, both Albert Dunn and Josephine Dunn take the position that § 34-1217 Ark. Stats. imposes a mandatory duty on the Chancery Court, and that when said parties filed their joint petition for annulment of the divorce decree, the Chancery Court was required, at all events, to grant the petition for annulment. The said § 34-1217, Ark. Stats., reads as follows:

"*Annulment of decree of divorce.*—The proceedings for annulling a final judgment for a divorce from the bond of matrimony shall be a joint petition of the parties, verified by both parties in person, filed in the court rendering the judgment, upon which the court may forthwith annul the divorce. (Civil Code, § 463; C. & M. Dig., § 3513; Pope's Dig., § 4395."

It is at once apparent that the Statute says: ". . . the Court *may* forthwith annul the decree." Now the

word "may" is usually employed as implying permissive or discretional, rather than mandatory, action or conduct; and it is construed in a permissive sense unless necessary to give effect to the intent to which it is used. 57 C. J. S. 456. To hold that "may" means "shall" in the Statute here involved, would mean that months, or even years, after a divorce decree had been granted, the parties could, by mutual consent, have the divorce decree annulled, regardless of property rights of third parties that had intervened, or regardless of the rights of the State, as the silent third party in every divorce proceeding.[1]

It is clearly apparent that the word "may" was used in § 34-1217,[2] Ark. Stats., in order that the Chancery Court could exercise its judicial discretion in considering a petition for annulment. It would certainly be a revolution in jurisprudence to hold that the Chancery Court—a court of vast discretional powers—is stripped of all discretion and is mandatorily required to act as a rubber stamp and set aside a divorce decree whenever the parties to that divorce decide to have the decree annulled. We have found no case, from any State, having a Statute similar to ours, which holds that the Court is required to grant an annulment in a case like the one at bar, without being free to exercise judicial discretion. See 17 Am. Jur. 372; 27 C. J. S. 806 and 913; and see, also, *Colvin* v. *Colvin,* 2 Paige Chan. (N. Y.) 385, 22 Am. Dec. 644.

In view of the discretion which the Statute, here involved, gives to the Chancery Court, we conclude: (a) that the Court was not mandatorily required to annul the divorce decree on the joint petition of the parties, but was free to exercise discretion; and (b) that no abuse of discretion is here shown.

The action of the Chancery Court is, therefore, in all things affirmed.

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[1] In *Mohr* v. *Mohr*, 206 Ark. 1094, 178 S. W. 2d 502, we said that the State was the "silent third party to every divorce suit."

[2] This § 34-1217 Ark. Stats. comes to us from § 463 of our Civil Code of 1869, which is a verbatim copy of the Kentucky Code of 1854; and that Code was in turn modeled from the Field Code of New York of 1848.

Opinion delivered April 27, 1953.

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

Robt. J. White, for appellee.

J. SEABORN HOLT, J. This case involves the custody of Julia Gene Janes, a little girl, eight years of age. Appellee is its father and appellants, its great-uncle and aunt, respectively. The child's mother, Nina Gene, married appellee November 7, 1940, and this child was born July 18, 1944. At the time of their marriage, both parties were living in Atkins. She was a school teacher and he a barber. Prior to June 15, 1951, they were separated and on June 28, 1951, Nina Gene obtained a divorce from appellee. A property settlement was made and she was

given the custody of the little girl. The decree provided: "It was further agreed by and between the plaintiff and defendant in making settlement subject to the approval of the court that the plaintiff shall have the care and custody of the infant daughter, Julia Gene, and to keep said child at the home of Mr. and Mrs. Wade Henry at Atkins, Arkansas, who are suitable persons and that they have helped plaintiff and defendant in taking care of said child all these years; that said care and custody by plaintiff is subject to the right of defendant to visit said child at all reasonable times."

Nina Gene Janes died April 26, 1952, and some three months later, appellee re-married and is now living in Little Rock in an upstairs apartment. His present wife had been divorced and has a twenty-one-year-old son.

The present suit was filed by appellants May 21, 1952, to obtain custody of Julia Gene. From the decree awarding custody to appellee is this appeal.

During the first year, or so, following the marriage, the mother, Nina Gene Janes, paid most of the household expenses until appellee secured employment in construction work which has, down to the present time, kept him away from home for the greater part of his time in various parts of the United States and some foreign countries. For several months prior to the child's birth, the mother had been in very poor health and under a doctor's care. It appears that appellee, who was in Detroit when the child was born, although knowing of his wife's condition, did not come to be with her at the time of the child's birth, but waited for six weeks thereafter before returning, his excuse being that his work required him to remain in Detroit. Following the child's birth, its mother's health continued so bad that she was unable to work regularly and moved to the home of her parents at appellee's insistence, although her mother was practically an invalid. Here they remained until in 1945. They moved to an apartment near the home of appellants and, without appellee's objections, appellants have taken care of the child, Julia Gene, as though she were their own and also assisted the mother until she died April 26, 1952.

Testimony of Nina Gene Janes, given at the divorce trial (and admitted in evidence in the present case), was in part, and in effect, that she was thirty-six years of age at the time, had taught school for fifteen years, but had to quit teaching in 1951 on account of poor health. She began teaching when Julia Gene was fifteen months old and her uncle and aunt (appellants) took care of her and have been like a father and mother to her. They treat her as though she were their own, took her to Sunday School and Church, and clothed her and helped support Nina Gene also. On one occasion, shortly before the divorce, appellee came to appellants' home, became enraged, and threatened to kill Nina Gene and the little girl, and since then this child appears to be afraid of her father and has expressed her dislike for him.

There was in evidence a portion of a will, executed by Nina Gene, which expressed the following request or desire: "In the event of my death, it is my desire that my beloved uncle, Wade Henry, and my beloved aunt, Mrs. Annie Jane Henry, of Atkins, Arkansas, have the care and custody of my beloved daughter, Julia Gene Janes, who was born on July 18, 1944, for the following reasons:

"Since the birth of my beloved daughter, Julia Gene Janes, my uncle and aunt named above had a great deal to do with looking after and caring for her, and in fact, they have helped clothe, feed and protect her. I have been in bad health, and they have cared for her in their own home practically ever since her birth. In addition thereto, I have taught school for a number of years, and they have had the care and charge of my beloved child from the time I would start to school in the morning until the time I would return in the afternoon, and this care upon their part has been with the absolute knowledge and consent of my former husband, Clarence Cecil Janes, and myself. They love my beloved daughter as if she were their own child and have cared for her in the same way."

There was other evidence from the child's aunt and schoolmates of the child's dislike and fear of her father.

Jane Ann Fewell (thirteen years old) so testified, in effect, and her sister, Glora Gene Fewell, (twelve years of age) testified that Julia Gene, while visiting her father, told her she did not like her daddy, that Mr. and Mrs. Henry were good to her and she loved them, was glad to start home, and "she wanted to come back home."

Appellants, Mr. and Mrs. Henry, are fifty-seven and fifty-five years of age respectively, and it appears undisputed that they are of good character, are able to, and have been furnishing a good home for the child. They are active church people and will give the child proper training. They have secured a substantial policy of insurance for her education and seem devoted to her. During the approximately eight years that they have been caring for Julia Gene, appellee has made no objections. He testified: "A. I didn't have anything to say about the child. They took care of the child. Q. They (appellants) took care of the child? A. And I had nothing to do with the child and I wasn't asked anything about her. Q. You didn't make any objections? A. No, sir. Q. Did you ever object to Mr. and Mrs. Henry looking after your child? During all of those eight years? A. I never objected."

Appellee (now forty-two years of age) has spent approximately sixteen months with this child during its lifetime. He now proposed to place this child in the care of a second wife. He is working in Bauxite and commuting back and forth from Little Rock. His present claim that he should have the custody of this child, we think, comes too late, after some eight years of apparent neglect and seeming indifference, bordering on abandonment, during which time he has allowed appellants to take his place, assume his duties, and do for Julia Gene what, he, as a father, should have done, thus allowing strong ties of love and affection to be developed in the hearts of appellants, as well as the child's.

Without attempting to detail the evidence in this voluminous record, it suffices to say that, after reviewing it, we have concluded that the findings of the Chancellor are against the preponderance of the testimony

and that the decree should be reversed, and the custody of this little girl awarded to appellants.

We are primarily concerned here with the best interests of the little girl and in reaching a solution of this difficult problem, we are not without well defined rules of law to guide us, running through many of our decisions.

We said in *Massey* v. *Flinn,* 198 Ark. 279, 128 S. W. 2d 1008: "We recognize the general rule that ordinarily the parent of the child is its natural guardian and is entitled to its care and custody, however, this is not always true. There are exceptions. Of prime concern and the controlling factor is the best interest of the child. . . . '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. . . . The courts will not always, however, award the custody of an infant to the father, but, in the exercise of a sound discretion, will look into the peculiar circumstances of the case, and act as the welfare of the child appears to require considering primarily three things: (1) Respect for parental affection, (2) Interest of humanity generally, (3) The infant's own best interest.' . . .

" 'Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights. This is a *habeas corpus* proceeding, and the court had the authority to grant the custody of the child to the aunt, provided it finds that the father had forfeited his rights thereto. Three parties are interested in the custody of minor children, the State, the parents, and the child itself. While the right of the father to the custody of his child is paramount, this is denied in many cases, and, regard being had for the welfare of the child, its custody has been placed elsewhere. . . . The permanent well-being of the child more than its present enjoyment is to be considered as of prime importance. No hard and fast rule can be laid

down on the subject, and each case must be governed to a large extent by its own particular facts.' . . .

"In *Verser* v. *Ford,* 37 Ark. 27, this court said: 'In this case the motherless infant was taken by the maternal grandmother with the father's assent, and tenderly guarded through all the perils of infancy. There has been all of a mother's care, and scarcely less than a mother's affection. The child is yet scarcely three years of age, delicate in health; she is in a safe asylum, surrounded by those who may be trusted to guard her anxiously against pernicious influences, and to do the best to instill into her mind such principles as will promote her future usefulness and happiness. They, too, plead the full strength of natural affection.

" 'The infant needs female care and guidance of that patient, ever-watchful nature which is better insured by the natural affection of a grandmother than by the inexperienced efforts of a father or the sense of duty of the second wife.' " See, also, *Tucker* v. *Tucker,* 207 Ark. 359, 180 S. W. 2d 571, and the recent case of *Griffen* v. *Newcom,* 219 Ark. 146, 240 S. W. 2d 648.

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

Justices George Rose Smith and Ward dissent.

Oliver *v.* Eureka Springs Sales Company.

5-80 257 S. W. 2d 367

Opinion delivered May 4, 1953.

J. B. Milham, for appellant.

J. E. Simpson, for appellee.

George Rose Smith, J. The principal question in this case is whether a sales company which innocently sells stolen property at public auction can be held liable to the buyer for the failure of title.

The Eureka Springs Sales Company owns a sales barn at which livestock are regularly sold at auction. On May 19, 1951, Fred Oliver bid for, and became the purchaser, of three heifers. It happened that the animals were stolen property, and Oliver, after having paid their value to the true owner, brought this action to recover the amount of his bid. The trial court, sitting without a jury, found that the defendant sales company had no knowledge that the heifers were stolen property and had acted merely as an agent or broker for Harve Hopper, who had employed the sales company to sell the heifers on a commission basis. Upon this finding the court entered judgment for the defendant.

The evidence does not support the judgment. The sales company was not a broker, since it had been entrusted with the custody of the animals. Bouvier's Law

Dictionary (3d Rev.), "Brokers"; *Harby* v. *City of Hot Springs,* Ark., 11 S. W. 694. Instead, the sales company was acting as Hopper's agent, and it can escape liability only by showing that the identity of its principal was disclosed. There is no testimony to that effect. Oliver testified that as far as he knew the sales company was the owner of the animals offered for sale. If that was Oliver's understanding Hopper was an undisclosed principal, and Oliver may treat the sales company as a party to the contract. *Shelby* v. *Burrow,* 76 Ark. 558, 89 S. W. 464, 1 L. R. A., N. S. 303.

The defendant showed that in no instance does it have title to the livestock sold at the sales barn, and it may be inferred that Oliver knew this. Nevertheless it is not suggested that the auctioneer announced the names of the persons whose stock was being sold. At most Oliver realized that the sales company was acting as the agent of some unnamed principal. If so, the principal was only partially disclosed, and Oliver is entitled to enforce the contract as against the agent. *Cooley* v. *Ksir,* 105 Ark. 307, 151 S. W. 254, 43 L. R. A., N. S. 527. There is some indication that Oliver might have discovered the identity of the seller by examining the sales company's books, but he was certainly under no duty to do so and therefore cannot be charged with the information an investigation would have disclosed. Rest., Agency, § 9, Comment *d.*

A new trial being necessary, two other errors should be mentioned. First, the complaint alleged that the heifers were sold to Oliver by the sales company, Roy Dennis, and Hobart Stanley, and judgment was prayed against all three. The court sustained demurrers interposed by Dennis and Stanley. Construed liberally, the complaint states a cause of action against these defendants, and on remand their demurrers should be overruled. Second, a part owner of the sales company testified that he had no recollection of the sale to Oliver but that he had examined the company's records and had found that the heifers were brought to the sales barn by Harve Hopper. The records were the best evidence; so

the plaintiff's objection to the testimony should have been sustained.

Reversed.

BURKS *v.* BURKS.

5-87 257 S. W. 2d 369

Opinion delivered May 4, 1953.

Robert J. Brown, for appellant.

Irvin M. Brewer, for appellee.

GRIFFIN SMITH, Chief Justice. The issue is whether two checks drawn in an unusual manner against the maker's sufficient bank balance vested property rights in the payee, or whether express wishes of the maker, who acted in expectation of death, should be disregarded. If the latter course should be pursued the administrator would take charge of the money, paid into court when Peoples National Bank filed its interplea.[1]

Following a protracted illness having its inception prior to November, 1951, [Mrs.] Ella Mae Burks died intestate December 15, 1951. She had been attended by

[1] Mrs. Burks' bank balance was $2,200.

her warm personal friend and sister-in-law, Mrs. Mildred Burks. November 17th Ella Mae wrote and delivered to Mildred Burks a check for $1,000. In the lower left hand corner the check-maker wrote "at my death". The second check (Dec. 10th) was in favor of Mildred Burks for $500 and bears the same notation.

The complaint, which is sworn to, asserts that for many months Ella Mae had not lived with her husband, D. A. Burks. She had formerly been married to a man named Raybon, and their son, Bedford, is confined to an institution for the mentally deficient, and has been so confined for many years.

When the Peoples National Bank refused to pay the checks because of Mrs. Burks' death prior to their presentation, Mrs. Mildred Burks applied for an injunction to restrain the bank from paying $1,500 to any other person, A. D. Burks having in the meantime been appointed administrator. An alternative prayer was that the amount be paid into court. The bank was allowed a fee of $50 for its legal expense, to be taken from the item of $1,500 placed in the court's registry. The fee is questioned here.

Mrs. Mildred Burks testified that her sister-in-law and her husband had been separated on a previous occasion, but adjusted their differences for a while. A second separation, however, occurred in circumstances that were not explained. Because of friendship's ties and a relationship that had prevailed for a long period of time, the two "inlaws" maintained a status of closest coöperation. Ella Mae, when her health failed, and in the absence of her husband, went to live with appellant. From October until death occurred in December Mrs. Burks was in St. Vincent's Hospital three times. The patient had told appellant she wanted her to buy presents for the afflicted son. An explanation of the transaction is shown in the footnote.[2]

[2] In substance, Mrs. Mildred Burks testified: "[Ella Mae] had told me a day or two before that she wanted me to buy some Christmas presents for her son, Raybon. When I went out there—I think it was on Monday—she said, 'Mildred, will you get my glasses out of the drawer, and my checkbook and pen out of my purse? I want you to write a check for me.' When I opened the checkbook I saw a check [had already

The stub from which the $1,000 check was detached contains this writing by Ella Mae: "Five hundred dollars given to Bedford Raybon, $4 a month, $1 every other week; $500 for your personal use. Ella Burks".

Appellees call attention to the fact that the checks were not presented for payment until January 23, 1952—thirty-nine days after death of the drawer.

Appellees rely upon two propositions: Ark. Stat's, § 68-1304, relating to gifts where there was no consideration, and the superior right of creditors. Such gifts are declared void "even against the grantor unless possession really and bona fide accompany such gift or conveyance".

The other point is that an uncertified check, being revocable, does not pass a present interest in the subject-matter and the order of payment is, as a matter of law, revoked when the maker dies.

Mr. Justice HART discussed gifts *causa mortis* and gifts *inter vivos* in *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65. There was no recorded dissent to Judge HART's statement that the trend of authority, and the better reasoning, is that a check may be the basis of a gift *causa mortis* where creditors are not concerned. This expression, however, appears in the opinion: "When the delivery of the check is coupled with an intent to transfer a present interest in the money, and no revocation is attempted, the intent of the donor should be given effect".

Appellees call attention to the condition they say must attach when payment of a check is demanded after death of the maker, that is, delivery of the check must be coupled with an intent to transfer a present interest

been made out] to me for $1,000. It was dated Nov. 17, and signed 'Ella Mae Burks'. She then said, 'Write out a check [for $500] and make it payable to yourself,' . . . and I said, 'What do you want with $500 up here?' and she said, 'I want you to have it.' [She then added]: 'You see a check for $1,000 made to you: I am going to die—I will never get out of this bed.' But I said to her, 'Let's wait until tomorrow,' but she got very nervous and replied, 'I want to write the check,' so I wrote it and she said, 'Hand me something to sign it with,' and I handed her my purse, and she signed it and wrote, 'At my death.' She [then] said, 'He has spent all the money of mine he is going to spend'."

in the money. Here, they say, is the absent condition, for Mrs. Burks' direction was that the check should be paid *at* her death. The opinion appears to have been explained by the subjoined quotation from Morse on Banks and Banking—a correct rule to the effect that there may be "a gift of a check *causa mortis*". The Morse rule analyzed by Judge HART is that there must be such a delivery by the donor as to clearly indicate his intent to transfer the property from himself, and an actual transfer of the rightful control of the property. The quotation then continues: "But this, we contend, is done when he gives a check to the donee, or to another to give to the donee, and does not revoke before the delivery is made according to instructions. In this peculiar case of a check the donor could revoke during his life; but as against the rest of the world it is a clear delivery of control of the money, and no one but the creditors of the donor has a right to object. [The creditors] have a superior equity to the donee; but, if the donor is solvent, and continues in the same mind till his demise, what right has any one else to interfere with his clear intent? . . .

"The donor has a right to do with his property what he chooses, and his intent, clearly indicated, should be respected, and his personal representative has no right to frustrate his wish. The continuous progress of legal thought on this subject of gifts points to the conclusion set forth above, viz., that, although a gift of a check cannot give an action against the donor himself, nor prefer the donee to creditors, yet it should be held good otherwise. And if the donor is solvent and does not revoke during his life, it ought, we think, to be good against the deposit, and against his personal representatives when they have obtained possession of the deposit on which the check was drawn. . ."

Smith, Administratrix, v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776, was a case where the check was cashed during the lifetime of the maker. Conflicting decisions were mentioned, coupled with the statement that many courts hold that delivery of the donor's own check in expectation of death is not the subject of a gift, either

inter vivos or *causa mortis,* where such check is not accepted or paid by the bank before the donor's death. (Citing cases). "But", says the opinion, "this court is committed to the so-called minority rule which holds that one's check or draft may be the subject of a valid gift by the maker, although it is not presented for payment until after the death of the donor".

Mr. Justice Wood, *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507, made an interesting review of the law of gifts such as we are discussing here, adverting to Justinian's definition embracing requisites essential from a factual standpoint—that is, circumstances attending the gift may be such that the donor prefers to retain dominion over it rather than have the donee acquire it, "but he prefers the donee should have it rather than his heirs". Judge Wood then said: "We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death, *i. e.,* the donor's death is a condition precedent to the vesting of the title to the thing given in the donee."

In the quotation from Morse, used by Judge Hart in the Carter-Greenway case, the inconsistency of a different rule was emphasized by a statement that "It does not seem sensible to say that a *donatio causa mortis* is a gift to take effect in case of death, and then to say that the donor did not intend it to be good unless it took effect before his death".

In *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19, A. T. McMillan, realizing the approach of death, gave Wilmot Clark certain things of value, and his bank book. It was held that this did not have the effect of transferring to Clark the bank balance, since "the book was only evidence of the state of the account".

A bank certificate of deposit was treated as a chattel subject to pass upon delivery as a gift *inter vivos,* notwithstanding the fact that the donor knew he was about

to die; but there could be questions of fact, (a) whether the owner of the certificate intended, at the time of delivery, that title should pass and the recipient's purpose was to receive it; (b) the jury could have found that the owner, being on his death bed and expecting soon to die, gave the certificate to the recipient, "which was a symbolic delivery of the money itself". In the second case the gift would be *causa mortis*.

In the case at bar all of the testimony, and the checks, disclosed an intent upon the donor's part that at the instant of death the money should pass to appellant—subject, however (in respect of $500) to the trust imposed for the benefit of the giver's incompetent son.

The trial court's action in allowing the interpleader a $50 fee is affirmed under authority of Ark. Stat's, § 27-816, and our thought is that the evidence does not show that a greater amount was earned. The judgment directing delivery of the balance of $1,450 to appellees is reversed, with directions that an order be entered not inconsistent with this opinion.

Mr. Justice WARD dissents from the court's action in affirming the payment of an attorney's fee to Peoples National Bank.

STUART *v.* STATE.

4731 257 S. W. 2d 372

Opinion delivered May 4, 1953.

[redacted]

Shaver, Tackett & Jones, for appellant.

Tom Gentry, Attorney General, and *Thorp S. Thomas* and *James L. Sloan,* Assistant Attorneys General, for appellee.

J. Seaborn Holt, J. A jury found appellant, Dr. C. E. Stuart, guilty on an information charging him with the "crime of threatening an officer by drawing a gun committed as follows, to-wit: The said defendant on the 3rd day of September, 1952, in Howard County, Arkansas, did unlawfully, wilfully and feloniously resist the execution of criminal process by threatening or by actually drawing a pistol and/or a gun upon Harold Bell, an officer and trooper with the Arkansas State Police Dept., etc.," and fixed his punishment at a term of one year in the State Penitentiary. From the judgment is this appeal.

About midnight on September 3, 1952, Mr. Bell, a State Police Officer, accompanied by Jake Hooker, City Marshal of Mineral Springs, while cruising the highway near Mineral Springs, observed appellant and his son, Carroll, parked in a car. He passed this car, then turned about, shined his spotlight on it, and came toward the parked automobile, at which time Dr. Stuart "took off down the road." Bell followed and shortly thereafter fired his pistol into the air and then at the tires of the fleeing car. The chase continued for about fourteen miles, ending at the Doctor's home in Nashville. Bell testified that after he had stopped at the Stuart home, he went up to the car and said, "you are driving under the influence," and told Stuart to get out. As he opened the door of the Stuart car, Stuart hit him with his fist;

then seized his steering wheel and held on, making it necessary for Bell to pull Stuart out of the car. As Bell was trying to force Stuart to the police car, Hooker cried out a warning that the boy in the car had a gun. Bell let Stuart go, ran around and got Hooker's gun and put it on the boy, telling him to "drop that gun." Instead of complying, the boy backed up the porch steps. Meanwhile, Stuart had run into the house and had returned with a shotgun, which he pointed at Bell. Simultaneously, he cursed and threatened Bell, saying if he did not get out he was going to fill him full of buckshot. Bell then got in his car and drove away. He had no warrant or process for appellant's arrest. Dr. Stuart was not arrested until the following day, at about 11 o'clock A. M.

For reversal, among twenty-seven assignments of alleged errors in the trial of the case, is appellant's assignment that the court erred in permitting the State to introduce testimony over his objections and exceptions to the effect that Dr. Stuart was "drinking" and "might have been resisting arrest on the day following the night occasioning the charge for threatening an officer," and also testimony concerning his actions at the Hale Drug Store on this same day "following the night occasioning the charge" against him.

The record shows that on September 4th, around 11 o'clock A. M., the day following the night of September 3, 1952, on which Dr. Stuart is alleged to have been drinking and resisted arrest by Officer Bell, that Sheriff Chesshir and Travis Ward, a State patrolman, then with warrant of arrest in their possession, arrested Dr. Stuart at the Hale Drug Store in Nashville. In the testimony of Officer Ward, the record reflects: "Did you observe him at the time he was placed under arrest? A. Yes. . . . Q. Tell the jury what condition Doc Stuart was in that morning relative to being drunk or sober. A. He was pretty drunk. . . . Q. Tell what took place at Hale & Hale's. A. We went in the drug store. The sheriff had warrants for Stuart—*Mr. Tackett*: I will ask to make objection to this testimony, and save exception to the rul-

ing of the Court. *The Court*: Overruled. . . . A. (Cont'd.) We went in and Sheriff Chesshir read the warrant and showed it to Dr. Stuart, and he asked me if I was Bell. I said I wasn't, that my name was Ward. He shook hands with me. Sheriff Chesshir told him he had the warrants, and would have to arrest him and he would have to make bond. He told him, 'Come on, let's go.' He grabbed hold of the stove and we pried him loose and took him out and put him in the car and carried him to the jail."

The Prosecuting Attorney testified that at the time of appellant's arrest at the Hale Drug Store "in my opinion, he was under the influence of liquor."

We have concluded that the trial court erred in admitting the above testimony over appellant's objections. We think the actions and behavior of Dr. Stuart on the day following his alleged offense could have no bearing on his guilt of the crime for which he was being tried. Such evidence could only result in tending to prejudice the minds of the jury against him.

In the case of *Cross* v. *State,* 200 Ark. 1165, 143 S. W. 2d 530, evidence was offered over objections of defendant to show that the accused was in an intoxicated condition several hours after the commission of the crime charged. The trial court held this testimony incompetent and so charged the jury. We there held: (Headnote 6) "Criminal Law. — Appellant's objection to the testimony of the arresting officers to the effect that she was in an intoxicated condition at the time of the arrest could not bring a reversal of the judgment where the court admonished the jury 'not to consider the question and answer,' since the court did all it could well do to eliminate all prejudice from the minds of the jury."

Conversely, since here the trial court, over appellant's objections and exceptions, refused to admonish the jury not to consider the above testimony, reversible error resulted.

Since we are reversing the judgment and remanding the case, we point out, in case of another trial, that appellant was charged and tried under the wrong statute for a crime not warranted by the evidence. The court instructed the jury that he was charged with a felony under the provisions of § 41-2803, Ark. Stats. 1947 (Act 59, § 12, page 214 of an act of the Legislature of 1868), which provides: "Threatening officer—Drawing Gun—Penalty.—Every person who shall resist the execution of any civil or criminal process by threatening or by actually drawing a pistol, gun or other deadly weapon upon the sheriff or other officer authorized to execute such process, shall, upon conviction thereof, be imprisoned in the penitentiary for a term not less than one [1] nor more than five [5] years."

Section 13 of that act (now § 41-4001, Ark. Stats. 1947) provides: "Every person and the aiders and abetters of every person who shall draw a pistol, gun or any other deadly weapon upon any other person . . . for the purpose of frightening or intimidating him from doing any lawful act, when such person drawing said pistol or gun or other deadly weapon is not justified in self-defense for so doing, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum not less than five hundred dollars [$500.00] nor more than one thousand dollars [$1,000.00] and shall be imprisoned in the county jail for twelve [12] months."

Section 41-2801, Ark. Stats. 1947 (Rev. Stats. of Ark., ch. 44, page 268, § 1) provides: "If any person shall knowingly and wilfully *obstruct or resist any sheriff* or other ministerial officer, in the service or execution of, or in the attempt to serve or execute any writ, warrant or process, original or judicial, *in discharge of any official duty*, in case of felony or other case, civil or criminal, or in the service of any order or rule of court, *in any case whatever,* he shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty dollars [$50.00], and may also be imprisoned not exceeding six [6] months."

Section 41-2802 (§ 2. Rev. Stats. above) provides: "Every person who shall assault, beat or wound any officer while engaged in the service or execution of, or in attempting to serve or execute, any writ, warrant or process, original or judicial, or any order or rule of court, *or while engaged in the discharge of any official duty,* shall be deemed guilty of a misdemeanor, and on conviction shall be punished as is prescribed in the last preceding section."

We think it was the clear intention of the Legislature, and we so hold, that § 41-2803, above, under which appellant was charged should apply only where a person resists, by threats or using a gun, *the execution of a warrant or process of arrest by an officer having such warrant or process in his possession at the time.* Here, it is undisputed that Bell had no warrant to arrest appellant on the night of September 3rd and under the facts here presented, appellant could be charged with no greater offense than a misdemeanor, as provided under §§ 41-2801-02 or 41-4001, above.

The offense for *resisting execution* of criminal or civil process by threatening or by drawing a gun on the officer armed with the warrant of arrest is made a felony and the penalty imposed is that of imprisonment in the penitentiary for a period of one to five years (§ 41-2803). The offense of one, without using a gun, *resisting an officer* in the service of process or in the discharge of any official duty (§§ 41-2801 and 41-2802, above) is made a misdemeanor and the penalty not less than a $50 fine and the defendant may be imprisoned not exceeding six months, and under § 41-4001, one who draws a pistol or deadly weapon to frighten or intimidate any one from doing any legal act, is guilty of a misdemeanor and shall be fined not less than $500 or more than $1,000 and imprisoned in the County Jail for twelve months.

As indicated, we think it was the intention of the Legislature to make it a more serious offense for the person to *resist the execution of a criminal process or warrant in the hands of the arresting officer at the time*

by threats or the use of a pistol or deadly weapon, than where it appears, as here, that appellant was not resisting the execution of process in Bell's hands, but was *resisting Officer Bell,* while he was acting without any warrant. In the former case, the offense is raised to the grade of a felony, in the latter a misdemeanor only.

The rule is well settled that "no case should be brought within a penal statute unless completely within its words, and every reasonable doubt about the meaning of the language should be resolved in favor of the accused," *Casey* v. *State,* 53 Ark. 334, 14 S. W. 90.

". . . Penal statutes must be strictly construed; . . . nothing will be taken as intended which is not clearly expressed; and . . . all doubts will be resolved in favor of the defendant in construing such statutes," *State* v. *Arkadelphia Lumber Company,* 70 Ark. 329, 67 S. W. 1011.

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

THOMPSON, COMMISSIONER OF REVENUES *v.* CONTINENTAL SOUTHERN LINES, INC.

5-72 257 S. W. 2d 375

Opinion delivered May 4, 1953.

O. T. Ward and *Conley F. Byrd,* for appellant.

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

ROBINSON, Justice. The Revenue Commissioner of the State of Arkansas filed this suit seeking to collect from appellees alleged unpaid gasoline and diesel fuel taxes. The defendants answered and cross-complained. Plaintiff demurred thereto. The trial court overruled the demurrer and upon the plaintiff's refusal to plead further, rendered a judgment for the defendants as against the complaint, and for the defendant Continental Southern Lines, Inc., on the cross-complaint in the sum of $35,218.72. The Revenue Commissioner has appealed.

The complaint alleges that the appellee Continental Southern Lines, Inc., is engaged in the business of transportation for hire of passengers into and through the State of Arkansas by motor bus, and as such has qualified as a bonded motor fuel user in Arkansas; that appellee Standard Accident Insurance Company had executed a surety bond guaranteeing that the bus company would comply with the statutes providing for motor fuel taxes; that the defendant bus company owes the State of Arkansas as tax on diesel fuel for the months of April, May, June, July, and August, 1952, the sum of $1,876 and owes the State as tax on gasoline from October, 1945, to August, 1952, the sum of $37,283.55. The answer denies any indebtedness to the State and alleges that defendant had paid the tax on the gasoline as required by law. By way of cross-complaint the defendant bus company alleged that it had not taken credit on the

diesel fuel it had used which was exempt to the extent of 20 gallons for each entry the bus company made into the State from January, 1945, to April, 1952, inclusive; and that it had therefore overpaid the State $35,218.72 which it was entitled to have refunded. The State filed a special demurrer to the answer on the ground that the Act granting the bus company a 20-gallon exemption from taxes on fuel brought into the State is unconstitutional.

The case turns on the constitutionality of Acts 378 and 383 of 1941 as amended by Acts 188 and 192 of 1943. In the year 1933 the legislature by Act 67 made it unlawful for any motor vehicle for hire to enter the State of Arkansas without paying 6½ cents per gallon tax on all the fuel it carried for the operation of such vehicle in excess of 20 gallons. In 1938 the Dixie Greyhound Line, operating buses for hire from Memphis to St. Louis, filed a suit to enjoin the State of Arkansas from collecting a tax on the portion of gasoline carried by buses to be used on the highways of Missouri. This case went to the U. S. Supreme Court, where the Act was held unconstitutional. *McCarroll, Commissioner,* v. *Dixie Greyhound Lines, Inc.,* 309 U. S. 176, 60 S. Ct. 504, 84 L. Ed. 683. The U. S. Supreme Court said that although the state had the right to tax vehicles engaged in interstate commerce for the use made of state roads, it had no right to collect a tax on the fuel that was being carried through the state to be used on the highways of other states. Subsequently the legislature of 1941 passed Acts 378 and 383 levying a tax on the motor fuel brought in by buses to be used on the highways of the State in excess of 20 gallons. This eliminated the feature of the 1933 Act which the U. S. Supreme Court had said was unconstitutional.

Subsequent to the passage of the 1941 Act, a suit was filed in the Pulaski Chancery Court against the Commissioner of Revenues alleging that notwithstanding the 1941 Act which provided for an exemption from the payment of the tax on 20 gallons of gasoline brought into the state, the Commissioner was collecting the tax

on such gasoline. *McLeod, Commissioner,* v. *Santa Fe Trail Transportation Co.,* 205 Ark. 225, 168 S. W. 2d 413. The Commissioner denied that the bus company was entitled to a 20-gallon exemption and alleged that § 6 of the Act allowing an exemption of 20 gallons to commercial operators for hire was void as being discriminatory against other operators. It was held that the discrimination between vehicles for hire and others was founded upon a reasonable distinction and was not an arbitrary classification and not unconstitutional. It was also held that if the operator of a motor bus had the gasoline in the fuel tank measured upon entering the state and again upon leaving the state, a 20-gallon exemption could be allowed; but if the operator of the bus did not want to suffer the delay that would be occasioned by measuring the gas upon entering and leaving the state, he could pay on the basis of the actual miles travelled in the state; but under the latter plan he would not be entitled to the 20-gallon exemption. In that case it was held there were reasonable grounds for distinction between the class of vehicles for hire and others; but whether such distinction existed as between intra-state vehicles for hire and inter-state vehicles for hire was not considered.

Following that decision, the 1943 legislature passed Acts 188 and 192, which make it possible for every vehicle for hire to pay monthly and get the 20-gallon exemption. Also the 1943 Acts allow the operator to compute the miles travelled on the state roads on the 20 gallons of exempt gasoline at eight miles per gallon.

Article 2, § 18 of the Constitution of Arkansas provides: "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."

Section 6 of Act 188 of 1943 provides: "Any person, firm or corporation who shall operate any motor carrier, bus, truck, transport or other motor vehicle for hire and who shall bring into the State of Arkansas motor fuel in the fuel tank or tanks of such vehicle or vehicles shall

be liable for a tax of 6½ cents per gallon on all of such motor fuel used or consumed in the State of Arkansas, except as hereinafter provided. Any such person, firm or corporation shall be entitled to an exemption from the payment of such tax on the first twenty (20) gallons of such motor fuel brought into the State of Arkansas on each and every trip in any such fuel tank or tanks of such vehicle or vehicles and used in the State of Arkansas, provided that there has been filed, or arrangement is made for the filing of, a corporate surety bond to secure the payment of such tax on all such motor fuel used or consumed in the State of Arkansas in excess of the twenty (20) gallons herein exempted, and provided report shall be made on or before the 25th day of each and every month of such motor fuel brought into the State of Arkansas and used during the preceding calendar month. . . ."

Act 192 of 1943 also allows the 20-gallon exemption. The Acts are not unconstitutional. Under the provisions of the Acts, no citizen or class of citizens is granted any privilege or immunity which upon the same terms is not granted to all citizens. It is true that one entering the state may use the highways without paying any tax on 20 gallons of gas he has in the fuel tanks, whereas one who does not enter the state but is already here must pay a tax on each and every gallon he uses in driving on the highways; but if this can be said to be a discrimination, it is not an arbitrary one.

In the Santa Fe case, it is said: "In the case of *Hardin, Commissioner,* v. *Vestal,* 204 Ark. 492, 162 S. W. 2d 923, this court quoted from the Kentucky Court of Appeals in the case of *Williams* v. *City of Bowling Green,* 254 Ky. 11, 70 S. W. 2d 967: 'The fact that a statute discriminates in favor of certain classes does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it.' The above quoted statement is in substance the holding of the U. S. Supreme Court in *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248,

73 A. L. R. 1464, 75 A. L. R. 1536, and it was there further held that the legislature may not only classify, but for taxation purposes, it may sub-divide classes into particular classes."

To permit operators of trucks and buses for hire to enter the state and be exempt from paying taxes on the first 20 gallons of gasoline they use which they brought into the state is not arbitrarily granting to such persons a privilege or immunity; in fact it is a matter of common knowledge that thousands of automobiles enter the state daily with gasoline in their tanks sufficient to travel over many miles of highways in the State of Arkansas. No tax whatever is paid to the State of Arkansas on this gasoline, whereas a person within the state pays a tax on each and every gallon used. Can it be said that under our constitution we can not grant to those entering the state any immunity whatever from the payment of taxes on gasoline contained in the fuel tanks of their automobiles, although in all probability they purchased the gas in another state where they paid a tax? To adopt a procedure of stopping every automobile at the border and collecting a tax on all the gasoline in the fuel tank would result in chaos. It is not conceivable that the constitutions of the various states would require that every automobile stop at every state line and pay a tax on the gasoline in the fuel tank before being permitted to enter that state. If the state can not grant the 20-gallon exemption to trucks for hire, perhaps it could not grant an exemption to any motor vehicle. It is entirely possible that the 20-gallon exemption has resulted in abuses, but a condition of that kind is one to be remedied by the legislature.

In *Bollinger* v. *Watson,* 187 Ark. 1044, 63 S. W. 2d 642, the Court had under consideration an Act of the Legislature equalizing the gasoline tax in border towns with the tax of adjoining states. Mr. Justice BUTLER, speaking for the Court, said: "We are of the opinion that there is no ground for the contention that the act violates the due process clause of the Federal and State Constitutions, or that it comes within the inhibition of

the 14th Amendment to the Federal Constitution or § 18, Art. 2, of the State Constitution. . . . It is not to be presumed that the State has any favors to bestow, or that it designs to inflict any arbitrary deprivation of any right. Discriminations between certain persons or classes is obnoxious to the genius of our government, and it is always to be presumed that no discrimination or abridgment of any fundamental right is contemplated or designed by a Legislature, and a law should not be held unconstitutional because of discrimination or because of some arbitrary deprivation of a right unless there is no rational doubt that it improperly discriminates or arbitrarily destroys some right. . . . There are many cases illustrating the wide latitude to be given Legislatures in enacting legislation and upholding their acts where there is some discrimination on the ground that it frequently is impossible to impose the same burden upon every species of property without regard to its nature, condition or class. (citing cases)."

In *Willis* v. *City of Fort Smith,* 121 Ark. 606, 182 S. W. 275, Mr. Justice Kirby, speaking for the Court, said, "When a classification of subjects is made by legislation, such classification must rest on some substantial difference between the classes created and others to which it does not apply, but where the statute or ordinance appears to be founded upon a reasonable basis and operates uniformly upon the class to which it applies, it can not be said to be arbitrary and capricious."

Likewise in the case at bar, where the Acts under consideration require buses for hire entering the State to pay taxes on all the gasoline used on the roads of the State with the exception of 20 gallons, it can not be said that the 20-gallon exemption is not founded upon any reasonable basis or is capricious.

In connection with the cross-complaint on which the defendant was given a judgment against the Revenue Commissioner in the sum of $35,218.72, appellant argues several reasons why appellee can not recover because of not having taken advantage of the exemption of 20

gallons for each entry on the diesel fuel from 1945 to 1952, but it is necessary to mention only one point in disposing of that issue. Appellee seeks to recover voluntary payments made of taxes. This can not be done. Cooley in *The Law of Taxation,* Ch. 20 § 1282, gives this rule: "It is well settled that if the payment of a tax is a voluntary payment, it cannot be recovered back, except where a recovery is authorized by the provisions of a governing statute regardless of whether the payment is voluntary or compulsory" (Vol. 3 at p. 2561); and further: "Where voluntary payments are not recoverable, it is immaterial that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Ignorance or mistake of law by one who voluntarily pays a tax illegally assessed furnishes no ground of recovery." (Vol. 3 at page 2564).

In *Brunson* v. *Board of Directors of Crawford County Levee Dist.,* 104 Ark. 24, 153 S. W. 828, 44 L. R. A., N. S. 293, Mr. Justice HART, speaking for the Court, said: "In some of the states the right to recover illegal taxes paid under protest is given by statute. In this state, however, there is no statute regulating the matter, and if any recovery is had it must be under the rules of the common law. The common-law rule governing cases of this kind is laid down in the following cases: *Lamborn* v. *County Commissioners,* 97 U. S. 181, 24 L. Ed. 926; *Union Pacific R. R. Co.* v. *Dodge County,* 97 U. S. 541, 25 L. Ed. 196. These cases lay down the following rule: 'Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release (not to avoid) his person or property from detention, or to

prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary.' "

We have concluded that the appellant can not recover from the appellee because the 20-gallon exemption is lawful; and the appellee can not recover from the appellant because the payments made were voluntary. The cause is reversed with direction to set aside the judgment and for further proceedings consistent with this opinion.

MOREHEAD *v.* NIVEN.

5-95 257 S. W. 2d 361

Opinion delivered May 4, 1953.

A. D. Chavis, for appellant.

Coleman, Gantt & Ramsay, for appellee.

ED. F. MCFADDIN, Justice. The question is whether the complaint stated a cause of action.

Some time prior to 1929, John Morehead, Sr. and Patsy Morehead, his wife, as owners of 160 acres in Jefferson County, mortgaged the land to Mosaic Templars, to secure a debt of $5,500, evidenced by a series of notes. In 1929, Mosaic Templars foreclosed the mortgage, and H. T. Perry purchased the land for $5,800. Thereupon, John Morehead, Sr. and Patsy Morehead, either voluntarily removed from the land or were evicted. Perry sold the land to D. B. and J. D. Niven in 1930; and in 1941, D. B. Niven conveyed all his interest to J. D. Niven, who has been in complete possession ever since.

On October 26, 1951, the appellants, as the heirs of John Morehead, Sr. and Patsy Morehead, filed this present suit against J. D. Niven as sole defendant, alleging the facts as aforesaid, and also claiming: (a) that the Mosaic Templars foreclosed before the last note of the series was due; (b) that the Mosaic Templars practiced fraud in obtaining a decree for an excessive amount; (c) that in the decree of foreclosure in the Mosaic Templars suit, the Court retained jurisdiction ". . . for such further orders as may be proper to enforce the rights of the parties . . ."; and (d) some of the children of John Morehead, Sr. died before the foreclosure suit. On the foregoing allegations, the plaintiffs prayed that the Chancery Court now set aside the entire Mosaic Templar foreclosure suit; that J. D. Niven be required to account for all revenues on the lands from 1941 to date; that the plaintiffs be permitted to redeem the lands; and for all other relief.

To the complaint, J. D. Niven filed a demurrer, which was sustained. When the plaintiffs refused to plead further, the complaint was dismissed; and the plaintiffs have appealed. There are many reasons why the Court was correct in sustaining the demurrer; and we briefly mention only a few:

(1) The Mosaic Templar foreclosure suit was completed in 1930, when Perry obtained the Commissioner's

Deed. John Morehead, Sr. and his wife, Patsy, were living at that time, and it is not claimed that they were under any disability of any kind. All of the claimed defects in the Mosaic foreclosure decree were matters intrinsic to that proceeding, and were matters that should have been presented there, else they were lost. *Hendrickson* v. *Farmers Bank,* 189 Ark. 423, 73 S. W. 2d 725; *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517; *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234.

(2) There are no allegations in the present complaint sufficient to make any part of the "mortgagee in possession" doctrine apply in this case. Perry (Niven's grantor) took possession under a Commissioner's Deed, and not as mortgagee. See *Williams* v. *Wallace,* 111 Ark. 509, 164 S. W. 301; and see *Security Bank* v. *Davis,* 215 Ark. 874, 224 S. W. 2d 25. Furthermore, the provision in the Mosaic Templar decree, as to retaining of jurisdiction, did not mean anything other than that the parties might go into that suit for further relief within apt time. The present suit is an independent proceeding.

(3) Perry conveyed to the Niven in 1930; and the complaint specifically states that J. D. Niven has been in possession of the lands, claiming as exclusive owner of same, ever since 1941. Section 37-108 Ark. Stats. says:

"All actions against the purchaser, his heirs or assigns, for the recovery of . . . lands sold at judicial sales shall be brought within five (5) years after the date of such sale, and not thereafter; . . ."

Thus limitation is a complete bar to the plaintiffs' complaint; and when limitation appears on the face of the complaint—as it does in this case—the defense may be raised by demurrer. See *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835; and *Wheeler* v. *The Southwestern Greyhound Lines,* 207 Ark. 601, 182 S. W. 2d 214.

The decree is affirmed.

4732 257 S. W. 2d 362

Opinion delivered May 4, 1953.

W. F. Reeves, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. The defendant has appealed from a conviction under Ark. Stats., § 41-2225, for concealing the death of her bastard child. The jury recommended a suspended sentence of three years in the penitentiary which the trial judge declined to follow except as to the last year of said sentence. We refrain from a detail of the sordid evidence which was ample to sustain the jury's verdict.

The principal contention for reversal is that error was committed in permitting appellant's former husband to testify against her at the trial. The defendant was married to Wayne Reed in 1933 and they separated about 1947 when Reed married another woman in Faulkner County without being divorced from the defendant. Reed and the defendant were still legally married on October 28, 1951, which is the date defendant is alleged to have committed the offense, but Reed obtained a divorce from the defendant on April 24, 1952, which was prior to the trial on November 25, 1952. In May, 1952, the defendant married the man alleged to be the father of her deceased child.

Over the defendant's objection Reed was called as a witness by the State and permitted to testify that he thought he was divorced from the defendant when he remarried in 1947; that he had not cohabited with the defendant since that time and had not seen her for three years.

Under our statutes a husband or wife may testify on behalf of but not against the other in a criminal action, except in cases in which an injury has been done by either against the person or property of the other. Ark. Stats., §§ 43-2019 and 2020. Prior to the enactment of these statutes one spouse was incompetent to testify against the other and was allowed to testify for the other only when acting as agent for the other in a business transaction. Ark. Stats., § 28-601 (3). In construing this statute in *Inman* v. *State,* 65 Ark. 508, 47 S. W. 558, the court held that a divorced wife could testify against a former husband only as to such facts as did not come to her knowledge while the marriage relation existed. The court said: "While the marriage relation exists, husband and wife are, under this statute, incompetent to testify for or against each other; and after that relation ceases they are incompetent to testify for or against each other as to such communications as were made by one to the other during the marital relation; but, as to such facts as did not come to them while that relation existed, they are competent witnesses for or against each other after that relation ceases."

Here the defendant's former husband was permitted to testify to facts that came to his knowledge while the marriage relation still existed and his testimony was, therefore, incompetent and inadmissible.

There is still another reason why this testimony was inadmissible. This court is committed to the so-called Lord Mansfield rule to the effect that a husband or wife is incompetent to testify as to the husband's non-access in affiliation proceedings where such testimony would tend to prove a child conceived after marriage to be illegitimate. Even in bastardy proceedings where the statute (Ark. Stats., § 34-712) makes the mother a com-

petent witness, this court has consistently applied the rule and excluded such evidence on the grounds of decency, morality, and public policy. In *Liles* v. *State, ex rel. Johnson,* 117 Ark. 408, 174 S. W. 1196, the mother was permitted to testify that she had not cohabited with her husband for more than four years at the time the defendant had sexual intercourse with her. This court held such testimony inadmissible and so prejudicial as to call for a reversal of the case. See, also, *Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842, L. R. A. 1916B, 1052; *Scott* v. *State,* 173 Ark. 625, 292 S. W. 979. We reaffirmed the rule in the recent case of *Shatford* v. *Shatford,* 214 Ark. 612, 217 S. W. 2d 917.

The defendant's further contention that the court erred in instructing the jury cannot be considered for the reason that proper objection was neither made at the trial nor carried forward in the motion for new trial.

For the error in permitting the defendant's former husband to testify against her in the circumstances, the judgment is reversed and the cause remanded for a new trial.

WARD, J., dissents.

FAULKNER, ADMINISTRATOR *v.* FAULKNER.

5-83 257 S. W. 2d 570

Opinion delivered May 4, 1953.

Rehearing denied June 1, 1953.

Cecil Grooms, for appellant.

H. R. Partlow and *Ward, Coleman & Mayes,* for appellee.

WARD, Justice. James Thomas Faulkner, a citizen and resident of Greene County, died intestate December 16, 1951, at the age of 86, leaving as his survivors a widow, Nettie Faulkner, appellee herein, and four children by a former marriage. Three of said children were sons, named Golve [appellant], James David and Hall H., and one was a daughter named Gladys Faulkner Garner. His estate at death consisted of 140 acres of land [including the homestead] valued at approximately $9,000 and personal property valued at approximately $20,000. In 1924, after his children were grown and married, James Thomas Faulkner married appellee and lived with her until his death.

On October 22, 1943, the deceased signed a purported will in which he disposed of his property as follows: His widow to get $1,000 in money and, also, 60 acres of land [presumably the homestead] for life, with the remainder to the four children: James David to get 80 acres of land in fee; each of the remaining three children to get $2,000 in money; and the balance of his personal property was to be divided equally among his four children. The purported will was kept in a lockbox at Paragould until about three weeks before Mr. Faulkner died, when it was taken to his home and placed with his personal papers. Before Mr. Faulkner's death his

wife and his son, Hall H., had read the purported will and were fully aware of its provisions.

Mr. Faulkner was buried the day following his death, and a few hours after the funeral the widow and four children met in the kitchen of the family home and read the will. At this time everyone thought the will was valid, and it was agreed that Hall H. Faulkner, the named executor, should probate the will as soon as he could conveniently do so. Four days later, on December 21, when Hall H. presented the will for probate he was informed by an attorney that it was not valid and could not be probated because there was only one witness to the testator's signature. At the same time the attorney informed Hall H. and his brother, Golve, that if the members of the family wanted to abide by the wishes of the deceased as expressed in the purported will, they could enter into a family agreement to that effect and ask the Probate Court to appoint an administrator and have the estate distributed according to the expressed wishes of the deceased. Also, on the same occasion, the attorney prepared and delivered to Hall H. a "Family Agreement" for the widow and four children to sign. The said writing, minus the signatures, is as follows:

"FAMILY AGREEMENT

"KNOW ALL MEN BY THESE PRESENTS:

"That we, Golve J. Faulkner, Hall H. Faulkner, James David Faulkner, Gladys Faulkner Garner and Nettie Faulkner, being the widow and children and the sole and only heirs at law of James Thomas Faulkner, do hereby state that we have read the attached paper, the purported last will and testament of James Thomas Faulkner, and hereby agree, each with the other, to abide by the terms of the said purported last will and testament and consent that after the administration of the estate of James Thomas Faulkner is completed that the Probate Court of Greene County, Arkansas, may make an order of distribution distributing the said estate in the manner as set out in the purported last will and testament.

"We further agree that James Thomas Faulkner wanted his property and estate divided as set out in the attached purported will and state that it is our desire that his property and estate be divided just as he wished.

"Witness our hands on this the 21st day of December, 1951."

Following the above transactions Hall H. and Golve signed the agreement and on the same day Hall H. went to the home of the widow and took her in his car to the store operated by Golve where, according to appellant, the paper was read and signed by appellee. Later the agreement was signed by James David and his sister, Gladys. Pursuant to the above and to a waiver of notice signed by all parties, Golve was appointed administrator about a week later and proceeded to administer the estate in accordance with the provisions of the signed agreement. Later the widow and three children signed a deed conveying to James David the 80 acres of land mentioned in the deceased's purported will.

Before the administration thus begun was completed, appellee filed her petition in Probate Court for homestead, dower and statutory allowances. To this appellant pleaded the family agreement, and appellee replied that if she signed the agreement [which she denied] her signature was "procured through pressing, over-reaching, and misrepresentation amounting to fraud at a time when [she] was overcome with grief" and when she was "physically and mentally exhausted to the point of being incapable of realizing or understanding the nature and effect of the agreement." The Chancellor found in favor of appellee and we are asked to reverse that decision.

We are persuaded that the ruling of the Chancellor should be sustained and for the basic reason [assigned by him] that, without finding there was any active, conscious intent to deceive, the brothers and sister failed to reveal all information within their knowledge when, under the circumstances, they were bound to do so.

This was the situation: By the terms of the agreement the widow was to receive the homestead for life and $1,000, when under the law she was entitled to receive (a) the homestead for life, (b) her dower interest in all real estate, (c) one-third in fee of all personal property [amounting to approximately $6,000], (d) $1,000 under Ark. Stats. § 62-2501, and (e) certain other allowances under subsections b. and c. of the above-cited section. It is not contended by appellant that the above information was disclosed to the widow and her rights explained, nor was it explained to her how or why the "Family Agreement" came into existence. It is probably true, as stated by appellant, that appellee is an intelligent woman and read the agreement, but the agreement itself reveals none of the information mentioned above and might even have misled her into thinking the will was a valid instrument.

There are other circumstances that must also be considered. The agreement was presented for appellee's signature only four days after the death of her husband and it is not denied that she was greatly grieved at the time, and the fact that she was expecting the will to be probated as such could easily have prevented her from understanding the full import of the agreement. The record shows that appellee had been in ill health and nervous for about six months as a result of her husband's last sickness and that she had been treated for nervousness by doctors before and after his death. The record also indicates that appellee and the four children had been on friendly relations and that she was looking to them for help in the probation of the purported will.

Under the above facts and circumstances a confidential relationship existed between the widow and the four stepchildren and particularly between her and Hall H. and Golve, which fact imposed on them the duty of acting in utmost good faith and of making full disclosure of all information within their knowledge. A failure so to act in good faith and make full disclosure amounts to the exercise of undue influence, even though no overt act of deception may be committed.

In cases of this nature not only the family relationships but all the surrounding facts and circumstances are to be considered. In the case of *Caldcleugh* v. *Caldcleugh,* 158 Ark. 224, 250 S. W. 324, the Court said:

"Undue influence has a broad field to work upon in the condition of the person influenced. All the surrounding circumstances which might make him susceptible and yielding are to be considered. The doctrine of equity concerning undue influence reaches every case 'where influence is acquired and abused or where confidence is reposed and betrayed.' "

In the cited case the Court approved the cancellation of a conveyance from the widow to the brothers and sisters of her deceased husband and assigned as one of the reasons that: "She was not informed that her husband's mother would inherit a life interest in his real estate. She was not informed what her dower rights were in the premises." The Court did say: "She was only told that she could secure a greater interest by having a lawsuit." In the case under consideration the widow was not told anything about her rights or what she was giving up by signing the agreement, nor could there have been any valid threat of a lawsuit to prevent her from securing those rights.

In dealing with a similar question involving a confidential relationship in the case of *Million, et ux.* v. *Taylor,* 38 Ark. 428, the Court, at page 432, used the following language:

"There are many authorities exacting under such circumstances *uberrima fides* [utmost good faith]; with the duty of full disclosure of everything affecting value, and each other's interest in the subject matter."

We cannot agree with the able argument of appellant that the "Family Agreement" in this case should be sustained under the family settlement doctrine. It is true that such settlements are favored in law and this Court has many times upheld them. An exhaustive compilation of such cases may be found at page 855 in *Pfaff Adm.* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356. How-

ever, each case presents a different set of facts and circumstances and each must be so considered and decided.

Under the facts and circumstances in this case, we cannot say the trial court's decision was against the weight of the evidence and its decree is therefore affirmed.

CRISCO *v.* MURDOCK ACCEPTANCE CORPORATION.

5-71 258 S. W. 2d 551

Opinion delivered May 11, 1953.

Rehearing denied June 22, 1953.

Josh W. McHughes, Brooks Bradley and *Tilghman E. Dixon,* for appellant.

Lowell W. Taylor and *Owens, Ehrman & McHaney,* for appellee.

ROBINSON, Justice. Appellant Crisco bought an automobile on a conditional sales contract from James Hampton, d/b/a Public Auto Company. Hampton assigned the contract without recourse to Murdock Acceptance Corporation; later Crisco filed suit in the Pulaski Chancery Court to cancel the instrument on the ground that a usurious rate of interest had been charged. There was a decree in favor of Hampton and the finance company. However, Crisco was allowed a credit for an overcharge of $45. Crisco has appealed maintaining that the contract is usurious and therefore void, and the finance company has cross-appealed, contending that the Court erred in giving the $45 credit.

According to the evidence, Crisco saw the automobile advertised in a newspaper for the sale price of $1,475. He went to look at the car, and it had a sales tag attached for that amount. He was also told by the salesman the price was $1,475 and no other sales price was mentioned. Upon making the purchase, he was furnished an invoice signed by Homer Jones, Hampton's agent, which described the car and stated the cash price of $1,475, a time price differential of $326, and a total time price of $1,801. Crisco also signed the invoice. The transaction took place on Saturday, April 5, 1952; and although the contract itself does not show the date of the assignment to Murdock Acceptance Corporation, it must have been done immediately because on Monday, April 7, a policy of insurance covering fire, theft, etc., was issued by the Central National Insurance Company, and Murdock Acceptance Corporation is named in the loss payable clause. The selling price as shown on the insurance policy is $1,425; apparently this was meant for $1,475 as written

figures on the invoice can be easily mistaken for $1,425 instead of $1,475; but in any event it certainly was not meant for $1,801.

Over cross-appellant's objection, Crisco testified that the agreement was that he would receive a credit of $900 on a car he was trading in; however, the invoice and contract show a credit of only $855.

In addition to the policy of insurance covering the automobile, the Credit Life Insurance Company of Springfield, Ohio, issued a policy insuring Crisco's life in the sum of $1,116 and providing indemnity for loss of time by reason of sickness or accident in the sum of $62 per month. The policy covered a period of 18 months and the premium was $39.06. The premium on the automobile policy was $112, making a total in premiums of $151.06 on the policies issued. The "differential" named in the invoice was $326.

Crisco testified that he owed $170 on the car he was trading in, which according to the terms of the sale was assumed by Hampton. Hence when the $170 is deducted from $855, $685 is left to apply on the purchase price of $1,475. Deducting $685 from $1,475 leaves Crisco owing $790. Adding the $326 "differential" to the $790 makes a total of $1,116. The balance due as stated in the contract is $1,116 payable in 18 installments of $62 each.

All of this proves that Hampton used the $1,475 cash price as a basis upon which to compute the so-called "differential." The evidence is convincing that Hampton did not have a credit price of $1,801 set up on his automobile. He deducted the down payment from the cash price, and then according to some formula he made a charge for carrying the balance for a period of 18 months; he added the amount determined by the formula he used to the balance owed on the $1,475 after giving credit for the down payment; and this amount totalled $1,116.

The problem of usury is one that has existed as far back as we have any records; about as fast as man has been able to make laws against usury, schemes have been

devised to evade those laws. The framers of our Constitution attempted to guard against usury by Art. 19, § 13 of the Constitution which provides as follows: "All contracts for a greater rate of interest than 10 per cent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum."

Ark. Stat., § 68-602 provides: "The parties to any contract, whether the same be under seal or not, may agree in writing for the payment of interest not exceeding ten (10) per centum per annum on money due or to become due."

Ark. Stat., § 68-603 provides: "No person or corporation shall, directly or indirectly, take or receive in money, goods, things in action, or any other valuable thing, any greater sum or value for the loan or forbearance of money or goods, things in action, or any other valuable thing, than is in section one (§ 68-602) of this act prescribed."

Ark. Stat., § 68-609 provides: "Every lien created or arising by mortgage, deed of trust or otherwise, on real or personal property, to secure the payment of a contract for a greater rate of interest than ten (10) per centum per annum, either directly or indirectly, and every conveyance made in furtherance of any such lien is void; and every such lien or conveyance may be cancelled and annulled at the suit of the maker of such usurious contract, or his vendees, assigns or creditors. The maker of a usurious contract may by suit in equity against all parties asserting rights under the same, have such contract and any mortgage, pledge or other lien, or conveyance executed to secure the performance of the same, annulled and cancelled, and any property, real or personal, embraced within the terms of said lien or conveyance, delivered up if in possession of any of the defendants in the action, and if the same be in the possession of the plaintiff, provision shall be made in the decree in the case removing the cloud of such usurious lien, and conveyances made in furtherance thereof, from the

title to such property. Any person who may have acquired the title to, or an interest in, or lien upon such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial process, mortgage or otherwise, either before or after the making of the usurious contract, may bring his suit in equity against the parties to such usurious contract, and any one claiming title to such property by virtue of such usurious contract or, may intervene in any suit brought to enforce such lien, or to obtain possession of such property under any title growing out of such usurious contract, and shall by proper decree have such mortgage, pledge or other lien, or conveyance made in furtherance thereof, cancelled and annulled in so far as the same is in conflict with the rights of the plaintiff in the action."

Ark. Stat., § 68-611 provides: "Neither the maker of a usurious contract nor his vendees, assigns or creditors, or any other person who may have or claim an interest in any property embraced within the terms of such usurious contract, shall be required to tender or pay any part of the usurious debt or interest as a condition of having such contract, and any conveyance, mortgage, pledge or other lien given to secure its payment or executed in furtherance thereof, enjoined, cancelled and annulled, and any rule of law, equity or practice to the contrary is hereby abrogated."

In the early case of *Ford* v. *Hancock,* 36 Ark. 248, it was said: "Usury is a corrupt agreement for more than the legal rate of interest on a loan of money, or for the forbearance of a debt. It is not usury for one who sells a piece of property on credit, to contract for a higher price than he would have sold it for cash. If the intention be, in fact, to sell on credit, he has the right to fix a price greater than the cash price, with legal interest added; but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, this is an agreement for forbearance that is usurious. Therefore, where the in-

tention is not apparent, it is a question for the jury to determine, whether it was a *bona fide* credit sale, or a device to cover usury."

In *Standard Motors Finance Co.* v. *Mitchell Auto Co.,* 173 Ark. 875, 293 S. W. 1026, 57 A. L. R. 877, it was held that charging a price more than ten per cent greater for an article sold on credit than would have been charged had the sale been for cash, does not constitute usury. *Ford* v. *Hancock* is cited with approval but nothing is said about the language in that case, ". . . but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, this is an agreement for forbearance that is usurious."

Cheairs v. *McDermott Motor Co.,* 175 Ark. 1126, 2 S. W. 2d 1111, also cites *Ford* v. *Hancock* with approval, but loses track of the following language from that case: "Therefore, where the intention is not apparent, it is a question for the jury to determine, whether it was a *bona fide* credit sale, or a device to cover usury."

In *General Contract Purchase Corp.* v. *Holland,* 196 Ark. 675, 119 S. W. 2d 535, it is said: "The fact that the difference between the cash price of the LaSalle car purchased by appellee and the credit price amounted to more than 10 per cent per annum on the cash price would not make the note usurious. There is nothing in the law that will prevent a dealer from charging a higher price when he sells his goods on time than he would have charged if the purchase price had been paid in cash. The amount of the increase in price is not limited by the law, but it depends upon the agreement of the parties." No authority is cited, and the language in *Ford* v. *Hancock* to the effect that if the sale be really made on a cash estimate or where the intention is not apparent it is a question for the jury to determine whether it is a *bona fide* credit sale or a device to cover usury is not mentioned.

In *Harper* v. *Futrell,* 204 Ark. 822, 164 S. W. 2d 995, the Court said: "This Court has held that the finance

charges in connection with the sale of property under a conditional sales contract are not paid for a loan of money, but are a part of the purchase price which the purchaser agreed to pay, and that there is no usury in a transaction of this kind." Citing *Cheairs* v. *McDermott Motor Co., supra.*

Thus it will be seen that although *Ford* v. *Hancock* has been cited with approval all along as authority for a credit price more than 10 per cent greater than a cash price not being usurious, the language in that opinion, ". . . but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, this is an agreement for forbearance that is usurious. Therefore, where the intention is not apparent, it is a question for the jury to determine, whether it was a *bona fide* credit sale, or a device to cover usury," has gradually been lost sight of.

In the case of *Schuck* v. *Murdock Acceptance Corp.*, 220 Ark. 56, 247 S. W. 2d 1, the purchase price of the automobile as shown by the contract appeared to be $2,328; but the loan company who purchased the title-retaining note from the automobile company obtained an insurance policy which showed the actual cost of the automobile when purchased, including equipment, to be $1,795. The loan company paid $1,276.40 for a $1,728 note at the time of purchase, and $24 at a later date. It was found in that case that as a matter of fact $1,795 was the selling price of the automobile, and there was a trade-in of an old car of $400 and $200 paid in cash, making a down payment of $600, leaving a balance of $1,195; and that on such balance interest was charged at the rate of 15.25%; and that the contract showing a total price of $2,328 was a device to cover usury.

Immediately following the Schuck case, we had *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973. It then appeared that the language in such cases as *Cheairs* v. *McDermott* had given the impression that a sale could be figured on a cash estimate and any sum which might be added to the balance after

the down payment as "differential" or "carrying charges" or "credit price" would not be construed as usury, even though greatly exceeding 10 per cent. And in the Hare case we said: "In a long line of cases, we have permitted the seller, under one guise or another, to do exactly what was done in the case at bar, and we have permitted the transferee of the paper to recover in just such a situation. Some of such cases are: *Garst* v. *General Contract Purchase Corp.*, 211 Ark. 526, 201 S. W. 2d 757; *Harper* v. *Futrell,* 204 Ark. 822, 164 S. W. 2d 995, 143 A. L. R. 235; *General Contract Purchase Corp.* v. *Holland,* 196 Ark. 675, 119 S. W. 2d 535; *Cheairs* v. *McDermott,* 175 Ark. 1126, 2 S. W. 2d 1111; *Standard* v. *Mitchell,* 173 Ark. 875, 298 S. W. 1026, 57 A. L. R. 877; and *Smith* v. *Kaufman,* 145 Ark. 548, 224 S. W. 978.

"In the case at bar, the parties dealt on the strength of the aforesaid holdings, which have become a rule of property, and we must not overrule these cases retroactively. Therefore, insofar as the case at bar is concerned, it must be affirmed on the strength of our previous holdings."

The Hare case then gave a *Caveat* to the effect that such cases as *Cheairs* v. *McDermott* could no longer be relied on as to the amount which could be added as "differential," "carrying charges," or "credit price" to the cash price and not be considered usurious.

We have been urged to recall the *Caveat* in the Hare case, but decline to do so; however, the case at bar must be affirmed on the usury issue because the contract was made prior to the date the Hare case became final.

Appellant also urges for reversal that the Court erred in overruling a motion for continuance made on the day the case was to be tried. Such motions to a large extent rest within the discretion of the trial court, and the record here is not such that we can say there was an abuse of discretion.

Appellant also contends that the court erred in overruling a motion made on the date of the trial to require the defendant to produce certain records; but appellant

could have obtained any records desired by making the motion at an earlier date or by subpoena *duces tecum* issued prior to the date of trial.

Crisco's testimony that the agreement was he would receive a $900 credit on the car he traded in instead of $855 as shown on the face of the contract was not admissible. The evidence is not sufficient to show fraud, and ordinarily parol evidence is not admissible to vary the terms of a written contract, *Outcault Advertising Co.* v. *Bradley,* 105 Ark. 50, 150 S. W. 148; *Firestone Tire & Rubber Co.* v. *Webb,* 207 Ark. 820, 182 S. W. 2d 941; but there is an exception when such testimony is for the purpose of showing a usurious contract, *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516; *Prickett* v. *Williams,* 110 Ark. 632, 161 S. W. 1023. However, here the Chancellor's holding that there was no usury is affirmed; therefore the testimony as to the claimed credit of $900 instead of $855 cannot be considered as it is at variance with the written contract; the trial court therefore erred in allowing the $45 credit.

Affirmed on appeal, reversed on cross-appeal.

Mr. Justice WARD concurs.

ON REHEARING

GEORGE ROSE SMITH, J., on rehearing. In this case and in the allied cases that were decided on May 11 and May 25, 1953, the losing parties insist in petitions for rehearing that they have been deprived of their property without due process of law and have been denied the equal protection of the laws, in violation of the Fourteenth Amendment to the federal constitution. Ordinarily we do not consider questions raised for the first time on rehearing, but in fairness to the public we think it better to set this issue at rest now than to permit our views to remain undisclosed until the same question can be raised in future litigation.

The argument now presented is based on the fact that we said in *Ford* v. *Hancock,* 36 Ark. 248, that if no *bona fide* credit sale is involved it is usurious to add more than ten per cent *per annum* to the cash price

merely because time is given for its payment. As we explained in the original opinion in the case at bar, *Ford* v. *Hancock* has never been expressly overruled; but in a long series of later decisions we allowed the emphasis to shift gradually from substance to form, and in doing so we finally reached a point at which a loan of money could lawfully be disguised as a credit sale.

In *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973, we returned to the spirit of *Ford* v. *Hancock*. In the *Hare* case we had three possible courses of action: (*a*) We might simply have adhered to the intervening decisions that had imperceptibly chipped away the foundation on which *Ford* v. *Hancock* rested. Such a holding would have involved no constitutional issue, since adherence to precedent is a basic principle of the common law. (*b*) We might have retroactively overruled those intervening decisions, thereby invalidating countless contracts made in reliance upon our declarations of the law. Even though such retroactive judicial pronouncements are permitted by the constitution, *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382, they are manifestly contrary to a sense of fair play. We could not in good conscience inform merchants that their reliance upon our many decisions had been foolhardy, that they should have guarded against the possibility that agreements lawful when made might later be declared void.

We chose instead the third course—that of recognizing the validity of contracts made upon faith in our decisions; but at the same time we stated in detail the rules to be followed after the opinion became final. That course was so demonstrably fair to every one that it is difficult for us to comprehend how it can be thought to have been violative of the constitution. That same "novel stand," however, was taken by the losing party in *Great Northern R. Co.* v. *Sunburst O. & R. Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, and was there shown by Justice Cardozo to be wholly without merit. We can add nothing to his admirable discussion.

Rehearing denied.

WARD, Justice, concurring. I deem it appropriate to concur in this case chiefly for the purpose of commenting on the *caveat* contained in the case of *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973, since the opinion indicates the *caveat* will be followed hereafter. By reference to the *Hare* case it will be found that the *caveat* is divided into three sections. I can see nothing wrong with section (1).

Section (2), in my judgment, contains dangerous implications. It is realized that this *caveat* was probably intended only as a general guide for future decisions, but at the same time its language is calculated to so disturb legitimate business practices as to justify pointing out inherent dangers before they are incorporated into the body of law by decisions of this Court.

For the sake of brevity section (2) will not be copied here, but will be referred to as it appears in the *Hare* case, *supra.*

The objections I wish to point out can be made plainer by use of a simple, imaginary case which, it is submitted, is typical of many actual cases that might arise, and which comes within the framework of this section of the *caveat.*

The imaginary case. A, a secondhand car dealer, sells B a used car for $500 and takes his note for that amount due in one year, with interest at 10% per annum from date. Evidencing the transaction is a bill of sale, signed by both A and B, showing the above facts. A then takes B's note to C, a person or company engaged in buying (or discounting) commercial paper, and sells him the note for $490 cash.

What happens. B reads the *caveat* in the *Hare* case and calls on his lawyer, L. Suit is filed by B to cancel his note for usury. At the trial there is no trouble proving that C had many times before discounted notes for A, and, of course, A was reasonably sure he would do so this time. If L has any trouble making this proof,

he can get material assistance from *caveat* section (3). B swears A had a cash price of $495 but boosted it up to $500 for credit. A cannot deny this. C cannot deny, of course, that he will make $10 more than 10% interest on B's note.

The trial judge, having read section (2) of the *caveat,* perceives there is only one question of fact to determine, and so holds to this effect, that A, at the time he sold the car to B increased his cash price with the reasonable assurance that he could discount the paper [B's note] to C, then finds for B.

The realization of just what the jury might do in the above hypothetical case is enough to give the handlers of commercial paper a nightmare. Not only could C get hurt but so might anyone who purchased B's note from C.

The result.

1. In effect the *caveat* overrules numerous decisions of this Court [several cited in the opinion in this case] that a seller can fix his own price for his merchandise, and that he can [safely?] fix one price for cash and a different price for credit.

2. In effect the *caveat* makes usury depend on acts subsequent to the execution of the note. It must be concluded from the wording of the *caveat* itself that B's note would never have become tainted with usury if: (1) A had kept the note; (2) A had sold the note to someone who was not "engaged in the business of purchasing" notes; or (3) A had no assurance in advance that C would discount B's note.

It is readily conceded that the intervention of some third party, on the theory of agency, might be so related to the payee as to indicate usury, but here C has done nothing more than let A know he is in the discounting business and was willing to handle his paper.

Surely no one doubts that the discounting of commercial paper is a legitimate occupation. In Vol. 55 Am. Jur. at page 344 it is stated:

"Bills and notes, like other property, may be bought and sold on such terms as may be agreed upon, and a discount at any rate," etc., citing a long list of authorities.

The apparent intent on the part of this Court to protect the public from usurious transactions is laudable, but it occurs to me that we should be very careful in our effort to act as guardian that we do not inadvertently endanger or unjustly impede the transaction of legitimate business, particularly in the important realm of the free and confident circulation of commercial paper.

It appears to me also that many of the perplexing problems which arise out of usury charges could be met by the simple expedient of this Court requiring that every questionable charge be itemized or treated as interest. As long as credit prevails people are going to buy, and, as I see it, the only practical protection this Court can give is to guard them from being deceived. So, when a person desires to buy a car or any other article of merchandise, if he consents to pay the credit price and also to pay for an insurance policy, etc., he could not expect to be relieved of his assumed obligation where no deceit or fraud is involved and he knows full well what he has agreed to pay for. To say that, under such a rule, the public would be imposed on by unconscionable dealers and finance companies, is to admit that competition in business is no longer effective to keep prices reasonable.

Under the application of the rule I have proposed the question of usury in any transaction would depend on the presence or absence of any kind of fraud or deception, and I would not object to a strict enforcement to protect the public. Under the *caveat,* however, certain specified acts which are legal *per se* can, by certain declared presumptions and relationships, culminate in usury. In answer to this it could be said that the *caveat* presupposes an element of deception. If so, let it be met on that basis as I have suggested. It appears to me, however, that the *caveat* attempts to deal with a decep-

tion it imputes to the dealer—a deception that exists only in the mind of the dealer and which cannot be reached by any practicable method yet devised by man.

My prediction is that the further we attempt to pursue the process of judicial determination suggested in the *caveat,* the more confused our opinions and the public will become.

MURDOCK ACCEPTANCE CORPORATION *v.* HIGGINS.

5-76 258 S. W. 2d 558

Opinion delivered May 11, 1953.

Rehearing denied June 22, 1953.

Lowell W. Taylor and *Owens, Ehrman & McHaney,* for appellant.

Carl Langston and *Wayne Foster,* for appellee.

GRIFFIN SMITH, Chief Justice. The Chancellor found that usury was involved when G. C. Ring and Lester Stewart, doing business as Ring & Stewart Motor Co., sold a used automobile to Frances Higgins. She received $140 as credit for an old car she had purchased for the same amount. A check for $160 was given to increase the down payment to $300, leaving $855 to be paid in fifteen monthly installments of $57. No interest is indicated and the contract (executed on a Murdock form) recites a "total time price" of $1,155.

Ring testified that he prepared the conditional sales contract the morning of October 2, 1951, and delivered it in duplicate to Mrs. Higgins at her home where the

original and a copy were immediately executed and returned to him, the purchaser retaining the second sheet. Mrs. Higgins admitted that the signature was hers, but denied signing the contract October 2d. It was her recollection that the documents were signed not earlier than Oct. 6 and not later than the 19th. But Ring testified that he sold the paper to Murdock Oct. 2d, and that company's records and other evidence appear to sustain this contention.

Immediately preceding Mrs. Higgins' signature there is a single line of clear type with substantial spacing above and below to separate it from what is sometimes referred to as "confusing small print". It reads: "Executed in duplicate, one copy of which was delivered to and retained by purchaser, THIS 2d DAY of Oct., 1951". The words "this" and "day" were in blackface all-capital letters. Likewise "TOTAL TIME PRICE", was in blackface, all-caps., followed by $1,155.

Appellee relies upon *Schuck* v. *Murdock Acceptance Corporation,* 220 Ark. 56, 247 S. W. 2d 1, while appellant contends that its contract comes within the scope of *Hare* v. *General Contract Corporation,* 220 Ark. 601, 249 S. W. 2d 973.

The appeal is controlled by *Crisco* v. *Murdock Acceptance Corporation, ante,* p. 127, 258 S. W. 2d 551.

Reversed.

AUNSPAUGH *v.* MURDOCK ACCEPTANCE CORPORATION.

5-51 258 S. W. 2d 559

Opinion delivered May 11, 1953.

Rehearing denied June 22, 1953.

Brooks Bradley, Tilghman E. Dixon and *Josh W. McHughes,* for appellant.

Lowell W. Taylor and *Owens, Ehrman & McHaney,* for appellee.

S. L. White, Amicus Curiae.

George Rose Smith, J. This is one of several cases, all involving the issue of usury, that were argued and submitted together. In this case the chancellor dismissed the appellant's complaint upon a finding that the contract was not usurious.

On May 8, 1950, Aunspaugh purchased from James Hampton, one of the appellees, a Studebaker car which was offered for sale for $995 in cash. Aunspaugh, instead of paying cash, traded in a Chevrolet car for a credit of $345 and signed a conditional sales contract by which he agreed to pay the sum of $987 in 21 monthly installments of $47 each. Aunspaugh also received a bill of sale which recites that the balance was financed with Murdock Acceptance Corporation in 21 payments of $47 each. It cannot be doubted that Aunspaugh, if he read these documents, was aware of his obligation, and the chancellor specifically found that Aunspaugh "knew and understood the terms and conditions" of the sale.

On September 15, 1950, Aunspaugh brought this suit to obtain a cancellation of the contract upon the ground that it was usurious. It is conceded that even after the cost of insurance purchased by Murdock is deducted from the total time price of $1,332 the difference between the

cash price and the credit price, if treated as interest, exceeds the legal rate of 10% per annum. During the pendency of the suit the chancellor required the monthly installments to be paid into the registry of the court, and this money was adjudged to belong to Murdock when the complaint was dismissed.

In all respects but one this case is governed by the opinion in *Crisco* v. *Murdock Acceptance Corporation,* also decided today. 222 Ark. 127, 258 S. W. 2d 551. The only distinction that might be regarded as material lies in the fact that here Hampton transferred the conditional sales contract to Murdock for $687 in cash and, by means of what is referred to as a dealer's loss reserve, became entitled to receive an additional $31 from Murdock in the event that Aunspaugh discharged his debt in a manner satisfactory to Murdock. It is now insisted that this agreement for a contingent future payment had the effect of making Hampton the agent of Murdock in the consummation of a loan from Murdock to Aunspaugh. The answer to this argument is that prior to the finality of our decision in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, this type of transaction was treated as a credit sale rather than as a loan of money. In that view Hampton could not have been Murdock's agent in the negotiation of a loan, for no loan is involved. As long as the transaction is treated as a credit sale it is immaterial to the purchaser what arrangements are made between the seller and the finance company for the transfer of the sales contract.

There being no material difference between this case and the *Crisco* case, the decree is affirmed.

DUNCAN *v.* MCADAMS.

5-79 257 S. W. 2d 568

Opinion delivered May 11, 1953.

George E. Pike, for appellant.

Botts & Botts, for appellee.

Ed. F. McFaddin, Justice. The right of ownership of a 40-acre tract is the dispute presented by this appeal. Appellants (Duncan and his grantees) filed suit to compel appellees (McAdams and wife) to convey the 40-acre tract; and from a decree refusing the prayed relief, there is this appeal.

On January 1, 1941, McAdams and Duncan entered into a contract whereby McAdams agreed to sell and Duncan agreed to buy certain lands in Arkansas County, described in the said contract as follows:

"North Half of the Northwest Quarter (N½NW¼) and Southeast Quarter of the Northwest Quarter (SE¼ NW¼) all in Section 35, Township 5 South, Range 2 West, containing 80 acres, more or less according to the U. S. Gov't. Survey, located in the Southern District of Arkansas County, Arkansas."

The agreed price was $600, evidenced by a series of notes to be paid $100 and interest each year, and the contract provided that if any payment should not be made when due, then the seller could declare all payments theretofore made to be rent. On November 27, 1948, Duncan finally paid the last of the notes and interest, and McAdams and wife executed to Duncan a Warranty Deed, conveying an 80-acre tract, described as follows:

"E½ NW¼ Sec. 35, Twp. 5 South, Range 2 West of the 5th P. M., containing 80 acres more or less according to the U. S. Government Survey."

It will be observed that the contract of January 1, 1941, described not only the 80 acres contained in the said deed of 1948, but also described the NW¼ NW¼ Sec. 35, which is the 40-acre tract here in dispute. Even though Duncan accepted the deed in 1948 that omitted the said 40 acres, nevertheless he and his co-appellants now claim that McAdams is bound to convey the said 40 acres contained in the contract and omitted from the deed.

On August 3, 1950, Duncan and wife conveyed the 40 acres, here in dispute, to Williams, Shackelford, Purdy and Trussell; and the said grantees, along with Duncan, filed this suit against McAdams and wife, on August 16, 1950, seeking to compel McAdams and wife to convey the said 40-acre tract.

Against the complaint, McAdams claimed that the 40-acre tract was included in the 1941 contract by mutual mistake; that McAdams only intended to contract to sell, and Duncan only intended to buy, the 80-acre tract described in the 1948 deed; that Duncan frequently acknowledged said mistake between 1941 and 1948; that Duncan accepted the 1948 deed as fully satisfying the 1941 contract; and that the present suit was inspired by Duncan's grantees, who knew long prior to their deed from Duncan that he had no claim to the said 40 acres.

On the issues framed by the pleadings, many witnesses were heard by the Chancellor, and it became a question of which set of witnesses to believe. The rules of law applying to a case like the one here are:

(a) before Duncan accepted any deed under the contract, the burden would have been on McAdams to show a mistake in the contract;

(b) but after Duncan accepted the 1948 deed in satisfaction of the contract, the burden devolved on Duncan and his co-appellants to prove that there was a mistake made by the parties, a misrepresentation, or a fraud perpetrated on Duncan when he accepted the 1948 deed in satisfaction of the contract. These rules are true because our cases hold that a contract for the conveyance of lands is deemed merged in the deed subsequently executed under the terms of the contract. See *O'Bar* v. *Hight,* 169 Ark. 1008, 277 S. W. 533; *Allen* v. *Thompson,* 169 Ark. 169, 273 S. W. 396; *Fretwell* v. *Nix,* 172 Ark. 230, 288 S. W. 8; and *Jackson* v. *Lady,* 140 Ark. 512, 216 S. W. 505. Cases from many jurisdictions are cited in the Annotation in 84 A. L. R. 1008 on the matter of a deed as merging the provisions of an antecedent contract. In 55 Am. Jur. 756, the rule is stated:

"In the absence of fraud or mistake, and in the absence of contractual provisions or agreements which are not intended to be merged in the deed, upon the acceptance of a deed tendered in performance of an agreement to convey, the written or oral agreement to convey is merged in the deed, the agreement to convey is discharged or is modified as indicated by the deed, the deed regulates the rights and liabilities of the parties, . . ."

Again in 55 Am. Jur. 758, the rule is stated:

"Although the lands embraced in the deed are not the identical lands described in the agreement, yet in the absence of evidence of mistake, misrepresentation, or fraud, if the purchaser accepts the conveyance, the agreement to convey is discharged."

The fact that Duncan accepted the 1948 deed is clearly established; so the burden was and is on Duncan and his co-appellants to prove that there was a mistake, a misrepresentation, or a fraud perpetrated on Duncan, when he accepted the 1948 deed. There is no occasion

for us to consider whether such proof would have to be merely by a preponderance of the evidence, or by evidence clear, cogent and convincing; because Duncan and his co-appellants have failed to sustain the burden under either rule. It would unduly prolong this opinion to detail the pertinent testimony of the various witnesses and to comment on the original papers which we have caused to be brought up to this Court for examination. We conclude that Duncan and his co-appellants failed to prove their case even by a preponderance of the evidence; and we also conclude that before Duncan's grantees received the deed from him, they knew of all the defects in Duncan's claim to the 40 acres.

Therefore, the decree of the Chancery Court is in all things affirmed.

SAGE LAND & LUMBER COMPANY *v.* HICKEY.

5-97 257 S. W. 2d 941

Opinion delivered May 11, 1953.

Luther H. Cavaness, for appellant.

Merle Shouse, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by the appellant, Sage Land & Lumber Co., to set aside a tax sale and clerk's deed based thereon. The facts are undisputed.

Appellant owned the 40-acre tract which was wild and unimproved in November, 1944, when Appellee Jim Campbell purchased it at a sale for the 1943 taxes which had actually been paid by the appellant on March 16, 1944. A clerk's tax deed was issued to Campbell on April 27, 1948, and recorded on the same date. Campbell and wife deeded the land to appellee A. D. Hickey on May 10, 1948, and this deed was recorded on March 3, 1952.

Hickey went into possession immediately following his purchase and fenced the land in October, 1948. He cleared part of the tract and made a tomato crop on it in 1949 and a corn and cane crop in 1950. He cleared the balance of the tract in 1951 and has since maintained it as a fenced pasture.

Appellant paid the taxes on the land for the years 1945 to 1948, inclusive, while appellee Hickey paid the taxes for 1949, 1950 and 1951. This suit was instituted by the appellant on January 29, 1952.

The chancellor found from the undisputed evidence that appellant's suit was barred because it did not appear, "that the plaintiff (appellant), his ancestors, predecessors, or grantors, was seized or possessed of the lands in question within two years next before the commencement of such suit," as required by Ark. Stats., § 34-1419. Appellant contends that application of the statute in a case where the tax sale is void because the taxes had already been paid would result in an unconstitutional taking of one's property without due process of

law, and that the Legislature only intended to make the statute applicable when the taxes were in fact delinquent and unpaid.

In a long line of decisions we have held the statute applicable to possession under a tax deed which sufficiently describes the land even though such deed is void for other reasons, including jurisdictional defects. In *Dickinson* v. *Hardie,* 79 Ark. 364, 96 S. W. 355, the tax title purchaser held possession for more than two years under his deed although the original owner had actually paid the taxes prior to the sale, as in the instant case. In holding the original owner's suit barred by the statute, the court said: "The appellee argues that this section can not apply because this could not be a sale for nonpayment of taxes; that the collector, no more than any other citizen of the State, has the right to sell lands unless in fact there has been a nonpayment. It is true that the collector has no such right; but still he did sell for an alleged nonpayment, and the purchaser went into possession under deed based upon such sale, and continued in possession for more than two years before this suit was brought.

"This is purely a statute of limitations, and runs against void sales, as well as voidable sales or regular sales. The statute is not in favor of those holding under valid deeds issued pursuant to valid tax forfeitures and valid sales, but is in favor of the possession for two years under deeds therein mentioned, one of which is the deed under which Dickinson held here.

"A statute of repose is not needed in favor of purchasers at valid tax sales. The validity of the sale and precedent proceedings effectually carries the title, and renders unnecessary such statutes, and they are enacted for the benefit of those acquiring these State titles and quieting these questions after two years possession under them. This whole matter was gone into fully and conclusively in the recent case of *Ross* v. *Royal,* 77 Ark. 324."

In *Norwood* v. *Mayo,* 153 Ark. 620, 241 S. W. 7, this court recognized that the cases of *Ross* v. *Royal* and

Dickinson v. *Hardie, supra,* represented the minority view in this country but specifically declined to overrule them saying the opinions had become rules of property in this State. See, also, *Honeycutt* v. *Sherrill, Trustee,* 207 Ark. 206, 179 S. W. 2d 693, and cases there cited.

In discussing the operation and effect of the statute in *Baum* v. *Yarberry,* 212 Ark. 471, 206 S. W. 2d 190, we said: "That the period of limitation fixed by this statute is a comparatively short one, and that an enforcement of the rule provided in this statute may, in some cases, work a great hardship or apparent injustice are matters addressing themselves to the legislative branch of government."

Appellant also argues that the statute is inapplicable because the appellees did not pay taxes on the land until 1950. However, we have held that the adverse possessor's failure to pay subsequent taxes does not operate to deprive him of the benefit of the statute. *Schuman* v. *Kerby,* 203 Ark. 653, 158 S. W. 2d 35.

Appellant also says that appellees entered into a conspiracy to cheat and defraud the appellant of its property. It is unnecessary for us to determine whether it would make any difference if the tax deed was void for that reason since the appellant neither pleaded nor proved such fraudulent conspiracy.

It is undisputed that appellee Hickey went into actual possession of the land under the tax deed and held such possession for more than two years before this suit was instituted. He thereby acquired title by adverse possession under the statute.

Affirmed.

5-98 257 S. W. 2d 561

Opinion delivered May 11, 1953.

Rehearing denied June 1, 1953.

A. D. Chavis, for appellant.

No appearance for appellee.

WARD, Justice. On May 30, 1951, appellant filed a complaint in ejectment against appellee, alleging: that he was the owner of lot 3, block 24 of Dorris Addition East to the City of Pine Bluff; that he acquired title to said property by a tax deed from the State of Arkansas in 1937; that he took possession under said deed and has held actual possession thereof for more than two years; that appellee, without title or authority, took possession of the property within the past three months; and that he was entitled to immediate possession. The prayer was to have appellee ejected, and all other proper relief. The answer was a general denial.

At the close of the trial the court instructed a verdict against appellant, and he has appealed. The only question for us to consider is whether the evidence warranted a submission to the jury.

The Evidence. The material evidence on the part of appellant is substantially as follows: A. D. Chavis

received a deed, with above description, from the State based on a previous forfeiture, by the same description, and on June 3rd of the same year Chavis quitclaimed the property, by same description, to appellant. Appellant says he took possession and kept it till dispossessed by appellee; that he never paid any taxes on the property because the collector wouldn't let him, and that he took out a fire insurance policy on the small house in 1950. It appears that appellant never lived on the property, but did rent it to J. H. Primm for about eighteen months in 1940 and 1941. On one occasion some people wanted to buy a right-of-way across the property and asked appellant about it. A Mr. Turner decided to stay in the house in 1950 so it could be insured.

On behalf of the defendant the evidence shows said block 24 is not laid off into lots on the official City Plat, nor is there anything of record to show where lot 3 is located. The plat shows block 24 to be irregular in shape, and the evidence shows it is crossed or bordered by a railroad track and a ravine. Appellant himself stated he did not know where lot 3 was located. The evidence further shows that appellee holds a deed to the land in block 24 by a metes and bounds description. The deed is from Vienna V. Thurmond and is dated May 4, 1948. Testimony was introduced to show that Vienna Thurmond and her relatives had claimed and occupied the land for many years previous to the time appellant acquired his deed. Appellee tore down the old house in January, 1951, and built a new one.

Under the above state of the record there is no substantial evidence to support appellant's claim. Under the well-established rule in ejectment suits appellant must stand on the strength of his own title and not on the weakness of appellee's title. See: *Beardsley* v. *Hill,* 77 Ark. 244, 91 S. W. 757; *Haynes* v. *Clark,* 196 Ark. 1127, 121 S. W. 2d 69, and *Knight* v. *Rogers,* 202 Ark. 590, 151 S. W. 2d 669.

The deed to appellant, as has been shown, contained a description that described no land that could be located from the county records or by any clue contained in the

deed, and was, therefore, ineffective to convey title. The law in this connection is so well established that citations are not necessary. We also note that appellant did not rely on seven years' adverse possession and therefore we do not consider whether the proof was sufficient to sustain such a plea had it been offered.

Affirmed.

KUESPERT *v.* ROLAND.

5-64 257 S. W. 2d 562

Opinion delivered May 11, 1953.

Troy W. Lewis, for appellant.

R. W. Laster, for appellee.

J. SEABORN HOLT, Justice. Appellant, Max J. Kuespert, Jr., and appellee were married in 1924. To this union, a child, Katherine, was born December 31, 1940. The parties were divorced in 1947, and both have remarried. By the terms of the divorce decree, there was a property settlement and appellee (the mother) was awarded custody of the little girl,—with visitation privi-

leges to the father,—and $25 per month for her support. The decree also provided: "In event said infant daughter shall become seriously injured or so ill as to require more than ordinary medical care, or shall require hospitalization, then First Party shall pay, in addition to the twenty-five dollars monthly support aforesaid, all such medical or hospital expenses so incurred."

Appellee filed petition February 18, 1952, in which she alleged that the monthly support payments of $25 were insufficient, and "the minor child of the parties, Katherine Kuespert, now requires dental treatment in the form of braces for her teeth, which expense was unforeseen at the time of said agreement; and that this expense in the sum of One Hundred and Fifteen Dollars ($115) should be borne by the plaintiff, Max J. Kuespert, Jr.," and prayed that the monthly allowance for support be increased, that appellant be required to pay for dental expenses, and for her attorney's fee and costs.

Trial resulted in the court's finding that the monthly payments for Katherine's support were sufficient and should not be increased, that the child "is in need of dental orthodontic treatment; and that, the respondent herein, Max J. Kuespert, Jr., is liable for and should be ordered to pay for such treatment as may be necessary," and decreed that appellant, Max J. Kuespert, Jr., "arrange and pay for, with any recognized dentist and orthodontist of his choice in the City of Little Rock, Arkansas, the treatment that is necessary for the minor child of the parties, Katherine Kuespert; that the respondent, Max J. Kuespert, Jr., pay to the petitioner's attorney, R. W. Laster, the sum of Fifty Dollars ($50) for his services; and that the respondent, Max J. Kuespert, Jr., pay to the petitioner all of her costs."

This appeal followed.

For reversal, appellant says: "There was not sufficient legal evidence before the court to justify the finding that orthodontic treatment was needed; . . . the husband was relieved in the original divorce decree, and the

wife impliedly assumed all maintenance expenses above $25 monthly, with two exceptions, neither of which is here involved," and "the allowance of attorney fees to the petitioner was contrary to law."

Our rule is well settled that it is both the legal and moral duty of the father to support his minor children in accordance with his means and ability. This obligation is required of him regardless of any court order. *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677.

It appears that appellant does not seek to evade this responsibility of support within his means, but he insists that dental care and orthodontic treatments were not contemplated and assumed by him under the provisions of the divorce decree above.

There was testimony of the mother (appellee) to the effect that the child was in an unusual and urgent need of dental treatment, and that delay might injure her health, that orthodontic treatment was necessary also which would require an expenditure of $115. In fact, it appears that the child's immediate need is a number of extractions and fillings and that braces to straighten and realign her teeth should not be attempted until a later date.

On the evidence presented, we are unable to say that the Chancellor's findings, in effect, that immediate dental treatment for this child was required, that, in the circumstances, appellant should assume the reasonable expense therefor, commensurate with his apparently modest means, and ability to pay, were against the preponderance of the evidence; nor can we say that the father's obligation in this regard did not fall within the terms of the above provision in the divorce decree.

There was no error in allowing an attorney's fee of $50, in the circumstances. Our statute, § 34-1210, Ark. Stats. 1947, provides: "During the pendency of an action for divorce or alimony, the court may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and execu-

tions and proceedings as in cases of contempt, and the court may allow additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided for in the decree."

The fee allowed does not appear to be unreasonable.

Affirmed.

COMER *v.* STATE.

4734 257 S. W. 2d 564

Opinion delivered May 11, 1953.

J. Fred Parish, for appellant.

Tom Gentry, Attorney General, and *Thorp S. Thomas* and *James L. Sloan,* Assistant Attorneys General, for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted of carnal abuse and sentenced to confinement in the penitentiary for three years. Ark. Stats., 1947, § 41-3406. This appeal puts in issue the sufficiency of the State's evidence.

The information charges that Comer had carnal knowledge of his daughter Lorine, a girl under the age of sixteen. Lorine, as a witness for the prosecution, denied having had sexual relations with her father. She admitted that she had signed a statement to the contrary during the prosecuting attorney's investigation of the

case, but she declared that her former statement was untrue. The court instructed the jury that the prior statement was admitted for impeachment only and was not to be considered as evidence of the accused's guilt. There was no other evidence that the crime had been committed; so the jury must have disregarded the court's instruction and concluded that Lorine told the truth in the first instance.

We have often held that the prior inconsistent statements of a witness are admissible for impeachment but not as substantive evidence of their truth. *Minor* v. *State,* 162 Ark. 136, 258 S. W. 121; *Sisson* v. *State,* 168 Ark. 783, 272 S. W. 674. The Attorney General concedes this to be the settled law in Arkansas, but he asks us to overrule our earlier decisions for the reason that an outstanding legal thinker, John H. Wigmore, thought the rule to be unsound. Wigmore on Evidence, § 1018. Wigmore's position was that the prior statement is objectionable as substantive evidence only because it was made out of court and in circumstances when its truth could not be tested by cross-examination. Wigmore believed that the objection lost its force when the witness took the stand and submitted himself to cross-examination. He conceded, however, that the courts have universally taken the orthodox view, which we have followed in the past.

We appreciate the abstract logic of Wigmore's argument, but there are practical objections to adopting his reasoning in its entirety. If a subsequent opportunity for cross-examination converts unsworn hearsay into competent testimony, then an entire accusation, such as a charge of rape, could be fabricated merely by first having the prosecutrix emphatically deny the truth of the charge and by then calling another witness to say that the prosecutrix had made a contrary statement on some other occasion. Again, we are not persuaded that the opportunity to cross-examine months or years later is equally as valuable or equally as effective as the exercise of that privilege when the facts are much fresher in the memory of the witness. Perhaps nice distinctions could be worked out to meet these objections to Wigmore's

theory, but we suspect that the ultimate result would be not so much a rejection of the orthodox view as the recognition of minor exceptions to its applicability. Certainly the question is not wholly one-sided; Wigmore, in his discussion of the problem, mentions the fact that he himself advocated the prevailing rule in the first edition of his treatise but later changed his mind. When the arguments are this closely balanced we think the advantage of certainty in the law should tip the scales in favor of the rule of *stare decisis*.

Reversed and remanded for a new trial.

TORNEY *v.* CAMPBELL.

5-56 257 S. W. 2d 930

Opinion delivered May 18, 1953.

Ben C. Henley and *J. Smith Henley,* for appellant.

Eugene W. Moore, for appellee.

WARD, Justice. Appellants, who owned an improved 65-acre farm some ten miles north of Harrison, listed it for sale with Hugh Barnett, a local real estate broker. Barnett showed the farm to appellees, and after making certain representations as to how much water the well would supply, sold it to them for $7,250, part of which was paid down and the balance was payable later. Six days before the last note for $3,000 became due on April 18, 1952, appellees filed suit against appellants asking damages in the amount of $2,500 on the ground that ap-

pellants, through their agent, made false representations regarding the amount of water the well would produce. The chancellor found in favor of appellees and fixed their damages at $1,000. There were other issues not material to this decision, which gave the chancery court jurisdiction.

Since we have concluded there was sufficient evidence to support the chancellor's finding that misrepresentations regarding the water supply were made by appellants' agent and relied on by appellees, we deem it unnecessary to discuss fully the testimony on that issue.

The evidence shows that appellant, who previously purchased the farm for $7,000, had a well drilled to the depth of approximately 450 feet, and that when the well was completed the water was about 300 feet deep. Appellees say they informed the broker they expected to raise chickens and would need an ample supply of water for that purpose, and that they were assured by him the well would be adequate. There is much evidence, though disputed, that soon after appellees took possession the supply of water was insufficient for even household purposes. The evidence supporting appellees' contention that they purchased the farm for the purpose of raising chickens is not convincing. It appears the chancellor did not try the case on that theory because practically all the testimony was directed to the supply for household use.

We point out that the chancellor's finding of misrepresentations does not necessarily imply any conscious deceit or fraud on the part of appellants or their agent.

In our judgment the amount of damages fixed by the chancellor are excessive and should be reduced to $500. The uncontradicted testimony shows that when the well was first tested there was about 300 feet of water and that 500 gallons were bailed out, that on the following morning a test showed approximately 250 feet of water, and that while appellants lived there they had an ample supply. On the other hand, appellees admit they have not had the well cleaned out, have not had the pipes pulled, nor had the valves in the well tested, notwith-

standing there was competent evidence that otherwise the capacity of the well could not be properly judged. Conflicting and indecisive testimony was introduced to show the value of the farm with the well in its present condition. It appears also from the record that appellees are not eager for a return of the purchase price which they agreed to pay for the farm.

We realize that it is impossible to fix definitely the amount, if any, appellees have been damaged, but in view of the indecisive evidence on this question and the lack of pertinent evidence, as above indicated, it is our best judgment that the sum of $500 is adequate. The decree of the trial court is so modified and otherwise affirmed.

PERRY *v.* DUNCAN.

5-86 258 S. W. 2d 560

Opinion delivered May 18, 1953.

Rehearing denied June 22, 1953.

U. A. Gentry, for appellant.

Barber, Henry & Thurman, for appellee.

J. SEABORN HOLT, J. May 21, 1952, appellant, C. E. Perry, purchased from Lyman Duncan, operating as Duncan Auto Sales, an automobile on a credit or time payment plan. He signed a conditional sales contract, which provided that the sale was made to Perry "for a total time price of $2,817.98." It appears undisputed

that this contract was completely filled out at the time and that Perry understood its provisions. Not only did he so testify, in effect, but so did his wife who was with him at the time. The contract showed an allowance of $1,000 with the deferred balance of $1,817.98 to be paid in five monthly installments of $25 each, one installment of $600, then eleven $25 installments and a final installment of $817.98.

Perry says: "It is true that an automobile was sold, but it was sold at a quoted price of $2,250. No other price was quoted to the purchaser. It is true that credit was extended, which entailed the payment of more than $2,250. . . . The dealer made no credit price to appellant."

Appellees argue that this was a bona fide sale of an automobile on a credit, or time price, rather than for cash and that the purchaser, Perry, signed and executed this completed contract for an amount in excess of the cash price quoted.

The trial court by its decree declared the sales contract void for usery and relieved Perry of any liability insofar as said contract obligated him to pay money and at the same time held the contract valid in its terms whereby title to the automobile in question was retained by the seller, appellee, or his assignee.

Both parties have appealed, appellee, Duncan, from that part of the decree declaring the sale contract usurious, and appellant, Perry, from that part of the decree that found that the usurious charge did not void the contract.

Perry stoutly insists that the case of *Schuck* v. *Murdock Acceptance Corporation,* 220 Ark. 56, 247 S. W. 2d 1, is conclusive of this controversy, and appellee argues that *Hare* v. *General Contract Corporation,* 220 Ark. 601, 249 S. W. 2d 973, is controlling.

This case is controlled by *Crisco* v. *Murdock Acceptance Corporation,* 222 Ark. 127, 258 S. W. 2d 551, and in accordance with the rule there announced, we hold that the contract here is valid. It therefore becomes

unnecessary to determine whether title to the automobile remains in the seller, since that question is now moot.

Accordingly, that part of the decree declaring the contract usurious and void is reversed and the cause is remanded with directions to enter a decree consistent with this opinion.

PHILLIPS *v.* MELTON.

5-82 257 S. W. 2d 931

Opinion delivered May 18, 1953.

Jeptha A. Evans, for appellant.

Jeta Taylor and *John J. Cravens,* for appellee.

ED. F. MCFADDIN, Justice. This is an election contest for the office of School Director.

At the General School Election in March, 1952, Truman Phillips (appellant) and Roy Melton (appellee) were rival candidates for the office of School Director of Ozark District No. 14. On the face of the returns, Phillips was certified as elected by a vote of 408 to 406. Thereupon, Melton filed an election contest in the Circuit Court;[1] and also appealed from the County Court order which declared Phillips to have been elected.[2] The two cases were consolidated in the Circuit Court; and after an extended hearing, involving votes challenged for a variety of grounds, the Circuit Court found that Melton had received 399 legal ballots, and Phillips had received only 395. Accordingly, judgment was entered declaring Melton the winner.

From an unavailing motion for new trial, Phillips (joined with the Chairman and Secretary of the County Election Commission, who were named as defendants by Melton) prosecutes this appeal. The issues here have been simplified into a challenge by Phillips of the Circuit Court's ruling on only nine ballots. We list and discuss enough of these to decide the appeal.

I. *Votes of Mr. and Mrs. H. E. Crabtree.* These votes were for Melton; and the Trial Court held them to be valid, notwithstanding Phillips' claim that the Crabtrees were not residents of the Ozark School District at the time of the election. The evidence showed that the Crabtrees had resided in Alix, in the Ozark School District, for many years, and had a home there; that Mr. Crabtree suffered an injury and sought other employment, which he found in Ft. Smith on January 22, 1952 (less than 60 days prior to the election here involved); that the Crabtrees purchased a home in Ft. Smith, and placed their children in school there, and advertised their home in Alix for sale, but soon can-

[1] See Act No. 366 of 1951, as found in § 80-321 Cumulative Pocket Supplement of Ark. Stats.

[2] See § 80-311 Ark. Stats., and Act 403 of 1951, as found in § 80-318 Cumulative Pocket Supplement of Ark. Stats. Annotated.

celled the advertisement and withdrew the house from sale. Mr. Crabtree testified that his Ft. Smith work was not necessarily permanent; that he and Mrs. Crabtree intended to keep their home in Alix and return to it; that they considered Alix to be their permanent residence; and that they had not voted, and did not intend to vote, in any election in Ft. Smith, or lose their residence and domicile in Alix.

On the foregoing testimony, the Circuit Court held the Crabtrees were residents of Alix in the Ozark School District. The determination of residence is a question of intention, to be ascertained not only by the statements of the person involved, but also from his conduct concerning the matter of residence. *Ptak* v. *Jameson,* 215 Ark. 292, 220 S. W. 2d 592. Intention is, therefore, a question of fact. In election contests, the findings of the Trial Judge, on factual questions, have the force and effect of a jury verdict. *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831; and *Logan* v. *Moody,* 219 Ark. 697, 244 S. W. 2d 499. Even though we might have reached a different conclusion on the facts, nevertheless, there is substantial evidence to support the finding made by the Trial Court on the question of the residence of the Crabtrees, so we affirm the judgment on the legality of these two votes.

II. *The Vote of Mona Ming.* This was a vote cast for Phillips, but the Trial Court discarded the vote on the testimony of the voter. Mrs. Mona Ming testified that when she entered the polling place, one of the Election Judges asked her for whom she intended to vote; that she told him that she was going to vote for Melton; that he talked to her: stating that her husband had voted for Phillips, and that Melton would "tear up our school." Then she voted for Phillips.

The Trial Court was clearly correct in holding Mrs. Ming's vote for Phillips to be void. An Election Judge should observe absolute impartiality. The language found in § 3-1415 Ark. Stats. is pertinent:

"No officer of elections shall do any electioneering on election day. No person whomsoever shall do any electioneering in any polling room, . . ."

Certainly an election judge has no right to campaign for his candidate at the polling booth, as was done in this case. So we affirm the Trial Court's ruling in cancelling Mrs. Ming's ballot for Phillips.

III. *The Vote of Bobby Bond.* This voter was a maiden voter,[3] and his vote was for Melton, and the Trial Court ruled the vote to be valid. The age of the voter was conceded, but appellant challenges the vote because Bond did not sign the affidavit required of a maiden voter by § 3-227 Ark. Stats.; and appellant claims that our holding in *Logan* v. *Moody,* 219 Ark. 697, 244 S. W. 2d 499, is ruling here.

But the Statute and case just cited relate to a maiden voter in a *primary election,* whereas the election here is a *general election.* Art. 3, § 1 of our Constitution, as well as Amendment No. 8 thereto, uses this language as to a maiden voter:

". . . provided, that persons who make satisfactory proof that they have attained the age of 21 years since the time of assessing taxes next preceding said election and possess the other necessary qualifications, shall be permitted to vote; . . ."

Under the foregoing Constitutional provision, the 1909 Legislature passed Act No. 320 (as found in § 3-123 Ark. Stats.), which provides, *inter alia:*

"Any person who makes satisfactory proof that he has attained the age of 21 years since the time of assessing taxes preceding said election and possesses the necessary qualifications, shall be entitled to vote."

We find no provision in the law governing *general elections* which requires that the "satisfactory proof" shall be by affidavit. In regard to primary elections, the Initiated Act of 1916, as now found in § 3-227 Ark.

[3] The words "maiden voter" mean one who becomes of voting age before the election and after the tax assessing period next preceding the election. See Constitutional Amendment No. 8.

Stats., and as discussed in *Logan* v. *Moody, supra,* requires that the "satisfactory proof" shall be by affidavit. Why this distinction should be made between primary elections and general elections is a question for the Legislature, and not for the Court. The fact remains that there is no law for an affidavit being required of a maiden voter in a general election. The Judges and Clerks in this election must have received "satisfactory proof" regarding the age of the voter here questioned, because they allowed him to vote and counted his ballot. We affirm the Trial Court's ruling that the vote was valid.

IV. *The Votes of Eva Wall and Dick West.* Each of these persons voted an absentee ballot for Phillips, and the Trial Court ruled each ballot to be void. We affirm the ruling of the Trial Court on each ballot. Eva Wall's application for absentee ballot was signed by her daughter; and Dick West did not sign any application. Eva Wall duly executed the affidavit to accompany her returned ballot; but Dick West merely signed the form without having the affidavit accomplished. We rest our opinion herein on the failure of each voter to sign the application for the absentee ballot.

Act No. 325 of 1949 is captioned, "An Act to Regulate and Prescribe the Method of Absentee Voting in All Elections; . . ." and pertinent provisions from this Act may be found in § 3-1124 et seq. of the Cumulative Pocket Supplement of Ark. Stats. Annotated. Section 3-1126 prescribes the form of application the voter is required to sign in order to obtain an absentee ballot. The form prescribes the line for the "Signature of the Voter." This certainly means the voter's signature, and not the signature of someone for him. Even if the voter is reduced to signing by mark, still there must be a "signature of the voter." In each of the two votes here at issue, there was no compliance *by the voter* with this Statute. This is not a case of failure of the County Clerk to perform a ministerial act, as was the situation in *Logan* v. *Moody, supra:* this is a case of the failure of the voter to comply with the law.

Conclusion. According to the Circuit Court's judgment, Melton received 399 legal votes, and Phillips received 395 legal votes. Only nine votes are challenged by the appellant on this appeal. We have already affirmed the Trial Court's ruling on six of these nine votes. Therefore, it is unnecessary to consider the three remaining votes, as the decision on these could in no wise change the result of the Circuit Court judgment.

Affirmed.

CITY OF SPRINGDALE *v.* CHANDLER.

5-100 257 S. W. 2d 934

Opinion delivered May 18, 1953.

Ulys A. Lovell and *James E. Evans,* for appellant.

Courtney C. Crouch, for appellee.

ROBINSON, Justice. The trial court held an ordinance of the City of Springdale pertaining to the keeping of chickens in the corporate limits to be invalid, and the City has appealed.

Section One of Ordinance No. 255 of the City of Springdale provides: "That hereafter no person or persons shall keep or permit to be kept within the City limits of Springdale, Arkansas, any cow or cows, hog or hogs, sheep, goats, horses, poultry or other livestock, which animal or animals shall be housed or permitted to

run or graze during the day or night within 150 feet of the dwelling house of any other inhabitant of the City of Springdale, Arkansas, provided that no action shall be taken by the properly constituted authorities of the City of Springdale, Arkansas, except upon written protest of two or more neighbors of the person keeping such livestock."

Appellee was charged with a violation of this Ordinance by keeping chickens in the city within 150 feet of a dwelling. He filed a demurrer which was sustained by the trial court.

The Statutes give cities authority to prevent injury or annoyance within the city limits from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated; and authorize cities to prevent, abate and remove nuisances of every kind; and give the power to make such ordinances as to them shall seem necessary to provide for safety, health, etc. Ark. Stat. § 19-2303, § 19-2304, § 19-2401.

A municipal corporation can not declare that to be a nuisance which is not a nuisance *per se*. *Merrill* v. *City of Van Buren,* 125 Ark. 248, 188 S. W. 537.

A livery stable in a city or town is not a nuisance *per se, Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519, *City of Fort Smith* v. *Bonner,* 194 Ark. 466, 107 S. W. 2d 539, nor is the hide and fur business, *City of Fort Smith* v. *Western Hide & Fur Co.,* 153 Ark. 99, 239 S. W. 724, or the keeping of cattle in a city, *Bryson* v. *Ellsworth,* 211 Ark. 313, 200 S. W. 2d 504. A city or town has no right to declare the keeping of bees in the city a nuisance. *Town of Arkadelphia* v. *Clark,* 52 Ark. 23, 11 S. W. 957.

However, the city may regulate the location of livery stables, but such a regulation must not be arbitrary or unjust, *City of Little Rock* v. *Reinman-Wolfort Automobile Livery Co.,* 107 Ark. 174, 155 S. W. 105. Likewise a city may regulate the keeping of chickens, but whether such regulation is arbitrary or unjust depends on evidence. It might be arbitrary to prevent the keeping of a

few hens at a place where it would not be arbitrary or unjust to prevent the keeping of thousands of chickens.

But here a violation of the ordinance depends on whether two or more neighbors have filed a written protest. Such neighbors could protest against one person because of the keeping of chickens, and yet such accused person's next-door neighbor could keep chickens under the same circumstances because no one had protested. Hence the ordinance is in conflict with Art. 2, § 18 of the Constitution which provides: "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."

A city ordinance which allows an arbitrary discrimination is unconstitutional and void, *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509, 109 S. W. 293, 16 L. R. A., N. S. 1035.

Affirmed.

LINDSEY *v.* CHRISTIAN.

5-93 257 S. W. 2d 935

Opinion delivered May 18, 1953.

C. T. Bloodworth and *Bryan J. McCallen,* for appellant.

Gerald Brown and *Kirsch & Cathey,* for appellee.

GEORGE ROSE SMITH, J. This case centers upon the validity of a deed executed by C. E. Lindsey. The litigants pleaded all relevant facts so that the point of law

could be raised by demurrer to the answer. The effect of the chancellor's action in overruling this demurrer was to hold the deed valid.

In 1939 Lindsey conveyed three residential lots to the appellee, the deed reciting, "This deed is not to be effective until death of grantor." The instrument was delivered to the appellee and retained by her until Lindsey's death in 1952. Lindsey's heirs then brought this suit to cancel the conveyance upon the theory that it was testamentary in character.

We have held in a long line of cases, some of which are reviewed in *Smith* v. *Smith,* 218 Ark. 228, 235 S. W. 2d 886, that a deed like this one, if delivered, is a valid grant of a future interest, the quoted language merely reserving a life estate to the grantor. Here it is shown that the appellee agreed not to record the instrument until Lindsey's death, but this fact does not distinguish the case from our earlier decisions. Since the remainder interest passed upon delivery of the deed it makes no difference, as between the parties to the conveyance, whether the deed was ever placed of record.

The appellants also rely on the fact that in 1940 Lindsey conveyed certain business property to the appellee by a similar unrecorded deed. Later on the two agreed that Lindsey might sell the business property to a third person, which was done. Even though in that situation the purchaser might acquire a title superior to that of the appellee under her unrecorded conveyance, we do not perceive that that circumstance has any bearing upon the construction of the instrument now before us.

Affirmed.

THOMAS *v.* LACOTTS.

5-31 257 S. W. 2d 936

Opinion delivered May 18, 1953.

Rehearing denied June 8, 1953.

Botts & Botts, for appellant.

House, Moses & Holmes and *E. B. Dillon, Jr.,* for appellee.

GRIFFIN SMITH, Chief Justice. The pleadings are voluminous. Appellant's abstract, brief, and his reply brief cover more than 650 pages.

Mill Bayou, or Mill Creek Bayou—as the sluggish waters are referred to by interchangeable terms—separates the LaCotts property from more than 2,500 acres

owned by Thomas. A large part of Thomas' land is adapted to farming and some is suited to rice growing, but duck-shooting privileges form a substantial part of his income.

Appellant asserts ownership of the east half of section three, township five south, range four west, in Arkansas county, and he has other lands, "adjoining and surrounding this tract." The LaCotts property is immediately west of the 2,500 acres upon which five artificial reservoirs were constructed by Thomas at a cost of about $40,000.

The bayou enters the LaCotts land from the north, flows south a short distance, makes a horseshoe bend in turning east, then continues south in a relatively straight course appreciably west of the line dividing Thomas from LaCotts. It then wends east by south to a point on LaCotts' land not far from the boundary between the disputants. Here LaCotts constructed a dam and levee. The dam was of sufficient height to obstruct the natural flowage, thus diverting the waters to a low wooded area on LaCotts' property used for duck-shooting during the open season and as a natural feeding range at other times.

Without the dam, bayou overflowage inundated the LaCotts property during the wet season; also when upper proprietors flooded their rice fields excess waters reached the bayou through canals or tributaries. But during the dry season water movement southward was controlled by a series of levees. There is no record of protests by proprietors south of the lands here involved, although Thomas had effectively built dams and levees that are said to have had the effect of retarding flowage.

A short distance below the LaCotts dam and at a point admittedly on Thomas' land, appellant (Thomas) dug a canal, extending northeast. There is evidence that the depth of this canal is equal to or on a level with the bed of the bayou where its southwestern terminus connects with the stream. At the northeastern end a so-called "relift" has been operated for many years. This

consists of a large pump capable of transferring ten to fifteen thousand gallons of water per minute from the canal to the inter-connected reservoirs owned by Thomas.

It is contended by LaCotts that the dam built by Thomas a short distance below the relift canal and a second dam built by Thomas farther south and east caused out-of-season overflows affecting woodlands, hence growth of certain trees was stunted and others were killed. There is also an inference that when the relift pump was operated at normal speed during low water the tendency toward depletion drew water down the bayou and into the canal more rapidly than normal action of the stream. This had the effect of accelerating bayou flowage, thus "drawing" water from above the canal entrance and upper reaches of the bayou, to the injury of LaCotts.

Appellant says in his statement that for fifteen or twenty years he has been making reasonable use of a portion of bayou water for agricultural purposes, although admittedly the artificial reservoirs, which cover approximately 500 acres, are also used for duck-shooting purposes. LaCotts undertook to lease some of the wild land from Thomas, but the latter explained that he had contracts with a dozen or more sportsmen at DeWitt to whom shooting rights had been let on a paying basis. Shortly thereafter appellant says he observed that the natural flow in Mill Bayou was not reaching his canal as usual. The deficiency was particularly noticeable at the relift where the water was so low that the pump became useless. It was then that Thomas discovered that LaCotts had built the dam now complained of.

It is conceded that the diverted water, after spreading over the LaCotts lands to the west, reëntered the bayou; but this, says Thomas, "was below the farm lands owned by appellant, and below his relift, so that [I] could not make reasonable use of the waters coming down the bayou in its natural course." A further complaint by appellant is that maintenance of the dam (above which appellees' levee extends several hundred

feet) will have the inevitable result of denuding the duck-shooting area leased to the DeWitt sportsmen.

Another justification urged by Thomas for taking the bayou water in large quantities is that the general result, as contrasted with irrigation of rice lands from wells, tends to prevent exhaustion of underground water, the level of which has continued to fall for several years, entailing higher costs for pumping. It is a matter of common knowledge, says appellant, that rice watered from reservoirs or a stagnant source grows better than if served from underground.

Shortly after LaCotts built the dam in 1950 Thomas noticed that less water was flowing down the bayou. He made, or caused to be made, an investigation and found the structures here complained of. For some time thereafter supplies in the artificial ground tanks met appellant's needs, but eventually the reserve water was reduced from 500 to an estimated 100 to 150 acres. Pumps in two irrigation wells were then conditioned. One was operated for 15½ days, the other for a day longer.

In a complaint filed July 20, 1950, Thomas asked the court to restrain the defendants from constructing a levee or dam it was alleged they were then working on; that they be required to remove the dam, and that damages in the sum of $10,000 be assessed because of crop deterioration and other losses.

Appellees' answer is an assertion that the dam was begun in 1949; that plaintiff knew of the construction, or should have known that it was being undertaken—this because Thomas' residence was within three or four hundred yards of the fence along which the work was being done. It was then alleged that the dam (with its southern or southwestern terminus across the bayou) was completed along the east side of the defendants' property, but west of the fence that had for fifteen years been maintained as the boundary line. Construction of the dam, referred to as a culvert, was admitted. This was done to shut off part of the water and permit

it to flow over portions of the southwest quarter belonging to the defendants.

Approximately twenty years before suit was brought the defendants' father purchased the east half of the northwest quarter of the southwest quarter of section three, etc., with the intention of using the property as a duck range. A fence was put up, beginning at the highway north of the land and running a mile south through the center of section three. It was of wire nailed to posts and trees for the express purpose of marking the boundary between the owners of the east and the west half of section three. It was asserted that the fence had been continually maintained. Sometimes it was rebuilt, at other times repaired, and it had been recognized as the line of demarkation.

Separate surveys of this north-south line were made on behalf of appellant and appellees. H. L. Franks was employed by Thomas and Thomas J. Strode by LaCotts. A. E. Heagler also testified for LaCotts regarding intricate topographical structure and flowage matters. Because the surveys made by Franks and Strode varied considerably, diverging at a point not far from the LaCotts culvert and gradually increasing southward, the Chancellor—acting, as he thought, with full approval of the litigants—directed St. George Richardson, of Memphis, to make an independent survey. The court's order was that none of the interested persons should be with Richardson. Through a misunderstanding one of the defendants was present part of the time and this is assigned as error.

The Chancellor, in a lengthy written opinion, conceded that he should have entered an order covering this phase of the transaction, but concluded that no harm had been done and overruled the objection. Richardson's survey did not differ materially from Strode's; and, while the Chancellor rejected the defendants' plea of adverse possession and agreed boundary, he accepted as correct the Richardson line. This does not show important variations from the fence, "as presently existing." The record includes photographic exhibits showing clear-

ly defined wire, such as one might expect to find in such an area.

Technical objections are urged against this finding, and it is insisted that the court erred in refusing to permit Fricke to give further testimony. We have often held that the time within which testimony must be presented is a matter of judicial discretion. Here there was no arbitrary determination by the Chancellor, who appears to have patiently considered testimony over a long period of time in a praiseworthy effort to hear and have brought into the record everything of a decisive or contributory character that the parties were entitled to present.

An itemized statement by Thomas showed a cost of $793.04 for operating his well pumps. The Court found that from estimates believed reasonably accurate, each well would produce 1,250 gallons per minute against an average of 10,000 per minute for the relift pump—a ratio of four to one. Thus, taking the view that operation of the pumps cost four times as much as the relift, but that relift costs should be deducted, the net sum was found to be $615.40. We very frankly concede that there is some element of speculation in this result, but the burden of establishing the damage with greater certainty rested upon appellant. To reverse and remand on the ground of speculative conclusions would be a distinct disservice to appellant when costs are considered.

The next consideration relates to appellant's contention that the dam should be removed. After the complaint was filed LaCotts placed the hull of an old steam boiler under the earthwork to allow impounded water to flow in sufficient volume to meet appellant's agricultural demands. The Chancellor found that this contrivance was not on the channel bottom. But in the decree, as distinguished from the opinion, the defendants (appellees here) were restrained ". . . from damming or blocking Mill Bayou so as to prevent the free flow of the water downstream." The effect of this order is, we think, a finding that appellant had not met the burden of proving that the boiler-culvert was elevated to an ex-

tent interfering with sufficient flowage to deprive the lower proprietor of his riparian rights.

To what extent wild duck reserves may share in water apportionable to riparian proprietors is an untilled judicial field in Arkansas. In January, 1940, Mr. Wells A. Hutchins, Irrigation Economist, U. S. Department of Agriculture, delivered an address at Stuttgart in which he discussed water uses and appurtenant legal rights. He is the author of Selected Problems in the Law of Water Rights in the West, and other books dealing with this general subject. His Stuttgart address (preserved by the College of Agriculture, University of Arkansas) contains pertinent suggestions regarding the need of statutory control of water in this state before the problem becomes too complex with growth of population. Two rights were analyzed by Mr. Hutchins: the riparian doctrine and the doctrine of appropriation, the latter being common to many of the western states.

The definition of a watercourse is concisely given in *Boone* v. *Wilson,* 125 Ark. 364, 188 S. W. 1160. The nature and extent of a proprietor's rights are discussed in *Taylor* v. *Rudy,* 99 Ark. 128, 137 S. W. 574. A riparian owner is entitled to the unimpaired natural flow of a stream over his land, but this right is subject to reasonable uses by upper proprietors. *Meriwether Sand & Gravel Co.* v. *State,* 181 Ark. 216, 26 S. W. 2d 57. These rights inhere in the soil and are vested. Our decisions go to the point that under the riparian doctrine no proprietor has priority in the use of water in derogation of another's rights.

In commenting upon these coequal rights Mr. Hutchins presented a chart with examples:—"The use of water on tract 'G' may have begun fifty years ago and may have been continuous, and valuable improvements may have been made which will be seriously [impaired] if the tract is deprived of the use of a substantial part of the stream flow; yet the owner of tract 'E' may begin use today and lawfully demand his share of the flow, with the result that tract 'G' will hereafter be entitled to only a partial use of the stream. The ri-

parian right does not depend upon use and is not lost by nonuse. This is in direct conflict with the appropriative right, which may be declared forfeited if nonuse of the water continues for a period prescribed by statute, and which can be lost instantly by abandonment of the right."

Appellant contends that the testimony of appellees' witness Heagler contradicts main contention respecting elevations. One of Heagler's charts shows the elevation some distance north of the LaCotts dam to be 171 feet. The LaCotts culvert is not in the center of the bayou channel, and Heagler's testimony is that the water level would have to be about two and a half feet before flowage would occur. However, at the time this witness testified Thomas was not being adversely affected. Elevation below the dam varies from 171 to 174 feet, hence theoretically the water Thomas says by-passed his canal, but re-entered the bayou farther downstream, would seemingly flow back to the relift if not impeded by appellant's own dam. The testimony along this line was not sufficiently developed to form the basis of a definite conclusion.

Final argument against the decree is that error was committed in not allowing damages for crop deterioration. On this point the court said: "The record, although large, does not reflect the amount of plaintiff's yield for 1949, 1950, or any prior year. These figures could easily have been ascertained and testified to . . . The testimony was also rather vague [as to whether the want of water reduced the prospective yield below preceding years]. . . . Guess-work evidence can never be accepted when definite evidence is available and can be given. This is pure speculation which a court has no business indulging in."

We are not able to say that the Court's summation of the evidence was erroneous, or that the crop damages claimed by appellant were established by preponderating evidence on a water-shortage basis.

The court assessed each litigant with his own cost, and we affirm this apportionment. The same rule will be applied to appeal costs.

Affirmed.

KNIGHT *v.* KNIGHT.

5-90 258 S. W. 2d 41

Opinion delivered May 18, 1953.

Rehearing denied June 15, 1953.

Bailey & Warren, for appellant.

Guy B. Reeves, Mehaffy, Smith & Williams and *R. Ben Allen,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee, L. H. Knight, to obtain an annulment of his marriage to the appellant, Bernice Knight. By cross-complaint

Mrs. Knight sought a divorce. The chancellor found that Mrs. Knight's divorce from a former husband was void for the reason that she had not been a resident of Arkansas for three months prior to the rendition of that decree on March 16, 1942. Upon this finding the chancellor annulled the marriage and of course found it unnecessary to consider the defendant's cross-complaint.

The pivotal point in the case is whether Mrs. Knight, who was then Mrs. Kimball, became a resident of Arkansas on or before December 16, 1941. In the divorce decree the court expressly stated that Mrs. Kimball had been a resident of Crittenden County, Arkansas, for more than three months preceding the entry of the decree. The appellee concedes that when a judgment is attacked collaterally for want of jurisdiction every presumption must be indulged in favor of the validity of the judgment. *Hardy* v. *Hilton,* 211 Ark. 991, 204 S. W. 2d 163. There is also a strong presumption that the marriage between Mr. and Mrs. Knight is valid. Thus the appellee labors under a heavy burden of proof in his effort to obtain an annulment. We are decidedly of the opinion that the evidence falls far short of the high degree of cogency that is required in a case of this kind.

Knight, a contractor, and Mrs. Kimball met in Louisiana at a time when both were separated from their spouses. The friendship between the two continued after Knight went to Panama on a contracting job. It was decided that the couple would be married as soon as they could obtain divorces. According to Mrs. Knight, Knight suggested in a letter that she go to West Memphis, Arkansas, and consult an attorney of Knight's selection for the procurement of a divorce from Kimball. We think it beyond question that Mrs. Kimball came to Arkansas in December of 1941. She fixes the date as about the middle of the month. She testified that she remained in West Memphis until three or four days before Christmas, when she went to Houston, Texas, to meet Knight, who was flying back from Panama. After meeting Knight, Mrs. Kimball spent the Christmas holidays with her parents in Lufkin, Texas. It is undisputed that on

New Year's Day Knight and Mrs. Kimball left Texas and drove to West Memphis, where Knight also established his residence, it having been understood all along that the couple intended to live in Arkansas. It is not contended that Mrs. Kimball's Arkansas residence, if already established, would be interrupted by her Christmas visit to her parents.

Mrs. Kimball was awarded a divorce on March 16, but Knight's case was delayed, and Mrs. Kimball returned to Lufkin to await Knight's release from his marriage. That decree was entered on August 29, 1942, and, Mrs. Kimball having returned to Arkansas, the two were married on the same day and have lived in this State ever since. At the time of their separation on December 18, 1951, they were occupying a relatively expensive home which they had built near Little Rock. It is undisputed that they considered themselves lawfully married for more than nine years, and according to Knight's complaint it was not until after their separation that he discovered that there was any question about the validity of Mrs. Knight's divorce.

Mrs. Knight's own testimony amply supports her belief that she was a resident of Arkansas for at least three months before March 16, 1942. Her decree recited that the court considered the depositions of Mrs. Kimball, her two daughters, and Mrs. Noah Phillips. Each daughter had testified that Mrs. Kimball came to Arkansas in December. Mrs. Phillips' testimony was that she operated a rooming house in West Memphis and that Mrs. Kimball had resided there since December 14, 1941. Thus the evidence given by those who had reason to know the facts was materially in excess of the minimum required in a divorce case.

It is important to remember that Knight himself was a resident of West Memphis for the last two and a half months of the period in question. He was paying Mrs. Kimball's expenses, they were represented by the same attorney, and it cannot be doubted that each was intensely interested in the other's case. They knew that

they could not be married until Knight was granted a divorce. We are unable to think of any plausible reason for Mrs. Kimball, in these circumstances, to misrepresent the facts to her own attorney, to Knight, and to the court. It is significant that Knight chose not to take the witness stand in the present case.

The testimony attacking the duration of Mrs. Kimball's residence in West Memphis is by no means conclusive. An employee of a chain store testified that Mrs. Kimball had worked as an extra sales person in Lufkin in December and March, but since the company's records did not show the exact days of her work this evidence does not necessarily contradict the appellant's testimony. Another witness remembered that Mrs. Kimball was in Texas between the attack on Pearl Harbor and Christmas, but he was unable to specify the date of her visit.

One witness only, W. C. Allen, testified positively that Mrs. Kimball was in Texas on either the 13th or 14th of December. Allen based his statement on the fact that he had returned from Panama (where he worked with Knight) on the Saturday after Pearl Harbor, and that he talked to Mrs. Kimball on the night of his arrival or the next day. This witness, however, was attempting to recall a casual encounter that had occurred ten years earlier, and if his recollection is faulty by as much as forty-eight hours his testimony fails to negative the jurisdiction of the Crittenden Chancery Court. We are not willing, on testimony so obviously susceptible to error, to condemn as adulterous a marital association that continued for almost a decade.

It is also contended that the divorce decree is void as a matter of law for the reason that Mrs. Phillips, the principal corroborating witness as to Mrs. Kimball's residence, gave her deposition on March 10, 1942, which was four days before the expiration of the plaintiff's three months in Arkansas. We do not regard this as a fatal defect. Substantial corroboration is all the statute requires; it is not necessary that the supporting witness keep the plaintiff in sight for three consecutive months. And even if it should be assumed that Mrs. Kimball left

the State on March 10, although there is no evidence to that effect, the question would still be whether she thereby abandoned her Arkansas citizenship. Such a suggestion is obviously rebutted by the fact that she has continued to live here for more than ten years.

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

McFaddin, J., concurs.

Carty *v.* Carty.

5-91 258 S. W. 2d 43

Opinion delivered May 25, 1953.

Rehearing denied June 15, 1953.

Melbourne M. Martin and *Alonzo D. Camp,* for appellant.

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

MINOR W. MILLWEE, Justice. This is the second divorce suit between the parties who were married in 1945. In 1949 each party sought a divorce from the other on the ground of indignities and we affirmed a decree denying a divorce to either because both were equally at fault. *Carty* v. *Carty,* 217 Ark. 610, 232 S. W. 2d 446. The appellant, Mrs. Carty, was awarded $75 monthly for her separate maintenance on the former appeal.

The instant suit for divorce was brought by appellee, Mr. Carty, on September 4, 1952, on the ground of three years separation without cohabitation under the 7th subdivision of Ark. Stats., § 34-1202, it being alleged that the separation was due solely to the misconduct of Mrs. Carty.

Appellant denied the allegations of the complaint in her answer and filed a cross-complaint in which she sought a divorce and one-third of appellee's property on the same ground as that alleged by the appellee. Appellant also pleaded the former decree as *res judicata* of the question as to who was at fault for the separation. At the conclusion of appellee's testimony, the appellant

withdrew her cross-complaint, asked for dismissal of the complaint because of the insufficiency of appellee's evidence, and declined to introduce testimony in her own behalf. She has appealed from a decree granting appellee a divorce and terminating the $75 monthly allowance for separate maintenance granted on the former appeal.

Appellant first contends that the chancellor set the case for trial before the issues were joined contrary to the provisions of Ark. Stats., § 27-1719.[1] After appellant's motion for attorneys' fees and costs had been disposed of, she filed a motion to require appellee to make the complaint more definite and certain on October 17, 1952. Appellee responded to this motion on November 3, 1952, and asked that appellant be required to answer and that the cause be set for immediate trial. On December 1, 1952, appellant filed a motion to require appellee to elect whether he sought relief on the ground of three years separation or on the ground of general indignities. At a hearing on December 3, 1952, the chancellor ordered appellant to file her answer and cross-complaint on that date and that the cause be set for trial on December 5, 1952, which was done.

In *Sisk* v. *Becker Roofing Co.,* 183 Ark. 101, 34 S. W. 2d 1078, we held that the purpose of the last proviso of § 27-1719, *supra,* was to eliminate delay and make it possible for either party to obtain a trial without waiting ninety days after issues joined. See, also, *McMorella* v. *Greer,* 211 Ark. 417, 200 S. W. 2d 974, and *Buckner* v. *Sewell,* 216 Ark. 221, 225 S. W. 2d 525. In the Buckner case we held that the burden was on the complaining party to show prejudicial results in setting the case for trial. Here the appellee had alleged only one ground for

[1] This section reads: "Actions prosecuted by equitable proceedings shall stand for trial on any day that the court meets in regular or adjourned session, where the issues have been joined for ninety (90) days, but where they have not been so joined though by the provisions of Sections 1208 and 1209 (§§ 27-1135, 27-1137) they should have been, the party in default, as to time, shall not be entitled to demand a trial; provided, however, that in all actions now pending or hereafter brought, upon application of any party, after issues joined, the court or chancellor in vacation may, on notice to opposing counsel or guardians *ad litem,* set the action for trial, or if the court finds that the proof has been completed it may try the action, on any earlier date."

divorce in his complaint and the chancellor was warranted in concluding that appellant was pursuing dilatory tactics in filing the motion to elect and subsequently an oral motion to disqualify the court from hearing the case. The case was set for trial on the ninety-second day after the filing of the complaint without any showing or contention of prejudice to the rights of the appellant. The parties had previously engaged in a lengthy trial. Insofar as the appellant was concerned the issues were joined on December 3, 1952, and the broad discretion given the court under the statute was not abused by setting the case for trial two days later in the absence of some showing of prejudice.

It is next argued that appellee did not make out a case under the three year statute because he did not prove a certain period of exactly three years when the separation without cohabitation began and ended. Appellee alleged and proved that he actually left the residence of the parties by court order on August 24, 1949, but that since approximately forty days prior thereto they had occupied separate rooms and had lived apart from each other without cohabitation since that date. The suit was filed on September 4, 1952, and more than three consecutive years had elapsed whether the date of separation actually occurred on August 24, 1949, or forty days prior thereto as the trial court found. We are unable to concur in appellant's belief that her argument on this point is not "farfetched and unduly belabored."

It is next argued that there is no corroboration of appellee's testimony showing three years separation without cohabitation. Appellee's son testified that he had visited his father several times weekly since August 24, 1949, and knew that appellee had not lived with the appellant since that date. On cross-examination he stated in detail the different places where appellee had resided since the separation and stated that appellant had not lived with appellee at any of these places during the period of more than three years. He declined to state positively whether the parties had ever had sexual inter-

course at any time during his absence during the three-year period. We have held that the purpose of the rule requiring corroboration is to prevent procuring divorces through collusion and that where it is plain there is no collusion, the corroboration may be comparatively slight. *Scales* v. *Scales,* 167 Ark. 298, 268 S. W. 9. In *Gabler* v. *Gabler,* 209 Ark. 459, 190 S. W. 2d 975, we approved the following statement from 17 Am. Jur. 338: "It is difficult to lay down a general rule as to what corroboration is required in a divorce case. . . . The general rule is more significantly stated that where a particular fact or circumstance is vital to the complainant's case, some evidence of the same, in addition to the complainant's testimony, will be required. If an essential fact is difficult of proof, corroboration may be sufficient though weak. The corroboration must, of course, relate to material testimony and must be something of probative weight. Evidence which is hearsay or irrelevant is insufficient."

Appellant relies on the Gabler case, but there the corroborating witness did not know the appellant or the place of residence of appellee in whose behalf he was testifying and would only say that the parties had not been cohabiting as far as he knew. The essential fact of absence of cohabitation, or sexual intercourse, is, of course, one that is difficult to prove. It is certain there is no collusion in the case at bar and we hold that appellee's testimony as to three years separation without cohabitation was sufficiently corroborated.

It is finally contended that the chancellor erred in failing to award appellant either a portion of appellee's property or alimony. Appellant made no request for permanent alimony and withdrew her cross-complaint in which she sought one-third of appellee's property. Section 34-1202 (7), supra, does not affect the jurisdiction of the court to adjust property rights, or award alimony, and provides that for those purposes the court may consider which spouse is the injured party. *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238. Over the appellant's

objection the appellee offered proof tending to show that the separation was due to the fault of the appellant, substantially the same testimony having been given at the former trial. Appellant insists that our holding on the former appeal that the parties were equally at fault for the separation is *res judicata* of this issue. We agree that this is true, but it does not necessarily follow that appellant is *ipso facto* entitled to relief which she did not ask for in the trial court.

We have frequently held that the trial court is given a wide discretion in fixing or refusing permanent alimony and unless there has been an abuse of such discretion, it will not be disturbed by this court. We have also held that a divorced wife on a trial *de novo* here, may be entitled to alimony even though she is at fault in the separation and had not specifically sought such relief in the chancery court. Each case must be decided on the particular facts presented, the court giving proper consideration to the ability of the husband to pay and many other circumstances, including the conduct of each as bearing upon the cause of the separation. *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 339; *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998.

While our holding on the former appeal that both parties were at fault for the separation is conclusive on this issue, we deem it appropriate to point out some of the proof upon which the court found that appellant was partly at fault and other circumstances relating to the question of alimony. Appellant is 25 years younger than appellee who is 72 years of age and who retired from business about 12 years ago. Prior to the marriage appellant consulted a fortune teller who advised the marriage and prophesied that appellee would die within six months. Difficulties arose when appellee refused to place his property in their joint names and the appellant insisted on attending gambling and drinking parties without him. Appellee has a monthly income of approximately $250 from real estate which he acquired long before the marriage, but is ill and unable to work. Appellant is employed, in good health and capable of earning

a good salary. Under all the circumstances we are unable to say that the chancellor abused his discretion in failing to award appellant permanent alimony or a portion of appellee's property.

Affirmed.

McFaddin, J., did not participate in the final disposition of this case.

Hammond *v.* Stringer, Trustee.

5-62 258 S. W. 2d 46

Opinion delivered May 25, 1953.

C. L. Farish and *John M. Lofton, Jr.*, for appellant.

John G. Moore and *J. M. Smallwood*, for appellee.

GRIFFIN SMITH, Chief Justice. Appellants as heirs of Mrs. Janie Dilbeck sought a decree vesting in them unascertained interests in the estate of the testatrix. They alleged that the express trust created by the will had failed in part in that the fund specifically set aside for the designated purpose was in excess of anything the testatrix could have contemplated, therefore as to such surplus Mrs. Dilbeck's heirs at law should share according to the degree of relationship.

The will, after making nominal bequests, directed the executors (one of whom had died at the time of suit) to convert real property into money, pay debts, " . . . and that they purchase and erect a tombstone at my grave of a like character and description as that at the grave of my deceased husband, J. W. Dilbeck; that they procure and have placed around my grave a marble coping like that around the grave of my said deceased husband, and that they have a concrete coping placed around the entire lot on which the graves . . . are located. I further direct my executors to pay for the materials and work mentioned out of the proceeds of the sale of my real property, and that they use the balance of said proceeds, if any, in the care and upkeep of the cemetery lot containing [these] graves, exercising their own best judgment in the handling of said money and the expenditure thereof and continuing to do so until the entire balance of said money is expended."

Allegations of the complaint were that interest or dividend earnings on an investment of $500 would be sufficient to provide the installations required by the will and cover cost of perpetual upkeep in Morrilton Cemetery Association's burial ground, where the bodies rest. It will be seen, therefore, that those specifically mentioned in the will, whose rights to share in the estate were expressly limited, now propose to have the amounts increased on the theory that the testatrix must have been mistaken regarding appropriate costs, or as to the amount to be realized from sale of the property.

The Cemetery Association derives its revenues from contributions, approximating $2,000 annually. It has been

in debt "maybe three years out of six." The intention is to keep driveways mowed. The Dilbeck lot had been given the same attention as others. The Association does not replace grave markers, or repair concrete installations.

W. H. Springer, the surviving trustee, testified that the fund in his hand might be a little more or a little less than $2,700. He had paid the Association to keep the site mowed, but quit when suit was filed.

The secretary of a saving and loan association testified that his company had been paying dividends equal to four percent. Assuming this status would continue, a reasonable return on an investment of $500 would be $20 per year. An officer of the cemetery association testified that the Dilbeck executor had been paying $15 yearly for upkeep of the graves.

At the conclusion of evidence offered by the plaintiffs the defendant's motion to dismiss was sustained. Effect of the holding was to say that the evidence was not legally sufficient to support contentions of the plaintiffs that the fund should be diverted. We agree with that view. Act 470 of 1949, and the construction given it in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, are not impaired by this holding.

It is conceded by appellees that equity has power to grant relief in a case like this if the evidence discloses miscalculations by the maker of a will and a fair inference is that but for such error no restriction would have been expressed. A leading case cited by appellants is annotated in 55 A. L. R., p. 1303, *In re Turk's Will,* 221 N. Y. Supp. 225, 128 Misc. R. 803, appeal dismissed, 222 Appellate Division 724, 226 N. Y. S. 111. Cases from other courts, such as *Ford* v. *Ford's Executors,* 91 Ky. 572, 16 S. W. 451, are mentioned.

The better rule is that courts will not interfere with the right of a testator to create a trust for use in the care of cemetery lots " . . . so long as the amount is commensurate with the purpose and does not offend public policy, and [when] it cannot be said as a matter of law

that a less sum would be sufficient for that purpose." *In re Devereaux Estate,* 48 Pa. D. & C. 491. See, also, *In re Wrenshall's Estate* (1919), 72 Pa. Sup. Ct. Rep. 258.

The generally accepted view is that one may do what pleases him in disposing of property by will unless positive prohibitions of law interfere or unless the disposition made is contrary to public policy. The first proposition is emphasized in *Clemenson* v. *Rebsamen,* 205 Ark. 123, 168 S. W. 2d 195.

Here the chancellor was dealing with a lawful will in which the testator's wishes were clearly set out. The opinion of the secretary or treasurer of a building and loan association that $500 placed with his company would probably produce $20 annually, and the belief of others that no greater sum was essential, were clearly contrary to Mrs. Dilbeck's directions that her executors *should continue* [*upkeep*] "until the entire balance of said money is expended." In vol. 2, at p. 1021, § 337, of the Restatement, it is said: "If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination." In the case at bar the appellants are not beneficiaries other than to the limited extent of $1. How can it be said that Mrs. Dilbeck did not intend that this should in any circumstance be the maximum receivable? Executor Springer testified to an awareness that he had not taken care of the lot "like Mrs. Dilbeck wished, or like I would have taken care of it," but for the litigation.

Pertinent comments are to be found in *Hills* v. *Travelers Bank & Trust Co.,* 125 Conn. 640, 7 A. 2d 652, 123 A. L. R. 1419-25: "The function of the court with reference to trusts is not to remake the trust instrument, reduce or increase the size of the gifts made therein, or accord the beneficiary more advantage than the donor directed that he should enjoy, but rather to ascertain what the donor directed that the donee should receive and to secure to him the enjoyment of that interest only."

Assuming that a current investment of $500 would yield $20 per year, still there can be no permanent assur-

ance that this income will continue indefinitely, or that it is sufficient. Mrs. Dilbeck had a perfect right to direct that the residue of her estate be kept in trust for the care of her grave and that of her husband, and that all of the money be spent for these purposes.

Affirmed.

CITY OF LITTLE ROCK *v.* FAUSETT & CO., INC.

5-117 258 S. W. 2d 48

Opinion delivered May 25, 1953.

O. D. Longstreth, Jr., and *Dave E. Witt,* for appellant.

Talley & Owen and *Robert L. Rogers, II,* for appellee.

J. SEABORN HOLT, J. This appeal involves the rezoning of a two acre tract of land lying in the proximate center of Garden Homes Addition and Garden Homes Extension Addition, Little Rock. This two acre tract lies within, and on the north border of, an eighteen acre tract, all of which had previously been zoned for "K" Heavy Industrial use under a City Zoning Ordinance of 1937.

Appellee, Fausett & Co., in 1946, had purchased sixteen acres (for $500 per acre) out of the eighteen acre tract, had it rezoned for residential purposes, developed

it into home-sites, and had platted it as Garden Homes Extension Addition. Appellee constructed and sold eighty-five homes on this sixteen acres. Soon after developing the sixteen acres, appellee purchased the two acre tract in question for $1,100 an acre, but did not develop it. In May, 1951, the City, by Ordinance No. 8626, rezoned the two acre tract from "K" Heavy Industrial use to "B" Family use, and in addition also rezoned an area around the outside of the residential property for light industrial use as a buffer between the residential property and heavy industrial property. The city left all of the property outside of the buffer area as heavy industrial property.

The present suit was brought June 3, 1951, by appellee to have the City's action in rezoning the two acres declared void and unconstitutional, and, as indicated, the trial court declared the City's action void in accordance with appellee's prayer and reclassified the two acres to "K" Heavy Industrial property.

The decree recited: "All of Block 2; Lots 1, 2, 6, 11 and 15, Block 3; Lots 3, 4, 5 and 6, Block 4; all in Garden Homes Extension Addition to the City of Little Rock, Arkansas, and West 264 feet of South 367.5 feet of Lot 24, Manufacturer's Addition to the City of Little Rock, Arkansas, . . . is hereby declared to be rezoned to that of 'K' Heavy Industrial District."

It appears undisputed that the two acres in question are in a residential addition and practically surrounded by homes. Appellee, as indicated, acquired the sixteen acres of property surrounding this two acres at a time when it was zoned for "K" Heavy Industrial use, but was successful in having it rezoned for residential purposes and has built and sold eighty-five houses, located in this tract. Thereafter, appellee succeeded in buying the two acres containing fourteen lots and now seeks to use it for "K" Heavy Industrial purposes.

After a careful review of all of the evidence, we have concluded that the finding of the Chancellor that the City Council acted arbitrarily and unreasonably is against the preponderance of the testimony.

The City Planning Director, Friday, after a careful study of the situation, testified that, in his opinion, "B" Family Residence is the proper zoning for this two acre tract. The City Planning Commission also found that this property should remain as a residential zoned property. Mr. Eichenbaum, a member of the Commission, testified: "A. We had a hearing before the sub-committee on zoning and then a hearing before the Planning Commission. Q. What did you find? A. We found that the property as zoned for residential was being used predominately for residential purposes and it was the opinion of the commission in order to protect the majority of the land used for that entire area it should remain as residential zoned property. Q. And you rezoned it for residential property? A. Yes. . . . I think the land value would greatly depreciate if an industry was put in the center of residential property."

Mr. Thom, a witness for appellee, frankly admitted on cross examination, when asked what effect rezoning of this property to "K" Heavy Industrial use would have on the home owners in the area; "Well I think it would definitely hurt them." He also testified that these fourteen lots which cost appellee $500 per lot (vacant) were now worth $750 each (vacant).

Our rule is well settled that: "Before the courts may reject the findings of the municipal authorities it must be shown that their action was unreasonable and arbitrary." *Evans* v. *City of Little Rock,* 221 Ark. 252, 253 S. W. 2d 347.

"Moreover, to set aside the decree and the finding of the Council would be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question." *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167. See, also, *Herring* v. *Stanmus,* 169 Ark. 244, 275 S. W. 321.

In all cases "this power may not be arbitrarily used, and must . . . 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." *City of Little Rock* v. *Sun Building & Developing Company,* 199 Ark. 333, 134 S. W. 2d 582. See, also, the very recent case of *City of West Helena* v. *Bockman,* 221 Ark. 677, 256 S. W. 2d 40.

In the circumstances, it seems to us that the action of the City Planning Commission and the City Council falls far short of being unreasonable and arbitrary. Accordingly, the decree is reversed for further proceedings consistent with this opinion.

CITY OF LITTLE ROCK *v.* CONNERLY.

5-103 258 S. W. 2d 881

Opinion delivered May 25, 1953.

O. D. Longstreth, Jr., Dave E. Witt and *John F. Park,* for appellant.

Talley & Owen and *Robert L. Rogers, II,* for appellee.

GRIFFIN SMITH, Chief Justice. The city planning commission, initially, then the city council, refused to rezone lot 6, block 199, original city of Little Rock, and A. R. Connerly, Jr., who had recently purchased the property appealed, and was by a Chancery Court order authorized to construct and operate a wholesale radio and miscellaneous appliance business and radio repair shop at 1323 Broadway, with the right to repair or re-

construct the building according to a drawing outlining the exterior conception. The city has appealed.

Connerly's complaint alleged that all of the property on the east side of Broadway is being used for commercial and light industrial purposes, including a combination clinic, office, and boarding house at No. 1301; that "the balance of the houses" on the east side of Broadway's 1300 block are large, antiquated, two-story structures used as boarding and rooming houses, and that No. 1401 Broadway—directly across the street from plaintiff's lot—has for many years been used as a service station. The city denied that property referred to was being used in violation of ordinances, but asserted that the area had been classified or zoned as D-Apartment. It was conceded that the filling station did not conform to the existing classification, but in extenuation it was shown that an original building so adapted occupied the lot at the time zoning became effective, and that in the circumstances it was not a legal imperative that the existing business be suspended. *City of Little Rock* v. *Williams,* 206 Ark. 861, 177 S. W. 2d 924. A permit for a more modern structure on this property was approved several years ago.

More than twenty residents and owners of residence property in the affected area joined in an intervention. They alleged, in effect, that "spot zoning" was an edging-up process by which gradual encroachment occurred, an initiatory step inevitably followed by other owners who felt that if one exception should be made the planning commission could not logically refuse a second, or a third petition, thereby breaking down by successive steps—seemingly harmless as isolated transactions—that which would not be done as a whole.

It is clearly shown that traffic on Broadway is heavy and that at its intersection with Fourteenth street there is an almost constant flow of vehicles, halted momentarily by electrically-operated signal lights. Appellee argues that his modernized operations would add nothing to the district's inconvenience and that no one could

possibly be annoyed in consequence of the activities he proposes to pursue.

Conceding that this might be true in respect of some of those who are protesting, the question we must determine is not what the situation of a particular property owner would be. Rather, we must accept the facts as they exist and say whether the single exception authorized by the decree is consonant with the legislative plan to permit cities of the first class to establish zones limiting the character of buildings that may be erected and uses to which they may be put, for the statute authorizes the municipal authority to designate portions of the city where manufacturing establishments may be erected or conducted, portions where business other than manufacturing may be carried on, and portions set apart for residences. Ark. Stat's, § 19-2805.

Except for the filling station on Broadway at Fourteenth, all property south of Thirteenth street on Broadway to Eighteenth is zoned as D-Apartment, or C-Two Family Apartments.

The record shows that formerly an effort was made to rezone the Fourteenth-st.-Broadway area and that the proposal was rejected by the planning commission and the city council. In appellant's brief it is stated that the council's last action was unanimous.

In recent years city zoning has been sustained against charges that the affected proprietor was deprived of his property without just compensation. The incidents of urban life inducing reasonable uniformity in planning were discussed in *City of Little Rock* v. *Sun Building & Development Co.*, 199 Ark. 333, 134 S. W. 2d 583. The opinion contains comments by Mr. Justice Sutherland of the U.S. Supreme Court, who gave emphasis to the fact that any line drawn by a zoning ordinance establishing districts was bound to bring complaints from owners near the boundaries.

A case involving spot zoning was decided December 1, 1952, *Evans* v. *City of Little Rock,* 221 Ark. 252, 253 S. W. 2d 347. A concluding statement is: "For us to

uphold the appellant [petitioner'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." There projection of an existing right was involved. In the case at bar there is no such right.

We think the testimony clearly shows that the homesite acquired by appellee for conversion to commercial purposes is in a residential district and that neither the planning commission nor the city council acted arbitrarily in rejecting the proposed intrusion.

It follows that the decree must be reversed.

KENSINGER ACCEPTANCE CORPORATION *v.* TIPPET.

5-105 258 S. W. 2d 561

Opinion delivered May 25, 1953.

Barber, Henry & Thurman, for appellant.

R. W. Griffith, for appellee.

J. SEABORN HOLT, J. Appellee, Tippet, brought this suit to cancel a conditional sales contract on the ground of usury, and from a decree sustaining his contention is this appeal.

The record reflects that on November 1, 1951, Tippet purchased from Union Motor Company of North Little Rock, an automobile for a total time price (or credit price) of $1,778.10. Of this amount, Tippet paid in cash, or its equivalent by a trade in, $492, leaving a

time balance due of $1,286.10, which he agreed to pay in eighteen monthly installments of $71.45 each. As evidence of this agreement, Tippet executed and signed, in favor of Union Motor Company. a conditional sales contract. This contract provided that the title to the automobile should remain in the seller of said car, until the balance of the purchase price was fully paid. Thereafter, the seller, Union Motor Company, sold and assigned to appellant, Kensinger Acceptance Corporation, the conditional sales contract.

Tippet admitted that he expected to pay more by buying the automobile on time than if he had paid cash. He had paid all installments due when the present suit was filed.

For reversal, appellant relies on the case of *Hare* v. *General Contract Corporation,* 220 Ark. 601, 249 S. W. 2d 973. We hold that this case is controlled by *Crisco* v. *Murdock Acceptance Corp.,* 222 Ark. 127, 258 S. W. 2d 551, and therefore the decree must be and is reversed with directions to enter a decree consistent with this opinion.

UNIVERSAL C. I. T. CREDIT CORPORATION *v.* CROSSLEY.

5-68 258 S. W. 2d 562

Opinion delivered May 25, 1953.

Rehearing denied June 22, 1953.

Wright, Harrison, Lindsey & Upton and *Cockrill, Limerick & Laser,* for appellant.

Josh W. McHughes, Brooks Bradley and *Tilghman E. Dixon,* for appellee.

ED. F. MCFADDIN, Justice. This is another case[1] in which usury is pleaded against a conditional sales contract. The transaction here involved occurred prior to the date the opinion in the Hare case[2] became final.

In purchasing an automobile, appellee Crossley signed a conditional sales contract, which reads in part:

"Payable in cash or trade-in before delivery.....$232.80
Leaving Time Balance of..... 853.65
Payable . . . in 21 successive monthly
installments..... 40.65"

After our opinion in the Hare case, Crossley brought this suit to have his contract declared usurious. The Trial Court agreed with Crossley, and Universal C. I. T. has appealed. The fact remains that some of the items charged against Crossley—which would be *indicia* of usury under the Hare case—are items permitted under cases[3] governing transactions entered into before the opinion in the Hare case became final. The present case is in all respects ruled by our opinion in *Crisco* v. *Murdock,* 222 Ark. 127, 258 S. W. 2d 551.

Therefore, the decree of the Trial Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice WARD concurs.

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[1] Some other recent cases, similar to this one, are: *Murdock* v. *Higgins,* 222 Ark. 140, 258 S. W. 2d 559; *Aunspaugh* v. *Murdock,* 222 Ark. 141, 258 S. W. 2d 559; *Crisco* v. *Murdock,* 222 Ark. 127, 258 S. W. 2d 551; *Kensinger* v. *Tippet,* 222 Ark. 199, 258 S. W. 2d 561; and *Perry* v. *Duncan,* 222 Ark. 160, 258 S. W. 2d 560.

[2] The "Hare case" is *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973. The opinion in the Hare case was delivered on May 26, 1952, and the petition for rehearing was denied on June 30, 1952.

[3] Some such cases are *Cheairs* v. *McDermott,* 175 Ark. 1126, 2 S. W. 2d 1111; *General Contract* v. *Holland,* 196 Ark. 675, 119 S. W. 2d 535; *Harper* v. *Futrell,* 204 Ark. 822, 164 S. W. 2d 995, 143 A. L. R. 235; and *Garst* v. *General Contract,* 211 Ark. 526, 201 S. W. 2d 757.

5-46 258 S. W. 2d 564

Opinion delivered May 25, 1953.

Rehearing denied June 29, 1953.

[redacted]

P. L. Smith, for appellant.

Barber, Henry & Thurman, for appellee.

ED. F. MCFADDIN, Justice. This is an action brought by the widow and child of Arthur Reed to recover damages for his wrongful death. The Trial Court sustained the defendant's plea of *res judicata,* and entered judgment dismissing plaintiffs' action. The correctness of that judgment is challenged by this appeal.

Arthur Reed, 20 years of age, was killed in a traffic mishap in Nevada County, Arkansas, on December 1, 1948, when the car in which he was riding had a collision with a truck belonging to Blevins, the appellee. Arthur Reed's parents lived in Nevada County; and on December 2, 1948, Oscar Stuart (brother-in-law of the deceased) was duly appointed administrator of the Estate of Arthur Reed, by the Probate Court of Nevada County. On December 7, 1948, Oscar Stuart, Administrator of the Estate of Arthur Reed, deceased, filed action in the Nevada Circuit Court against appellee Blevins for damages for the wrongful death of Arthur Reed. The statutory authority for such action is found in §§ 27-903-4, Ark. Stats. The complaint alleged that Arthur Reed was survived by his father and mother, as next of kin. No mention was made of any wife or child, because none of Arthur Reed's Nevada County relatives knew that Arthur Reed had married while working in California, or that he left a wife and child in that State when he returned to Arkansas some time prior to his death.

On January 11, 1949, the said case of Stuart, Administrator v. Blevins was tried in the Nevada Circuit Court (a jury being waived), and a judgment of $2,500 was entered against Blevins in favor of Stuart, Administrator. That judgment was paid to the Administrator, who gave the money to Arthur Reed's parents. Oscar Stuart has never been discharged as Administrator of the Estate of Arthur Reed, and has a bond as such Administrator.

On November 29, 1950, the appellants, Elizabeth Reed and Bruce Reed, as the widow and child of Arthur Reed, filed the present action against appellee Blevins (defendant in the Stuart, Admr. suit) for damages for the wrongful death of Arthur Reed. Blevins pleaded, *inter alia,* the judgment in the case of Stuart, Administrator v. Blevins as *res judicata* of the present action. The Trial Court sustained the plea and dismissed the complaint. The correctness of the Trial Court's judgment is the question before us on this appeal; and we reach the conclusion that the Trial Court was correct.

By Act No. 53 of 1883 (Ark. Stats., §§ 27-903-4) the Arkansas Legislature provided:

"Whenever the death of a person shall be caused by wrongful act . . . and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case, the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages. . . . Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, . . . and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin . . ."

Under the foregoing Statute we have always held that when a personal representative was appointed, such personal representative was the only person who could maintain a suit for damages for wrongful death. In *St. Louis etc. Co.* v. *Garner,* 76 Ark. 555, 89 S. W. 550, an unmarried man, 22 years of age, was killed, and there was a personal representative appointed of his estate. Thereafter, the father of the deceased attempted to file an individual action for damages; and Mr. Justice BATTLE, speaking for a united Court, said:

"The plaintiff (appellee) had no right to bring or maintain this action, there being a personal representative of the deceased. Kirby's Digest, § 6290; *Davis* v. *Railway Co.,* 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283."

Again, in *St. Louis etc. Co.* v. *Crick,* 182 Ark. 312, 32 S. W. 2d 815, in discussing who could maintain a suit for wrongful death, we said:

"The statute provides to whom letters of administration may be granted for the survival of causes of action for damages caused by the wrongful act, neglect or default of another, and that such actions shall be brought in the name of the personal representative of such deceased person; such personal representative or admin-

istrator being entitled to recover all damages resulting from the wrongful death of the deceased both for the benefit of his estate and the next of kin. Secs. 7-11 and 1074-75, C. & M. Digest; *Southwestern Gas & Electric Co.* v. *Godfrey,* 178 Ark. 103, 10 S. W. 2d 894."

Thompson v. *Southern Lumber Co.,* 113 Ark. 380, 168 S. W. 1068, is not *contra* to our cited holdings, because in the Thompson case, there had never been an administrator appointed or an action brought by anyone as administrator, whereas in the situation here before us, there was, and still is, an administrator and there has been a recovery by the administrator under the same Statute—§§ 27-903-4, Ark. Stats.—that the appellants are seeking to invoke. Our Statute contemplates but a single cause of action, vested in the Administrator, if one exists, and a recovery by him for the right given by the Statute is exhausted by his recovery. Even though an heir be not named in the suit filed, the heir is still entitled to participate in the fund recovered by the Administrator. See 16 Am. Jur. 175.

The case of *Atlantic Greyhound Lines* v. *Keesee,* 72 U. S. App. 45, 111 F. 2d 657, might be cited for the present appellants; but we prefer to follow the reasoning and decision of the Supreme Court of Oklahoma in the case of *Wilson-Harris* v. *Southwest Tele. Co.,* 193 Okla. 194, 141 Pac. 2d 986, 148 A. L. R. 1337.[1] In the Oklahoma case, the question was whether a judgment obtained by an administrator for the benefit of the next of kin, in an action in which it was alleged that the deceased was a single man, barred a subsequent action by a successor administrator for the benefit of one proved to be the widow of the deceased. The Oklahoma Statute authorizing a recovery for wrongful death[2] is very simi-

[1] In 148 A. L. R. 1346, there is an Annotation entitled: "Judgment in wrongful death action as *res judicata* in a subsequent action in same jurisdiction for the same death under same statute brought by or for benefit of statutory beneficiary whose status as such ignored in the former action."

[2] Title 12, § 1053 of the Oklahoma Statutes is the wrongful death Statute, and reads as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the

lar to §§ 27-903-4, Ark. Stats. The Oklahoma Court held that the action brought by the first administrator for the benefit of the next of kin barred a subsequent action by a successor administrator for the benefit of a previously unknown widow. In so holding, the Oklahoma Court said:

"In deciding this question we must not confuse the cause of action and the person in whom it is vested with the beneficial interest in the recovery. By the great weight of authority statutes like ours, creating a right to recover damages for wrongful death, are held to contemplate but a single cause of action. 16 Am. Jur. 103; 25 C. J. S., Death, § 49, pp. 1148, 1149; 8 R. C. L. 790; 17 C. J. 1250. This action is generally vested in the administrator if one exists (25 C. J. S., Death, § 58, pp. 1169-1174) and a recovery by him, or the one entitled to sue, is conclusive upon other persons, for the right given by the statute is then exhausted. *Hartigan* v. *So. Pac. R. Co.*, 86 Cal. 142, 24 P. 851; Freeman on Judgments, 5th Ed., § 618, p. 1273.

"In accordance with these general rules it is generally held that the person in whom the cause of action is vested may settle or compromise the claim, even without the consent of the beneficiaries, and the settlement so made may be plead in bar of a subsequent action. 25 C. J. S., Death, § 47, p. 1146; 16 Am. Jur. 41-42, 107; 103 A. L. R. 445, note; *Mann* v. *Minnesota Elec. Light & Power Co.*, 10 Cir., 43 F. 2d 36. The courts likewise generally hold that a judgment for one entitled to sue bars a subsequent action by a posthumous child, even though the statutes declare that a child conceived, but not yet born, is to be deemed an existing person. 16 Am. Jur. 103; 25 C. J. S., Death, § 49, p. 1149; 17 C. J. 1251; *Gulf & Ship Island R. Co.* v. *Bradley,* 110 Miss. 152, 69 So. 666, Ann. Cas. 1918D, 554; Ann. Cas. 1918D, 556, note; L. R. A.

former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased."

1916E, 130, note; *Parmley* v. *Pleasant Valley Coal Co.*, 64 Utah 125, 228 P. 557.

"While an adjudication in favor of one entitled to sue is conclusive and bars a subsequent action against the defendants, the beneficial interest in the recovery belongs to the persons designated by the statute, and they may participate in the fund recovered in the first action even though not named in the pleadings. 16 Am. Jur. 175; *Oyster* v. *Burlington Relief Dept.*, 65 Neb. 789, 91 N. W. 699, 59 L. R. A. 291."

The judgment rendered by the Nevada Circuit Court on January 11, 1949, in the case of *Stuart, Admr.* v. *Blevins,* is *res judicata* against the present action. In that case, the question was the total damages for the wrongful death of Arthur Reed, and it embraced every element of damage that existed for such wrongful death. One of the elements of damage in that case was the amount that a widow and child might have recovered. The fact that proof of existence of such widow and child was not made, does not prevent the judgment from being *res judicata.* In *McCarroll* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561, we showed the extent of *res judicata*: we there held that when Caldarera had sued McCarroll in a previous suit concerning the constitutionality of Act No. 310 of 1939 (as reported in 198 Ark. 584, 129 S. W. 2d 615), the holding in that case of *Caldarera* v. *McCarroll* was *res judicata* on every point concerning the constitutionality of said Act No. 310, whether or not such point was raised in the Caldarera suit. Our holding in *McCarroll* v. *Farrar* is in entire accord with the holding of the Supreme Court of the United States in *Chicot Dist.* v. *Baxter State Bank,* 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317, in which Chief Justice HUGHES said that the well settled principle is that " . . . *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter that might have been presented to that end.' "

When Stuart, Administrator, sued Blevins and Blevins paid the judgment, the rights of the present appellants attached to that judgment and any relief they may have is against Stuart, Administrator, and not against Blevins, the present appellee.

The judgment of the Circuit Court is in all things affirmed.

Mr. Justice MILLWEE not participating.

GEORGE ROSE SMITH, J., dissenting. Today's decision is obviously unjust, but my disagreement is based not on abstract justice but on the fact that the majority's unfortunate conclusion can be reached only by putting form above substance. There is nothing in either the statute or our decisions that requires us to go that far.

It is of course true that the statute requires an action for wrongful death to be brought in the name of the personal representative when one has been appointed, and our cases have uniformly enforced this requirement. But the personal representative is not the real party in interest. The recovery does not become an asset of the estate; instead, the administrator holds it as a trustee for the statutory beneficiaries. *Davis* v. *Railway,* 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. For that reason we have characterized the personal representative as "a formal party" to the action, "a mere trustee." *Adams* v. *Shell,* 182 Ark. 959, 33 S. W. 2d 1107.

With the exception of today's decision we have in every case recognized the beneficiaries as the real plaintiffs when that question was important. Even though the administrator is the sole plaintiff we have held that he is not even a party within the dead man's statute and so may testify about personal transactions with the decedent. *Chicago, R. I. & P. Ry. Co.* v. *Jenkins,* 183 Ark. 1071, 40 S. W. 2d 439. Again, it is not the administrator's contributory negligence but that of the real plaintiff that bars recovery. *St. Louis, I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1, 56 S. W. 46.

Even more important, the measure of the administrator's recoverable damages is wholly dependent upon the identity of the heirs. If the only heirs were distant kin not dependent upon the decedent for support the administrator could recover only nominal damages, for the legal injury is not to the person killed but to those who survive. Consequently the jury may consider the pecuniary loss sustained by each of the statutory beneficiaries, even though the recovery is divided under the statute of descent and distribution rather than according to their individual deserts. *Jenkins* v. *Midland Valley R. Co.,* 134 Ark. 1, 203 S. W. 1; *Railway Co.* v. *Sweet,* 60 Ark. 550, 31 S. W. 571.

Thus the personal representative is a party only in the sense that the statute requires his name to appear in the complaint. He cannot even state a cause of action without giving the names of the true plaintiffs, for it is their right of action that he enforces. In this case the administrator asserted a wholly non-existent cause of action—an injury to Reed's father, who as a matter of law had no right of action whatever. Yet the court now says that Reed's widow and infant child were represented in that case, even though proof of their existence was not made. As the court said in an analogous situation in *Atlantic Greyhound Lines, Inc.,* v. *Keesee,* 72 App. D. C. 45, 111 F. 2d 657; "The fact remains that [the administrator] . . . did not sue as a trustee for [the widow]. He sued as trustee for other relatives, including himself, on the theory that she was disqualified by desertion to share in the proceeds of recovery. His suit was in denial, not in affirmation of her rights. He could not at the same time represent her and refrain from presenting any claim which would permit the jury to 'direct' that any portion of the judgment be 'distributed' to her. To hold otherwise would allow her only the form and deny her the substance of representation. The substance, not the form, is controlling."

Perhaps the majority's conclusion could be justified if there were any strong ground of public policy supporting the result reached, but there is none. The decision

accomplishes one thing and one thing only; it enables a tortfeasor who has wrongfully caused another person's death to pay a consent judgment to the personal representative without making the slightest investigation to determine whether the persons really injured are even represented. I can think of no other situation in the law in which the defendant is relieved of all responsibility for determining whether he has been sued by the right person. It is nothing new for a wrongdoer to have to pay twice; the law merely says that his payment to the wrong person did not extinguish the real cause of action. On what ground of policy should we follow a different rule when the tortfeasor is guilty of the most serious wrong that can be committed? Under this very death statute we have held that when some of the heirs bring suit without a personal representative having been appointed, the judgment is not *res judicata* as to another heir who was not joined as a plaintiff. *Thompson* v. *Southern Lbr. Co.,* 113 Ark. 380, 168 S. W. 1068. Of course that decision is not controlling here, but it is the most closely analogous case in our reports and points the way to the correct decision in the case at bar.

The majority offer this widow and child the empty comfort of what will doubtless prove to be a fruitless suit against the administrator, for a maximum sum that bears no relation to the injury suffered by these plaintiffs. If reasons of policy are to control, I think it plain that it is the defendant who should be required to seek to recover the payment that resulted entirely from his negligence and through no fault of these appellants.

ROSE *v.* BLACK & WHITE CAB COMPANY.

5-111 258 S. W. 2d 50

Opinion delivered May 25, 1953.

Gutensohn & Ragon, for appellant.

Hugh Bland and *Shaw, Jones & Shaw,* for appellee.

George Rose Smith, J. This is a claim for workmen's compensation for an injury received by Gustaf Rose while driving a taxicab upon which the appellee's name was painted. The Commission denied the claim upon a finding that Rose was an independent contractor rather than an employee.

This company does not own the taxicabs which bear its name. Each vehicle is owned by a driver, although in most instances the company finances the purchase by means of a conditional sales contract which requires the driver to pay $5.00 a day until the car is paid for.

The company makes no payments of any kind to the various drivers. Instead, each driver agrees to pay the company $4.50 for each twelve-hour shift during which the vehicle is in service. In return for these payments the company provides several services for the individual drivers. The main service is the maintenance by the company of a central office at which telephone calls for taxicabs are received and relayed to the drivers by radio. The company also provides collision and liability insurance and installs radio sets in the cabs, these sets being owned by the company. It also maintains a garage at which the drivers may, if they wish, buy gasoline and oil and have their vehicles repaired.

At the time of his accident Rose did not himself own a cab but was serving as an extra driver for Montie Robinson, who owned the car in which Rose was hurt.

Rose and Robinson had their own understanding, Rose agreeing to make the $4.50 payment for the twelve hours during which he drove the cab each day and also to make a daily payment of $5.00 on the purchase price. Except for these payments each was entitled to retain all fares and tips received from passengers. Had Rose's services been unsatisfactory it was not the company but Robinson who had the power to discharge him.

The appellant's contention is that this method of doing business is an artificial device for avoiding the compensation law. We answered a similar argument in *Lockeby* v. *Ozan Lbr. Co.,* 219 Ark. 154, 242 S. W. 2d 115, by saying: "It is argued, however, that the lumber company's method of operation after 1945 was merely a colorable arrangement to avoid liability for torts and workmen's compensation. No doubt the company was motivated by a desire to reduce its liability in those respects, but that fact is not decisive of the issue. The real question is whether, under the new arrangement, the company actually retained that supervision and control that mark the contract as one of employment, regardless of its form. There is substantial evidence to sustain the Commission's conclusion that such supervision and control were not retained by the company."

Here, too, we think it a question of fact whether Rose was an employee of the cab company or an independent contractor. This record is not devoid of evidence to support the Commission's finding that Rose was not an employee. There was proof that the drivers were free to work or not to work as they chose. The company had no interest in their fares or tips. The drivers were not required to purchase their cars with the company's assistance, nor were they compelled to patronize its garage. They were entitled to take vacation trips in their cabs and to use them for other purposes of their own. The twelve-hour payment of $4.50 was intended primarily to defray the expense of receiving and transmitting messages—a service obviously of value to the drivers. No driver, however, was required to accept any particular call, that being left to the driver's own wishes. On the

other hand there is testimony from which the inference might be drawn that the cab company was in fact an employer; but it is the province of the Commission rather than of the courts to settle issues of fact when the evidence is in conflict.

Affirmed.

ARKANSAS VALLEY ROYALTY COMPANY *v.* ARKANSAS-OKLAHOMA GAS COMPANY.

5-101 258 S. W. 2d 51

Opinion delivered May 25, 1953.

Lee Seamster, Don Trumbo and *E. J. Ball,* for appellant.

Daily & Woods and *Moore, Burrow, Chowning & Mitchell,* for appellee.

ROBINSON, Justice. The principal issue is whether a certain instrument conveys a one-eighth royalty to an undivided interest in the oil, gas, and other minerals that may be produced from the described property; or is it a deed to the fee in an undivided interest in such minerals. The Chancellor held it to be a conveyance of a one-eighth royalty. We agree with the Chancellor.

At the time of his death in the latter part of August, 1927, J. A. Kelley owned and occupied as a homestead 120 acres on which was outstanding an oil and gas lease in favor of the Southern Union Gas Company. Kelley died intestate, survived by a widow and seven sons and daughters. On March 26, 1931, the widow Mary E. Kelley, two of the daughters with their husbands, and one son with his wife executed and delivered to the Arkansas Valley Royalty Company, a corporation, an instrument prepared by H. H. Ball on a printed form entitled "Mineral Deed." The blank spaces in the form were filled in with pen and ink by Mr. Ball, president of the grantee corporation. That part of the deed which is in Ball's handwriting is indicated by italics; the pertinent part of the conveyance is as follows:

"Know All Men by These Presents, That *Mary E. Kelley, a single woman, John H. Kelley, Lana Kelley, Will Triplett and Anna Triplett,* of *Franklin* County, State of *Arkansas* for and in consideration of the sum of *One and no/100* Dollars (*$1.00*) cash in hand paid by *The Arkansas Valley Royalty Company,* hereinafter called Grantee, and other good and valuable considerations, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered, and by these presents do grant, sell, convey, assign and deliver unto said Grantee an undivided *All full Royalty* interest in and to all of the oil, gas, and other minerals in and under, and that may be produced from the following described land situated in *Franklin* County, State of *Arkansas,* to-wit: *All of our 1/8 interest, Each, in the following land: The Northeast 1/4 of the Northeast 1/4 of Sec. 26, and the Southeast 1/4 of the Southeast 1/4 of Sec. 23, and the Southwest 1/4 of the Southwest 1/4 of Sec. 24, all in Twp. 9 North of Range 29, West, containing 120 acres. This Deed is made for 1/8 interest to Each one owning an interest in said land. Which is 1/8 Interest to each one signing deed all Heirs of Mrs. M. E. Kelley* of Section *23-26-24* Township *9* Range *29* containing *120* acres more or less, together with the right of ingress and egress at all times for the purpose of mining, drilling,

and exploring said lands for oil, gas, and other minerals and removing the same therefrom. Said land being now under an oil and gas lease executed in favor of *Southern Union Gas Company,* it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes *full Royalty* of all of the oil royalty, and gas rental or royalty due and to be paid under the terms of said lease insofar as it covers the lands above described. It is understood and agreed that *all full royalty* of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said Grantee and in the event that the above described lease for any reason becomes cancelled or forfeited, then and in that event, an *full royalty, All of our Interest* of the lease interests and all future rentals on said land for oil, gas and other mineral privileges shall be owned by the said Grantee *now* owning *Full Royalty, All* of all oil, gas and other minerals in and under said lands, together with.....interest in all future events. To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said Grantee herein, *their* heirs and assigns forever; and Grantor do hereby bind sel*ves our* heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said Grantee herein, *their* heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof."

The lease held by Southern Union Gas Company, referred to in the Arkansas Valley Royalty Company instrument, was cancelled and forfeited and no well was ever drilled pursuant to that lease.

On October 5, 1943, all seven of the children of J. A. Kelley and Mary E. Kelley, his widow, executed an Oil and Gas Lease to Arkansas-Oklahoma Gas Company, and on the 29th day of December, 1949, that company conveyed to Arkansas-Louisiana Gas Company an undivided ½ interest in the lease. Land covered by the lease is in the Cecil Gas Field in Franklin County. Gas has been

discovered in that field and the Arkansas Oil & Gas Commission has established 640-acre drilling units.

Appellant Arkansas Valley Royalty Company contends the document set out above conveys to it the fee interest in the minerals owned by those who signed the conveyance. Appellees Arkansas-Oklahoma Gas Co. and Arkansas-Louisiana Gas Co. maintain that the document only conveys a ⅛ royalty interest owned by the signers thereof. John H. Kelley, his wife Lanie E. Kelley, Annie Triplett and Hettie Eubanks claimed in the trial court that their signatures to the conveyance to the Arkansas Valley Royalty Co. were obtained by fraud, but have not appealed from an adverse ruling on that point.

There are two issues; one, does the document convey a ⅛ royalty in the undivided interest of those who signed it, or is it a deed to the fee interest in the minerals owned by those who signed; second, are appellees barred by laches from denying the instrument is a deed to a fee interest in the minerals.

The least that can be said of the instrument is that it is ambiguous. It contains words indicating it was intended as a conveyance of a fee interest in the minerals; on the other hand, words and phrases are used leading one to believe a conveyance of a full ⅛ royalty was all that was intended. It is prepared on a printed form entitled "Mineral Deed." It gives the grantee the right of ingress and egress for the purpose of drilling, etc.; it "includes full royalty of all of the oil royalty and gas rental or royalty due and to be paid under the terms of said lease insofar as it covers the lands above described." It states "that all full royalty of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in the event that the above-described lease for any reason becomes cancelled or forfeited, then in that event a full royalty, all of our interest of the lease interests and all future rentals on said land for oil, gas and other mineral privileges shall be owned by the said grantee now owning full royalty, all of all oil, gas and

other minerals in and under said lands together with .....interest in all future events.''

From the language just quoted, it can be argued that a mineral fee is transferred; however, the conveyance also provides ''have granted, sold, conveyed, assigned and delivered, and by these presents do grant, sell, convey, assign and deliver unto said Grantee an undivided full royalty interest'' . . . ''that may be produced from the following described land'' . . . ''all of our ⅛ interest, each'' . . . ''this deed is made for ⅛ interest to each one signing deed all heirs of Mrs. M. E. Kelley'' . . . ''it is understood and agreed that this sale is made subject to said lease (Southern Union Gas Co. lease) but covers and includes full royalty'' . . . ''it is understood and agreed that all full royalty of money rentals'' . . . ''then and in that event a full royalty.''

At the outset the granting clause does not mention conveying a fee interest in the minerals, but ''an undivided all full royalty''; also ''all of our ⅛ interest, each'' . . . ''this deed is made for ⅛ interest'' . . . ''which is ⅛ interest to each one signing deed all heirs of Mrs. M. E. Kelley.'' The reference is definitely to the children of Mrs. Kelley, which are 7 in number, and if they were conveying all of their fee interest they would be conveying a 1/7 each and not a ⅛; whereas ⅛ is their royalty interest. If it had been the intention of the parties to convey a mineral fee subject to the outstanding lease, it would have been a very simple matter to have done so without the use of language calculated to lead one to believe only a royalty was being conveyed, especially when a mineral deed form was being used.

The deed was prepared by the president of the grantee corporation; the Supreme Court of Mississippi in *Palmer* v. *Crews,* 203 Miss. 806, 35 So. 2d 430, 4 A. L. R. 2d 483, pointed out that the terms ''royalty,'' ''minerals in place,'' and ''lease of oil, gas and other minerals'' have a well defined meaning as separate and distinct estates when one is compared to the other; and then,

referring to the person who prepared the document in question in that case, said: "And a practical man of many years experience in the oil business, serving as *president of a royalty company,* is presumed to know and fully understand the difference between these separate estates."

"In construing a written instrument it should be interpreted most strongly against the party who prepared it." *Marley* v. *Hackler,* 176 Ark. 238, 3 S. W. 2d 20; *W. T. Rawleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S. W. 2d 886; *New York Life Ins. Co.* v. *Dandridge,* 202 Ark. 112, 149 S. W. 2d 45, 134 A. L. R. 1519.

In *Longino* v. *Machen* 217 Ark. 641, 232 S. W. 2d 826, there was an issue similar to the one involved here, and there the Court said: "The deed under consideration is unquestionably ambiguous, but we have concluded that the Chancellor's construction is a more reasonable one than that suggested by the appellants. When the instrument is examined in its entirety it is seen to make three separate references to 'royalty' as being the subject of the conveyance. We are aware that this term is sometimes loosely used to mean an interest in minerals in place, but it is well settled that the ordinary and legal meaning of the term is a share of the product or profit, to be paid to the Grantor or Lessor by those who are allowed to develop the property . . . On two occasions we have interpreted language not wholly dissimilar to that now before us as meaning royalty payments to the lessor rather than an interest in the minerals themselves . . . When we realize how easily the parties might have conveyed an interest in the minerals by the execution of an ordinary mineral deed we do not feel justified in saying that instead they sought to accomplish the same result by the cumbersome and roundabout method now urged by the appellants."

The conveyance to appellant by Mrs. Kelly, a son, and two of her daughters, dated March 26, 1931, was in the chain of title of appellees' lease dated October 5, 1943. This suit was filed by appellees May 23, 1952;

therefore appellant contends appellees are barred by laches and estoppel from now asserting the conveyance to the appellant was not a deed to a fee interest in the minerals. But appellees say they had no way of knowing appellant was going to claim the conveyance was such a deed rather than a transfer of royalty.

Since we are holding the conveyance to appellant was one of royalty and not of a fee interest in the minerals, appellant has not been prejudiced by the delay in filing the suit, even if it could have been filed at a substantially earlier date.

Affirmed.

DEAN *v.* DEAN.

5-63 258 S. W. 2d 54

Opinion delivered May 25, 1953.

Carl Langston and *Wayne Foster,* for appellant.

Talley & Owen, Norman D. Price, Dean R. Morley and *L. Gene Worsham,* for appellee.

J. SEABORN HOLT, J. Appellant and appellee were married April 7, 1947, and separated March 3, 1951. January 28, 1952, appellant, (Frances Dean) proceeding under Act 68 of 1951 (§§ 34-2401—34-2414, Ark. Stats. 1947—Supplement 1951) filed petition against appellee, then a resident of Pennsylvania, asking for reasonable allowance for her support. Appellee answered with a general denial and in a cross complaint alleged that appellant was suffering from mental disease at the time of their marriage, which she fraudulently concealed from him and prayed that their marriage be annulled.

A trial on October 29, 1952, resulted in a decree granting appellant $60 per month for her support, $50 additional for her attorneys, and denying appellee the relief prayed in his cross complaint. Both parties have appealed, appellant on the ground that the award of $60, in the circumstances, was not sufficient for her support, and appellee from that part of the decree denying his prayer for annulment.

(1)

We first consider appellee's cross appeal. On the record presented, we have concluded that the Chancellor's findings that in the consummation of this marriage, appellant was guilty of no fraud on appellee, was not against the preponderance of the testimony.

A number of witnesses testified as to appellant's general health (physical and mental) prior to her marriage to appellee. The effect of the testimony of these witnesses was that for about eighteen months just prior to the marriage, they along with Frances were employed by the War Assets Administration, and her work appeared to be satisfactory, and she appeared normal in every way.

Witness, Ed Moulton, former director of personnel of W.A.A., testified that Frances worked under his supervision prior to her marriage to Dean, that she held down a very responsible position in which she was efficient, capable and industrious. She came to the W.A.A. with a satisfactory history of work at the Camden Or-

dinance Plant and Camp Robinson and voluntarily quit work with W.A.A. on September 15, 1947. Mrs. Webber corroborated Moulton and testified that she was in charge of secretaries for W.A.A. during the time that Frances worked there, that her work was satisfactory and her deportment and actions were not different from those of other employes.

C. H. Burks, an employee of W.A.A., testified that for several months Frances worked with him in an office cage, where money was received, and that on occasions Frances was entrusted with as much as $90,000 for deposit. She was efficient, reliable, normal and he saw nothing unusual in her actions.

Mrs. Carlon and Bobby Jean Farabee testified that they worked with Frances for eighteen months prior to her marriage, that she appeared normal in all respects.

Frances testified that at the time she married appellee, she was earning approximately $300 per month and that prior to the time she worked with the W.A.A., she worked at Camp Robinson for the Finance Officer and prior to that employment, she worked at Camden as secretary to the Commanding Officer.

Appellee admitted that he lived with appellant intermittently from the date of their marriage (1947) to the date of their separation (1951), at one time for a period of fourteen months in Philadelphia.

While there is some evidence that appellant had had some medical treatment before her marriage, the testimony falls far short of showing any concealment of material facts on the part of Frances relating to such treatments that would amount to any fraud practiced on appellee sufficient to absolve him from the marriage contract and warrant an annulment. The trial court therefore correctly denied appellee's plea for annulment.

(2)

We have concluded, however, that the court erred in denying appellant's petition for an increase in the support allowance of $60. Our governing statute, § 34-

1211, Ark. Stats. 1947, provides: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

The amount of support must always depend upon the particular facts in each case, such as the husband's earnings and ability to pay, as well as the needs of the wife. Here, it appears conceded that appellee is earning between four and five hundred dollars per month in regular employment. In the past two or three years, appellant's health has become so impaired that she is unable to support herself, and is living with, and dependent on, her mother who does not possess the means to care for her. These parties are still husband and wife and it is appellee's duty to support Frances. In the circumstances, we hold that $60 per month is insufficient to meet appellant's present and necessary requirements. See *Pledger* v. *Pledger,* 199 Ark. 604, 135 S. W. 2d 851 and *Carty* v. *Carty,* 217 Ark. 610, 232 S. W. 2d 446.

Appellee will be required to pay appellant $100 per month for her support beginning May 1, 1953, subject to future modification, if required by changed conditions.

With the above modification, we affirm the decree, appellee to pay the costs here and in the court below, and an additional attorneys' fee of $150 to appellant's counsel.

GREEN *v.* STATE.

4724 258 S. W. 2d 56

Opinion delivered May 25, 1953.

Jim Merritt and *Claude Cruce,* for appellant.

Tom Gentry, Attorney General and *Thorp Thomas,* Assistant Attorney General, for appellee.

WARD, Justice. On June 27, 1952, an information was filled by the Prosecuting Attorney against Warren Green [a Negro] charging him with grand larceny for stealing a cow valued at more than $35.00. On September 20, 1952, Green was tried and convicted by a jury which fixed his punishment at imprisonment in the State Penitentiary for three years.

In appellant's motion for a new trial and on appeal he assigns numerous grounds for a reversal. We have concluded that one of these assignments, later considered, calls for a reversal and therefore the other assignments which relate to the admissibility of certain testimony, the eligibility of a jury commissioner, the opening of the jury list, etc., need not be discussed.

Negroes excluded from the trial jury. Three days before the trial appellant filed a motion to quash the regular panel of the petit jury on the ground that the jury commissioners had intentionally excluded electors of the Negro race from said jury panel and that Negroes had been intentionally and systematically excluded from jury service in Drew County for 20 years, solely because of color, all in violation of the Constitution of the United States and the Constitution of the State of Arkansas. Some question arises as to whether the motion went only to the regular jury panel or to it and the special jury list. As we view this case it makes no material difference in this instance how the motion is construed but we think the effect of the motion challenged the regular panel and it shall be so considered.

Pursuant to statute the jury commissioners in February, 1952, selected the jurors for the September, 1952, term of court. They selected for the regular panel 24 regular and 6 alternate jurors, all White. At the same time they also selected a special panel consisting of 17 Whites and 9 Negroes, the latter being at the bottom of the list. This last list was selected pursuant to *Ark. Stats.* § 39-220, and, as provided therein, was to be used in lieu of bystanders when and if the regular panel was exhausted. In this instance the regular panel list was opened some 10 days before the first day of the September term of court and it appears that the special list was opened some few days before the defendant was put on trial.

The trial judge overruled appellant's motion to quash the jury panel with a statement to the effect that every jury commission in his district had always been and will continue to be instructed to select jurors without regard to race, creed or color, and that this instruction had been given to the jury commission involved in this case.

At the hearing on the motion facts developed pertinent to the question under consideration, in addition to those mentioned above, are substantially as follows:

According to the oral testimony introduced and the records exhibited at the hearing on the motion, no Negro had ever been selected on the regular panel of jurors in Drew County for many years and only in one instance had a Negro been selected as an alternate on such panel, and the only instances where Negroes had served as jurors in any capacity, or had the opportunity to so serve, were the ones presently mentioned. A. J. Hicks, colored, was an alternate on the list selected in February, 1949, and served one day. At the 1948 September term four Negroes were called as bystanders to serve on a jury. A former sheriff who served from 1943 to 1949 remembered calling some Negroes as bystanders to serve on a jury, but this could have been the same incident before mentioned.

The three jury commissioners testified that they had no objections to having Negroes on the juries and that they did not exclude Negroes from the September, 1952, list because of color. They also stated that the judge had instructed them to disregard race, color and creed in selecting jurors.

It is not disputed that approximately one-third of the qualified electors in Drew County are Negroes and that a substantial number of them have the qualifications to serve as jurors.

Under the above factual situation were the constitutional rights of appellant prejudiced by the trial court's refusal to grant his motion to quash the regular panel of the petit jury? In our opinion the answer is in the affirmative.

Past exclusion. In our opinion the factual situation here makes out a *prima facie* case that Negroes had been systematically excluded from jury service in Drew County for many years before the trial of appellant, and that such exclusion was because of color. Only once in the past had a Negro been selected by the jury commissioners on the regular panel of petit jurors, and in that instance he was chosen as an alternate. The relatively few instances when Negroes had been allowed to serve on special panels, not selected by jury commissioners, in no way conform to the mandate against racial discrimination contained in the 14th Amendment to the Constitution of the United States. The method of selecting petit jurors, as set out by the Statutes of Arkansas, is by jury commissioners and the rights of Negroes under these Statutes can not be met in the manner above indicated. In cases where the facts were similar to the facts here our courts have consistently held they amounted to exclusion because of race or color in violation of the Constitution. For some of those decisions see: *Maxwell* v. *State,* 217 Ark. 691, 232 S. W. 2d 982; *Hill* v. *Texas,* 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Hale* v. *Kentucky,* 303 U. S. 613, 58 S. Ct. 753, 82 L. Ed. 1050; *Pierre* v. *Louisiana,* 306 U. S. 354, 59 S.

Ct. 536, 83 L. Ed. 757; *Patton* v. *Mississippi,* 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76; *Norris* v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; and *Akins* v. *Texas,* 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692.

The same conclusion was reached in the case of *Smith* v. *Texas,* 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, where the court observed that the names of Negroes were placed at the bottom of the jury lists and that the jury commissioners stated they had not intentionally excluded Negroes because of prejudice or color. This case involved grand jurors but our own Court, in *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, recognizes, along with other jurisdictions, that the same rule applies in this connection to both petit and grand juries.

Exclusion not cured. It is argued that regardless of whatever exclusion may have obtained in the past, the jury panels from which was chosen the trial jury contained the names of nine Negroes and that this was a compliance with all constitutional requirements. We are not convinced by this argument.

Although the record is silent as to what method was used in selecting the trial jurors, what jurors were selected, or what opportunity appellant had of securing jurors of his own race, yet we think this is immaterial in this instance. As was said in the *Maxwell* case, *supra,* "we are dealing primarily with the Constitution as distinguished from a particular defendant" and, as was also stated in that case, it makes no difference if the result of the trial would have been the same if the regular panel had been quashed in compliance with appellant's motion. Whatever rights appellant had under the Constitution existed and were invaded at the time his motion was overruled. Notwithstanding what did actually happen in regard to securing an impartial jury, it cannot be denied that the action of the court left appellant faced with the prospect of having to eliminate some forty jurors before he could reach members of his own race. In a situation very similar to the one here where the court discharged all of the regular panel except thirteen,

which panel preceded a special list containing eight Negroes, this court held, in the *Maxwell* case, *supra,* it was error not to have excluded the entire panel.

It is true, as contended, that past exclusion may be cured in any particular instance by the selection of a proper jury consisting of part Negroes, as was held in the case of *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307. The facts as stated by the court in the cited case were quite different, however, from the facts here, for it is stated in the opinion that three Negroes "were members of the regular panel, and numbered 7, 10 and 12 in the examination of jurors for trial in this [that] case."

It has been uniformly stated in many decisions that no one of a certain race has the right to demand a jury composed wholly or partially of his own nationality, and we are in thorough agreement. See: *Dorsey* v. *State,* 219 Ark. 101, 240 S. W. 2d 30, and *Martin* v. *Texas,* 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497. However, once a *prima facie* case of exclusion in the past on account of race or color has been established, as we hold it has here, it cannot be overcome by the selection of a trial jury panel which does not contain the names of jurors which are of the same race as the defendant. Otherwise it would be presumed that the same systematic exclusion because of race or color still existed.

In accordance with the views above set out, we conclude that the judgment of the trial court must be reversed.

PAVING IMPROVEMENT DISTRICT NO. 12 *v.* BROOKS.

5-74 258 S. W. 2d 233

Opinion delivered June 1, 1953.

Ulys A. Lovell and *James Evans,* for appellant.

Price Dickson and *Peter G. Estes,* for appellee.

ED. F. MCFADDIN, Justice. This is a direct attack on the assessments of benefits on one parcel of property. Appellants, Paving District No. 12 and Curb & Gutter District No. 11, are companion districts: No. 12 being for the purpose of paving, and No. 11 being for the purpose of curbing and guttering, a portion of McKinney Street in the City of Springdale, Arkansas. The ordinance, levying the assessment of benefits in each district, was duly passed and published by the City Council;[1] and within thirty days thereafter, appellees, Brooks and wife, filed a suit in the Chancery Court against each district, claiming the assessment of benefits of each district to be excessive on the Brooks property. The two suits were consolidated for trial.

In Paving District No. 12, benefits of $1,100 were assessed against the Brooks property, and in Curb & Gutter District No. 11, benefits of $900 were assessed against the Brooks property: making total benefits of $2,000 for the improvements by both districts. Witnesses for appellees, after qualifying as to knowledge of real estate values, testified that the $2,000 total benefits were grossly excessive. Some witnesses placed the total benefits as low as $500, and others placed them as high as $1,200. On the other hand, witnesses for the districts, after likewise qualifying as to knowledge of real estate

[1] See § 20-413 Ark. Stats.

values, placed the total benefits to appellees' property as high as $2,500. After hearing the evidence *ore tenus,* the Chancery Court found the $2,000 benefits excessive, and permanently enjoined any collection of benefits by either District on the Brooks property. From that decree there is this appeal.

I. *Excessiveness.* The appellants argue that the Trial Court was in error in holding the benefits to be excessive, and claim that the Court failed to accord to the assessors' reports the weight to which such reports were entitled. But the Chancellor rendered an opinion, copied into the record, which showed a thorough understanding of the weight to be given the assessors' reports, and the amount of evidence that the property holders must offer to overcome the benefits as assessed. This opinion also contained a review of some of our leading cases. We cannot say that the preponderance of the evidence is contrary to the Chancellor's findings that the benefits were excessive on the Brooks property; so we hold that the decree is not erroneous in this regard.

II. *The Proper Benefits.* We hold, however, that the Chancery Court was in error in failing to determine the correct benefits to be assessed against the Brooks property in each district. The applicable Statute (§ 20-416 Ark. Stats.) says:

". . . Within thirty days after such publication, the district or any property owner may bring suit in the Chancery Court of the County for the purpose of correcting or invalidating such assessment; . . ."
When the direct attack (i.e., one within thirty days) is against *all* of the assessments in the district, then the Chancery Court, if it sustains the attack, necessarily sets aside all the assessed benefits, as was done in *Turner* v. *Adams,* 178 Ark. 67, 10 S. W. 2d 41. See also *Lenon* v. *Street Improvement Dist.,* 181 Ark. 318, 26 S. W. 2d 572. But when the direct attack relates to the excessiveness of the assessments on specific property, rather than all the property in the district, then the quoted Statute provides that the suit in the Chancery Court shall be ". . . for the purpose of correcting

. . .'' such assessment. This latter is the situation in the case at bar; and the Chancery Court should have fixed the amount of benefits to be assessed against the Brooks property by each of the Districts here involved.

Since we try chancery cases *de novo* on the record, we have carefully reviewed all the evidence; and we conclude that the Brooks property is clearly benefited a total of $1,200 by the improvements to be made by the appellant districts. One witness *called by Brooks* was the Mayor of Springdale. He testified that $2,000 benefits were excessive, but that $1,200 benefits for both districts would be proper; and he divided this, as $700 for the benefits in the Paving District and $500 for the benefits in the Curb & Gutter District. Since Brooks' own witness testified to these figures, appellees certainly cannot complain when we fix the benefits at such figures. We conclude that the preponderance of the evidence is in accord with these last mentioned figures.

Therefore, we remand the cause to the Chancery Court, with directions to correct the benefits on the Brooks property to conform to this opinion, and to enter a decree accordingly. Each side will bear one-half of the costs of this appeal.

BERGDORF *v.* THE LIVE WIRE CLUB OF EUREKA SPRINGS.

5-113 258 S. W. 2d 234

Opinion delivered June 1, 1953.

J. B. Milham and *C. A. Fuller,* for appellant.

Festus O. Butt, for appellee.

WARD, J. Sometime in 1942, a group of public-spirited women of Eureka Springs organized a club known as the Live Wire Club. At the organizational meeting one of the appellants, Edna Bergdorf, was elected President, a position which she held until at least November 22, 1948.

It appears that for some months prior to the date above mentioned a sharp controversy had existed among the members of the Club, principally over the title to certain real property which the Club claimed. This controversy culminated, as appellees contend, in Edna Bergdorf's resigning and organizing a new club under the same name of the original club.

Whether Edna Bergdorf did actually resign her membership in the original club is, we think, the only question to be considered on this appeal.

As contended by appellee, the original club elected Ethel Hill President at the time Edna resigned, and in 1951 Mrs. Mae Farwell was elected President and is now serving as such. Mrs. Farwell says she has been a member of the Live Wire Club for 8 or 10 years.

On the other hand, Edna Bergdorf contends that she never resigned as a member but that in January, 1951, when certain members of the club locked her and others out of a regular meeting, they held a meeting of their own and elected her President, a position which she now claims to hold.

In December, 1951, appellee, acting through its officers, filed a complaint in Chancery Court to the effect that it was the original and authentic Live Wire Club, that it was affiliated with the County Home Demonstration Clubs and the State Federation of Women's Clubs, that it owned certain real property and had money in the bank, but that appellants were attempting to usurp its name and authority and were interfering with the use of

its property. After hearing the testimony the trial judge enjoined appellants from the alleged interference.

If Edna Bergdorf resigned her membership in the original club prior to 1949, then it must follow that the club to which she was subsequently elected President, and which she now represents, was and is entirely distinct from appellee. In our opinion the weight of the evidence sustains the finding of the special chancellor that Edna did so resign her membership.

Lillian Ames, a member of appellee, testified that Edna resigned from the club on November 22, 1948, at the time Ethel Hill was elected President. This testimony was contradicted by Edna and others.

Mrs. Farwell testified that Edna came to her home on one occasion and stated "that she had resigned and had organized her a club," and that she knew Edna "has been using and trying to use the name of the Live Wire Club as the name of her club." This testimony was likewise contradicted.

Mrs. Chandler testified that Edna had resigned from the club and was claiming to have a club of her own. She also testified that Edna called her on the phone and stated that she had resigned. To the same effect was the testimony of Mrs. Mae Hardy.

The above testimony is at least partially corroborated by the minutes of the meeting held in November, 1948, a portion of which reads as follows:

". . . but very little was done, as Goldie said she had some things she wanted to talk about. She accused Edna, the President, of having the deed to the club house made out in her name, and told her she did not think they could trust her. Then Edna tore up the deed and told them she would resign and they could get them a President they could trust. She also told them she would go with them to make a new deed, but they did not respond, and her sister, Zoe, said she would put in the paper when she did resign. We dismissed early and went home. Elsie Tallant, Secretary."

To lend further support to the special chancellor's view in accepting appellee's version of the conflicting testimony is the established fact that a violent dissension did arise among the members of the original club and that a division of some kind did occur.

In view of the above it is our judgment that the decree of the Chancery Court should be and it is hereby affirmed.

THOMPSON, COMMISSIONER OF REVENUES *v.* HOLMES.

5-104 258 S. W. 2d 236

Opinion delivered June 1, 1953.

O. T. Ward, for appellant.

W. A. Leach, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellees were sued jointly by the Commissioner of Revenues for tax and penalties due on twelve cartons of cigarettes purchased at Blytheville in September, 1951, the allegation being that under § 10 of Act 416 of 1941, the amount due would be $25 per package, or $3,000. From judgments in favor of the defendants the Commissioner has appealed.

Essential facts are that Lula Mae Kandy was employed by Milton Holmes, who inferentially operates a place of business in or near Stuttgart. Lula Mae testified that she was asked by two friends to take them to a highway construction job near Blytheville and borrowed Holmes' car for that purpose. Holmes says he thought she would be gone one day and became alarmed when she did not return when expected, and reported her prolonged absence to the police. As a matter of fact, Lula Mae collided with the rear of a truck near Stuttgart and wrecked Holmes' car. This occurred while she was returning the third day after leaving home. Painful physical injuries were sustained by Lula Mae, but she did not require hospitalization.

Holmes went to the accident scene and took possession of personal effects belonging to Lula Mae. Officers were on hand when Holmes undertook to salvage packages of cigarettes from a broken carton. The testimony does not clearly show whether, when the wreck occurred, there were ten or twelve cartons. Lula Mae insisted she had bought them for Christmas presents and had paid $1.70 per carton. Impeaching testimony was that in municipal court she had said that the cigarettes cost $1.45.

It is conceded that the cigarettes were not stamped. "Consumer" is defined by law to be any person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in any way other than by sale, barter, or exchange. Ark. Stat's, § 84-2302.

Section 84-2307 reads: "The consumer shall require, when he purchases, receives, takes into his possession, or has delivered to his premises, cigarettes in packages, cartons, or other containers, that the proper Arkansas revenue stamp be affixed to show that the tax has been paid."

As to Lula Mae all of the instructions complained of have not been abstracted and the judgment must be affirmed.

Holmes, however, was the beneficiary of Instruction No. 6 in which the jury was told that if it should find from preponderating evidence that this defendant had possession of the cigarettes, still the state could not recover ". . . unless Milton Holmes knew that said cigarettes were not stamped. If Holmes did not know the cigarettes had no stamps, your verdict will be for Milton Holmes."

There was evidence that Holmes had been in business since 1948. A witness who was at the scene of accident testified that Milton was unloading Lula Mae's clothing from the damaged car and commented that there should be "quite a bit of money that had been taken from his juke box." Upon receiving this information the witness flashed a light, "and [in there] I saw several rolls of money that had been wrapped up."

In view of attending circumstances—Lula Mae's use of Milton's car, presence of the money and this defendant's knowledge that it was there, his acts in undertaking to retrieve the cigarettes, and Lula Mae's status as his employee—substantial inferences were present from which the jury could have found that his interest in the cigarettes was more than the attributes of a good Samaritan.

The transaction falls within the *Gates-Hughson* pattern, 186 Ark. 348, 53 S. W. 2d 581. There the court told the jury that the law would not be violated unless the stamps ". . . had been intentionally removed, to be preserved and used again."

The holding was that absence of the stamps made a *prima facie* showing, casting upon the defendant the law's contemplated burden.

So, in the instant case, it was error to give Instruction No. 6. The judgment in favor of Milton Holmes is reversed and the cause remanded for a new trial. Affirmed as to Lula Mae Kandy.

Mr. Justice McFaddin dissents as to the Holmes reversal.

5-119 258 S. W. 2d 237

Opinion delivered June 1, 1953.

[redacted]

Frank C. Douglas and *James M. Gardner,* for appellant.

Bruce Ivy, for appellee.

J. SEABORN HOLT, J. Sidney E. Evans died intestate April 15, 1950. His wife had predeceased him. They had no children. Annie B. Miller, a niece of Mr. Evans and his guardian, brought suit to collect balance alleged to be due on a demand note dated September 15, 1922, given to Evans by appellees, the Browns, in the amount of $10,000, with 10% interest thereon, and secured by deed of trust on two business lots in Luxora, Arkansas, William Wood being named as trustee. Foreclosure on the lots was prayed. May 31, 1950, the suit was revived in appellant as administratrix. To the complaint, appellees answered with a general denial and specifically denied owing appellant any sum whatever. In an amendment to the complaint September 25, 1950, appellant alleged, in effect, that since filing the original complaint, she had learned that appellees, for a complete defense, were relying on a release deed executed by Mr. Evans April 23, 1949, and

duly recorded. Appellant further alleged that if, in fact, Evans executed such release deed, it was given at a time when he was not mentally capable of executing such instrument and also pleaded fraud and undue influence. October 13, 1950, appellees filed answer to the amendment to the complaint, denied every material allegation therein and pleaded as a complete defense the release deed executed by Mr. Evans April 23, 1949.

Trial resulted in a finding by the court of all issues of law and fact in favor of appellees and dismissed appellant's complaint for want of equity. This appeal followed.

For reversal, appellant argues that the release deed executed by Evans April 23, 1949, was procured by fraud, undue influence, and at a time when Mr. Evans was without mental capacity, and that there was no consideration.

After a review of all the testimony, we have concluded that none of appellant's contentions is supported by a preponderance of the testimony and cannot be sustained.

As indicated, appellees executed the note in question September 15, 1922, with an interest rate of 10%. Mr. Evans and appellees were close friends of long standing and this friendship appears to have continued up to Mr. Evans' death. Evans was engaged in farming and the Browns in the mercantile business and through arrangement of the parties, Evans bought groceries, merchandise, supplies, etc., for his family and farming operations from the Browns and such purchases were from time to time credited on the note by Evans, the last endorsement being made September 15, 1938.

Briefly stated, the evidence shows that appellees paid Evans at intervals on the note a total of $15,600, from September 22, 1922, to September 15, 1938. On April 9, 1949, the parties made a full settlement of the balance due on the note and on that date, appellees paid Evans an additional sum of $9,000, evidenced by store account owed by Evans of $7,046.10 and a check to Mr.

Evans for $1,953.90, making a total paid of $24,096. There was written on the face of the check: "Balance due on note of $10,000 dated September 15, 1922, also deed of trust securing same."

On this same day, Mr. Evans went to the bank in Luxora to get the note and deed of trust to deliver to appellees, but found it missing from his lock box, and on the same day, at his own suggestion, he executed and signed a receipt which recited: "*RECEIPT*—This will acknowledge receipt of the sum of One Thousand nine hundred fifty-three and 90/100 ($1953.90). Said sum being a full and complete settlement of the balance due on a note in the sum of Ten Thousand Dollars ($10,000.00), dated September 15, 1922, which was secured by a Deed of Trust on Tracts 1 and 2 in the F. C. Lewis Sub-division of Block 17 of the Thomas and Morrow Addition to the Town of Luxora. And I hereby acknowledge a full and complete settlement of the above mentioned indebtedness and the Deed of Trust securing same. Witness my hand on this the 9th day of April, 1949. (Signed) Sidney Evans."

After further search, Mr. Evans was unable to locate the note and Deed of Trust and at his further suggestion, he executed on April 23, 1949, the release deed in question which contained this recital: "*RELEASE DEED*—KNOW ALL MEN BY THESE PRESENTS: That I, Sidney Evans, in consideration of the full payment of all indebtedness mentioned in a certain Deed of Trust, dated September 15, 1922, and recorded in Book AA, at Page 576, in the Circuit Court Clerk and Recorder's office at Osceola, in and for the Osceola District of Mississippi County, Arkansas, executed by Jesse Brown and Lola Posey Brown, on the following described real estate in the Town of Luxora, Mississippi County, Arkansas, to-wit: Two lots in the Thomas and Morrow Addition to the Incorporated Town of Luxora, Arkansas, and more fully described as follows: Lots 1 and 2 carved out of Lot 17 of the Thomas and Morrow Addition to Luxora and formerly owned by F. C. Lewis. The lien on the real

estate above mentioned is hereby discharged and released in full. Witness my hand on this the 23 day of April, 1949. (Signed) Sidney Evans." This release deed was acknowledged April 23, 1949, and recorded April 25, 1949.

It appears that in June, 1948, Charles Evans (a nephew) and Joe Miller, husband of the administratrix, having secured access to Mr. Evans' lock box, had removed the note and deed of trust without the knowledge of Evans.

A large number of witnesses was presented by the parties. It could serve no useful purpose to detail the testimony, some of which is conflicting. It suffices to say that, after a review of all of the evidence, we have reached the conclusion that the preponderance thereof shows that Mr. Evans was not unduly influenced and possessed sufficient mental capacity at the time he made the release deed on April 23, 1949, which was and is a full and complete settlement of the note in question. A number of witnesses, mostly disinterested, including Dr. Blodgett, who had examined Mr. Evans on April 9th and on April 18, 1949, testified, in effect, that Mr. Evans was competent when the deed of trust was executed. Exhibits in evidence of the handwriting of Mr. Evans convince us that the signature on the release deed was written by the same party who signed certain personal checks of Evans, which checks admittedly were signed by him. We find no evidence that he was unduly influenced or overreached in making the settlement.

There was testimony that at the time of the settlement, Mr. Evans suggested that since appellees had received no interest on Evans' store account with them over the years, it was only fair that interest charges on both sides be offset against each other. Whether Mr. Evans who was without children, was motivated to accept in settlement a smaller amount than was legally due, by reason of his friendship for appellees, their many kindnesses, a sense of fairness, or a feeling that a 10% interest rate was exorbitant, we do not know, but the fact remains that he had a perfect right to make a settlement

if mentally competent and not unduly influenced or overreached.

In *Gordon* v. *Moore,* 44 Ark. 349, we held: (Headnote 1) "ACCORD AND SATISFACTION: Payment of part. An agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money and execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act."

In the body of the opinion, the case of *Cavaness* v. *Ross,* 33 Ark. 572, strongly relied upon by appellant, was distinguished in this language: "In the Cavaness case nothing was done but the payment of the money by the debtor. No release was given. The original notes were retained and afterwards assigned, as valid, to one ignorant of the compromise. . . . We conclude, therefore, that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money, and the execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act." See, also, *Dreyfus* v. *Roberts,* 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823.

As pointed out, we are dealing here with a written, signed, acknowledged, and recorded release, which clearly distinguishes it from the Cavaness case, where no release whatever was given.

Finding no error, the decree is affirmed.

ROUSSEAU *v.* ED WHITE JUNIOR SHOE COMPANY.

5-110 258 S. W. 2d 240

Opinion delivered June 1, 1953.

Ward, Coleman & Mayes, for appellant.

Gerald Brown and *Kirsch & Cathey,* for appellee.

George Rose Smith, J. This is an action by the appellant to recover back wages and a penalty under our statute requiring a corporate employer to pay a discharged employee his wages within seven days after the discharge. Ark. Stats. 1947, § 81-308. There was a verdict for the plaintiff for $9.38 as back wages, but the court had instructed the jury that no penalty could be recovered. Whether the latter charge was correct is the only question now presented.

Before this controversy arose Mrs. Rousseau had worked for the appellee off and on for several years, having quit her job on three or four occasions and having been later re-employed in each instance. It has been the appellee's practice to pay its employees on every other Friday for a work period of two weeks, but in order to allow time for bookkeeping entries the company does not actually make payment until the Friday next succeeding that on which a particular work period ends.

On Friday, March 21, 1952, Mrs. Rousseau completed a two-week work period, for which she would ordinarily have been paid on the next Friday, March 28. In this interim Mrs. Rousseau worked an eight-and-a-half-hour day on Monday, March 24, and came to work as usual on Tuesday. At about noon she learned of the death of her grandfather, and with the company's per-

mission she went home and stayed away from her workbench until an officer of the company telephoned her on the morning of Friday, March 28, and demanded that she return to work by one o'clock that afternoon. Mrs. Rousseau did not comply with this demand, and the jury would have been warranted in finding that she was discharged for that reason.

In the midafternoon of that same Friday Mrs. Rousseau and her husband went to the company's office to collect her wages. Mrs. Rousseau accepted a check for the period that had ended on Friday, March 21, but she was informed that her wages for the preceding Monday and half of Tuesday would not be paid until the next regular payday, two weeks later. After some argument about this point Mrs. Rousseau and her husband left the office. There is not one word of testimony indicating that Mrs. Rousseau then gave the company a mailing address to which her check should be sent. Two weeks later, according to its practice, the company mailed Mrs. Rousseau a check for nine dollars (less thirteen cents deducted for social security), but this tender was rejected and the present suit was filed. In the course of its pleadings the defendant admitted liability for $9.38 (the amount of the jury's verdict) and offered to confess judgment to that extent.

On this proof the trial court rightly held that the statutory penalty was not recoverable. This statute allows the employer a grace period of seven days in which to pay the discharged employee his wages. We have held again and again that even when this period elapses without the wages having been paid it is still incumbent upon the employee, in order to collect the penalty, to show either (*a*) that during the seven days of grace he requested the employer to send the payment to a specified mailing address, or (*b*) that not having made such a request he renewed his demand for payment after the expiration of the seven-day period. *Wisconsin & Ark. Lbr. Co.* v. *Reaves,* 82 Ark. 377, 102 S. W. 206; *St. Louis, I. M. & S. Ry. Co.* v. *McClerkin,* 88 Ark. 277, 114 S. W. 240; *Lusk* v. *Jones,* 128 Ark. 312, 194 S. W. 250.

In her brief Mrs. Rousseau earnestly contends that it was for the jury to say whether she complied with requirement (*a*) by instructing the appellee to mail her check to a specified address. There is, however, no direct evidence whatsoever to that effect. Mrs. Rousseau testified at length, but she did not so much as hint that she had supplied the appellee with the mailing address that the statute requires. Nor did any other witness intimate that this requirement had been met.

In spite of this deficiency in the proof it is argued that the jury might have inferred that the statutory requirement was met, for the reason that the appellee had Mrs. Rousseau's address in its files and eventually mailed her check to that address. If the statute were to be liberally construed it might be permissible to indulge in such speculations. But this law is penal in the extreme; here the appellant asks a penalty of $354 for the appellee's delay in making a payment of $9.38. When the penalty is so obviously disproportionate to the actual injury it has always been the policy of the law to hold the plaintiff to a strict compliance with the statutory conditions. With reference to this exact statute we said in the *McClerkin* case, *supra*: "Nothing can be taken by intendment to show compliance with statutes of this kind." And in the *Lusk* case we answered a similar argument with these sentences: "But appellee further insists that because his foreman or timekeeper knew that he had been receiving his pay check at the Jonesboro station it was unnecessary for him to give the notice required by the statute. The court adheres to its former construction that in order for an employee of a railroad to avail himself of the penalty, he must comply strictly with the statute." To these settled rules of law we need now add only the observation that, since every employer is likely to have somewhere in his files the address of each of his employees, the statutory requirement that the employee pointedly notify the employer of a mailing address would be completely nulli-

fied if the employer's prior knowledge were taken "by intendment" as a compliance with the law.

Affirmed.

CANTRELL *v.* MOORE.

5-81 258 S. W. 2d 548

Opinion delivered June 1, 1953.

Talley & Owen, Dean R. Morley and *L. Gene Worsham,* for appellant.

Clark & Clark, for appellee.

GRIFFIN SMITH, Chief Justice. Donald Moore, alleging that he was engaged in the business of dusting cotton for Central Aero Service at Morrilton, sued Dennis Cantrell on an oral contract to dust cotton in the vicinity of Conway. He set out a joint venture by which each would receive half of the net profits. Moore conceded that he held $287.50 subject to distribution, but asserted that total earnings had been $8,664. Certain allegations relating to the use of oil and gasoline from Cantrell's supply service were made. Moore also mentioned the payment of $1,337.50 to Cantrell, but insisted that the correct balancing of debits and credits would show that $4,694.96 was still due him, as reflected by an itemized statement filed with the complaint.

In his answer and cross-complaint, as amended, Cantrell conceded that Moore was in charge of the airfield that he (Cantrell) held through lease, but asserted a verbal contract with an aviator named Van Brooks for

dusting and spraying. In consequence of Van Brooks' operations $5,341.55 was earned in 1951. Other claims advanced by Cantrell resulted in a net demand of $7,-080.08.

The court's findings were that Cantrell owed Moore $4,286.52, with interest at 6% from Oct. 3, 1952, for which judgment was rendered. The correctness of this finding is appealed from.

Appellee insists that the testimony is not properly before the court and urges that the bill of exceptions be disregarded.

All of the evidence was oral. The caption shows an order that the reporter take such testimony, transcribe it, and when so transcribed it should be "filed as depositions in said cause."

Section 3 of Act 139 of 1951 deals with evidence introduced orally in open court. Unless interested parties waive the requirement, "a complete record of the proceedings shall be made by the official court reporter or other reporter duly designated by the court, and upon the request of either party, or the chancellor, said record shall be transcribed, certified by the reporter as true and correct, and filed with the clerk of the court in which said proceedings were had. . . ."

Section 4 directs the clerk to give immediate notice "of the filing of the transcribed and certified record to the chancellor and counsel for the respective parties. The chancellor may, upon reasonable notice to counsel for all parties, approve and sign the record, or he may refer the record to counsel for their approval. In the event counsel cannot agree, the matter shall be presented to the chancellor, wherever found, who shall approve all or a part of the record, making such corrections therein as may be appropriate, all within the time limited for appeal. 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."

In the case at bar trial was had August 15th and the decree entered Oct. 3. The appeal was lodged here Jan-

uary 14th, 1953, and was, therefore, well within the time limit. But the only verification is the reporter's certificate and the clerk's endorsement. It has been held that this is not sufficient. Even before Act 139 became effective its salient purposes were given effect. In *Elvins* v. *Morrow,* 204 Ark. 456, 162 S. W. 2d 892, the necessity for verification of testimony was emphasized:—"The trial court (except as to a by-standers' bill of exceptions) is the final authority, and approval by the judge of what purports to be transcribed testimony is imperative unless brought into the decree or judgment, or unless the parties are in agreement. . . . The next inquiry is, What is meant by the expression found in § 1493 of Pope's Digest that a stenographer's transcription of oral testimony shall be filed with the clerk 'and treated as depositions taken in the regular manner?' Was it intended thereby to substitute a stenographer's certificate for the judge's approval of a bill of exceptions? We do not think so."

Act 139 has been construed on several occasions. *Bolls* v. *Craig,* 220 Ark. 880, 251 S. W. 2d 482, amended opinion on rehearing, p. 886; *Meadows* v. *Costoff,* 221 Ark. 273, 252 S. W. 2d 825; *Townson* v. *Townson,* 221 Ark. 610, 254 S. W. 2d 952. In the Meadows-Costoff case it was said that the clear purpose of § 3 was to definitely fix a uniform time for filing the bill of exceptions in chancery cases. This language was followed by a quotation from Act 139, "The chancellor may . . . approve and sign the record . . ." The opinion adds, "—meaning, of course, the record filed in accordance with § 3." Finally, there is this statement: "It is evident that the purpose of this Act No. 139 was to allow the chancellor to approve any bill of exceptions filed . . ."

In the Townson case reference to Act 139 is coupled with the declaration that ". . . it was essential that the bill of exceptions be approved within the time allowed."

We think the effect of these decisions is that in chancery cases the bill of exceptions must be approved by the

chancellor. Otherwise the testimony is not a bill of exceptions.

In order that the oversight in this case may not be charged to counsel as the contributing cause of the appellant's failure to prevail, it is only fair to say that a majority of the judges think the case would have to be affirmed on its merits.

Affirmed.

MOFFATT *v.* WYMAN.

5-109 258 S. W. 2d 533

Opinion delivered June 1, 1953.

Rehearing denied June 29, 1953.

A. James Linder, for appellant.

Etheridge & Sawyer, for appellee.

MINOR W. MILLWEE, Justice. This suit was instituted by appellees, L. A. Wyman and wife, against the appellant, E. W. Moffatt, to have a warranty deed and contract to repurchase declared to be a mortgage and to permit a redemption therefrom. The parties were formerly neighbors residing in the Milo community in

Ashley County. In 1950 appellees' 40-acre homestead was about to be sold in satisfaction of a foreclosure judgment in favor of R. L. Craig. Appellees sought a loan from appellant to pay off the foreclosure judgment after the appellant had volunteered to assist appellees in saving their homestead.

After considerable negotiations between the parties the appellees on March 28, 1950, executed a warranty deed conveying the land to appellant. On the same date Appellee L. A. Wyman and the appellant entered into a written contract in which the appellant agreed to sell the land to Wyman on or before December 1, 1950, for $1,615 with the right of possession retained by Wyman until said date. It was also provided that time was the essence of the contract; that Wyman must exercise the right to repurchase on or before December 1, 1950; and that appellant should insure the improvements on the land at the expense of Wyman and that any payment for losses under the policy should be credited on the payment of the repurchase price.

Appellees had not paid the repurchase price on December 1, 1950. There is a decided conflict in the evidence as to whether the parties, on or before said date, agreed to an extension of time of payment of the repurchase price and also as to whether appellees offered and the appellant refused payment within the extended time. The evidence on behalf of appellees was to the effect that the parties entered into an oral agreement to extend the option to repurchase by payment to appellant of $10 per week and that appellant refused to accept payment of the repurchase price within the extended period and insisted upon a forfeiture of the option to repurchase.

Appellant testified that no such extension agreement was made and that the nine weekly payments admittedly made by appellees represented payments as rent and were so acknowledged by appellees. A combination home and store building on the lands was destroyed by fire in May, 1951, and the appellant collected $1,000 upon an insurance policy which he had procured under the contract.

The chancellor held that the evidence sufficiently established a parol extension of the time for payment of the repurchase price under the contract and a waiver by the appellant of his right to insist upon a forfeiture for non-payment on or before December 1, 1950. A decree was entered directing specific performance of the contract to repurchase upon payment by appellees of $629.21 which the court found due the appellant after all credits including the $1,000 insurance payment. Appellees paid the amount fixed into the registry of the court and this appeal followed.

It should be noted that while appellees based their right to relief upon the theory that the warranty deed and repurchase contract constituted a mortgage, the chancellor treated the suit as one for specific performance of the contract to repurchase. The court's finding as to the amount required to redeem the land is fully sustained by the evidence whether the suit is treated as one to redeem from a mortgage or one for the specific performance of the repurchase agreement. The chancellor concluded that even if the transaction was not intended as a mortgage, the appellant, by entering into the extension agreement and accepting weekly payments thereunder after some of such payments were delinquent, waived his right to insist on a forfeiture upon the failure of appellees to pay the repurchase price by December 1, 1950.

We have held in many cases, including those where the parties have by contract provided that time of payment shall be of the essence of the contract, that the right to insist on a forfeiture by failing to pay within the time may be waived by express agreement or the acts and conduct of the party who has the right to insist on the forfeiture. In *American Mortgage Co.* v. *Williams,* 103 Ark. 484, 145 S. W. 234, the court said: "The doctrine has been well settled in equity that the breach of an agreement sufficient to cause a forfeiture may be waived by the other party by his acts and conduct, or may be acquiesced in by him so that he will be precluded from enforcing the forfeiture. Mr. Pomeroy

in his work on Specific Performance of Contracts, § 394, says: 'Whenever time is made essential, either by the nature of the subject-matter and object of the agreement or by express stipulation or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the one who is entitled to insist upon punctual performance by the other or else that the agreement be ended—may waive his right to the benefit of any objection which he might raise to the performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with the purpose on his part to regard the contract as still subsisting and not ended by the other party's default.' This court has approved this principle from almost its earliest history, and has steadily adhered to it. *Atkins* v. *Rison,* 25 Ark. 138; *Banks* v. *Bowman,* 83 Ark. 524, 104 S. W. 209; *Braddock* v. *England,* 87 Ark. 393, 112 S. W. 883; *Turpin* v. *Beach,* 88 Ark. 604, 115 S. W. 404; *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989; *Three States Lumber Co.* v. *Bowen,* 95 Ark. 529, 129 S. W. 799."

In *Friar* v. *Baldridge, supra,* the court said: "Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that the failure to promptly pay will work a forfeiture. *Ish* v. *Morgan,* 48 Ark. 413, 3 S. W. 440; *Quertermous* v. *Hatfield,* 54 Ark. 16, 14 S. W. 1096; *Block* v. *Smith,* 61 Ark. 266, 32 S. W. 1070. But the final effect of such an agreement will depend on the actual intention of the parties, as evinced by their acts and conduct; and such a breach of the contract as would work a forfeiture may be waived or acquiesced in. The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is the evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement, in order to fully determine their true intent. It is a well-settled principle that equity abhors a forfeiture, and that it will relieve against a

forfeiture when the same has either expressly or by conduct been waived."

As previously indicated, there is a sharp dispute in the evidence on the issue of waiver as well as the question of whether the parties entered into an agreement to extend the time of payment under the repurchase contract. It would serve no useful purpose to detail this conflicting testimony. After hearing and observing the witnesses the chancellor made exhaustive findings in which he determined that the evidence preponderated in appellees' favor on both issues. After careful consideration of the testimony we are unable to say that the chancellor's findings are erroneous.

Affirmed.

YOCUM *v.* HOLMES.

5-102 258 S. W. 2d 535

Opinion delivered June 1, 1953.

Rehearing denied June 29, 1953.

Barber, Henry & Thurman and *Tom Gentry,* for appellant.

John E. Hooker and *Conley F. Byrd,* for appellee.

ROBINSON, J. Appellee Hazel Lee Holmes, alleged widow of Thomas T. Holmes, and administratrix of his estate, recovered a judgment in the sum of $15,000 for the benefit of the infant son of the deceased Holmes who was killed when struck by an automobile operated by appellant Alford M. Yocum.

In the complaint the administratrix asked for judgment in the sum of $10,000 to compensate her personally for the loss of her husband and $5,000 for her mental anguish; also $124,654.40 for the benefit of the estate and $5,000 for the benefit of the estate for conscious pain and suffering of the deceased, and $500 for medical, hospital, and funeral expenses. The court directed a verdict for the defendant so far as the rights of the alleged widow were concerned, on the ground that there was no showing that she was ever legally married to the deceased. The jury returned a verdict for the defendant on the issue of pain and suffering on the part of the

deceased, and a verdict for the benefit of Thomas T. Holmes, Jr., son of the deceased, in the sum of $15,000.

On the morning of March 18, 1952, Thomas T. Holmes left his residence on West 16th Street in Pine Bluff, Jefferson County, at about 5:15 A. M. to go to work. It was his custom to walk up the railroad right-of-way to Sixth Avenue and thence to the Implement Truck & Supply Company where he would catch a ride to the place where he worked. On the morning in question it was raining and Holmes was wearing black rubberized pants of a rainsuit and a dark leather jacket. There was no sidewalk; he was walking west on his right-hand side of the street. The appellant, Alford M. Yocum, was also on his way to work in his automobile, travelling west on Sixth Avenue on his proper side of the street. His automobile struck Holmes, who died a short time thereafter as a result of the injuries received, which consisted of a badly broken left leg and severe brain injuries. The automobile struck him with such force that he was knocked up onto the hood of the car, making a large dent therein, across the hood breaking off the radio aerial, and thence to the ground. Appellant earnestly contends there is no evidence of negligence on his part, and that Holmes was guilty of negligence in walking in the street in the nighttime during a hard rain while wearing a black rainsuit, and in failing to see the appellant's car when the headlights were burning brightly.

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. It cannot be said as a matter of law that it is negligence for one to walk in the street where there is no sidewalk, or to go to work when it is very dark, or to wear a black rainsuit when it is raining; nor can we say as a matter of law that all of these things considered together constitute negligence. It is not known definitely whether Holmes saw Yocum's car approaching; but in any event it was a question for the jury to say whether Holmes was negligent in failing

to get out of the street to avoid being struck by the car. Apparently Holmes and the automobile were going in the same direction; the jury could have found that Holmes did see the reflection of the lights and knew that the car was approaching, but without negligence on his part assumed that the driver of the car also saw him and would pass to his left. Whether Holmes was guilty of contributory negligence in the circumstances was a jury question.

It was also a jury question as to whether Yocum, the driver of the car, was guilty of negligence. He testified he did not see Holmes until the instant the car struck him, although the lights on his automobile were burning.

B. C. West, a city patrolman, answered a call to the scene and arrived about 10 minutes later. He testified that it was raining but he could see in the beams of the headlights of his car a distance of about half a block. Yocum makes no contention that he saw Holmes before the instant of striking him; but says that in the circumstances he was not negligent.

Jack Gragg lives about 100 feet from the place where Holmes was injured, and he heard the impact. Dr. E. Frank Reed testified that Holmes' injuries consisted of a severe contusion on the left side of his head and a compound fracture of the bones of the lower left leg; about 4 inches of bone protruded from the wound. In his opinion the force of the object which struck Holmes came from the rear.

The evidence when viewed in the light most favorable to the appellee justifies a jury finding that Yocum, the driver of the automobile, negligently failed to keep a proper lookout for other users of the street.

In *Breashears* v. *Arnett,* 144 Ark. 196, 222 S. W. 28, the appellee Arnett had come out of a picture show and crossed the street at that point; and when about 10 feet from the curb on the opposite side of the street, was struck by an automobile driven by Breashears. There was some testimony to the effect that the automobile was

being driven at a greater rate of speed than was ordinarily the custom upon the roads or streets. Appellant testified he was going about 10 miles an hour. Mr. Justice WOOD, speaking for the Court, said the issues of negligence and contributory negligence are questions of fact for the jury.

In the case of *Adams* v. *Browning,* 195 Ark. 1040, 115 S. W. 2d 868, a Laura Adams, administratrix of the estate of Richard Franklin, filed suit against Browning for the negligent killing of Franklin. It developed that Browning's automobile was travelling rapidly and Franklin was walking in the same direction with his back to the car, and apparently did not see it approaching until about the time it struck him. At the close of plaintiff's testimony the defendant requested and the court gave to the jury an instruction to find for the defendant. The cause was reversed for the trial court's error in directing a verdict, and this Court said: "Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege but their right to judge of the sufficiency of the evidence. The credibility of the witnesses, the weight of their testimony, and its tendency, are matters peculiarly within the province of the jury. If there is any substantial evidence it is the duty of the court to submit the matter to the jury."

In *Northwestern Casualty & Surety Co.* v. *Rose,* 185 Ark. 263, 46 S. W. 2d 796, an issue was involved as to the negligence of a Mr. Rose in driving an automobile into and upon a Mr. Bonner. It was a rainy evening in November; it was dark but the street lights had not yet been turned on. Rose had passed an intersection about four car lengths "when all at once a man loomed up in front." In affirming a judgment based on the negligence of Rose, this Court said: "The jury might have inferred that, under the conditions then existing, the lights [on the automobile] were burning, and, if so, that they cast light a sufficient distance ahead to enable Bonner's presence on the street to have been discovered in time for

the driver of the car to stop the same." The Court further said: "It is the well-settled rule that the duty rests upon the driver of an automobile to exercise ordinary care in its operation, and in the exercise of such care it is his duty to keep a constant lookout to avoid injury to others. This is particularly incumbent upon him when driving on the street of a city in order to avoid injury to pedestrians, as he should anticipate their presence upon such streets and their equal right to their use. *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. 2d 391; *Byrd* v. *Galbraith,* 172 Ark. 219, 288 S. W. 717; *Smith A. T. Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. 2d 1052; *Duckworth* v. *Stevens,* 182 Ark. 161, 30 S. W. 2d 840; *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. 2d 1110."

In the case at bar, in addition to the testimony of Officer West as to being able to see one-half block in the beam of the headlights of an automobile, H. C. Clanton, who arrived at the scene immediately after Holmes was injured, testified that as soon as his lights dipped over the railroad he saw Yocum running back to a dark object in the street (the injured Holmes). Witness was probably one-fourth or one-half block away at the time. The inference deducible from this testimony is that if the witness could see Yocum running back to the dark object in the street, Yocum should have seen Holmes in the first instance. There was plainly a question for the jury.

Hazel Lee Holmes testified that she and the deceased Thomas T. Holmes were married in Camden, Arkansas, in April, 1950, and lived together as man and wife from that time until his death March 18, 1952; that Thomas T. Holmes, Jr., was born October 30, 1952, following his father's death in March of that year; that prior to her marriage to Holmes she had been married to Fletcher Matson Monday, and on cross-examination said she was divorced from Monday in Jefferson County about four years previously.

In an attempt to show that Hazel Lee Holmes was not the legal wife of Thomas T. Holmes, appellant produced as a witness M. V. Mead, Chancery Clerk of Jef-

ferson County, who testified that he had searched the court records covering the past ten years and could find no case where Hazel Lee Walker Monday had been granted a divorce from Fletcher Matson Monday; but did find a case where Daisy Mae Monday was granted a divorce from Fletcher M. Monday on May 5, 1951, which was subsequent to appellee's marriage to Holmes. The Court instructed the jury that Hazel Lee Holmes was not entitled to any damages because it had been proved she was not lawfully married to the deceased at the time of his death. The issue of whether the court erred in so instructing the jury is not raised by cross-appeal.

The trial court held that the child of a marriage, void because the wife had another living husband, was legitimate and entitled to share in his father's estate. Appellant concedes that this ruling of the court is correct as a general statement of law, but contends that there is no showing that the second marriage was solemnized under the form and in the manner prescribed by law; and for that reason the child of the second marriage is not entitled to inherit from his father. Incidentally, there was no evidence of Hazel's marriage to Monday except her testimony.

The appellee testified that she married Holmes in April, 1950, in Camden, Arkansas; her testimony on that point was sufficient to make it a jury question as to whether a marriage took place. In 35 *Am. Jur.* 318 it is said: "The rule that the testimony of eyewitnesses to a marriage ceremony is competent to prove the marriage without the production of the certificate of marriage or accounting for its nonproduction is applied in numerous cases holding that the testimony of either of the parties to the marriage is admissible to prove the marriage," citing as authority a long list of cases from numerous states.

Mr. Wigmore says: "*Celebrant's Certificate or Register Not Preferred to Oral Eye-Witness.* Some heresies die a hard death. With a phoenix-like persistence they arise again and again, after repeated judi-

cial pronouncements which ought to have been final, to plague each new generation and to call for fresh incinerations. One of these is the supposition that, as between possible sorts of eye-witness evidence, the *celebrant's certificate* or *register-entry* is preferred to the *oral testimony* of celebrant, clerk, or bystander . . . But there is no such rule. The marriage-certificate was at common law probably not even admissible . . . and it has always been recognized that both certificate and register were of inferior value, inasmuch as further evidence of the identity of the parties named may be required:" *Wigmore on Evidence,* 3d Ed., § 2088.

Appellee testified she married Holmes in Camden, Arkansas, in April, 1950, and lived with him as man and wife to the day of his death some two years later. Where the marriage is established by evidence, it is presumed to be regular and valid and the burden of proof is upon the party attacking it. *Royal* v. *Mosaic Templars of America,* 143 Ark. 596, 219 S. W. 752.

Even if she were not divorced from Monday at the time of her alleged marriage to Holmes, if her second marriage was in accordance with the laws of the state, a child of that marriage is an heir of his father. *Bruno* v. *Bruno,* 221 Ark. 759, 256 S. W. 2d 341. See, also, *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759, and *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412.

Appellant contends that the case at bar is controlled by *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189, but there is a distinction between the cases. The Martin case was from the Chancery Court and tried *de novo* in this Court, where it was held that the great weight of the evidence proved John Martin was never married to Lena Watkins; whereas in the present case the uncontradicted evidence is that the mother and father of Thomas T. Holmes, Jr., were married in Camden in April, 1950. This being true, the fact that the mother may not have been divorced from her former husband would not be material insofar as the legitimacy of the child is concerned. Ark. Stat. § 61-104 provides: "The

issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

Next, appellant contends that under the pleadings in the case no damages were asked for Thomas T. Holmes, Jr. The complaint alleges damages of $124,654.40 and there was a prayer for judgment in that sum. In addition to the item mentioned, it was alleged that the widow had been damaged in the sum of $10,000 by the death of her husband and $5,000 for her mental anguish; $5,000 for the estate for the conscious pain and suffering of the intestate, and $500 for medical, hospital, and funeral expenses. If the $124,654.40 item were removed from the pleadings, still there would be an allegation of damages and prayer for judgment for everything that the estate could possibly be entitled to recover. Therefore the $124,654.40 item can be construed as a sum asked for the benefit of Thomas T. Holmes, Jr. Otherwise there is no explanation for that allegation of damages. If the trial court had not considered this allegation in the complaint sufficient so far as the minor son was concerned, the complaint could have been treated as amended.

Ark. Stat. § 27-1160 provides: "The Court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case . . . the Court must, in every stage of an action, disregard any error or difficulty in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Affirmed.

Justices George Rose Smith and Ward dissent.

5-22 258 S. W. 2d 540

Opinion delivered June 1, 1953.

Rehearing denied June 29, 1953.

[redacted]

Pat Robinson and *Graves & Graves,* for appellant.

Bernard Whetstone, for appellee.

ED. F. MCFADDIN, Justice. This appeal stems from a traffic mishap, which occurred when a car in which appellee, Mrs. Matlock, was riding was involved in a collision with a gravel truck driven by Morton, claimed to be the servant of the defendants, Lambert and Barr, the appellants here. We will refer to the parties as they were styled in the Trial Court.

The defendants, Lambert and Barr, were under contract to have gravel transported from a point north of

Lewisville, in Lafayette County, to an oil field west of Lewisville. The trucks, loaded with gravel, traveled West on U. S. Highway 82, and then turned off the highway into a dirt road which led to the oil field. The collision occurred when one of the gravel trucks attempted to make the left turn, and collided with the car in which Mrs. Matlock was riding as a passenger. The Jury awarded Mrs. Matlock $10,000 damages, and awarded Mr. Matlock $2,500 for his wife's medical bills and for loss of services of his wife. The defendants have appealed, urging reversal on the grounds now to be discussed:

I. *Independent Contractor.* The defendants claim that they were entitled to an instructed verdict on the theory that there is no evidence that Morton, the driver of the gravel truck, was the servant or agent of the defendants, Lambert and Barr.

The evidence showed that Lambert and Barr purchased the gravel in the pit and had their own equipment, foreman and employees loading the ten or twelve trucks engaged in hauling the gravel; that when the trucks reached the oil field, Lambert and Barr's men directed the truck drivers when and how to dump and spread the gravel; that the truck in question was owned by Johnny Atkins and driven by Curtis Morton; that Atkins paid Morton by the day for driving the truck, and that Lambert and Barr paid Atkins by the yard-mile for the gravel hauled. Thus, it was the defendants' contention that Atkins was an independent contractor engaged in hauling the gravel, and that Morton was the servant of Atkins.

On the other hand, it was testified that Atkins told Morton to do whatever Lambert and Barr instructed; that if Morton had not obeyed Lambert and Barr's instructions, he would have been sent off the job; and that Morton was subject to Lambert and Barr's orders. The foreman of Lambert and Barr testified that he could have sent the Atkins truck off the job if he so desired. One of the tests used to determine whether the relationship, in a case such as this, is master-servant or independent contractor is the control of the workman, the right to direct his work, and the right to discharge him from the work.

In *Hobbs-Western Co.* v. *Carmical,* 192 Ark. 59, 91 S. W. 2d 605, we quoted from earlier cases:

" 'The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer.' "

In *Delamar & Allison* v. *Ward,* 184 Ark. 82, 41 S. W. 2d 760, the factual situation was, in salient essentials, similar to that in the case at bar; and we there said:

"Delamar & Allison testified that they did not in any case employ the driver of any truck, and that these drivers were employed and paid by the truck owners, and that they had no control over any of the drivers and were not concerned as to the manner in which they did their work, and were interested only in the result thereof. But this was the principal question of fact in the case, and we think the testimony was sufficient to support the finding that Delamar & Allison employed the trucks, and none were engaged except those employed by them, and the right to discharge necessarily implied, and that they had the right to direct and control the drivers of the trucks and had exercised that authority, although but few directions were required.

"We conclude therefore that the testimony warranted the finding that there were not three hundred independent contractors engaged in hauling the gravel, but that all the drivers were employees of Delamar & Allison, and that the relation of master and servant existed between Westmoreland and the other truck drivers and Delamar & Allison. *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. 2d 320; and *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167."

In *Ice Service Co.* v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 411, we said:

"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 re-

served, it became a question for the jury whether or not the relation was that of master and servant. *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680; *Harkins* v. *National Handle Co.,* 159 Ark. 15, 250 S. W. 900."

We therefore conclude that the Trial Court was correct in submitting the independent contractor question to the Jury.

II. *Negligence.* The defendants also claim that they were entitled to an instructed verdict on the theory that there was no proof of any negligence done or suffered by the driver of the gravel truck. But on this point, just as on the preceding one, a question was made for the Jury. Mrs. Matlock was riding in a car being driven by Mr. Flournoy, who was driving west on U. S. Highway 82 from Lewisville to Texarkana. Flournoy was behind the Morton gravel truck and gave a horn signal, and was in the act of passing the truck, when Morton turned to the left to leave the highway to the oil field road, and ran his truck into the right side of the Flournoy car. Witnesses for the plaintiff testified that Flournoy gave the horn signal, indicating his intention to pass the truck; that Morton *gave no signal of any kind* and turned to the left without slackening his speed. The foregoing evidence, even though strongly denied by the defendants, was sufficient to take the case to the Jury under § 75-618, Ark. Stats., and the cases of *Mo. Pac. Trans. Co.* v. *Sacker,* 200 Ark. 92, 138 S. W. 2d 371, and *Barboro & Co.* v. *James,* 205 Ark. 52, 168 S. W. 2d 202.

III. *Instructions.* Another question on this appeal is the language found in Paragraph 4 of instruction No. V.[1] In Paragraphs 2 and 3 of said instruction No. V, the

[1] The entire Instruction No. V, with the paragraphs duly numbered, is as follows:

"Instruction No. V.

"1. If you find from a preponderance of the evidence that Morton, the driver of the truck, was a servant of Lambert & Barr, then you are told that in passing upon the question of whether or not he was negligent, you may take into consideration the following:

"2. The laws of the State of Arkansas provide:

'No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner

Court instructed the Jury in the language of Section 75-618 Ark. Stats., and then continued in paragraph 4 of the same instruction with this language:

"The signals herein required by the Laws of Arkansas shall be given either by means of the hand and arm or by a signal lamp or signal device of a type approved by the State Highway Commission, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle, *and the distance from the center of the steering wheel to the outer edge of the truck exceeded 24 inches,* then the said signal must be given by such a lamp or device. In the event the signal is given by hand and arm, the signal for a left turn is the horizontal extension of the hand and arm." (Italics our own.)

It will be observed (a) that paragraph 4 embodies verbatim all of § 75-619, Ark. Stats., as found in the 1947 Permanent Volume, unaffected by Act No. 151 of 1951; and (b) that the italicized language in paragraph 4 of the instruction, while not the full text of Act No. 151 of 1951, is nevertheless garnered from the 1951 Act, which used the 24-inch figure, just as in the italicized language. This Act No. 151 of 1951 was held unconstitutional in

hereinafter provided in the event any other vehicle may be affected by any such movement.'

"3. The law further provides: 'A signal of intention to turn right or left shall be given continuously during not less than the last 100 feet travelled by the vehicle before turning.'

"4. The signals herein required by the Laws of Arkansas shall be given either by means of the hand and arm or by a signal lamp or signal device of a type approved by the State Highway Commission, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle, *and the distance from the center of the steering wheel to the outer edge of the truck exceeded 24 inches,* then the said signal must be given by such lamp or device. In the event the signal is given by hand and arm, the signal for a left turn is the horizontal extension of the hand and arm.

"5. So, you are instructed that if you find from a preponderance of the evidence that the driver of the truck, Morton, was a servant of the defendant, Lambert & Barr, and that he violated any or all of the above provisions of the law, then you are instructed that this is evidence of negligence which you may take into consideration in arriving at a determination as to whether or not the driver, Morton, was negligent."

the case of *State* v. *Bryant,* 219 Ark. 313, 241 S. W. 2d 473.[2]

Defendants claim that the italicized language in paragraph 4 clearly shows that the instruction was based on said Act No. 151; and so defendants insist that the instruction was erroneous and that the cause must be reversed. The defendants objected generally to the instruction; and then objected specially on two points not germane to the present argument:[3] so, with only a general objection for foundation, the defendants are now urging that the judgment should be reversed because of the italicized language in paragraph 4 of the instruction.

The addition of the italicized language—"and the distance from the center of the steering wheel to the outer edge of the truck exceeded 24 inches"—really made the instruction more favorable to the defendants than the instruction would have been without such italicized language. In the paragraph 4, the Jury was told that one driving a truck was required to use a signal device when two conditions concurred: (a) when ". . . a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle . . ."; *AND* (b) when ". . . the distance from the center of the steering wheel to the outer edge of the truck exceeded 24 inches." These two conditions were joined by the conjunctive "*AND*"; and thus the Court told the Jury that a signal device would only be required when *both* conditions concurred. The adding of the condition (b)—and that was the italicized language in

[2] *State* v. *Bryant* was decided July 9, 1951; and the present case was tried on April 28, 1952. It is only fair to the Trial Court to state that nowhere in the transcript of this case is there any reference to the case of *State* v. *Bryant.*

[3] The only objection that the defendants made to this instruction is as follows:

"The defendants object generally to the giving of Court's Instruction No. V and object specifically to the giving of said instruction for the reason that this instruction fails to take into consideration the superior right of the road of the front car, in this instance driven by Curtis Morton, and also for the reason that the instruction states that the violation of the traffic statutes is evidence of negligence when in fact it is only evidence the jury may consider along with the other evidence in the case in determining whether or not the driver was negligent."

paragraph 4—made the instruction more favorable to the defendants than the law required; and a party cannot complain of an instruction more favorable to him than is justified.[4]

Conclusion. We have examined the other assignments urged by the defendants and find none to possess merit.

Affirmed.

GRIFFIN SMITH, C. J., dissents.

MITCHELL *v.* MALVERN LUMBER COMPANY.

5-108 258 S. W. 2d 549

Opinion delivered June 8, 1953.

W. H. McClellan, for appellant.

W. H. Glover and *Paul B. Young,* for appellee.

ED. F. MCFADDIN, Justice. This is a suit brought by appellants seeking to have certain instruments cancelled, and to recover property, the possession of which has not been held by appellants since 1931.

In 1904, Samuel Mitchell died intestate, the owner of lands in Hot Spring County, Arkansas. He was survived by many heirs at law. In 1927, the owners of some of the interests in his estate instituted partition proceedings for the lands. The case reached this Court in 1930 in *Mitchell* v. *Fowler,* 181 Ark. 857, 28 S. W. 2d 66. After we remanded the cause, there were other proceedings in

[4] *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458, 92 S. W. 249, and other cases collected in West's Ark. Digest, "Appeal and Error," Key No. 1033 (5).

the Chancery Court, the validity of which we need not determine. At all events, in 1931, Kight received a Commissioner's Deed to the lands here involved, which are a part of the Samuel Mitchell lands. In 1934, Kight executed a warranty deed to appellee, Malvern Lumber Company, definitely describing the lands in the present controversy.

On June 25, 1952, appellants, claiming as heirs of Samuel Mitchell, filed the present suit against Malvern Lumber Company (hereinafter called "Malvern"), alleging the invalidity of all the proceedings involving appellants' interests, and also alleging fraud to have been practiced by the attorney—now deceased—who obtained a decree fixing his lien for services rendered in the partition proceedings, and which decree resulted in the said Commissioner's Deed to Kight. Malvern denied the invalidity of the Commissioner's Deed, and also pleaded limitations and laches. Trial resulted in a decree for Malvern, which is challenged by this appeal.

With a variety of defenses suggested by the appellee, we select laches as the one on which to rest the affirmance. The uncontradicted evidence established:

(a) that even though the lands were wild and unimproved, nevertheless Malvern has all the time since 1934 paid all taxes on the lands under a deed duly of record and definitely describing the lands, and Malvern has all the time had the lines around the lands painted and blazed, and two of its employees have regularly checked the lands at least twice each month to see that there was no trespassing;

(b) that some of the plaintiffs have resided within one mile of the lands and have frequently passed by the said lands;

(c) that McKinley Mitchell—the moving spirit in the present litigation—learned in 1942 of the sale of the lands to Malvern and of Malvern's possession of the lands, and offered in that year to "redeem" the lands;

(d) that after learning of Malvern's deed and possession in 1942, there was a delay until 1952 before instituting the present suit;

(e) that in 1932 the lands had a value of $3.00 an acre, and in 1952 the lands had a value of $75.00 an acre; and

(f) that the attorney who caused the lands to be sold at the Commissioner's sale in 1931 (against which appellants allege fraud), and who would be able to give all the facts, died in January, 1951, and the present suit was not filed until June, 1952. Thus, Malvern is prevented from having his testimony.

In the light of the foregoing facts, the Trial Court was correct in holding that the appellants are barred by laches. Some of our cases exemplifying and applying laches to situations similar to those in the case at bar are: *Grimes* v. *Carroll,* 217 Ark. 210, 229 S. W. 2d 668; *Daniels* v. *Moore,* 197 Ark. 727, 125 S. W. 2d 456; and *Burbridge* v. *Wilson,* 99 Ark. 455, 138 S. W. 880.

The decree is affirmed.

STUCKER *v.* HARTFORD ACCIDENT & INDEMNITY COMPANY.

5-114 258 S. W. 2d 544

Opinion delivered June 8, 1953.

Rehearing denied June 29, 1953.

Dinning & Dinning, for appellant.

O. C. Brewer and *A. M. Coates,* for appellee.

ROBINSON, Justice. Appellant Stucker filed suit on a policy of insurance covering the life of a horse. This is the second appeal. 220 Ark. 475, 248 S. W. 2d 383. On the 24th day of November, 1950, for the purchase price of $50 appellant bought the horse in question, a four-year old named "Charlie." About one week later, December 1, 1950, appellant obtained the policy which insured the horse for $1,000. On May 14, 1951, appellant claims that at about 3:00 p. m. he was cleaning the stall and the horse was in an adjoining paddock; that another horse neighed and scared Charlie causing him to jump into the paddock fence, thereby injuring a muscle in his hip to such an extent that he was destroyed by veterinarian injecting strychnine into his veins on the 16th day of July, 1951.

When the case was here the first time, the cause was reversed because the court had permitted the insurance company to interpose affirmative defenses when such defenses had not been alleged in the answer. After reversal, the trial court permitted the defendant insurance company to amend its answer and allege among other things a policy provision as follows: "This company shall not be liable for the death of any animal caused by the voluntary destruction of such animal or animals for any reason or purpose whatsoever, unless such destruction shall have occurred within six hours after such animal or animals are injured, and then only where such animal or animals were injured and destroyed on a public highway or a public race course, during a racing meeting, or at any other public event, gathering or place, during a public gathering, and a certificate from a licensed veterinarian, certifying that the destruction of such animal was immediately necessary because of its

having been accidentally crippled or maimed, shall have been obtained prior to the destruction of such animal or animals, or where this company shall consent in writing to such destruction, signed by its general agent at its Live Stock Department office at Chicago, Illinois."

At the trial of the case from which comes this appeal at the completion of plaintiff's evidence the court directed a verdict for the defendant insurance company because of the above-quoted provision in the policy, the uncontradicted evidence being that the insurance company refused to give consent to the destruction of the horse. Appellant contends that the trial court erred in permitting the answer to be amended for the second trial. This point is controlled by *Sanders* v. *Walden,* 214 Ark. 523, 217 S. W. 2d 357, 9 A. L. R. 2d 1040, holding such an amendment is permissible.

Next, appellant maintains that appellee waived the provisions of the policy it now relies on by having put the policyholder to the trouble of furnishing proof of loss when the insurance company had the information upon which it later denied liability. The horse was not injured and destroyed under circumstances that would render the company liable on the policy according to its terms unless the insurance company gave its consent to a voluntary destruction of the animal. This the company refused to do and made known such refusal before the horse was destroyed. In the circumstances of the injury to the horse, such animal not having been "injured and destroyed on a public highway or a public race course, during a racing meeting, or at any other public event, gathering, or place, during a public gathering," the insurance company was at no time liable under the terms of the policy. It could have become liable by giving its consent to the destruction; but after getting the information about the happening of the injury, it refused to give such consent. The company had a right to ask for all available information so it could intelligently exercise its discretion in giving or withholding consent to destroy the animal.

Such cases as *German Insurance Co.* v. *Gibson,* 53 Ark. 494, 14 S. W. 672, to the effect that an insurance company waives a forfeiture for misrepresentation where it asks for and accepts proof of loss subsequent to the time it learned of such misrepresentation are not in point. Here the company had the discretion of consenting to the destruction of the animal or refusing such consent, and it did nothing to lead the policyholder to believe that such consent would be given.

Affirmed.

ALTSHULER *v.* ALTSHULER.

5-130 258 S. W. 2d 545

Opinion delivered June 8, 1953.

Eichenbaum, Walther, Scott & Miller, for appellant.

Richard W. Hobbs, for appellee.

WARD, Justice. This appeal involves the question of allowances for the support of a twelve year old boy. A

proper perspective of this question requires a brief history of the facts and proceedings leading up to the present litigation.

The parties hereto were married and lived in New York City where they have continued to live at all times except for a short time when appellee was a resident of this state, as will be later explained. A son, Mortimer, Jr., was born to this union about the year 1940.

In 1944 the parties separated and by order of a proper court appellant was to pay $70 a week for the support of appellee and the four year old son. Either by court order or agreement the mother, appellee, was to have custody of Mortimer, Jr., but the father was to have visitation rights amounting in the aggregate to approximately 80 days each year.

In 1945 appellee came to Arkansas, established a residence and secured a decree of divorce. In this action the court gave appellee custody of the son apparently on the terms mentioned before and ordered appellant to pay $200 per month for the support of appellee and Mortimer, Jr. These payments were made by appellant for four or five years.

In 1949 appellant remarried and now has a child by that marriage. Soon after appellant's marriage appellee applied to the Domestic Relations Court in New York City for additional support money for the son and on January 30, 1951, an allowance of $115 per month was granted. It appears that the Court was aware of the $200 allowance made here but naturally could not tell how much was for the son's support.

On February 3, 1951, appellee remarried and, for that reason, appellant refused to pay the full $200 allowance for the following month but did offer to pay the sum of $50 per month in addition, it appears, to the $115 per month allowance made by the New York Court. Appellee refused to accept the reduced payments and in April, 1951, she petitioned the original trial court here for an adjustment based solely on support for the son. In August, 1951, the trial court here reduced the

$200 allowance to $150 per month for Mortimer, Jr. This order was made with knowledge of and in addition to the $115 monthly allowance mentioned above. Following this and in December, 1951, appellant, by petition to the Domestic Relations Court in New York, obtained a reduction there of $65 in the original $115 allotment. In making the reduction the Court recognized the Arkansas allowance of $150 per month.

The reduction order of the New York Court precipitated the action from whence comes this appeal. On March 7, 1952, appellee filed a motion in the original cause in this state asking to have the $150 monthly allowance increased, and the trial court granted a $65 per month increase, or an allowance here of $215. This allowance when added to the $50 allowed by the New York court, of course, makes a total allowance of $265 for the support of Mortimer, Jr. Appellant urges a reversal of the trial court on two grounds.

Proper Forum. Appellant insists, but we do not agree, that the New York court is the proper forum, and that therefore the action in this state should have been dismissed. Much could be said in favor of such contention from the standpoint of convenience since all parties concerned live in New York, but the fact remains that the Chancery Court of this state obtained unquestioned jurisdiction of both parties and subject matter in the original divorce suit in 1945, and by proper orders has retained it ever since. In cases too numerous and well known to require citations we have held that once our Chancery Court obtains jurisdiction, as it has here, it retains jurisdiction to adjust allowances for support and in matters of custody. If the trial court in this instance had seen fit to disclaim jurisdiction and had remanded the parties to the New York courts, a different question might have been presented, but such a situation is not presented and we express no opinion in regard thereto. Our attention is called to a citation found in 14 *Am. Jur.* at page 424, § 230, which discusses the doctrine of *Forum Non Convenies.* Without quoting, it suffices to say this authority recognizes that the matter of forum, in in-

stances like the one presented here, involves "the exercise of judicial discretion" on the part of the trial judge, and we cannot say the trial judge abused his discretion in this instance.

Amount of Allowance. The only other ground for a reversal urged by appellant is that the award of $215 is excessive. We recognize, of course, that this award must be considered in connection with the New York award of $50 per month, and that appellant will have to pay a total of $265 per month for the support of his son, Mortimer, Jr., but we can not say that the decision of the Chancellor in this regard is against the weight of the evidence. Much of the essential testimony is not conflicting, and we believe a brief summary will suffice to justify our conclusion. As stated by appellant, only two things need be considered. One is the proper amount required and the other is the ability of appellant to pay.

Proper Amount. Appellee says it costs from $400 to $450 per month to adequately provide clothing, food, education, recreation and incidentals, that she has been keeping her son's money in a separate account and spending it all for his benefit, and that she has had to supplement funds for that purpose from other sources. While this sum might, on first impression, appear excessive, yet we must consider that these parties live in a large city where expenses are undoubtedly greater than in a smaller place. We should also take into consideration the manner in which they were accustomed to living, as well as the boy's age and the general increase in living expenses during the past few years. There is another circumstance which indicates appellant himself might not consider $265 excessive for his twelve year old son, for it appears he is paying $224 per month rent for an apartment in which he has an $8,000 interest and that he is paying $270 per month for a maid for his wife and a nurse for his infant child. Appellant complains that appellee is not spending all the money on Mortimer, Jr., but it seems that no such objection was made previous to this litigation. Under these facts and circumstances we think the Chancellor's judgment as to

the size of the allowance is supported by the weight of the evidence.

Appellant's Ability to Pay. In addition to what has been shown above there is other evidence which we think amply sustains the Chancellor's conclusion that appellant is financially able to pay the combined monthly allotments totaling $265. During the past eight years, according to the record, appellant has drawn as salary an average of around $23,000 per year, after payment of Federal income taxes, and he is the sole owner of the business [from which he draws his salary] which has assets of from $80,000 to $90,000. According to appellant's testimony there is a possibility his salary may not be as large hereafter as it has been previously, but that will be a matter for future adjustment by the court if his predictions prove well found. Also, to offset some reduction in income, appellant admits that he has been paying $5,000 a year for the support of his mother who died in 1952. He will, of course, not have this expense hereafter.

Affirmed.

GUYOT *v.* STATE.

4736 258 S. W. 2d 569

Opinion delivered June 8, 1953.

George D. Hester and *Ed E. Ashbaugh,* for appellant.

Tom Gentry, Attorney General and *Thorp Thomas* and *James L. Sloan,* Assistant Attorneys General, for appellee.

GRIFFIN SMITH, Chief Justice. Janet Mahirum and Noel Guyot were married July 11, 1949 and lived together until June the following year. They were divorced January 19, 1951, the proceedings having been instituted by Noel. The two became the parents of a girl, born March 30, 1950. Custody of the child was awarded to the mother. The decree directed Noel to provide $15 per month, the first payment to be made on or before February 15, 1951. The mother testified that nothing had been available since that date. Janet has been working for some time and the baby, Catherine Ann, is with her maternal grandparents, with whom the mother resides.

This appeal is from a circuit court judgment finding Noel guilty of "neglecting and refusing to provide support and maintenance for his child." Act 67, approved February 9, 1951, Ark. Stat's, § 41-204, et seq. The statute (§ 1) provides that when a man neglects or refuses to provide for the support and maintenance of his child he shall be imprisoned on the county farm for not more than one year, or fined not less than fifty nor more than one thousand dollars, or both. Section 2 makes it a felony to abandon one's wife or child and then leave the state. In view of the court's action we are not concerned with this section, although it is shown that Noel is attending the University of Cincinnati, in Ohio, where he plays ball and receives remuneration. He is spoken of by witnesses as "working his way through college." It is assumed that he will be inducted into the military forces after graduation. The divorce decree contains a provision that if this occurs the $15 payments are to be superseded by the government's allowance for a soldier's child.

By consent a circuit court jury was waived and a plea of not guilty was entered. Counsel for the defendant

thinks the Act is inapplicable in those cases where chancery court has dealt with the subject-matter and when jurisdiction has been retained, as here.

It will be conceded, of course, that chancery has power to punish contumacious conduct when the defendant is within the court's jurisdiction. But it is equally well settled that when equity has jurisdiction it may coerce recalcitrants by adjudging them in contempt for failure to comply with appropriate orders even though in a court of law the defendant may be guilty of a crime. Let us suppose that in the case at bar the chancellor had enjoined Noel from calling on his former wife, or molesting her in any manner, and let us further suppose that in disregard of this injunction he pressed his attentions and when repulsed engaged in acts of violence. It could hardly be urged that the chancellor was without power to punish for contempt, and certainly an assault would constitute a crime, either statutory or at common law. All lawyers are familiar with the rule that conduct prohibited by state action may be punished, even though a federal statute covers the same transaction and has been invoked. It has long been held that this is not double jeopardy.

Section 7 of Act 67 permits the circuit court, in lieu of the fine and jail sentence authorized by § 1, to order the defendant to pay "a certain sum periodically" for a time not to exceed one year. This payment may be to the guardian or custodian of the child.

The trial judge sought earnestly to procure from interested parties an agreement whereby the jail sentence could be dispensed with. Noel's father, Walter Guyot (seemingly upon advice of counsel) persistently refused to make any payments directly to Janet. Court adjournments were taken for the purpose of permitting conferences. Finally Guyot agreed that he would pay $15 per month to Mrs. Mahirum, the child's grandmother, and the court entered its judgment with this promise in the nature of a stipulation. But for the agreement it is quite clear that the penalty would have been more severe. Having benefited to the extent of the lesser punishment

the appellant is in no position to complain unless the law is invalid. In that event, of course, only a moral obligation would remain.

It is our view that the general assembly has authority to enact laws denouncing child abandonment and to prescribe punishment for violations, and the fact that equity retains jurisdiction to enforce its judgments and decrees does not affect the legislative power.

Noel's procurement of a divorce did not relieve him of legal responsibility for the support of his minor child.

Affirmed.

GUENTHER *v.* GUENTHER.

5-128 258 S. W. 2d 562

Opinion delivered June 8, 1953.

Jay W. Dickey and *John Harris Jones,* for appellant.

J. T. Wimberly and *Johnson & Lovett,* for appellee.

GEORGE ROSE SMITH, J. This is a family dispute involving the ownership of a tractor, a cow, and a calf. Ben Guenther, the appellee, brought this suit in replevin

to recover possession of these chattels from his son, Leroy. At the close of the plaintiff's case the defendant moved to dismiss the action upon the ground that the plaintiff's evidence showed the parties to be joint owners of the property and that therefore the plaintiff could not maintain replevin. It is the court's denial of this motion that is principally urged as error.

In passing upon the motion the trial judge was required to view the evidence most favorably to the plaintiff, and the same rule is followed on appeal. We do not think it can be said that there was no substantial evidence of the father's sole ownership of the tractor and cattle.

Ben Guenther testified that in 1945 he bought the tractor from Rosa Svesta for $1,000. He did not have a bill of sale, but there is no requirement that an executed contract for the sale of personal property be evidenced by a writing. The Guenther family farmed together until the spring of 1951, when a dispute arose and the family split into two groups. Ben referred to this as a dissolution of the partnership and stated that he "gave" Leroy a half interest in the tractor provided Leroy paid Ben $500 in the fall, or, if Leroy preferred, Ben would pay Leroy $500 and retake the machine. According to Ben, he retained ownership until the $500 was paid. On cross-examination Ben explained that he was trying to help his son, "and I was giving him the good end of the deal if he wanted to take it." There is no contention that either ever paid the other the $500. Leroy, to the contrary, defended upon the assertion that it was he who bought the tractor from Mrs. Svesta and who has owned it ever since.

The jury evidently believed Ben's account of the original purchase, and upon that premise the other testimony is open to two interpretations. From Ben's reference to a partnership the jury might have inferred that Ben contributed the tractor as an asset in the venture. But it could also be concluded that Ben, as the sole owner of the machine, made a gratuitous offer to sell the property to Leroy in the autumn. There is no contention that

this offer was accepted or acted upon, and if it was without consideration it would of course be revocable. Taking the testimony as a whole, we think an issue was made for the jury.

As to the cow and calf, Leroy testified that they were given to him by his mother. But Ben testified that he owned the cow by virtue of having raised her and that he merely lent the animal to his wife at a time when the couple were living apart. The calf was born while the cow was in Mrs. Guenther's custody. Even though Ben also stated that the cow and calf were as much his wife's as his as long as Mrs. Guenther remained in the family home, the proof sufficiently sustains the jury's conclusion that the appellee was actually the owner of both animals.

Affirmed.

WARD, J., dissents in part.

BROWN *v.* OZARK BLACK MARBLE COMPANY, *et al.*
OZARK BLACK MARBLE CO. *v.* STEPHENSON, *et ux.*

5-121 258 S. W. 2d 882

Opinion delivered June 8, 1953.

[redacted]

Barber, Henry & Thurman and *Opie Rogers,* for appellant.

W. F. Reeves and *N. J. Henley,* for appellee.

J. Seaborn Holt, J. Two cases have been consolidated on this appeal, *R. R. Brown* v. *Ozark Black Marble Co.* and *William Stephenson, et ux.,* interveners, in which a mortgage foreclosure is involved, and the case of *Ozark Black Marble Company* v. *William Stephenson, et ux.,* a suit for damages and injunctive relief against the Stephensons.

Both cases are an aftermath of *Ozark Black Marble Co.* v. *Stephenson,* 208 Ark. 338, 186 S. W. 2d 145, opinion March 19, 1945, in which the same two tracts of land and deeds were involved as here. In that case, the facts disclose that on January 30, 1939, the Stephensons executed to J. G. Cazort and H. B. Skinner a "Stone Deed" to all the stone on Stephenson's home place of 128 acres, in consideration of the sum of $100 "and other valuable considerations . . . It is understood that J. G. Cazort and H. B. Skinner are to form a corporation by the name of Ozark Black Marble Co., and are to give W. M. Stephenson and wife 150 shares of no par value, common stock, also $100 per acre for land that is used in any way

or that is damaged, as used or damaged or any fraction thereof; and Grantees to leave any buildings constructed on said lands if and when operations on above land are abandoned."

The land was described as situated "in Searcy County, State of Arkansas, to-wit: That part of the N ½ NE ¼ Section 11, and of the S ½ SE ¼ Section 2 and of the SW ¼ SW ¼ Section 1 Twp. 14 N, R 15 W, described as follows: (a metes and bounds description) containing in all 128 acres more or less."

This deed was recorded February 4, 1939.

On August 31, 1939, Stephenson executed another deed conveying all of the stone (Stone Deed) to Ozark Black Marble Co. on a 132 acre tract (adjoining the 128 acre tract) for a consideration of $1.00 "and other good and valuable considerations. . . . It is agreed and understood that the Ozark Black Marble Company is to pay W. M. Stephenson and wife $100 per acre for land that is used, or damaged in any way, or any fraction thereof, and Grantees to leave any buildings constructed on said lands if and when operations on above land are abandoned." This 132 acre tract (known as the Mabrey tract) is described as "land situated in Searcy County, State of Arkansas, to-wit: 68 acres of undivided half of W ½ SW ¼ Sec. 1 and NE ¼ SE ¼ Sec. 2, 108 acres; Pt. SW ¼ NW ¼ Sec. 1 described as follows: Commencing at the SW Cor. of said Sec.; running E. 7 rods for place of beginning; thence N. 11 rods; thence E. 21 rods; thence S. 11 rods; thence W. 21 rods to place of beginning, being 1 acre more or less. Pt. SE ¼ NE ¼ Sec. 2, Tp. 14, N. R. 15 W, described as follows: Commencing at SE Cor. of SE ¼ NE ¼ Sec. 2 and running N. 35 rods; thence W. across big hollow and up to the main bluff on W. side of said big hollow; thence run in SW direction around with main bluff to W. boundary line of SE ¼ SE ¼ Sec. 2, Tp. 14 N, R 15 W; thence S. to corner of said forty; thence E ¼ mile to place of beginning, containing 17 acres, more or less. Also 4 acres out of SE Cor. of SE ¼ SE ¼ Sec. 2 and 1 acre out of SE Cor. of NE ¼ SW ¼ Sec. 2, all in Tp. 14 N,

R 15 W, containing in the aggregate 132 acres, more or less.'' This deed was recorded on August 31, 1939.

On February 21, 1939, Cazort and Skinner executed a ''Stone Deed,'' conveying all ''stone in and under that may be produced from'' the 128 acre tract, to Ozark Black Marble Co. This deed was recorded February 23, 1939.

On February 29, 1944, Stephenson brought a suit against Ozark Black Marble Co. in the Searcy Chancery Court to cancel the two Stone Deeds on the two tracts of land above on the ground that Cazort and Skinner had misrepresented their financial ability. The trial court entered a decree cancelling the two Stone Deeds as prayed, but on appeal here March 19, 1945, we reversed, and there said: ''On the direct appeal the decree is reversed and the cause remanded with directions to dismiss the complaint for cancellation as being without equity, subject to the right of appellees to bring another action to cancel for failure of appellants to use due diligence to further develop and market said black marble in changed economic circumstances.''

On January 1, 1944, R. R. Brown, appellant, loaned Ozark Black Marble Co. $1,580.97, taking its note therefor payable five years after date. As security for payment, Ozark executed a mortgage to Brown on the ''stone in and under'' the 128 acre and the 132 acre tracts, title to which was in Ozark Black Marble Co. The mortgage was recorded January 4, 1944.

It thus appears that this mortgage was executed and recorded almost two months before the Stephensons sued in February 29, 1944, to cancel the Stone Deeds, which action, as indicated, on appeal here, resulted in our dismissing his complaint and holding that the two Stone Deeds were ''outright conveyances of all stone under the respective tracts of land.''

The present suit by Brown against Ozark Black Marble Co. was brought in April, 1949, to recover the amount due on the note, with prayer for foreclosure of the mortgage lien on the two tracts in question. Stephen-

son intervened in this suit and alleged, in effect, that Ozark had no right, claim or title to the lands mortgaged to Brown, that the Stone Deeds were leases and void because Ozark had not operated the marble quarry and had failed to perform certain agreements with Stephenson.

Trial on September 10, 1952, resulted in a dismissal of Brown's complaint "insofar as it seeks a lien upon the lands here involved . . . for want of equity" and directed cancellation of the mortgage in question.

In this Brown case, it appears undisputed that Ozark executed its note to Brown for $1,580.97 January 1, 1944, due five years thereafter, and as security, also executed a mortgage on the two tracts of land covered by the two Stephenson deeds to Ozark (the 128 acre tract and the 132 acre tract, that this mortgage was duly recorded in Searcy County on January 4, 1944, that the debt was not paid at maturity, that the deeds held by Ozark were both recorded prior to January 4, 1944, and constituted the record of title in Ozark. We find no evidence of any fraud on the part of Ozark Black Marble Company in procuring the loan from Brown and executing the mortgage as security. The burden was on appellees to establish fraud. *Gregory* v. *Consolidated Utilities, Inc.,* 186 Ark. 406, 53 S. W. 2d 554.

Brown was not concerned about any alleged agreements or differences arising between Ozark Black Marble Co. and Stephenson relating to diligence exercised by Ozark in developing the two pieces of property. He had a perfect right to rely on the record of the recorded deeds which showed that the unconditional title to the stone on and under the two tracts in question was in Ozark Black Marble Co. He was in the position of an innocent holder and entitled to a foreclosure of his security for the full amount due on the note against appellees. We therefore reverse the decree in the Brown case and remand, with directions for further proceedings consistent with this opinion.

In the case of *Ozark Black Marble Co.* v. *Stephenson, et ux.,* the parties agree that the primary and decisive

question presented is, as stated by the Chancellor "whether or not the plaintiff company (Ozark) exercised reasonable diligence in the development of the properties covered by the stone deeds. In the opinion of the court this primary question rests entirely upon the issue of whether or not plaintiff was prevented from developing this property by the wrongful conduct of the defendant, Stephenson."

The court found the issues in this case in favor of appellees and directed the cancellation of the two Stone Deeds in question.

After a review of all the testimony, much of which appears to be in irreconcilable conflict, we are unable to say that the Chancellor's findings that Ozark failed to exercise due diligence in developing the property involved were contrary to the preponderance of the evidence.

While on trial de novo here, we are not bound by the findings and conclusion of the Chancellor, we do give due deference to such findings as to the preponderance of the evidence where the evidence, as here, is conflicting and evenly balanced. Our rule is "that the judgment of the chancellor on the question of the preponderance of the evidence will be considered as persuasive when the evidence is conflicting and evenly poised, or nearly so." *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750.

The court's findings contain these recitals: "It appears that more than four years had elapsed since the opinion of the Supreme Court before suit was filed and more than seven years had elapsed since the opinion of the Supreme Court when the cause was finally submitted. During all this time the only effort the plaintiff made for the development of the property was for approximately one week in July, 1946. Aside from that one week's work, nothing has been done. Therefore, the court must conclude that the plaintiff was not diligent in the development of the property and the marketing of the products. Mr. Cazort seeks to excuse this lack of diligence by asserting that the defendant, Stephenson,

by threats of physical violence prevented the plaintiff from pursuing operations." Testimony as to threats of physical violence was conflicting.

"Moreover, it is not claimed by Mr. Cazort or any of his witnesses that Stephenson in any manner forbade or hindered operations on the Stephenson lands. It was only entry upon the Mabrey lands (the 132 acre tract) to which Stephenson objected. All agree to this fact. . . . The testimony shows that the plaintiff was not to enter upon the Mabrey lands until they were paid for; that plaintiff first procured Stephenson to buy these lands from Mabrey with the assurance that the plaintiff would soon raise the money and pay for them; that plaintiff was not to enter upon them until they were paid for; that Stephenson later sold his cattle and paid Mabrey the purchase price, either $2,000 or $2,100; that the plaintiff never paid Stephenson anything for them and never acquired any rights in them and didn't even claim such rights during the original suit. During the operation of the mine, Cazort stated to his superintendent, Derickson, that he had no right to enter upon the Mabrey lands on several occasions."

In our former decision, above, as has been indicated, while we reversed and declared the two deeds there (which are the same deeds in question here) to be Stone Deeds, in that case there was no allegation that Ozark Black Marble Co., appellant here, had breached "an implied warranty to develop" and that question was not determined. We did, however, specifically reserve to appellees (Stephensons) "the right . . . to bring another action to cancel for failure of appellants (Ozark Black Marble Co.) to further develop and market said black marble in changed economic circumstances."

Accordingly, the decree in this case of *Ozark Black Marble Co.* v. *Stephenson, et ux.,* is affirmed.

McFaddin, J., not participating.

5-84 258 S. W. 2d 886

Opinion delivered June 8, 1953.

Hale & Fogleman, for petitioner.

Mann & McCulloch, for respondent.

MINOR W. MILLWEE, Justice. Petitioners, D. B. Woollard and J. C. Johnson, are commissioners of Drainage District No. 3 of Crittenden County. In February, 1952, persons claiming to own a majority in value of the real property in the district petitioned the county court to remove the petitioners as said commissioners and to appoint L. S. Young and Lawson T. Garner in their places pursuant to the provisions of Ark. Stats., § 21-505.

After a hearing on the petition and the response thereto, the county court entered an order on June 4, 1952, denying the petition for removal. On the same date the petitioning property owners duly filed an affidavit for appeal to circuit court which was granted by order of the county court. On October 9, 1952, the county clerk filed in the office of the circuit clerk a transcript which contained certified copies of all the original pleadings, papers and record entries filed and made in the county court proceeding, but did not file the original papers.

The next term of the civil division of the circuit court, after the granting of the appeal, convened on November 24, 1952. After a previous setting the case was called for trial in circuit court on December 29, 1952, when the Petitioners Woollard and Johnson by special appearance filed a motion to dismiss the appeal for want of jurisdiction because the original papers had not been filed in the circuit court. The motion to dismiss was heard on the date it was filed. In the order denying the motion on the same date, the circuit court directed the county clerk to file the original papers in the circuit court. The court then granted petitioners' request for a stay of proceedings to permit them to file the instant petition in this court in which they seek a writ of prohibition to prevent the Crittenden Circuit Court from proceeding further in the action.

Petitioners say the circuit court is without jurisdiction. They contend that the statutes governing appeals from the county court are mandatory in the requirement that the original papers be filed within six months after the order granting the appeal, and that the remedy by appeal to this court is inadequate. The pertinent statutes are Ark. Stats., §§ 27-2001, 27-2003, and 27-2004 which we copy in the margin.[1]

[1] "27-2001. Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court, at any time within six [6] months after the rendition of the same, either by the court rendering the order or judgment or by the clerk of the circuit court of the proper county, with or without supersedeas, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court ren-

It should be noted that § 27-2001 relates entirely to the *granting* of an appeal, while §§ 27-2003 and 27-2004 relate to the *perfecting* and trial date of the appeal. Now it is undisputed that the appealing property owners fully complied with § 27-2001. They filed their affidavit and prayer for appeal which was granted by order of the county court on June 4, 1952, the date of trial. It is true we have held that this section is mandatory and that the circuit court is without jurisdiction to hear an appeal where there is no order of either the county court or circuit clerk granting the appeal as the statute directs. Mississippi County v. Moore, 126 Ark. 211, 190 S. W. 110. We have also held that the spirit and purpose of this statute have been attained when the affidavit and prayer for appeal have been filed with the clerk of the county court within the time allowed, and when either the county court or the clerk of the circuit court orders the appeal. Tuggle v. Tribble, 173 Ark. 392, 292 S. W. 1020. Here the appeal was duly granted by order of the county court within the period prescribed in the statute.

We now turn to the appeal perfecting sections. By § 27-2003 it is directed that the clerk of the county court transmit to the clerk of the circuit court the original papers and a transcript of the record entry in the cause which, under § 27-2004, stands for trial at the succeeding term of circuit court, if the appeal is granted ten days before circuit court convenes and unless it is continued for cause. It is noted that § 27-2003 prescribes no definite time within which the original papers and record transcript must be filed while § 27-2001 provides that the

dering the judgment or order appealed from or the clerk of the circuit court shall forthwith order an appeal to the circuit court at any time within six [6] months after the rendition of the judgment or order appealed from, and not thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him.

"27-2003. In all appeals to the circuit court from all said judgments and orders of the county court, the clerk of said court shall transmit all of the original papers and a transcript of the record entry in the cause or matter to the clerk of the circuit court, and take his receipt therefor and file the same in place of such papers.

"27-2004. All appeals granted ten [10] days before the commencement of any term of the circuit court, next after the appeal is allowed, shall be tried and determined at such terms, unless continued for cause."

appeal must be *granted* within six months "and not thereafter." Although § 27-2004 indicates that the transcript and original papers should be filed before the first day of the next term of court, it merely deals with the time the case shall stand for trial.

The effect of our decisions is that § 27-2004 is directory only and that the circuit court is clothed with considerable discretion in determining whether there has been unnecessary or prejudicial delay in filing a transcript of the county court proceedings. In *Briner* v. *Holleman,* 115 Ark. 213, 170 S. W. 1010, this court affirmed the action of the circuit court in dismissing an appeal from county court where the transcript was not filed until five weeks after the convening of circuit court. In construing § 27-2004 the court held that it must indulge the presumption that the circuit court found there had been unnecessary delay in the absence of a showing to the contrary. The court also said that it was a matter of discretion with the trial court whether the appeal may be prosecuted where there is a delay after the first day of the term in filing the transcript. Applying the same rule here, we should indulge the presumption that the circuit court found there had *not* been unnecessary delay, or that the delay was satisfactorily explained, in the absence of some showing to the contrary. It should also be noted that in the Briner case nothing had been filed in the circuit court until long after the court had convened, while in the case at bar certified copies of all the original papers and record entries were filed in circuit court nearly five weeks before the next term convened.

Prior to the adoption of Act 323 of 1939 [Ark. Stats., § 26-1307] it was provided by Ark. Stats., § 26-1306 that, a transcript of appeals from justice courts should be filed on or before the first day of the circuit court next after the appeal was allowed. In *Hart* v. *Lequieu,* 110 Ark. 284, 161 S. W. 201, this court reversed the action of a circuit court in dismissing an appeal where the appellant offered to show a meritorious excuse for not having filed the transcript within the statutory time. Also in *LaMode Garment Co.* v. *Moore & Co.,* 190 Ark. 721, 81 S. W. 2d

841, the court said that the statute was not mandatory as to the time of filing the transcript and cited many cases in support of that conclusion. In this connection the petitioners rely on *Carden* v. *Bailey,* 87 Ark. 230, 112 S. W. 743, where no transcript of a justice of the peace judgment had been filed by the appealing defendant two years after the judgment. The plaintiff then filed the transcript in circuit court and asked for affirmance of the judgment and this Court held that the circuit court abused its discretion in refusing to dismiss the appeal when no excuse was shown for the long delay.

It is understandable why the circuit court in exercising his discretion under § 27-2004 might conclude there had been no unnecessary delay in filing the original papers which were made available by the court's order on the trial date. There is no showing or contention that petitioners were in any manner prejudiced because the original papers had not previously been transferred from the office of the county clerk to the office of the circuit clerk. Under the circumstances, we conclude that no abuse of the circuit court's discretion has been shown in the case at bar.

It is not inappropriate to add that there is nothing in this record to indicate that petitioners' remedy by appeal is inadequate. See, *Weaver* v. *Leatherman,* 66 Ark. 211, 49 S. W. 977; *Jones* v. *Coffin,* 96 Ark. 332, 131 S. W. 873; *Harris Distributors, Inc.* v. *Marlin, Judge,* 220 Ark. 621, 249 S. W. 2d 3.

The petition for writ of prohibition is denied.

HARE *v.* GENERAL CONTRACT PURCHASE CORPORATION.

5-133 262 S. W. 2d 287

Opinion delivered June 15, 1953.

Rehearing denied December 21, 1953.

P. L. Smith, for appellant.

Guy B. Reeves, for appellee.

Tilghman E. Dixon, amicus curiae.

J. Seaborn Holt, J. Clyde Hare, appellant, after the opinion in *Hare* v. *General Contract Purchase Corp.* by this court May 26, 1952, 220 Ark. 601, 249 S. W. 2d 973, had become final June 30, 1952, filed a complaint in August, 1952, in the nature of a Bill of Review in the Pike Chancery Court. He sought to have the former decree set aside for alleged error of law apparent on the face of the decree. He alleged, in effect, that although an interest rate of more than 10% had been charged contrary to Art. 19, § 13 of the Constitution of Arkansas, the Court had refused to cancel the note and contract involved, and that appellant's right to the equal protection of the law had been violated, and he had been denied due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. Appellee filed motion to quash, alleging that the relief prayed had been adjudicated and pleaded *res judicata* of all issues presented. The trial court sustained appellee's contention and found that the matter was *res judicata* and dismissed appellant's complaint. This appeal followed.

We hold that the action of the trial court was correct and therefore must be affirmed.

Our opinion in the Hare case was based on facts (hereinafter set out) which, in effect, established that a time price contract had been entered into between the purchaser, Hare, and the dealer, Meeks, which contract was later duly assigned and transferred to appellee, General Contract Purchase Corporation. We there stated the facts to be:

"Appellant, Clyde Hare, purchased a used truck from Earl Meeks, a second-hand automobile dealer in Arkadelphia, for $1,750. After making a cash payment of $100, and trading in a car for a credit of $500, the balance due by Hare to Meeks was $1,150. To handle this balance, Hare executed to Meeks a title retaining contract and note for $1,439.13. The note and contract were on forms supplied Meeks by appellee, General Contract Purchase Corporation; and Meeks and Hare understood that the said $1,150 was increased $289.14 to take care of insurance, interest and *service charges* on the delayed payments; and that the note for $1,439.13 was payable $68.53 per month for twenty-one months.

"A day or two after the completion of the trade between Meeks and Hare, Meeks transferred the title retaining contract and note to the General Contract Purchase Corporation, without recourse, and received $1,150. Hare made six of the monthly payments to General Contract Purchase Corporation."

"*Service Charges*" referred to above in this language "$289.14 (added to the $1,150) to take care of insurance, interest and service charges, etc.," included an increased price because of deferred time payments. This construction is equally applicable to the introductory language in footnote 5, wherein an interest rate of 11.5% is mentioned. We further said:

"Thus, we come to appellee's final defense, which, as previously stated, is that the $140.89 was not only for interest, but for a service charge in connection with the sale of the truck. The balance on the truck was $1,150, and the insurance premium was $148.24, so the debt was $1,298.24. But the note was for $1,439.13. The question is whether such interest and service charge, which when added together exceed 10%, make the transaction usurious. It is clear: (a) that Hare and Meeks agreed that $289.13 would be added to the $1,150, in order to cover insurance, interest, and *carrying charges* (service charges); (b) that the parties thought the $289.13 listed as 'time price differential (including any insurance),' was a perfectly legal addition, and; (c) that

it was not until months after the trade was made and after Hare claimed usury, that it was ascertained that the insurance premium was $148.24, and the interest and other charges were *$140.89*.

"The evidence fails to show that Meeks acted as the agent of General Contract Purchase Corporation in this case, so there was a sale by Meeks to Hare, and the transfer of the note and papers by Meeks to General Contract Purchase Corporation. The question is whether such 'time price differential' is legally permissible against the plea of usury even when there is a sale on which to predicate such increased price.

"In a long line of cases, we have permitted the seller, under one guise or another, to do exactly what was done in the case at bar, and we have permitted the transferee of the paper to recover in just such a situation. (Citing many cases.)

"In the case at bar, the parties dealt on the strength of the aforesaid holdings, which have become a rule of property, and we must not overrule these cases retroactively. Therefore, insofar as the case at bar is concerned, it must be affirmed on the strength of our previous holdings."

Accordingly, the decree is affirmed.

MORRIS *v.* VARNELL.

5-118 258 S. W. 2d 889

Opinion delivered June 15, 1953.

Tom Kidd, for appellant.

Alfred Featherston and *Arvin A. Ross,* for appellee.

ROBINSON, Justice. Appellant Morris conveyed standing timber by warranty deed to American Excelsior Corporation. Before the timber was removed and prior to the expiration of the time specified for removal, Morris, without mentioning the former conveyance of the timber, sold the land to one Henderson. Henderson placed of record his deed to the land before the timber deed was recorded. Appellee Varnell claims to be the real party in interest so far as the grantee named in the timber deed is concerned, and filed this suit in his own name against Morris for a breach of the covenant of warranty.

In defense of his action in conveying the land to Henderson without mentioning the prior timber deed, appellant claims he dealt with a Mr. McElroy who was agent of the grantee named in the deed, American Excelsior Corporation; and that after a part of the timber was removed McElroy stated they were through and would remove no more timber although about 70 cords, worth $23.50 a cord, had been cut and stacked at considerable expense, but not removed from the land. McElroy did not appear as a witness, and a preponderance of the evidence sustains the Chancellor's finding that appellee Varnell is the real party in interest, and that McElroy had no authority to waive the rights of the timber purchaser.

There was a finding by the Chancellor in favor of appellee for damages in the sum of $1,900. Appellant claims this is excessive; however $500 had to be paid

to Henderson by the purchaser of the timber for permission to remove that part which had been cut and stacked; there were 250 cords with a stumpage value of $5 per cord, equalling $1,250, which Henderson would not permit to be cut; and $150 was allowed as expense incurred in attempting to clear the title to the timber; making a total of $1,900. The evidence fully justifies the amount of damages allowed.

The next question is whether Varnell can maintain the suit alone without having made American Excelsior Corporation a party. The complaint alleges that American Excelsior Corporation is the grantee in the deed and that plaintiff Varnell is the real party in interest. The defendant did not by demurrer or answer raise the issue of whether the excelsior company should be made a party. The answer was only a general denial and plea of the statute of frauds. During the trial when Varnell offered evidence that he was the real party in interest, counsel for the defendant objected, the plaintiff offered to make the excelsior company a party plaintiff, but upon defendant's objection to that procedure the offer was withdrawn.

The issue of defective parties must be raised by demurrer or by the answer; otherwise it is waived. *Less* v. *English,* 75 Ark. 288, 87 S. W. 477; *Tomlinson Chair Mfg. Co.* v. *Jop-Pa Mattress Co.,* 122 Ark. 566, 184 S. W. 32; *Flanagan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. 2d 70.

Affirmed.

EVANS *v.* BOONE.

5-140 258 S. W. 2d 890

Opinion delivered June 15, 1953.

L. A. Hardin and *Owen S. Samuel,* for appellant.

Edwin E. Hopson, Talley & Owen and *Dean R. Morley,* for appellee.

WARD, Justice. The only question for our decision is whether the Chancellor erred in allowing appellees (plaintiffs below) to take a nonsuit after they had completed their testimony and rested and after appellant's motion to dismiss.

Since we affirm the indicated action of the Chancellor, it is unnecessary to discuss the merits of the other issues raised in the lower court, and so the following summary of the record will suffice as a background for the question under consideration.

Appellees filed a complaint in the lower court alleging, among other things, that: Mrs. Lizzie McCullough Evans died November 11, 1951, survived by her husband, the appellant; the deceased by will, left a dwelling in Little Rock to her husband for life or until he remarried, and after this the property was to vest in fee in Daniel McCullough Boone and Franklin Coston Boone, the appellees; the will also contained a provision that, by agreement, the three devisees could sell the property and divide the proceeds (as specified in the will); and appellant remarried on December 23, 1951, without the knowledge of appellees and thereafter, on January 16, 1952, fraudulently bought appellees' interest (by warranty deed) pursuant to a contract dated January 7, 1952. The prayer was for a cancellation of the deed.

After the court overruled a demurrer to the complaint, appellant answered, and appellees produced their testimony and announced they had rested their case. Thereupon, appellant filed a written motion, pursuant

to Ark. Stats., 1947, § 27-1729, to dismiss the complaint on the grounds that no fraud had been proven, that there was a verbal agreement to sell previous to appellant's remarriage, and that appellees had made no tender of the purchase price paid to them by appellant. This was just before the noon recess and when court reconvened at 1:30, appellees requested, and the court granted, a nonsuit over the objections of appellant.

The material part of Ark. Stats., § 27-1405, reads as follows: "An action may be dismissed without prejudice to a future action: First. By the plaintiff before the final submission of the case to the jury, or to the court, where the trial is by the court."

Text writers admit that there is some confusion in the decisions of the various courts regarding the question here presented, but our own decisions are unanimous in sustaining the action of the trial court in this instance.

An early leading case which has been many times approved is *St. Louis S. W. Ry. Co.* v. *White Sewing Machine Co.,* 69 Ark. 431, 64 S. W. 96, where the court approved the following language: " 'After a case has been finally submitted to the jury or court the plaintiff has no right to dismiss the action without prejudice to a future action, but, while all legal right on the part of the plaintiff has ended the court may, in its discretion, and to prevent injustice and wrong, permit the plaintiff to recall the submission and dismiss without prejudice, and in such case the action of the court, unless it has abused its discretion, is no ground of error.' "

The above decision was approved in *Carpenter* v. *Dressler,* 76 Ark. 400, 89 S. W. 89, where this court reversed the lower court for refusing a nonsuit, using this language: "A case is not finally submitted until the agreement (argument) is closed, and a plaintiff has a statutory right to nonsuit until final submission. . . . The court treated the agreement to submit the case as the final submission; and if this be right, still it was in the sound discretion of the court to permit a nonsuit after final submission. . . ."

For other cases affirming the above rule, see *Hall, Adm.,* v. *Chess & Wymond Co.,* 131 Ark. 36, 198 S. W. 523; *Watts* v. *Watts,* 179 Ark. 367, 15 S. W. 2d 997; *Jonesboro Compress Co.* v. *Simpson,* 182 Ark. 698, 32 S. W. 2d 447; and *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583.

We rest this decision on the ground that the Chancellor had a right, within his sound discretion, to permit appellees to take a nonsuit and that no abuse of discretion has been here shown.

We mention that some decisions of this court noted above seem to indicate that there is no final submission until after final arguments, and that a party can, as a matter of right, take a nonsuit (without prejudice) any time before final submission. We do not here, however, express any opinion on the exact time or stage of the proceedings when a litigant loses this right.

Affirmed.

BLALOCK *v.* BLALOCK.

5-107 258 S. W. 2d 891

Opinion delivered June 15, 1953.

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

Barrett, Wheatley, Smith & Deacon and *Penix & Penix,* for appellee.

ED. F. MCFADDIN, Justice. This is a suit brought by appellant to have an alleged trust declared in his favor, and enforced on land owned by appellee.

The appellant, H. S. Blalock, and the appellee,[1] J. A. Blalock, are brothers. In 1933,[2] each brother received 100 acres of land from his father. Appellant mortgaged his land in 1934; and in 1935, when threatened with foreclosure, he conveyed his lands to appellee, who assumed the mortgage indebtedness and later paid same. Appellant now claims that the real consideration of his 1935 deed to appellee was the latter's agreement to hold title as trustee, and then, after satisfying the mortgage indebtedness, to reconvey to appellant any land that might remain of the 100 acre tract. The present suit was filed March 1, 1952, appellant claiming that in 1940, appellee sold 60 acres of the land, and should now return the remaining 40 acres and also make an accounting.

The Chancery Court denied appellant all relief, and this appeal challenges that decree. The learned Chancellor delivered a written opinion, which is in the transcript, and so clearly and concisely states the issues, the salient evidence, and the applicable rules, that we quote pertinent portions of it:

"In this case the plaintiff seeks to impress certain real property with a trust, and to compel the re-conveyance of the property to him.

"When we give full effect to plaintiff's testimony we find him seeking to engraft by parol testimony an express trust on the deed that he made to his brother and his sister-in-law. This is forbidden by Statute.

"The effect of the plaintiff's testimony is that he deeded the property to his brother under an agreement by the terms of which his brother was to pay off certain indebtedness against the property and save as much of it as possible, and that then the plaintiff and his

[1] Other appellees, besides Mrs. Laura Blalock (wife of J. A. Blalock), are corporations holding mortgages on the J. A. Blalock land here involved.

[2] The deeds from the father to the sons were dated in 1926, but the father retained possession of the land until his death in 1933.

brother would have an understanding and agreement as to the amount of money that the defendant had paid, and that he would re-convey the property to the plaintiff for that consideration.

"Courts in this State are reluctant to permit an express trust to be created by parol testimony, especially where a long period of years has elapsed; and even where parol testimony is admissible to establish a trust, the evidence must be full, clear and convincing, and not merely by a preponderance of the evidence.

"The first act of the plaintiff in conveying the property was entirely inconsistent with his contentions. Nowhere in the record has the Court been able to find that there was ever any agreement between the plaintiff and Laura Blalock, the wife of James Blalock. Yet the plaintiff conveyed the property to James Blalock and Laura Blalock, husband and wife, thereby creating an estate by the entirety in which the right of survivorship exists. In other words, had James Blalock died immediately after the transfer of the title to the property, the property would have vested in Laura Blalock and, as stated above, there is no contention that there was any agreement of any kind with Laura Blalock. . . .

". . . The defendant, James Blalock, assumed an indebtedness against the property conveyed to him and executed his notes for the remainder of the recited consideration. In order to pay off this mortgage indebtedness he mortgaged not only the property conveyed to him, but all of his own property. And then, in order to pay the indebtedness thus incurred, he sold a portion of his own property, as well as a portion of the conveyed property. This occurred more than seven years before the filing of this suit. Notwithstanding this fact, however, the plaintiff continued to recognize the defendant as his landlord; to pay rent; at times he left the property and went to Michigan, and he permitted the defendant to further mortgage the property with his knowledge and consent. Nothing in these facts and circumstances created a presumption that the defendant,

or the defendant and his wife, held the property in trust for the plaintiff.

. . .

"It is true that it is not essential that proof to establish a trust be made by witnesses who have no interest in the case, but the interest of the witnesses may be considered in determining whether or not the testimony is clear, satisfactory and convincing. All of the witnesses who testified for the plaintiff in this case were interested witnesses, either directly, or as the wife or children of the plaintiff.

"The principal cases relied upon by the plaintiff are discussed and distinguished by our Supreme Court in the case of *Hawkins* v. *Scanlon,* 212 Ark. 180, 206 S. W. 2d 179.

"The complaint of the plaintiff will therefore be dismissed for want of equity, and the defendants will have judgment for their costs."

Appellee questions the sufficiency of the transcript filed by the appellant, and also urges the Statute of Frauds, and the Statute of Limitations; but we find it unnecessary to consider these matters because our study of the entire record convinces us; (a) that even if parol evidence be admissible to show an implied trust, nevertheless, the appellant did not offer in the court below that *quantum* of proof required to establish a trust;[3] and (b) that the appellant has not established in this court that the Chancellor's findings are contrary to the preponderance of the evidence.[4]

Therefore, the decree is in all things affirmed.

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[3] In *Kelley* v. *No. Ohio Co.,* 210 Ark. 355, 196 S. W. 2d 235, we discussed the *quantum* of proof required. See also other cases collected in West's Ark. Digest, "Trust," Key 44. A case strikingly similar to the one at bar, and in which the attempt to prove a trust failed because of the absence of the required *quantum* of proof, is *Mitchell* v. *Powell,* 194 Ark. 638, 109 S. W. 2d 155.

[4] See West's Ark. Digest, "Appeal & Error," § 1009, for the scores of cases declaring the rule that the Chancellor's findings of fact will not be set aside on appeal unless they are contrary to the preponderance of the evidence.

BLAGG, *et al. v.* STRICKLAND TRANSPORTATION COMPANY, INC.

5-126 258 S. W. 2d 894

Opinion delivered June 15, 1953.

Wootton, Land & Matthews, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

MINOR W. MILLWEE, Justice. Donald M. Stueart was driving his automobile over Highway No. 7 between Arkadelphia and Hot Springs, Arkansas, on May 7, 1952, when the car collided with a motor truck belonging to Woodrow Ligon and being driven by Morris McCoy. Stueart sustained injuries from which he died shortly after the collision.

Appellants, Mary Stueart and Helen Ruth Blagg, are co-administratrixes of the estate of Donald M. Stueart, deceased. They brought an action in the Circuit Court against Ligon, McCoy, D. W. Hoskins, d/b/a Hoskins Truck Service, and the appellee, Strickland Transportation Company, Inc., hereinafter called "Strickland," seeking damages for the alleged wrongful death of their intestate. At the conclusion of all the testimony introduced at the trial, the court instructed a verdict for Strickland and a mistrial resulted as to the other defendants. The only

issue on this appeal is the correctness of the trial court's action in directing the verdict in favor of Strickland.

The relevant facts are not in dispute. In 1947, Strickland owned certificates, or permits, issued to it by the Interstate Commerce Commission and the Arkansas Public Service Commission, covering various interstate and intrastate routes for the transportation of merchandise by motor carrier. On March 28, 1947, Strickland and Hoskins entered into a written contract in which Strickland agreed to lease to Hoskins for 10 years its operating rights over certain of its intrastate routes, including Highway No. 7 between Arkadelphia and Hot Springs, for $125 per month, with an option that Hoskins might renew the lease for an additional 10 years at the expiration of the primary lease term. The contract was also made subject to the approval of the Arkansas Public Service Commission.

On April 2, 1947, the joint petition of Strickland and Hoskins was filed with the Public Service Commission pursuant to Ark. Stats., § 73-1715, requesting approval of the lease contract. After proper notice, a hearing was held on April 21, 1947, resulting in an order by the Commission approving the lease agreement as being in the public interest. Strickland removed the routes designated in the lease and the order of the Commission from its intrastate tariffs, and closed its terminal warehouse in Hot Springs. Hoskins began operating said routes under his own certificate number previously issued by the Commission and opened a warehouse in Hot Springs. Strickland has not engaged in intrastate operations over the designated routes since issuance of the order of the Commission on April 21, 1947. Woodrow Ligon was hauling freight for Hoskins under some oral agreement between them when Ligon's truck collided with Stueart's automobile on May 7, 1952.

In determining whether the trial court erred in directing a verdict for Strickland, the sole issue is whether the latter, as lessor, is liable for the torts of the lessee Hoskins, or his agent, under a lease of intrastate operating rights which has been approved by the Public

Service Commission pursuant to § 73-1715, *supra.* The Arkansas Motor Carrier Act [Ark. Stats., §§ 73-1701—73-1727] contains no express provision in reference to such liability. While the transfer of a certificate and the lease of operating rights thereunder are duly authorized by § 73-1715, *supra,* such lease, or transfer, is ineffective without the approval of the Public Service Commission. *Gregory* v. *Lewis,* 205 Ark. 68, 167 S. W. 2d 499. It should also be noted that § 73-1716 provides that before a carrier is issued a certificate or permit under the act, it must comply with the rules and regulations of the Commission relative to furnishing surety bonds or insurance policies for the protection of shippers and the public generally.

There is a decided conflict of authority on the question presented. Some courts hold that where the lease is authorized by a statute which contains no express provision as to the subsequent liability of the lessor, the authority to lease implies an exemption from liability on the part of the lessor for the torts of the lessee. Other courts hold that the lessor is not relieved from liability unless there is an express provision to that effect in the statute which authorizes the lease. See Annotation, 28 A. L. R. 122; 13 C. J. S., Carriers, § 707; 44 Am. Jur., Railroads, § 343.

This court noted the two conflicting lines of authority on the issue here presented in *Little Rock & Fort Smith Ry. Co.* v. *Daniels,* 68 Ark. 171, 56 S. W. 874, and chose to adopt the first view expressed above. In that case, the appellant railway leased its road together with its equipment and franchises to another company for a term of years pursuant to statutory authority. Justice Battle, speaking for the court, said: "We are aware that there is a wide diversity of opinion upon this subject. But we think that the weight of authority and reason sustain the view we have expressed. In granting the authority to lease, the statutes empowered it to transfer the possession and control of the demised property, together with the duty of operating the road, to the lessee, to the exclusion of the lessor; and this transfer

carried with it to the lessee the responsibility for injuries caused by its negligence in the discharge of such duty, and exonerates the lessor from the same. The authorities which hold to the contrary do so upon the ground that the legislature must expressly exempt the lessor from responsibility, in order to exonerate him from liability. They concede that the legislature may by express enactment exonerate the lessor, and, in the absence of such enactment, they limit the effect of the lease when the legislature or the parties have not done so. They grant the right to a railway company to relinquish control of its railroad under the authority vested in it by the statute to lease, but hold that it is still liable for the injuries caused by negligence in the exercise of such control, unless the statute expressly exempts them from such liability on account of the lease. They tacitly assume 'that, in granting authority to lease, the legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that, in granting authority to execute a lease, the legislature conferred authority to execute an effective instrument, with all the qualities and incidents with which the law invests a lease. If this be true, then the lease does transfer possession and control from one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee. For negligence in managing and using the demised premises the lessor is not responsible.' *Railway Co.* v. *Curl,* 28 Kan. 622; *Nugent* v. *Railroad Co.,* 80 Me. 62, 12 Atl. 797; *Arrowsmith* v. *Railroad Co.,* 57 Fed. Rep. 165; Elliott on Railroads, § 469, and cases cited."

While the judgment against the lessor in the Daniels Case was reversed, the court nevertheless held the lessor to be a proper party defendant since the plaintiff had a right to a satisfaction of his judgment against the lessee out of the corpus or physical property of the leased railway under our constitution and statutes. In the case at bar, Strickland leased no equipment or other physical property to Hoskins and no proprietary or property

rights in the use of the public highways are conferred by the issuance of a certificate under the Motor Carrier Act. See § 73-1710(d). Manifestly, the legislature intended that shippers and the public generally should be protected through insurance or surety bond required of a certificate holder or operator under § 73-1716, *supra.*

Appellants cite several cases from other jurisdictions which follow the view rejected by this court in the Daniels case. They also rely on the case of *Memphis, Dallas & Gulf Ry. Co.* v. *Richardson,* 126 Ark. 236, 190 S. W. 434. In that case it was held that if fire was set by the engine of one railway while upon the tracks of another under some kind of joint permissive use not disclosed by the record, both would be responsible for the damages, but, if the fire was set by the engine of the company owning the tracks, it alone would be responsible. There is nothing to indicate that there was any lease or transfer of operating rights involved in the Richardson Case. On the contrary, it is certain that there was no exclusive lease or use granted under legislative approval such as that involved here and in the Daniels Case. This distinction was clearly recognized in *St. Louis, I. M. & S. Ry. Co.* v. *Chappell,* 83 Ark. 94, 102 S. W. 893, 10 L. R. A., N. S. 1175. The court there pointed out the difference between a case of joint use by two companies and one where the lessor company parts with possession and control of the road under a lease sanctioned by legislative authority.

The principle adopted by this court in the Daniels Case is controlling and Strickland is not liable for the torts of the lessee Hoskins, or those acting for Hoskins, under the facts here presented. It follows that the trial court correctly instructed a verdict for Strickland. The judgment is accordingly affirmed.

4698 259 S. W. 2d 142

Opinion delivered June 22, 1953.

[redacted]

Walter L. Brown, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

ROBINSON, Justice. Appellant was convicted of murder in the first degree and sentenced to death. The crime was alleged to have been committed on December 8, 1951. A felony information was filed on December 10, and on the same day the court appointed attorneys to represent the defendant and issued an order directing that he be committed to the State Hospital for Nervous Diseases for a period of 30 days for a mental examination. On January 15, 1952, the prosecuting attorney filed with the court a petition stating that the defendant had been examined at the State Hospital and it was found that he was suffering with "psychosis with cerebral arteriosclerosis with paranoid trend." The petition asked that the court order the defendant's return to Ouachita County and that the court appoint a commission to make a further study and examination as to the sanity or insanity of the defendant.

On January 22, there was filed in open court a report from the State Hospital as follows: "We have completed our examinations in the case of R. H. Green,

who was admitted to the State Hospital under Act No. 3 from Ouachita County, Arkansas, and we hereby certify that the following is a true and correct report of our findings in this case:

"DIAGNOSIS: Psychosis with cerebral arteriosclerosis with paranoid trend.

"1. It is the opinion of the examining staff that R. H. Green was mentally incompetent and not responsible for his acts at the time of their alleged commission.

"2. It is further the opinion of the examining staff that R. H. Green is mentally incompetent and not responsible at the time of this mental examination.

"3. It is therefore the recommendation of the examining staff that the charges against R. H. Green be dismissed and that he be committed to the State Hospital under Act 241 of the 1943 Legislature for the treatment of his mental condition."

The Court, acting on the petition of the prosecuting attorney, appointed Drs. R. B. Robins, James Guthrie, and Perry Dalton, as commissioners to make an additional examination of the defendant to ascertain his mental condition and report to the court. The commissioners were authorized to secure the services of any alienist desired to assist in the examination and were directed to file their report with the court along with that of any alienist selected. On the same day defendant by his attorneys filed a motion to set aside the order appointing the commission. On January 30, 1952, the court overruled defendant's motion to set aside the appointment and ordered the commission to employ Dr. Louis Cohen of Little Rock to also make an examination; ordered the defendant held in county jail in Ouachita County for a period of a week for examination by the commission and that he then be returned to Little Rock and placed in the State Hospital for Nervous Diseases, and ordered Dr. Cohen to make all and any daily examinations necessary; and directed that the defendant be returned to the sheriff of Ouachita County at the completion of all examinations. On March 21, on mo-

tion of the prosecuting attorney, the court issued an order in which it was set out that the commission and Dr. Cohen had completed their consultations with the finding that in their opinion the defendant was sane and without psychosis, and ordered him returned to the custody of the sheriff of Ouachita County.

On April 2, 1952, the cause came on for trial. Defendant interposed the defense of insanity. Dr. Robins, one of the commissioners appointed by the court, and Dr. Louis A. Cohen whose employment was authorized by the court, testified that the defendant was sane and without psychosis.

The defendant made no objection to the order committing him to the State Hospital for a mental examination in the first instance; but by motion to set aside the order, he objected to the appointment of a commission to examine him and the order authorizing the employment of an alienist.

Initiated Act No. 3 of 1936, Ark. Stats., § 43-1301, and also Act No. 256 of 1949, Ark. Stats., § 43-1304, authorize the trial court to commit a defendant to the State Hospital for a mental examination for a period not exceeding 30 days. The statutes also provide: "the action of the court in committing the defendant for an examination shall not preclude the State or defendant from calling expert witnesses to testify at the trial, and such expert witnesses shall have free access to the defendant for the purposes of observation and examination during the period of his commitment to the State Hospital for examination."

Art. 2, § 8 of the Constitution of the State of Arkansas provides: "nor shall any person be compelled, in any criminal case, to be a witness against himself." To the same effect is the 5th Amendment to the Constitution of the United States. There is a line of cases holding that to compel a defendant to submit to a physical examination and then the introduction of evidence as to what the examination revealed does not do violence to the constitutional provision against compelling one to give evidence against himself. *State* v. *Petty,* 32 Nev.

384, 108 Pac. 934; 25 Ann. Cas. 1912D, 223 n.229. See 164 A. L. R. 967 and 25 A. L. R. 2d n.1407. However, the weight of authority appears to be to the contrary. 14 Am. Jur. 879; *State* v. *Height,* 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437; and notes in 164 A. L. R. 967 and 25 A. L. R. 2d 1407. On the side of the majority is our case of *Bethel and Wallace* v. *State,* 178 Ark. 277, 10 S. W. 2d 370. There the question of insanity was not involved, and it was held that the testimony of a doctor who made a physical examination of the defendant in jail at the request of the sheriff was inadmissible as to the physical condition of the defendant because such testimony would be in violation of the 5th Amendment to the Constitution of the United States and Art. 2, § 8 of the Constitution of Arkansas.

But in some states, including Arkansas, holding that evidence of the findings of a physical examination made under compulsion is not admissible, there is an exception as to a mental examination made for the purpose of determining the sanity or insanity of the defendant. *State* v. *Coleman,* 96 W. Va. 544, 123 S. E. 580. In *Clements* v. *State,* 213 Ark. 460, 210 S. W. 2d 912, it was held that where one had been committed to the State Hospital for mental examination, the doctors making the examination could testify without violating the defendant's constitutional rights; and in the case at bar defendant does not contend his constitutional rights were violated by sending him to the State Hospital for mental examination. In fact, he made no protest against such procedure even though it was not done on his motion. But the question here is whether the court was in error in appointing a commission to examine the defendant.

The General Assembly has provided for a mental examination of those charged with crime who may be insane or may plead insanity as a defense; but with the exception of a preliminary examination in some instances to determine whether defendant should be sent to the State Hospital for examination, the statutes do not authorize the court to appoint anyone to make an examination. Ark. Stat. 43-1304, 43-1305.

A statute compelling the defendant to submit to a mental examination in order that a psychiatrist may form an opinion as to his sanity, and then permitting the alienist to testify in court detailing the questions and answers upon which he bases his opinion, is on the borderline of the constitutional interdiction against compelling one to testify against himself; and although the statute has been held to be constitutional, *Clements* v. *State, supra,* it should not be stretched, enlarged, or expanded. However, the state and the defendant are authorized to have independent examiners, and the statutes do not prohibit either side from calling as a witness any competent person, expert or otherwise, to testify as to the mental capacity of the defendant. But if the court names the ones to make the examination and that fact is developed by the evidence as was done here, it could appear to the jury that the witnesses are vouched for by the court.

Dr. Robins testified on direct examination: "Q. I will ask you if you examined him in a capacity in your office, and in what capacity you made your examination at that particular time? A. Well, the judge appointed a panel of 3 of us local physicians to conduct an examination of Mr. Green and to employ any psychiatric help that we might need. . . ." On direct examination Dr. Cohen testified: "Q. Did you have the opportunity of examining this particular person, R. H. Green, the defendant in this case? A. I was appointed by the court to perform such examinations, I believe. Q. By the Ouachita County Circuit Court? A. Yes."

In many instances there are people on the jury serving for the first time. To some of them the whole courtroom procedure is strange and perhaps somewhat confusing; and when a psychiatrist testifies that he was appointed by the court to examine the defendant, a juror could very easily come to the conclusion that the witness' testimony is entitled to greater consideration than if he had been selected by the prosecuting attorney or counsel for the defendant, or named by the statutes. In fact, where the expert's testimony is favorable to the

State, the prosecuting attorney might so argue the weight of the witness' testimony.

For the error of the court in appointing doctors to make an examination, the cause is reversed and remanded for a new trial.

The Chief Justice not participating.

MURDOCK ACCEPTANCE CORPORATION *v.* CLIFT.

5-155 259 S. W. 2d 517

Opinion delivered June 22, 1953.

Lowell W. Taylor and *Owens, Ehrman & McHaney,* for appellant.

H. B. Stubblefield, for appellee.

WARD, Justice. On May 13, 1952, appellee and her husband, Henry Clift, went to the Scallion Motor Co. and completed arrangements to purchase a 1949 Model Chevrolet Automobile which had been advertised for sale for $1,295. In substance the deal was for Henry Clift to trade in a 1947 Willys Station Wagon and pay $57 per month for 24 months, which payments were inclusive of interest, insurance, and a small amount designated as "Dealer's Reserve." After all papers had been prepared it was learned that Henry Clift was not 21 years old, and so it was agreed to prepare new papers in the name of appellee. This was done and all papers were signed by appellee as of May 14, 1952.

There is some conflict in the testimony regarding certain details of the transaction, but appellee admits

she signed the Conditional Sale Contract presently described. The said contract, No. 27433 and dated May 14, 1952, described a 1949 Model Chevrolet Convertible Coupe. In bold type appears the following:

For a TOTAL TIME PRICE of	$1,882.00
Payable ON OR BEFORE DELIVERY	$ 514.00
Leaving a DEFERRED BALANCE	$1,368.00
Payable at office of Murdock Acceptance Corporation to be hereafter designated in installments of 24	$ 57.00

The last line above appellee's signature reads: "Executed in duplicate, one copy of which was delivered to and retained by purchaser, this 14 day of May, 1952." On the reverse side of the above contract appears an assignment by the Scallion Motor Co. to the Murdock Acceptance Corporation.

On July 22, 1952, suit was filed by appellee to cancel the above sale contract for usury. The Chancellor found in favor of appellee and appellants have appealed.

A "Customer's Statement" introduced in evidence shows that the balance of $1,368 due on the contract was arrived at as follows:

Delivered price of car	$1,494.00
Down payment	$ 514.00
Unpaid balance	$ 980.00
The price differential	$ 388.00
Total balance	$1,368.00

There are different explanations of how the items $1,494 and $514 were arrived at, but it is unnecessary to discuss them in view of the decision hereinafter reached.

The Conditional Sale Contract described above brings this case clearly within the decision in the case of *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973, and *Crisco* v. *Murdock Acceptance Corporation,* 222 Ark. 127, 258 S. W. 2d 551, and calls for a reversal of this case.

The price differential of $388 not only included interest and insurance premium but also included an item

of $19.60 which is designated as "Dealer's Reserve," and it is argued that this shows the relationship of agency existed between the dealer and appellant, Murdock Acceptance Corporation. This same question was resolved against appellee's contention in the recent case of *Aunspaugh* v. *Murdock Acceptance Corporation,* 222 Ark. 141, 258 S. W. 2d 559.

During the pendency of this case in the trial court appellee made payments into court on her contract in the amount of $285. In its decree the trial court gave appellee judgment for this amount. It also appears that appellee has possession of the car and that no payments have been made since the date of the Chancellor's decree. For these and other good reasons, it is determined that the mandate of this court should be issued immediately.

Reversed.

SMITH *v.* WOFFORD, GUARDIAN.

5-162 259 S. W. 2d 507

Opinion delivered June 22, 1953.

George H. Steimel, for appellant.

W. J. Schoonover, for appellee.

ROBINSON, Justice. On petition of Earlene Smith Wofford, guardian of the estates of Dorothy Dianne Smith and Alvin Burris Smith, Jr., minors, the probate court ordered the sale of the minors' homestead. At the time of his death, the deceased parent whence came the homestead owed debts which were apparently amply secured. The appellant, J. Henley Smith, filed a remon-

strance to the petition of the guardian to sell the homestead and has appealed from the order of the court allowing the sale.

We reach only one point, and that is can a minor's homestead be sold where the parent who owned the homestead at the time of his death owed debts; and the answer is no.

Ark. Stat., § 57-639, provides for the sale of a minor's homestead, but even under this statute the minor's homestead cannot be sold when the parent leaving the homestead also left debts.

Art. 9, § 6, of the Constitution of Arkansas is as follows: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

In *Merrill* v. *Harris,* 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, it was held that a minor's homestead when the parent leaving the homestead owed no debts could be sold on order of the court; but in *Tipton, Adm., Ex Parte,* 123 Ark. 389, 185 S. W. 798, it was held that the probate sale of the homestead by a guardian in cases where there are debts is absolutely void; and the principle announced in the Tipton case was approved in *Dodd* v. *Hopper,* 182 Ark. 24, 30 S. W. 2d 837; *Rushing* v. *Horner,* 130 Ark. 21, 196 S. W. 468; and *Puckett* v. *Glendenning,* 135 Ark. 551, 205 S. W. 454. The case of *Penney* v. *Vessells,* 221 Ark. 389, 253 S. W. 2d 968, in no way impairs the holding in the above cases because in that case the sale of the

minor's homestead where there were debts was not involved.

Appellee urges that the Tipton case and other cases adhering to the principle therein announced should be overruled, and to affirm the case at bar, those cases would have to be overruled. The Constitution gives the minor children the privilege of sharing the homestead with the widow, and provides that they are entitled to half the rents and profits until they arrive at 21 years of age. In the Tipton case, Mr. Justice HART said: "As we have already seen the framers of our Constitution plainly intended to preserve for the minor the homestead exemption of the parents after their death and to prevent the sale thereof for the debts of the parents during the minority of the children and it has always been the policy of this court to give such a liberal construction to the homestead laws as will best effectuate this humane intention of the framers of the Constitution." Judge HART then points out that when there are debts, it may not be possible upon the sale of the homestead to protect the minor's homestead interests as guaranteed by the Constitution; whereas when there are no debts, there would be no reason for the property not selling for its full value, the minor thereby getting the full benefit of the value of the homestead.

We adhere to the principle announced in the Tipton case. Therefore, the judgment is reversed.

ED. F. MCFADDIN, Justice (Concurring). I concur for the purpose of calling special attention to Mr. Justice BATTLE's dissenting opinion in *Merrill* v. *Harris*, 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, which dissenting opinion I think should be adopted—to operate prospectively—as the correct interpretation of Art. IX, § 6, of our Constitution: the effect of adopting such dissenting opinion would be to prohibit the sale of a homestead—in all instances except under lien foreclosure proceedings—while any of the children remained under 21 years of age.

The said Art. IX, § 6, of the Constitution, provides:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with the said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

This Constitutional provision says that while a child is under 21 years of age, said child shall be entitled to the "rents and profits" of the homestead. If the homestead is sold under any guise whatsoever, then certainly the child is deprived of the "rents and profits" of the homestead: to allow the homestead to be sold is to defeat the protection and rights which the Constitution guarantees to the minor children.

Justice Battle expressed it this way:

"A sale of such lands during the minority of the children tends to defeat the magnificent policy of the constitution, and should be treated by all courts as void.

"It follows that the probate court cannot sell the fee in the land without defeating the spirit and intent of the constitution. It seems to me that no argument or authority is necessary to prove that the constitution, from which it derives its jurisdiction, did not vest the probate court with the authority to defeat its policy or violate any of its provisions."

When the majority held—as it did in *Merrill* v. *Harris, supra*—that the homestead could be sold when the ancestor left no debts, then this Court had to point

out in Tipton, Ex parte, 123 Ark. 389, 185 S. W. 798, that the homestead could not be sold when there were debts. Then the Legislature, by § 226 of Act No. 140 of 1949 (§ 57-639 Ark. Stats.), sought to broaden the holding in Tipton, *Ex parte*. The majority holding in the present case is that the Statute, (§ 57-639 Ark. Stats.) is unconstitutional insofar as it affects the rights of a minor in the homestead of an ancestor who owed debts.

To my mind, the simple solution of the whole problem is to adopt—with prospective application—Justice Battle's dissent in *Merrill* v. *Harris;* and when such result is achieved, we will get back to the spirit of the Constitution and to the protection which it accords to minors. In the hope that this may some day come to fruition, I am writing this concurring opinion.

HUFFMAN *v.* STATE.

4739 259 S. W. 2d 509

Opinion delivered June 22, 1953.

Cole & Epperson and *W. H. McClellan*, for appellant.

Tom Gentry, Attorney General and *Thorp Thomas*, Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On a charge of possessing intoxicating liquor for sale in a dry county, a jury trial resulted in a verdict finding appellant guilty as charged and assessment of punishment. This appeal followed.

For reversal, appellant first questions the sufficiency of the evidence.

The record reflects that about June 20, 1952, appellant, Huffman, was arrested by State Trooper Montgomery on Highway 270 in Hot Spring County and a gallon of whiskey, contained in four pint bottles and eight one-half pint bottles, was found in appellant's car. Each bottle was enclosed in a separate paper sack. The arrest was made by the officer on information that Huffman was carrying whiskey. Trooper Montgomery and Harris, Deputy Sheriff, testified that a number of reports had come to them that appellant was engaged in the illegal sale of intoxicating liquor at his "Drive-In" Cafe. Harris testified that shortly before appellant's arrest on the present charge that he (Harris) concealed himself in some shrubbery about twenty-five yards away, in the rear of appellant's "Drive-In" and observed bottles of whiskey being passed to customers through their car windows, saw them drinking out of the bottles and following with a soft drink, or chaser. There was evidence that appellant had the reputation of being a bootlegger (admissible in evidence under Ark. Stats. 1947, § 48-940).

Without attempting to detail more of the evidence, we conclude that when the testimony is viewed in the light most favorable to the State, as we must, it was sub-

stantial and sufficient to go to the jury on the issue whether appellant illegally possessed the liquor for sale, (*Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; *Grays* v. *State,* 219 Ark. 367, 242 S. W. 2d 701).

In *Freeman* v. *State,* 214 Ark. 359, 216 S. W. 2d 864, we said: "Whether appellant possessed the liquor for the purpose of sale or merely for his personal use was a matter for the jury to determine under the facts and circumstances. The purpose for which liquor is possessed or kept may be shown by circumstantial evidence. . . . The jury had a right to consider the amount of liquor and the number and size of the containers in which it was found, in determining whether appellant would likely procure and possess a gallon or two gallons of whiskey for his personal use in pint containers. Under § 14140 of Pope's Digest (Ark. Stats. 1947, § 48-940) the jury also had a right to consider appellant's reputation for engaging in the illegal liquor traffic in determining his guilt or innocence of the charge."

Next appellant contends that the court erred in giving, over his general objections and exceptions, the following instruction: "1. You are instructed that in arriving at your verdict in this case as to the defendant's guilt or innocence, you may take into consideration the reputation of the defendant in the community in which he lives, as to whether or not he was engaged in the illegal traffic of intoxicating liquors. You may further take into consideration the number of containers in which the liquor was found, if any, and the manner in which it was sacked or wrapped, as well as all the other facts and circumstances in the case, and you are further instructed that circumstantial evidence is competent evidence. And you may convict the defendant upon the circumstantial evidence alone if in your opinion the circumstances in this case convinces you beyond a reasonable doubt as to his guilt. In other words, circumstantial evidence is as competent evidence upon which to base your verdict as direct evidence."

Appellant says: "The instruction was inherently wrong and prejudicial in that it told the jury that it

could take into consideration the reputation of appellant in engaging in the illegal traffic of liquor, without further telling the jury that such could be considered only as tending to show the nature of the business in which the appellant was engaged at the time of the alleged offense. . . . for the reason that the Court commented on the weight of the testimony in that it singled out and told the jury to take into consideration the number of containers of whiskey and the manner in which it was sacked. . . . they could convict on circumstantial evidence alone without further instructing them that such circumstantial evidence must be consistent with appellant's guilt to the exclusion of every other reasonable hypothesis of his innocence."

We do not agree. The instruction was not inherently erroneous. It was therefore good as against a general objection. The vice in the instruction was not that it amounted to an instruction on the weight that should be given to certain parts of the evidence, (*Hogue* v. *State,* 93 Ark. 316, 124 S. W. 783) but in placing undue emphasis thereon. As indicated, there was no specific objection on the latter ground by appellant. The trial court was therefore not afforded the opportunity to correct the alleged error, and complaint for the first time here comes too late.

The latter part of this instruction relating to a conviction on circumstantial evidence, when read in connection with Instruction No. 4, which the court gave, clearly and fairly declared the law governing convictions on circumstantial evidence. Instruction No. 4 contained this language: "You are instructed that although it is competent to convict on circumstantial evidence before you would be authorized to convict on such evidence, the facts and circumstances in evidence must point with reasonable certainty to the defendant's guilt and they must be consistent with each other and consistent with the defendant's guilt to the exclusion of every reasonable hypothesis of his innocence."

Finally appellant argues that the court erred "in refusing to permit witnesses for the appellant, Joyce

Wheatly Huffman and Vivian Kemp, to testify as to whether conditions around appellant's place of business indicated it was a bootleg joint." This contention is based on the following testimony of these two witnesses offered by appellant. Joyce Huffman testified: "Q. Have you, during the time that you were down there, observed anything to indicate that it was a bootleg joint? A. No, sir. Q. In your cleaning up of the place—," and Vivian Kemp testified: "Q. During the time you worked down there were you reasonably well observant of the business that went on generally? A. Yes, sir. Q. Do you know if your observations were such that you would know if it was a bootleg joint at that time? A. I think so."

Objection was made by the State to the introduction of the testimony of each of these witnesses, which the court sustained over appellant's objections and exceptions. This evidence, in effect, called for the opinions of the witnesses, and there was no error in excluding it. There was no proper foundation laid for such testimony.

"It is a fundamental principle of the law of evidence as administered by our courts, both in civil and criminal cases, that the testimony of witnesses upon matters within the scope of the common knowledge and experience of mankind, given upon the trial of a cause, must be confined to statements of concrete facts within their own observation, knowledge, and recollection—that is, facts perceived by the use of their own senses—as distinguished from their opinions, inferences, impressions, and conclusions drawn from such facts," 20 Am. Jur., § 765, p. 634.

"The determination of whether a nonexpert witness has sufficient knowledge of the matter in question or had sufficient opportunity for observation so as to be qualified to give his opinion or conclusion is largely within the discretion of the trial court, and not ordinarily reviewable upon appeal, unless clearly erroneous," 20 Am. Jur., § 773, p. 645.

We think no abuse of discretion was shown.

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

GARNETT *v.* CLAYTON, *et al.*

5-135 260 S. W. 2d 441

Opinion delivered June 22, 1953.

Rehearing denied October 5, 1953.

Evans & Farrar and *Rose, Meek, House, Barron & Nash,* for appellant.

Wootton, Land & Matthews and *Wood & Chesnutt,* for appellee.

MINOR W. MILLWEE, Justice. The issue here is whether a vested or contingent remainder in certain land passed to Aubrey Boykin, now deceased, under the will of his grandmother, Alice E. Garnett, who died February 15, 1922.

Alice E. Garnett executed a will on January 5, 1921, in which she devised certain lands in the city of Hot

Springs, Arkansas, to each of her two sons and a daughter, Rita Boykin. The residue of her estate, except certain real estate located in Washington, D. C., was left to said three children equally in fee simple. Included in that residue was certain real estate in Hot Springs which is the property involved in the instant controversy.

On July 26, 1921, Alice E. Garnett executed a codicil to her will in which she devised the property involved here, which previously had been included in the residuary clause of her will, as follows: "Second: I give, devise and bequeath to my daughter, Rita Boykin, for life, and the remainder after her death in fee simple to her children, the property belonging to me and located in the City of Hot Springs, Garland County, particularly described as follows: . . . (here follows description of property)."

Upon her death in February, 1922, Alice E. Garnett left surviving her the three children named in the residuary clause of her will and one grandchild, Aubrey Boykin, the son of Rita Boykin, a widow. Aubrey Boykin died intestate on September 22, 1922, leaving as his sole heir, his mother, Rita Boykin, who died testate on December 23, 1946. Under the duly probated will of Rita Boykin, the property here involved was devised to appellees, who have since been in possession under claim of title.

Appellant, Rose K. Garnett, is the widow of Evelyn Sidney Garnett, who died testate March 28, 1943. The latter was the son of Alice E. Garnett and one of the three residuary devisees under her will. As sole beneficiary under her husband's will, appellant brought this action in ejectment, claiming ownership of a one-third undivided interest in the property in controversy.

The claim of appellant is predicated on the contention that a contingent remainder passed to Aubrey Boykin under the will of his grandmother, Alice E. Garnett. Hence, says appellant, upon the death of Aubrey Boykin prior to that of his mother, a reversionary interest in the property passed under the residuary clause of the will to the three children of Alice E. Garnett.

In a well-considered opinion, the trial court rejected appellant's contention and adopted that of the appellees to the effect that Aubrey Boykin took a vested remainder under the will and upon his death, unmarried and intestate, the title ascended to Rita Boykin, his sole heir, who became the owner in fee simple of the property, which she devised to the appellees. We concur in that decision.

The case of *Jenkins* v. *Packingtown Realty Co.,* 167 Ark. 602, 268 S. W. 620, involved a devise of property to a son and wife for their lives, "and after their death, to be equally divided between their children, share and share alike." The couple had one child. After the husband's death, the widow and child conveyed the property. The court held that the conveyance passed title; that the remainder was contingent until the birth of a child when it became vested, subject to open up and admit afterborn children. In so holding, approval was given to the rule laid down in *Doe Poor* v. *Considine,* 6 Wall. 458, 73 U. S. 458, 18 L. Ed. 869, as follows: "A devises to B for life, remainder to his children, but, if he dies without leaving children, remainder over, both the remainders are contingent; but, if B afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and, if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."

We have followed and applied this rule in many subsequent cases, including *Landers* v. *People's Bldg. & Loan Ass'n,* 190 Ark. 1072, 81 S. W. 2d 917; *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584; and *Steele* v. *Robinson,* 221 Ark. 58, 251 S. W. 2d 1001. As Chief Justice McCulloch pointed out in the Jenkins case, the rule finds support among all the text writers. See, also, Restatement, Property, § 157, Sub-section n. The record reflects that appellant was relying on the case

of *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994, when she instituted the present action. At that time, the decision had not been rendered in *Steele* v. *Robinson, supra,* wherein the Deener case was overruled.

We agree with appellant's contention that the will and codicil must be construed together. We cannot agree with the further contention that, when so construed, an intention different from that so clearly expressed in the codicil is to be gathered from the general testamentary scheme of the original will and the surrounding circumstances existing at the time of the execution of the will and codicil. It is clear that the testatrix by execution of the codicil withdrew the property here involved from the residuary clause of the will and by plain and unambiguous language created a vested remainder in her only grandson, Aubrey Boykin, under the rule which we have adopted. Upon Aubrey Boykin's death, the vested estate in remainder was acquired by Rita Boykin. Upon her death, the title passed under her duly probated will to the appellees.

The judgment is affirmed.

George Rose Smith, J., not participating.

Timmons *v.* Clayton.

5-124 259 S. W. 2d 501

Opinion delivered June 22, 1953.

E. H. Timmons, for appellant.

Phillip H. Loh, III, for appellee.

Ed. F. McFaddin, Justice. Appellant and appellee own adjoining lands within the city limits of Morrilton; appellant's tract of about two acres lies north of appellee's property, and the slope of the surface is from north to south. The decisive question on this appeal is whether previous litigation between the same parties is *res judicata* of the principal issue in this litigation.

Previous Litigation.

In 1951, appellant filed suit in Chancery, claiming appellee was obstructing Timmons Street, which was on the south side of appellant's land and the north side of appellee's land. By cross-complaint, appellee sought damages, claiming that appellant had:

". . . constructed three stock ponds on his said lands which have created reservoirs for natural drainage; that said ponds empty into each other and finally to the pond located in the southeast part of plaintiff's property; that at said pond plaintiff has constructed a spillway which permits water to run over and upon the lands of said defendant, to the damage of the defendant, for which he seeks to recover the sum of $500 as damages; that said impounding of natural drainage and diverting the flow of the same over and upon the lands of said defendant is a nuisance and cannot be abated in an action at law, except by a multiplicity of suits."

The appellant denied the allegations of the cross-complaint; and a Chancery trial resulted in a decree: (1) enjoining appellee from closing Timmons Street; and (2) finding that the waters which appellant had impounded were only *surface waters.* The Chancellor's written opinion on the latter point reads:

"The Court finds that although the *plaintiff is impounding surface water on his lands and is diverting the flow thereof, that the defendant proved no damages as a result of the diversion.*" (Italics our own.)

Present Litigation

After the conclusion of the previous litigation, Timmons Street was graded by the City of Morrilton, and a drainage ditch on either side of the street was designed to carry the surface water easterly about three hundred feet into the ditch alongside State Highway No. 9. Then appellee constructed a terrace near his north line and across the swale or depression that the surface drainage had followed over his land.

When appellee constructed this terrace, appellant filed the present suit, alleging that appellee had constructed a dam over a natural water course, and that the effect of appellee's construction was to cause the waters to flood Timmons Street. Appellant alleged that the ditch through appellee's lands was a "*natural water course,*" as distinguished from a depression or swale for the flowing of surface water. The prayer of the appellant's present complaint was for a ". . . mandatory injunction compelling defendant to remove the dam and levee from across the stream. . . ."

To this complaint, appellee pleaded — *inter alia* — that the previous litigation between the parties was *res judicata,* because in the previous litigation, the Court found that the drainage ditch was for surface water, and was not a natural water course. After a patient hearing, the Trial Court held: (a) that the previous litigation had determined that the waters were surface waters; and (b) that appellant had shown no damage. The Chancellor rendered a written opinion, from which we quote:

"Without reciting the testimony, it was admitted that the dam in question was constructed on defendant's lands and that its purpose was to repel the water in question. There was also testimony on the part of defendant that the dam caused the water to flow into

ditches dug by the City along each side of the road and that there was no flooding of the highway in the recent rain.

"A view was also had of the premises.

"It appears that the first question to be decided is that stated in *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110. . . . 'The principal issue is whether Turner, by putting in this levee, has wrongfully obstructed natural water courses or has merely fended off surface waters, as he is entitled to if he does not unnecessarily damage his neighbors. *Little Rock, Etc., Co.* v. *Chapman,* 39 Ark. 463, 43 Am. Rep. 280; *Baker* v. *Allen,* 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93.' . . .

"The following findings are made:

"1. *Res Judicata:*

"The question as to the type of water involved here was directly involved in the previous suit, where it was raised in the pleadings, made the subject of proof, was the subject of a finding by the court which was used as the basis for that part of the decree pertaining to plaintiff having impounded and diverted the water in question. . . .

"Accordingly, the plea of *res judicata* is sustained.

"2. . . . No damages were proved."

We conclude that the Trial Court was correct. In the previous litigation, appellant had been happy with the finding that the only water he was impounding was *surface* water. Now he wants to claim that the same ditch which carried *surface water* through his land, became a *natural water course* when it reached the adjoining lands of the appellee. The appellant cannot thus blow hot and cold. Here we are dealing only with surface water.[1]

The rule as to the blocking of surface water in an urban location is stated in *Levy* v. *Nash,* 87 Ark. 41, 112 S. W. 173, 20 L. R. A., N. S. 155.

[1] In 12 A. L. R. 2d 1338, there is an Annotation entitled: "Liability, as regards surface waters, for raising surface level of land."

"To make it (the property) useful for this purpose, the owner has the right to fill it up, elevate it, to ditch it, to construct buildings on it in such a manner as to protect it against the surface water of an adjoining lot. If in so doing he prevents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. This is a necessary incident to the ownership of such property. A contrary rule would operate against the advancement and progress of cities and towns and to their injury, and would be against public policy."

In areas outside urban centers, a lower proprietor may protect himself from *surface water* by erecting a levee where that is the practical method of protecting his land from surface water, and where in so constructing the levee he acts in good faith and is free of negligence. *Baker* v. *Allen,* 66 Ark. 271, 50 S. W. 511; *Jackson* v. *Keller,* 95 Ark. 242, 129 S. W. 296; *Honey* v. *Bertig,* 202 Ark. 370, 150 S. W. 2d 214; and *Brasko* v. *Prislovsky,* 207 Ark. 1034, 183 S. W. 2d 925.

Since (a) appellant in this litigation with the appellee is bound by the previous decision that the water here involved is surface water; and since (b) appellee in building his terrace to fend off the surface water is not shown to have acted negligently, or in bad faith, it therefore follows that the decree herein is in all things affirmed.

ADKISSON *v.* STARR.

5-132 260 S. W. 2d 956

Opinion delivered June 22, 1953.

Amended on Denial of Rehearing October 19, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

Clark & Clark and *Wallace Townsend,* for appellee.

George Rose Smith, J. This is a suit between adjoining riparian landowners to obtain a division of about 1,200 acres of land that was formed by accretion as the channel of the Arkansas River gradually shifted westward. The appellants, defendants below, and their predecessors in title have long owned riparian land (referred to as the Adkisson place) in Section 13, Township 3 North, Range 14 West. The appellee and his predecessors have owned the adjoining farm to the south, known as the Rector place and lying in Sections 24, 25, and 36. The recession of the river over a period of more than fifty years exposed the lands now in dispute, which lie directly west of the original farms. The chancellor divided the new land by extending the common boundary (the south line of Section 13, which is also the north line of Section 24) due west across the area in controversy. The appellants contend that all the disputed acreage became their property by accretion, or, if it did not, that they have acquired title by adverse possession.

The voluminous record gives a pretty complete history of the shifting of the river in this vicinity. When the United States finished its survey in 1856 the river flowed southward through the four sections mentioned above, so that each section was then fractional. Apparently the river had long occupied this bed, for on the east its bank was so high that it is sometimes called a bluff.

The next survey, made in 1900, shows that the river had begun to move westward. This plat reveals an extensive sandbar on the east side of the river in Sections 13 and 24, indicating that the river's movement to the west began in those sections. According to this survey Palarm Creek, which is an important factor in this litigation, came down from the northeast, crossed the sandbar, and emptied into the river at about the center of Section 13, which is part of the Adkisson place.

As this segment of the river continued to shift to the west Palarm Creek did not extend its channel in a direct line to reach the river. Instead, at some time not fixed by the proof the creek turned southward in Section 13 and flowed parallel to the river for two or three miles before joining the river some miles below the original mouth of the creek. In so paralleling the larger stream the creek for the most part followed the old river bed, but in doing so it left a strip of accreted land between the creek bed and the bluff bank on the east. The lands now in dispute comprise a long V-shaped peninsula bounded on the north by the Adkisson place, on the west by the Arkansas River, and on the east by Palarm Creek, with the Rector place lying on the east side of the creek in the lower three of the sections mentioned.

As a preliminary matter a jurisdictional question was raised in the oral argument, although it is not urged in the briefs. All the land actually in dispute lies in Faulkner County, since in this vicinity the line between that county and Pulaski County runs down the river to the mouth of Palarm Creek and thence up that creek, with the land between the two streams being a part of Faulkner County. Act 59 of 1875, Adjourned Session. Although part of the disputed land lay in Pulaski County

before the river shifted to the west, the rule is that a boundary line defined by a watercourse follows a gradual change in the course of the stream, though the boundary is not affected by a sudden avulsion. *DeLoney* v. *State,* 88 Ark. 311, 115 S. W. 138.

Nevertheless we think the Pulaski Chancery Court had jurisdiction, for the complaint also asked the court to apportion the narrow band of accretion lying between Palarm Creek and the bluff bank. That strip is east of the creek and is therefore in Pulaski County. It happens that the defendants concede the plaintiff's title to this strip, and perhaps the defendants could have disclaimed ownership of the Pulaski County land and insisted that the real controversy be tried in Faulkner County. But the defendants acquiesced in the plaintiff's choice of the forum, and the decree has the effect of awarding the Pulaski County land to the appellee. It follows that the suit involves the title to land in both counties; so the venue may be laid in either county. Ark. Stats., 1947, § 27-601.

On the merits the appellants first contend that the disputed acreage accreted entirely to their land in Section 13. This argument is based on the fact that the original Rector place lay entirely east of Palarm Creek and is now separated by that stream from the land in controversy. The Adkisson place, on the other hand, lay on both sides of the creek to the north, and it is therefore argued that the appellants' ownership extended southward and westward as the recession of the river built up land between the two watercourses.

This identical argument was rejected in *Dowdle* v. *Wheeler,* 76 Ark. 529, 89 S. W. 1002, 113 Am. St. Rep. 106. There, as here, a river had slowly shifted away from adjoining littoral properties, and later on a smaller stream occupied the old river bed and blocked Mrs. Wheeler's access to the accretion that lay in front of her property. In upholding Mrs. Wheeler's title we stressed the fact that a narrow strip of the accretion lay between her property and the creek. "This goes to show that there was a deposit against the shore line be-

fore the waters of the river receded, that this process continued until the bed of the river rose to the level of the creek's bed, and that then, as the waters of the river receded, the flow from the creek prevented further deposits in its extended channel, and established a permanent channel along the old bed of the river."

On its material facts this case cannot be distinguished from that one. The 1900 plat shows that Palarm Creek then entered the river in Section 13, but a sandbar had already begun to build up along the shore of the Rector place. Witness after witness confirmed the existence of accreted land between the creek's new bed and the old bluff bank. Aerial photographs put the matter wholly beyond controversy. We can think of no reasonable theory to account for this physical situation except that advanced in the *DeLoney* case, to the effect that the river first left a shelf of accretion against the appellee's property and that later Palarm Creek turned southward and established a new channel on that shelf. It is necessarily true that the new channel was bounded on both sides by accretions already a part of Rector place, and for that reason all later accretions to the west also became a part of the appellee's property.

A much more difficult question is presented by the appellants' proof of adverse possession. Except in rare seasons of extreme drought Palarm Creek is a formidable barrier that cannot be conveniently crossed without a boat. Hence the appellee has been cut off almost continuously from his part of the land in dispute, the only access having been from the Adkisson place to the north. Hence about the only dominion that has been exercised over the newly formed acreage has been that of the appellants and their predecessors. We agree with the chancellor, however, in thinking that the proof does not show sufficient acts of ownership to work an investiture of title in the appellants.

The claim of adverse possession rests mainly upon the assertion that the owners of the Adkisson place have long maintained a fence on their side of Palarm Creek. If so, the area in controversy was effectively enclosed

by this fence on the east, by the appellants' property on the north, and by the Arkansas River on the west. We have carefully studied every reference in the record to this alleged fence, but we are unable to spell out any period during which the fence is shown to have been maintained for seven successive years, even disregarding temporary breakages caused by flood waters.

One witness, who was familiar with the property from about 1907 until 1917, testified that there was a fence along the creek during those years, but three other witnesses whose testimony related to part or all of this period gave evidence to the contrary. The next mention of this fence is in the testimony of R. E. Dent, who owned the Adkisson place from 1917 until 1930. Dent says that he fenced the west side of the creek in 1917 or 1918, that an overflow covered the fence, and that he fenced a second time. Yet he does not specify the location of the fence nor say how long it remained in place. J. C. Cook was a tenant of Dent's in 1923 and says that there was then a fence on the west side of the creek, but he gives no details whatever.

Ed Fisher, Dent's overseer from 1923 until 1930, testified that a fence was erected in 1924, but he was unable to say how far it extended down the creek. "Nearly every year we took willow posts and put a fence in there to keep from pulling [cattle] out of that creek. . . . We run it around a slough." Fisher's positive statement that a new fence was put up in 1924 carries the implication that Dent's fence of 1917 or 1918 no longer existed. It may also be inferred from Fisher's language and from other testimony that the 1924 fence was not a continuous barrier but was instead a series of fences put up only where it was necessary to keep cattle from being mired in the various bogs in the creek bed. All this fencing seems to have consisted of two or three strands of barbed wire nailed to trees, and had the fence been of much permanency it seems that more evidence of its location would have survived than is reflected by this record.

There is practically no reference to the existence of any fence from 1930 to 1935. To the contrary, two of the appellants' witnesses pulled cattle out of the bog in 1932, which tends to negative the maintenance of a fence in that year. To the same effect is the clear-cut testimony that an entirely new fence was built by the Adkissons in 1935. That one was swept away by a flood in the same year, was replaced a year or two later, and the replacement has been kept in repair ever since. But the appellee tolled the statute of limitations in 1941 by bringing suit in Faulkner County for a division of these lands. By tacit agreement that suit has been allowed to lie dormant, but of course its pendency eliminates the issue of adverse possession from 1941 to the present.

The above is the testimony most favorable to the appellants, but there is fully as much evidence to the contrary, much of which was given by the appellants' witnesses. George Irby had lived on the Adkisson place for forty years. He helped put up the 1935 fence, but he could not remember any other fence having been on the west side of the creek. Marshall Mainard said that for fifty years he had been almost as familiar with the Adkisson place as with his own land across the river, but he had no knowledge that a fence existed in the 1920's or the 1930's. We need not detail many other instances in which corroboration might have been expected but was not produced. At most we can say only that the testimony is so evenly balanced that we find it impossible to discern a preponderance in either direction. In this situation it is our practice to be guided by the chancellor's conclusions.

If, as we must conclude, the land was unenclosed from time to time, there is not much other proof of adverse possession. The appellants naturally had no color of title to these accretions; so they are not aided by the rule that actual possession of part of a tract carries with it constructive possession of the whole. It was therefore incumbent upon them to show actual physical possession of this unenclosed acreage. This is a burden of proof hard to sustain, for by their nature these lands

did not readily yield to actual possession. The advancing edge of the accretion consisted at first of sandbars not susceptible of agricultural use. (In 1939 a survey showed that sandbars comprised 588.14 of the total 1,239.80 acres of accretion.) It necessarily took time for the sandbars to be converted into soil by deposits of silt and by the growth of vegetation. The testimony and the photographs in the record convince us that the land has remained almost entirely unimproved. The appellants allowed their cattle to roam over the bar, and wild hay was cut now and then. But substantial growths of timber are shown by the pictures, and one of the appellants states that in 1948 trees were cut that exceeded twelve inches in diameter at the stump.

Small fields were planted to corn in some years, but the proof does not establish the location of any field before the 1939 survey. The witness Moreland estimated that eleven acres on the bar were cultivated in 1925. Troy King thought there were from seven to twelve acres in corn in 1936; one of the appellants put the figure for that year at thirty-five acres. These fragments of cultivation certainly do not show the required actual occupancy of more than twelve hundred acres.

There is much proof that the bar was generally considered to be part of the Adkisson place, and that conclusion was plausible enough. The peninsula was separated from the Rector place by Palarm Creek and could be conveniently entered only from the north. But as a matter of law the title rested in the appellee, and much more than a subjective belief of ownership is necessary to the acquisition of title by prescription. We have no doubt that the appellants believed themselves to be the owners of this land and that pursuant to that belief they intermittently exercised acts of ownership over various small and unspecified patches of the property. They, however, had the burden of proving their claim of title, and we are not willing to override the chancellor's judgment upon the basis of testimony that leaves us with serious doubt as to the merit of their position.

The appellants also have a State tax deed to part of the property, but it is based upon tax forfeitures that occurred while the land was being assessed in Pulaski County. Whatever title the State acquired was extinguished when the river gradually edged across the property and by reliction added it to lands in Faulkner County. It follows that when the State executed its deed in 1948 it had no title to convey.

Affirmed.

WARD, J., dissents.

BEASLEY, STATE COMPTROLLER *v.* DAILEY.

5-125 260 S. W. 2d 442

Opinion delivered June 22, 1953.

Rehearing denied October 5, 1953.

Tom Gentry, Attorney General, and *John R. Thompson,* Assistant Attorney General, and *Ed F. Ashbaugh,* for appellant.

Carl Langston, for appellee.

GRIFFIN SMITH, Chief Justice. Dalton Dailey, doing business as Dailey's United Supply Company, sought to prevent the treasurer of state from paying warrants amounting to slightly more than $12,500. Vouchers had been issued by the State Game and Fish Commission in payment of bills for furniture installed in the commission's new building in 1952. The state comptroller was made a defendant and the game and fish commission intervened.

Dailey's complaint asserts that Beasley was officially derelict in delegating to the commission authority expressly vested in the comptroller; that the commission and the comptroller did not comply with mandatory provisions of Act 214 of 1943, and that as a taxpayer the suit was public in its nature, the intention being to prevent an illegal exaction. A temporary order restraining payment of warrants issued to Dailey's competitors was made permanent by the special chancellor. This appeal tests the correctness of that order.

Section 4 of Act 214 is entitled: "Pre-Authorization of Expenditures." Where the estimate is that purchases will exceed $500 sealed bids are required. Published notice is given. If prospective bidders are known, the state agency or department to which the Act is applicable must send information by mail announcing that on a day certain bids will be considered. A slightly different procedure applies to purchases when it is contemplated that $500 or less will be involved.

Language of the Act is that contracts shall be awarded to the lowest responsible bidder, "taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for

bids." The agency or department receiving bids shall submit them to the comptroller, *"and he shall have the power to decide as to the lowest responsible bidder as to all purchases"*.

The request for bids is dated February 13, 1952. Responses were receivable until the morning of February 21 at 10 o'clock, "the nomenclature and specifications [of the furniture desired] being specifically described". See footnote for copy of advertisement.[1] The publication closes with the comment that the furniture must be of first class quality, material, and workmanship, with guaranteed delivery March 15th. The department reserved the right to reject any or all bids.

The comptroller testified that the commission's needs were certified to him, that he authorized publication of the advertisement, and furthermore that he approved the rejection of Dailey's bids and ordered that other bids be accepted. Dailey contends that in the aggregate $1,500 in excess of his bids went to the suppliers whose offers were accepted—or would go to them if the warrants are paid. But the comptroller also testified that when Dailey's bids were received just a few minutes before the "dead line" in point of time, insufficient information was given. In some instances sizes and descriptions varied from furnishings upon which bids had been requested. Dailey was not present and could not be questioned for explanatory purposes when the bids were opened, nor was he represented.

Item No. 1.—(executive walnut desks)—called for bids on three units 68 to 72 inches. Dailey offered three

[1] (1)—Three executive walnut desks, size 68 to 72 inches; (2)—One walnut table, 34 x 68 inches; (3)—Two walnut drop-head secretarial desks, 58 to 68 inches; (4)—One walnut directors' table, 32 x 48 inches; (5)—Three walnut telephone cabinets; (6)—One 5-ft. walnut reception bench; (7)—Three leather upholstered walnut revolving side arm chairs; (8)—Fourteen leather upholstered side arm chairs; (9)—One walnut revolving side arm chair; (10)—Three leather upholstered secretarial posture chairs; (11)—Twelve walnut arm chairs; (12)—150 plastic upholstered theatre type seats, installed; (13)—Five gray steel executive desks, 68 to 72 inches; (14)—Two gray steel drop head secretarial desks; (15)—One gray steel side panel secretarial desk; (16)—Six gray steel side arm upholstered revolving chairs; (17)—Six gray steel side arm chairs; (18)—Three gray steel upholstered secretarial posture chairs; (19)—Twelve 4-drawer gray steel letter files.

desks 78 x 36 inches, the length being six inches in excess of the maximum requested by the commission. In the circumstances, however, this would not be controlling. The Democrat Printing & Lithographing Company's bid of $350 (less 15%) was accepted in purchasing one desk 68 x 36 inches—the exact length specified in the advertisement. Two other desks were purchased from Parkin Printing & Stationery Company for $212.50 each. These were 66 x 36 inches—two inches short of specifications.

Item No. 3.—The specifications were for two walnut drop-head secretarial desks, 58 to 68 inches. Dailey's bid was $350 for "Walnut typewriter desks." Size and description were absent. The commission accepted the bid of Parkin Printing Company for "Two Leopold 60 x 34 drophead typewriter desks, genuine walnut, at $187 each."

Item No. 5.—Where the advertisement called for three walnut telephone "cabinets," Dailey's proposal mentioned telephone "stands."

Item No. 6.—The comptroller's construction was that this bid on a 5-ft. walnut reception bench failed to show the kind of material offered. In this we think the comptroller was in error, since the caption of Dailey's bids was, "All items first class quality and wood items are of solid walnut construction." The award went to Parkin at $178.90 when Dailey's bid was $105.

Item No. 12.—The advertisement was for 150 plastic upholstered theatre-type seats, installed. Dailey did not bid on this lot because he was unable to make delivery.

Only a few of the many items discussed by the comptroller will be mentioned, although testimony covered the entire range. It is to be doubted that any but the litigants—and they have the information—would be interested in a recapitulation of all bids and the comptroller's reasons for rejecting Dailey's offers and in most instances accepting quotations substantially higher in point of price.

The question is whether the intention of Act 214 was to compel the comptroller to look to figures alone in ap-

proving bids for merchandise like furniture. Every informed person knows that walnut, mahogany, and other veneers are sold as "solid," and that the responsibility of the seller and his connection with manufacturers whose products have been proven are essentials, on a parity with price. A so-called "walnut desk 36 x 78" may be worth $100 or $1,000, depending entirely upon its construction and finish. The same rule applies to every item the commission proposed to buy. Secretary McAmis went, as the law directs, to the comptroller, and that official sanctioned the methods by which bids were received; and the comptroller gave his unqualified approval to purchases and rejections. Was this error of a kind invalidating the contracts? We do not think that it was.

In the first place an expensive building, reflecting credit upon the state and upon the commission, was to be furnished. Certainly those who were in charge of the commission's activities had a right to some explanation regarding the quality of more than twelve thousand dollars worth of permanent furnishings. It is in evidence that no descriptive literature accompanied Dailey's bid. At least one witness testified that he undertook to inspect the offerings, but was not successful. Perhaps this effort was not aggressively followed up, but the protruding fact is that the comptroller supervised the transaction, that he exercised what appeared to him to be a discretionary right to say who was the lowest responsible bidder, and that in rejecting Dailey's offer and approving the bids of D. P. & L., of Parkin, and of All State Supply Co., he took into consideration detailed descriptions, photographs of various items, quality of the merchandise, and relied upon personal inspections made by those to whom the duty of ascertaining facts not shown in Dailey's bids had been delegated. It is inconceivable that the lawmakers, in approving Act 214, expected an individual who was already burdened with as many duties as anyone could possibly discharge, to personally supervise the matters at issue.

It is our view that the statutory expression "lowest responsible bidder" was intended to permit the comptrol-

ler to disregard price in favor of intrinsic values where, in his judgment, the merchandise offered at a lower figure was not comparable to the higher quality found in the article needed. The exhibits attached to or supplied concurrently with the prevailing bids are persuasive of the proposition that the commission and the comptroller took a realistic view of the transactions and completed the purchases without violating the legislative concept, hence the decree must be reversed. It is so ordered.

Justice MILLWEE not participating.

GEORGE ROSE SMITH, J., (dissenting). I do not contend that Dailey is entitled to complain because his own bids were rejected, but I agree with the chancellor in thinking that these purchases were not made in compliance with the law and that Dailey as a taxpayer should have an injunction. Since the majority have deemed it unnecessary even to state the facts that I regard as controlling it is necessary for me to summarize some of the evidence.

McAmis, executive secretary of the Fish & Game Commission, testified that in advertising for bids the Commission purposely avoided exact sizes and specifications, so that the commissioners would have a wider range of selection. In addition to this intentionally vague invitation to bidders, the prospective sellers were notified by telephone that their bids need not conform exactly to the specifications as advertised. A representative of one of the successful bidders testified that he understood all along that it was a customer's selection type of bid and that his part in the transaction would be a job of salesmanship.

When the bids were opened all the sellers except Dailey had salesmen present. The salesmen submitted samples of their wares and literature concerning the furniture offered for sale. Representatives of the Commission then went on a shopping tour and selected whatever items they thought would be suitable for the new building, *regardless of price.* Purchases were made from three different concerns, but in several instances

the bid that was accepted was higher than a competing bid made by another one of these same three companies. Obviously in such cases the rejected bid not only was lower but also was admittedly made by a responsible merchant. The representatives of the Commission merely thought that the more costly article would better suit the new building.

To call this procedure competitive bidding is simply a misuse of the English language. The advertisement for sealed bids accomplished nothing except to inform furniture dealers that the Commission was in the market for some merchandise. The statute (Ark. Stats. 1947, § 13-304) requires that the specifications be advertised, that sealed bids be submitted, and that the purchase be made from the lowest responsible bidder. Here neither the specifications nor the sealed bids served the slightest purpose, *nor were they intended to.* They were empty gestures, devoid of all the significance that the statute meant for them to have. If this method of doing business satisfies the statutory requirement that bidding be competitive, the legislature has wasted its time in enacting the law. Even with some safeguards the State's purchasing system has been subjected to abuse, but I see no limit either to the favoritism or to the waste of public funds that is made possible by the court's approval of these contracts.

BRINKMAN *v.* PEEL.

5-139 260 S. W. 2d 448

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

Perkins and *Duty,* for appellant.

Vol. T. Lindsey and *Jeff R. Rice,* for appellee.

GRIFFIN SMITH, Chief Justice. In March, 1951, William H. Brinkman and his wife, as joint tenants, purchased a farm in Delaware county, Oklahoma, for $45,000, and thereafter spent appreciable sums rehabilitating and improving it. Within less than six months the place was listed with eight or ten realtors for sale at $65,000. Possession was surrendered to F. S. Cochran about the first of November. Cochran purchased through Clifford Black, a Rogers realtor. The Cochran contract was closed during the afternoon of October 15th and the price paid and to be paid was $60,000. A check for $5,000 was given as the down payment.

This appeal is from a judgment for $3,000 in favor of Terry Peel, a Bentonville realtor, with whom the Brinkmans had the farm listed. Peel's contention is that preliminary discussions had taken place between representatives of his office and J. T. McKinney, and that on the morning of October 15th, or shortly afternoon, difficulties were eliminated, resulting in a firm offer of $60,000 by McKinney and an acceptance by Brinkman. McKinney, who lived in Texas, had inspected the property and attempted to buy it at a price substantially lower than the listed figure. He also specified that a large deep freeze unit and other personal property were to be included. It is not disputed that the Brink-

mans refused McKinney's first offer, evidenced by a telegram dated October 12th. But Peel, through use of the telephone, persuaded McKinney to drop his stipulation regarding the deep freeze; thereupon Peel or those representing him discussed details with Brinkman before noon October 15th. During these conversations Brinkman refused to include the deep freeze; but he admits that while in Peel's office there were telephone conversations with McKinney and that he (Brinkman) participated in the exchange of views. Following these conversations Peel had his attorney draw up a contract reflecting, as Peel testified, the final offer made by McKinney and its acceptance by Brinkman. Prior to Brinkman's arrival at Peel's office there had been long distance conversations with the prospective purchaser.

Joe Johnson, one of Peel's salesmen, had talked with McKinney. After receiving McKinney's telegram Johnson went to Oklahoma and saw Mrs. Brinkman. Her husband was temporarily absent. Mrs. Brinkman told Johnson she would have Brinkman go to Peel's office the next day. When Brinkman reached the realtor's office the morning of the 15th he told Johnson to go ahead and accept McKinney's offer of $60,000, $10,000 to be paid in cash and possession to be given January 1. Originally the cash payment had been tentatively discussed with the idea that 10%, or $6,000, would be paid, with possession December 1.

Johnson testified that, after receiving McKinney's authorization, the final offer was explained to Brinkman, who said, "We'll just go ahead and enter into a contract on those terms". Jeff Rice, an attorney representing Peel, was informed of the essentials and told to prepare the instrument.

Before discussions were closed Brinkman received a telephone call from Black's office. According to Brinkman, Black told him he was with Cochran at the Harris Hotel in Rogers. Brinkman says he kept the appointment at 12:30 and while there sold the property to Cochran for about $3,000 more than McKinney had

offered. After accepting Cochran's offer they left at two o'clock to go to the farm, Cochran and Black in "their" car, and Brinkman in his truck. Brinkman went by Bentonville, was again in contact with Peel's office, took the original contract and two copies, and left. The cross-examination of this witness discloses his attitude:

Question (by counsel for Peel): "[Mr. Brinkman], after you had been to Rogers (these folks had been dealing with you all morning and [had] gone into a contract [after making telephone calls]—you went there and accepted a deal with Black? A. That's right.

"Q. Then you came back and picked up the contract and didn't tell them [about selling to Cochran]? A. That's right.

"Q. Why didn't you tell them? A. What difference does it make? . . .

"Q. Why didn't you tell them that Black had sold it—had found a buyer—and that you had already sold to Mr. Cochran? A. I just didn't think about it".

Brinkman denied that in picking up the abstract he told Peel or his representative that it would be returned the next morning with a deed. The witness admitted that Peel's agents saw him in November, and at that time he had not disclosed that a sale had been made through Black.

Brinkman's defense is that he did not agree to all of the terms exacted by McKinney, therefore there was no meeting of the minds. It is not seriously urged that McKinney was not ready, able, and willing to buy, or that the method of payment was unsatisfactory.

The cause was tried before Judge Cummings, a jury having been waived. As a prerequisite to factual findings in favor of Peel it was necessary that the evidence preponderate in his favor; but we affirm if there was substantial evidence tending to support appellee's contentions.

The law is that as between realtors who have nonexclusive listings, the agent first producing a buyer

whose offer meets the seller's terms has earned his commission. Certainly there was testimony legally sufficient to establish McKinney's offer, the discussions by telephone, the submission of McKinney's proposals to Brinkman, and his acceptance. When Brinkman went to Peel's office the morning of October 15th he had his abstract of title and temporarily left it with the real estate agency.

The explanation by Brinkman that he merely received the offers with the intention of discussing the proposals with his wife was not accepted by the trial court and must be rejected here. Paraphrasing an excerpt from *Balser* v. *Ramseur,* 209 Ark. 150, 189 S. W. 2d 785, "There is a question of fact which we think the record presents, and that is whether Peel advised Brinkman that he had procured a purchaser before Brinkman closed with Cochran through Black. If Brinkman was advised that Peel had procured McKinney as a purchaser before permitting another agent to sell, Brinkman is liable to Peel for the commission, although he may also have paid or become liable to pay Black a commission". In the Balser-Ramseur case the agency was exclusive.

The general rule of liability is that a realtor has earned his fee when, in response to the seller's agreement to dispose of the property under terms sufficiently clear for identification of the subject-matter, the method of payment, and other details, a purchaser ready and willing to buy and able to pay is produced. *Bowen* v. *Riggan,* 218 Ark. 244, 235 S. W. 2d 967.

A second objection is that the court erred in not dissolving an attachment by which an automobile was taken into custody by the sheriff of Benton county. Brinkman contends that the car was his wife's property and that she was not a party to the contract for sale of the farm. Disregarding the suggestion that Brinkman was his wife's agent in the real estate transaction, we have testimony from which the court was justified in finding that the automobile belonged to appellant. Fol-

lowing the attachment Brinkman executed a retention bond, with the U. S. F. & G. as surety. The car was released to William H. Brinkman when he produced and exhibited to the sheriff a bill of sale showing his individual ownership. There was no objection when the sheriff testified to this transaction.

Affirmed.

CITY OF LITTLE ROCK, *et al. v.* GOODMAN, *et al.*

5-116 260 S. W. 2d 450

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

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

Edward E. Stocker and *Cooper Jacoway,* for appellee.

ED. F. MCFADDIN, Justice. This suit was instituted in the Pulaski Chancery Court in an effort to obtain rezoning of certain property in Little Rock from residential property to heavy industrial property.

In several recent cases we have indicated the burden on a property owner who claims that rezoning has been arbitrarily or unreasonably refused by the Administrative Agencies and the City Council. *City of Little Rock* v. *Connerly,* 222 Ark. 196, 258 S. W. 2d 881; *City of Little Rock* v. *Fausett & Co.,* 222 Ark. 193, 258 S. W. 2d 48;

City of West Helena v. *Bockman,* 221 Ark. 677, 256 S. W. 2d 40; and *Evans* v. *City of Little Rock,* 221 Ark. 252, 253 S. W. 2d 347.

To review all the evidence in the present record and to measure it by the rules recognized in the foregoing cases would unduly extend this opinion. It is unnecessary to make this review, because we rest our decision on the absence of any sufficient ownership of, or interest in, the property by the persons filing this suit.

The appellees are Saul Goodman, Don Gordon, and Sam Barg; and they are occupying the property involved as tenants at will of the property owners. The appellees, as plaintiffs, filed the present suit on July 31, 1951, against the City of Little Rock, and its Engineer and Chief of Police. The plaintiffs alleged: that they were then operating their junk yard and salvage business on certain lots on Block *Three,* Intercity Addition to Little Rock; that they ". . . desire to use and need to use in the conduct of their business certain lands lying directly West of and immediately across Anna Street from . . . " the present place of business; that the said lands sought to be rezoned are Lots 10, 11, and 12, Block *Two,* of said Intercity Addition; that the plaintiffs had exhausted all the remedies provided by said Zoning Ordinance; and that the various City officials and Commissions, including the City Council, had refused to give to plaintiffs authority or permission to operate their business on the west side of Anna Street in said Block *Two.*

In its answer, the City stated that the lots in Block *Two* are zoned as residential property; ". . . that plaintiffs do not state sufficient title or interest in Lots 10, 11 and 12 of Block *Two,* Intercity Addition to the City of Little Rock, for the purpose of entitling them to ask for a rezoning of said property; . . . and that none of the parties in whom title now stands, on the records of the Circuit Clerk's office, has applied for or asked for a rezoning of said property."

Thus, the pleadings presented the issue as to whether the appellees had sufficient interest in the property to

support this suit in the Chancery Court to enjoin the City and its officials from interfering with the appellees in the use of the property in Block *Two* for a junk yard. On the question of ownership, the plaintiff, Goodman, testified that the three plaintiffs were partners; that Gordon and Goodman each married a daughter of Mr. and Mrs. Izzy Besser; that the lots involved were owned by Mr. and Mrs. Izzy Besser; and that plaintiffs (appellees) were mere tenants at will.[1] It was shown that in 1949, Mrs. Besser petitioned the City Planning Commission and the City Council to change the classification of the said lots from "B" Residential District to "H" Business District, in order to permit the operation of a trailer court, and that this request was denied by both the City Planning Commission and the City Council of Little Rock; so evidently Mrs. Besser, as the owner of the property, knew that it was classified as residential property when she allowed the present appellees to use the lots as tenants at will.

The question is whether a mere tenant at will, without the joinder of the property owner, can maintain a suit against the City to change the classification of the property from "B" Residential District to "K" Heavy Industrial. We have no Arkansas cases in point, but

[1] Here is a pertinent portion of Goodman's testimony:

"Q. Have you been claiming those lots then under a lease with the Bessers since some time in 1943, or around in there? A. We have never actually had a lease; it has been, you might say, verbal.

"Q. Has there been a verbal agreement with you? A. Yes, a verbal agreement; I believe it is in the I. Besser will. My father-in-law has told me many times that in the case of the death of either one of them the two daughters will receive that property.

"Q. Those two daughters being your wife and Mr. Gordon's wife? A. Yes.

"Q. So you have been occupying and claiming that property under Mr. and Mrs. Besser since 1943? A. Yes.

"Q. And you have been paying rent on it? A. Yes.

"Q. During that time has anybody questioned the ownership of the Bessers as far as you know? A. No, sir.

"Q. Mr. Goodman, I wish you would tell the Court why you need the lots west of Anna Street. In the first place, has your business grown, or not? A. We started in 1943, we started with two trucks and today we have twelve pieces of equipment operating and we have advertised our business more, and it seems like more scrap is coming in from all over the state and we send trucks out to pick it up and have steady routes to send them over."

there are cases from other jurisdictions that shed light on the question. In *Lee* v. *Board of Adjustment,* 226 N. C. 107, 37 S. E. 2d 128, 168 A. L. R. 1,[2] a person holding an option to purchase land was permitted to file application for rezoning. In *Smith* v. *Selligman,* 270 Ky. 69, 109 S. W. 2d 14, a person holding an option to purchase property was allowed to file a petition for rezoning. *In re Elkins Park Improvement Ass'n Zoning case,* 361 Pa. 322, 64 Atl. 2d 783, the Supreme Court of Pennsylvania allowed an equitable owner of property to seek rezoning.

In *Dimitri* v. *Zoning Board,* 61 R. I. 325, 200 Atl. 963, the Supreme Court of Rhode Island remanded a cause in order to allow a party to prove his ownership of the property sought to be rezoned, saying:

"The burden is upon the petitioner to make proper proof of his ownership of or interest in the lot in question, in order that it may clearly appear that he is a party aggrieved by the decision of said board, and that he is entitled to raise the questions he is now asking to have decided in this case."

Likewise, in *Sun Oil Co.* v. *Macauley,* 72 R. I. 206, 49 Atl. 2d 917, the Supreme Court of Rhode Island[3] held Sun Oil Company's petition for rezoning to be insufficient, saying:

"First, the petition does not show that the Sun Oil Company had any title or any clear interest in the land in question. The real owner did not join in the application for a modification of the zoning regulations nor did he otherwise appear before the zoning board to support the application filed by the Sun Oil Company."

In McQuillin "Municipal Corporations", 3rd Ed. Vol. 8, § 25.259, the text states:

"Relative to proper parties to apply or petition to zoning boards for permits, variances, nonconforming

[2] In 168 A. L. R. 13, there is an extensive Annotation on phases of Zoning Variations. See, also, 58 Am. Jur. 1058 on Parties in Zoning Variations.

[3] The decision in the Sun Oil Company case is subsequent to that in *Ralston Purina Co.* v. *Zoning Board,* 64 R. I. 197, 12 Atl. 2d 219, in which the Rhode Island Supreme Court allowed a *Lessee* to seek rezoning under the terms of a particular ordinance there involved.

uses and the like, it has been adjudged that one must have title or a clear legal interest in land to entitle him to apply in his own right to a zoning board for a variance with respect thereto. On the one hand, it has been held that a vendee under a contract to purchase land is not entitled to apply in his own right for a variance in the use of that land. On the other hand, it has been ruled that a vendee under a contract of sale of certain premises is a proper party to apply to a zoning board for a special permit relating to those premises."

But in all of these reviewed cases, the party seeking rezoning [4] was more than a tenant at will of the property sought to be rezoned. In the case at bar, mere tenants at will instituted this plenary suit in the Chancery Court and sought to show that the City Planning Commission and City Council had acted arbitrarily and unreasonably in refusing a petition for rezoning, when at no stage of the proceedings did the property owners ever become parties to such suit. Our Statute provides that every action must be prosecuted in the name of the real parties in interest. (See § 27-801, Ark. Stats.) Here real estate is involved; and we hold that the owners of the real estate are the real parties in interest, and that the appellees, as mere tenants at will, cannot maintain this suit for rezoning, since the landowners are not parties.

Accordingly, the judgment of the Chancery Court, allowing a rezoning, is reversed, and the cause is remanded with directions to dismiss the complaint.

Mr. Justice MILLWEE not participating.

WARD, J. (dissenting). I am unable, for the reasons hereinafter set forth, to agree with majority opinion in this case.

The majority opinion is based on the ground that appellees have no such interest in the property sought

[4] Many cases hold that an adjacent property owner, aggrieved by an order allowing rezoning, may appeal to the Courts as an "aggrieved party". 58 Am. Jur. 1073. See Discussion in Yokley "Zoning Law and Practice", Sec. 170; and see Metzenbaum "The Law of Zoning", page 271 *et seq.* See, also, *Hernreich* v. *Quinn,* 350 Mo. 770, 168 S. W. 2d 1054.

to be re-zoned as to give them standing in court. An analysis of the decisions cited in support of the majority view are not, to me, convincing.

The *Dimitri* case, 200 Atl. 963, makes no mention of the provisions of any zoning ordinance which, here, are important it seems to me. Moreover the court merely held that the petitioner did not prove his ownership or "*interest* in the property." (emphasis supplied). It is important to note that the court, at least by fair implication, did not require absolute ownership.

Sun Oil case, 49 Atl. 2d 917. Here, again, the court gave no consideration to the ordinance provisions, and, also again, stated that the petitioner must have title or "some clear *interest*" (emphasis supplied).

The majority of opinion, in a foot note, merely refers to the case of *Ralston Purina Co.* v. *Zoning Board,* 12 Atl. 2d 219, with the comment that it was decided before the *Sun Oil* case, implying that it was thereby overruled. The *Ralston* decision deserves fuller consideration for two reasons: First, it is in point with matter under consideration and sustains my position, and; Second, it has in no way been overruled by the *Sun Oil* or any other decision, as is presently pointed out.

The *Ralston* case was considered by the Supreme Court of Rhode Island on a petition for a writ of *certiorari* by a "petitioner as a person aggrieved by a decision of the zoning board of the town of Westerly" to whom the Board had denied a permit to erect a coal-pocket at an estimated cost of $950. The Supreme Court, in reversing the decision of the zoning board, used this language [12 Atl. 220]:

"It is first urged by those supporting the board's decision that the petitioner, being merely the lessee of the premises upon which the proposed coalbin is to be erected, can not alone, without joining the owners of such property, apply for the building permit in question, or bring the instant petition. We *find nothing in the Westerly zoning ordinance* (emphasis supplied), or in

the enabling acts authorizing its enactment, which specifically or by implication denies the petitioner the right to file an application without joining the owners of the property in question. In our judgment, the petitioner has a sufficient interest in the leased premises to permit it alone to apply for the building permit in question."
The *Sun Oil* decision had under consideration an entirely different zoning ordinance, involved other questions, and did not even mention the *Ralston* case. The citator reveals that the *Ralston* case has been approved but never overruled.

This brings us to a consideration of the decisive question here—the provisions of the Little Rock zoning ordinance. Section 18 of Ordinance 5421 [the one under consideration] reads:

"Appeals: Appeals to the Board may be taken by *any person* aggrieved." . . . etc (emphasis supplied).

The same ordinance also provides that any *person* or *persons,* jointly or severally *aggrieved* by any decision of the Board may appeal to the Circuit Court (emphasis supplied).

I submit that if the framers of the ordinance under consideration had meant to limit the right of petition and appeal to property owners they would have used language to that effect. It appears to me that the majority opinion wholly fails to present sufficient reason or precedent to justify the narrow construction it gives to the zoning ordinance in question. Surely, under the undisputed testimony here, appellees were interested persons and surely they were aggrieved. For many years they had occupied the property under a verbal lease from the father-in-law of two of them. In fact the father-in-law had assured them they would eventually own it. After all this suit is concerned only with the *use* of property, and appellees had the exclusive use of this particular property.

5-134 260 S. W. 2d 455

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

J. B. Milham, for appellant.

A. J. Russell and *Festus O. Butt,* for appellee.

ED. F. MCFADDIN, Justice. This is a suit to determine priority as between two mortgagees. The Chancery Court decided in favor of Maberry; and Mark has appealed.

In 1948 Mark was the owner of certain real and personal property in Eureka Springs, known as the Allred Hotel and its furnishings. Loucks, a real estate agent claiming to act for Mark, sold the Allred Hotel and furnishings under the terms of a contract dated April 28, 1948, and reading in part:

"Received of Cecil Maberry, for a corporation to be hereafter formed, the sum of $500, as earnest money for the purchase of the Allred Hotel in the City of Eureka Springs, all furnishings and everything in connection therewith for Anson Mark, the owner of said property, and for whom I am acting as agent.

"This is on condition that $8,500 more in cash will be paid as soon as the legal papers can be drawn to carry out this contract and the abstract of Mark brought down to date, showing clear title to everything in connection with the hotel.

"It is understood that Cecil Maberry as agent for the corporation, aforesaid, is to place a Mortgage upon said property not to exceed $15,000, and that he shall give a second mortgage to the said Mark for $10,000, subject to said first Mortgage, . . .

"It is understood hereby between the parties that the said Maberry as said agent, who will expedite the drawing of the necessary papers and forming the corporation and paying the balance of the purchase money, and that upon the said Maberry, as aforesaid, completing his part of the deal, the said Mark shall at once give a Warranty Deed for the building, furniture, fixtures, equipment, and all other personal property now used in connection with the said hotel and owned by the said Mark. . . ."

In pursuance of the said contract, Cecil Maberry organized an Arkansas corporation, styled "Springs In-

vestment Company"; Mark and wife executed a Warranty Deed to Springs Investment Company, dated May 18, 1948; Springs Investment Company executed a first mortgage to Cecil Maberry to secure $15,000; and Springs Investment Company executed the second mortgage to Mark for $10,000. The $15,000 mortgage was filed a few minutes prior to the $10,000 mortgage.

On October 25, 1952, Mark filed the present suit against the Corporation, and also against Cecil Maberry,[1] J. A. Maberry, and V. M. Anderson. Mark is now claiming:

(a) that Mark's mortgage for $10,000 is prior and superior to the $15,000 mortgage held by Maberry;

(b) that Cecil Maberry, J. A. Maberry, and V. M. Anderson, as incorporators and officers of Springs Investment Company, are each personally liable to Mark for the $10,000 balance due him by the Corporation; and

(c) that a chattel mortgage executed in 1949 by Springs Investment Company to Maberry on furnishings then purchased, is junior to the $10,000 mortgage held by Mark.

As aforesaid, the Chancery decree was adverse to Mark on each contention, and he has appealed.

I. *Superiority As Between Mark's Mortgage And Maberry's Mortgage.* The mortgage held by Mark recites: "This mortgage is junior and subject to a prior mortgage for $15,000 executed by same grantor to Cecil E. Maberry . . ." Our cases hold that a mortgagee, who accepts a mortgage which recites a prior mortgage, is estopped to deny the superiority of the prior mortgage. *Clapp* v. *Halliday,* 48 Ark. 258, 2 S. W. 853; *Gibson* v. *Doughty,* 193 Ark. 1037, 104 S. W. 2d 449.

To overcome the application of the cited cases, Mark claims that this recital in his mortgage is fraudulent, was never authorized by him, and never known by him. Thus it becomes necessary to recite some of the salient testimony as to the sale of the hotel property by Mark.

[1] Mrs. Cecil Maberry was also named as a defendant.

Loucks, a real estate agent in Eureka Springs, testified that she represented Mark, and in such capacity, signed the contract with Maberry, as previously quoted. Loucks testified that she sent the contract to Hunter,[2] a lawyer in Chicago, who had theretofore corresponded with her and who claimed to be Mark's attorney. On May 18th, Mark and wife executed the deed to Springs Investment Company, conveying all the real and personal property; and the acknowledgment of that deed was taken by Robert L. Hunter, as Notary Public, in Cook County, Illinois; and that is the same name as the attorney who wrote the letter to Loucks previously mentioned. The notes and mortgage now sued on by Mark were forwarded to Mark, and Loucks received her real estate commission for closing the trade.

It is true that the agent's *declarations*—i.e., the statements in the contract of sale—are not admissible to prove agency, but only to corroborate other evidence tending to establish agency.[3] Nevertheless, the agency can be established by circumstances; and any evidence tending to establish agency is admissible, including the testimony of the agent.[4]

At the time Mark signed the deed to Springs Investment Company, he could not have known of the existence and name of such corporation, except through the agency of Loucks to execute the original contract: Mark accepted the fruit of Louck's agency for him, and cannot now be heard to disclaim such agency. *Rose City Mercantile Co.* v. *Miller,* 171 Ark. 872, 286 S. W. 1010. It

[2] Hunter's letter to Loucks, dated May 3, 1948, recites:

"Enclosed is the abstract of title for the Allred Hotel which Mr. Mark is selling to Cecil E. Maberry. . . . Mr. Mark has advised me that he will accept the Maberry proposition. . . . Mr. Mark is to have a second mortgage for $10,000 on the hotel including the real estate and personal property. . . . Notes are to be executed by the corporation payable as outlined in your proposal of April 28th. . . ."

[3] *Thompson* v. *Hollis,* 194 Ark. 1, 104 S. W. 2d 1065. See, also, other cases collected in West's Ark. Digest, "Principal and Agent," Key No. 22.

[4] *Moore* v. *Ziba Bennitt,* 147 Ark. 216, 227 S. W. 753; *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020; *Meadows* v. *Hudson,* 90 Ark. 294, 119 S. W. 269. See, also, other cases collected in West's Ark. Digest, "Principal and Agent," Key No. 23.

therefore follows that Louck's agency was established; and accordingly, Mark is bound by the provisions of the Loucks contract and the recital in the Springs Investment Company mortgage, to the effect that the mortgage held by Mark is second to a $15,000 first mortgage to Maberry on the same property.

II. *Mark's Claim For Personal Judgment.* The Articles of Incorporation of Springs Investment Company recite the incorporators, officers, and number of shares held by each to be as follows:

Cecil Maberry, President & Treasurer	148 shares
J. A. Maberry,[5] Vice-President	1 share
V. M. Anderson, Secretary	1 share

The Articles of Incorporation state: "The amount of capital stock with which this Corporation will begin business is $15,000."

Mark claims that the Springs Investment Company did not have $15,000 when the mortgage was executed by it to Mark, and so he claims personal responsibility of the incorporators and officers because of § 64-607, Ark. Stats., which reads:

"Penalty for commencing business before amount of capital specified in articles of incorporation is paid in.—No corporation shall commence business until the amount of capital specified in its articles of incorporation as the amount of capital with which it will commence business has been paid in. If any corporation shall violate this provision, its directors and stockholders shall be personally liable for the debts of the corporation, but such liability shall not exceed in the aggregate the amount of capital specified in its articles of incorporation as the amount of capital with which it will commence business."[6]

[5] He was the father of Cecil Maberry.

[6] See 13 Am. Jur. 202 and 18 C. J. S. 1336 for discussion of liability under similar statutes of other States. In 50 A. L. R. 1030, there is an Annotation entitled: "Individual Liability of Stockholders, Directors, or Officers, on Corporate Contracts Improperly Entered into before Subscription of Requisite Amount of Stock." We here call attention to the fact that in the case of *Better Way Life Ins. Co.* v. *Graves*, 210 Ark. 13, 194 S. W. 2d 10, the Statute there involved related to insur-

But there are several answers to Mark's argument based on the above statute:

(a) Springs Investment Company's first act of business was to pay Mark $9,000 in cash and to receive the deed from Mark to the Allred Hotel building and contents (of a value of $19,000, according to Mark's own witnesses). The receiving of this deed gave the Corporation more than $15,000 in capital assets according to the contract valuations. Thereafter, the Corporation executed a first mortgage to Maberry for $15,000 (the proceeds of which were to be used to repair and improve the Allred Hotel building and provide additional furnishings); and the Corporation then executed its second mortgage to Mark for the balance of $10,000 on the purchase price of the hotel and contents. But when the Corporation paid Mark the $9,000 and received the deed to $19,000 of property, certainly the Corporation then had more than $15,000 in capital.

(2) Furthermore, when Mark contracted to sell the Hotel and contents to "a corporation to be organized," he made no requirement that such corporation to be subsequently organized should have any amount of assets except the hotel and contents and a line of credit of $15,000 for subsequent improvements and refurnishings. The incorporators of the Springs Investment Company fulfilled every requirement Mark made of them in his contract of sale. So we find no merit in Mark's contention on this point.

III. *Priority Of Subsequent Mortgage On After Acquired Items Of Furniture.* Springs Investment Company was incorporated in 1948, and took over the Allred Hotel. There was a lower floor of the hotel that had been only a basement; and the Corporation fixed this basement into four apartments, and in 1949, bought furniture and equipment for the same in the amount of $3,286. The Corporation borrowed this amount from Cecil Ma-

ance companies, and required that a certain amount of the capital be paid in "cash." The word "cash" does not appear in our general corporation statute, under which Springs Investment Company was organized.

berry, and executed to him a mortgage on the new furniture and fixtures in the four basement apartments.

Mark claims that his $10,000 mortgage covers the new furniture and fixtures in the basement apartments, and is superior to Maberry's 1949 mortgage of $3,286 thereon. But Mark's mortgage did not attempt to cover any furniture or personal property that the Corporation might acquire *after* the execution of the mortgage to Mark. The mortgage held by Mark merely says, as regards furniture and fixtures in the hotel:

"This (mortgage) also includes all the fixtures, appurtenances, furnishings and all other personal property of whatsoever kind or character now in the Hotel Allred and used in connection with same hotel, located upon the first above described lots."

It is elementary that for a mortgage to cover after acquired property, it must so state. *Hill* v. *Morris,* 124 Ark. 132, 186 S. W. 609; *Fox* v. *Pinson,* 180 Ark. 68, 20 S. W. 2d 645. In the absence of some phase of substitution of other property for that mortgaged—and no such claim of substitution is here made—after acquired property is not covered by a mortgage which fails to refer to after acquired property. Since Mark's mortgage executed in 1948 did not refer to after acquired property, it follows that he has no mortgage on the furniture and fixtures purchased in 1949 and placed in the four apartments, as aforesaid.

The decree is in all things affirmed.

TASSIN *v.* REYNOLDS.

5-94 260 S. W. 2d 462

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

Dinning & Dinning, for appellant.

James P. Baker and *A. D. Whitehead,* for appellee.

George Rose Smith, J. This is another phase of a long dispute over the custody of Bobby Joe Reynolds, now twelve years of age. We need not restate those facts contained in earlier opinions in the case. 209 Ark. 890, 192 S. W. 2d 984; 212 Ark. 1020, 208 S. W. 2d 987. When the case was last before us in 1948 custody was awarded to the mother, Mrs. Tassin, for the nine school months of each year and to the father for the three summer months.

In 1951, upon Reynolds' petition for a modification of the order, the chancellor continued in force the divided custody we have mentioned. In that order, which was not appealed, the court found that both parents and both step-parents were responsible people capable of directing the child's life. A year later, in September of 1952, Reynolds filed the present petition for a modification of the earlier order. After a hearing the chancellor reversed the existing arrangement by ordering that Reynolds have the boy at West Helena during the school term and that Mrs. Tassin have him at her home in Louisiana during the school vacation.

Although Reynolds' petition avers a change of conditions since the court's order a year earlier, there is little proof to sustain the allegation. About the only change is in the attitude of the child, who testified that he is mistreated when living with his mother and that he prefers to live with his father. At the close of the testimony the chancellor, in a statement addressed to the stepfather, Tassin, expressed the view that Bobby Joe has become unmanageable. "He apparently has turned his back on his own mother like Reynolds has turned his on his own mother. . . . I think it is to your interest not to take this boy down there with his attitudes. Somebody is making a liar out of the boy."

We agree with the chancellor's point of view but not with his answer to the difficulty. In 1951 the child testified that he preferred to live in Louisiana, that he had more playmates there, and that he was given more spending money. A year later, at the hearing below, the child repudiated his former position and gave substantially the same reasons for wanting to live in West Helena. It is perfectly evident that, perhaps abetted by his parents, this lad has learned to play the wishes of one parent against those of the other, with little regard for the truth.

We think this unfortunate situation, if it can be remedied at all, can be corrected only by terminating the division of custody that has resulted in this child's having been the subject of bitter controversy during his whole life. When this petition was filed Mrs. Tassin was entitled to have the child for nine months of each year, and, there being no substantial change of conditions, we think it best to award her the boy's exclusive custody, with Reynolds to have reasonable visitation privileges. In this decision we are influenced by Mrs. Tassin's steadfast devotion to her son during the long course of this litigation; see particularly our first opinion. Reynolds, on the other hand, seems unable to get along well even with his own family. His mother has twice testified against him in the case, and at the hearing below his sister also appeared as a witness for Mrs. Tassin. Inasmuch as the Tassins state that they are well able to support the child, Reynolds is relieved of any obligation to make payments for the child's maintenance, subject to the chancellor's power to modify the order should conditions change.

The decree is reversed and the cause remanded for the entry of a decree consistent with this opinion. Lest there be uncertainty about the right of custody before this court reconvenes in the fall, the mandate will issue immediately, without prejudice to any petition for rehearing that may be filed.

CROOM *v.* UNITED FARM AGENCY.

5-151 260 S. W. 2d 454

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

Shelby C. Ferguson, for appellant.

Chas. F. Cole, for appellee.

GEORGE ROSE SMITH, J. This action for a sales commission resulted in an $1,125 judgment for the plaintiff. The defendant's only contention on appeal is that he, a resident of the Northern District of Sharp County, cannot be sued in the Southern District upon a transitory cause of action.

Act 39 of 1893 created two judicial districts in the county, authorized two terms of court annually in each district, and provided that a resident of one district could not be sued in the other. Act 223 of 1929 reduced the terms of circuit court to two a year, one in each district. Act 110 of 1933 fixed new dates for the terms of court, six months apart, and added: "The jurisdiction of the Court sitting at either of said County seats shall be co-extensive with the entire County."

We agree with the trial judge's interpretation of the statutes. It has long been the practice of the legislature to provide at least two terms of circuit court a year in each county. Yet from 1929 to 1933 the citizens of Sharp County had access to only one regular session of court annually, as the 1893 Act treated the two districts as separate counties in the matter of venue. It was clearly

the intention of the 1933 General Assembly to remedy the matter by permitting all residents of the county to be sued in either district. Unless the statute had that effect we do not perceive that the quoted sentence accomplished anything at all.

Affirmed.

LYDON, *et al.* *v.* DEAN.

5-142 260 S. W. 2d 465

Opinion delivered June 29, 1953.

Rehearing denied October 5, 1953.

Wright, Harrison, Lindsey & Upton, for appellant.

Hebert & Dobbs and *Moore, Burrow, Chowning & Mitchell,* for appellee.

WARD, Justice. The principal issues involved on this appeal regard instructions given and refused by the court. Specifically we are concerned with the difference in the effect of an instruction containing the clause "a proximate cause" and one containing the clause "the proximate cause."

FACTS. It will be necessary to set out only sufficient facts to clarify the issues here involved. About 7:00 P.M., Sunday, June 17, 1951, one John F. Lydon, was driving an automobile in a westerly direction along highway 70, going from Benton to Hot Springs. In the car with him were the appellants, Aline Lydon, Margaret Lydon, and Francis Patrick Lydon, who was the driver's minor son. John Timothy Lydon, a minor son of the driver, was also in the car, but apparently he was not injured as no judgment was asked for in his favor. When Lydon's car approached an intersection with highway 70 he attempted a left turn and while doing so his car was struck by a car being driven easterly on highway 70 by appellee, Robert S. Dean. As a result of the collision, it is alleged that appellants were injured. By stipulation of the parties, but withheld from the jury, it appears that previously appellee had sued John F. Lydon for damages as a result of this collision and that a settlement was effected whereby Lydon paid appellee a stipulated amount.

PLEADINGS. The complaint filed by appellants set forth the following specific acts of negligence on the part of appellee:

(a) He drove the vehicle operated by him at a high and excessive rate of speed under the circumstances, in violation of the laws of the State of Arkansas;

(b) He failed to keep a proper lookout for other traffic lawfully using this said highway;

(c) He failed to keep the vehicle operated by him under proper control;

(d) He failed to turn or swerve the vehicle operated by him in order to avoid a collision with the vehicle occupied by the plaintiffs (appellants); and

(e) He failed to exercise ordinary care, etc.

It was further alleged that as "*a* direct and proximate result of the negligence and carelessness of the defendant, Robert S. Dean . . ." the appellants were injured. (Emphasis supplied.)

For answer, appellee denied all material allegations of the complaint and charged that John F. Lydon failed to keep a proper lookout and was otherwise negligent in the operation of his car, and that his negligence was the *sole and proximate* cause of the collision. (Emphasis supplied.) Appellee also alleged that appellants and John F. Lydon were engaged in a joint enterprise at the time of the collision and that the plaintiffs were therefore chargeable with the negligence of said John F. Lydon.

Upon trial before a jury the verdict was in favor of appellee, hence this appeal.

JOINT ENTERPRISE. After all the testimony had been introduced the court instructed the jury that there was no evidence in the case which would justify a finding that the plaintiffs and John F. Lydon were engaged in a joint enterprise at the time of the collision, and that consequently any negligence shown on the part of John F. Lydon could not be imputed to any of the plaintiffs and would not constitute a defense. This instruction was objected to at the time by appellee and it is insisted that the court should have left the question of a joint enterprise to the jury. However, after a review of the testimony on this point, we have concluded that the trial judge was correct.

INSTRUCTIONS. The principal contention of appellants is that the court by giving, refusing, and modify-

ing certain instructions deprived them of a trial upon their theory of the case. Their theory was: That plaintiff could recover even though appellee and John F. Lydon were both negligent; that this would be true even though the negligence of both parties was a concurring proximate cause of the collision; and that it was not incumbent upon appellants to show that appellee's negligence was the sole and only cause of the collision. It is not seriously contended by appellee that the above statement of law is not correct where, of course, the driver of the car and the occupants were not on a joint enterprise, as we hold here. It has been so held by this court in the case of *Willbanks* v. *Laster,* 211 Ark. 88, 199 S. W. 2d 602. In that case it was said:

". . . the jury might have found, and evidently did find, that although Laster (the husband) was negligent, this negligence was not the sole proximate cause of the collision; in other words, that the collision was the result of the concurring negligence of the drivers of the two cars. The recent case of *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287, cites a number of cases which state the law to be that where two or more persons were negligent and their negligence concurred to injure a third person, both parties are liable."

In the case of *Checker Cab & Baggage Co., Inc.* v. *Harrison,* 191 Ark. 564, 87 S. W. 2d 32, we said:

"It is the rule of general application, and finds support in our cases, that to render a person liable for a negligent act, it need not be the sole cause thereof. It is sufficient if it concurs with one or more efficient causes. Where several efficient causes combined to produce injuries, a person is not relieved from liability because he was responsible for only one of them."

We set out below the grounds upon which appellants rely to show that their theory of the case was not fairly presented to the jury.

(a) Appellants requested instruction No. 6 which reads as follows:

"If you find from a preponderance of the evidence that Robert S. Dean was negligent in any degree as alleged in the complaint, and that such negligence, if any, was *a* proximate cause of the collision and resulting injuries, if any, then you will return your verdict in favor of Francis Patrick Lydon, Margaret Lydon, and Aline Lydon, regardless of whether or not John F. Lydon was also negligent. Provided that you do not find from a preponderance of the evidence that Aline Lydon was herself negligent; for negligence, if any, on her part would constitute a defense to her cause of action." (Emphasis supplied).

At the insistence of appellee the trial court modified the above instruction by changing the italicized letter "a" to "the". Appellant objected specifically to the modification.

Appellants take the position that the above change amounted to telling the jury that it could not find for appellants unless it also found that appellee's negligence was the sole and only proximate cause.

At first blush it might appear that no such significance as claimed by appellants attaches to so slight a change in wording. Yet we are convinced that this change, together with other matters hereafter mentioned, resulted in depriving appellants from having their cause of action fairly submitted to the jury. Support for this conclusion is found in the case of *Sedorchuk* v. *Weeder,* 311 Mich. 6, 18 N. W. 2d 397. In this case where a similar issue was involved the court had under consideration the meanings of "a" and "the" when used in connection with proximate cause. From the opinion we quote the following:

"We cannot, however, approve the charge as given because of the repetition of, and the emphasis on, the phrase, '*the* proximate cause'. As thus given, the charge was tantamount to an instruction that, before plaintiff could recover, he must show that defendant's negligence was 'the sole' proximate cause of the accident. This is not the law, as there may be two proximate causes of an

accident. (Cases cited.) A proximate cause of an injury is not necessarily the sole cause. (Cases cited.)

This distinction is especially important in the instant case because of the fact that the contributing negligence, if any, of plaintiff's driver cannot be imputed to this minor plaintiff; and it does not therefore follow that defendant is not liable unless his negligence is *the* proximate cause. The jury should have been clearly instructed that plaintiff cannot recover from the defendant unless the jury finds that his negligence was *a* proximate cause. Although the trial judge was correct in holding that defendant's negligence was a question of fact for the jury, we are of the opinion that, for the reason above noted, the charge as given was misleading. The judgment must be vacated and a new trial granted." (All italics are those of the Supreme Court of Michigan.)

(b) We agree with appellants that the vice indicated in the above modified instruction was emphasized by the giving of appellee's instruction No. 5, the latter part of which defined proximate cause as:

"*That* cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is *the* efficient cause, *the one* that necessarily sets in operation the factor that accomplished the injury." (Emphasis supplied).

It will be noted that the italicized words, "that", "the", and "the one", used in the above instruction all point to a single cause and to that extent necessarily eliminates the possibility of more than one cause. In the case of *Harvey* v. *Exner,* 194 Wis. 149, 216 N. W. 165, where similar wording was used in an instruction, the court employed the following language which we adopt in so far as it is applicable to the issue here:

"This language is subject to the interpretation that there can be but one proximate cause of an injury. The jury having found that the defendant's negligence constituted the proximate cause of the injury, they might

well have believed that they could not find that the want of ordinary care on the part of Harvey also constituted a proximate cause of the collision, in view of the fact that they were nowhere told that there could be more than one proximate cause.''

Appellants offered other instructions which presented their theory of the case but they were refused by the court. There were no other instructions given the jury by the court which properly presented appellants' theory of the case.

Appellee contends that appellants' theory of the case was properly presented to the jury because the court instructed the jury that it could find for appellants regardless of whether or not John F. Lydon was also negligent, but we cannot agree. Not only were appellants entitled to this kind of an instruction but they were entitled to an instruction permitting them to recover in the event they found that the negligence of both appellee and John F. Lydon were concurring proximate causes. However, as shown above this right was denied appellants when the court in effect told the jury that it could not find in favor of appellants unless it also found that appellee's negligence was the sole and only proximate cause of the collision.

It is finally insisted by appellee that any error that the court may have committed by giving the modified instruction discussed above was harmless for the reason that his own request for an instructed verdict should have been granted by the court. This requested instruction is based on the ground that there is no evidence showing any negligence on the part of appellee. We cannot agree with this contention.

It will be remembered that, as heretofore set out, the complaint contained several allegations of negligence on the part of appellee. It is our view that the testimony of John F. Lydon was sufficient to make a jury question on this issue. Lydon testified that before turning left on the intersecting road he pushed a knob on the left side of the steering wheel which caused a light to blink

indicating a left turn, and that he put out his hand and that he "put his hand out and let it stay out" until he had made a full stop at the intersection; that he shifted into low gear after looking in both directions and attempted to cross highway 70; and that the signal light was on all this time. It was his testimony that his car was practically across highway 70 when the rear end was hit by the right front portion of appellee's car. The evidence shows that John F. Lydon and appellee both had an unobstructed view along highway 70 for a distance of several hundred feet west of the point of the collision.

In view of the above testimony we think the jury might have found that appellee did not maintain a proper lookout at all times or that he did not use proper care in trying to avoid hitting Lydon's car after he might have discovered it in his line of progress.

For the reasons stated above the judgment of the lower court is reversed.

The Chief Justice and Justice MILLWEE dissent.

GRIFFIN SMITH, Chief Justice (Dissenting). I do not attach to "the" and "a" the legalistic mischief assessed by the majority. It is my view that chimerical shadings do not influence a jury's verdict.

COVINGTON *v.* SHACKLEFORD, *et al.*

5-213, 5-214, 5-215, 5-216 and 5-217 259 S. W. 2d 676

Opinion delivered June 29, 1953.

Earl J. Lane and *Q. Byrum Hurst,* for appellants.

Julian Glover, for appellee.

GRIFFIN SMITH, Chief Justice. Appellants are citizens and taxpayers of Garland county. Five townships are involved: Farmer, Sulphur, Bain, Mill, and Lee. Petitions asking that local option elections be held in each township were duly filed and by the county court found to be sufficient. Appeals were concurrently taken to circuit court where findings of the county court were upheld May 16, 1943, thus paving the way for a public expression by the electorate. Motions for new trials were overruled May 20th, with ten days for bills of exceptions. On May 28th the appellants were given an additional 30 days. Appeals were lodged here June 12th.

Section 48-804, Ark. Stat's, regulates appeals from county to circuit court, and from circuit court to the Supreme Court. . . . "Any appeal from the final decision of the circuit court shall be taken within ten days, and shall be advanced and immediately determined by the Supreme Court."

In oral argument appellants conceded that the appeals were not taken within ten days. It is insisted, however, that the short statutory period is unreasonable and is an infringement on due process of law.

In a sense the question was decided in 1944, *Van Gundy* v. *Caudle, County Judge,* 206 Ark. 781, 177 S. W. 2d 240. The phase of Initiated Act No. 1 of 1942 (see Ark. Stat's, § 48-804) relating to appeals from county to circuit court was discussed. The ten-day limitation was held valid, although the precise time element was not the main issue. A summary of that decision is that an appeal from a county court order from a local option (liquor) election, taken more than ten days after the judgment became final, was too late, and this was true notwithstanding the subsequent filing of a motion to set aside the order, since the motion would neither interrupt nor toll the time allowed for appeal.

A period of twenty days for property owners to protest assessments in drainage districts does not violate due process because of the restrictive period. *Taylor* v. *Board of Commissioners of Cache River Drainage Dis-*

trict No. 2, 156 Ark. 226, 245 S. W. 491. See, also, *St. Louis, Iron Mountain & Southern Railway Company* v. *Maple Slough Drainage District,* 138 Ark. 131, 211 S. W. 168. A road district was involved in *Vietz* v. *Hazen, Lagrue and Slovak Road Improvement District,* 139 Ark. 567, 214 S. W. 50. The 20-day limitation period was upheld.

The record does not disclose any extraordinary circumstance or event—sometimes spoken of as a procedural casualty—that would take the case out of the general rule heretofore sanctioned, hence the appeals must be dismissed because filed out of time. A per curiam order to this effect was made June 22d, with the notation that an opinion would follow.

STATE *v.* ALEXANDER, *et al.*

4742 259 S. W. 2d 677

Opinion delivered June 29, 1953.

Tom Gentry, Attorney General, and *Thorp Thomas* and *James L. Sloan,* Assistant Attorneys General, for appellant.

Rieves & Smith and *Henry S. Wilson,* for appellee.

MINOR W. MILLWEE, Justice. The defendants are three residents of Tennessee and duly licensed by that state as commercial fishermen. They were charged in the Municipal Court of West Memphis, Arkansas, with the crimes of operating commercial fishing tackle while non-residents of Arkansas and using trammel and gill nets at night in violation of Arkansas statutes. Upon a trial, the defendants were found guilty and fined $50 on each charge and their tackle ordered confiscated. They appealed to the Crittenden Circuit Court.

At the trial in Circuit Court, the trial judge granted the State's motion for a directed verdict of guilty at the conclusion of the evidence in chief on behalf of the defendants, and the same penalty was assessed as in municipal court. The defendants filed a motion for new trial on the ground that the courts' action in directing the verdicts of guilty against them was contrary to the law and the evidence. The order of the Circuit Court sustaining the motion and granting the defendants a new trial recites: "That the court committed error in holding that it is presumed that the offense charged in the information was committed within the jurisdiction of the court, because the place of commission of the alleged crime is an essential element thereof, and the burden is upon the State of Arkansas to show beyond a reasonable doubt that the alleged offense occurred within the actual boundaries of the State of Arkansas, the court further

finding that the statute giving the State of Arkansas concurrent jurisdiction with the State of Tennessee to the east bank of the Mississippi River was not intended to apply to an act which is criminal in the State of Arkansas but lawful in the State of Tennessee and was particularly not intended to embrace the acts set forth in the information herein."

In prosecuting this appeal from the order granting a new trial, the State has stipulated that judgment absolute shall be rendered against it if said order be affirmed.

For the purposes of this appeal it seems to be conceded by the State that, at the time of their arrest, the defendants were fishing commercially at night with trammel and gill nets on the Tennessee side of the waters of the Mississippi River where that stream forms the boundary line between the two states. At any rate, a careful consideration of the testimony demonstrates that at least a disputed question of fact for the jury's determination was presented as to whether the defendants were fishing in the territorial boundaries of Tennessee at the time of their arrest. It is also admitted that commercial fishing with trammel and gill nets at night is permitted under Tennessee law and that defendants were duly licensed as commercial fishermen. Ark. Stats., § 47-410 (E) provides that only residents of Arkansas may be licensed to fish commercially and under sub-section (G) the use of trammel or gill nets at night is prohibited.

The State's contention that the trial court correctly instructed verdicts of guilty against the defendants is based upon a compact between Tennessee and Arkansas entered into pursuant to Joint Resolution No. 7 of the United States Congress approved February 4, 1909. This resolution authorized the two states to enter into a compact, "to fix the boundary line between said States, where the Mississippi River now or formerly formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body there-

of by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States respectively over offenses arising out of violation of the laws of said States upon the waters of the Mississippi River." Pursuant to the resolution, the legislatures of Tennessee and Arkansas passed acts which provide that the two states have concurrent criminal jurisdiction over the waters of the Mississippi River where it forms the boundary line between the two states. See Ark. Stats., §§ 43-1401 and 1402; Williams Tennessee Code, § 93.

The issue presented is stated in the following question propounded by the attorney general: "May the State of Arkansas punish an act which has been denominated a crime by this State when that act is committed within territory over which Arkansas has jurisdiction by compact authorized by the Congress of the United States concurrently with the State of Tennessee, despite the fact that the State of Tennessee, within whose actual boundaries the act occurred, has not seen fit to prohibit the same act by its statutory law?" In our opinion, the trial court, in ordering a new trial, correctly answered in the negative where the act complained of, as here, relates to fishing rights.

We approve the following concise statement of the rule in 22 Am. Jur., Fish and Fisheries, § 39: "The concurrent jurisdiction which two states may have over the width of a river, the center of which forms the territorial boundaries of the states, is not to be construed as giving one state authority to punish violations of its fish laws occurring beyond its side of the river, if such act is duly authorized by the neighboring state." See, also, 36 C. J. S., Fish, § 15; Leflar, Conflict of Laws, § 73.

In *Nielson* v. *Oregon,* 212 U. S. 315, 29 S. Ct. 383, 53 L. Ed. 528, it was held that the state of Oregon cannot, by virtue of its concurrent jurisdiction conferred by Congress over the Columbia River, make criminal the operation of a purse net in that river within the territorial limits of the state of Washington, under authority and license

from that state. In so holding, the court said that the primary purpose of the grant of concurrent jurisdiction was to avoid nice and difficult questions as to whether a criminal act was committed on one side or the other of the exact boundary which changes with the shifting of a river channel. The court further said: "The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that, in some instances, the interests of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state cannot enforce its opinion against that of the other; at least, as to an act done within the limits of that other state. . . ."

The Nielson Case was followed in *Miller* v. *McLaughlin,* 281 U. S. 261, 50 S. Ct. 296, 74 L. Ed. 840, where the court held that a grant of concurrent jurisdiction to two states over a river did not preclude one of them, without the concurrence of the other, from regulating fishing by its own residents in that part of the river that is within its own territorial limits. See, also, *Roberts* v. *Fullerton,* 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953; *State* v. *Bowen,* 149 Wis. 203, 135 N. W. 494, 39 L. R. A., N. S. 200.[1] A different result was reached in *Olin* v. *Kitzmiller,* 259 U. S. 260, 66 L. Ed. 930, 42 Sup. Ct. 510, where the two states involved in the compact had practically identical statutes regulating fishing rights. The effect of these decisions is to hold that the "concurrent jurisdiction" granted under the compact has reference to jurisdiction over acts which have been made criminal or unlawful by both states insofar as the regulation of fishing rights is concerned. The

[1] Contra: *State* v. *Moyers,* 155 Iowa 678, 136 N. W. 896, 41 L. R. A. N. S. 366. See, also, *State* v. *Cunningham,* 102 Miss. 237, 59 So. 76, Ann. Cas. 1914D, 182.

jurisdiction granted does not empower one state to spread its mere police regulations over the territory of another and thereby regulate the sovereign rights of the latter in or to the fish in the waters flowing over its territory. *Roberts* v. *Fullerton, supra.* An anomalous situation indeed would result if a resident of Tennessee who is duly licensed by that state to fish in its territorial waters could be prohibited from doing so because he is a non-resident of Arkansas.

Since a jury question was made as to whether the defendants were fishing in Tennessee territorial waters at the time of their arrest, the trial court erred in directing verdicts of guilty against them in the first instance. It follows that the court did not abuse its discretion in granting the motion for new trial. The judgment is, therefore, affirmed and judgment absolute will be rendered here against the State in accordance with the provisions of Ark. Stats., § 27-2150. It is so ordered.

GRIFFIN SMITH, C. J., concurs.

ROBINETT *v.* CAMPBELL EQUIPMENT COMPANY.

5-145 259 S. W. 2d 515

Opinion delivered June 29, 1953.

Appellant *Pro Se.*

A. James Linder, for appellee.

J. SEABORN HOLT, J. The judgment, from which is this appeal, was rendered October 20, 1952.

June 16, 1953, appellee, Campbell Equipment Co., filed in this Court a "Motion to Dismiss" on the ground:

"1. That no service of summons has been had upon appellee in this matter, nor has service of summons been waived by appellee or anyone for appellee, and therefore appellee's appearance has not been entered in this court in this matter. 2. That copy of brief of appellant has not been furnished appellee as provided by the rules of this court, and that appellee has not had the benefit of having appellant's brief, and therefore has had no opportunity to prepare a brief in this cause."

Rule 21. "Rules of the Supreme Court of Arkansas," May, 1945, 207 Ark. Reports, provides: "(a) Summons—When an appeal is granted by the Clerk of this Court, a summons shall be issued, commanding the appellee to appear within sixty days and defend."

The record in the office of the Clerk of this Court reflects that this appeal was filed March 27, 1953, and summons, returnable in sixty days, was issued on that same date. No return on this summons has been made. No service of summons, waiver thereof, or entry of appearance on behalf of appellee is shown.

It appears from our decisions, such as *Bell* v. *Rice,* 183 Ark. 105, 35 S. W. 2d 88, and *Foreman* v. *Dickinson,* 177 Ark. 121, 6 S. W. 2d 829, that prior to the revision of our Rule 21, above, in 1945, service of summons on an appellee was required to be had within a reasonable time after appeal, which time varied in most cases. Under the above rule, a definite time limit of sixty days following the granting of the appeal by this Court within which summons may be served on appellee has been fixed, thus obviating a finding by this Court of what would be a reasonable time, in the circumstances.

It appearing, therefore, that service of summons was not had on appellee within the sixty days allowed, the appeal must be and is dismissed.

ALLISON *v.* BINKLEY.

4735 259 S. W. 2d 511

Opinion delivered June 29, 1953.

W. M. Ponder, Blackford & Irby and *S. L. Richardson,* for appellant.

Hout & Thaxton, for appellee.

ROBINSON, Justice. Appellant Dave Allison and appellee Louise Allison Binkley were divorced on March 27, 1947, and the custody of their child Erma Lee Allison was given to Louise. Allison was ordered to pay to Louise $25 per month as support and maintenance for the said minor child. The order of the court was complied with until the year 1951 when only two payments of $25 each were made for that year, and no payments were made during the year 1952. Louise filed a petition asking that Allison be cited for contempt by reason of his failing to make the $25 a month payments as ordered by the court.

After a hearing the court entered a decree finding that Allison was in contempt of court for failure to comply with the decree of March 27, 1947, and that he was in arrears $550; and ordered that he be committed to jail until that sum was paid. Allison has appealed.

Appellant makes no contention of inability to pay the $25 per month as ordered by the chancellor, but seeks

to justify non-payment on the grounds that without his knowledge or consent the child was taken out of the State of Arkansas for a few months on two different occasions. However, the preponderance of the evidence shows that the defendant knew where his daughter was in Michigan and could have made the payments if he wished to do so. Appellant further seeks to excuse himself by saying that the child had quit school against his wishes, but this is no valid reason for refusing to abide by the order of the court.

Next, appellant says that Erma Lee according to the stipulations in the case became 18 years of age on April 10, 1952, and that he would not be liable for her support subsequent to that time. However, the same stipulation provides that on March 27, 1947, Erma Lee was 11 years of age; and if her birthday is April 10 as contended by appellant, she would be 18 years of age in April of 1953. Therefore the record is not clear on this point, and the burden was on appellant to make the showing that the child had become 18 years of age.

On November 10, 1951, Erma Lee's disabilities as a minor were removed by an order of the court. Appellant contends that this emancipation relieved him of making further payments. One who has not reached his majority may be so advanced mentally as to be capable of intelligently and wisely dealing with a real property transaction, and yet be unable to do the work required to obtain the necessaries of life. Here the preponderance of the evidence shows that Erma Lee is not capable of supporting herself, and in this situation we do not think the removal of her disabilities by order of the court relieved the father from abiding by a court order requiring him to help support his daughter.

Affirmed.

5-146 259 S. W. 2d 496

Opinion delivered June 29, 1953.

Digby & Tanner, for appellant.

Mary Margot Biddulph, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

ROBINSON, Justice. Appellant, J. G. Cooper, doing business as Cooper Lumber Company, filed this suit against appellee Chester Sparrow and others, contending that Sparrow as the prime contractor in the construction of certain dwellings is indebted to Cooper in the sum of $150 for cash advanced by Cooper to one H. W. Kennedy, a painting subcontractor, and used by Kennedy in meeting payrolls; and also prayed for judgment against Sparrow in the sum of $894.68 for materials furnished by Cooper and used on the job. The other defendants in the case are the owners of the property on which Cooper seeks to establish a materialman's lien. There was a decree in favor of Sparrow and the property owners. Cooper has appealed.

The subcontractor Kennedy made arrangements with Cooper to furnish materials for the paint job, and Cooper

also agreed to advance Kennedy money to meet his payroll. The contract between Sparrow and Kennedy was prepared at Cooper's office; however, Cooper is not a party to the contract; but the contract provides that all payments made by Sparrow on the contract with Kennedy be made to H. W. Kennedy and Cooper Lumber Company. A preponderance of the evidence shows that Sparrow did not know and had no reason to believe that Cooper had agreed to advance payroll money to Kennedy. After the job had been in progress for some time, Sparrow made a check to Kennedy and Cooper jointly in the sum of $800 at which time Kennedy owed Cooper $507.80 for materials and also owed for cash advanced to meet the payroll; but Sparrow did not know of the advances for payroll purposes. Later Sparrow learned of such advances and in order to protect himself made no further checks to Kennedy and Cooper, but saw to it that the employees of Kennedy who were working on the job were paid, and also withheld an amount he thought sufficient to pay for the materials. Sparrow contends the entire $800 paid to Kennedy and Cooper jointly should be credited on the materials account; but only $506.80 was owed on that account at the time of the $800 payment. When Cooper cashed the $800 check he could not credit to the materials account more than was owed on that account. As a matter of fact, Cooper credited the entire $800 to the account for cash advanced for payroll purposes. He claims that he had a right to credit the amount paid in such manner and that Sparrow as the prime contractor still owes the entire materials account and $150 balance on the cash account, and that he, Cooper, should have a lien on the property to secure the payment of both accounts.

Cooper contends that the principle of promissory estoppel applies and relies on *Peoples National Bank of Little Rock* v. *Linebarger Construction Co.*, 219 Ark. 11, 240 S. W. 2d 12. However, the facts in that case were altogether different from those in the case at bar. There Linebarger was the principal contractor and it was shown that the bank advanced money to a plastering con-

tractor to meet his payroll on reports from Linebarger to the bank as to the amount of money the plastering contractor had earned on his contract for that particular payroll period. Linebarger knew the bank was advancing the money to meet the payroll on the strength of his reports. But here a preponderance of the evidence shows that Sparrow did not know Cooper was to advance money for payroll purposes, and in fact had no reason to suspect that Cooper contemplated making such advancements to Kennedy at the time Kennedy and Sparrow entered into the contract. It is true that Sparrow had every reason to believe that Cooper was going to furnish the materials to Kennedy, but Cooper was in the materials business and not in the banking business, and Sparrow had no reason to believe that Cooper was going to furnish money. While Cooper was entitled to a lien on the property for the materials furnished, he was not entitled to a lien for cash advanced. *Long-Bell Lumber Co.* v. *Auxer,* 221 Ark. 672, 255 S. W. 2d 163. *Bank of Commerce* v. *Lawrence County Bank,* 80 Ark. 197, 96 S. W. 749.

As between debtor and creditor, where the debtor fails to designate the debt and there are several debts to which the payment can be applied, the creditor may apply it as he chooses. *Hawkins* v. *Hawkins,* 200 Ark. 38, 137 S. W. 2d 904. However, there is an exception to this rule and that is where the materialman knows the source of the money is a third party whose property would be subject to materialman's lien. *Long-Bell Lumber Co.* v. *Auxer,* supra.

Cooper knew the $800 check came from Sparrow; in fact Cooper was one of the payees named on the check. In these circumstances it was Cooper's duty to apply the payment to the account for which Sparrow was liable and for which the property was subject to a lien. *Long-Bell Lumber Co.* v. *Auxer,* supra; *Farr* v. *Weaver,* 84 W. Va. 182, 99 S. E. 395; *Webb* v. *Crane Co.,* 52 Ariz. 299, 80 Pac. 2d 698. If the law were otherwise a materialman might knowingly use the money of one person to discharge the debt of another, and at the same time leave the property owner in such position that he could

be compelled to pay again. See, also, annotation in L. R. A. 1916D, 1259.

At the time Sparrow wrote the check to Kennedy and Cooper in the sum of $800, Cooper had furnished materials amounting to $507.80 and Cooper should at that time have applied a sufficient sum to the materials account to pay it in full. Sparrow deposited in court $289.24 owed to Kennedy which can also be applied to the payment of the Cooper materials account of $894.68. This leaves $97.64 owed to Cooper for which he is entitled to a lien.

Reversed with directions to enter a decree not inconsistent herewith.

ED. F. MCFADDIN, Justice (dissenting). I respectfully dissent from that portion of the majority opinion which refuses Cooper a judgment for $1,044.68 against Chester Sparrow; and here are the matters impelling my dissent:

On February 2, 1952, Sparrow, the prime contractor, let a subcontract to Kennedy to paint twelve houses. Kennedy and Sparrow signed the following instrument:

"I, H. W. Kennedy, Paint Contractor, propose to paint the inside and outside of twelve (12) houses for C. M. Sparrow, General Contractor, located at Stuttgart, Arkansas. Said houses are four and five room houses.

"On four room houses all material, labor, brushes and other equipment will be furnished by H. W. Kennedy for $375.00 per house. On five room houses all paint, labor, brushes and equipment will be furnished by H. W. Kennedy for $480.00 per house.

"I, C. M. Sparrow, General Contractor, agree to pay $375.00 per four room house where paint work on each house is completed, and to pay $480.00 per five room house after satisfactory final F. H. A. Inspection.

"*All payments will be made jointly to H. W. Kennedy, Paint Contractor, and to Cooper Lumber Company.*

"All work will be performed in a workmanship like manner and in accordance with accepted procedure." (Italics our own.)

Attention is called to the fact that the foregoing contract specifically recited: "*All payments will be made jointly to H. W. Kennedy, Paint Contractor, and to Cooper Lumber Company.*" That contract was made for the benefit of Cooper, and therefore it was actionable by Cooper. In *H. B. Deal & Co.* v. *Head,* 221 Ark. 47, 251 S. W. 2d 1017, we discussed the matter of third party beneficiaries in contracts; and after citing many of our own cases, we approved this statement of the rule from 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."

In the case at bar, Cooper had sued Sparrow on the foregoing contract which shows on its face that it was made for his benefit; and the quoted rule impels me to the conclusion that Cooper is entitled to recover.

The majority opinion recites that Sparrow did not know that Cooper was furnishing payroll money to Kennedy. What difference would such ignorance on the part of Sparrow have to do with the matter, when by his own contract he had agreed that *all* checks would be made payable to both Kennedy and to Cooper? Sparrow knew he had signed this contract, and he knew he breached it when he failed to make checks payable to both Kennedy and Cooper. The contract in itself puts Sparrow on notice of the rights of Cooper: and such notice if pursued by Sparrow, by any inquiry, would have disclosed that Cooper was relying on Sparrow's signed agreement every time Cooper advanced any payroll money to Kennedy. Our cases hold that, the notice of facts and circumstances which put a man of ordinary intelligence and prudence on inquiry is, in the eyes of

the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. *Bland* v. *Fleeman,* 58 Ark. 84, 23 S. W. 4; *Waller* v. *Dansby,* 145 Ark. 306, 224 S. W. 615; *Jordan* v. *Bank,* 168 Ark. 117, 269 S. W. 53; *Shoptaw* v. *Sewell,* 185 Ark. 812, 49 S. W. 2d 601.

At first Sparrow honored his signed agreement by issuing a check for $800.00 to both Kennedy and Cooper as payees. Thereafter Sparrow breached his contract by issuing checks to Kennedy without including Cooper as payee. But Cooper relied on the signed agreement that Sparrow had made, and advanced payroll money and supplies to Kennedy in the total sum of $1,844.65. Deduct from this total the one check of $800.00 in which Cooper was named as payee; and there is left a balance of $1,044.68 that Cooper is entitled to recover from Sparrow by virtue of the contract.

Since the majority is not compelling Sparrow to live up to his signed contract, I respectfully dissent.

McCULLOUGH *v.* McCULLOUGH.

5-147 260 S. W. 2d 463

Opinion delivered July 6, 1953.

Rehearing denied October 5, 1953.

[redacted]

John E. Hooker and *Goodwin & Riffel,* for appellant.

Milton McLees, for appellee.

GRIFFIN SMITH, Chief Justice. Hubert, Junior, is the fifteen-year-old son of Hubert C. McCullough and his former wife. The marriage occurred in Pine Bluff in 1936. Thereafter the couple moved to Memphis and lived together until the fall of 1944. In December of that year Mrs. McCullough procured a divorce in Pulaski county, Arkansas. Hubert, Jr., was then six years of age and his custody was given to his mother. This suit was brought to change the original order.

In 1946 Mrs. McCullough married in Little Rock. The stepfather Hubert, Jr., thus acquired had a son who was about eight years old when the marriage occurred. Evidence conclusively shows that the former Mrs. McCullough, since her second marriage, has lived in an environment of domestic tranquillity. She is devoted to her stepson and he to her; and Hubert's stepfather has maintained a status of impartiality respecting the two boys, accepting Hubert and bestowing upon him and his mother a full measure of affection, understanding—and liberality where material considerations are involved. In brief, the mother, her husband and son, and her husband's son, are shown in a highly credible light; and but for the unfortunate circumstance of divorce and Hubert's welfare, the scars of 1944 and events preceding them would be obscured, or at least ameliorated to incidental consideration.

Although the McCullough divorce decree did not require the payment of alimony or make any provision for aid in supporting Hubert, the mother and father agreed that $15 per month should be sent by McCullough, and these payments have been made. A further agreement was that Hubert should be permitted to visit his father in Memphis for a week during the Christmas season and for two periods of two weeks each in the summertime. This arrangement was maintained until Christmas following the institution of this suit.

Following their marriage and removal to Tennessee, Mrs. McCullough worked in a department store until her pregnancy required that she remain at home. The couple had purchased a residence at 763 Hollywood St., Memphis, title being by the entirety. Under Tennessee law the parties, when divorced, own as tenants in common. *Brown* v. *Brown,* 160 Tenn. 685, 28 S. W. 2d 350.

McCullough has remarried. He and his wife are employed by Firestone Tire & Rubber Company. McCullough's take-home pay is between $100 and $120 a week. His wife's take-home pay is $71.04 per week and each is on a night shift. Neither is at home between 11:00 p. m. and 7:00 a. m.

In August, 1952, McCullough petitioned the chancery court to modify its decree and to give him the exclusive custody of Hubert. In an amended response appellee asked that she be permitted to prove the fair rental value of the Memphis residence and that McCullough be required to account to her for any sums received by him since the divorce was granted, less her proportionate share of taxes and insurance. Undisputed testimony is that the property is worth $9,000 and that it is mortgaged for $1,900—the approximate balance on an original obligation. The court awarded appellee $2,500 "for her interest in the property", and directed her to execute and deliver to McCullough a deed when payment was made. The father's prayer for custody of Hubert was denied, but he was directed to pay $30 per month as a contribution to the boy's maintenance. There is no appeal from this order.

McCullough's principal contention, on the issue of custody, is that the boy is old enough to make his own determination; that he (the father) is financially able to extend educational and other desirable opportunities that appellee cannot afford; that Hubert is talented and possesses unusual ability in drawing—a natural gift that could be highly developed in the Memphis schools;—that companionship between them has been maintained in spite of separation; that the boy's stepmother is attached to him and is not only willing but is anxious to assume the responsibility of directing the youth's conduct; and, finally, it was shown that appellant had purchased, in January, 1948, government E bonds for which he paid $3,750. These securities, it is pointed out, will be worth $5,000 at maturity when Hubert is nineteen years of age. The bonds are payable to Hubert or his father.

Hubert testified that while he loved his mother, he also loved his father and his stepmother; and finally, under close examination, he stated that he loved them best. When in Memphis with his father he was allowed greater freedom, more money, and an opportunity for sports, such as fishing and playing ball. His mother did not want him to have a bicycle because she was afraid of an accident. She gave him some spending money, but nothing comparable to his father's liberality.

Little Rock school authorities testified that a change such as appellant contemplates in respect of educational opportunities is ordinarily detrimental, at least for a short period during which adjustments are being made.

It is hinted that appellant's suit was filed after appellee had declined two offers for her interest in the Memphis property. Appellee had written that she would settle for $600, plus one-half of the value of the household furnishings. Appellant first offered $625, but increased this to $800.

We are not unmindful of decisions that a child who by reason of his years is capable of indicating a preference regarding custody is entitled to express his or

her views; and a court will always give careful consideration to such wishes. But the expression of a preference is not binding upon the court. A chancellor will look behind mere words, appraise conditions, circumstances and contributing factors, and will alter an order of custody only when a change will be for the minor's best interests.

Here we are not willing to say that Hubert's best interests will be served if appellant is made custodian. The boy has been carefully reared in a Christian home where evidence of the slightest discord is wholly lacking. For one so immature as Hubert to say that he loves his mother, but that he has greater love for the stepmother whom he can hardly know in a true sense, is the expression of a status in conflict with the lessons life teaches. A disclosure of temporary emotional instability under tests to which this boy was subjected is not to be wondered at, nor does it mean that in later years he will not regret an utterance induced by conflicting desires.

The decree in respect of custody is affirmed, and so is the award of $30 monthly.

The judgment for $2,500 stands on a different basis. There was no showing that rents or profits of any character had been realized. The Chancellor, of course, felt that with evidence that the net value was about $7,000, each would be entitled to half, less the taxes, insurances, and other allowable items that appellant had been out, hence $2,500 would probably not be more than appellee was entitled to. We think, however, that the method of accounting was deficient and that the award did not fall within the pleadings even if they should be regarded as having been amended to correspond with the proof. For these reasons the judgment for $2,500 is reversed. In other respects the decree is affirmed.

5-154 260 S. W. 2d 446

Opinion delivered July 6, 1953.

Rehearing denied October 5, 1953.

Lee Seamster and *E. J. Ball,* for appellant.

Crouch & Blair, Rex W. Perkins and *Jeff Duty,* for appellee.

GEORGE ROSE SMITH, J. This is an action in unlawful detainer for the possession of certain business property, used as a cafe. The tenants' defense is that they exercised an option to renew the lease and are entitled

to retain possession for an additional year. The trial court, sitting without a jury, entered judgment for the plaintiff.

The appellants, Ralph Hoffman and his wife, were not originally parties to the lease. On August 31, 1951, Late leased the property to Lawrence Clark for a primary term of one year, "with an option for an additional five years from year to year." The lease also provides that it cannot be assigned by the tenant without the landlord's written consent. In November Clark's wife became ill, and he sought Late's permission to transfer the lease to the Hoffmans. Late testified, over objection, that he consented to the transfer only upon an oral agreement with the Hoffmans that they were to have the property just for the rest of the primary term, with no privilege of renewal. When Late accepted the Hoffmans as tenants he or his representative had them add their signatures to the written lease. Late retained a signed copy of the lease and made it an exhibit to his complaint below.

On June 24, 1952, Late gave the Hoffmans written notice to vacate at the end of the primary term, on August 31, 1952. They countered by serving notice on Late that they were exercising their privilege of renewal for another year. When the tenants refused to surrender possession at the end of the primary term this suit was filed. We regard as the decisive issue the Hoffmans' contention that Late's testimony about the oral agreement is contrary to the parol evidence rule.

It is the accepted present-day view that the parol evidence rule is not really a rule of evidence but is instead a rule of substantive law. Wigmore on Evidence (3d Ed.), § 2400; Williston on Contracts (Rev. Ed.), § 631; Rest., Contracts, § 237; 4 Ark. L. Rev. 168. As Wigmore puts it, *supra*: "What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all." The practical justification for the rule lies in the stability that it gives to written con-

tracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing.

Hence in the case at bar it makes no difference whether Late's version of the oral negotiations is true or false. In point is *Randle* v. *Overland Texarkana Co.*, 182 Ark. 877, 32 S. W. 2d 1064, 75 A. L. R. 1516, where the plaintiff, by demurring to the answer, admitted an allegation that there had been an oral agreement contrary to the written contract sued upon. We sustained the demurrer, saying: "The allegation simply means that, although [the defendant] signed the note, there was a contemporaneous oral agreement that he should not be bound, but that he signed for reference merely. Under such circumstances the rule is that parol evidence is not admissible to contradict or vary the written instrument."

Counsel for the appellee tacitly concede the force of the parol evidence rule by vigorously insisting that there was no written contract between Late and the Hoffmans. The argument is that Clark could assign the lease only with Late's written consent, that such consent was withheld, and that therefore Late's agreement with the Hoffmans was oral. The conclusion drawn by counsel is that the original lease to Clark was the only written contract, and familiar principles of law permit that contract to be modified by a *subsequent* oral agreement.

There are two flaws in this chain of reasoning. To begin with, the provision requiring written consent to an assignment was for the benefit of the landlord and could be waived by him. *Reconstruction Finance Corp* v. *Home Inv. Co.*, 221 Ark. 131, 252 S. W. 2d 398. Late undoubtedly waived this condition by putting the Hoffmans in possession, by accepting rent from them, and by stating in his notice to vacate: "Your lease on said premises expires on August 31, 1952."

In the second place, the negotiations between Late and the Hoffmans led to a contract that was written, not

oral. The Hoffmans were required to affix their signatures to the original lease and thereby to bind themselves to the duties imposed on the lessee. Late now sues upon that very instrument, and he can hardly say that it is not in writing.

We must reverse the judgment, and ordinarily we would direct that the cause be dismissed. But the judgment awarding possession to the plaintiff does not appear to have been superseded; so if the appellee has regained possession the appellants are entitled to restitution. *Foster* v. *Beidler,* 81 Ark. 274, 98 S. W. 968; *Dodson* v. *Butler,* 101 Ark. 416, 142 S. W. 503, 39 L. R. A., N. S., 1100, Ann. Cas. 1913E, 1001. The cause is therefore remanded.

VAN PELT *v.* JOHNSON.

5-127 259 S. W. 2d 519

Opinion delivered July 6, 1953.

John D. Eldridge, Jr., for appellant.

Henry & Long, for appellee.

ROBINSON, Justice. The alleged abandonment of a homestead by a widow is the issue. Louis Clark was married twice and had children by each marriage. Those by the first wife filed this suit claiming the second wife, the widow of Clark, had abandoned the homestead; and also alleged the widow is liable for the rents and profits she has made and collected since such alleged abandonment. All the children of Clark have reached their majority. The Chancellor held that the widow had not abandoned the homestead.

Clark died intestate in 1926, leaving a widow, minor children, and a homestead consisting of about 20 acres; subsequent to Clark's death Hattie, Clark's widow, lived on the property continuously until 1932 at which time she married one Daniel Rogers. Thereafter she lived on the property at intervals until 1939, when she was divorced from Rogers; and later married Johnson, her present husband. She and Johnson lived on the property until 1944 at which time the dwelling was destroyed by fire. Arson was suspected. For this reason and the further reason that Johnson would have no interest in the Clark homestead in the event of Hattie's death, they acquired a lot as an estate by the entirety across the road from the 20 acres and built a house thereon, where they have since lived.

Hattie has not actually lived in a house on the 20 acres since 1945, but has been in control and possession of the property, paying taxes thereon, and her husband Johnson has farmed it each year.

Art. 9, § 6 of the Constitution of Arkansas provides: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life; Provided, that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares

to go to the younger children; and then all to go to the widow; and provided that said widow or children may reside on the homestead or not. And in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." Foregoing quotation is from a microfilm of the original Constitution of 1874; there is a discrepancy in punctuation when compared with the Constitution as set out in Ark. Stat. Vol. 1, page 124.

In *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63, the children by his first wife of the owner of the homestead claimed that the second wife, the widow, had abandoned the homestead. The homestead was located in Logan County, and subsequent to the death of Butler the homestead owner, Mrs. Butler, moved to Ft. Smith with her children where she purchased a home. Mr. Justice McHaney said: "Here there are children, and she had no separate homestead in her own right at the time of the death of her husband. In such a case the acquisition of a homestead in her own rgiht, after the death of her husband, does not constitute an abandonment of her husband's homestead so as to deprive her of the rents and profits thereof during her natural life."

Judge McHaney then quotes from *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205, as follows: "Our Constitution gives a homestead to the widow for life, without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants. . . . Upon the death of her husband, a life estate vests in her in his homestead, and she has the right to lease it and receive the rents from it, subject, of course, to the rights of her minor children to share same with her until each of them arrives at the age of 21 years; and we do not think she forfeits her homestead by a second marriage and removal to the homestead of her second husband."

In the *Colum* case it was further said: "The general rule is that a remarriage by a widow will not operate to destroy the homestead character of a home left

to her and her children by a former husband. Our Constitution does not require a widow to occupy the homestead. There is nothing in it to indicate that the framers intended that the marriage of the widow and her going to her second husband's homestead and occupying it with him should work a forfeiture of her previously existing legal rights. In short, there is nothing in our Constitution to indicate that the right of homestead of a widow should terminate, should she remarry and go to live with her husband on his homestead."

The Constitution specifically provides: "that said widow or children may reside on the homestead or not." Here the widow does not reside on the homestead; she lives on other property in which she owns an interest; but the Constitution permits her to live on other property which she may own without necessarily abandoning the homestead left by her husband. Here the widow has not in any way relinquished control or possession of the property she claims as a homestead, and there is no evidence of abandonment except the fact that she lives on other property in which she owns an interest which is permissible under the Constitution. She can not have two homesteads, *Grimes* v. *Luster,* 73 Ark. 266, 84 S. W. 223; but she has the right of election, *Bank of Hoxie* v. *Graham,* 184 Ark. 1065, 44 S. W. 2d 1099. There is no evidence that she claims as her homestead any property other than the 20 acres involved here. It is true that she testified on cross-examination that she and her husband bought the lot across from the 20 acres for the purpose of making their home there, but it is clear from her entire testimony that she used the word "home" in the sense of living on the lot, and she did not testify that she claimed the house and lot as her homestead.

Affirmed.

DAILEY *v.* ALLEN.

5-152 259 S. W. 2d 516

Opinion delivered July 6, 1953.

[redacted]

J. R. Booker and *Jackie L. Shropshire,* for appellant.

L. Weems Trussell and *Nona Lee Trussell,* for appellee.

MINOR W. MILLWEE, Justice. This suit was brought by plaintiff, Leatha Dailey Allen, on behalf of herself and her cotenants to cancel a deed to a 20-acre tract of land executed by her father, Bob Dailey, shortly before his death in 1931 to his son, D. C. Dailey. Defendants are the widow and heirs of D. C. Dailey who died in 1934. Plaintiff alleged there was a failure of consideration for the deed which she asserted was never delivered and was withheld from record until 1949.

Defendants filed an answer denying that plaintiff had any interest in the 20-acre tract and asking that their own title thereto be quieted. They also filed a cross-complaint in which they alleged that plaintiff and defendants were co-owners of another tract containing approximately 80 acres by inheritance from Bob Dailey, deceased, and that plaintiff had wrongfully sold the timber from said tract for which she should be required to account. There was a prayer that defendants be decreed as complete owners of both tracts as their interest ap-

peared, that the complaint be dismissed, and for an accounting by plaintiff.

Plaintiff filed a demurrer and reply to the cross-complaint. In the reply, she denied that defendants had any interest in the 80-acre tract or any other portion of the estate of Bob Dailey, deceased, and asserted that defendants' ancestor, D. C. Dailey, had received his share of said estate. Plaintiff also pleaded laches and limitations as to defendants' claim to the 80-acre tract and prayed, "that she be granted such additional relief as from the pleadings and proof adduced thereon may entitle her . . . ."

The cause proceeded to trial and was taken under advisement by the court on April 29, 1952, without any action being taken on plaintiff's demurrer to the cross-complaint. On June 30, 1952, defendants filed a motion for non-suit on their cross-complaint. A decree was entered on October 6, 1952, cancelling the deed to the 20-acre tract as prayed in plaintiffs' complaint. The decree further recites that defendants should be permitted to take a non-suit on their cross-complaint but that such action should not prevent the adjudication of the issues tendered in the reply and counterclaim of the plaintiff. As to the 80-acre tract it was decreed that defendants' ancestor, D. C. Dailey, received an advancement covering his full share in the estate of Bob Dailey, deceased, and that defendants had no title or interest in said lands.

The only contention for reversal is that the trial court was without authority or jurisdiction to litigate the issues as to the 80-acre tract after granting defendants' motion for a non-suit on their cross-complaint. This question must be determined from the face of the record since the bill of exceptions was stricken on plaintiff's motion by our order of May 11, 1953.

Ark. Stats., § 27-1407, provides that in any case where a set-off or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed

his action or failed to appear. We have repeatedly held that a voluntary non-suit by the plaintiff leaves the defendant's cross-complaint or counterclaim pending for adjudication under this statute. *Zurich General Accident & Liability Ins. Co. Ltd.* v. *Smith,* 209 Ark. 135, 189 S. W. 2d 718. In *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7, the court said that under this section an answer alleging a counterclaim is, in effect, the institution of a cross-action against the plaintiff for a recovery under the facts set up in the counter-claim and entitles defendant to any relief consistent with the evidence and the issue.

We hold that the principles announced in the foregoing cases are applicable where the defendants, as here, brought in the new issue as to the 80-acre tract in their cross-complaint. The cross-complaint was in the nature of a cross-action by the defendants against the plaintiff on a new issue. Before the non-suit was taken, plaintiff filed her reply in which issue was joined on the cross-complaint and she set up her counterclaim as to the 80-acre tract. The trial court had the authority and right to proceed to a determination of the issues tendered by plaintiff's counterclaim to the cross-action filed by defendants as to the 80-acre tract, although defendants had taken a non-suit on the cross-complaint. The decree so holding is affirmed.

CHERRY *v.* COUSART BAYOU DRAINAGE DISTRICT.

5-222 259 S. W. 2d 513

Opinion delivered July 6, 1953.

L. Dewoody Lyle, for appellant.

A. F. Triplett, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges an order of the Jefferson Circuit Court, which granted the directors of the Cousart Bayou Drainage District[1] (sometime hereinafter called "Cousart") the authority to purchase a dragline and equipment for said district under the provisions of § 21-575 Ark. Stats.

On May 29, 1953, a petition, signed by a majority of the landowners in Cousart, was filed in the Jefferson Circuit Court[2] praying that the Directors of the District be empowered to purchase a dragline and equipment in order to clean and keep clean the drainage ditch of Cousart. That the petition is signed by the requisite majority is conceded.[3] The Circuit Court forthwith directed that the hearings on the said petition be set for June 19, 1953, and that notice of such hearing be given.[4]

[1] The Cousart Bayou Drainage District was originally created by Act No. 283 of 1907 for lands in Jefferson County. Then, by Act No. 19 of 1909, the district was enlarged to also include lands in Lincoln County. Other legislative enactments increasing or otherwise modifying the powers of the district are Act No. 144 of 1911; Act No. 677 of 1923; Act. No. 118 of 1925. In *Berry* v. *Cousart Drainage Dist.*, 181 Ark. 974, 28 S. W. 2d 1060, we held that the district enjoyed the benefits of Act No. 227 of 1927, now found in § 21-568 Ark. Stats.

[2] Cousart is a district with lands in two counties. Most of the lands are in Jefferson County, so the Jefferson Circuit Court has jurisdiction under § 21-501 Ark. Stats.

[3] The appellant's brief in this Court states: "The majority of the property owners have now filed a petition asking the Board of Directors to purchase a dragline. . . ."

[4] The order for notice recites: ". . . and the Clerk of this Court is hereby directed to publish a notice in both Jefferson and Lincoln Counties, Arkansas, once a week for two weeks, advising the property owners of such hearing . . ."

At the hearing on June 19, 1953, appellant resisted the petition for himself and for any other interested land owners. The Circuit Court granted the petition and authorized the Directors of Cousart to purchase the dragline and equipment. This appeal challenges the Circuit Court order.

In *Halsell* v. *Drainage District,* 216 Ark. 746, 227 S. W. 2d 136, we held that a District could purchase a dragline under a situation such as exists in the case at bar. In the Halsell case, the question was: " 'Has Drainage District No. 17 the power and authority to purchase a dragline and equipment to be used by the District in cleaning out and maintaining its drainage system?' " We answered that question in the affirmative; and the opinion in the Halsell case is ruling here as to the power of Cousart to proceed under § 21-575 Ark. Stats.

The appellant claims that § 21-575 Ark. Stats. is too indefinite[5] to authorize the Court to empower Cousart to act; but we hold that the appellant's contentions are without merit. Section 21-575 Ark. Stats. is a part of Act No. 95 of 1947, and that Act says in § 2 thereof (as found in § 21-576 Ark. Stats.):

"This Act is supplemental and does not repeal any existing drainage law."

The last quoted language clearly means that the power contained in § 21-575 is supplemental to the other powers of Drainage Districts. Act No. 227 of 1927 (now § 21-568 Ark. Stats.) provides that districts organized by special acts shall be regulated by general law: so for the exercise of the power granted under § 21-575 Ark. Stats., and the procedure as to notice, hearings,

[5] On this point appellant says:

"That such section 21-575 is too indefinite in its provisions to constitute a workable law and is therefore void in that such section:

(a) makes no provision as to how or by whom it is to be determined whether a majority of the property owners have signed said petition,

(b) contains no provision for notice of any kind to the property owners in said District of any hearing to be held on such petition,

(c) contains no provisions as to a hearing on such petition,

(d) contains no provisions for the levying of a tax or borrowing money beyond the general statement that for the purposes of carrying out the provision of such act drainage districts are authorized to levy a maintenance tax and obtain funds as now provided by law."

determination of the majority, and authorization for borrowing money, recourse must necessarily be had to the general law regulating procedure by Districts. Circuit Courts have jurisdiction of drainage district matters, where the district embraces land in two or more Counties. (§ 21-501 Ark. Stats.) Setting the case for hearing and directing publication of notice is governed by § 21-533 Ark. Stats.

There remains for consideration only the question of the authority of the District to borrow money to purchase the dragline. Section 21-533 Ark. Stats. provides:

"The district shall not cease to exist upon the completion of its drainage system, but shall continue to exist for the purpose of preserving the same, of keeping the ditches clear from obstruction and of extending, widening or deepening the ditches from time to time as it may be found advantageous to the district."

Section 21-553 Ark. Stats. authorizes districts to borrow money and issue bonds. Here, as in the Halsell case,[6] there is no question presented that would indicate any impairment of the rights of the bond holders. The Court found that Cousart has outstanding bonds of only $26,000, and has on hand at this time more than enough money to pay all of the outstanding bonds and leave about $10,000 to be applied on the purchase of the dragline. The Court found that the dragline and equipment would cost approximately $45,000; so if the present bond holders are all paid (and Cousart has such right of prepayment), and money is borrowed to supplement the funds on hand for the purchase of the dragline, no present bondholder could be hurt.

The Court found that Cousart has unused benefits in excess of $500,000. A continuation of the present collection rate of 3% on assessed benefits will provide ample funds to retire the purchase price of the dragline and equipment, and also provide funds for cleaning out the drainage ditch. This is not a case of undertaking new improvements, but rather is the maintaining of

[6] *Halsell* v. *Drainage Dist.*, 216 Ark. 746, 227 S. W. 2d 136.

the improvements that have already been made. See *Cox* v. *Drainage Dist.*, 208 Ark. 755, 187 S. W. 2d 887; and *Campbell* v. *Beaver Bayou Drainage Dist.*, 215 Ark. 187, 219 S. W. 2d 934.

The judgment of the Circuit Court is affirmed.

MATHEWS *v.* COTHRAN.

5-59 259 S. W. 2d 504

Opinion delivered July 6, 1953.

Mark E. Woolsey, for appellant.

John J. Cravens, Jeta Taylor and *G. C. Carter,* for appellee.

GRIFFIN SMITH, Chief Justice. William Mathews owned 320 acres in the Ozark district of Franklin county. He was 70 years old and without wife or child when the deed resulting in this litigation was executed. One dollar "and other good and valuable considerations to us in hand paid" were recitals in the instrument dated September 12, 1951. The grantee is Mathews' niece, who is the appellee here.

On January 23, 1952, Mathews sued for cancellation. He alleged that the deed was given with the understanding that Lillian would move from California to the plaintiff's home and care for him during the period of his declining years and impaired health. The beneficiary, he said, had failed to render the contemplated services. On the contrary she had returned to California with her husband and had no intention of complying with conditions that Mathews contended were inducements to the transaction.

Following the trial Mathews died. The cause was revived in the names of Chesley O'Neal and E. W. Pillstrom, devisees under Mathews' last will.

In executing the deed the land was described as being in township nine north when in fact the tract was in township eight.

The trial court refused to cancel the deed for failure of consideration, but decreed reformation. Title was vested in appellee.

Mathews testified that the niece he intended (conditionally) to favor was the daughter of his brother, Ira. Ira and the niece and her husband—all living in California—had conducted correspondence with Mathews prior to the time the deed was executed. In March, 1950 Mathews named Lillian as sole beneficiary in a will. One of the letters written for Ira by his daughter mentioned uncertainties regarding Lillian's position in respect of the property, the inference being that the will might be contested.

Mathews testified that after the will was made Lillian and her husband visited with him for about three weeks.

This was in October, 1950. When the couple returned to California Mathews went with them and remained for less than a month. His illness was growing progressively worse and he felt that, having spent so many years in the Ozark area, he was better off there. A letter received from Ira (rewritten by Lillian and enclosed with one from her) was dated December 9, 1950. Ira complained that he had not been treated as a brother. He referred to "that dirty bunch"—a group composed of individuals "who didn't want you to have anything for your work, while taking care of Father and Mother". The suggestion was that Mathews should "get everything put in Lillian's name". Mention was made of money in the bank. The comment was: "If you leave it there you will have to pay income tax—and it will be plenty. Get wise to yourself and act now—get things fixed up . . . . Later may be too late".

In August, 1951, Lillian's husband wrote Mathews that he had information indicating that the will would be contested. He mentioned a rumor that Mathews was considering a sale of the property, then added, "But if it was mine I would sell it at all, because I really like it down there". [Apparently "wouldn't" was intended, rather than "would"].

In September, 1951, Lillian and her mother visited Mathews and spent two weeks with him. Mathews says that when they were preparing to leave he told Lillian he would deed the place to her "if they would come back and stay with me". Whether "they" refers to Lillian and her mother, or Lillian and her husband, is somewhat obscure; but the witness very definitely stated that Lillian promised to come back and stay with him. There was no objection when Mathews was asked if Lillian paid anything for the deed. He said that she did not.

Shortly thereafter Lillian and her husband and children shipped their furniture from California and moved into the Mathews home. They remained less than four months, returning to California in January. When asked how he treated these relatives during the period

they remained with him, Mathews said: "Well, as bad as I was feeling I treated them just as near right as I could—as good as I could—but I was sick practically all the time . . . . They wanted me to go back [to California] with them, and that's all I can tell you. I wasn't able. I couldn't stand it back there because I wouldn't live long enough".

On cross-examination Mathews readily admitted that the will he executed in Lillian's favor was a voluntary act, that he loved her at that time and still did, but that she and her husband were non-cooperative while on the farm. They would "lie up in bed" during the morning and supplied little if any assistance on the farm:—"They wouldn't help me take care of the cattle, and I told them right at the start that I would have to sell them".

Lillian's testimony directly contradicts statements made by her uncle. She accompanied the grantor to Johnson's abstract office where the deed was made and where the uncle said, "I want the property to be yours today". Johnson asked if any consideration was to be mentioned and Mathews replied, "The place is to be all yours today without any consideration". It was at Johnson's suggestion that the one dollar consideration was inserted. Mathews left the deed at the recorder's office, but procured it later and gave it to Lillian when she moved to the farm.

Woodrow Cothran, appellee's husband, was in California when the deed was executed and therefore did not know what transpired between his wife and her uncle regarding it.

Johnson's recollection was that when Mathews was asked if any consideration was to be shown in the deed the maker replied, "No, I'm giving it to her". The dollar recital was Johnson's voluntary act.

Lillian returned to California almost immediately after the deed was executed, but shortly thereafter received a letter from Margaret O'Neal stating that Lillian's Uncle William was ill. After discussing the matter with her husband, Lillian concluded to return to Arkan-

sas "as soon as we could and stay with [Uncle William] until he was better". Expenses incurred, including the return to California, amounted to $984.

Testifying further, Lillian said that when she and her family moved to the farm she wanted to build an outside toilet, but her uncle objected:—"We wanted to have our cook stove (gas) changed to butane, but he objected. He did not want us to use curtains or rugs. He objected to cutting weeds—just let them go . . . . It was impossible to make our home with my uncle, and my husband could not find work".

Mathews testified that the property was worth $15,000.

In a letter addressed to the attorney *ad litem* explaining her understanding of relationships, Lillian wrote: "There was no agreement made whatever, verbal or otherwise. But I knew he wanted some one with him, although he never said or did I ask".

It is readily understandable that Lillian and her husband— with their two small children—were not satisfied with the rural district into which they moved. Lillian's husband had been employed by North American Aviation as a drophammer operator. The California environment and their mode of living were no doubt more agreeable to taste and personal contacts and desires than the somewhat drab existence emphasized by Lillian as a would-be homemaker on the farm in Franklin county. Mathews preferred the place to California. To him it was home, with all that the word implied.

It is noteworthy that the uncle Lillian pictures as one who acted upon impulses of love and affection to the exclusion of his own right to remain upon the premises did not deliver the deed until the family moved from California. There is no hint that Lillian would have dispossessed the old man. On the contrary she testified that when the deed was being drawn she volunteered the suggestion that a life estate be retained, and that Uncle William replied, in effect, that he wanted to close the transaction as of that date.

It is argued that the deed was not subject to reformation, having been voluntarily executed as a mere gratuity, "and lacking in the elements of a contract," *Nelson* v. *Hall,* 171 Ark. 683, 285 S. W. 386; *Wells* v. *Smith,* 198 Ark. 476, 129 S. W. 2d 251. But the grantor contended that it was not a gratuity, and that contractual elements were present. If we accept Lillian's version, there was a gift and reformation would not lie. On the other hand, if we read into the transaction Lillian's admission that she knew Uncle William wanted some one to be with him, there has been supplied the natural inference that Lillian understood the deed was predicated upon reciprocal duties.

We do not find it necessary to decide this question. Our conclusion is that the evidence preponderates in favor of Mathews' statements that before the deed was executed uncle and niece understood what was expected. Just how this understanding was expressed—whether in particular words or conduct upon which the grantor had a right to rely—this is immaterial. The deed was not immediately delivered. Lillian and her family promptly moved to the farm. It is unreasonable to believe that they shipped their furniture and that Lillian's husband gave up his aircraft job without reason. The conduct is not harmonious with a stay in Franklin county limited to Mathews' illness then thought by appellee to be of a temporary character. Rather, leaving California was the act of a family making a definite move for a positive purpose; and the record supports the conclusion that life on the farm was found to be irksome and that the uncle's illness and irritability were more than appellee and her husband had expected.

This is understandable and appellee could not be prevented from abandoning her contract. But she could not toss it aside and still receive its benefits unless Mathews' conduct had the effect of driving them away. Our conclusion is that Lillian made her election, hoping that Uncle William would follow the family to California. That he did not choose to do so has proved unfortunate

from Lillian's material standpoint, for the decree must be reversed with directions to cancel the deed.

MORROW *v.* RAPER.

5-148 259 S. W. 2d 499

Opinion delivered July 6, 1953.

Campbell & Campbell, for appellant.

E. C. Thacker and *Michael B. Heindl,* for appellee.

MINOR W. MILLWEE, Justice. The parties are owners of adjacent tracts of land along U. S. Highway 70 near Lake Hamilton in Garland County, Arkansas. Plaintiff, R. F. Morrow, brought this action against the defendants, Chester Raper and wife. After describing the contiguous tracts belonging to the parties, the complaint alleges: "Further complaining, plaintiff states that the property line between the said tracts of land has been in dispute for some time, and that by judgment of this Court in Case No. 6846, which was styled *R. F. Morrow* v. *Mr. and Mrs. O. D. Adcock* was adjudicated April 12, 1946, the property line was established and

found to be the center of the Hot Springs and Rock Creek Road. That said line was established by driving iron pins in the center of said road, and was declared to be a dividing line between the property owned by the plaintiff and that owned by Mr. and Mrs. O. D. Adcock. That defendants derive their title to the aforementioned property through Mr. and Mrs. O. D. Adcock, who were party defendants in said case No. 6846."

The complaint further alleged that defendants were encroaching upon plaintiff's property by erecting a part of a building thereon. There was a prayer for damages for the alleged encroachment and an alternative prayer for possession.

In their answer, the defendants, who are successors in title to the Adcocks, defendants in the 1946 action, pleaded the former circuit court judgment as *res judicata* of the cause of action asserted by plaintiff.

Trial before the Circuit Court, sitting as a jury, resulted in a judgment for the defendants which recites: "That the plaintiff failed by a preponderance of the evidence to prove that the defendants had encroached upon the line as established by order of this Court on April 12th, 1946; the Court doth find that the line in dispute between plaintiff and defendants and their privy in title was adjudicated by this court on April 12th, 1946, and that this Court is without jurisdiction to change or alter the line as set out by order of this Court on April 12, 1946; that said cause is *res judicata.*"

There was introduced at the trial in the instant case the report of the two surveyors who were appointed by the court in the former action to survey and establish the dividing line between the litigants. This report, together with a map of the survey which the two surveyors then made and filed, formed the basis of the 1946 judgment. The report recites that said surveyors had established a line by driving iron pins in the center of the Hot Springs-Rock Creek Road which was the line dividing the properties of the parties. At the trial in the instant case, A. F. Annen, one of said surveyors, testified that

he made another survey after institution of the instant suit and found the iron pins still in place; and that, according to the survey and report made in the 1946 suit, there was no encroachment upon the plaintiff's property.

Now the testimony that there was no encroachment upon plaintiff's property according to the survey which formed the basis of the 1946 judgment is not disputed. In the instant case, plaintiff's evidence, sharply disputed by that of the defendants, was to the effect that the surveyors appointed by the Court in the 1946 action made a mistake in locating and identifying the center of the Hot Springs-Rock Creek Road.

Plaintiff's contention for reversal on this appeal is summarized in the fourth ground of his motion for new trial, as follows: "The Court erred in holding that this cause is *res judicata* as plaintiff owns a vested interest in the lands in question, which could not be destroyed by a prior judgment of this court, and which, being based on a mistake, was void *ab initio,* and should have been disregarded and not received in evidence or disregarded as having no probative value." We cannot agree with this contention.

The plaintiff brought an action in 1946 against defendants' predecessors in title to determine the same factual issue presented in the instant action, that is, the location of the center of the Hot Springs-Rock Creek Road which forms the line dividing the properties of the parties. The 1946 judgment, being rendered by a court which had jurisdiction of the parties and subject-matter, was valid and not void as plaintiff now contends. When plaintiff did not appeal from the 1946 judgment, it became final and conclusive of the present action under the doctrine of *res judicata.* It is a fundamental rule that, when a question is settled adversely to a litigant by judgment of a court of competent jurisdiction, such judgment precludes the litigant from raising the same question in another suit. *Barton* v. *Meeks,* 209 Ark. 903, 193 S. W. 2d 138 and cases there cited.

There is no contention by plaintiff that the 1946 judgment was obtained by fraud or collusion. The only

contention is that the surveyors made a mistake in establishing the boundary line in that suit. The fact, if true, that the question of the boundary line may have been erroneously determined in the former suit does not impair the conclusiveness of a valid judgment rendered by a court of competent jurisdiction, which has not been set aside or corrected on appeal. *Tri-County Highway Improvement Dist.* v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627; *Strauss* v. *Missouri State Life Ins. Co.,* 188 Ark. 286, 66 S. W. 2d 299; 30 Am. Jur., Judgments, § 156; 50 C. J. S. Judgments, § 704.

As the trial court observed in his oral findings in the instant case: "Mr. Morrow, no doubt, accepted that survey, the order of the Court at that time, fixing the center of the old road, because there was no appeal taken from the judgment of the circuit court at that time. It may be that the surveyors, Mr. Annen and Mr. Phillips, were in error in fixing the center of that old road, that may have happened, Mr. Morrow. They may have been in error, but nevertheless, they did fix the center of that road. You had a remedy at that time, if it was wrong you failed to avail yourself of that remedy and that then became the center of that old road, the line as fixed and established by Mr. Annen and Mr. Phillips."

The judgment is affirmed.

BROWN PAPER MILL COMPANY, INC. *v.* WARNIX.

5-96 259 S. W. 2d 495

Opinion delivered July 6, 1953.

Bridges & Young, for appellant.

Ed F. McDonald, for appellee.

George Rose Smith, J. This is a suit by the appellant to enjoin the cutting of timber upon land claimed by it and to recover $500 in damages for timber already cut. The only disputed issue is the correct location of the boundary line between two forty-acre tracts. The chancellor dismissed the complaint upon a finding that the plaintiff had not proved its case to the court's satisfaction.

The appellee's land lies immediately west of the appellant's. The area in dispute is a strip about thirty-five feet wide that is claimed by both litigants. To sustain its assertion of title the appellant relies strongly upon the fact that for some fifty years a fence has been maintained on the west side of the disputed strip by the appellee and his predecessors in title. The appellee's enclosed property has been used as a pasture, while the strip in question and the appellant's land to the east have been wild and unimproved. Indeed, the complaint alleges that the disputed strip is not suited for any purpose except the growing of timber.

We agree with the chancellor's conclusion that the mere existence of the fence did not affect the title to the area in controversy. The record does not show that there was ever an agreement upon the fence as the boundary line. A few witnesses testified that they understood the location of the fence to represent the line, but their belief was based merely on the fact that the fence was there and hence added nothing to the physical facts.

On the other hand, there is testimony that Bob Butler, a former owner of the appellee's forty, erected this fence many years ago and deliberately placed it west of his property line in order to leave space for a road on his own land. Of course a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side. That loss would occur only if his neighbor should take possession of the strip and hold it for the required period of years. But here there can be no claim of adverse possession, as the land east of the fence has been wooded all along.

It is also contended that the testimony of surveyors shows the true boundary line to coincide approximately with the appellee's fence. On this issue the trial court apparently credited the testimony of the county surveyor, who had been familiar with this boundary for over thirty-five years and whose survey showed the line to be along the eastern edge of the parcel in controversy. There is other corroborating testimony to indicate that the county surveyor's line agrees with the original government survey.

Although the appellant attacks the accuracy of the county surveyor's measurements, the trouble is that it offers no persuasive substitute. The company employed two surveyors to make independent determinations of the boundary, and these two are themselves in disagreement. To accept any of the three suggested lines is to reject the other two. After studying the record we are not convinced that any one of the three is demonstrably more reliable than the other two. In these circumstances the chancellor rightly held that the plaintiff had not met its burden of proof.

Affirmed.

WARD, J., dissents.

COPELAND *v.* HUFF, JUDGE.

Nos. 5-272 and 5-273 261 S. W. 2d 2

Opinion delivered August 22, 1953.

Vacation order and opinion adopted as opinion of Court October 5, 1953.

[redacted]

Wood, Chesnutt and *Smith,* for petitioner.

H. A. Tucker, for respondent.

GEORGE ROSE SMITH, Justice. During the court's summer recess Curt C. Copeland has presented to me two companion petitions seeking relief against C. Floyd Huff, Jr., as judge of the Garland Circuit Court. The petitions are identical except as to the relief sought; the first asks for a writ of mandamus and the second for a writ of prohibition. (Under Article 7, § 4, of the constitution, either writ may be issued by any judge of the supreme court.)

The record reflects no dispute concerning the facts. Copeland is the publisher of a weekly newspaper in Gar-

land County. On August 10, 1953, the Garland grand jury returned sixteen indictments against Copeland, all charging criminal libel. Twelve of these indictments allege that Copeland libeled Judge Huff by publishing false accusations that Judge Huff is a thief, that he has been engaged in stealing cars, that he associates with professional gamblers, and that he is otherwise lacking in integrity. The other four indictments have to do with libelous statements that Copeland is said to have printed concerning E. S. Stevenson and A. R. Puckett.

On August 19 Copeland filed a motion asking that Judge Huff declare himself disqualified to preside in the cases. On the same day Copeland moved that the indictments be quashed for the reason that Judge Huff had called the grand jury into special session, had charged it on the law of criminal libel, had appeared as a witness against Copeland, and had dominated and controlled the grand jury in the consideration of these charges.

The motion for disqualification was immediately presented to Judge Huff and was overruled. The judge, after considering the opinion in *Foreman* v. *Marianna,* 43 Ark. 324, concluded that he had no direct pecuniary interest in the proceedings and was, therefore, eligible to conduct the trials in their entirety. He announced that he would not preside when the cases were heard on their merits but that he would pass upon all preliminary motions, so that some other judge would not be required to make trips to Hot Springs for that purpose. The motion to quash the indictments was set for hearing on August 24. The present petitions, which assert that Judge Huff will be called as a witness in connection with the motion to quash the indictments, ask that he be precluded from ruling upon that motion or upon any subsequent issues in the cases.

It is my conclusion that Judge Huff, in adverting only to his lack of pecuniary interest in the cause, overlooked other implications of Article 7, § 20, of the constitution. That section not only states that no judge shall preside when he has an interest in the outcome of the case; it also prohibits a judge from participating when

"either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law". The fourth degree of consanguinity or affinity has been so prescribed. Ark. Stats., 1947, § 22-113.

We have uniformly given a liberal scope to the word "parties," as used in this section, to the end that the courts may achieve impartiality in the minds of the public as well as impartiality in fact. *Johnson* v. *State,* 87 Ark. 45, 112 S. W. 143, 18 L. R. A., N. S. 619; *Ferrell* v. *Keel,* 103 Ark. 96, 146 S. W. 494. If the respondent must be treated as a party within the intent of the constitution there can be no doubt of his disqualification, regardless of his pecuniary interest in the matter.

The decision in *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748, completely settles this question. There Byler was convicted of having murdered the sheriff. After the trial it was discovered that the judge's wife was related to the deceased within the prohibited degree. Even though Byler's guilt was clearly established, and even though the trial had been fair in every way, the conviction had to be set aside. Of course, the murdered sheriff was not technically a party to the proceeding against his assailant, but we reasoned that a judge is disqualified "if he be the injured party, or if he be related by consanguinity or affinity . . . to the injured party." Here the respondent is himself the victim of the alleged crimes, and to hold that he is not disqualified would be in effect to overrule the *Byler* case, which is obviously beyond my authority even if I were so inclined, and I am not.

The only other issue is whether mandamus or prohibition is available to the petitioner in these circumstances. Of course, mandamus does not lie to compel the performance of a duty that is discretionary, but I am unable to perceive that the law leaves the respondent with any choice in this matter. On the undisputed facts Judge Huff is ineligible to preside in these cases; so his duty to withdraw is merely ministerial. As far as I am aware, every court that has passed on the question has held that mandamus is a proper remedy in this situation.

See *Vallejo* v. *Superior Court,* 199 Calif. 408, 249 P. 1084, 48 A. L. R. 610; *State ex rel. Ballard* v. *Jefferson Circuit Court,* 225 Ind. 174, 73 N. E. 2d 489, *State ex rel. Nolan* v. *Judge,* 39 La. Ann. 994, 3 So. 91; *Hearn* v. *Miller, Judge,* 168 Okla. 411, 33 P. 2d 506. It is true that in some of the above cases the judge's duty to withdraw from the case was laid down by statute; but that is immaterial, since mandamus lies to enforce a clear legal right, whether it arises by statute or by common law. *Haines* v. *People,* 19 Ill. App. 354; *Chance* v. *Temple,* 1 Iowa 179, 189; *State ex rel. Sparling* v. *Bronson,* 83 Ohio App. 108, 82 N. E. 2d 780. Here the circuit court's duty is unmistakably imposed by the constitution itself—an authority of greater force than either legislation or the common law.

For these reasons it is ordered that a temporary writ of mandamus issue, directing that the respondent refrain from presiding in the cases in question, the writ to remain in force pending further action of the entire court upon its reconvening. Additional relief by prohibition being unnecessary, the second petition is temporarily denied.

Mr. Justice McFaddin concurs in the result reached by the majority, but thinks prohibition is the correct remedy instead of mandamus; the Chief Justice not participating, for the reason that he did not have the benefit of the original oral presentation.

Ex Parte Rubly.

4747 261 S. W. 2d 4

Opinion delivered October 5, 1953.

Cole & Epperson and *W. H. McClellan,* for petitioner.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for respondent.

SAM ROBINSON, Justice. On March 13, 1953, the prosecuting attorney of Hot Spring County filed an information charging Grant Rubly, Jr., with the crime of burglary. Subsequently the prosecuting attorney suggested to the court the possibility of the defendant's being insane and moved that he be committed to the State Hospital for a mental examination. At a hearing on the motion evidence was taken calculated to shed light on the mental capacity of the defendant. Thereupon on May 12 the court ordered the defendant committed to the State Hospital for a mental examination. On May 18 defendant filed in this court a petition for a writ of habeas corpus alleging that inasmuch as it had been stated to the trial court that insanity would not be pleaded as a defense, the court was without authority to commit the defendant to the hospital for a mental examination, and alleged that he was, therefore, being unlawfully held.

The petition for the writ of habeas corpus was merely filed with the clerk of this court as any ordinary case, and was not called to the attention of any member of the court. No attempt was made to obtain an immediate hearing on the petition. On June 17 petitioner filed a brief on the question. Ordinarily the State's brief would have been due July 8; however, court adjourned for the summer on July 6. Before petitioner's brief was filed, he was diagnosed as sane and released from the hospital. Hence the question presented is not only moot at this time, but was moot at the time petitioner's brief was filed.

The nature of this case is not such that if the point in question is not decided it will always be moot for the reason that a person in every instance would be released from the hospital before the court in regular course of procedure could decide the issue. If the petition for the writ had been presented to any member of this court, the writ could have been issued immediately and the matter set for a hearing on its merits a few days hence.

Ark. Stat., § 34-1702, provides: "The writ of habeas corpus shall be issued upon proper application by the following officers: By a judge of the Supreme Court or of any chancery court during the sitting of their respective courts or in vacation. The power of the Supreme, circuit or chancery courts to issue writs of habeas corpus shall be coextensive with the State." and § 34-1703 provides: "The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in the first section of this article (§ 34-1702), to any person who shall apply for the same by petition, showing, by affidavit or other evidence, probable cause to believe he is detained without lawful authority, or is imprisoned when by law he is entitled to bail."

In *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617, it is said: "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 can not affect the matter in issue in the case at bar."

It appears to be the weight of authority that if, pending an appeal, the restriction is removed and the accused procures his release, he can not thereafter maintain a proceeding previously begun for a writ of habeas corpus. *Ex Parte Erwin,* 7 Tex. App. 288; *State ex rel. McMonagle* v. *Konshah,* 136 Minn. 331, 162 N. W. 353; *Ex Parte Henion,* 6 Cal. Unrep. Cas. 182, 55 Pac. 326. Petitioner has been released, the issue is moot, and, therefore, the petition for the writ is denied.

4744 261 S. W. 2d 1

Opinion delivered October 5, 1953.

[redacted]

Cole & Epperson and *W. H. McClellan*, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas*, Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. Doyle N. Whitten, charged with the murder of Johnny Elmore, was found guilty of voluntary manslaughter and sentenced to imprisonment for two years.

The homicide occurred soon after midnight on the morning of September 21, 1952. Whitten and his wife had been separated for some time; Mrs. Whitten was living at the home of her father. The State's proof showed that Whitten, having learned that his wife was out with another man, drove to his father-in-law's house and waited outside with a rifle. Within about two hours Elmore and Mrs. Whitten arrived in a truck. The State's contention is that Whitten then fired at the cab of the truck and fatally wounded Elmore. Whitten's testimony is that as he was walking toward the truck his foot slipped in a small ditch and the rifle was discharged accidentally.

Clarence Montgomery, a state policeman, investigated the killing within an hour or so after it took place. He testified that Whitten then stated that he shot Elmore because of his being out with Whitten's wife. On cross-

examination the defense sought to show that Whitten had also told Montgomery that he had slipped in a gully when the gun discharged. The court sustained the State's objection to this testimony, on the ground that such a statement would be self-serving.

This ruling was erroneous. We have often held that when the State introduces part of the accused's confession, he is entitled to prove other relevant parts of the confession, despite their being exculpatory or self-serving. *Williams* v. *State,* 69 Ark. 599, 65 S. W. 103; *King* v. *State,* 117 Ark. 82, 173 S. W. 852; *Smith* v. *State,* 216 Ark. 1, 223 S. W. 2d 1011. This rule is evidently sound, for a statement must usually be read in its context if the speaker's exact meaning is to be determined. Of course it is for the jury to decide what weight is to be given to the defendant's contemporaneous explanations, but the prosecution cannot be permitted to offer only such excerpts as are damaging to the accused and to exclude from the jury's consideration other statements that are relevant to an understanding of the whole.

Reversed and remanded.

WATTS *v.* STATE.

4740 261 S. W. 2d 402

Opinion delivered October 5, 1953.

Rehearing denied November 9, 1953.

 [redacted]

J. Fred Parish and *C. M. Erwin,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellant was convicted of the crime of rape and sentenced to life imprisonment. His motion for new trial contains 18 numbered assignments, but we find it necessary to discuss only Assignment No. 6,[1] which requires a reversal.

That the little 14-year-old girl was raped in her home by a hooded man who then fled through the woods, admits of no doubt. The serious issue was the evidence which tended to identify the appellant as such assailant. The person who committed the rape wore a hood over his face. In the woods the hood was found with hairs in it, supposedly from the head of the assailant. After appellant was arrested, some hair was taken from his head and sent by the State Police to the Federal Bureau of Investigation in Washington, along with the hairs in the hood. All this was in an effort to ascertain whether the two sets of hair were from the head of the same person.

The report was received by the State Police from the Federal Bureau of Investigation, but was never made available to the accused or his counsel. Several efforts were made by the court-appointed counsel for the accused to get this F.B.I. report, as counsel claimed a desire to take the deposition of the F.B.I. laboratory technician in Washington. All such efforts were unsuccessful because the Court ruled that it would not require

[1] This assignment reads in part: "The court erred in instructing the jury that they were not to consider any testimony concerning the Federal Bureau of Investigation report mentioned by Sergeant Henley of a comparative examination of hair; and the court erred . . . in the instruction given by the court to the jury to disregard any testimony about an investigative or comparative report . . ."

the filing of the report, since it would be inadmissible if offered in evidence.[2]

On the trial of the case, Sergeant Henley, of the Arkansas State Police, was called as witness for the State, and the following occurred:

"(Cross-examination).

". . . Q. Now, you took the hair off of his head when he was out at the police station, didn't you? A. No, sir. Q. Was it while he was in jail? A. Yes, sir.

. . .

"Q. And with that you sent some hair out of that hood, did you not? A. Yes, sir. Q. Did you send that to the F.B.I.? A. Yes, sir."

(Redirect examination).

"Q. How many pieces of hair did you send out of the hood? A. Two. Q. What was the substance of that report?"

The defendant's counsel objected to the attempt to have the witness answer the last quoted question claiming—*inter alia*—that the report was available and the attempted answer would be hearsay. When the Prosecuting Attorney asked the Trial Court to instruct the jury to disregard all evidence about the F.B.I. report, this occurred:

"By the Court: I am going to instruct the jury they are not to consider any testimony concerning the report mentioned by Sergeant Henley of a comparative examination of hair in their deliberations.

"By Mr. Erwin: Except to the ruling.

"By the Court: I am ruling out the whole thing, about the hairs or the report.

[2] In 52 A. L. R. 207 there is an Annotation on "Right of accused to inspection or disclosure of evidence in possession of prosecution." In addition to the reported case preceding the Annotation (*i. e., People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 156 N. E. 84, 52 A. L. R. 200) attention is also called to the following cases: *State* v. *Tabet* (W. Va.), 67 S. E. 2d 326; *State* v. *Di Noi* (R. I.), 195 Atl. 497; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. Supp. 2d 130; and *Goldman* v. *U. S.*, 316 U. S. 142, 62 S. Ct. 993, 86 L. Ed. 1322.

"By Mr. Erwin: We object to the ruling of the court, ruling out of any consideration or argument the fact of the investigation, and the evidence with regard to the police taking his hairs out of his head. Note our exceptions."

Thereupon, over the defendant's objections and exceptions, the Court instructed the jury:

"Gentlemen, you are instructed to disregard any testimony with reference to hairs from the defendant's head, or hairs from the so-called mask, and to disregard any testimony about an investigation or comparative report."

Without this "hair evidence," the other evidence of identity consisted largely of lay opinion testimony as to footprints. We are not holding that the defendant was entitled to the F.B.I. report; but we are holding that the Trial Court committed prejudicial error in ruling out all the evidence about there being such a report concerning the comparison of the defendant's hair with the hair found in the hood worn by the assailant. Such ruling by the Trial Court prevented the defendant's counsel from arguing to the Jury anything about the failure of the State to offer the most definite evidence of identity that was available in this case.

The attorney for the defendant was entitled to the right to argue to the Jury on the failure of the State to produce the best evidence that the State possessed. In *Hopson* v. *State,* 121 Ark. 87, 180 S. W. 485, we recognized that the Prosecuting Attorney could comment on the failure of the defendant to call witnesses—other than himself—to testify as to facts known by such witnesses and claimed to be favorable to the defendant. See also *Cascio* v. *State,* 213 Ark. 418, 210 S. W. 2d 897. The same rule applies as to the right of the defendant to comment to the jury on the failure of the State to call witnesses who would presumably have supported the State's theory. In 23 C. J. S. 568, in discussing comments on failure to produce witnesses or evidence, the cases are summarized:

"Counsel for accused may comment on the absence of a state witness, competent and cognizant of material facts, or on the failure of the state to use available and competent evidence."

The right to make such an argument to the jury is impliedly recognized in those cases which discuss the presumption arising from the failure to produce witnesses or testimony. In *Graves* v. *U. S.*, 150 U. S. 118, 14 S. Ct. 40, 37 L. Ed. 1021, the rule is stated in this language:

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be favorable. 1 Starkie Ev., 54; *People* v. *Hovey,* 92 N. Y. 554, 559; *Mercer* v. *State,* 17 Tex. App. 452, 467; *Gordon* v. *People,* 33 N. Y. 501, 508."

In Wharton on Criminal Evidence, 11th Ed., § 112, this language appears:

"Failure to call as witnesses those who could testify to material facts may give rise to adverse presumptions or inferences, and an attempt to prevent a witness from attending is admissible as a fact from which an unfavorable inference may be legitimately drawn."[3]

When the Court told the jury to "disregard any testimony about an investigative or comparative report," the Court thereby prevented the defendant's counsel from commenting to the jury on the failure of the State to present the evidence the State might have offered regarding identity. The defendant was entitled to have his court-appointed counsel allowed to argue to the jury on the failure of the State to offer such evidence and the Court's ruling precluded such argument.

[3] See also Wharton on Criminal Evidence, 11th Ed., § 1124; Underhill on Criminal Evidence, 4th Ed., § 45; and *Stocker* v. *Boston & Main R. R.*, 84 N. H. 377, 151 Atl. 457, 70 A. L. R. 1320. Of particular interest is the case of *Gutierrez* v. *State,* (96 Tex. Cr. R. 327), 257 S. W. 889.

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

The Chief Justice and Mr. Justice MILLWEE dissent.

WILLIAMS *v.* CITY OF MALVERN.

4743 261 S. W. 2d 6

Opinion delivered October 5, 1953.

Cole & Epperson and *W. H. McClellan,* for appellant.

Lawson E. Glover, for appellee.

MINOR W. MILLWEE, Justice. On appeal from the Malvern Municipal Court, the defendant was convicted in Circuit Court of the crime of contributing to the delinquency of a minor by indecently molesting an eight-year-old girl.

Although the information stated a date upon which the offense was alleged to have been committed, there was a total failure of proof on this point. The defendant contends that the city's failure to prove that the offense occurred within one year next preceding the filing

of the information, as required by Ark. Stat., § 43-1603, calls for a reversal. The city's confession of error on this point is well taken. Our cases hold that the State must prove the commission of a misdemeanor within one year next preceding the filing of the information or the finding of an indictment.

In construing § 43-1603, *supra,* in *Pate* v. *Toler,* 190 Ark. 465, 79 S. W. 2d 444, the court said: "The above section is somewhat more than a statute of limitations, as regards to time. Ordinarily, the statute of limitations in proceedings is a matter of defense, which may be pleaded or be waived. The above section, however, is a limitation upon the power of courts to try one for any offense less than a felony, unless the charge shall have been instituted within the year after the offense charged was committed. The State must prove that the offense was committed within the year prior to the filing or making the charge. *Stelle* v. *State,* 77 Ark. 441, 92 S. W. 530; *State* v. *Reed,* 45 Ark. 333." In the earlier case of *Dixon* v. *State,* 67 Ark. 495, 55 S. W. 850, the rule was applied even though, as here, the defect in proof was not called to the attention of the circuit judge at the trial but was raised for the first time in the motion for new trial.

It is also argued that it was incumbent on the State to prove that the prosecuting witness was in fact a delinquent child before the defendant could be found guilty, and that the failure to make such proof calls for a dismissal of the charge. While the authorities are in disagreement on the question, it is our conclusion that a defendant may be found guilty of contributing to the delinquency of a minor, under our statute, for acts which directly tend to cause delinquency, whether that condition actually results or not.

Under Ark. Stats., § 45-239, it is made a misdemeanor for any person to "cause, encourage or contribute to the dependency or delinquency of a child, as these terms with reference to children are defined by this act . . ." In defining a delinquent child, our statute (Ark. Stats., § 45-204) enumerates, among others, one "guilty of indecent, immoral, or lascivious conduct." In *Cham-*

bers v. *State,* 168 Ark. 248, 270 S. W. 528, we emphasized the point that one might be guilty under our statute if he encouraged or contributed to the delinquency of a child, but we expressly recognized that the infant there involved had in fact become delinquent although she had not been so adjudged.

The situation here is similar to that in *People* v. *Gruhl,* 388 Ill. 52, 57 N. E. 2d 371, where the court said: "The acts alleged against the plaintiff in error were such as would directly tend to render such child guilty of indecent and lascivious conduct. Since the crime was complete when the acts were committed, it was not necessary for the information to allege nor for the trial court to find that that child, who is the subject of the offense, should be or become, by reason of the acts committed, a delinquent child."

In *Wallin* v. *State,* 84 Okla. Cr. 194, 182 P. 2d 788, the Oklahoma court, in construing a statute similar to ours, said: "In construing this act, we must keep in mind that the purpose of the juvenile delinquency statutes is to protect youth of the State from those evil and delinquent persons who would lead them astray. We are not inclined in the slightest to impair the usefulness and strength of these statutes by placing upon them a narrow, limited and strict construction."

"Such protective statutes should be liberally construed. A liberal interpretation of the juvenile delinquency statutes arms the State with a two-edged sword, to protect children not delinquent from the suggestions of delinquency, as well as for the punishment of those who might commit such acts as to a child already delinquent. In this connection it is not necessary that delinquency result from acts tending to contribute to delinquency." See also, *People* v. *McDougal,* 74 Cal. App. 666, 241 Pac. 598; *People, on Complaint of Barber* v. *Caminiti,* 28 N. Y. S. 2d 133; *State* v. *Harris,* 105 W. Va. 165, 141 S. E. 637.

The defendant relies on the case of *Lee* v. *State,* 33 Ala. App. 183, 31 So. 2d 375, where the court held that

the indecent fondling of a female did not constitute contributory delinquency. This case was expressly overruled in *Smithson* v. *State,* 34 Ala. App. 343, 39 So. 2d 678, which is the subject of an exhaustive note on the question in 4 Ark. L. R. 477.

We gather from our statutes that it was the overall purpose of the legislature to safeguard the young and innocent from those evil influences which expose them to the dangers of delinquency. The rule followed in the foregoing cases is, in our opinion, entirely consonant with that purpose and we disagree with one text writer's conclusion that it represents an extreme position.[1]

The defendant argues other assignments of error, but the issues involved probably will not arise on a retrial. It should be noted that the indecent molesting or fondling of young children is now made a felony by Act 94 of 1953.

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

DILLON *v.* STATE.

4745 261 S. W. 2d 269

Opinion delivered October 5, 1953.

Rehearing denied November 2, 1953.

[1] 43 C. J. S., Infants, Sec. 13.

House, Moses & Holmes and *E. B. Dillon, Jr.*, for appellant.

Tom Gentry, Attorney General and *Thorp Thomas*, Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal questions two judgments. One sentenced the defendant to a term of seven years in the penitentiary for burglary, the other to seventeen years for grand larceny.

Although the motion assigns as errors thirty-seven trial transactions and matters occurring after the arrest was made and prior to arraignment, emphasis here relates to but six: (1) A mistrial should have been declared because of inflammatory remarks by prosecuting attorneys in their opening remarks and in the closing arguments; (2) the state was permitted to cross-examine the defendant's wife on matters not brought out on direct testimony; (3) undue stress on a previous conviction was permitted and the state was allowed through innuendo to suggest that the defendant was falsifying when he

denied other convictions; (4) hearsay evidence was prejudicial; (5) alleged admissions by the defendant were improperly admitted, and, (6) the verdict was contrary to the law and the evidence to such an extent that appellant's demurrer and motion for a directed verdict when the state rested should have been sustained.

Dillon was convicted on charges that he broke into H. L. Gipson's garage and implement building at Harrison. The defendant is a citizen of Oklahoma residing at Tulsa where he operated and owned a garage and wheel-aligning business. He also owned a small sawmill near Highway 66 about twelve miles from Tulsa.

Gipson testified that at approximately 2:15 the morning of June 18, 1952, the garage was broken into. Five guns, a chain saw, a Clinton motor, and about $23,000 in money were taken. Gipson communicated with the manufacturers of the saw and received the company's coöperation in locating it, identification having been made through the serial number. Shortly after contacting the manufacturer information was received that the saw was at Dillon's mill near Tulsa. With this knowledge Gipson went to Oklahoma, accompanied by Sheriff Roy Johnson of Boone County, Deputy Haskell Sitton, and another officer. Gipson said that the mill was about a mile from the main highway and could not be seen from it; nor was there any sign calling attention to the intersection, or lateral. The saw was found in an old car, chained to another saw, and locked. This occurred on Saturday and Dillon was arrested the following Monday.

After being brought to Arkansas Dillon told Gipson that he bought the saw from a stranger and had a receipt for it. At one time Dillon said that a man known as John Kennedy was present when the saw was purchased, but later this contention was abandoned. According to Gipson's testimony Dillon stated that he could get up $15,000 personally, and in addition would execute a deed to some property "to help settle the deal". Finally, Dillon proposed taking Gipson "to those other boys". In this connection Gipson testified: "He said he could tell

who they were; that they wouldn't talk to the officers, but that they would talk to him. He said, 'I can take you to them [and] they will do what I am telling you. My wife can go with you' ". Dillon is also quoted as having said that two cars had been bought—worth $5,000—but "they" would have to sell them and it would take some time to get "this stuff" together.

Over defendant's objections Gipson was permitted to testify that one of the items stolen from his garage was a Clinton three-horse power gasoline motor. In Dillon's possession certain keys were found. These were taken by the officers who returned to Oklahoma and ascertained that one fitted a cabin at Langley, Okla., owned by the defendant, who on cross-examination admitted that the serial number was not on the motor. He explained that in transporting it by automobile the "deck lid" got hung and tore the plate partly off. The detached part was kept for future use if it became necessary to order parts. Dillon insisted that the motor was detached from his lawn mower and that he sometimes used it to drive a cement mixer.

There was testimony that the motor taken from Gipson's garage had been stuffed with paper where the dip-stick was ordinarily inserted. The motor found in defendant's cabin did not have a dip-stick, and the point of entry was stuffed with paper identified by Gipson as being similar to the paper he had put in the stolen motor.

Dillon's principal defense was an alibi. He was supported by Mrs. Dillon and by a friend who was positive that the defendant was at home the entire night of June 18th. Against these statements and Dillon's assertion that he had been in Harrison but once—two or three years ago while on his way to Norfork—was testimony that he was in Harrison June 16th.

First.—It is urged that a mistrial should have been declared (a) because of inflammatory remarks by a state representative in his opening statement, and (b) when special counsel referred to an "Oklahoma Gang," to

thieves and thugs. We fully agree with counsel for appellant that a courtroom should not be used as a forum where a lawyer engaged in a criminal prosecution may with impunity assail a defendant or his witnesses, and no doubt the border line of impropriety was almost reached. But the trial court commented that if testimony upon which the opening statements were made should be held inadmissible the jury would be properly admonished. We find nothing in the opening statement to which specific objections were made that would have warranted the court in acting upon the defendant's suggestions.

Testimony introduced by the state showed that Dillon was allowed to telephone from Harrison to a friend in Tulsa. Dillon said that he kept a pack of hounds for use in hunting wolves; that these dogs were in a pen and he feared they would go hungry, so he asked this friend to see that his "shotgun dogs" were fed. It is claimed by the state that the request was repeated, the inference being that "shotgun" was emphasized. The guns stolen from Gipson's garage were not found. Mr. Henley, in referring to the defendant's allegation that he was threatened by one of the officers, said: "At the very time when these threats were supposed to have been made, what was he doing? Sitting in the sheriff's office calling one of his brother thugs in Tulsa. . . ."

The record does not disclose an objection at the time the statement was made, but at the close of Henley's address one of the defendant's attorneys asked for a mistrial "by reason of the prejudicial statements in the argument—and we particularly want to object to the prejudicial and inflammatory reference to this defendant and his associates as thugs."[1] From a strictly technical standpoint the protesting attorney's request for a mistrial was predicated upon what he termed "prejudicial statements in the arguments of the attorneys for the state." This was followed by an "objection" to use of the

[1] One of Webster's definitions of thug is: A member of a former confederacy or fraternity of northern India, worshipers of Kali, in whose honor murder, usually by strangling, was made a profession, the members of the fraternity deriving their main support from plunder thus secured. They were suppressed by the British, 1830-40.

word thug. But assuming that the entire range of argument by the state was intended in the motion for a mistrial, we must reject the assignment because if the state's testimony were true (and certainly it was substantial) the expression was nothing more than a vigorous method of denominating the defendant and those presumptively associated with him.

Mr. Holt in his argument urged that the defendant be convicted. When objection was made the Court's admonition was: "The jury's attention is called to two statements made by counsel for the state. Mr. Henley referred to the defendant as a thug. The other statement [made by Mr. Holt] was that you ought to send the defendant to the penitentiary where he belongs. You are admonished that these are only statements of opinion of the attorneys, and they are not to be considered by you as evidence."

Second.—Frances Dillon, the defendant's wife, was called by him as a witness. She was not asked regarding the gasoline motor and certain other matters. However, the cross-examination had proceeded to a point covering five typewritten pages before an objection was interposed. This objection was that "there have not been more than one or two questions within the scope of the direct examination, [hence] the balance would be outside the scope of cross-examination." The objection was overruled. After further testimony had been given the following appeal to the court was made by one of the defendant's attorneys:

"At the conclusion of the cross-examination of this witness the defendant objects to the question and testimony adduced thereby with reference to all those questions outside the examination in chief, including the last series of questions, which are obviously intended solely to discredit the witness, and having no connection with the case, and no connection with the examination of this witness in chief." The motion was overruled and exceptions saved.

We agree that where, as here, the witness was the defendant's wife and therefore could not be called to testify against him, the state could not do by indirection what it could not do directly. We have also held that where the relationship does not exist the right of cross-examination should be confined to those facts and circumstances connected with the matters stated in the direct examination of such witness. The rule is different where the cross-examiner makes the witness his own. *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398, 119 S. W. 665. A later case is *Cook* v. *State,* 162 Ark. 205, 258 S. W. 136.

This rule, however, does not help appellant. His objections were not specific, and were not made when the testimony was given. It is not enough to say that "I object to all of the questions asked this witness except one or two." The trial court has a right to have attention specifically directed to the vice at the time it occurs in order to more correctly direct the trend of an examination.

Third—Prior Convictions.—Appellant admitted that he had been convicted of stealing an automobile in 1934. The present trial occurred in March, 1953, and appellant was then 36 years of age. He was therefore 19 in 1934. It is objected that counsel for the state, while interrogating the witness regarding other crimes or convictions, held a sheet of paper to which the attorney ostensibly referred while repeating the inquiries. Appellant thinks the effect of this procedure was to leave with the jury the impression that records of other convictions were at hand and that when negative replies were given they were untrue. Following preliminary legal skirmishes and the court's action in sustaining the defendant's objection to the form in which questions were being asked, there was this colloquy:

Question: "Since November 1, 1934, until the present time, how many times have you been convicted of grand larceny or a felony?" Answer: "One time, when I was a juvenile—in 1934". Comment by counsel for the state: "Your honor, in fairness to this witness I think

somebody ought to take him out behind the barn and tell him what a felony is. We think he has been convicted three times, and if he stands here and testifies he has been convicted one time, I want to seek an information for perjury". Immediately following this declaration there appears in parenthesis the following: "After private conferences between court and attorneys". It is not clear, therefore, whether the comment it is now claimed was prejudicial was made in the jury's hearing. The next question to which exception was taken was answered before an objection was interposed. A little later the paper from which counsel for the state was assumed to be reading was explained by one of appellant's attorneys in this way:

"We object to counsel continuing this. [Mr. Holt] has a sheet there and it has on its face the conviction of Dillon when he was a boy, when he was admitted; and the second entry is when he was committed to the reformatory for the first offense; the third entry is an entry [showing] his arrest. This question about Hutchinson (Kansas) on the sheet—it says 'S. I. P.,' which is an abbreviation meaning where he was committed to the reformatory".

The court directed the jury to consider the felony convictions "and other acts" only for the purpose of testing credibility of the witness.

It was said in *McCoy* v. *State,* 46 Ark. 141, and cited with approval in *Fielder* v. *State,* 206 Ark. 511, 176 S. W. 2d 233, that when an appellant voluntarily takes the stand as a witness in his own behalf he is subject to the same cross-examination to which any other witness might be subjected, and it is not improper to ask him if he has served a term in the penitentiary, and if so, upon what charge. The testimony, of course, has nothing to do with the guilt or innocence of the defendant respecting the crime with which he is presently accused; but where, as here, the defense is an alibi, coupled with long explanations of transactions in respect of which his testimony and that of others sharply conflict, any reasonable test

directed to the defendant's willingness to swear falsely may be applied, and we have consistently held that inquiries regarding former crimes or convictions are in that category.

Fourth—Hearsay Evidence.—We do not find in the record anything of a substantial nature based entirely upon hearsay to which objection was made in a timely manner that could have prejudiced the defendant's cause.

Fifth—Appellant's Admissions.—The state contended that Dillon had recently acquired certain valuable property, including an airplane, a motor boat, automobiles, and that he had spent money improving his home. Contra, it was asserted that the boat and airplane were bought before June 18th. Sheriff Johnson was asked if he knew the condition of appellant's cabin when a search was made on Tuesday. The officer described the extreme disorder of the interior and the objection was made that the question was prejudicial "unless the witness states that he personally saw the breaking and entering". The sheriff had said that when he reached the premises he learned that the ransacking had occurred "on Monday about midnight". When it is considered that reasonable inferences were deducible from admissions or declarations made by the defendant, we do not think the officer's testimony and Dillon's statements were erroneously introduced. Counsel takes the position that appellant's proposals, if actually made, were in the nature of a compromise, and these attorneys contend that evidence of compromise proposals is inadmissible. *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198. The rule ordinarily applies to civil litigation, as the cases in this state relied upon for support will disclose. Where reasonable minds would agree from statements voluntarily made by the accused that his references to the stolen property tended to tie him to the felony, such evidence is not open to the objection that a compromise is involved.

Sixth—Sufficiency of the Evidence.—Credibility of witnesses was a matter for the jury. On appeal we determine only whether the testimony on the whole case

was substantial. The jury was instructed not to convict the accused unless his guilt had been established beyond a reasonable doubt. It was the trial court's duty to set the verdict aside unless convinced that the jury had not erred in weighing the evidence. Here the test is substantiality, and we cannot say that this essential is lacking.

Affirmed.

Mr. Justice HOLT not participating. Mr. Justice ROBINSON dissents.

WATKINS, BROOMFIELD AND MATLOCK *v.* STATE.

4737 261 S. W. 2d 274

Opinion delivered October 12, 1953.

Cole & Epperson and *W. H. McClellan,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On an indictment charging the crime of assault with intent to kill, appellants were convicted and the jury fixed Watkins' punishment at 2 years in the State Penitentiary, Matlock's at 1½ years, and Broomfield's at 1 year. This appeal followed.

At about 3 P. M., October 18, 1952, appellants, in Watkins' car, after first procuring, and drinking some whiskey, from Lee Hawkins, nephew of Oscar Hawkins, the prosecuting witness, drove to Oscar Hawkins' place and engaged in a dice game, which resulted in an argument and a quarrel between Watkins and Oscar Hawkins over the ownership of a quarter. The testimony as to what happened thereafter is somewhat conflicting, but, according to Oscar Hawkins, Watkins went to his car and got a knife, and to frighten him, Hawkins fired a pistol and struck the rear glass of Watkins' car. Watkins, in company with Broomfield and Matlock, decided to kill Hawkins and made admissions to the sheriff to that effect. After each of the appellants had procured a gun and ammunition, they drove toward a cafe owned by Anna Gregory and while en route, Oscar Hawkins passed in his car going in the opposite direction. He stopped his car and another argument arose. After this argument ended, Hawkins proceeded to Princeton where he picked up his brother and two girls. They then drove to Anna Gregory's cafe and just as they drove up (about 7 P. M.), defendants opened fire on Hawkins, Watkins using a shotgun and the other two defendants .22 rifles. Hawkins suffered several gunshot wounds in the encounter. It appears that he fired only one shot. Watkins admitted to the sheriff "I shot the windshield the first shot and then I got behind a tree and reloaded and shot again." Six empty shells were found where he was standing. Matlock admitted to the sheriff that he used a .22 automatic rifle during the affray and got behind a fence and fired toward Hawkins' car, which was about 25 yards

away. Broomfield told the sheriff that they planned to kill Hawkins and that while running away from the scene, shot one time. On the whole, the evidence was ample to support the jury's verdict as to all appellants.

The instructions appear to have covered the case, correctly, fully and fairly.

It appears from the record that each of the appellants was represented by a different attorney at the trial, and that two separate motions for new trial were filed, one on behalf of Broomfield and Matlock, containing seven assignments of alleged errors, and the other for Watkins containing twenty-one.

All of the appellants question the sufficiency of the evidence. As indicated, we hold that it was sufficient. They also challenge the action of the Court in consolidating the cases for trial. This contention is without merit.

"When two or more defendants are jointly indicted . . . for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court." (Ark. Stats. 1947, § 43-1802.) No abuse of discretion is shown here. *Nolen* v. *State,* 205 Ark. 103, 167 S. W. 2d 503.

Other alleged errors common to all of the appellants have been carefully noted and found to be without merit.

We would affirm the judgment as to all of the appellants but for the error presently considered, which relates to Watkins only, since this assignment of error was properly preserved in his separate motion for a new trial, but was not preserved in the motion of Broomfield and Matlock.

Under our long established rule, an error not preserved in the motion for a new trial cannot be considered by us on appeal, (*United Order of Good Samaritans* v. *Anderson,* 171 Ark. 1033, 287 S. W. 194; *State* v. *Neil,* 189 Ark. 324, 71 S. W. 2d 700; *Suit* v. *State,* 212 Ark. 584, 207 S. W. 2d 315).

The record reflects that while the attorney for the State was examining two Negro witnesses on behalf of

the State, Anna Gregory,—in the jury's presence,—and Shirley Mae Lambert,—in chambers,—the following occurred during the questioning of Anna Gregory: "Q. Do you remember talking with Sheriff Parham about this case? A. Yes, sir. Q. Do you remember telling the sheriff and do you remember saying in the Grand Jury room that you heard J. L. Watkins say he was going to kill a damned Hawkins? A. No, he didn't say 'a damn Hawkins.' I didn't say 'a damn Hawkins.' By the Court: Let me warn you whatever you said then they have it down word for word and you were under oath then and are under oath now, but if you tell the same things two different ways you are going to be guilty of perjury. You get yourself straight. By Witness: That is what I told first. He said the Hawkins had been bothering him. I said, 'Go out of here with that gun.' He said, 'They have been bothering me and if they bother me any more that night he was going to get one of them.' Q. You are sure about that? A. That's right. Q. Is that the same thing you said in your testimony before? By Mr. Epperson: We object to him impeaching his own witness. By the Court: If a hostile witness, I am going to let him."

Immediately following the above testimony, Shirley Mae Lambert was being questioned by the Prosecuting Attorney also as to her previous testimony before the Grand Jury. "Q. Do you remember testifying in there that you saw those three and all of them had guns? A. Yes, sir. By Mr. Epperson: We object to him impeaching his own witness. The objections being overruled, the defendants save exceptions."

At this point, the Court retired to chambers where the following proceedings occurred: "By the Court: Girl, you are indicating or hinting at perjury here. If there is any perjury I am going to instruct the Prosecuting Attorney to file an information against the one that swears a lie. Girl, all the Court wants is the truth. If you told one story in that Grand Jury room and you are telling another one here you are under oath both times and you are going to be prosecuted and if guilty you are going to be sent to the penitentiary. I am not asking you

to tell me anything here. I am just warning you, in the presence of the Prosecuting Attorney and the lawyers for the defense and the Court Reporter. If you told one story in that Grand Jury room under one state of facts and tell another one here I am going to tell the Prosecuting Attorney to file information.

"By Mr. Epperson: We object to the admonition of the Court and further ask the Court to also further advise the witness that she should tell the truth at the present time during the trial of this case regardless of any prior statement she has made, regardless of whether it would be contradictory. (Defendants save exceptions.)

"By the Court: I will tell her that but she will still be accountable for her testimony before the Grand Jury. They have got it written down, this same man took down everything you said in that Grand Jury room, every word of it, and is taking down what you are saying here. Has anyone talked to you about this case? By Witness: No, sir. By the Court: No lawyers have talked to you? By Witness: No, sir. By the Court: No defendants have talked to you? A. No, sir. By the Court: You tell the truth, regardless of what happened, but I am telling him to file an information if you don't, and don't hesitate about it."

The comments and admonition of the trial judge to Anna Gregory, in the jury's presence, when she was asked by State's counsel: "Q. Do you remember telling the Sheriff and do you remember saying in the Grand Jury room that you heard J. L. Watkins say he was going to kill a damned Hawkins? A. No, he didn't say 'a damn Hawkins.' I didn't say 'a damn Hawkins,'" and the Court's immediate admonition: "Let me warn you whatever you said then they have it down word for word and you were under oath then and you are under oath now, but if you tell the same things two different ways you are going to be guilty of perjury. You get yourself straight," indicating that he thought she was not telling the truth when coupled with the fact that immediately following Anna Gregory's testimony, Shirley Lambert was intro-

duced by the State and when she was also asked by the Prosecuting Attorney in the jury's presence as to her previous testimony before the Grand Jury, the Court suspended further questioning and Shirley was immediately taken into the Judge's chambers and in effect was told that she was also about to commit perjury and would commit perjury if she did not tell the same story before the Trial Jury as she had told before the Grand Jury, were prejudicial to the rights of appellants had proper objections been made and preserved in the motions for new trial.

We hold that the Trial Court went too far with this witness and that his admonition, threats of prosecution for perjury, and instructions to her in chambers, immediately following similar remarks (as indicated) to Anna Gregory before the jury, tended to intimidate her in testifying even though not said to her in the presence of the jury. She was not bound to testify exactly as she did before the Grand Jury. She had the right to change that testimony if it were not true and to testify as to the truth before the Trial Jury. The jury was entitled to the benefit of this witness' testimony given freely by her and without any intimidation by the trial judge and in an atmosphere free of threats or coercion. It was the jury's province to be the sole judge of whether such testimony was true or false.

"In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate any opinion as to the credibility of a witness or as to controverted facts. For the jury are the sole judges of fact and the credibility of witnesses; and the constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them

to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the constitution, and would be a palpable violation of the organic law of the State." *Sharp* v. *State,* 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27.

"It was wholly within the province of the jury to say whether the testimony of the witness as disclosed by his examination at the trial was true or false." *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380.

"The remarks or conduct of the judge during the trial indicating his opinion as to the credibility or lack of credibility of a witness or of the weight of any evidence he may give, constitutes error." *Williams* v. *State,* 175 Ark. 752, 2 S. W. 2d 36.

For the error indicated, the judgment is reversed and the cause remanded for a new trial as to appellant, J. L. Watkins. The judgment is affirmed as to Hayward Broomfield and Richard Matlock.

ED. F. MCFADDIN, Justice (dissenting). The majority is correct in affirming as to the appellants, Broomfield and Matlock, since they failed to have any meritorious assignment in their motion for new trial; and an appellant can urge as alleged errors in the trial only the assignments contained in the motion for new trial. *State* v. *Neil,* 189 Ark. 324, 71 S. W. 2d 700; *Suit* v. *State,* 212 Ark. 584, 207 S. W. 2d 315.

And by the same token, I submit that the majority should also affirm as to the appellant, Watkins, since his motion for new trial failed to assign the point that the majority is seizing upon and claiming to have been error. To elucidate:

(1) *As Regards Anna Gregory.* Watkins' only assignment of error as to anything that occurred during the testimony of Anna Gregory is contained in Assignment No. 8 in Watkins' motion for new trial, and is in this language:

"The Court erred in permitting the Prosecuting Attorney to impeach Anna Gregory, his own witness, over the objections and exceptions of the defendant."

The majority opinion copies what occurred during the testimony of Anna Gregory, which concludes with the Court's remarks: "If a hostile witness, I am going to let him." Now the law is well established that a hostile witness can be impeached. *Shands* v. *State,* 118 Ark. 460, 177 S. W. 18; *Derrick* v. *State,* 92 Ark. 237, 122 S. W. 506; and other cases collected in West's Ark. Digest, "Witnesses", § 380 (5). So the Court was correct in such statement, and Watkins' assignment No. 8 in his motion for new trial was and is without merit.

The point I emphasize is, that Watkins made no *objection,* or *exception,* or *assignment in the motion for new trial,* concerning anything the Court said or did in the course of Anna Gregory's testimony, except the Assignment No. 8 in the motion for new trial, as previously copied; and that assignment did not relate to any "comment or admonition to Anna Gregory in the Jury's presence." So the majority has no right to leave the inference that Watkins objected to any admonition the Court might have given to Anna Gregory.

(2) *As Regards Shirley Mae Lambert.* Watkins only assignment in his motion for new trial relates to what the Court said to her *in chambers and outside the presence of the Jury.* I cannot see how, under such circumstances, any statements made by the Court to this witness, Shirley Mae Lambert, could have influenced the Jury, because the Jury did not hear any of the statements. In each of the cases cited by the majority, the remarks of the Trial Court were made *in the presence of the Jury.* The cases are: *Sharp* v. *State,* 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27; *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380; *Williams* v. *State,* 175 Ark. 752, 2 S. W. 2d 36. These cases have no application to the situation in the case at bar, and the majority has cited these cases (on remarks made by the Judge in the presence of the Jury) as applicable to the remarks here involved, *which were made outside the presence of the Jury.*

When he took Shirley Mae Lambert and her attorneys away from the Jury and talked to the witness as he did, the Trial Judge was only trying to keep the Negro girl from committing perjury; and the conduct of the Trial Judge should be commended by this Court, rather than seized upon as a ground for reversal.

For the reasons stated, I respectfully dissent as to the reversal of the judgment against Watkins. The Chief Justice and Mr. Justice MILLWEE join in this dissent.

WILSON *v.* STATE.

4748 261 S. W. 2d 257

Opinion delivered October 12, 1953.

Ernie E. Wright, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether Act 65, approved February 9, 1951, contravenes Amendment No. 14 to our constitution. The Amendment is an interdiction against local or special Acts by the general assembly. Act 65 provides a schedule of fees for justices of the peace "in counties having a population of between 10,275 and 10,290, according to the 1940 United States census report."

Ralph Howard is a justice of the peace for Mountain Home Township, in Baxter county. Carmack Sullivan, prosecuting attorney, filed information in Howard's court charging Roy Wilson with public drunkenness. The J. P. transcript shows a fine of $5 "and cost of the court, $22.50." Whether the fine was a part of the larger item is not made clear, but presumptively it was not. Wilson had entered a plea of guilty, but appealed because of the cost. The circuit clerk's certificate contains the following itemization "after taking appeal" Dec. 24, 1952: Fine, $5; [prosecuting] attorney, $10; sheriff, $7; court, $9.50; J. P., $1; total, $32.50. In a motion filed in circuit court April 13, 1953, the $5 fine is mentioned, and the cost is referred to (and itemized) as $24.75. The justice of the peace added a further charge of $2.75 as cost for certifying the appeal. It was the appellant's contention that with avoidance of Act 65 cost allowable would be $3.30, and there is a stipulation to this effect. It was also stipulated that Baxter is the only county falling within the population classification.

Special and local Acts were discussed by Robert M. Anderson, professor of law, in Vol. 3, No. 2, of the Arkansas Law Review. Many applicable Arkansas cases are cited and there are references to decisions from other courts and comments by lawbook writers.

The classification phase here presented was the issue in *State ex rel. Burrow* v. *Jolly, County Judge,* 207 Ark. 515, 181 S. W. 2d 479. By Act 73 of 1943 appointment, and then election, of road overseers in counties having a population of not less than 18,300 nor more than 18,350 were authorized. In the opinion notice was taken that accord-

ing to the 1940 census Randolph County, with a population of 18,319, was the only unit in the state to which the Act would apply. The trial court had found the legislation violative of the fundamental law, and in affirming the judgment it was said: "If we should reverse [the circuit court] in this case, effect would be to say that the general assembly, in adopting Act 73 and similar measures, has found a permissible point of penetration into Amendment No. Fourteen."

It is insisted, however, that our decisions upholding Acts affecting the administration of justice are applicable, since a justice of the peace is a constitutional officer in our judicial system.

In *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, Judge McCulloch spoke for the court in a mandamus proceeding involving § 26 of Art. 5 of the constitution—the requirement that there be publication of an intention to apply to the general assembly for enactment of a special law. By Act of Feb. 25, 1905, the Watson district of Desha county was abolished. Regular terms of the circuit and probate courts were affected. When the Second chancery district was established its terms were referable to the same restrictions. This statement is a part of the opinion: "Statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in their operation. Though such an Act relates to a court exercising jurisdiction over limited territory, it is general in its operation, and affects all citizens coming within the jurisdiction of the court." But the point decided in the Waterman case was that the notice required by the constitution would be presumed to have been given if the general assembly had acted.

We have held that a chancery clerk is a vital part of the court organization because he is required to perform numerous duties pertaining to judicial functions. *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S. W. 2d 647. The decision, however, was buttressed by § 15, Art. 7, of the constitution. An Act of the 54th general assembly increasing the salary of the court reporter for a chancery district was

upheld, while at the same time a measure increasing the salary of treasurers in counties having a population of not less than 65,000 nor more than 65,250 and designated property assessments was invalidated. *McLellan* v. *Pledger, County Treasurer,* 209 Ark. 159, 189 S. W. 2d 789. Acts relating to the payment of jurors, the salary of a circuit clerk and his deputies, fees allowable to a sheriff, and the salary to be paid a county judge have been adjudged special or local. *Norsworthy* v. *Searan,* 185 Ark. 98, 46 S. W. 2d 6; *State, to use and benefit of Garland County* v. *Jones,* 193 Ark. 391, 100 S. W. 2d 249; *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. 2d 55.

In upholding a legislative Act of 1915 creating municipal courts in certain cities and taking from justices of the peace all jurisdiction in misdemeanor cases, we said that justices of the peace have no vested rights in the fees and emoluments of the office. *State ex rel. Wm. L. Moose, Attorney General,* v. *Woodruff,* 120 Ark. 406, 179 S. W. 813.

The precise question here presented has not been before the court, and we—like the trial judge—must deal with it on first impression.

The phrasing of our decisions where the words "county officials" appear includes county judges, and some of these opinions were delivered before probate jurisdiction was transferred to chancery judges by Amendment No. 24, adopted Nov. 8, 1938. When it is remembered that the constitution vested certain judicial authority in county judges and that our holdings then were that the interdiction against local or special legislation included such officers, it is difficult to reason that a justice of the peace, who is a township officer, may benefit by local legislation under protection of a judicial status while county judges when having probate jurisdiction may not. Under existing laws a county judge presides over courts of common pleas, where created, and he may, in certain circumstances, issue orders for injunctions and other provisional writs. Art. 7, § 37, of the con-

stitution. We have also held that a county court order allowing or disallowing a claim is a judgment.

To be consistent and to place a reasonable construction upon the judicial status here contended for, we must either say that our former opinions dealing with county judges were erroneous, or we must apply the same rule to justices of the peace by saying that county and township officers, although invested with some judicial authority, do not fall within the class to which the exclusion applies. More logical is the suggestion that our former holdings have not gone to the extent of saying that the administration of justice is dependent upon the fees allowable to justices of the peace to an extent bringing them within the scope of exemptions now recognized as being indispensable to the administration of justice.

It follows that the Act was an infringement upon Amendment No. 14. This necessitates a reversal of the judgment.

WARD, J., dissents.

EPPERSON *v.* SHARP.

5-156 261 S. W. 2d 267

Opinion delivered October 12, 1953.

Charles L. Farish and *John G. Moore,* for appellant.

Johnston & Rowell, for appellee.

ROBINSON, J. This is a bastardy proceeding. On the 14th day of February, 1952, appellee Jewell Dean Sharp filed in the Conway County Court a verified complaint alleging that she was pregnant and that Olen Epperson was the father of her unborn child, and prayed that a warrant be issued for him and that upon a hearing he be declared the father of the child. The cause was styled "Jewell Dean Smith v. Olen Epperson." A warrant was issued on the complaint and affidavit, and on September 19, 1952, Epperson was formally notified that Jewell Dean Sharp had been delivered of the child. On the 6th of November a trial was held by the county court; the judgment recites that the defendant appeared in person and by his attorney and both sides announced ready for trial. A jury was impanelled upon the request of the defendant, and after hearing the testimony of the witnesses and instructions of the court the jury returned a verdict the effect of which was to find that Epperson was the father of the child; and the court rendered judgment against him for $134.35 for lying-in expenses and the sum of $20 per month to be paid to Jewell Dean Sharp until the child attained the age of 14 years.

On the same day Epperson filed an affidavit for appeal to the Circuit Court, and the appeal was allowed by the county court the next day, November 7. The appeal was lodged in the circuit court on the 21st day of November. On January 28, 1953, Jewell Dean Sharp by her attorneys filed a motion to dismiss the appeal for the reason that no appeal bond had been filed. The motion was granted; and Epperson has appealed.

First, appellant contends that Jewell Dean Sharp is not a proper party to the litigation and cannot maintain the suit. It is true that the statutes provide that the prosecuting attorney shall conduct the suit on behalf of the State on all appeals to circuit court in cases of bastardy. Ark. Stats., § 34-710. However, this does not mean that the mother of the child cannot have an attorney to represent her nor does it mean that the suit must be dismissed if the prosecuting attorney does not appear in the case. Ark. Stats., § 34-706, provides for a judgment

for the mother; it could hardly be said that a person who is entitled to a judgment is not a proper party to the suit to obtain the judgment. Moreover the question of proper parties was not raised by the appellant in either the county court or the circuit court. Appellant appeared in the county court with his lawyer and went to trial on the issue of whether he was the father of the child, and did not raise the question as to proper parties; and it does not appear that the question was raised in the circuit court. The issue of defective parties must be raised by demurrer or by the answer; otherwise it is waived. *Morris* v. *Varnell,* 222 Ark. 294, 258 S. W. 2d 889; *Less* v. *English,* 75 Ark. 288, 87 S. W. 447; *Tomlinson Chair Mfg. Co.* v. *Jop-Pa Mattress Co.,* 122 Ark. 566, 187 S. W. 32; *Flanagan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. 2d 70; *Teasley* v. *Thompson,* 204 Ark. 959, 165 S. W. 2d 940.

The appeal must be taken within 30 days from the rendition of the judgment; *Carr* v. *State for Use of Smith,* 164 Ark. 503, 262 S. W. 337. In effect we are urged to overrule the *Carr* case, but we think that case is sound and adhere to the rule therein announced.

The statute specifically provides: "No appeal shall be granted until affidavit and appeal bond is filed." Ark. Stats., § 34-709. There could be no valid appeal without filing the bond as the statute provides, and since this was not done, the trial court was correct in granting the motion to dismiss.

Affirmed.

WILLIAMS *v.* STATE.

4746 261 S. W. 2d 263

Opinion delivered October 12, 1953.

W. E. Billingsley and *S. M. Bone,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

PAUL WARD, Justice. Appellant, John Williams, was indicted, tried, and convicted for introducing fraudulent ballots in the ballot box of Baker Township in the Democratic Primary Election held on August 12, 1952. He has appealed on the general ground, among other grounds, that there is no evidence to sustain the conviction.

The statute under which appellant was indicted and convicted is Ark. Stats. Supp., § 3-1525 which is the same as § 8 of Act 482 of 1949. The applicable portion of the statute, as set out by the trial court in the instructions, reads as follows:

"Any person who adds or attempts to add any ballot to those legally polled at any election either by fraudulently introducing it into the ballot box before or after the ballots have been counted, or at any other time, or in any other manner, with the intent or effect of affecting the count or recount of the ballots, . . . shall be guilty of a misdemeanor."

FACTS. There is no dispute about the material facts presented by the evidence, and they are substantially as presently set forth.

One Jesse Burns and his wife drove up to the Baker box late in the afternoon and Jesse went in to vote just as the officials were preparing to count the ballots. He was told by the officials that they had no blank ballots left but that if he could find a piece of paper they would

allow him or help him to make up a ballot and vote. As Jesse left the building to look for such a paper he met appellant and told him what he wanted. Appellant then informed Jesse that he had some blank ballots in his car and offered them to him, and also asked Jesse if he wanted his wife to vote. Jesse replied that his wife was present but was not going to vote. Nothing else was said in this connection [as far as the record reflects] but Jesse testified that he got two blank ballots from appellant. Jesse then went back to the voting booth, and with the knowledge and consent of the election officials, voted one ballot for himself and one for his wife who, he says, had told him how she wanted to vote. The blank ballots which appellant gave Jesse were regular printed official ballots, but in some way and for some reason unexplained by the evidence the lower right hand corner of each ballot, where the unopposed candidate for Township Committeeman appeared, had been cut out.

Appellant in no way, or at least in no other way, encouraged Jesse to vote either for himself or his wife and he in no way indicated to them or either of them how or for whom they should vote. There is no evidence that appellant or anyone else was interested in who was elected Township Committeeman. Appellant was approximately 30 feet from the voting booth when the conversation and transaction mentioned above took place, and he had not been seen around the Baker box previously on this day except that he was seen by one of the election officials in the street around noon. The uncontradicted, but corroborated, testimony of appellant was that he obtained the blank ballots from the officials of the Day box [with their consent] after they had closed the polls, and his explanation was that he wanted them to use in tabulating the votes.

No other facts or circumstances were shown by the State's testimony to indicate that appellant had any fraudulent intent or ulterior motive in doing what he did.

Appellant made a motion for an instructed verdict of not guilty at the close of the State's testimony and

again at the close of all the testimony, but each time the motion was overruled. We think appellant was entitled to such an instruction.

The lower court properly viewed and defined the issues. It recognized that the distinction between accessories and principals had been abolished, and correctly defined an accessory [Ark. Stats., §§ 41-118 and 41-119]. It also properly limited the issues involving appellant's guilt to two: (a) The "clipped" ballots, and (b) The wife's vote. In our opinion the evidence was not sufficient to make a jury question on either issue. Hereafter in discussing these issues as defined above it must be remembered that the statute under which appellant was indicted contains the significant words "fraudulently" and "intent," and that therefore the evidence must show some animus or fraudulent intent on the part of appellant before he can be adjudged guilty.

(a) The "clipped" ballots. Under the facts above stated it would require imagination and conjecture to attribute any fraudulent intent on the part of appellant from the mere fact that he gave Jesse Burns the ballots which had been "clipped." The facts would indicate otherwise, because the initiative came from Jesse Burns and not from appellant and the State's testimony shows positively that appellant indicated no desire on his part as to how the ballots should be cast. There is not the slightest intimation that there was any contest over or interest in who should be elected committeeman in Baker Township.

(b) The wife's vote. After Jesse Burns received the blank ballots from appellant he entered the voting booth and, with the consent of the election officials, cast one ballot for himself and one for his wife in her absence. It appears to us that before the jury could attribute to appellant any fraudulent or ulterior motive it would have to assume, in the absence of proof, first, that appellant knew Burns was going to use one of the ballots for his wife's vote, and second, that appellant knew that Burns was going to vote his wife in her absence, and further

that appellant in some way gave encouragement and direction to Burns.

While the jury might possibly have been in possession of certain knowledge which strongly induced it to believe that all of appellant's actions were a part of a fraudulent scheme to produce votes favorable to some candidate of his choice, yet it is also true that under the evidence appellant's actions might have been prompted only by a desire to accommodate a friend who wanted to exercise his right to vote. The mere fact that appellant asked Burns if his wife wanted to vote is no evidence of fraud or fraudulent intent. Even if he had encouraged her to vote he would have done no more than is frequently done, with public approval, by many civic organizations and newspapers. It is common knowledge that they put on intensive drives to encourage people to vote.

It is a wise rule, developed through the years by judicial and legislative processes, that no one shall be deprived of his liberty or property on mere suspicion or conjecture. This and other courts have many times reaffirmed this vital safeguard against the miscarriage of justice.

In the case of *Jones* v. *State,* 85 Ark. 360, at page 362, 108 S. W. 223, we find this language: "There is just enough in the evidence to warrant a suspicion that appellant, when he traded with Ellison, might have known that the latter was assuming more authority over Dr. Neice's cattle than he really had. But mere grounds for suspicion do not justify conviction of crime. There must be substantial proof." In *Hogan* v. *State,* 170 Ark. 1143, 282 S. W. 984, the court reaffirmed that "guilt cannot be established by conjecture." In *Moran* v. *State,* 179 Ark. 3, at page 7, 13 S. W. 2d 828, the rule is stated in this language: "It is not allowable, under the rules of evidence, to draw one inference from another, or to indulge presumption upon presumption to establish a fact. Reasonable inferences may be drawn from positive or circumstantial evidence, but to allow inferences to be drawn from other inferences, or pre-

sumptions to be indulged from other presumptions, would carry the deduction into the realm of speculation and conjecture."

The rule is forcibly stated by the Supreme Court of Virginia in the case of *Dotson* v. *Commonwealth,* 171 Va. 514, 199 S. E. 471, at page 473, in this language: "From the facts shown, no reasonable inference of guilt can be deduced which will be equivalent to proof of guilt beyond a reasonable doubt which is always necessary. Where inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith. This is true no matter how suspicious circumstances may be."

For the reasons above stated the judgment of the trial court is reversed.

The Chief Justice and Justices MILLWEE and GEORGE ROSE SMITH dissent.

BERGER *v.* BERGER.

5-88, 5-131 261 S. W. 2d 259

Opinion delivered October 12, 1953.

Shackleford & Shackleford, for appellant in No. 88.

Harry C. Steinberg and *Claude E. Love,* for appellee in No. 88.

Harry C. Steinberg and *Claude E. Love,* for appellant in No. 131.

Shackleford & Shackleford, for appellee in No. 131.

ED. F. MCFADDIN, Justice. These two cases (Nos. 88 and 131) involve Mr. and Mrs. Berger, who were married in 1910, reared a family, and then separated in 1942, due to the fault of Mr. Berger. That the parties have lived separate and apart for three years without cohabitation was clearly established. Likewise, the *bona fide* residence of Mr. Berger in Arkansas was established. So the Trial Court was correct in granting the divorce to Mr. Berger under the seventh ground stated in § 34-1202, Ark. Stats. These cases relate to other questions.

Case No. 88

In this case, Mrs. Berger claims that she is entitled to judgment against Mr. Berger for an amount in excess of $6,600 because of a judgment rendered in the State of Connecticut. In 1943 the Town Court of West Hartford, Connecticut—on information filed by the Prosecuting Attorney—arrested and convicted Mr. Berger of the crime of non-support. The judgment in that case concludes:

"And it is thereupon considered and ordered by said Court that the said Berger pay costs of prosecution taxed at 6 dollars and 85 cents, and stand committed to the common Jail in Hartford, in said County, until this sentence be performed. And also that he, the said Berger, shall pay $15.00 per week towards the support of his wife and be bonded in the sum of $750.00."

Mr. Berger made four weekly payments on the aforesaid judgment and then left the State of Connecticut. There is nothing in the evidence in the present case to show that any action was ever taken to collect on the bond.

In this Case No. 88 Mrs. Berger claims that the unpaid weekly payments of $15 from 1943 to 1952 exceed $6,600, for which she seeks judgment. The Union Chancery Court denied her claim, and that is the issue on this appeal. We reach the conclusion that the Union Chancery Court was correct. In *Tolley* v. *Tolley,* 210 Ark. 144, 194 S. W. 2d 687, we held that the enforcibility in this State of a foreign judgment for support money depends on the effect the rendering State—in this instance, Connecticut—gives to such a judgment. An examination of the Connecticut Statutes and cases convinces us that the judgment of the Town Court of West Hartford, Connecticut, in the said criminal case against Mr. Berger, is not a judgment that Mrs. Berger could have enforced in Connecticut.

The non-support judgment in Connecticut was in a criminal action under § 6265 of the Connecticut Statutes of 1930[1]; and was not an alimony judgment under § 5182 of the Connecticut Statutes of 1930.[2] The Connecticut law provides that if the weekly payments should be defaulted in the criminal action, then the Town could take a forfeiture on the bond and the Court declaring the forfeiture could order the money paid either to the wife or to the Selectmen of the Town.[3] A Connecticut case bearing on this point is *State* v. *Newman,* 91 Conn. 60, 98 Atl. 346, 3 A. L. R. 103, in which the Supreme Court of Errors of Connecticut, in speaking of a proceeding under the Statute which, with amendments, is now § 8586 of the Connecticut Statutes of 1949, said:

"It is to be observed that this proceeding is not instituted in the name of the wife, but that it is a criminal prosecution in the name of the State."

See also *State* v. *Allderige,* 124 Conn. 377, 200 Atl. 341, and *State* v. *Pace,* 129 Conn. 570, 29 Atl. 2d 755.

Since the judgment in the non-support proceedings in Connecticut was not rendered in an *alimony action,*

[1] This is now § 8586 of the Conn. Statutes of 1949.

[2] This is now § 7335 of the Conn. Statutes of 1949.

[3] See § 6269 of the Conn. Statutes of 1930, which is now § 8590 of the Conn. Statutes of 1949.

but in a *criminal action,* and since the bond of $750 is for the benefit of the Town of West Hartford,[4] it necessarily follows that Mrs. Berger is not entitled to judgment here in her favor for any amount under the Connecticut non-support criminal proceeding. Therefore the decree in Case No. 88 is affirmed.

Case No. 131

After the Union Chancery Court refused Mrs. Berger a judgment for $6,600, as heretofore discussed, the hearing on her claim for alimony was continued; and at a subsequent date the Union Chancery Court awarded Mrs. Berger alimony of $150 per month. From that award Mr. Berger prosecutes the present appeal, claiming that he has no finances with which to pay such amount of alimony. It was shown that, due to her ill health, etc., Mrs. Berger's living expenses were $312 per month.

Our cases all recognize that in fixing the amount of alimony, the Court must take into account not only the wife's necesssity, but also the husband's ability to pay. *McCourtney* v. *McCourtney,* 205 Ark. 111, 168 S. W. 2d 200; *Tarr* v. *Tarr,* 207 Ark. 622, 182 S. W. 2d 348; *Coltharp* v. *Coltharp,* 218 Ark. 215, 235 S. W. 2d 884. The question here is Mr. Berger's ability to pay the alimony. He testified that he had only $2,500 when he moved to Arkansas from Florida in 1952; that it cost him $250 per month to live; that he was working on a plan to construct pre-fabricated houses and had not yet formed a company or gone into production. Thus he claimed a complete inability to pay any alimony.

But the Trial Court gave much weight to the testimony of Peter J. Berger, a mature businessman, living

[4] The Conn. statute provides a maximum penalty of one year, but § 8589 which controls in the present instance, since the judgment was by the *Town* Court of West Hartford, limits the possible maximum to six months. Since § 8586 provides for the suspension of sentence upon the accused's providing a bond to insure the payments ordered, it is evident that the bond in the instant case was to insure payment for six months only. To reduce it to actual dollars potentially due under the bond as ordered, therefore, the amount would be $390.00 for twenty-six weeks at $15 per week, plus $6.85 for costs; a total of $396.85. This would appear to be, with possible allowance for interest to be added, the total collectible by the obligee on the bond against the obligor.

in Michigan, and being the son of Mr. and Mrs. Berger. Mr. Peter J. Berger testified that in 1951, his father, Mr. Berger, had extensive real estate holdings in Florida. Here is a portion of his testimony:

"A. He owned a part of a building in North Miami. It was sold, the deed was conveyed as of January of this year. It was sold for $107,000, subject to a mortgage of slightly less than $70,000. Call it $70,000, for a round figure. It left him a net cash equity of approximately $37,000.

"Q. In January of this year?

"A. Yes, sir.

"Q. Do you know of any other transactions he made in Florida this year or prior to that?

"A. I certainly do. I have photostatic copies of deeds here which, by figuring everything up, amount to several thousand dollars.

. . . . .

"Q. Now, in addition to those you have just recited, there was a net gain of around $37,000 in January of this year from real estate transactions in Florida?

"A. That is right, in addition to other houses under construction. I am not exactly sure of the years but I think it was 1950 that he had built and subsequently sold, and I am a builder myself and I know that the profit on it must have been at least $3,000 per unit, a minimum profit of that."

From the foregoing testimony, which Mr. Berger did not subsequently take the stand to refute, the Trial Court concluded that Mr. Berger was concealing his assets, and therefore rendered the decree for alimony here attacked. We cannot say that the Trial Court was in error, so the decree for alimony is affirmed. All costs are taxed against Mr. Berger.

5-144 262 S. W. 2d 262

Opinion delivered October 12, 1953.

Rehearing denied November 2, 1953.

[redacted]

A. D. Chavis, for appellant.

Jay W. Dickey, for appellee.

MINOR W. MILLWEE, Justice. This is an action in ejectment by appellant, Emma Hudson, to oust appellee, Berkie Cannon, from a lot about 50 feet x 120 feet, in the City of Pine Bluff, upon which appellee has made her home for the past thirty years.

Appellant asserted title under a state tax deed dated May 10, 1944, which described a tract containing 4.10 acres. Appellant also alleged that her title had been quieted by a prior chancery decree in which she was plaintiff and Rufus May was a defendant. In an amendment to her complaint, she alleged that the final chancery decree excepted therefrom the land occupied by appellee, who was not made a party to the chancery suit. In her answer, appellee claimed title under certain deeds and by adverse possession for the statutory period. Trial before the circuit judge sitting as a jury resulted in a judgment sustaining appellee's claim of adverse possession and dismissing the complaint.

As we view the record, the only question for determination is whether the court's finding on the question

of adverse possession is supported by substantial evidence.

It is well settled that where a case is tried before the circuit judge sitting as a jury, his finding on a question of fact is as conclusive on appeal as a jury's verdict and will not be disturbed if there is any substantial evidence to support it. *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, 59 A. L. R. 899; *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322.

It is undisputed that appellee has resided upon the land claimed by her for the past thirty years. She testified that she moved on the property in 1923, as the tenant of Rufus May, from whom she later purchased the property. She received a deed from May to most of the land on November 17, 1933, and a second deed to the remainder of the property on March 23, 1944. These deeds recite a consideration of $765. She also testified that she had maintained the land under fence and paid taxes on it since 1933, under a claim of ownership. Although she first testified that she was only claiming the land described in her two deeds, she later stated that she claimed the property she had actually occupied under fence, regardless of the correctness of the descriptions in the deeds. Appellee's testimony as to her occupancy of the land was corroborated by several other witnesses.

While appellee admitted she was a witness for Rufus May in the prior chancery suit, she denied that she there testified that the property claimed by her and purchased from May in 1933 belonged to the latter. She also testified that, at that time, she understood that May was not claiming the property occupied by her, but was claiming adjacent property. While counsel for appellant is critical of this testimony, his own client admitted that she testified in the chancery case that she had no intention of claiming the property occupied by appellee but later changed her mind because appellee and others had talked about her.

Appellant argues that her title and right to possession were fully established by her deed from the State

and possession thereunder for more than two years. But it is undisputed that appellee has been in possession of the land claimed by her since 1923 and that appellant has never been in actual possession of the property.

After the appeal was lodged here, appellee filed a petition for certiorari to require the circuit clerk to complete the record by sending up the final chancery decree entered on August 8, 1952, which recites that the property occupied by appellee was excepted from its provisions. Appellant has filed a motion to quash the writ of certiorari on the ground that said decree was never introduced at the trial, while appellee contends that it was admissible under a stipulation that "all pleadings" in the chancery case might be made a part of the record. We find it unnecessary to determine whether the decree is properly a part of the record. As previously indicated, appellant alleged in the amendment to her complaint that the land claimed by appellee was excepted from the final chancery decree, and this was not disputed by appellee. Moreover, the decree was exhibited to the court during the trial, and it was there agreed that the land occupied by appellee was specifically excepted from the decree. Under this state of the record, it is unnecessary to pass on the motion to quash.

The evidence offered by appellee was substantial and sufficient to sustain every element of adverse possession for a period of more than seven years after appellant obtained her deed from the State. The judgment is, therefore, affirmed.

ATKINS *v.* GARNER, *et al.*

5-150 261 S. W. 2d 266

Opinion delivered October 12, 1953.

Gaughan, McClellan & Gaughan and *Walter H. Laney,* for appellant.

J. Bruce Streett, for appellee.

George Rose Smith, J. This is a suit by the appellant to enforce two promissory notes executed by the two appellees. There was a verdict for the defendants. The question before us is whether the trial court erred in permitting the defendants to offer proof of a contemporaneous oral agreement that is said to violate the parol evidence rule.

In March of 1948 the plaintiff, a dealer in used cars, sold to the defendants some forty vehicles that had little value except as scrap. The purchasers paid $100 in cash and gave a note for the balance of $5,000. Later on the plaintiff sold another lot of old cars to the defendants and received the other note sued upon, in the amount of $600. In form both notes are negotiable, payable in monthly installments of $100 and $50 respectively.

As their first defense the appellees pleaded, and were allowed to prove, an oral agreement that they were not to be personally liable on the notes. According to their testimony the notes were to be paid only from the proceeds derived from the resale of the cars as junk or salvage. A second defense is that the arrangement was terminated in the latter part of 1948, the plaintiff accepting the unsold cars in satisfaction of the unpaid balance now in dispute.

On the evidence the court was right in submitting the second defense to the jury, but the first defense should

have been rejected. The parol agreement relied upon, even if made, was ineffective as a matter of substantive law. In similar cases in the past the makers of promissory notes have offered to show by oral evidence that the obligation was to be payable only from certain property, *Smith* v. *McLaughlin,* 120 Ark. 366, 179 S. W. 496, or from notes given by purchasers to whom the property was resold, *Page* v. *Oates,* 194 Ark. 809, 109 S. W. 2d 661, or in lumber or merchandise instead of in money. *Fee-Crayton Hardwood Lbr. Co.* v. *Hogan,* 102 Ark. 103, 143 S. W. 585; *Harmon* v. *Harmon,* 131 Ark. 501, 199 S. W. 553. We have consistently adhered to the principle that such testimony is forbidden by the parol evidence rule.

The appellees cite no Arkansas case to the contrary, but they suggest that the rule with respect to negotiable paper has been changed by § 16 of the Negotiable Instruments Law. Ark. Stats. 1947, § 68-116. That section provides that as between the original parties to the instrument "the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." This language, however, merely restates the preëxisting rule by which an obligor may show that the operative effect of the entire instrument is subject to a condition precedent. Wigmore on Evidence, §§ 2408 and 2444; Rest., Contracts, § 241; *Graham* v. *Remmel,* 76 Ark. 140, 88 S. W. 899. The case at bar does not involve an attempt by the appellees to show that the appellant acquired no property in the notes; their effort is rather to prove by parol that the unconditional written obligation was qualified by a contradicting oral agreement made at the same time. But it has traditionally been a characteristic of negotiable instruments that they are not to be encumbered by collateral conditions, and this statute was certainly not intended to put negotiable paper in a worse position than that held by ordinary contracts.

Reversed and remanded for a new trial.

4741 261 S. W. 2d 541

Opinion delivered October 19, 1953.

Rehearing denied November 16, 1953.

Jim Merritt, James M. Smith, Robert M. Smith and *James Neill Smith,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. Upon a charge of murder in the first degree the appellant, C. E. Bazzell, was found

guilty of voluntary manslaughter and was sentenced to serve three years in the penitentiary.

The State's proof was to this effect: On December 31, 1952, Bazzell and the deceased, Bill Burris, spent most of the day at a domino table in a poolroom in the city of McGehee. A number of arguments took place between the two. At one time Burris objected heatedly to a remark made by Bazzell while the latter was merely watching the game, and, according to Bazzell, Burris then said: "You put your mouth in this game again and I am going to stick my fist in it." It is clearly shown that the two men were at outs when Bazzell left the poolroom in the late afternoon.

At about seven o'clock in the evening Bazzell returned to the pool hall, armed with a pistol. The State's witnesses say that he was in a belligerent mood and was looking for the man "that's going to shut my mouth up." Soon after Bazzell's return Burris came forward from the back of the room and attacked Bazzell with his fists. Bazzell, after receiving three or four blows, pressed his pistol to his adversary's side and killed him. The jury could have inferred from this testimony that Bazzell was guilty of murder; so we need not discuss the contention that the verdict is contrary to the evidence.

It is argued that the information should have been quashed for the reason that it was not sworn to by the prosecuting attorney. A complete answer is that neither the constitution nor the statutes require that an information be under oath. Amendment No. 21; Ark. Stats. 1947, Title 43, Ch. 8.

A second contention is that the trial judge improperly commented upon the weight of the evidence. During the presentation of the State's case Felix Woods was asked on cross-examination whether the accused had intended to go fox hunting on the night in question. The prosecution objected to the question as calling for hearsay testimony, and in overruling the objection the court remarked: "I don't think it has any bearing on the case. This fox hunt hasn't got anything to do with this killing

as I have found yet." Later in the trial the defense developed the theory that Bazzell was carrying the pistol in readiness for the hunt rather than out of enmity toward Burris, and on this premise it is now argued that the court's remark was prejudicial.

There are several defects in this argument. To begin with, the relevancy of the fox hunt was not apparent when the court made the observation complained of. On the contrary, the defense pretty well invited the court's remark by an earlier indication that the defense counsel thought the hunt to be immaterial. The matter had been mentioned only twice earlier in the trial, and on the second occasion the court inquired what the hunt had to do with the case. Defense counsel answered, "Yes, sir, I am stopping," after which the subject was dropped. Second, there was no objection to the court's remark at the time it was made. It was not until after the testimony of two additional witnesses that counsel made any protest. Finally, the observation obviously did not influence the jury. The fact that Bazzell was armed pertained only to the question of premeditation, and since the jury exonerated Bazzell of the charge of murder the issue of premeditation could not have been a vital factor in its verdict.

Another complaint is that the court refused to give a requested instruction on the presumption of innocence. The court gave a correct instruction of its own which adequately covered the subject, and there was no need to repeat the charge in slightly different language.

There is assigned as error the court's action in modifying a requested instruction on self-defense by the addition of the words we have italicized: "One who is suddenly viciously assaulted by another is not required to retreat, but may stand his ground and repel force with force, and if necessary to protect himself, may slay his assailant *unless the assailant himself provoked the assault.*" Quite evidently the court's modifying clause would have been clearer had the word accused been used instead of the word assailant, but there was no specific objection to this ambiguity.

The appellant, relying upon *Johnson* v. *State,* 58 Ark. 57, 23 S. W. 7, insists that the modification precluded the jury from considering the plea of self-defense if it were found that Bazzell, after having provoked the attack, changed his mind and in good faith sought to avoid the encounter. The trouble is that there is no evidence whatever to support such a conclusion by the jury; as the appellant says in his brief: "There is nothing in the record even to suggest that the accused provoked the assault." Thus at most the added clause was abstract and could not have misled the jury. Taken as a whole, the instruction was actually more favorable to the accused than it need have been, for it failed to tell the jury that the assault must have been such as to put the accused in fear of death or great bodily harm. *Striplin* v. *State,* 100 Ark. 132, 139 S. W. 1128; *Garrett* v. *State,* 171 Ark. 297, 284 S. W. 734.

More than fifty other assignments of error are contained in the motion for new trial, but after examining them all we conclude that the trial was wholly free from prejudicial error.

Affirmed.

MILLER *v.* STATE.

4755 261 S. W. 2d 411

Opinion delivered October 19, 1953.

A. M. Coates, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant was arrested while carrying a bucket containing several bottles of corn whiskey. In municipal court he was fined $250 under § 48-901(c), Ark. Stat's—possessing intoxicants for the purpose of sale. On a second charge growing out of the same transaction he was fined $500 and sentenced to serve three months in jail for possessing unstamped liquor. Ark. Stat's, § 48-934.

On appeal a plea of guilty to possession for sale was entered, but the defendant elected to stand trial on the charge of possessing the untaxed commodity. The jury assessed a fine similar to that adjudged in municipal court, but omitted the jail sentence. The appeal is from the $500 fine. It is contended that two offenses cannot be carved out of the same transaction, hence as to the contested judgment there should have been a directed verdict. *Holder* v. *Fraser, Judge,* 215 Ark. 67, 219 S. W. 2d 625.

In the cited case we said that if a thief simultaneously steals two objects the state may charge him with the theft of one, and under that indictment he cannot be convicted of stealing the other. A plea of double jeopardy would nevertheless bar a second trial for larceny, for there is only one offense which the state cannot subdivide by making separate accusations. In the succeeding paragraph, however, there is this sentence: "When the crimes involve the element of intent we see no difficulty in finding two offenses in one act."

In *Mullins* v. *Commonwealth,* 216 Ky. 182, 286 S. W. 1042, it was held that a former acquittal of unlawfully giving away liquor was no bar to prosecution for unlawfully possessing the same liquor, the offenses not being the same under that state's statutes. We approved this rule in *Eoff* v. *State,* 218 Ark. 109, 234 S. W. 2d 521, calling attention to a text in 22 C. J. S., p. 440. A

number of cases, both state and federal, are cited in the Eoff opinion, and it is conclusive here.

Affirmed.

REYNOLDS *et al.* *v.* HALL, SECRETARY OF STATE.

5-231 261 S. W. 2d 405

Opinion delivered October 19, 1953.

E. M. Arnold, for plaintiff.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for defendant.

Dean R. Morley, House, Moses & Holmes and *Owens, Ehrman & McHaney,* for interveners.

Warner & Warner, Amicus Curiae.

GRIFFIN SMITH, Chief Justice. In 1953 the 59th general assembly, by Act 285, amended legislation relating to the wholesaler's selling price for liquors. In 1949 a markup of 15 percent of the cost of liquor was authorized by § 3 of Act 282. Section 1 of Act 252, approved March 19, 1951, reënacted the 1949 limitation upon the selling price, but reduced it from 15 to 13 percent. The 59th assembly reënacted the two pertinent sections, but fixed the wholesaler's selling price at cost, plus 10%. Subdivision (b) levied and directed the wholesaler to collect three percent on such liquors, "which shall be in addition to any and all other taxes heretofore or hereafter levied and collected thereon".

The proceeds from such taxes were apportioned 40% to a County Fair Fund established by the Act, 52% to a similarly created State Fair Fund, and eight percent to the District Fair Fund. It will be seen that Act 285 first makes the wholesaler's selling price 10% more than his cost. This markup is in no sense a tax, nor was it so intended. But a tax is imposed on the wholesaler by subdivision (b), and from this tax the allocations of 40%, 52%, and 8% are made.

The levying Act was not an emergency measure. It was, therefore, subject to popular approval or rejection under Amendment No. 7 to our Constitution and this right became absolute if six percent of the legal voters, as defined by the Amendment, petitioned for such referendum not later than 90 days after final adjournment of the legislative session at which the Act was adopted.

Within the time allowed petitions containing 42,255 names were filed. It is not denied that the actual number of petition-signers necessary for referral was 23,495.[1]

This original action came to the court's attention in July of this year when 25 plaintiffs as resident taxpayers sought an order to restrain the secretary of state from certifying the subject-matter of the referendum to commissioners for inclusion on the ballot in the general election in November, 1954. Coupled with the petition was the request that a court commissioner be appointed to take testimony relating to the manner in which signatures were secured. By an order of July 6th this request was denied. Other pleadings were filed, including interventions. The secretary of state demurred, as did some of the interveners.

The complaint contends that the move to refer is selfishly inspired in that wholesalers alone will be affected; that irrespective of language in the Act first permitting a 10% markup and then levying the tax of three percent, the wholesaler's charge to the retailer remained 13% as before and cost to the public would not be affected because of the levy against the wholesaler.

It is then said that the wholesalers' committee as a voluntary group conspired with 640 retailers, the purpose being to have counterpart petitions circulated by retailers under a quota arrangement designed to produce 57,600 signatures. In conformity to this plan printed forms were placed in most of the retail whiskey stores and signatures of customers were solicited by proprietors and their employees. These petitions, it is contended, are an integral of the state's election machinery, therefore the procurement of signatures so set out was illegal and in contravention of public policy.

A further allegation is that wholesale dealers procured the circulation of attractively printed cardboard posters addressed to liquor users. These posters, it is

[1] Discrepancies involving about 25 signatures are spoken of, but are not important to this decision. (The certificate of the Secretary of State showed 42,280 signatures instead of 42,255 mentioned above.)

contended, contained false statements knowingly made for the purpose of convincing customers that Act 285 would increase the price of liquors three percent, in violation of subdivision (4), Ark. Stat's, § 2-202.

Finally it is urged that the ballot title was insufficient because its tendency would be to mislead the consumer into believing that the 3% tax would fall on him. A more exact statement may be copied from the brief: "It tells him of a 3% tax but does not tell him that the markup to the wholesale dealer is reduced by the same amount."

The ballot title reads: "An Act prescribing the markup on wholesale prices of alcoholic beverages, levying a tax of 3% on the wholesaler's selling price of alcoholic beverages, and providing for the distribution of revenue from such tax for the construction of buildings and facilities of state, county, and district fairs."

We have concluded that the demurrers of the secretary of state and the several interveners must be sustained. There is no statutory authority for avoiding petitions because signatures were procured by owners of retail liquor stores and their employees. It is true that subdivision (4) of § 2 of Act 195, approved March 11, 1943, (Ark. Stat's, § 2-202) denounces as a misdemeanor the conduct of one who knowingly and falsely misrepresents the purpose and effect of the petition or the measure for the purpose of causing anyone to sign, but the entire trend of legislation and the result of our decisions is to say that rights guaranteed by Amendment No. 7 may be facilitated by legislation, but not impaired or abridged. While on demurrer we must treat well pleaded elements of a complaint as having been admitted, here the legislative authority did not undertake to say that signatures procured through false representations would be ignored. Rather, the penalty is a fine of not less than $50 nor more than $1,000 for each such violation.

The conspiracy charged to wholesale and retail dealers is that by letter the nine wholesalers directed a course of conduct which, if not expressly prohibited by law, is clearly in conflict with public policy. In the letter com-

plained of it was stated that the committee composed of wholesalers had divided the state into six districts, "as shown by the map [attached]. The chairman of each district is shown. Please contact the wholesale salesman in your district for additional petitions and information. Each petition has space for 30 signatures. Our goal is a minimum of three complete petitions for every package store in Arkansas." The tax trend from 1935 to 1943 was referred to, the closing statement being: "Someone said we can be certain of two things—death and taxes. [We] think our industry can be sure of another—'death *by* taxes' unless we unite to combat this destructive trend today. Good luck!" Then by way of post script: "Please be sure to comply with all legal requirements in obtaining signatures."

We are unable to say that this letter is evidence of a conspiracy in the sense that the term is used in legal channels. There was, of course, coöperation. Financial interest no doubt convinced the actors that united they might stand. But this falls short of stating a situation upon which fraud might be predicated. Nor do we agree with plaintiffs that the poster published an untruth. It was to have been expected that interests threatened with adverse action would state the issue in its most favorable light. Still, the fact remains that Act 285 first reduced the retailers' markup, then authorized a levy of three percent. This amounted to nothing more than compelling the wholesaler to become collector for the state as to this special fund.

We do not wish to be understood as going to the extreme of saying that in no circumstance could the misrepresentation of the circulator of a petition avoid the signature of the person so influenced; but we do hold that where, as here, the measure sought to be referred was printed on the petition forms, there can be scant excuse for a voter saying that he relied upon extraneous representations rather than the textual matter. In the second place, no one in this proceeding claims to have been imposed upon. Instead, the plaintiffs merely insist that because of the plan pursued others were deceived.

A situation somewhat similar was presented to the Supreme Court of Missouri, *State ex rel. Westhues* v. *Sullivan, Secretary of State,* 283 Mo. 546, 224 S. W. 327. It was held that the judicial authority would not inquire into the reasons inducing a person to sign a referendum petition. See *Edwards* v. *Hutchinson, Secretary of State,* 178 Wash. 580, 35 Pac. 2d 90; *In re Initiative Petition No. 142,* 176 Okla. 155, 55 Pac. 2d 455. Somewhat related is *Luck* v. *Magnolia-McNeil Road Improvement District No. 1,* 141 Ark. 603, 217 S. W. 781. In the Luck case it was held that proceedings looking to the formation of the improvement district would not be enjoined on an allegation that signatures to the petition to form the district had been obtained through fraudulent representations. In other road improvement district litigation it has been held that persons claiming to have been misinformed had no right to rely upon the allegedly false statements. *Pharr* v. *Knox,* 145 Ark. 4, 223 S. W. 400. See *Vaught* v. *Frey,* 219 Ark. 525, 243 S. W. 2d 384.

Our conclusions in respect of the ballot title are likewise contrary to contentions of the plaintiffs. Certainly it is not required of one submitting a referendum proposal that all arguments for and against the measure be included in the title. It is sufficient if it fairly states what the Act provides, and this should be done as concisely as is practicable.

The plaintiffs' contentions are rejected and the cause is dismissed.

WATT *v.* STATE.

4749 261 S. W. 2d 544

Opinion delivered October 19, 1953.

Ovid T. Switzer and *W. P. Switzer,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On an indictment charging a violation of the Carnal Abuse Statute (§ 41-3406, 1947), appellant was found guilty and his punishment fixed by the jury at a term of four years in the State Penitentiary. This appeal followed.

Appellant, a thirty-eight year old white man, and the father of a five year old child, was employed as a gasoline truck driver. On December 21, 1952, Dolly Lou Brown, a little seven year old colored girl, and her three year old cousin, William Anthony, were walking down U. S. Highway 165 near Parkdale, Arkansas. Watt was in his truck on the side of the road. While Dolly Lou and her cousin were passing the truck, Watt called her over to him and pulled her into the truck. Then he put his hand on her vulva, and inserted his finger into her vagina, thereby rupturing her hymen, and causing her to bleed. Her testimony relative to the insertion was corroborated by Dr. A. E. Cone. In fact, the evidence appears not to be in dispute. The primary and decisive question presented is whether the lewd and lascivious acts, which appellant committed, are punishable under the above section.

The indictment charged: "The Grand Jury of Ashley County in the name and by the authority of the State of Arkansas accuse Jesse Watt of the crime of Carnal Abuse committed as follows, to-wit: The said Jesse Watt in the county and state aforesaid, on the ..... day of December

A. D. 1952, did have carnal knowledge and did abuse sexually Dolly Lou Brown, a female under the age of sixteen years," etc.

The above § 41-3406 on which it was based, provides: "Every person convicted of carnally knowing or abusing unlawfully, any female person under the age of sixteen (16) years, shall be imprisoned in the penitentiary for a period of not less than one (1) year nor more than twenty-one (21) years."

For reversal, appellant says: "A. The court erred in not directing a verdict for the defendant. B. Insufficiency of the evidence to sustain a conviction of carnal abuse. C. The court erred in refusing to give defendant's requested instructions Nos. 1 and 3."

A. & B.

At the close of the State's case, appellant offered no evidence, but rested, and in his requested Instruction No. 1 asked for a directed verdict of not guilty, insisting that the evidence was not sufficient to warrant a conviction. This request was denied. It appears that this court has never had before it for consideration a similar situation as is presented by this case.

Appellant earnestly insists that since no act of sexual intercourse took place or was attempted by him, he could not be convicted under the above section of the statute. We do not agree.

While it is true that the crime of "abusing unlawfully" is included in the crime of carnal knowledge, it does not follow that carnal knowledge is included in the term "abusing unlawfully" as used in the statute. If the word "carnal" was intended by our lawmakers to be included in the term "abusing unlawfully," why was it omitted? We hold that the act by its plain terms covers two distinct offenses. First, it makes unlawful, and punishable, carnal knowledge, or sexual intercourse, with immature girls, which requires actual penetration of the vagina by the male organ. In the second place, the act goes further and makes "unlawfully abusing" such child, by sexual acts,

short of actual sexual intercourse, also an offense and punishable. This is the exact situation presented in this case—and we hold the evidence was ample to sustain the jury's verdict of guilty.

On testimony similar in effect to that presented here, the Supreme Court of Alabama in *Lee* v. *State,* 21 Ala. App. 91, 13 So. 2d 583, held that this type of unlawful abuse was punishable under a statute which provided: "Any person who has carnal knowledge of any girl under twelve years of age, or abuses such girl in the attempt to have carnal knowledge of her, shall, on conviction, be punished, at the discretion of the jury, either by death or by imprisonment in the penitentiary for not less than ten years." In that case the defendant went to a female child's bed, put his hand on her private parts and "hurt" her. Medical testimony showed that the girl's genital organs had been seriously abused. No claim was made that the defendant had actual carnal knowledge of the girl. As in the case at bar, there was nothing more than an abuse of the girl's genital organs by the finger of the defendant. The Court, affirming the conviction, observed: "The crime may be committed without any contact of the genital organs. The principal is illustrated by this quotation from *Dawkins* v. *State,* 58 Ala. at page 379: 'It is said that often the chief injury to the child results from the use of the fingers of the male.' "

It will be noted that this Alabama statute appears even stronger in favor of appellant's contention here than our own statute above. Where our statute uses the words "abusing unlawfully," (omitting, as we have indicated, the word "carnal" from the sentence), the Alabama statute provides "or abuses such girl in the attempt to have carnal knowledge of her," making carnal knowledge one of the ingredients of the offense.

We think the case of *Curtis* v. *State,* 89 Ark. 394, 117 S. W. 521, relied upon by appellant, is distinguishable. There it was undisputed that the defendant had carnal knowledge of the girl in question. It was there said that "carnal abuse and carnal knowledge, as used in the stat-

ute, are synonymous terms," but we did not say that "abusing unlawfully" a female under the age of sixteen years was synonymous with carnally knowing or carnally abusing such female.

C.

Appellant next argues that the court erred in refusing to give his requested Instructions 1 and 3. No. 1 was, as indicated, a request for an instructed verdict of not guilty and was properly refused. There was also no error in refusing Instruction No. 3, which provided: "You are told that the essential elements of the crime of carnal abuse, as charged in this case, are sexual intercourse and the age of the prosecutrix. The terms 'carnal knowledge' and 'carnal abuse' as used in the statute, are synonymous terms and mean sexual intercourse. The state must prove beyond a reasonable doubt that the defendant did have sexual intercourse with Dolly Brown, and that the said Dolly Brown was at that time under the age of sixteen years. And, upon the whole case, you entertain a reasonable doubt that the defendant had sexual intercourse with the said Dolly Brown, or that she was under the age of sixteen years at the time of said act of sexual intercourse, then you should find the defendant not guilty."

This instruction was not a correct declaration of the law under our views above expressed. The court on its own motion correctly declared the applicable law on the facts presented in the following instructions:

"No. 3.—Every person convicted of carnally knowing or abusing unlawfully any female person under the age of sixteen years shall be imprisoned in the state penitentiary for a period of not less than one year nor more than twenty-one years. * * * No. 5.—If you find from the evidence in this case and beyond a reasonable doubt that the defendant, Jesse Watt, in this county and state within three years prior to the 21st day of December, 1952, did carnally know (or abuse unlawfully) Dolly Lou Brown, a female person then under the age of sixteen years, as charged in the indictment, you will find the defendant guilty," etc., and in No. 6: "Unless you find from the

evidence beyond a reasonable doubt that * * * defendant, Jesse Watt, did carnally know (or abuse unlawfully) the said Dolly Lou Brown, a female person then under the age of sixteen years, you will find the defendant not guilty."

We have not overlooked other assignments of alleged errors (not argued here by appellant) but find each to be untenable.

Affirmed.

Justice McFaddin concurs.

Robinson, J., dissenting. The majority opinion says: "Appellant earnestly insists that since no act of sexual intercourse took place or was attempted by him, he could not be convicted under the above section of the statute (Ark. Stat. § 41-3406). We do not agree." Thus the majority holds that notwithstanding no sexual intercourse took place or was attempted, the defendant is guilty of carnal abuse; but significantly no authority is cited to sustain this position.

I agree with counsel for the defendant; there can be no carnal abuse within the meaning of our statute without at least an attempt to have carnal knowledge of the female. Carnal knowledge and carnal abuse are well known legal phrases defined by the courts many times.

In support of the majority opinion there is cited *Lee* v. *State,* 21 Ala. App. 91, 13 So. 2d 583. The Alabama statute on carnal abuse is not the same as ours. The statute of that state provides: "Any person who has carnal knowledge of any girl under twelve years of age, or abuses such girl in the attempt to have carnal knowledge of her, shall, on conviction, be punished . . . etc". Code of Alabama 1940, Title 14, § 398. It will be seen at once that it is a violation of the Alabama statute for one to "abuse such girl in the attempt to have carnal knowledge of her". Conceivably one could violate that statute merely by proposing sexual intercourse to a girl under 12 years of age. In any event, the Alabama court found there had been an attempt

by the defendant to have carnal knowledge of the little girl; but in the case at bar, the majority opinion in effect says that even though there was no attempt to have sexual intercourse, the defendant is guilty of carnal abuse.

Then the majority gives emphasis to the word "unlawfully" in our statute and attempts to distinguish *Curtis* v. *State,* 89 Ark. 394, 117 S. W. 521, on that ground. But our court has heretofore dealt with the word "unlawfully" in the statute and has held that the word was only intended to exclude from the operation of the act those persons married to females under 14 years of age. In *Plunkett* v. *State,* 72 Ark. 409, 82 S. W. 845, Mr. Justice Wood speaking for the court said: "The statute under which appellant was indicted is as follows: 'Every person convicted of carnally knowing or abusing unlawfully any female person under the age of 16 years shall be imprisoned in the penitentiary for a period of not less than 5 nor more than 21 years'. Sand. & H. Dig., § 1865." (The quoted statute is identical with Ark. Stat. § 41-3406 except the punishment is different.) Continuing, Judge Wood said: "The legislature intended by this enactment to make it a felony for any person to carnally know or abuse any female under the age of 16 years, except in cases of marriage, either with or without her consent. Our statute makes it lawful for females to marry at the age of 14 years. Sand. & H. Dig., § 4907. And the word 'unlawfully' was used in the criminal statute under consideration with reference to the above provision of the civil statute, and to except those who came within it. If this was not the purpose of the use of the word 'unlawfully' then it had no purpose, and the legislature was engaged in putting a foolish conglomeration of words into a meaningless sentence."

That brings us to the question of just what is "carnal abuse", the crime of which the defendant has been convicted. We do not have to look to our sister states for a definition. Our court has said in plain, unequivocal words just what is meant in our statute by carnal abuse. In *Curtis* v. *State, supra,* the indictment charges: "the

said Jesse Curtis in the county and state aforesaid, on the 15th day of December, A. D. 1906, unlawfully and feloniously did make an assault in and upon one Bertha Williams, a female child under the age of consent, to-wit, of the age of fifteen (15) years, and her, the said Bertha Williams, unlawfully and feloniously did carnally know and abuse." The defendant moved to require the state to elect as between the charge of carnal knowledge and carnal abuse. The motion was overruled. This court said: "the ruling of the court in overruling the demurrer and refusing to require the prosecuting attorney to elect was correct. The indictment charged but a single offense. Carnal abuse and carnal knowledge, as used in the statute, are synonymous terms." Certainly there can be no dispute about the meaning of carnal knowledge; it means sexual intercourse. *Wharton's Criminal Law* 12th Ed. § 685; see also *Words and Phrases,* Vol. 6, pages 160-2; citing many cases defining carnal knowledge. Carnal abuse is defined in *Carothers v. State,* 75 Ark. 574, 88 S. W. 585. Chief Justice HILL in referring to § 2008 of Kirby's Digest which is the same as our present statute on carnal abuse with the exception of the penalty, said: "The fact of sexual intercourse with a female under 16 years of age, with or without consent, whether obtained by force or from lust, constitutes the crime denounced by this statute."

Undoubtedly counsel for the defendant in the case at bar relied on our cases in which this court has said that other indictments for all practical purposes identical with the one under consideration here charged but one offense, and that carnal knowledge and carnal abuse within the meaning of our statute are synonymous terms. Defendant's attorney in all probability depended on the well-established rule that sexual intercourse is an essential element of carnal knowledge, and the ruling of our court that carnal abuse is synonymous with carnal knowledge, and therefore did not put on any evidence whatever in the trial of the case. Being confident that the state had not proven the charge according to the decisions of this court, he stood on his motion for a directed verdict of not guilty.

Of course the defendant according to the evidence was guilty of a grievous offense and he violated the law of this state as it existed at the time of the commission of the act; but in my opinion he is not guilty of the charge for which he was tried. The legislature has recognized the fact that our laws were inadequate for the kind of situation presented here and passed Act No. 94 of 1953. Section 3 of the Act specifically refers to and makes unlawful the acts shown in this case to have been committed by the defendant, but the penalty is fixed at not more than three years in the penitentiary. If the legislature had considered that the carnal abuse statute then existing applied to acts as shown by the evidence here, there would have been no need for that portion of Sec. 3 dealing with such acts. Section 7 of the Act of 1953 states: "It has been found and declared by the General Assembly of Arkansas that the existing laws pertaining to molestation, enticement, abuse, and indecent fondling of minors are now inadequate . . . etc."

It is my firm opinion that the acts shown by the evidence to have been committed by the defendant do not constitute the crime of carnal abuse according to the law of this state as it has existed for over 100 years. I therefore respectfully dissent.

Justice GEORGE ROSE SMITH joins in this dissent.

TAYLOR *v.* STATE.

4750 261 S. W. 2d 401

Opinion delivered October 19, 1953.

Walter L. Brown, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. From his conviction of the crime of voluntary manslaughter, appellant prosecutes this appeal.

I. *Sufficiency of the Evidence.* The appellant admitted that he stabbed the deceased, Doris Lee Broughton, with a pocket-knife, and that she died a few minutes later. On Saturday night, December 20th, the deceased had cut the appellant; and the stabbing that resulted in deceased's death occurred at a road-house, or dance-hall, the following Saturday night, December 27th. Here is appellant's own version of the fatal encounter:

". . . was standing by the cigarette machine and she came over there and I said 'you bounced up against my arm,' and she said 'I am sorry,' and I said, 'get out of my face,' and she said 'you black so and so, I should have finished you up,' and I shoved her off and she came back and I shoved her back again and I went into my pocket and got my knife.

"Q. What was she doing then? A. She had run her hand in her pocket—coat pocket.

"Q. Had she already called you that language? A. Yes, sir.

"Q. And said she ought to finish you up? A. Yes, sir.

"Q. Then what did you do? A. That is when I stuck her with a knife.

"Q. What did you intend to do? A. I didn't intend to kill her and I stuck her down low.

"Q. Did you intend to kill her? A. No, sir.

"Q. Did you intend to hurt her bad? A. No, sir, I had no grudge at all, I just wanted to stop her coming on me.

"Q. Did you know her reputation down there in that community for being a dangerous character? A. She had cut two or three.

"Q. What were you trying to do when you used the knife? A. Trying to stop her off of me."

Thus appellant admitted inflicting the wound which indisputably resulted in the homicide. Appellant testified that the deceased was the aggressor; but witnesses for the State testified that the appellant said, just before he stabbed her: "You got me last Saturday night and I am going to pay you back." In view of all the testimony, we conclude that there was ample evidence to sustain the verdict.

I. *Specific Violent Acts of the Deceased.* The Court permitted witnesses to testify as to the general reputation of the deceased. This typical testimony was given by a witness called on behalf of defendant:

"Q. Do you know what her reputation was in that community for being a violent, turbulent and dangerous character for using a knife? A. Yes, sir, I know that.

"Q. Was that reputation good or bad? A. It was bad."

Without objection, the appellant was permitted to testify that he knew the deceased had "cut two or three." But appellant claims that the Trial Court should have permitted witnesses to testify as to three specific instances, in which deceased had used a knife on other men. The Trial Court was correct in refusing evidence as to specific acts of violence committed by the deceased on parties other than appellant. Our cases on this point are reviewed in *Edwards* v. *State,* 208 Ark. 231, 185 S. W. 2d 556. See also *Montague* v. *State,* 213 Ark. 575, 211 S. W. 2d 879.

III. *Instructions.* Appellant complains of the refusal of the Trial Court to give his Instructions 5, 6 and 10. It would unduly prolong this opinion to set out, *in extenso,* the refused Instructions, as well as the Instruc-

tions given, covering the points contained in the refused Instructions. It is sufficient to say: (a) that insofar as appellant's requested Instruction No. 6 contained a correct statement of the law, the same was covered by appellant's Instructions 2, 3 and 4 as given, considered with the Court's Instruction on "reasonable doubt"; and (b) that appellant's requested Instructions 5 and 10 were covered by appellant's Instructions Nos. 7 and 11, as given by the Court, when considered with the Court's Instruction on "self defense".

Finding no error, the judgment is affirmed.

VANCE *et al.* *v.* HINCH.

5-153 261 S. W. 2d 412

Opinion delivered October 19, 1953.

Cole & Epperson and *W. H. McClellan,* for appellant.

William C. Gilliam, for appellee.

WARD, J. The principal issue involved in this appeal is correctly stated by appellants as follows: "Is a marriage of an insane person absolutely void and subject to collateral attack after the death of one of the parties, or is such a marriage voidable only and subject to attack only during the lifetime of both parties with all rights of action terminated at death?"

One Indiana Hinch, a negro woman, died intestate at the age of 94, leaving an estate of considerable value. Some time before her death [the record does not state how long] she entered into marriage with appellee, Harold Hinch.

This action was brought on the complaint of appellant, Kitty Vance, a daughter, and Perla Mae Mayberry and Lawrence Treadwell, grandchildren, and all direct heirs of the deceased. The pertinent allegations are that because of the mental condition of the deceased at the time of such marriage the said marriage is void, and that by reason of such marriage the defendant is claiming courtesy in the estate of the deceased to the damage of the plaintiffs. The prayer was to enjoin appellee from claiming courtesy in the estate of the deceased.

Appellee moved the court to dismiss the complaint on the ground that the said marriage, conceding for the purpose of the motion the deceased to be incompetent at the time of the marriage, was not void but merely voidable, and, therefore, cannot be attacked by the heirs of Indiana Hinch after her death. The trial court sustained appellee's motion on the ground just stated, and this appeal follows:

To reverse the decree of the trial court appellants make the contention, citing *Rose* v. *Rose,* 9 Ark. 507, that at common law a marriage, where either party lacked mental capacity, was absolutely void. Appellants correctly state that the Revised Statutes, Chapter 28, § 1, now Ark. Stats. 1-101, incorporates into our own body of law the common law of England insofar as the same is applicable and of a general nature and not inconsistent with the constitution and laws of the United States or

this state. The argument is that since such marriages were absolutely void at common law and since this state has adopted the common law such is still the law in this state unless it has been changed by statute.

Notwithstanding appellants' capable argument to the contrary it is our opinion that Ark. Stats. § 55-106 does abrogate the common law with reference to such marriages. The section reads as follows:

"When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction. (Revised Statutes, Chapter 94, § 5)".

Appellants correctly urge that the presumption is against repeals by implication and that implied repeals are not favored and will not be held to exist if there is any other reasonable construction, so, it is urged, that the language of the cited statute, "want of understanding," is not broad enough to include a person of unsound mind. We cannot agree with appellants' argument.

It is apparent that the question presented here is an important one and that grave inequities might result from either interpretation. If it is held that such a marriage is voidable only and cannot be attacked after the death of the allegedly incompetent party then a situation arises where fraud could easily be perpetrated. For example, a designing person could effect a marriage with a known imbecile a few days or hours before the latter's death and there would seem to be no way to prevent such a person from profiting unjustly by his designing acts. On the other hand if it is held that such a marriage is absolutely void and can be collaterally attacked even after the death of the alleged incompetent it would be possible for designing heirs to set aside the sacred vows of matrimony and deprive the surviving spouse of valua-

ble property to which he or she might otherwise be legally and morally entitled to receive.

To our minds the language in Ark. Stats. § 55-106 leaves little doubt that it was the legislative intent to change the common law as it was originally adopted and incorporated into the laws of this state. It must be noted that the very statute [Rev. Stat., Ch. 28, § 1—same as Ark. Stats. § 1-101] which adopted the common law for this state provides that it shall not apply where it is inconsistent with any law [statute] of this state. Again it must be noted that at the same time the legislature adopted by statute the common law it also passed another statute [now Ark. Stats. § 55-106, set out above] which, we hold, changed the common law relative to effect of marriages by incompetents.

The question then would seem to be not, as urged by appellant, whether § 55-106 repeals § 1-101 by implication, but rather what is the meaning of § 55-106. Does this section make such a marriage void or voidable? Notwithstanding the statute contains the word "void" it also says the marriage shall be void only from the time it is declared a nullity by a court of competent jurisdiction. The only reasonable interpretation then, it appears to us, is that such a marriage is voidable and not void. In construing the meaning of the word "void" in Ark. Stats. § 55-102 in connection with § 55-106 it was held to mean "voidable" in *Kibler* v. *Kibler,* 180 Ark. 1152, 24 S. W. 2d 867.

Notwithstanding the conclusion arrived at above it does not answer appellants' contention that the phrase "want of age or understanding" found in § 55-106 is not broad enough to include a person of unsound mind. If appellant is right then it would be logical to argue that the common law in the respect here mentioned has not been changed.

We think the language referred to above is plain and must be interpreted to include a person of unsound mind. We see no less reason for it to be so applied than to apply it to a person of tender age, or one who is under

the influence of drugs or liquors. In each case there would be a lack of understanding. In *Bickley* v. *Carter,* 190 Ark. 501, 79 S. W. 2d 436, the words "want of understanding" in § 55-106 were held to apply to one who was drunk.

Having arrived at the conclusion that the common law has been changed by statute as set out above, can appellants here successfully attack the marriage of the deceased after her death?

It is conceded by both sides that our court has never directly passed on the question herein involved and has never interpreted the last mentioned statute. However, said statute has been construed by the Supreme Court of Missouri in the case of *Henderson* v. *Ressor,* 265 Mo. 718, 178 S. W. 175. There the husband, alleged to have been insane at the time of the marriage, died leaving considerable property and his wife claimed her dowry rights. The collateral heirs of the deceased husband brought suit in equity to annul the marriage on the ground of mental incapacity. The marriage took place in this state and the laws of this state were applied by the Missouri Court. In commenting upon the Ark. Stats. 55-106, the court stated:

". . . that its meaning is fairly apparent, and that its intention is, to a marked degree, salutary likewise goes without saying. To our minds, it means that the courts, and not the individuals affected, must, in all cases, be allowed to sit in judgment upon the question of the existence of nonage, or mental incapacity, or impotence, or fraud, or duress to an extent which will furnish sufficient cause for annulment. Its effect is to render the marriage of persons under the age of consent, or marriage of the mentally incapable, as also marriages contracted by fraud or force, voidable only, and, being so voidable and not void, legally vulnerable to attacks made in the lifetime of the spouses only."

The Missouri opinion cited with approval from 2 Nelson on Divorce and Separation, § 569:

" 'A voidable marriage can only be inquired into by a direct proceeding between the parties and during the lives of both of them. Until it is set aside it is practically valid for all purposes, but when set aside the decree renders it void from the beginning'."

In accordance with the above the decree of the trial court is affirmed.

RAGSDALE *v.* STATE.

4753 262 S. W. 2d 91

Opinion delivered October 19, 1953.

Rehearing denied December 7, 1953.

Reece Caudle, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas*, Assistant Attorney General, for appellee.

ROBINSON, J. Appellant Robert Ragsdale was convicted on the charge of involuntary manslaughter. The information charges that Ragsdale "did wilfully, unlawfully, and feloniously drive and operate a motor vehicle without due caution and circumspection and in the wanton disregard of the safety of others and then and there did drive the said automobile or vehicle upon and against the

person of Pearl Teem Thompson and her, the said Pearl Teem Thompson, did injure and kill."

On appeal there are two issues—the sufficiency of the evidence to sustain the verdict, and the trial court's action in overruling a motion that the prosecuting attorney be required to file a bill of particulars.

The trial court did not error in overruling the motion for a bill of particulars; the information plainly charges that the defendant in wanton disregard of the safety of others drove the automobile upon and against the person of Pearl Teem Thompson thereby killing her. The information fully informed the defendant of just what he was charged with doing; he had every chance to prepare his defense. The evidence produced no element of surprise. It is true the state's evidence tended to prove the defendant was under the influence of alcohol at the time of the commission of the offense; but this evidence did not go to prove what the defendant did, although it had a tendency to prove the cause of his actions.

Ark. Stat., § 43-1012, provides: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." § 43-804 provides: "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 charged, in order to enable him to prepare his defense. . . ."

The information contains all the requirements of the statutes. *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527; *Bryant* v. *State,* 208 Ark. 192, 185 S. W. 2d 280; *Haller* v. *State,* 217 Ark. 646, 232 S. W. 2d 829.

As to the sufficiency of the evidence, there is substantial testimony to the effect that Mrs. Thompson, the deceased, and her husband had driven out in the country to pick muscadines, parked their car on the shoulder of the road, and were engaged in picking the berries when

the defendant while under the influence of alcohol approached at a reckless rate of speed, drove his automobile completely off the road and onto Mrs. Thompson thereby killing her and seriously injuring Mr. Thompson. The evidence fully sustains a verdict of guilty.

Affirmed.

LIVELY *v.* LIVELY.

5-158 261 S. W. 2d 409

Opinion delivered October 19, 1953.

Melvin T. Chambers, for appellant.

Shackleford & Shackleford, for appellee.

MINOR W. MILLWEE, Justice. This appeal is from an order modifying a divorce decree by reducing monthly payments due appellant by appellee for the support of their 8-year-old son.

In a decree entered January 17, 1949, appellant was granted a divorce from appellee and given custody of their son. She was also awarded $100 per month for the support of the child. Shortly prior to the entry of the decree, the parties entered into a written "Stipulation and Property Settlement" in which appellee agreed, among other things, to pay $100 monthly for support of the child. The agreement also provided that in the event of a divorce, the parties "respectfully request that the court approve this stipulation and that the terms hereof be incorporated into the final decree. . . ." The written agreement was never filed with the court, nor was it expressly incorporated or referred to in the decree. However, the decree did provide for alimony and support payments in the amounts set out in the prior agreement of the parties. On September 25, 1952, appellee filed a petition pursuant to Ark. Stats., § 34-1213, to modify the decree of January 17, 1949, by reducing the monthly support payments for the child.

Appellant first contends the chancellor was without authority to modify the decree because it was based on the prior agreement of the parties. Our cases hold that where a decree for alimony or support is based on an independent contract between parties which is incorporated in the decree and approved by the court as an independent contract, it does not merge into the court's award and is not subject to modification except by consent of the parties. *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102; *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938; *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439. Although a court of equity may decline to enforce payments due under an independent agreement by contempt proceedings where changed circumstances render

such payments inequitable, the wife retains her remedy at law on the contract. *Pryor* v. *Pryor, supra.*

There is a second type of agreement in which the parties merely agree upon the amount the court should fix by its decree as alimony or support, without intending to confer on the wife an independent cause of action. This type agreement becomes merged in the decree and loses its contractual nature so that the court may modify the decree. *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226; *Wilson* v. *Wilson,* 186 Ark. 415, 53 S. W. 2d 990; *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954.

Since the agreement in the instant case merely requests the court's approval and was not mentioned in the decree, it must be concluded that it was merely advisory to the court in fixing the support payments and was not intended as an independent contract to make such payments. Moreover, the power of a court to modify a decree for the support of minor children cannot be defeated by an agreement between the parents even when the agreement is incorporated in the decree. 27 C. J. S., Divorce, § 322a. Although the court may adopt the agreement of the parents and incorporate it in the decree, it still has the power to modify the decree when it shall be made apparent that changed conditions make a modification necessary. *Kriedo* v. *Kriedo,* 159 Md. 229, 150 A. 720; *Troyer* v. *Troyer,* 177 Wash. 88, 30 P. 2d 963; *Messmer* v. *Messmer,* (Mo.), 221 S. W. 2d 521; *Harms* v. *Harms,* 302 Ky. 60, 193 S. W. 2d 407. It follows that the chancellor correctly held that the decree was subject to modification.

A more serious question is presented in determining whether there is sufficient proof of changed conditions since the decree to warrant a reduction of the monthly support payments from $100 to $65. We have held that the amount allowed for child support is subject to modification when required by the changed condition of the parties by increasing or reducing the amount according to the necessity of the one and the ability of the other party. *Watnick* v. *Bockman,* 209 Ark. 696, 192 S. W. 2d 131. Appellant contends that if the agreement is not binding as an

independent contract, then the amount for support of the child should be increased rather than decreased.

Both parties have remarried since the decree. Appellee now has a young stepdaughter to support, while appellant's present husband has two children by a prior marriage, and they have one child of their own. Appellee's income at the time of the divorce is not shown, but he has since been promoted to the rank of captain in the United States Army with a monthly income of $489.25. Appellee's only other financial change seems to have come about by his second marriage and his conversion to the Christian faith which entails payment of a tithe of $48 a month. As the child of the parties has grown older, the expense of his support has increased, and it does not appear that appellant's financial condition has improved materially since her remarriage.

While the original consent award may have been higher than the circumstances then warranted, we are of the opinion that there was insufficient showing of such changed conditions since the decree as would warrant a reduction of the monthly payments. The trial court's finding in this regard is, therefore, reversed as being against the preponderance of the evidence. The cause will be remanded with directions to reinstate the monthly support payments of $100 with all costs adjudged against appellee. In all other respects, the decree is affirmed.

Justice ROBINSON dissents as to reinstatement of the monthly payments of $100.

RUTLEDGE *v.* STATE.

4756 262 S. W. 2d 650

Opinion delivered October 19, 1953.

As amended on denial of Rehearing December 21, 1953.

S. M. Bone, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On information charging first degree murder, appellant was found guilty of voluntary manslaughter and his punishment fixed at a term of five years in the State Penitentiary. This appeal followed.

For reversal, appellant, in three of his assignments of error, questions the sufficiency of the evidence. He does not argue these assignments here. We hold, after consideration of all of the testimony, when viewed in the light most favorable to the State, as we must do, that it was ample to support a conviction.

Frank Beel, brother of Joe Beel, the victim in this case, owned a six hundred acre farm. On the day of the tragedy, Frank Beel discovered some fifty head of cattle belonging to appellant, Rutledge, which had entered Beel's pasture through a gap in Beel's fence. He immediately removed the cattle and wired and stapled the gap. A "Keep Out" sign had been posted at this gap for about five years.

Alvie and Vernon Lewis, who were hauling logs for appellant, and had been accustomed to pass through this gap over Beel's property, went to Beel's house and, in effect, demanded that he open the gap, stating that they had been advised by Judge Jeffery to cut the fence if Beel did not open it. Beel refused until he had consulted Judge Jeffery, promising to open it if the Judge so directed. At this point, Alvie Lewis became angry, began cursing, and said: "I am going over there and cut that fence and if you want to see it, be there in 15 minutes, but if you do, I will tell you one g-- damn thing right now, you won't come back." At the time of this argument, appellant was parked in his car about two hundred yards up the road from Frank Beel's home. The Lewis boys then left, followed by appellant.

To reach the point on appellant's land where the logs had been cut, it was necessary to open Clasby's gate, go

across his land, open another gate, then cross Beel's land and open the gap.

After the Lewis boys had departed, Joe Beel and his son, R. L. Beel, got in their pick-up truck to go home and in doing so, it was necessary to pass Clasby's gate. Appellant and the Lewis boys were at this gate when Joe Beel reached it. He stopped and asked appellant not to go through the gap. At this point Alvie Lewis and Joe Beel drew their knives. They soon put up their knives, but continued to quarrel when Alvie Lewis grabbed a shotgun in his truck, put a shell in it, but did not shoot. Joe Beel and his son then left and went home, but soon thereafter Frank Beel arrived and he and Joe procured their guns and started for the gap to ascertain if the Lewis boys had opened it. When Joe and Frank walked down an old road on the Beel property to about fifty feet from the gap, armed as indicated, appellant began shooting at the deceased. Joe and Frank were about eight feet apart at the time and Frank was wounded but Joe apparently was instantly killed by one of appellant's shots. Frank then dropped his gun and ran to Clasby's house. The guns of Frank and Joe Beel were loaded but had not been fired.

While some of the testimony was conflicting, in the circumstances, as indicated, we think it was ample to support the jury's verdict of voluntary manslaughter.

Appellant first argues that "the court erred in overruling defendant's motion to set aside and quash the array of petit jurors, both regular and special lists, named and selected by a jury commission appointed by the court at the present term of this court, and in not ordering the sheriff of the county to select a petit jury," (but see Act 205 of the Acts of 1951). We do not agree. It appears that the regular list of petit jurors, alternates, and specials, previously selected by the jury commissioners at the October term of 1952 was set aside by the court on April 20, 1953, and a new jury commission—, one of whom was a member of the previous jury commission, and alleged to be ineligible, § 39-202, Ark. Stats. 1947—, was appointed by the court to select

the jurors for the April, 1953 term of the Independence Circuit Court.

In effect, appellant argues that an ineligible jury commissioner was allowed to participate in selecting the jury that convicted him.

The record reflects that appellant's verified motion to quash the array of petit jurors was filed May 27, 1953, overruled by the trial court on the same day, and immediately following (on May 27) the case proceeded to trial. There is no showing or contention by appellant that he exhausted his peremptory challenges allowed him by law in choosing the jury, or that he was forced to accept any juror without the right of peremptory challenge. In fact, the record is silent as to whether he exercised any challenges at all. Appellant has failed to show such "substantial irregularity in selecting * * * the jury", § 43-1911, Ark. Stats. 1947, as would prejudice his rights, in the circumstances, because he has not shown that he exhausted his peremptory challenges. Our statute, 43-2725, provides that for prejudicial error only shall the judgment be reversed.

"Our statutes provide that a judgment shall be reversed for prejudicial errors only. The court has held that this statute was passed for the purpose of obviating 'the necessity of reversing judgments of conviction on account of mere errors of form which do not affect the substantial rights of the defendant.' *Lee* v. *State,* 73 Ark. 148, 83 S. W. 916; *Hayden* v. *State,* 55 Ark. 342, 18 S. W. 239. The error in not complying with the statute was not prejudicial in this case, because the defendant selected the remaining juror, and failed to exhaust his peremptory challenges." *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80, 83. See also *Morgan* v. *State,* 169 Ark. 579, 275 S. W. 918.

Next, appellant says: "The court erred over the objections and exceptions of the defendant in permitting the witnesses, V. L. Beel, Faye Beel and R. L. Beel and others to state and testify that the Lewis boys threatened to kill Joe Beel and Frank Beel when such statements, if made,

were said and done in the absence of the defendant," and thus violated the Hearsay Rule.

This testimony as to the alleged threats made by the Lewis boys to Joe and Frank Beel in the absence of the appellant was excluded by the trial court when an attempt was made by the State to introduce it in chief, but later on in the trial, Alvie Lewis had testified on direct examination on behalf of appellant that it was the Beel brothers who made the threats. Then, at this point, the State was allowed to introduce testimony in rebuttal. Faye Beel (daughter of Joe Beel) and others testified that Joe Beel made no threats and that Lewis warned Joe Beel, as above indicated, if he went down to the gap, he wouldn't return. This testimony being in the nature of rebuttal was properly admitted. (§ 43-2114, Ark. Stats. 1947).

Appellant also argues that there was error in admitting certain testimony on the cross-examination of appellant. The testimony complained of and the action of the trial court in connection with its introduction is disclosed by the record as follows: "Q. Do you happen to remember where you were on the 2nd day of February, 1926? I will tell you this—you were at a jury trial in justice of the peace court where you were convicted of disturbing the peace in Pleasant Plains? A. Before what kind of trial? I don't believe so; I don't believe there is any record I was tried before a jury in Pleasant Plains. Q. And fined $50.00 and $1.00 on the other charge by that jury? A. That is possible but I don't recall it. Q. There was a still found on your place October 23, 1952? A. There was not. Q. How far off your place was it and what has been the disposition of that charge? A. You are going to have to explain to me what you are talking about. Q. I'll withdraw the question if you don't want to answer it.

"By Mr. Bone: It is not competent. Now then, we ask the court to instruct the jury that this testimony introduced here which he admitted is no evidence whatever of the defendant's guilt on this charge; that the jury can only consider it in weighing his testimony, it goes to his credibility and that only. By the Court: Alright. Gen-

tlemen, you are instructed that this whole line of testimony that has to do with convictions on the part of the defendant will be considered by you only in weighing the credibility of the witness; it will only go to the weight you will attach to his testimony, and that is all."

The court, in limiting this testimony at the appellant's request and allowing it to be considered by the jury only in so far as it might affect appellant's credibility, did not commit error. *Phillips* v. *State,* 190 Ark. 1004, 82 S. W. 2d 836.

Appellant next contends that the action of the trial court in permitting the instructions to be carried into the jury room by the jury was reversible error. This contention is without merit for the reason that this was a matter within the sound discretion of the court. No abuse of such discretion was shown here. In *Benton* v. *State,* 30 Ark. 328, this court said: "The court had the discretion to refuse or permit the jury to take with them the instructions on retiring to consider of their verdict."

Appellant next says that the court erred in refusing to grant the request of many of the jurors in the form of affidavits, requesting a new trial for appellant, or, in any event, that he be put on probation. Appellant says that their verdict, in effect, was a compromise verdict. We find no merit in this contention. In the circumstances the matter was within the sound discretion of the trial court, as we said in *Black* v. *State,* 215 Ark. 618, 222 S. W. 2d 816: "The motion for a new trial was accompanied by a petition signed by 8 of the 12 members of the trial jury, asking the court to reduce the death sentence to a life sentence, or to grant a new trial. Conceding that the court had this power, its exercise was a matter within the discretion of the court." No abuse of discretion has been shown.

There is still another reason why the action of the court was correct. "The court should not allow an affidavit of a juror impeaching his verdict to be filed, except to show that it was made by lot," *St. Louis, I. M. & S. R. R. Co.* v. *Cantrell,* 37 Ark. 519 (Headnote 5). There is no showing here that the jury's verdict was reached by lot.

Finally, appellant argues that the giving of the general instruction No. 12 by the court was error and says: "It is clearly seen that the same is not responsive to the evidence in this case, assumes facts on matters that should have been left to the jury, is contradictory and very misleading." This instruction, though somewhat long, fully covered the law as applied to the facts and relating to appellant's plea of self defense which he says he solely relied upon. We find nothing in the instruction that would mislead or confuse the jury to the prejudice of appellant. It was not inherently wrong. Appellant made only a general objection. It was his duty, by a specific objection, to point out to the court any vice or error in this instruction in order to afford the trial court an opportunity to make corrections if necessary. This he failed to do. (*Keith* v. *State,* 218 Ark. 174, 235 S. W. 2d 539.)

Other assignments of alleged errors have not been overlooked. It suffices to say that we have examined all and find no error.

Affirmed.

Justice WARD concurs.

JENKINS *v.* STATE.

4754 261 S. W. 2d 784

Opinion delivered October 26, 1953.

Rehearing denied November 23, 1953.

Creekmore Wallace and *Q. Byrum Hurst,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant Bill Jenkins was charged and convicted of murder in the first degree for the killing of Cleo Jones, a 16 year old girl, on February 17, 1952. The jury fixed his punishment at death. At the close of the evidence of the state and at the conclusion of all the testimony, appellant by proper motions challenged the sufficiency of the evidence to sustain the verdict. It is now earnestly insisted that the state failed to prove premeditation and deliberation on the part of appellant.

The evidence disclosed that on the date in question appellant was living on highway 88 near Hot Springs about 500 feet from the home of Lester Cox. Appellant was separated from his wife, who lived about a quarter mile away on the same road. Marie Pitts had been keep-

ing house for appellant for nearly four years. Deceased, Cleo Jones, moved to appellant's home about three weeks before the killing and was employed at a "drive-in" operated by Lester Cox in the vicinity.

On the morning in question, appellant visited a night club from 1 a.m. to 4 a.m., where he drank intoxicants. He then drove his truck to Cox's "drive-in" where he stayed until later in the morning.

On the same morning, Marie Pitts and Cleo Jones decided to go to Pine Bluff to visit Marie's sister, and they had started to town to telephone the sister when they met appellant, who was driving his truck. The two girls entered the truck, and the appellant drove to Cox's drive-in, where they had coffee and spent considerable time. During the drive back to appellant's residence, Marie and the appellant quarreled and the latter became angry about the planned trip to Pine Bluff. The three drove to appellant's residence where they all got out of the truck. Appellant went into his house, and Marie and the deceased walked about 500 feet to the Lester Cox residence. Deceased entered the Cox home, and Marie walked from the porch toward appellant. As she closed the front gate appellant fired three shots at her with a pistol, wounding her in the arm and shoulder.

When Marie fell, appellant walked on to the Cox house with the pistol in his hand, and more shooting occurred in the house. Appellant then walked from the rear of the house, with the gun still in his hand, and stopped momentarily as he observed Marie still lying on the ground. He then drove off in his truck. Shortly thereafter, Cleo Jones was found lying in the doorway of the Cox home that leads from the kitchen to the back porch. There were two bullets imbedded in her brain, and she was unconscious until her death a few hours later. The shooting occurred about 10 a.m., and appellant was apprehended about three hours later while driving his truck. In the meantime, he had engaged in further drinking and was either drunk or in some other kind of stupor at the time of his arrest. There was

nothing in his walk or demeanor at the time of the shooting to indicate to a next-door neighbor that he was then intoxicated.

Lester Cox and appellant were close friends and partners in the livestock business. Cox worked at his "drive-in" until 7:30 a.m. and was home in bed at the time of the shooting. As witnesses for the state, Cox and Marie Pitts were reluctant and hostile, and each claimed to have suffered an unusual lapse of memory concerning certain facts contained in written statements made by them shortly after the killing. They also gave an account of deceased's having poured a phenobarbital solution in appellant's coffee at the Cox "drive-in" shortly before the shooting. This account had not been previously disclosed to investigating officers, and the jury in all probability regarded it as a fictitious afterthought.

Appellant argues that the foregoing evidence, even when considered in the light most favorable to the state, was wholly insufficient to show premeditation and deliberation.

The traditional view of this court on the question of premeditation and deliberation was expressed by Judge BATTLE, speaking for the court, in *Green* v. *State*, 51 Ark. 189, 10 S. W. 266: "In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a very brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence." This rule has been consistently followed by this court.

It is true that we have held that premeditation and deliberation will not be inferred or presumed from the

mere fact alone that the killing was done with a deadly weapon. *Weldon* v. *State*, 168 Ark. 534, 270 S. W. 968. But, we have also held that the premeditation and deliberation required to be shown to warrant conviction of first degree murder may be inferred as a matter of fact from the circumstances of the case, such as the character of the weapons used, the nature of the wounds inflicted, and the accused's acts, conduct, and language. *Bramlett* v. *State,* 202 Ark. 1165, 156 S. W. 2d 226.

Appellant calls our attention to a growing trend of some courts, and more particularly the Federal courts, to hold there must be some "appreciable" time between the formation of the intent to commit a killing and the actual killing.[1] Even in the cases relied on, there is no attempt to set out any particular time within which the intent to kill must be formed. In *McClendon* v. *State,* 197 Ark. 1135, 126 S. W. 2d 928, relied on by appellant, the killing was the result of a sudden fight between the defendant and deceased and this court observed that there was no time for the defendant to meditate or deliberate. We think a different situation is presented in the instant case.

Here the appellant, after engaging in the quarrel with Marie Pitts and the deceased, had time to enter his house and drive to the Cox residence while deceased and Marie Pitts had walked the distance of 500 feet. This afforded sufficient time for a cooling off period and ample time for reflection and consideration. From this and the other circumstances in evidence, the jury was warranted in concluding that the killing was the result of premeditation and deliberation on the part of appellant under our rule.

It is next insisted that an article appearing in a Hot Springs newspaper during the trial prejudiced appellant's right to a fair and impartial trial. The article objected to appears for the first time in the motion for new trial. The record shows that the jury was kept together and fails to disclose that any juror had access to

[1] See 4 Ark. L. Rev. 92.

or read the article. In fact, the matter was never brought to the court's attention during the trial. Under these circumstances there can be no presumption of prejudice arising from the mere publication of the article. As the court said in *Holt* v. *U. S.,* 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day."

Appellant also argues the court erred in one of the instructions on the question of insanity, because it erroneously assumed appellant killed deceased. The record affirmatively discloses that no objections were made by either side to any instructions given by the court. Although Ark. Stats., § 43-2723, provides that in capital cases there need not be any exceptions saved to the rulings of the court, we have repeatedly held that objections must be made to the proceedings complained of, and that there can be no reversal on account of the giving of an erroneous instruction which was not objected to in the trial court. *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477; *Johnson* v. *State,* 127 Ark. 516, 192 S. W. 895. This same rule is applicable to appellant's contention that the court erred in permitting two witnesses on rebuttal to testify that appellant had requested a roadhouse band to play "Shotgun Boogie" shortly before the killing. There was no objection to this and other testimony which the appellant now contends was erroneously admitted.

It is further insisted that the trial court erred in reading the information to the jury as one of the instructions at the conclusion of all the evidence. Aside from the fact that there was no objection to the court's action, we have held that it was proper for the court to read the information to the jury as one of the instructions under the circumstances presented here. *Malone* v. *State,* 202 Ark. 796, 152 S. W. 2d 1091. Our statute (Ark. Stats., § 43-2110) provides that the prosecuting attorney may read the indictment or information to the jury in his opening statement. In the case at bar, the

court observed that this had not been done and proceeded to read the information as one of the instructions without objection by the appellant.

We have examined other assignments of error in the motion for new trial and find them to be without merit. The record discloses that appellant received a fair and impartial trial. The rulings of the trial court on the admissibility of evidence were more favorable to the appellant than he was entitled under the law, and we find no prejudicial error in the record. In our review of the case, we are urged by counsel to consider the fact that appellant is a "Mississippi Choctaw" Indian with an enigmatic personality and a cultural background into which he and his ancestors have been forced over the years. These and other matters have been presented in a convincing manner, but are such as would be more appropriately addressed to the chief executive of the state.

The judgment is affirmed.

CAGLE *v.* GLADDEN-DRIGGERS COMPANY.

5-163 261 S. W. 2d 536

Opinion delivered October 26, 1953.

Lookadoo & Lookadoo and *J. Hugh Lookadoo, Jr.*, for appellant.

Leffel Gentry, for appellee.

GRIFFIN SMITH, Chief Justice. Appellee has the Pontiac automobile agency at Arkadelphia and also buys and sells used cars. For this operation a lot separate from the primary business location is used. In the summer of 1950 Cagle was employed as a salesman and assigned to the used car division. He had worked 47 days when the accident giving rise to this claim under the Workmen's Compensation Act occurred. The commission found that at the time of injury Cagle was not engaged in a mission related to his employment and rejected the claim. Circuit court affirmed, and so do we.

Cagle's employment called for a guaranteed salary of $200 per month. If commissions at 5% with a $60 limit on each car sold amounted to more than $200, he would be compensated accordingly. Permission was given Cagle to keep his own car on the lot and to sell it there or elsewhere if an advantageous offer should be made, but in that event the Gladden-Driggers Company was to be paid $25 to compensate the time presumptively lost to the employer.

On the morning of Sept. 21, 1950, Cagle took his Dodge pickup truck to Hot Springs where it was traded for a Chevrolet. Charles Gladden of the Pontiac company testified that Cagle procured permission to make the trip, Gladden's understanding being that Cagle would be back by one o'clock. Instead, he drove to Arkadelphia in the Chevrolet, then went by the appellee's place of business without stopping, and started for Texarkana. He had bought a bottle of whiskey in Hot Springs and had taken two small drinks. Before going to Hot Springs Cagle talked with Mrs. Mattie Fuller in the Caddo Hotel in Arkadelphia. Mrs. Fuller spoke of her intention to go to Texarkana that afternoon and Cagle proposed taking her in the event he should complete the deal in Hot Springs and secure the Chevrolet. Mrs. Fuller had business at Gurdon and preceded Cagle, but during the afternoon he ascertained that she was on the bus and trailed it for a short distance. Mrs. Fuller got out of the bus and joined Cagle, and the two had reached a point be-

tween Hope and Texarkana when the accident causing appellant's injuries occurred.

There was testimony that Cagle "must have been" driving between 60 and 70 miles an hour and that he was drinking. A highway patrolman testified that he met Cagle, who forced him off the highway. By the time the officer had turned his car to follow Cagle had driven off the highway onto the road shoulder, and in attempting to regain his position he struck a highway department truck, then veered into another truck. The Chevrolet, according to one witness, proceeded 150 feet after striking the second truck and came to a stop after reversing its direction.

Witnesses testifying in behalf of Cagle said that they did not smell liquor. Others thought he was drinking. The inference is clear that these witnesses believed he was under the influence of liquor. The commission, however, chose to base its findings upon the purely personal nature of Cagle's activities when the misfortune occurred.

The rule of general application is that when conflicting evidence is before the commission and a finding for or against the claimant is made on a factual issue, that determination will not be disturbed unless, as a matter of law, it is shown that the evidence upon which the administrative agency acted was without substance.

Affirmed.

SHARPENSTEEN, *et al.* *v.* STATE.

4751 261 S. W. 2d 537

Opinion delivered October 26, 1953.

A. L. Smith, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On a jury trial, appellants were found guilty of violating the provisions of § 67-717, Ark. Stats., 1947 (Acts 1943, No. 232, § 1, p. 486), which provides:

"It shall be unlawful for any person in this State to secure any goods, wares, and merchandise, credit, or anything of value by means of a check or draft drawn upon any bank or institution outside of the State of Arkansas when said check or draft shall be dishonored or payment refused on account of the giver of such draft or check not having sufficient funds on deposit in said bank to pay said check or draft".

Section 67-718: "Any person found guilty of a violation of § 1 (67-717) . . . shall be considered to have obtained such goods, wares, and merchandise, credit or other thing of value by means of false representations made in this State, and if the value of

such goods, wares, and merchandise, credit or other thing of value . . . shall exceed the sum of $25.00, then such person shall be guilty of a felony and upon conviction shall be punished by a term of not less than 6 months and not more than 2 years in the State penitentiary."

Each was adjudged to serve a term in the Arkansas State Penitentiary. This appeal followed.

For reversal, appellants stoutly contend that the undisputed testimony shows that they were guilty of no criminal offense under the above statute and that the trial court erred in refusing their request for an instructed verdict of not guilty at the close of all of the evidence. We have reached the conclusion that appellants were correct in this contention.

It appears that we have not heretofore had occasion to construe the act here in question. Our rule relating to the construction of statutes is well settled. "It is a rule never to be departed from that criminal statutes must be strictly construed. The rule is founded alike upon policy as well as humanity, designed for the protection of the citizen; unless he is clearly charged and proved guilty of a positive enactment of law, he cannot be punished." *Hughes* v. *State,* 6 Ark. 134.

In *Stout* v. *State,* 43 Ark. 415, this language was used: "Penal statutes in declaring what acts shall constitute an offense, and in prescribing punishment to be inflicted, are to be construed rigorously. The general words shall be restrained for the benefit of him against whom the penalty is inflicted. The case of an offender must fall within the words and the mischief to be remedied."

In *Casey* v. *State,* 53 Ark. 336, 14 S. W. 90, Chief Justice Cockrill said: "No case should be brought within a penal statute unless completely within its words, and every reasonable doubt about the meaning of the language should be resolved in favor of the accused."

Appellants had been engaged for several years in buying and selling chickens on a rather large scale, in

Siloam Springs, Ark. They carried a bank account in the Delaware County Bank of nearby Jay, Okla. In early October, 1952, appellants purchased 6,500 pounds of chickens at twenty-seven cents per pound from Bob Edwards in Jane, Mo., which is about two miles north of the Arkansas line. The chickens were delivered by Edwards to appellants on the same day of purchase and carried away by them in their truck. Edwards was told to call for his "pay" in two or three days and he testified that some three or four days later, he went to appellants' place of business in Siloam Springs and received their check drawn on the above bank in Jay, Okla., for the chickens, in the amount of $1,755.00. The check was dated October 10th and Edwards was told not to present it to the bank for payment until the following Monday, October 13th, at which time there would be sufficient funds on deposit to cover it. The record discloses that there were sufficient funds to cover the check on the 13th, 14th, 15th, and 16th of October. However, when the check was presented for payment a day or so after the 16th, payment was refused because of "insufficient funds" and the check had not been paid up to the date of trial.

Under the plain terms of the above statute, violation would occur when "any person" secures "in this State . . . any goods, wares, and merchandise, credit or anything of value by means of a check," etc. Obviously, on the facts here, appellants had bought and received the chickens in Missouri three or four days before they delivered their check to Edwards in Arkansas. By delivering this check to Edwards, appellants secured nothing in Arkansas in addition to the chickens which they already had, which had been purchased in Missouri, and there delivered to them a few days before. This sale and delivery in Missouri constituted, in effect, an open account.

Accordingly, the judgment is reversed and the cause dismissed.

JONES, *et al. v.* ROGERS, TRUSTEE, *et al.*

5-165 261 S. W. 2d 649

Opinion delivered October 26, 1953.

Talley & Owen, Dean R. Morley and *Norman D. Price,* for appellant.

Harry E. Meek and *H. B. Stubblefield,* for appellee.

ED. F. MCFADDIN, Justice. The appellants, Jones and Fields, were the highest bidders at a Commissioner's sale of real estate, conducted under the terms of a foreclosure decree of the Pulaski Chancery Court. When the sale was reported, the Court, by order of April 2, 1953, refused to confirm the sale; and appellants claim that the Court acted arbitrarily in refusing confirmation.[1] We have grave doubts as to whether the appellants have sustained their claim, that the Chancery Court acted arbitrarily; but we need not, and do not, discuss that question, because there is another issue which is fatal to the appellants' appeal: and that is the point of waiver, which we now discuss.

[1] We have many cases holding that the purchaser at a foreclosure sale can appeal from the order refusing confirmation. Some of our cases in which such appeal was taken are *Hinton* v. *Elliott,* 187 Ark. 907, 63 S. W. 2d 633; and *George* v. *Norwood,* 77 Ark. 216, 91 S. W. 557.

The foreclosure sale was held on March 18, 1953, and appellants were the highest bidders, at the figure of $34,500.00. On the same day, the Court made an order permitting these appellants, in lieu of giving bond "with good surety,"[2] to make their personal bond without surety for the amount of the bid, provided the appellants would deposit (which they did) with the Commissioner, the sum of $5,000.00 in cash to apply on the bid if the report should be finally approved. The said order of March 18, 1953, further provided:

". . . but in the event said Commissioner's sale to them is not confirmed by the Court, then said $5,000.00 shall be returned to said Herbert J. Jones and Leon P. Fields without any deductions therefrom and their bond cancelled."

The Commissioner's report of sale was heard by the Chancery Court on April 2, 1953, and after hearing the objections, the Court refused to confirm the report of sale and ordered a re-sale. This order of April 2, 1953, contained this language:

"It is further ordered that the sum of Five Thousand Dollars ($5,000.00) paid to the Commissioner of this Court by said Herbert J. Jones and Leon P. Fields in connection with their bid on March 18, 1953, be returned to them upon request, and that their bond filed herein be and the same is hereby cancelled; . . . And said high bidders, Herbert J. Jones and Leon P. Fields, at the time excepted, asked that their exceptions be noted of record and prayed an appeal to the Supreme Court of Arkansas which appeal is hereby granted."

The appellants perfected their appeal to this Court on April 23, 1953, without making any supersedeas or other bond; and then on June 2, 1953, *withdrew the* $5,000.00 that they had deposited with the Commissioner, and at the same time, endorsed on the margin of the said order of April 2, 1953 (being the order from which they are now attempting to appeal), the following:

[2] Section 51-1109, Ark. Stats., contains the quoted language.

"Received of Arline Turner, Clerk, check for $5,000.00 this June 2, 1953, as set out in this order.

/s/ Leon P. Fields,

/s/ Herbert J. Jones."

By certiorari the appellees have brought before us the foregoing endorsements,[3] and now ask us to dismiss the appeal on the theory that the appellants, by withdrawing the said $5,000.00 deposit, have accepted the benefits of the order of April 2, 1953, and thereby lost all rights to challenge the said order. We hold that the said motion to dismiss should be granted. We have a number of cases recognizing that when an appellant accepts a portion of a challenged order inconsistent with his appeal, he thereby waives his appeal. Some such cases are *Bolen* v. *Cumby*, 53 Ark. 514, 14 S. W. 926; *Cranford* v. *Hodges,* 141 Ark. 587, 218 S. W. 185; *Wolford* v. *Warfield,* 170 Ark. 82, 278 S. W. 639; *Hutton* v. *Pease,* 190 Ark. 815, 81 S. W. 2d 21; *Baker* v. *Adams,* 198 Ark. 482, 129 S. W. 2d 597; *Morgan* v. *Morgan,* 171 Ark. 173, 283 S. W. 979.

There are cases which have allowed an appeal to be prosecuted when the appellant, in accepting benefits under the challenged decree, has accepted only those which would come to him regardless of the decision, and when the part of the decree accepted is independent of the part challenged on appeal. Some such cases are: *Kelley* v. *Laconia Levee Dist.,* 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; and *McCown* v. *Nicks,* 171 Ark. 260, 284 S. W. 739, 47 A. L. R. 332. But these last cited cases are not applicable to the case at bar, as we now demonstrate: when appellants made their bid of $34,500.00 on March 18, 1953, the law required that they make a ". . . bond, with good surety, to be approved by the person making the sale . . .". (See § 51-1109

[3] In *Bolen* v. *Cumby,* 53 Ark. 514, 14 S. W. 926, we approved the practice of this Court receiving "evidence *dehors* the record to establish the fact that the appellant has waived the right to prosecute the appeal; . . ." We further said that where the undisputed facts establishing the waiver are thus adduced to this Court, it is proper to dismiss the appeal.

Ark. Stats.)[4] To avoid the making of the statutory bond, the appellants, with the permission of the Court, granted the same day, gave only their personal bond secured by a cash deposit of $5,000.00. The Court order of April 2, 1953 (here challenged), gave the appellants the right to withdraw the $5,000.00 cash; and, when they did so withdraw the money on June 2, 1953, there were left no secured bond, or any kind of supersedeas. Ever since June 2, 1953, appellants have enjoyed the possession and use of the $5,000.00, which benefits came to them only by reason of the order of April 2nd, because without such order they could not have withdrawn the money. Thus, when appellants withdrew the money, they accepted a benefit entirely inconsistent with their appeal.

It is clear that under the authority of *Cranford* v. *Hodges,* 141 Ark. 587, 218 S. W. 185, and the other cases hereinbefore cited, this appeal must be dismissed; and it is so ordered.

Mr. Justice George Rose Smith not participating.

Smotherman *v.* Blackwell.

5-153 261 S. W. 2d 782

Opinion delivered October 26, 1953.

Rehearing denied November 30, 1953.

[4] The appellants were not parties plaintiff with the right to credit any judgment on the bid, as is sometimes provided in foreclosure decrees.

[redacted]

Kaneaster Hodges, for appellant.

Pickens & Pickens and *Wayne Boyce,* for appellee.

George Rose Smith, J. This dispute involves the ownership of a narrow strip of ground described as the east five and a half feet of Lot 1, Block 9, Dill's Second Addition to the City of Newport. The record title is in the appellees, Mr. and Mrs. Blackwell; but the principal plaintiff-appellant, Vernon L. Smotherman, who owns the adjoining Lot 2, contends that the parties' deeds should be reformed to vest in him the title to the strip in controversy. The chancellor found that although there may have been mutual mistakes as between certain predecessors in the two chains of title, the Blackwells as *bona fide* purchasers acquired title free of Smotherman's equitable right to obtain reformation.

The testimony establishes beyond question that mutual mistakes did occur. When Block 9 was platted in 1911 the north half of the block consisted of eight lots fronting on Malcolm Street to the north. Lots 1 to 7 were each fifty feet in width, but Lot 8 on the east end of the block was only forty-three feet and eight inches wide.

In 1943 the entire block, then unimproved, was bought by the Newport Development Company. To make up for the shortage in Lot 8 the company succeeded in having the city vacate the east five and a half feet of Cedar Street, which lies next to Lot 1 at the west end

of the block. The ordinance provided that title should revert to the abutting owner.

It was undoubtedly the company's intention to redivide the block by moving the lot lines five and a half feet to the west, so that Lots 1 to 7 would be fifty feet wide and Lot 8 forty-nine feet two inches. By an oversight, apparently due to the death of the company's president, no revised plat of the block was filed for record, but the company acted upon the belief that the block had been replatted. Eight houses were built, each in the center of a lot as redrawn. A surveyor prepared and certified as correct an individual plat of each lot, showing each house to be centrally located. In reliance upon these plats a federal agency insured mortgages upon each house, in the belief that the houses were far enough from the property lines to comply with its requirements.

In 1944 the development company began selling the houses to the public. Those original purchasers who testified at the trial say that an officer of the company showed them the property and represented the lots to be fifty feet wide, with the houses situated midway between the side lines. A company official corroborates this testimony. However, the various deeds given by the development company described the lots by number only, and, of course, this is the mistake sought to be corrected. We are convinced that both the development company and its vendees intended to contract in accordance with the lines staked out by the company's surveyor. During the succeeding years the various owners of the eight lots have acted upon the same assumption, constructing their fences, garages, driveways, etc., with respect to the lines that every one believed to be correct. We think it perfectly clear that the original parties acted under a mutual mistake and that all succeeding owners have had the same misconception.

Nevertheless the law permits the Blackwells, by claiming the strip now in question, to dislocate property lines all along the block, unless the proof shows that the Blackwells had notice of Smotherman's equity when they

purchased Lot 1 from James P. Young in July of 1948. On this issue the evidence preponderates in favor of Smotherman. At the time of the Blackwell's purchase there was a fence along more than half of the boundary between Lots 1 and 2, situated approximately on the line now contended for by Smotherman. He had also put in a storm cellar that extended to within a foot of the fence. Even Mrs. Blackwell conceded on cross-examination that she "supposed" that Smotherman had possession up to the fence when she and her husband acquired Lot 1.

No dispute arose between these neighbors until the appellees had the line surveyed in either 1949 or 1950. Their surveyor relied only upon the 1911 plat of the addition, and we infer that for the first time the Blackwells learned that they had a claim to a fifty-five-and-a-half-foot lot. Smotherman, when told of the surveyor's findings, confessed some uncertainty as to the exact location of the boundary line, for the reason that his fence ran at an exact right angle to Malcolm Street, whereas all the plats show the lot lines as deviating by four degrees from a right angle. After some dispute about the survey this suit was filed by Smotherman and several other owners of homes within the block.

The appellees recognize the rule that hostile possession puts a purchaser on notice of the occupant's rights, but they insist that Smotherman's possession would not have ripened into title after seven years, since his fence extended only from the alley to a point opposite the rear of his house. The question, however, is not that of adverse possession; it is whether Smotherman's partial occupancy gives notice of his claim. In a case identical in principle, *Thalheimer* v. *Lockert*, 76 Ark. 25, 88 S. W. 591, we held that it does. There, as here, the description used in the deed was legally good, but it did not include all the land the parties had in mind. There, as here, the first grantee was in possession of only part of the omitted property when the common grantor sold to a third person. It was held that the second purchaser, being put

on notice by possession, took subject to the plaintiff's equitable right to obtain a reformation of his deed.

It is rather ingeniously argued that Smotherman's possession gave notice only of such facts as the Blackwells would have learned had they made inquiries of Smotherman himself, and in 1948 Smotherman was not aware of the mutual mistakes that had occurred some years earlier. The answer is that Smotherman's occupancy gave notice of the ultimate fact—that he claimed to own the land—and a landowner cannot be expected to recite offhand all the evidence that may be needed to establish his title. Had the Blackwells taken the precaution of having a survey made before they bought Lot 1 they would have learned of Smotherman's hostile possession, and they are charged with knowledge of such facts as would have been disclosed by a diligent investigation of his claim. Such an investigation would have led to the discovery of the past events that now entitle him to the relief prayed.

Reversed.

The Chief Justice and Justices McFaddin and Ward dissent.

Harrison *v.* United Farm Agency.

5-157 262 S. W. 2d 293

Opinion delivered October 26, 1953.

Rehearing denied December 14, 1953.

Collins, Core & Collins, for appellant.

Shaw & Spencer, for appellee.

WARD, J. This suit was brought by appellee, O. E. Butterworth, as agent for the United Farm Agency, to recover from appellants the sum of $1,250 claimed as a commission for selling their farm near Mena. It was contended by appellants that appellee was not entitled to any commission because he did not procure the purchaser in accordance with the contract and agreement between the parties. The case was tried, on agreement, before the Circuit Judge sitting as a jury.

Most of the essential facts are not in dispute. On January 14, 1950, while Evelyn Harrison was living at Panama, Oklahoma, and her husband was working near Mena they signed a sales agreement whereby appellee was to sell their farm consisting of 301 acres for $12,500 for a commission of 10 per cent. It later developed that the farm was owned by the wife. On November 15, 1950, appellee, having procured a prospective buyer in the person of Henry C. Vanadore, prepared a lease contract which was signed by H. J. Harrison and the said Henry C. Vanadore whereby the latter leased the premises for $500 for the year 1951. Contained in the lease contract

was an option for Vanadore to purchase said property at the said price of $12,500 at any time prior to November 15, 1951. The lease also provided that Mrs. Harrison should have possession of or collect the rents from a four-room tenant house located on the premises and that Vanadore would give immediate possession at the expiration of the lease.

On September 13, 1951, appellant, Evelyn Harrison, entered into a written contract with Vanadore whereby she agreed to sell him the farm for the price of $12,500, part of which was paid down and the balance to be paid later. Mrs. Harrison agreed that if Vanadore paid her a specified sum by January 1, 1952, she would deliver to him her warranty deed. It was noted in the contract that Vanadore was in possession of the land and would continue in possession as her tenant until January 1, 1952, at which time he would be permitted to remain in possession under the terms of the contract.

Appellants make numerous objections to the findings of fact by the trial judge but two principal grounds are urged for a reversal. First, it is insisted that Mrs. Harrison did not authorize her husband to insert the option clause in the lease contract to Vanadore and she did not know he had done so for 6 or 8 months thereafter; and that she never ratified the same. Second, it is insisted that Mr. Harrison did not own the land and did not sign the sales contract to Vanadore and therefore should not be held liable for part of the commission.

FIRST. It is our opinion that there is substantial evidence to sustain the trial judge in holding that Mr. Harrison was acting as the agent for his wife when he executed the option contract to Vanadore and, to the same effect, that Mrs. Harrison ratified the contract entered into by her husband. We set out below some reasons for this conclusion.

(a) It is not denied that Mrs. Harrison signed the sales agreement with appellee and that it was not disclosed at the time that she was the sole owner of the land. Therefore when, some months later and pursuant to the sales

contract, Mr. Harrison executed the option contract to Vanadore at the instance of appellee it was reasonable for appellee to assume at the time that Mr. Harrison was also acting for or with the consent of his wife.

(b) It is not denied that the $500 rental mentioned in the option contract was paid to Mr. Harrison and deposited in an account to him and his wife, and Mrs. Harrison at no time offered to refund the money.

(c) It is apparent that regardless of whether Mrs. Harrison knew of and approved the option contract at the time it was signed she did know about it in September 1951 [before the option had expired] when she agreed to sell the land to Vanadore. It is also undisputed that Mrs. Harrison was aware that appellee had obtained Vanadore as a prospective purchaser and that Vanadore held a written option to buy the farm.

(d) Mrs. Harrison herself testified that she guessed she accepted the acts of her husband in leasing the property and she says that she okayed the lease contract, but she made no effort to rescind when she later learned it contained the option to buy.

(e) When the sales contract to Vanadore was executed by Mrs. Harrison in September, 1951, she acknowledged therein that Vanadore was in possession of the farm and that he could remain in possession, which indicated she was approving the original lease.

Notwithstanding the fact that the deed from Mrs. Harrison to Vanadore was not executed until January 27, 1952, yet the contract to deliver the deed was, as stated, executed in September, 1951, at a time when Vanadore's option to purchase was still in effect, and she had full knowledge that appellee was solely responsible for procuring Vanadore as a prospective purchaser. In the case of *Harris & Hull* v. *McCarty-Vaughan-Evans Corporation,* 283 P. 111 (Calif.), the purchaser of certain lands sued the owners of the lands for specific performance of a contract of sale which the owners contended was signed by a person not authorized by them. Judgment was given

for the defendant owners but was reversed by the Appellate Court using this language:

"Respondents contend that the contract was not executed by any person having authority to bind the seller. This may be conceded for the purposes of this opinion, but the alleged contract was delivered to the defendants, and, admittedly, the plaintiff paid them, and, with knowledge of the terms of the contract, they accepted four payments thereon, aggregating $1,960.12, which they still retain. This was such a ratification of the contract as to bar any defense on the ground of want of authority to execute it."

As heretofore stated the trial was had before the judge sitting as a jury and of course, his findings will have the same force and effect as the findings of a jury. We cannot say there was no substantial evidence to support the finding of fact that Mrs. Harrison either authorized or ratified the lease-option which was executed by her husband. Somewhat the same situation was considered in the case of *Miller* v. *Green,* 227 S. W. 984, not carried in the Arkansas Reports. The court there stated:

"It was purely a question of fact under the evidence as to whether or not Leatherwood was the agent of the appellant having authority to enter into a contract with appellee to sell her lands. But, if the jury had found that he was not such agent and had no such authority, it was still a question for the jury to determine as to whether or not the appellant had knowledge of his unauthorized acts, and whether or not, having such knowledge, she ratified and approved the same."

SECOND. It was not error for the trial court, under the facts and circumstances of this case, to render judgment against the husband, H. J. Harrison, even though the proof shows that the title to the farm was held in the name of his wife. The undisputed proof shows: (a) Mr. Harrison signed the Listing Agreement wherein he agreed to pay a 10 per cent commission to appellee. The agreement did not show that Mrs. Harrison claimed to be the

sole owner but on the contrary it does show that under both of their names appeared in print the following: "signatures of record owners"; (b) When the lease-option agreement was signed the first rent payment by Vanadore was deposited in the name of both husband and wife; (c) At the time the suit was filed writs of garnishment were issued against the Planters National Bank of Mena and the Union Bank of Mena. The answer to these writs showed that the Union Bank had on deposit the sum of $166.94 in the name of Mr. and Mrs. Harrison, and that the Planters Bank had no deposit for either of them. In addition to the above a garnishment was issued against the purchaser, Henry C. Vanadore, who admittedly still owes money to one or both of the appellants. Since it appears that the proceeds of the sale may have been treated as community property appellee was entitled to a judgment against both to insure the collection of any judgment rendered in his favor.

A similar situation obtained in the case of *Manzo* v. *Boulet,* 220 Ark. 106, 246 S. W. 2d 126, where this court, in holding Mrs. Manzo owed the full commission though she only had a 49 per cent interest in the property, said:

"There is no evidence that Boulet was ever told that the business was incorporated or put on notice that the Manzos meant to employ him on the basis of their stock ownership. On the contrary, the proof is that the Manzos described the physical assets of the business and together agreed to pay the commission if Boulet sold the concern."

It is specifically pointed out by appellants that this case should be reversed because the sale was not consummated within the time provided in the Listing Agreement, citing cases to support this contention. In the usual case appellants' contention would be right. It must be borne in mind, however, that here we are dealing with a series of written instruments which are all linked together and are overlapping. It is our conclusion that, under all of the facts and circumstances previously set forth herein, Mrs. Harrison, by failing to repudiate the lease-option contract when she became aware of its terms and by executing a

sales contract with Vanadore [the purchaser produced by appellee] before the lease-option contract had expired, in effect agreed to an extension of the Listing Agreement. It is abundantly clear that the lease-option contract was a direct result of the Listing Agreement which Mrs. Harrison signed.

In accordance with the views above expressed the judgment of the lower court is affirmed.

ED. F. MCFADDIN, Justice (dissenting). The majority holds that the Harrisons, as the landowners, are liable for a real estate commission claimed by the broker (United Farm Agency and Butterworth), even though the sale of the property was consummated several months after the expiration of the broker's contract. From that holding I dissent. It is my view that the broker is not entitled to any commission in this case, because (a) the sale was not made within the time stated in the broker's contract of employment; (b) the owners are not accused of bad faith; and (c) the owners did no act to extend or waive the time limit set out in the broker's contract of employment.

On January 14, 1950, the owners (Mr. and Mrs. Harrison) listed the farm for sale with the broker, and signed a contract (on forms provided by the broker),[1] which provided in part: "I grant you the right to procure a purchaser, ready, able and willing to buy said property . . .", at the designated price, and "I agree that this contract shall remain in effect for a period of one year, and that when terminated there shall be no charge for expenses, commissions, or otherwise against me. However, if within 90 days after termination I sell the property to a purchaser procured through you or your representative, I will immediately pay you the full commission . . ." The contract was dated January 14, 1950. The year expired January 13, 1951, and

1. The rule that a written contract is to be strictly construed against the writer applies to a real estate broker's contract, as well as any other contract. See *Peebles* v. *Sneed*, 207 Ark. 1, 179 S. W. 2d 156.

the 90 days thereafter expired on April 13, 1951. The sale herein was not made until September 13, 1951, which was 5 months after the year and 90 days provided in the contract.

All of the activities of the broker were conducted by Butterworth. He showed the farm to Mr. Vanadore, who was at that time unwilling to buy, but wished to rent the farm with an option to purchase. Accordingly, on November 15, 1950, Harrison signed such a contract with Vanadore, leasing the farm for one year at a rental of $500.00 cash, and giving Vanadore one year in which to exercise the option to purchase. Butterworth delivered the $500.00 rental money to Harrison, without claiming any commission. No further effort was made by the broker to sell the farm to anyone, and no request was made for a renewal of the contract with the Harrisons. When Vanadore exercised his option on September 13, 1951, the papers were prepared and the trade completed without any services on the part of the broker. The Harrisons did nothing to impliedly extend the broker's contract, or to waive the time limit which the broker had placed in the contract. In allowing the broker to recover in this case, the majority of this Court is saying that if a broker, who has a time limit for completing a sale, can inveigle the owner into leasing the property for any length of time under a contract containing an option for the lessee to buy, then the land owner must pay the broker the commission on the sale if the lessee *ever* exercises the option. I cannot agree with such holding.

The broker's contract in this case stated that he would not be entitled to a fee for a sale of the property unless he produced—within the year and 90 days—a purchaser ready, able and willing to buy; and it is admitted that within that period of time, the broker did not produce such a purchaser. In *McCurry* v. *Hawkins*, 83 Ark. 202, 103 S. W. 600, we held that when the broker's contract of employment stipulated that the sale should be made within a limited time, the broker was *not* entitled to his commission if he failed to produce

a buyer within the time stated. Likewise, in *Murray* v. *Miller,* 112 Ark. 227, 166 S. W. 536, we find this language:

"According to the undisputed evidence in this case, the appellant has not shown himself entitled to a commission, and the Court was correct in giving a peremptory instruction. This is so on two distinct grounds. In the first place, appellant's authority was limited to a specified time, and the rule is that under a contract thus limited the agent must produce a purchaser 'ready, willing and able' to purchase within the time specified. If he fails to do that, he is not entitled to a commission, even though a sale is subsequently made by the owner to a purchaser who had negotiated with the agent. *Brown* v. *Mason,* 155 Cal. 155, 99 P. 867, 21 L. R. A., N. S., 328. This is, of course, subject to the rule that the owner must act in good faith and not hinder or interfere with the agent in his effort to make a sale during the period of the contract. Good faith on the part of the owner is the test of his liability, under a contract thus limited, unless the agent produces a purchaser within the time limited in the contract. *The Addressograph Co.* v. *The Office Appliance Co.,* 106 Ark. 536, 153 S. W. 804; *Greenspann* v. *Miller,* 111 Ark. 190, 163 S. W. 776."

In American Law Institute's Restatement of the Law of Agency, in § 446, the holdings are summarized in this language:

"An agent whose compensation is conditional upon his performance of specified services or his accomplishment of a specified result within a specified time is not entitled to the agreed compensation unless he renders the services or achieves the result within such time, except where the principal, in bad faith, has prevented him from doing so."

As previously stated, there is no claim that the Harrisons acted in bad faith in this case. Furthermore, in the discussion following said § 446 of the Restatement, this appears:

"If, after the time limit has expired, the broker continues his efforts with the seeming approval of the principal who, by his conduct, appears to recognize the agency as subsisting, it may be inferred either that the principal has extended the time within which he is willing to pay the stated commission or that the principal agrees to pay the broker a reasonable compensation (not necessarily the amount previously offered) for subsequent successful efforts of the broker. But the mere fact that the broker continues his efforts to the knowledge of the principal is not enough to warrant this interference, nor is it sufficient that the principal himself re-opens negotiations with a customer previously found by the broker."

The last sentence covers the situation here. Many cases involving similar situations are collected in the Annotation in 26 A. L. R. 784, entitled, "Broker's right to commission as affected by failure to consummate sale within time limited by terms of employment". The rule is well established, and I regard the present holding as a departure from well established cases.

SOUTHLAND TRACTORS, INC. *v.* CLAYTON.

5-161 261 S. W. 2d 539

Opinion delivered October 26, 1953.

Wils Davis, William A. Percy and *DeWitt Poe,* for appellant.

Edwin E. Hopson, Jr., for appellee.

ROBINSON, J. Appellant, Southland Tractors, Inc., hereinafter referred to as Southland, is a distributor of Ferguson tractors and implements and also handles implements of other makes. Appellee Bert Clayton was in the tractor and farm implement business at McGehee, Arkansas, and obtained tractors and implements from Southland. Southland filed this suit against Clayton for the balance of $1,837.52 on a $4,171.99 note and $51.95 on an open account. Clayton filed a cross-complaint for $3,615.42 on an alleged oral contract providing for the return of certain tractors, implements, and parts to Southland. A jury was waived, the court rendered a judgment for Clayton, and Southland appeals.

In obtaining the tractors and implements from Southland, Clayton would pay 10% at the time of purchase. Southland would transfer the title-retaining notes for the balance to a finance company and guarantee the payment. Clayton would pay 10% each 90 days thereafter until he made a resale of the particular item; then the entire balance owed on that item would be paid in full. Clayton got into such financial condition that he could not make the 90-day deferred payments; Southland loaned him $4,171.99 to bring up to date his past-due payments with the finance company; but in a short time Clayton was again behind in his payments.

It was then that Howard Sullins, President and General Manager of Southland, George Walters, Zone Manager, and T. D. Warner, Secretary and Treasurer, all acting for Southland, made a trip to McGehee to see what could be worked out. They first conferred with Clayton at his place of business, but due to the lack of privacy they retired to a hotel room where they held a further discussion. The outcome of this lawsuit depends on the terms of an agreement reached between the parties at Clayton's place of business and in the hotel room.

Southland contends that in the sale of the property to Clayton title had been retained and the only agreement reached with Clayton on the trip to McGehee was that the property would be returned to Southland and the balance

owed thereon cancelled as in a replevin suit. On the other hand, Clayton claims that the property was returned to Southland under the terms of the oral agreement which provided that he was to be allowed credit in a final settlement for the amount he had paid on the property; and that after taking into consideration all debits and credits, Southland owed him $3,615.42. There does not appear to be any controversy as to this being the sum owed to Clayton by Southland after taking credit for the balance owed on the note and open account and after having paid the finance company in full, if Clayton is correct in his claim that he was to get credit for the amount he had paid on the property which he returned to Southland.

The trial court, sitting as a jury, accepted Clayton's version of the transaction and rendered judgment against Southland on the cross-complaint. If there is any substantial evidence to support the finding of the court sitting as a jury, the judgment must be affirmed. *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322.

Clayton states positively that Mr. Sullins said: "Now here is what we will do . . . I want the stuff." Clayton testified: "I said, 'I don't want to lose any money in the deal, no more than I have already.' He said, 'Here is what we will do—I want you to have every dime you have got in the tractors and implements and parts. I don't want you to lose a penny—I want you to get what you have got coming, then if we have got anything coming I want, naturally, to have my part of it. I want you to pay up.' I said, 'That's fair enough, if you give me what I have got in it, all of it, then I am willing to pay up—I don't want any of your money—I am willing to pay if you say I owe anything—just give me what I have got in the business and I will give you the franchise and step out of the picture.' "

Clayton further testified: "Q. Let me ask you if you are positive that they told you that you would get back what you had in the tractors and implements and parts. A. That's right. Q. So far as the parts——(interrupted). A. He said, 'If you have got anything coming we want you

to have every dime of it and if we have got anything coming naturally we want ours.' I said, 'Well, that is fair enough.' He said, 'We will move the stuff out,' and I said, 'Suits me.' "

Royce Ingram, an employee of Clayton, testified that while Sullins and the others were at Clayton's place of business before going to the hotel room he heard a representative of Southland say to Clayton that they would have to take his franchise, but if he had anything coming back to him he would get it.

In addition to the testimony of Clayton and Ingram there are circumstances which tend to corroborate their testimony. There were seven tractors returned by Clayton to Southland, which Clayton had purchased and received about a year before, and on each of which he owed a balance of only about $1,000.00. He testified that before he would have agreed to return the tractors to Southland and receive credit merely for the balance owed, he would have sold the tractors to his neighbors and friends in the farming business. He says that any number of them would have been more than glad to have purchased the tractors for the balance owed to Southland. Clayton's contention in this respect is highly persuasive. It does seem likely that if he was to receive from Southland credit for only the balance owed on these new and unused tractors, instead of the amount he had paid, he would rather have let his friends and neighbors in the community buy the tractors for the balance owed thereon.

Southland claims that a short time before the final agreement Clayton had returned implements receiving credit only for the balance due thereon, and that such fact goes to show that he was willing to return the merchandise on that basis. However, Clayton states that the failure to claim credit for the amount paid was due to an oversight by the person who made the audit. The $3,615.42, the amount of the judgment, is the sum left in Clayton's favor after crediting him for the original purchase price of the returned property and then charging him with the balance due on the note and open account

and the sum paid by Southland to the finance company on Clayton's account.

After reviewing the entire record we are unable to say there is no substantial evidence to sustain the judgment.

Next, appellant says the trial court erred in failing to state in writing conclusions of fact and law separately. The trial was held on August 14, 1952; the court took the case under advisement and no request was made at that time for a statement in writing as to conclusions of law and fact. On October 24, 1952, the court notified the respective counsel that the judgment would be for the defendant on the cross-complaint in the amount sued for. It was not until November 6, 1952, that appellant filed a motion asking that the conclusions of law and fact be reduced to writing. The judgment was entered of record January 17, 1953; the request for special findings of fact was not made upon the trial or during it. In *Globe & Rutgers Fire Ins. Co.* v. *Pruitt,* 188 Ark. 92, 64 S. W. 2d 91, Mr. Justice FRANK SMITH speaking for the court said: "The statute contemplates that these findings shall be made upon the trial, or during it, and a request made thirteen days after the trial was not in apt time."

Affirmed.

MCKNIGHT *v.* GARRISON.

5-177 261 S. W. 2d 794

Opinion delivered November 2, 1953.

Rieves & Smith, for appellant.

J. H. Spears, for appellee.

GRIFFIN SMITH, Chief Justice. Ray L. Garrison operates a ready-mix concrete plant at West Memphis. J. A. McKnight owns a gin at Crawfordsville and is engaged in related plantation enterprises. Prior to January 9, 1952, McKnight ordered from Garrison an unascertained quantity of ready-mix, the general plan being that the amount delivered would be what McKnight could use in a day. The controversy, however, relates to the second load. McKnight's foreman, James R. Crawford, testified that the concrete was being used to build or repair the scale deck where cotton was weighed. This, said Crawford, is the floor of the truck scale. Repair work was in the open.

Before the first truck was unloaded rain began falling, interfering materially with the work. Crawford told the driver not to bring the second load "until it stopped raining". It is not disputed that this message was delivered to an authorized representative of Garrison; but it is likewise undisputed that rain was not falling in West Memphis when the second load was dispatched shortly before noon. When this consignment reached Crawfordsville the downpour had reached such proportions that Crawford thought the concrete would be ruined if it should be unloaded. Crawford testified that he "went to town" (that is, to Crawfordsville) and telephoned Garrison, who told him to look at the delivery boy's ticket and keep him about two hours from the time he left the [West Memphis] plant, then allow 35 or 40 minutes for the driver to return; if it had not stopped raining then, the boy was to be sent back to the ready-mix plant. Garrison testified that he did not remember this conversation.

From this course of conduct McKnight insists that Garrison continued to exercise dominion over the truck and its content and in the circumstances there could be no tender of delivery. Garrison's position is that the message sent by McKnight's representative was literally complied with. It was not raining at the plant when the second load was dispatched. Crawfordsville is but eleven or twelve miles from West Memphis, and the seller had a right to assume that the same conditions prevailed at each place. The ready-mix is designed for use within a few hours after it is prepared, otherwise it solidifies in the container and causes damage.

When the load was returned to West Memphis following McKnight's rejection, Garrison made use of about half of the mix, thus reducing loss to that extent. The bill sent Knight amounted to $51.21, including sales tax. Other amounts owed by McKnight were set out in the complaint, bringing the total to $478.75. All of this indebtedness except the item of $51.21 was tendered when the trial began. Judgment was rendered for the full amount, with interest from January 13, 1953. Appellant thinks that interest should not accrue after the tender in open court. On this question the testimony is not sufficiently abstracted to show error.

We think, also, that after receiving the message relating to rain Garrison had a right to assume that with cessation in West Memphis the way was clear for delivery at Crawfordsville. McKnight's foreman testified that there was no telephone at the gin, and this, to some extent, impaired the seller's opportunity to ascertain whether the condition prevailing in West Memphis also existed at Crawfordsville.

The issue is one of fact and we are not able to say that the court, acting without a jury, was not sustained by substantial evidence.

Affirmed.

Opinion delivered November 2, 1953.

[redacted]

House, Moses & Holmes, Thomas C. Trimble, Jr., and *Charles J. Lincoln,* for appellant.

Earl J. Lane, Michael B. Heindl and *Mallory & Carlisle,* for appellee.

J. SEABORN HOLT, J. August 22, 1952, appellee, Onetha Ross, filed suit to recover damages, alleged to have

been received when she fell in the aisle of appellant's bus because of appellant's negligence in operating the bus. Appellant answered with a general denial and affirmatively pleaded as a defense contributory negligence of appellee and "the defendant's employee, driver of defendant's bus, was forced to make an unscheduled stop at the intersection of Ouachita Avenue and Central Avenue . . ., as the only means of avoiding an accident with another vehicle, which other vehicle's actions were without the control of the defendant or its employee; said stop was necessitated by defendant's employee acting in an emergency to avoid a catastrophe." A jury awarded appellee $3,000 and no complaint is made that this verdict is excessive.

Appellant earnestly insists, however, that there was no substantial evidence to warrant any recovery and "that considering the evidence in the light most favorable to the appellee, there is no question but what the operator of the bus in stopping it at the time the appellee fell and received her injuries, was acting in an emergency and was attempting to avoid a collision which could have resulted in extensive injuries and damages to the lives and property of his passengers and others."

At about 4:20 P.M., February 14, 1952, appellee boarded appellant's bus on the Como Hotel corner on Ouachita Ave. in Hot Springs, without incident. She was the only person to board the bus at that point. While holding to an upright post just behind the driver, she paid her fare, procured a transfer, and while still holding to the post, the driver started the bus in motion, throwing appellee off balance. Some seven or eight other passengers on the bus at the time were all in their seats. She stumbled forward in an effort to secure a seat in the rear of the bus, and on account of the quick take-off and speed of the bus which "was going unusually fast," she had to strain forward, holding on from seat to seat, as she proceeded. She testified: "Q. And about how many steps did you take, Onetha? A. About three or four, I just got about half way of the bus. Q. What caused you to fall? A. A sudden stop of the bus. Q. What kind of a stop

was it? A. He stopped, I thought he stopped—the distance that he drove the red light, I thought, well, it just caught him, but I couldn't tell positive. Q. Well, what kind of a stop was it? A. It was just a sudden stop. . . . Q. And what happened after that? A. That gave me a sling and I commenced stepping backwards, and when I fell my head was right up where he could look down on me." Appellee fell on her back with such force that her back was broken in two places and a bone just above the elbow was badly fractured, pronounced by a doctor as a "badly shattered fracture." Appellee spent thirty-three days in a hospital.

Other witnesses tended to corroborate appellee. Georgia Dunwood testified: "A. Well, when the bus stopped, it usually stopped there at the Como, why she walked in like me or you or anyone, she just walked in, she dropped her money in over there where you register, then she stood waiting for her transfer and he gave her the transfer and so he just pulled right off, and so she turned around and when she turned around while he was pulling off that just gave her a stumble you know, to make a step and she did make a step, the first seat running this way and the seat running this way there at the corner, and when she got there she fell back, and then when he made that jerk why she just fell back and went right back under him. Q. What kind of a jerk was it, Georgia? A. Well, he got on the brakes I guess, he must have just checked up like that— Q. Well, when the bus driver jerked like that, how did you react? A. I, all the rest of us—all of us kind of jerked. All together like that, we all jerked. Q. Everybody jerked, even the people sitting down, is that right? A. Yes, give us all a jerk. Q. You saw Onetha fall? A. Yes, sir. I saw her fall." She was seated at the time in the rear of the bus and saw another car "right in front of the bus" going in the same direction.

While there was evidence on behalf of appellant, denying that there was any negligence in the sudden stopping of the bus, we hold that the above testimony was

sufficient to support the jury's verdict under our well established rules in actions of this nature.

In *Capital Transportation Company* v. *Howard,* 217 Ark. 333, 229 S. W. 2d 998, we announced the rule in this language: "Before appellee would be entitled to recover, the burden was on her to show, by some substantial testimony, that her fall and consequent injuries resulted from a violent or an unusual jerk, amounting to negligence on the part of appellant in operating its bus. We so held, in effect, in such cases as *St. Louis-San Francisco Railway Co.* v. *Porter,* 199 Ark. 133, 134 S. W. 2d 546; *Missouri Pacific Railroad Company* v. *Baum,* 196 Ark. 237, 117 S. W. 2d 31, and *Missouri Pacific Transportation Co.* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958.

. . . . . .

"The same standard of care is required in the operation of trains, buses, street cars and trolley buses. Our rule is well settled that we must affirm where there appears any substantial evidence to support the jury's verdict. It is also our duty to view the evidence in the light most favorable to the appellee, giving to it, its strongest probative value, in her favor, with every reasonable inference deducible from it, whether from all the evidence presented or from appellee's testimony only. *Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575, and *St. Louis Southwestern Railway Company* v. *Holwerk,* 204 Ark. 587, 163 S. W. 2d 175", and in *Pugh* v. *Camp,* 213 Ark. 282, 210 S. W. 2d 120, we said:

"It is well settled that a verdict should be directed against a party only when there is no evidence tending to establish an issue in his favor, when viewed in the most favorable light to him. *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328. Or, stating it another way, 'If there is any evidence tending to establish an issue in favor of a party, it is error to direct a verdict against him.' Headnote 1, *Scott* v. *Wisconsin & Ark. Lbr. Co.,* 148 Ark. 66, 229 S. W. 720."

The many cases relied upon by appellant to support its contention that it was entitled to a directed verdict

are all, we think, distinguishable on the facts peculiar to each.

Among those cases is the above case of *Capital Transportation Company* v. *Howard,* one of our most recent cases. In that case, the plaintiff alleged that she was caused to fall in the rear of a bus just before reaching her seat when there was a sudden jerk or "snatch" of the bus, causing her to fall to the floor and injuring her. We there said that no witness "testified that there was a violent or unusual jerk, . . ." and "it is highly significant that appellee was the only passenger on the bus, wherein other passengers were standing, to receive a fall or injury, and made no complaint to the bus driver."

As indicated, in the present case, all passengers were seated at the time that appellee fell and it appears that all noticed and received a sudden jerk of the bus. Appellee, the only one standing, was thrown so violently on her back on the floor of the bus, within a few feet of the bus driver, that she suffered a broken back, a badly shattered fracture of the bone above the right elbow and was so painfully and seriously injured as to require hospitalization for thirty-three days.

We now consider appellant's defense that its driver's sudden stop of the bus was without fault on his part and an act of emergency, in the circumstances. We hold that whether the bus driver was confronted with such an emergency, which would absolve appellant from liability, would depend upon whether the bus driver was himself free of any negligence in creating the emergency. This presented a jury question. The general rule, which is in accord with our own, is stated in *138 A. L. R.,* p. 229, (b) in this language: "The inference of negligence on the part of the operator of a motor vehicle that arises from evidence of a violent and unusual jerk or jolt of the vehicle may be rebutted by proof that a sudden stop or turn was necessary to avoid a collision or some other unexpected emergency. . . . However, the defense of sudden emergency is not available unless the party who invokes it is himself free from fault in creating the emergency."

Appellant offered evidence that the driver stopped suddenly in an effort to avoid colliding with an automobile that was entering the street intersection from his right and thus avoid injury to his passengers and to others. On this point, the bus driver (Scott) gave this version: "Q. When did you first see that car? A. Well, just a second or two, I guess before it turned there, because I wasn't expecting a car coming from there because I had a green light and they were supposed to stop on a red light. Q. How fast would you say the car was going? A. Oh, I'd say around 15 miles an hour, maybe. . . . Q. When did you first notice this other car that you state turned in front of you? A. Oh, just a second or two before I stopped. Q. You didn't notice the car before that? A. I noticed the car on the other street, but I didn't notice this particular one. Q. How far did you miss that car? A. I'll say just a couple of feet, maybe."

In the circumstances, it was for the jury to say whether Scott was keeping a proper lookout to his right for traffic. He appears to make no claim of obstructed view and admitted that the car in question was going slowly, about 15 miles per hour. The jury may have found from all of the evidence that Scott was looking straight ahead and driving unusually fast in order to beat a red light. In a situation somewhat similar, we said in *Missouri Pacific Transportation Company* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242: "The jury may have concluded from this evidence that C. W. Raines (carrier's bus driver) was traveling at an unreasonably dangerous rate of speed and was the author of the jam or emergency he claimed to have gotten into. One cannot negligently create a dangerous situation and escape liability on the theory that he acted as he did under the impulse of the moment."

Affirmed.

5-159 261 S. W. 2d 795

Opinion delivered November 2, 1953.

[redacted]

Walter L. Brown, for appellant.

Claude E. Love, for appellee.

ED. F. MCFADDIN, Justice. The location of the boundary line between the Church property and the Eiland

property resulted in this litigation, which now reaches this Court in (a) an appeal from a *nunc pro tunc* order, and (b) an appeal from the refusal of the Court to grant a bill of review. We give the chronology of events:

(1) On September 6, 1950, Parkers Chapel Methodist Church[1] (hereinafter called "Church") filed suit against Mr. and Mrs. Eiland (sometimes hereinafter called "Defendants") in the Chancery Court, alleging, *inter alia,* that the defendants had constructed a fence which encroached on the Church property, and praying that the defendants remove the fence and return to the Church the possession of a triangular strip, being approximately 240 feet on each side, with a base of approximately 30 feet. The defendants denied that the Church owned the disputed strip, and pleaded title, adverse possession, etc.

(2) On December 15, 1950, the cause was tried in the Chancery Court, and a decree rendered which awarded to the Church the disputed triangular tract. A tract was described in the decree in a long description of several hundred words, and the decree then used this language:

"IT IS THEREFORE considered, ordered, adjudged and decreed by the Court that the title to all of the lands in dispute in this cause and which is situated South of the Old Fence, as originally situated as described above, be and the same is hereby quieted and confirmed in Plaintiffs; . . ."

(3) On June 26, 1951, the defendants (*i.e.* the Eilands) filed *their petition* for a *nunc pro tunc* order, claiming that the decree of December 15, 1950, failed to correctly describe the disputed strip, in that the decree took too much land from the defendants.

(4) On February 15, 1952, the Church filed *its petition* for a *nunc pro tunc* order, claiming that the decree of December 15, 1950, failed to correctly describe the dis-

[1] The Trustees of the Church made affidavit that they were authorized by the Quarterly Conference to bring the suit, and no question was made as to proper parties.

puted strip, in that the decree did not award the Church sufficient land.

(5) On November 3, 1952, the Chancery Court heard the two petitions for *nunc pro tunc* and entered an order in accordance with the petition of the Church. From that order of November 3, 1952, the defendants have appealed; and their contention will be hereinafter discussed under the Topic, "*Nunc Pro Tunc* Order".

(6) On January 21, 1953, the defendants (*i.e.* the Eilands) filed their petition for bill of review, alleging: (a) that after the lapse of time for appeal from the original decree of December 15, 1950, the Court—by order *nunc pro tunc*—had materially changed the boundary line described in the 1950 decree; (b) that the defendants had newly discovered evidence which would prove that the line was erroneous as designated in the *nunc pro tunc* order; and (c) that the defendants' right of appeal had been lost without any fault. The Church resisted the petition for bill of review; and after a hearing, the Court, on April 3, 1953, denied the bill of review. From such denial, the Eilands appeal, and their contention will be discussed under the heading, "Bill of Review."

Order Nunc Pro Tunc

We have a number of comparatively recent cases, each involving the entry of an order *nunc pro tunc,* and some of these cases are *Hall* v. *Castleberry,* 204 Ark. 200, 161 S. W. 2d 948; *Mitchell, et al.* v. *Federal Land Bank,* 206 Ark. 253, 174 S. W. 2d 671; *Richardson* v. *Sallee,* 207 Ark. 915, 183 S. W. 2d 508; *Brooks* v. *Baker,* 208 Ark. 654, 187 S. W. 2d 169; and *Irby* v. *Drusch,* 216 Ark. 130, 224 S. W. 2d 366. In *Hall* v. *Castleberry,* we quoted from earlier cases in this language:

" 'The purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred and as often announced by this court, "The authority of the court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken." *Lourance* v.

Lankford, 106 Ark. 470, 153 S. W. 592, Ann. Cas. 1915A, 520.' ''

In making the *nunc pro tunc* order in the case at bar, the Court was obviously describing the land that the Court awarded to the Church in the decree of December 15, 1950, but which, by clerical misprision, failed to be properly described. We also have several cases in which it is recognized that the recollection of the Trial Judge is an important factor in determining what was the original decree sought to be entered by order *nunc pro tunc.* See *Bertig* v. *Grooms,* 164 Ark. 628, 262 S. W. 672; *St. Louis-San Francisco R. Co.* v. *Hovley,* 196 Ark. 775, 120 S. W. 2d 14; *Bobo* v. *State,* 40 Ark. 224; and *Hall* v. *Castleberry, supra.* The same Trial Judge who entered the *nunc pro tunc* order of November 3, 1952, had tried the case and viewed the premises herein involved, and had made the decree of December 15, 1950. Both in the decree and the order *nunc pro tunc,* there is the recitation that the Trial Judge, with the consent of the parties, made a personal examination of the "disputed lands and premises involved herein." Thus, we have the *nunc pro tunc* order supported by the Judge's personal recollection. Under the rationale of the holdings in our cases, above listed, we sustain the *nunc pro tunc* order herein challenged.

Bill of Review.

In their bill of review, the Eilands claimed: that they took some pictures of the premises in 1946 or 1947; that these pictures could not be found at the time of the trial in 1950; that they had recently been discovered; and that they were tendered to the Court in the bill of review. The Eilands claimed that these pictures showed that the property line should not be located as it was, either in the original decree, or in the *nunc pro tunc* order. Thus, the bill of review claimed to be based on newly discovered evidence.

In *Richardson* v. *Sallee,* 207 Ark. 915, 183 S. W. 2d 508, in discussing a bill of review on the ground of newly discovered evidence, we listed three rules, *inter alia,* as applicable to the granting of such a review:

"1. The pleading is addressed to the sound discretion of the trial court. For bill of review cases, see *Webster* v. *Diamond,* 36 Ark. 532; *Smith* v. *Rucker,* 95 Ark. 517, 129 S. W. 1079, 30 L. R. A., N. S. 1030; . . .

"2. The newly discovered evidence must be material, not merely cumulative, but sufficient to change the result of the original trial. For bill of review case, see *Killion* v. *Killion,* 98 Ark. 15, 135 S. W. 452; . . .

"3. The newly discovered evidence must be such as could not have been discovered at the original trial by the exercise of reasonable diligence. For bill of review cases, see *Bartlett* v. *Gregory,* 60 Ark. 453, 30 S. W. 1043; *Davis* v. *Hale,* 114 Ark. 426, 170 S. W. 99, Ann. Cas. 1916D, 701; *Jackson* v. *Becktold Ptg. & Bk. Mfg. Co.,* 97 Ark. 415, 134 S. W. 629; *Long* v. *Long,* 104 Ark. 562, 149 S. W. 662. . . ."

Tested by these three rules, we cannot say that the Court abused its discretion in denying the bill of review. The Trial Judge had personally observed the disputed lands and premises and had the pictures before him when he heard the evidence offered in support of the bill of review, so he knew just how material these pictures were to the case. Furthermore, there is a serious question as to the diligence on the part of the Eilands in failing to find the pictures prior to the 1950 trial, or to mention them at that trial.

We affirm the Chancery Court in the rulings here challenged.

RAND *v.* THWEATT, ADMINISTRATOR.

5-184 261 S. W. 2d 778

Opinion delivered November 2, 1953.

Rehearing denied November 30, 1953.

McMillen & Teague, for appellant.

Rose, Meek, House, Barron & Nash, for appellee.

MINOR W. MILLWEE, Justice. The facts in this case are stipulated. Rosa L. Rand De Mers was the widow of J. C. Rand and had been married to A. N. De Mers for several years in May, 1946, when she executed her will. She became incompetent in December, 1946, and died January 29, 1953, leaving an estate valued at $278,000.

In the first paragraph of the preamble to her will, testatrix relates how the estate had been acquired by the hard work and frugality of her first husband and her own labor and sacrifice after his death. In the second paragraph, testatrix gave her reasons for the small bequest to her second husband, A. N. De Mers. The third paragraph describes the nature and location of her properties. The fourth paragraph of the preamble reads: "I have a sister, Mrs. Frank Oliver, now residing in Memphis, Tennessee, with her daughter, Anna Oliver Taylor, residing also in Memphis; the six children of my deceased brother, John Sherrod; the two brothers of my deceased husband, J. C. Rand; and my husband, A. N. De Mers; and also a true, tried, and trusted friend named herein below, and it is among these that I do devise and bequeath my properties in the respective portions unto each as herein named below".

After directing the payment of funeral expenses and debts, and specific bequests of $10 to A. N. De Mers and $5,000 to the friend, Mrs. Minnie Halliburton, the will provides: "All the rest and residue of my personalty and realty, wherever situated and located, I do hereby give, devise and bequeath the same unto the following persons in the respective proportions, to-wit:

"To my sister, Mrs. Frank Oliver, now residing in Memphis, Tennessee, and her daughter, Anna Oliver Taylor, also of Memphis, Tennessee, an undivided one-fourth interest in and to same.

"To the six children of my beloved deceased brother, John Sherrod, said children with their names and addresses as follows:

1. Hazel Sherrod Adams, 201 South Maple Street.
2. Maude Sherrod Brown.
3. Grace Sherrod Hopper, Helena, Arkansas.
4. Frank Sherrod, Detroit, Michigan.
5. George Sherrod.
6. Rose Sherrod Seaton, Detroit, Michigan,
   Five thousand ($5,000.00) Each;

"Unto the two brothers of my beloved first husband, J. C. Rand, Charles Rand, residing in the State of Massachusetts, and Henry Rand of Portsmouth, New Hampshire, an undivided one-fourth interest in and to said property as above, same to be divided among them in the proportions as above set out. (Italics supplied.)

"If, after the above bequests are paid, there remains any rest and residue of my estate, then the net proceeds of the remainder shall be divided with each of the beneficiaries heretofore named above, except A. N. De Mers, share and share alike."

Henry Rand predeceased the testatrix. Interested parties filed petitions to construe the will to determine whether a class gift or a gift to them as individuals was made to Henry Rand and Charles Rand, under the above devise and bequest to them. The trial court found that a gift to individuals was intended, that the one-eighth interest devised and bequeathed to Henry Rand therefore lapsed and should become a part of the residue to be distributed to the other beneficiaries designated in the will, except A. N. De Mers.

A review of the cases demonstrates that courts are somewhat hesitant to lay down any hard and fast rule for determining whether a gift is to a legatee individually or as a member of a class. Appellant relies strongly on the rule stated in 57 Am. Jur., Wills, § 1259, as follows: "The only universal rule for determining whether testamentary gifts to several persons are gifts to them as a class rather than as individuals is to ascertain the intention of the testator, which it is everywhere conceded, is controlling. The decisive inquiry is whether or not the testator, in making the particular gift in question, did so with 'groupmindedness,' whether, in other words, he was looking to the body of persons in question as a whole or unit rather than to the individual members of the group as individuals; if the former, they take as a class. Any additional circumstances which may be seized upon, such as the general scheme of the will, the manner and form in which the beneficiaries are designated, the particular language used, or the relationship of the parties and the cir-

cumstances surrounding the testator, are to be regarded merely as aids in ascertaining the testatorial intention."

There is another settled general rule that is equally applicable to the case at bar, to the effect that where a bequest or devise is made to beneficiaries designated by name, they take as individuals rather than as a class, in the absence of a contrary intention appearing elsewhere from the will, or the surrounding circumstances. The rule is stated in Page on Wills, § 1049, as follows: "If the gift is made to beneficiaries by name, the gift is, *prima facie,* not one to a class, even if the individuals who are named possess some quality or characteristic in common.

"Where there is a gift to a number of persons who are indicated by name, and who are also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class.

"The context, however, may show, that the names of the beneficiaries were added to the description of them as members of a class for the purpose of greater certainty, and that the paramount intention of testator was to make the gift to a class. In such case the gift will be treated as one to a class even if the names of the beneficiaries are given in the will. . . .

"If the will gives the number of the members of the class, this is *prima facie* a gift to them individually; the class being given merely by way of identification or description.

"If the names of the members of the class as well as the number of the members are given, the inference is quite strong that the gift is to individuals, and not to a class." See also, 57 Am. Jur., Wills, § 1261; annotations: 75 A. L. R. 773, 105 A. L. R. 1394.

In attempting to ascertain the intent of the testatrix in the case at bar, we have only the will itself, unaided by any extrinsic evidence or circumstances. In the devise and bequest under consideration it should be noted that the

testatrix not only named the beneficiaries but also gave their number, address, and relationship. There can be no doubt that under the authorities generally a strong *prima facie* case is thus made in favor of a gift to individuals distributively and against a gift to a class. The difficult and controlling issue is whether that presumption is overcome by the language, form, or general scheme of the will as reflected by the context of the will as a whole. Appellant points to the fourth paragraph of the preamble to the will where the testatrix lists her beneficiaries and insists that "groupmindedness" is definitely established by the form, punctuation and groupings of the beneficiaries, together with the general context of the will. In answer appellees point to the fact that such grouping of relatives is only natural and logical and that an intent to make a class gift could easily have been indicated by words of survivorship as between Henry and Charles Rand, or the other beneficiaries, if such gift had been intended.

In most of the cases where wills have been construed to have created a class gift, the devise or bequest has been to "children", "brothers", "heirs", or to some other group of persons without specifically naming the beneficiaries. See *Martin* v. *Gray,* 209 Ark. 841, 193 S. W. 2d 485. In those cases where a class gift was held to have been created despite the fact that the beneficiaries were named, there are presented important factors either in the language of the will itself or the surrounding circumstances sufficient to repel and outweigh the inference arising from the naming of the beneficiaries. We agree with the trial court that the context of the will under consideration does not present sufficient indication of a class gift to overcome the *prima facie* presumption of a gift to Henry Rand and Charles Rand as individuals. The judgment is accordingly affirmed.

George Rose Smith, Justice, not participating.

Paul Ward, Justice, dissenting. I am unable to agree with the majority opinion in this case for the reasons hereinafter set out. The general and universally

accepted rule governing the construction of wills is to ascertain the intention of the testator, and this is the rule in this state. From *Morris* v. *Lynn,* 201 Ark. 310, at page 311, 144 S. W. 2d 472, we quote the following:

"As said by this court in *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417, 'All our cases are to the effect that the object in construing wills is to ascertain the intention of the testator. This must be done from the language used as it appears from the consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will.' "

All other rules, such as those discussed in the majority opinion, are to be used merely as aides to ascertain the intention of the testator. The only exception that comes to my mind would be where some established rule of law or property would prevent giving effect to the intention of the testator, and certainly this is not the situation here.

It is true that in this case there is no extrensic evidence to throw any light one way or the other on the intention of the testatrix but that is not essential because, as appears in the above citation, the intent must be gathered from the contents of the will itself. A careful consideration of the contents of the will under consideration convinces me that the testatrix intended to give an undivided one-fourth interest to the two brothers, Charles and Henry Rand and not to give an undivided one-eighth interest to each of them as the majority opinion holds. Listed below are some of the things gathered from the will which we think show this intent.

(a) The will shows a definite logical grouping of the beneficiaries which indicates the testatrix was thinking in groups and so intended to divide her property. One group is her sister and her sister's daughter; another group is the six children of her brother; and

another is the two brothers of her first husband—the group with which we are concerned.

(b) The matter of relationship to the testatrix is something that should be taken into consideration. See 57 Am. Jur. Sec. 1266. It is clear from a casual reading of the will that the testatrix thought a great deal of her first husband, giving him credit for accumulating most of her estate. It appears only natural therefore that she would desire a sizeable portion of her estate to go to his heirs.

(c) If the testatrix had wanted each of the two brothers to receive only a one-eighth interest it would have been very easy to say so. So it seems significant that she chose to give an undivided one-fourth interest to Charles Rand and Henry Rand. To my mind it is farfetched and unreasonable to say that the testatrix gave any consideration whatever to Ark. Stats. § 50-411 which gives effect, under ordinary circumstances, to such a devise.

The fact that the two brothers were mentioned by name does not necessarily preclude a class designation. It is so recognized in Page on Wills in the portion copied in the majority opinion. Conceding the general rule that the giving of names and addresses is, in some instances, *prima facie* evidence against a class devise it must still be remembered that this rule is to be used only in an effort to determine the intention of the testator. Under the wording of the will under consideration I am unable to understand how any light is thrown on the intention of the testatrix simply because she gave the names and residences of the two brothers. At any rate any indication of intention from this source is minor as compared with the intention gathered from a reading of the entire will.

Justice Robinson joins in this dissent.

5-160 261 S. W. 2d 793

Opinion delivered November 2, 1953.

[redacted]

Harold L. Hall, for appellant.

Ed E. Ashbaugh, for appellee.

Paul Ward, J. W. H. McKnight, appellant and plaintiff below, filed suit in the Chancery Court against F. E. Tate, appellee, asking to have appellee restrained from obstructing the use of an alley in Block 20 Bellview Addition. The material allegations of the complaint are: That appellee is the owner of lots 4, 5, and 6 in said Block 20; that a 20-foot alley bisects said block running east and west, and; that said alley was dedicated to the public use in a Bill of Assurance of Bellview Addition of Pulaski County. It is further alleged that the defendant has erected a fence across said alley, blocking the same, and depriving the plaintiff and the public of the use of said alley.

To the above complaint appellee filed a demurrer on the ground that the complaint does not state a cause of action, and the same was sustained by the trial court. It is our conclusion that the trial court was correct.

The rule is, in such instances, that a private citizen cannot complain of an encroachment upon a city street or alley unless he can show special damage aside from that suffered by the general public. In *Kennedy* v. *Crouse,* 214 Ark. 830, at page 833, 218 S. W. 2d 375, the rule was concisely stated in these words: "But a private citizen cannot complain of an asserted encroachment upon a street unless he can show special damage aside from that suffered by the general public."

We have repeatedly held that special damage accrues to one who has been deprived, by the obstruction of a street or alley, of the right of ingress and egress to and from his own property. From our opinion in *Sullivant* v. *Clements,* 180 Ark. 1107, 24 S. W. 2d 320, we quote: ". . . and this court has held that the deprivation of an entrance to, or exit from, one's property is a special or peculiar damage to him, different from that suffered by the general public, and for which an action will lie." (Citing other cases.)

The complaint here fails to state facts sufficient to bring it under the above rule. In *State ex rel. Letta* v. *Marianna,* 183 Ark. 927, at page 933, 39 S. W. 2d 301, the court said: "While the petitioner alleges that he has been damaged, no facts are stated as a basis for this statement . . ."

The complainant here merely states that he and the public have been deprived of the use of said alley, but fails to state facts to show in what manner he, any more than the general public, has been damaged.

The complaint being insufficient to state a cause of action, the demurrer was properly sustained.

Affirmed.

Opinion delivered November 2, 1953.

[redacted]

Josh W. McHughes, for appellant.

Merle Shouse, for appellee.

SAM ROBINSON, J. Appellant, H. & P. Manufacturing Company, hereinafter referred to as H. & P., is in the sawmill business and filed this suit to enjoin and restrain T. N. Hanson, a former employee, from disposing of any of the company's property or going onto the premises of the company at Marshall, Arkansas; and asked judgment against Hanson for damages alleged to have occurred by reason of his action in dismantling a portion of the company's mill. A temporary restraining order was issued without notice. Hanson filed a cross-complaint alleging the company was indebted to him for wages earned and that in addition he was entitled to recover the penalty provided by Ark. Stat., § 81-308 because of the company's failure to pay his wages within seven days after his discharge. He further alleges he is entitled to $1,000 of H. & P. stock under the terms of a previous contract of employment. He also seeks damages for tools he left on the company's premises which he claims were lost by reason of the injunction preventing him from going on the property and recovering them. There was a judgment for Hanson on the cross-complaint for wages in the sum of $390, penalty in the sum of $715.85, $300 for loss of tools, and stock having a face value of $1,000. H. & P. appeals, but makes no contention here that Hanson is not entitled to the $1,000 in stock.

In May, 1950, the appellant company and appellee Hanson entered into a contract of employment covering a period of five years; but on or about May 1, 1951, by mutual agreement of the parties this contract was terminated. Hanson continued to work for the company at the weekly salary of $84.23. In May or June of 1951 H. & P., due to financial difficulties, closed its plant and laid off all employees with the exception of Hanson, who was retained on the payroll because at that time the company owed him accumulated wages which it was unable to pay. There was no actual work for him to do and as he expressed it, he just "piddled around".

Finally in July, 1951, H. & P. realized it could no longer carry Hanson on the payroll while trying to raise the money to pay his back salary; therefore he was given

notice that he would not be credited with a salary after August 4. Hanson then made a trip to Little Rock where after a conference with the State Labor Commissioner he called on the president of H. & P. and made a demand for his past-due salary, which at that time amounted to $1,086.48 less a credit due the company in the sum of $98.88 for property sold by Hanson during February and March. There was apparently no ill feeling between the parties; H. & P. was simply unable to pay Hanson's salary and he realized it. It appears that by way of an amicable settlement it was agreed between the parties that Hanson would return to Marshall and sell enough of H. & P.'s property to pay his past-due salary in full.

There is a dispute as to just what property Hanson was authorized to sell. The president of H. & P. says he was authorized to sell what was known as the Hogue tract of timber, and rough lumber and logs on the mill yard; Hanson says he was authorized to sell any and all company property. In any event, in August and September Hanson sold some of the personal property amounting to $597.60, leaving a balance of salary owed to him of $390. Hanson dismantled the mill to some extent, but it appears the parts were stored on the mill property where they were protected from the weather; and we do not think H. & P. has been damaged due to the fact that a portion of the mill was disassembled.

Later Hanson ran an ad in a local paper to the effect that practically all of the company's personal property would be sold at a certain time and place to the highest bidder. When the president of H. & P. learned of the ad, he caused this action to be filed and got a temporary restraining order enjoining Hanson from disposing of any of the property and from going onto the mill property.

Hanson says he lost valuable tools which were on the company property at the time the injunction was issued. He was given notice his connection with the company would be severed August 4 and when he left his tools there after that date he did so at his own risk; the temporary injunction was not issued until October 9. It is not shown that the company had any reason to believe

Hanson had left tools on the premises when his pay was stopped; and it is not shown the tools were lost due to any negligence of the appellant company.

Next, Hanson is not entitled to recover a penalty by reason of the company's failure to pay his salary in full August 4 when he was removed from the payroll. It is true he demanded his salary two days later, but he then entered into an agreement to help dispose of certain property in order to raise the money to pay his salary. Moreover Hanson conferred with the president of H. & P. with reference to his salary on August 6, only two days after his salary stopped, and it does not appear that he called for his check at the expiration of seven days or notified H. & P. where to send it. Seemingly he was satisfied with the arrangement whereby he was authorized to sell company property to raise funds with which to pay his salary. If he had called for his money after the seven-day period, or had notified the company where to send it, perhaps the company would have suspected he was going to seek a penalty and by a supreme effort might have been able to raise the money to pay his salary. The statute is a penal one and is imposed only in favor of those who come strictly within its letter. *Missouri Pacific Railroad Co.* v. *Clement,* 207 Ark. 389, 181 S. W. 2d 240. Where a discharged employee neither calls for his pay after expiration of seven days nor notified the employer where to send his paycheck, he is not entitled to recover the penalty. *Wisconsin & Arkansas Lumber Co.* v. *Reaves*, 82 Ark. 377, 102 S. W. 206; *St. Louis, I. M. & S. R. Co.* v. *Bailey*, 87 Ark. 132, 112 S. W. 180. In *Lusk* v. *Jones,* 128 Ark. 312, 194 S. W. 250, it is said: "In order for an employee of a railroad company [the Act now applies to all corporations] to avail himself of the penalty provided in this statute, he is required to request his foreman or timekeeper to send his money or check therefor to some station where a regular agent is kept; else, after the expiration of seven days from the date of his discharge, he is required to demand his money from someone authorized to pay the wages due him."

Furthermore the only reason Hanson was kept on the payroll for 60 days or more after the mill closed down was because of the fact that the company was unable to pay him his accumulated salary. Hanson testified: "Q. Now when the mill discontinued operating some time after May 19, 1951, you knew that there was no further employment there for you, didn't you? A. I didn't see any. . . . Q. All right. After we ceased operating, didn't you remain up there at Marshall when there was nothing to do except piddle around awaiting the outcome of my efforts to raise money to pay your back wages? A. That is right." [It will be recalled that Hanson was on the payroll during this period.] "Q. Yes, in other words, then you were actually on the payroll and sending in your payroll weekly at $84.23 a week and not producing a thing that the company could sell or gain any benefit from. A. That is right." Therefore Hanson was actually allowed a salary for 60 days after the job closed down.

Our conclusion is that Hanson is entitled to a judgment in the sum of $390, also stock of the face value of $1,000; but he is not entitled to judgment for the loss of his tools nor is he entitled to recover a penalty. Appellant, H. & P. Manufacturing Company, is not entitled to recover damages by reason of the partial dismantling of the mill.

The cause is reversed with directions to enter a decree not inconsistent herewith. The costs of appeal are assessed against appellee.

MUNCRIEF *v.* HALL, SECRETARY OF STATE.

5-314 262 S. W. 2d 92

Opinion delivered November 9, 1953.

Rehearing denied December 7, 1953.

James W. Chesnutt, Martin K. Fulk and *William H. Donham,* for appellant.

Tom Gentry, Attorney General and *John R. Thompson,* Chief Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. This is a test suit to determine the constitutionality of Sec. 17 of Art. 7 of Act 41 of 1953, which section,[1] in its entirety, reads:

"SECTION 17. *Contracts Awarded Under Article 19 of the Constitution.* All contracts negotiated under the provisions of Section 15 of Article 19 of the Constitution, shall be awarded by the Director, subject to the approval of the Governor, State Auditor and State Treasurer and to the other provisions of Section 15 of this article, and subject to delivery to the point of use as provided for by Paragraph (J) of Section 13 of this article.

"All powers and duties now conferred by law upon the Secretary of State as the designated official to superintend the letting of all public contracts for the purposes

[1] Only this one Section is involved in this litigation. This is mentioned so that no one will think that the holding in *McCarroll* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561, would make the present decision *res judicata* in litigation involving other portions of the Fiscal Code.

set forth in Section 15 of Article 19 of the Constitution are hereby repealed; and such powers are hereby conferred upon the Director of Finance under the provisions of this Act."

Prior to the enactment of said Act 41 of 1953 (known as the "Fiscal Code" and so hereinafter designated), the law governing the negotiation of contracts, with reference to § 15 of Art. 19 of the Constitution, was contained in Act No. 171 of 1921, which, as now found in § 14-301, Ark. Stats., reads:

"Contracts let by Secretary of State—Approval of contracts.—The Secretary of State is hereby designated to superintend the letting of all public contracts, for all purposes set forth in section 15 of article 19 of the Constitution of Arkansas, and he shall discharge his duties, proceed in accordance with and be governed by the provisions of chapter 162 of Crawford & Moses' Digest of the Statutes of Arkansas relating to the letting of public contracts; provided, that all contracts entered into by said Secretary of State, before they become binding upon the State, shall receive the approval of the Governor, Auditor and Treasurer in their respective official capacities."

After the enactment of the Fiscal Code in 1953, the Secretary of State, upon inquiry, was officially advised by the Attorney General of Arkansas that Sec. 17 of Art. 7 of the Fiscal Code was unconstitutional:[2] therefore the Secretary of State proceeded to advertise for bids to be received under § 14-301 Ark. Stats. Thereupon, the appellant, Muncrief, as a taxpayer, filed this suit in the Pulaski Chancery Court, to enjoin the Secretary of State, C. G. Hall. Frank A. Storey, as a taxpayer, and as the Director of the Department of Finance and Administration under said Fiscal Code, intervened and adopted the allegations of Muncrief's complaint to the effect that § 14-301 Ark. Stats. was repealed by Sec. 17 of Art. 7 of the Fiscal Code, and that said section of the Fiscal Code was in all things constitutional. Hall, as Secretary of

[2] Such opinion of the Attorney General was because of the decision of this Court in *Ellison* v. *Oliver*, 147 Ark. 252, 227 S. W. 586.

State, resisted the complaint, claiming that said Sec. 17 of the Fiscal Code was unconstitutional, and therefore § 14-301 Ark. Stats. continued to be the law. The Chancery Court entered a decree in accordance with Hall's contentions; and the case is here on appeal.

We affirm the decree of the Chancery Court. Our duty as Judges is to uphold the Constitution and the cases interpreting it.

I. *A Study of Ellison* v. *Oliver*. As we of the majority see it, the holding of this Court in *Ellison* v. *Oliver*, 147 Ark. 252, 227 S. W. 586, has settled the question here presented. In that case, the Arkansas Legislature of 1889[3] had designated the Governor, Secretary of State and Auditor, as the ex-officio Commissioners to superintend the letting of all public contracts for the purposes set forth in Sec. 15, Art. 19 of the Constitution. The said constitutional provision reads:

"... all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer."

Thus the Act of 1889 constituted the three officials (Governor, Secretary of State, and Auditor) as a *board* to *let the contracts*, and left it to the Treasurer to later signify his acquiescence or rejection in a manner not disclosed.

This Court held that the Act of 1889 was violative of the constitutional provisions just quoted because (1) the Constitution in Sec. 15, Art. 19 necessarily meant that contracts must be *let* by some officer other than the Governor, Auditor and Treasurer, since those officials were to approve the contracts, rather than to negotiate them; and (2) that the said three officers named in the Constitution (Governor, Auditor and Treasurer) were not by

[3] This was Act No. 107 of 1889, which provided, *inter alia*: "The Governor, Secretary of State, and Auditor shall be ex-officio commissioners to superintend the letting of all public contracts for all the purposes set forth in Section 15 of Article 19 of the Constitution of Arkansas, and shall discharge the duties in the manner hereinafter prescribed. . . . The Board of Contracts shall have power to let the contract biennially for stationery and furnishing the halls of the Legislature at the same time the other contracts are let, and to make specifications of the articles and services required."

the Constitution made members of a Commission, but acted as individuals in approving or rejecting the contracts *negotiated by some other official.* Here are some pertinent quotations from the majority opinion in the case of *Ellison* v. *Oliver*:

(1) "We believe that the language used by the framers of the Constitution contains an implied prohibition against giving these officers the power to let contracts for the public printing. The authority conferred is that all such contracts shall be subject to the approval of the Governor, Auditor, and Treasurer. This *necessarily implies that the letting of the contract shall be performed by another officer or officers.*" (Italics our own.)

(2) "The framers of the Constitution, however, intended that contracts for the public printing should be let by another officer or officers, but that they should be subject to the approval of the Governor, Auditor, and Treasurer. The word 'approval' means that the contracts should receive the official sanction of the officers named, and that this should be given separately."

In the concurring opinion written by Mr. Justice Frank G. Smith, it was recognized that the officer who had to approve the contract should not be interested in the letting of the contract, and there is this language:

"Practically speaking, officers would be expected to approve a contract which they had let . . . . the two officers who assist in letting the contract might become committed to its approval before the matter was taken up with the Treasurer, as the Constitution evidently contemplated."

The case of *Ellison* v. *Oliver* was decided in January, 1921, and has been repeatedly cited by this Court and never questioned.[4] Even in the present litigation, there is no insistance that *Ellison* v. *Oliver* should be over-

[4] It is interesting to note that Mr. Justice FRANK G. SMITH, who wrote the concurring opinion in *Ellison* v. *Oliver*, later cited the majority opinion on another point, in the case of *Morley* v. *Remmel*, 215 Ark. 434, 221 S. W. 2d 51.

ruled. After the decision of this Court in *Ellison* v. *Oliver,* the Legislature passed Act No. 171 of 1921, which is now § 14-301 Ark. Stats. and is the law under which the Secretary of State is acting in the case at bar. *Ellison* v. *Oliver* clearly holds that the Governor cannot participate in the negotiation or letting of the contracts. His constitutional duty is to approve or reject the contracts after they are negotiated: he is not to negotiate.

II. *A Study of the Position of the Director of Finance and Administration.* With the point established that under *Ellison* v. *Oliver,* the Governor cannot negotiate the contracts, we turn to an examination of the position[5] of Director of Finance and Administration. That position was unknown until the Legislature adopted the Fiscal Code of 1953. The said Code has these provisions, which we italicize:

(1) In Art. 1, Sec. 2 (C), it is declared the policy of the State: "To create and establish the Department of Finance and Administration *as an agency directly responsible to the Governor* as Chief Executive of the State, and to define the duties of the Director of Finance and Administration; . . . ."

(2) In Art. 2, Sec. 1, the Director of Finance and Administration acts " . . . . *in behalf of the Governor.*"

(3) In Art. 3, Sec. 1 (B), it is said: "*The Director shall be employed by, and serve at the pleasure of, the Governor.*"

In Art. 3, Sec. 2, it is provided that the Director take an oath: but we find nothing in the Act that requires his appointment to be confirmed by the Senate. He was not so confirmed. Thus we conclude that by the Fiscal Code, the Director of Finance and Administration acts at the direction of the Governor and serves during the will and pleasure of the Governor.

III. "*What One Cannot Do Himself, He Cannot Do Through Another.*" Ever since the early days of

[5] We call it "position" to avoid saying whether the holder is an officer or an employee.

our Anglo American legal system, and continuously to the present, there has been the maxim: "What I cannot do myself, I cannot do through another."[6] This maxim leads us to these inescapable conclusions in this litigation: (1) that no amount of judicial legerdemain can escape the fact that the Director of Finance and Administration acts at the direction of the Governor; and (2) since, under *Ellison* v. *Oliver,* the Governor could not serve in the negotiating or letting of the contracts, certainly the Director of Finance and Administration cannot serve in the negotiating and letting of the contracts.

Under the holding of this Court in *Ellison* v. *Oliver, supra,* we conclude that Sec. 17 of Art. 7 of the Fiscal Code is violative of the Constitution, and that § 14-301 Ark. Stats. is still the governing law.

Affirmed.

Justice George Rose Smith concurs.

Griffin Smith, Chief Justice (dissenting). The opinion shunts the very principle it undertakes to emphasize—that the state government is conducted by three coordinate branches, each independent of the other. The general assembly (not the Governor) designated the duties that are to be discharged by the director of finance and administration, one duty being the letting of printing contracts. To say that the director is the agent of the governor in the ministerial matters incidental to these lettings is to assume, without evidence, and to condemn, without cause. The implication is that gentlemen appointed by the executive thereafter become his puppets and perform according to a formula fashioned for each emergency as it arises.

I am not yet willing to believe that honest men are not to be found in the public service, nor do I believe that the executive is concerned with shady affairs the constitution was intended to circumvent.

[6] Those who love Latin say it: *"Quod per me non possum, nec per alium."* The case of *Murrell* v. *Smith,* 4 Coke 24 b 76 Reprint 928, was decided by the Court of Kings Bench in 1591; and this maxim was there used. It was also used in the case of the Monopolies, 11 Coke 84 a 77 Reprint 126, also decided in the Reign of Elizabeth I.

Who lets the printing contracts, and how they are advertised and the bids received, are detail delegated to the general assembly—not to the courts. Words of piety and suggestions of possible conflict between authority are not sufficient to alter the proposition that the constitution gave to the lawmaking body the right to formulate a method for making contracts under the provisions of § 17 of Article 7 of Act No. 41 of 1953.

In my opinion the controversy does not raise a reasonable doubt, and certainly the situation is not one to warrant results that in effect stigmatize honorable officers of a coordinate branch of the government. I would reverse the decree and leave the authority where the general assembly had a right to place it.

J. Seaborn Holt, J. (dissenting). I do not agree with the majority that § 17, Art. 7 of Act 41 of the Acts of 1953 is unconstitutional and unenforceable.

In determining the constitutionality of a legislative enactment, we have certain well established and fundamental rules to guide us which have been adhered to throughout the history of this Court. Unless expressly, or by implication, the Legislature is prevented from doing so under our Constitution, it has the power to enact the written laws of the State and to declare its policy. We have nothing to do with legislative policy. All legislative acts are presumed to be constitutional and we must so hold unless clearly incompatible, and at variance, with the Constitution. All doubts on the question of the constitutionality must be resolved in favor of the constitutionality of the act. The rule is elementary that every reasonable construction must be resorted to in order to preserve the constitutionality of the act. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

It will be noted that Art. 19, § 15 of our Constitution makes no provision for any specific official to let the contracts for public printing and other services covered thereby, but specifically provides that they shall be performed under contract with the lowest responsible bidder "under such regulations as shall be

prescribed by law,'' and that all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer of the State.

By Art. 7, § 17 of Act 41, *supra,* the General Assembly has created the position of Director of Finance and Administration and assigned to him all powers and duties for the superintending, letting and awarding of all public printing contracts, subject always to the approval of the Governor, Auditor and Treasurer of the State. The Act leaves no latitude for discretion or arbitrary action on the part of the Director in the actual letting of the contracts. All steps in the letting are thoroughly covered and controlled by Act 41, and, as I view it, actually amounts to no more than a formal ministerial act on the part of the Director in performing this self executing function in the name of the State. In such circumstances, we must indulge in the presumption that this Director, acting for the State of Arkansas, will perform the duties imposed upon him without fear or favor.

The majority say that the holding of this court in *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586, has settled the question here against appellants' contention that the Act in question is constitutional. I did not so construe that holding. As I construe that opinion, it was the Court's intention there to answer the argument in support of the constitutionality of the 1889 Act. That 1889 Act amended a previous act so as to make the Governor, Secretary of State and Auditor, commissioners to superintend the letting of all public contracts for the purposes set forth in Art. 19, § 15 of the Constitution, but made no provision for the approval of the letting of such contracts by the Governor, Auditor and Treasurer of the State, as provided by Art. 19, § 15 of the Constitution. The act did not provide that the public printing contracts also be approved by the State Treasurer, and in the *Ellison* v. *Oliver* case, the Treasurer was not consulted and did not approve the printing contracts in question. The question that then arose was whether it was the intention of the constitutional provision, *supra,* to require

the approval of the Governor, Auditor and Treasurer collectively, or whether it was the intention to obtain the approval of each separately. I do not think that it was the intention of this Court in the above case to hold or to imply that some other officer or officers other than the Governor, Auditor or Treasurer should let the contracts. This seems apparent from the following language used: "So here, if the framers of the Constitution had given the Governor, Auditor and Treasurer the power to make or let contracts for the public printing, the nature of the act to be performed would have required them to act jointly. The framers of the Constitution, however, intended that contracts for the public printing should be let by another officer or officers, but that they should be subject to the approval of the Governor, Auditor and Treasurer. The word 'approval' means that the contracts should receive the official sanction of the officers named, and that this should be given separately. Because their approval is necessary under the Constitution, we must reach the conclusion that their action is designed to be a check upon the action of the board. Each of the officers named is fitted by reason of the duties of his office to pass judgment upon the action of the board. The contract when made can be passed from one to the other for his approval in order that he may give the public the benefit of his judgment and official sanction. It is in the nature of a veto power, and each of the officers can withhold his approval and thus veto the contract."

The majority appear to rest heavily on a paragraph taken from the concurring (not the majority) opinion of Justice Frank G. Smith in the above case and point out that "it was recognized that the officer who had to approve the contract should not be interested in the letting of the contract." Certain language from that concurring opinion (omitting parts) is set forth. A full quote of what Judge Smith said is as follows:

"I concur in the holding that the Treasurer could not be left off the board while the Governor and Auditor were made members thereof. Practically speaking, of-

ficers would be expected to approve a contract which they had let. So that, if the Governor and Auditor were made members of the board to let the contract, the Treasurer should also have been made a member, otherwise the two officers who assist in letting the contract might become committed to its approval before the matter was taken up with the Treasurer, as the Constitution evidently contemplated.

"But I perceive no reason why the three State officers might not be authorized to let the contract as well as to approve it if they were all three put on the board. Whatever might be said of the policy of legislation of that character, I see no constitutional objection to it.

"The Constitution contains no inhibition to that effect, the only provision being that 'no member or officer of any department of the government shall in any manner be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer.'

"The approval of the contract by these officers was the thing desired, and that would be obtained if they were made members of the board which lets the contract in the first instance."

This language speaks for itself, and I fail to see how any comfort can be derived by the majority from it.

Under Act 41 of 1953, as has been pointed out, the separate approval of the constitutional officers named, —Governor, Auditor and Treasurer, — of the contracts prepared and let by the Director must be had. A majority was not sufficient. The approval of all these constitutional officers was required.

I cannot agree that because the Legislature provided that the Governor appoint a Director to perform duties in effect ministerial, it would require us to strike down the legislation as unconstitutional on the theory that such appointee might be influenced or controlled by the Governor.

It is interesting to note that the majority opinion points out that Art. 3, § 2 of the 1953 Act provides "that

the Director take an oath: But we find nothing in the Act that requires his appointment to be confirmed by the Senate. He was not so confirmed." The clear implication being that had the Senate confirmed the Governor's appointee (for Director) then we would uphold the constitutionality of the section challenged. Just how this alleged additional safeguard would have prevented any influence being exerted by the Governor over the Director (had the Governor been so inclined) is not made clear.

COCA-COLA BOTTLING COMPANY OF JONESBORO *v.* MISENHEIMER.

5-181 261 S. W. 2d 775

Opinion delivered November 9, 1953.

Frierson, Walker & Snellgrove, for appellant.

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

MINOR W. MILLWEE, Justice. This appeal is from a judgment in favor of appellee, Mrs. Edward Misenheimer, against appellant Coca-Cola Bottling Company of Jonesboro, Arkansas, in the sum of $50 damages allegedly sustained by drinking from a bottle of Coca-Cola which contained a dead mouse.

At the conclusion of the testimony on behalf of plaintiff, and at the close of all the evidence, appellant requested a directed verdict in its favor, without indicating to the trial court the basis for such requests. Both requests were denied. The only assignments of error in the motion for new trial are: (1) the court erred in refusing appellant's requests for an instructed verdict, and (2) that the verdict is inconsistent with the instructions given. The question of the sufficiency of the evidence was not mentioned either at trial or in the motion for new trial.

For reversal, appellant says the case was tried under the doctrine of *res ipsa loquitur,* and it is now contended that the evidence was insufficient to meet the requirements of the doctrine because it was not shown that the bottle from which appellant drank was then in the same condition as when it left the exclusive custody and control of appellant. The assignment that the court erred in not directing a verdict for appellant must be overruled, if there is any substantial evidence, viewed in the light most favorable to appellee, to support the verdict. *Arkansas Power and Light Company* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387.

The testimony on behalf of appellee discloses that she lives with her husband and their three children in the little village of Waldenburg, in Poinsett County, near the W. K. Neeley Company, where the husband is employed as a farm implement mechanic. In connection with the implement store, Neeley Company also operates

a service station which handles soft drinks bottled by appellant. Appellee's husband quit work about 6 p.m. on August 17, 1952, when he purchased from the service station a case of assorted soft drinks containing several Coca-Colas bottled by appellant. The bottles remained sealed and capped while in the possession of the service station, and in the same condition when brought into the home by appellee's husband, shortly after 6 p.m. Appellee immediately put the drinks into the refrigerator.

About 9 o'clock the following morning, appellee opened drinks for some children and a Coca-Cola for herself, using a bottle opener to remove the caps. Upon drinking one swallow of Coca-Cola, she immediately became nauseated and started vomiting. Her son then pointed out to her that the bottle contained a mouse, which was whole at that time but had a foul odor. It was in a state of decomposition when the bottle was introduced in evidence at the trial. Appellee was treated several times by a physician who testified as to her illness.

Although appellant has not abstracted the instructions, we will assume the case was tried on the theory of *res ipsa loquitur,* since there was no direct or affirmative proof of negligence on the part of appellant. We have held that under the doctrine of *res ipsa loquitur* a plaintiff must show that there was no opportunity for the contents and character of a bottled drink to have been changed from the time it left defendant's hands until the time of the alleged injury. See *Coca-Cola Bottling Company of Fort Smith* v. *Hicks,* 215 Ark. 803, 223 S. W. 2d 762, and cases there cited.

Appellant's contention is that since appellee's husband did not testify, there was no showing that the Coca-Cola was the same beverage that he purchased, or if so, that it was in the same condition in which he bought it. In this connection, the clerk who sold the drinks testified the bottles remained capped and sealed at all times while in the store and were in the same condition when sold. Appellee testified that the drinks were purchased from

the Neeley service station by her husband who brought them home while she was preparing the evening meal, and that she immediately put them in the refrigerator. There was no objection to this testimony, and on cross-examination she testified: "Q. Mrs. Misenheimer, when, on what date did you say your husband purchased that? A. On Monday afternoon, after he quit work at 6:00 o'clock. Q. This is one of the bottles he brought home? A. That is right. Q. You drank the contents the next day? A. Yes."

In *Coca-Cola Bottling Company* v. *Cromwell,* 203 Ark. 933, 159 S. W. 2d 744, the bottled drink was left opened for a time in an automobile out in the woods in semi-darkness before part of it was drunk, and for a considerable time thereafter before the cap was replaced. We held that a case was made for the jury, against the contention that contamination might have occurred while the bottle remained open in the car. See, also, *The Coca-Cola Bottling Company* v. *Davidson,* 193 Ark. 825, 102 S. W. 2d 833; *Hope Coca-Cola Bottling Company* v. *Jones, ante* p. 222 Ark. 52, 257 S. W. 2d 272.

We think the situation here is somewhat similar to that presented in the Hicks case, *supra,* where we said: "In the light of the instructions, the jury must be taken to have determined that the breaking of the bottle, and the resultant injury to plaintiff's foot, were proximately caused not by any negligent act of the plaintiff herself, nor by any non-negligent act of the plaintiff or anybody else, nor by any unascertained fact or event, but rather by the negligence of the defendant in the course of filling, charging, capping or otherwise preparing the bottle. In reaching that conclusion, the minds of the jurors must have gone through a process of reasoning to the effect that since the bottle did explode, and none of the possible explanations just enumerated were acceptable to them, and since negligence in filling, charging, capping or otherwise preparing the bottle was a reasonable explanation of what had happened, the verdict should be arrived at in accordance with that reasonable explanation."

So here, we think the evidence is sufficient for the jury to have determined that the presence of the mouse in the bottle, and the resultant injury to appellee, were proximately caused not by any negligent or non-negligent act of the Neeley Company, the appellee or her husband, nor by any unascertained event, but rather by the negligence of the appellant in preparing the bottle. On the whole case, we hold the evidence sufficient to sustain a jury finding that there was no opportunity for the content and character of the bottle of Coca-Cola to have been changed from the time it left appellant's hands until appellee drank from it. The judgment is, therefore, affirmed.

SMITH *v.* STATE.

4757 261 S. W. 2d 788

Opinion delivered November 9, 1953.

Shaver, Tackett & Jones, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. An information was filed charging Luther Smith (the appellant), Cecil Smith, and Wanda Dodson with the crime of robbery. Luther Smith, tried separately, was convicted and sentenced to serve three years in the penitentiary. His appeal presents questions with reference to the admissibility of evidence.

The State's proof showed that on the night of October 24, 1952, the two Smiths, Wanda Dodson, and Laura Pilgreen lured the prosecuting witness, E. J. Rogers, into a car and took him to a lonely place, where he was beaten and robbed of $319. Rogers did not appear as a witness at the trial, and objections are made to the State's introduction of the testimony given by Rogers at a preliminary hearing.

It is first contended that the State failed to prove affirmatively that a sufficient search had been made for the missing witness. On this point a deputy sheriff testified that he had recently received a subpoena for Rogers, that he had made a diligent search, and that he had been unable to find Rogers. The deputy sheriff was not cross-examined by defense counsel, who now contend that the reference to a diligent search was a mere conclusion which should have been supported by a narrative of the actual search that was made. Substantially similar testimony, except that the officer added that he had been informed that the person sought had left the State, was held a sufficient foundation in *Holland* v. *State,* 122 Ark. 462, 183 S. W. 978, and *Rodgers* v. *State,* 209 Ark. 37, 189 S. W. 2d 608. Furthermore, in the case at bar defense counsel, in the course of objecting to the use of Rogers' former testimony, stated that they could prove that Rogers was an embezzler "and is now a fugitive from justice." With such evidence available to the accused he cannot complain that the State's proof was not as detailed as it might have been.

It is also contended that Luther Smith was not represented by counsel at the preliminary hearing and was not legally called upon to cross-examine Rogers, since Smith had asked that the hearing be waived. The trial

court was warranted in finding from the testimony of the reporter who took down Rogers' former evidence that Luther Smith was present, was represented by a lawyer, and that his attorney in fact exercised his right of cross-examination. We need not explore the question of when a defendant is "legally called upon" to cross-examine an adverse witness. That phrase appears in a quotation approved in *Scott* v. *State,* 160 Ark. 125, 254 S. W. 341, but the issue is immaterial here, as the appellant actually availed himself of the privilege of cross-examination.

Complaint is also made that the court permitted Laura Pilgreen, an accomplice who appeared as a witness for the State, to testify on redirect examination that a day or two after the robbery she had reported the facts to a sheriff in Missouri. The court's ruling was correct. During the cross-examination of Laura Pilgreen the defense had very effectively insinuated that she was giving false testimony in return for a promise of immunity from prosecution. The witness having been impeached by the defense, it was proper for the prosecution to attempt to restore her credibility by a fact tending to rebut the impeachment; that is, that she had reported the robbery before having discussed the case with the prosecuting attorney. Wigmore on Evidence, § 1128; *State* v. *Bennett,* 226 N. C. 82, 36 S. E. 2d 708.

Affirmed.

MALVERN BRICK & TILE COMPANY *et al. v.* ALEXANDER.

5-335 261 S. W. 2d 798

Opinion delivered November 9, 1953.

Leffel Gentry, Cole & Epperson and *Barber, Henry & Thurman,* for appellant.

Richard C. Butler and *Eugene A. Matthews,* for appellee.

George Rose Smith, J. This is a controversy between the appellant A. B. Alexander and the appellee Verna Cook Alexander concerning the ownership of certain corporate stock in the Malvern Brick & Tile Company. By a decree entered on October 17, 1953, the chancellor held that the appellee is the owner of the stock. The appellants, A. B. Alexander and the corporation, filed notice of appeal under § 2 of Act 555 of 1953.

On October 30, 1953, the appellants, without waiting for the complete record to be settled and certified, filed in this court what is admittedly only a partial record and presented to us the application now being considered, by

which they ask leave to file a supersedeas bond in the sum of $10,000. The appellants have made no attempt to obtain a writ of supersedeas in the trial court. During the oral argument upon the present application the appellant's counsel frankly conceded that their failure to apply to the chancellor for approval of a supersedeas bond was due to the fact that, at a hearing involving an earlier decree which proved to be void for reasons we need not detail, the chancellor had indicated that he would require a supersedeas bond in the sum of $259,460.02. Thinking this amount to be excessive, the appellants seek to by-pass the trial court by filing a partial record in this court and applying to us for approval of the $10,000 bond that is tendered.

We think it perfectly plain that Act 555 does not contemplate that the trial court's authority is to be circumvented in this manner. Section 5 of that statute provides that an appellant "may present to the court for its approval a supersedeas bond . . ." This reference to "the court" unquestionably means the trial court—a fact that becomes too clear for argument when §§ 2, 3, 4, and 5 are read together. We may add that § 5 is copied almost verbatim from Rule 73 (d) of the Federal Rules of Civil Procedure, and there is not the slightest doubt that Rule 73 refers to the federal trial courts.

In spite of the fact that § 5 of Act 555 requires the application for supersedeas to be presented to the trial court, the appellants insist that §§ 6 and 17 of the Act provide an alternative method by which a stay may be obtained by the filing of a partial record in this court. This contention is bottomed upon § 17, which reads: "Section 17. *Record for Preliminary Hearing in Appellate Court.* If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, *for a stay pending appeal* [our italics], for additional security on the bond on appeal or on the supersedeas bond, or for any immediate order, the clerk of the trial court at his request shall certify and transmit to the appellate court a copy

of such portion of the record or proceedings below as is needed for that purpose." Upon the premise that the partial record now before us has been properly docketed under the language just quoted, the appellants rely on § 6 of Act 555 for the rule that "After the action is so docketed, application for leave to file a [supersedeas] bond may be made only in the appellate court."

This reasoning must be rejected for the reason that its basic premise is wrong. Section 17 was not meant to enable an appellant to obtain an ordinary writ of supersedeas by the mere filing of an incomplete record in this court. It is the trial judge who is familiar with the case as a whole, and § 5 sensibly requires that routine applications for supersedeas be presented to him, when the complete record has not yet been filed in this court. What § 17 does is to permit the appellant to apply for preliminary relief in this court, upon a partial record, in certain situations which at least implicitly involve a review of the trial court's failure to grant the relief sought here. As an example, § 17 allows us to review the trial court's approval of an appeal bond when the security is thought to be insufficient. By the same reasoning, that clause in § 17 which permits us to grant "a stay pending appeal" implies appellate jurisdiction rather than the exercise of power that is vested in the trial court in the first instance. The clause refers to those emergency stay orders that temporarily set aside the trial court's action and hold the cause in abeyance until the appeal can be heard. See *Union Sawmill Co.* v. *Felsenthal etc. Co.,* 84 Ark. 494, 106 S. W. 676; *Hampton* v. *Hickey,* 88 Ark. 324, 114 S. W. 707; *Mewes* v. *Bank of DeWitt,* 133 Ark. 144, 201 S. W. 1106.

This case does not fall in that category. It is a run-of-the-mine application for supersedeas that should have been presented to the chancellor. Inasmuch as the appellants were not entitled to file a partial record under § 17 of Act 555, the case was improperly docketed in this court, and § 6 of the statute has no application. The application for leave to file a supersedeas bond is denied,

and the case is, without prejudice to a future appeal, stricken from the docket.

HOT SPRINGS SCHOOL DISTRICT NO. 6 *v.* SURFACE COMBUSTION CORPORATION.

5-174 261 S. W. 2d 769

Opinion delivered November 9, 1953.

Wood, Chesnutt & Smith, Wright, Harrison, Lindsey & Upton and *Wootton, Land & Matthews,* for appellant.

Richard M. Ryan, Bugbee, Johnston & Conkle and *Barber, Henry & Thurman,* for appellee.

WARD, J. This appeal involves the question of service on a foreign corporation under Ark. Stats., § 27-350, and also under Act 347 of 1947 the first section of which Act appears in Ark. Stats. as § 27-612 and the second and third sections of which appear as § 27-340.

The trial court sustained a motion to quash service obtained on appellee, a foreign corporation domiciled in Ohio, and the only testimony taken before the trial judge was on that motion.

Pleadings. The question arose in this way: Appellant, Hot Springs School District No. 6 [hereafter referred to as "No. 6"] filed suit for damages against appellant, F. & J. Appliance Company [hereafter referred to as "F. & J."] which, it was alleged, breached its contract by installing defective heating equipment in three school buildings. F. & J., a partnership domiciled in Garland County, answered and also filed a cross-complaint against appellee, Surface Combustion Corporation [hereafter referred to as "Surface"], alleging that Surface had covenanted with it to furnish all equipment and materials and also complete engineering plans and service, and asked for judgment, if any was rendered against it, over against Surface in the same amount.

After F. & J. filed its cross-complaint No. 6 amended its complaint and made Surface a party defendant.

Service. Both F. & J. and No. 6 procured service on Surface, apparently as the trial judge thought, under Act 347 of 1947 by serving a copy of the summons on the Secretary of State and also by serving a copy on George Dillon who resided in Pulaski County and who, as was alleged, was Surface's agent in this state.

Ruling of the Trial Court. In sustaining Surface's motion to quash service the trial court ruled that Act 347 applied only to actions arising out of tort and, consequently, did not apply to this action on contract. Apparently no consideration was given to the possibility that Surface might have been properly served under the provisions of Ark. Stats., § 27-350. This section reads:

"Where the defendant is a foreign corporation having an agent in this state, the service may be upon such agent." It appears that such issue was involved in the motion.

We have reached the conclusion, for the reasons set out below, that the trial court was in error in sustaining the motion to quash service on Surface.

Act 347 of 1947. While it is true the first section of Act 347 contains language which tends to sustain the trial court's finding that the Act applies only to tort actions, yet the majority of this court concludes that the language of the Act as a whole, and particularly the language in §§ 2 and 3, makes it apply to actions on contract in certain instances. This conclusion is based on a portion of § 2 copied below:

"Any non-resident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and Laws of this State as to doing business herein, who shall do any business or perform any character of work or service in this State shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the Secretary of State, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee."

If it be conceded that § 1 of Act 347 applies only to tort actions then our interpretation of §§ 2 and 3 necessarily means the Act covers two different related subjects. This situation however does not militate against the constitutionality of the Act. In *Ewing* v. *McGehee,* 169 Ark. 448, at page 453, 275 S. W. 766, the following appears:

"It is also contended that the statute is void because the caption does not refer to all the matter contained in

the body of the act. There is no provision in the Constitution of this State with respect to what the caption of statutes shall contain. Our Constitution does not contain a provision so often found in State constitutions to the effect that statutes shall embrace only one subject, which shall be clearly stated in the caption. Conceding that a statute is void which undertakes to legislate with reference to unrelated subjects, we do not find that the present statute is open to that objection."

It does not follow however from the conclusion reached above that we are now holding the service on Surface in this action is good. This is a question that must be passed on by the trial court after the introduction of testimony. As indicated by the portion of § 2 of Act 347 copied above, it is necessary for the trial court to find that this cause of action "accrued" from Surface's "doing . . . such business, or the performing of such work or service . . ." It also appears from that portion of said § 2 not copied that it is necessary for other things to be done before the service on Surface would be good and complete and this would also have to be developed by testimony. In the hearing before the trial court no testimony was introduced on either of these points.

Arkansas Statute 27-350. This section which provides another method of obtaining service on non-resident corporations reads as follows:

"SERVICE ON FOREIGN CORPORATIONS.—Where the defendant is a foreign corporation having an agent in this State, the service may be upon such agent."

The nature, character and extent of the actions of the agent under this section necessary to constitute him an agent for service on a foreign corporation may be different from the acts necessary on the part of the corporation or agent under § 2 of Act 347. The exact nature of these acts have been the subject of much litigation as is evidenced by the cases mentioned below: *McWhorter* v. *Anchor Serum Co.* (Ark.), 72 F. Supp. 437; *International Shoe Company* v. *The State of Washington, et al.,*

326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95; *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820; *Rodgers* v. *Howard,* 215 Ark. 43, 219 S. W. 2d 240; *Green* v. *Equitable Powder Mfg. Co.* (Ark.), 99 F. Supp. 237.

We do not deem it necessary to comment on the holdings in the cases mentioned above or to comment on the evidence introduced in the trial court for the purpose of showing that Dillon was a proper agent for service. It was a question of fact for the trial court to decide whether the actions of Dillon, as disclosed by the evidence, were sufficient to constitute him an agent for service, but the trial court, as indicated above, did not pass on this question. It therefore becomes necessary to remand this case for further findings and action by the trial court.

In the case of *Shephard* v. *Hopson,* 191 Ark. 284, 86 S. W. 2d 30, there was involved a question of fact as to whether or not proper service was had, and in this connection the court said:

"Whether the place of service was at the usual place of abode of Virgie M. Shephard and whether such service was had on Mary J. Shephard were questions of fact, and we cannot say that the answer of the chancellor to these questions in the affirmative was against the preponderance of the evidence."

Service by F. & J. There is another question which is discussed. As previously stated, when F. & J. was sued by No. 6 it filed a cross-complaint against Surface and attempted to secure service by serving the Secretary of State pursuant to Act 347 and also by serving Dillon [presumably] under Ark. Stats., § 27-350, in Pulaski County. It is argued by appellee that, proceeding under § 27-350, service would be governed by Ark. Stats., § 27-613, which provides that "Every other action may be brought in any county in which the defendant or one of several defendants resides or is summoned." Therefore, it is urged, service on Dillon in Pulaski County was void because this action was brought in Garland County.

We do not deem it necessary to decide this issue now since the result of a retrial may render it non-essential.

In accordance with the above facts the cause is reversed and remanded for further proceedings.

CHAMBERS *v.* JONES, CHAIRMAN.

5-179 262 S. W. 2d 285

Opinion delivered November 9, 1953.

Rehearing denied December 14, 1953.

Murry & Anders and *Paul L. Barnard,* for appellant.

Quinn Glover, Hibbler & Hibbler and *Harold B. Anderson,* for appellee.

ROBINSON, J. Appellant T. M. Chambers, Jr., was the pastor of the Arch Street Baptist Church of Little Rock. At a meeting of the members of the church he was discharged, but he attempted to continue to function as pastor claiming that the church meeting at which his discharge was voted was illegal. The trustees of the church and the deacons filed this suit to enjoin the Rev. Chambers from attempting to act as pastor. A temporary injunction was granted and on a final hearing it was made permanent.

The church engaged the Rev. Chambers as pastor in February, 1947. At that time the parties made a written agreement providing among other things: "That we adopt the New Directory for Baptist Churches by Edward T. Hiscox, which is used by the National Baptist Convention and the leading Baptist churches everywhere, as reference in church government." The agreement also provides: "General business meetings should be had only when the pastor calls for them and need not be every month."

Hiscox' Directory was not introduced in evidence; however, appellant contends that a business meeting could be called in two ways only. First, the pastor could call the meeting; it is agreed this was not done. Second, according to Rev. Charles Lawrence who testified as an expert, any member of the church at any church service could rise and make a motion that the church resolve itself into a business meeting, and if the motion carried such meeting would be held. The meeting at which it was decided to dispense with Rev. Chambers' services was not called according to either of the above methods; hence the question presented is whether the meeting was a legal one.

The meeting at which it was voted to dispense with the services of the Rev. Chambers came about in this manner. There was dissatisfaction in the church with reference to the pastor. On November 14, 1952, the Board of Deacons met in an effort to settle the matter. The pastor was invited to attend, and came in at the last of the meeting. As a result of this meeting of the deacons, a church meeting was called for January 6, and was advertised from the pulpit and in the church bulletin. However, no action was taken at the January 6 meeting with reference to the Rev. Chambers because of a question as to the legality of that meeting; but the gathering was considered a meeting of the church. Therefore at that time another meeting was called for February 3 and was advertised from the pulpit and in the church bulletin several times. Under the heading of "Announcements," the following notice appeared in the church bulletin: "To the members

of the Arch Street Baptist church, it was voted in the Church Business Meeting last Tuesday night January 6, 1953, that there will be a Business Meeting to determine by vote whether the service of Rev. T. M. Chambers, Jr., be continued or discontinued. We are asking all members to be present February 3, 1953, 8:00 P. M."

It was thought that the meeting on January 6 was a church meeting although it was called by the deacons and not by the pastor or on motion of a member made at a devotional service on Sunday or Wednesday; and since the meeting of January 6 had been given wide publicity and was considered a church meeting, it was thought that by vote of the members present a business meeting could be called for February 3 at such time.

In the meantime on January 25 at a regular devotional service the pastor was given a vote of confidence. As heretofore stated, the February 3 meeting was advertised several times both from the pulpit and in the church bulletin.

After the circumstances attending the calling of the meetings had been explained to him, the Rev. Lawrence testified: "Q. The Deacons, as the Board of Deacons, went before the church on January 6th and asked the church to set a date and did set the date of February 3rd which was regularly voted on and carried. What was wrong with the meeting of February 3rd? A. It was a valid meeting if the church voted to have it."

First the Board of Deacons called a meeting for January 6; this call was advertised from the pulpit and in the church paper. At the January 6 meeting by vote of those present a church business meeting was called for February 3, and this meeting was advertised from the pulpit and in the church bulletin. At the meeting of February 3 the vote was 70 to 1 in favor of dispensing with the services of the Rev. Chambers as pastor. The Chancellor arrived at the conclusion that the testimony showed the February 3 meeting to be a legal one. We cannot say the Chancellor's finding is contrary to a preponderance of the evidence.

Affirmed.

BOYD *v.* THE ARKANSAS MOTOR FREIGHT LINES, INC., *et al.*

5-180 262 S. W. 2d 282

Opinion delivered November 9, 1953.

Rehearing denied December 14, 1953.

Chas. C. Wine, for appellant.

Ned Stewart, Stanley P. Clay, Leroy Hallman, William J. Smith and *Thomas Harper,* for appellee.

GRIFFIN SMITH, Chief Justice. Public Service Commission issued its certificate of convenience and necessity to S. C. Boyd, enlarging his intrastate rights. Circuit court reversed and we affirm its judgment.

For eleven months prior to the commission's action Boyd had operated intrastate as Texarkana-Nashville Motor Freight Lines, carrying general commodities from Texarkana to Hope, and from Texarkana to Nashville and Lockesburg. Certain government consignments are

the objects of competitive efforts. Explosives, or the ingredients or materials requisite to the manufactured product, move from DeSoto, Kansas, to the Shumaker Ordnance Plant near Camden, Ark. A witness supporting Boyd's application testified that recent shipments involved eleven million pounds, but the routing was through Texas and Louisiana, with mileage substantially in excess of what the haul would be if DeQueen should be used as a gateway.

The only witness who verified Boyd's contentions touching service necessities was M. J. Sears, president of Luper Transportation Company of Tulsa. He estimated that with routing of the supplies through DeQueen a saving of $135 for a round trip would be effectuated. But Sears' idea was to interchange business with Boyd. He was permitted to testify that protesting carriers would not sustain loss if the certificate should be issued—this for the reason that the government's policy was to apportion or equalize transportation patronage among the qualified truck lines. The witness was morally certain of this result because his company kept a representative in Washington whose business it was to relay information. This agent had formerly been "connected with the defense department."

Boyd petitioned for the right to utilize Highway No. 71 from Lockesburg to DeQueen where the interchange with Sears' company (Luper Transportation) would take place. From DeQueen the routes would be 71 to Lockesburg, 24 to Nashville, 4 to Hope, 67 to Prescott, 24 to Camden, and 79 to the ordnance plant. A highway map shows this to be approximately 120 miles, not including the distance from Camden to the government plant.

DeSoto, Kansas, is about 45 miles southwest of Kansas City. It is not shown that Sears' company has authority to transport explosives between those points. But the witness, Sears, insisted that if intrastate rights should be extended to Boyd, Luper Transportation, by connection with Boyd at DeQueen, would have a more direct route to Camden, thus eliminating three or four other

operators who presently participate in the business. He assumed that Arkansas Motors came down its certificated route—a relatively direct course south from Kansas City over 71 into this state, then to Camden.

The evidence clearly shows that Luper's interest in the intrastate certificate was equal to if not greater than Boyd's. Sears intended to lease his company's trailers to Boyd when interstate shipments reached DeQueen. There would be no exchange of facilities—a practice common among carriers. To use Sears' own language in regard to Boyd, "I expect him to make a little money out of it."

There was no testimony that shipments of explosives originated at DeQueen or at any point along the routes mentioned in the application. Outgoing tonnage from the Shumaker plant went to the west coast. Whether other lines now participating in the Kansas City-to-Camden shipments would be taken care of through government recognition of their needs for business, said Sears, would depend upon "how strong their people are in Washington." Luper had asked the Interstate Commerce Commission for authority to enter Shumaker on a temporary basis and the certificate had been denied.

This question was asked of Sears: "You are only interested in seeing [Boyd] get his application to go from DeQueen to Shumaker to supply a deficiency your company now has?" A. "I think he would make some money out of the deal." Q. "But that is your interest, isn't it?" A. "Sure it is my interest."

The record is silent on the question of who would profit through the reduced mileage mentioned by Boyd; but ordinarily in interstate transactions the rate between two points is constant irrespective of the route that is utilized. If this be true, the saving here would be to Luper, with Boyd participating incidentally.

The trial court held that under admissions that the business would be exclusively interstate, Public Service Commission was without jurisdiction to entertain the

application. It also held that there was no showing of convenience and necessity.

Because we agree with the last proposition it is unnecessary to explore the jurisdictional field.

In *Missouri Pacific Railroad Company* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644, we took note of transportation facilities afforded by the railroad company, the issue being whether a bus line should be permitted to compete. The opinion, written by Judge Frank G. Smith, quoted from Pond on the Law of Public Utilities, v. 3, § 775, where it is said that the prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and preserve investments already made for this purpose, for "Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates."

Boyd's testimony and that of his witness, Sears, emphasized the convenience that would flow to Luper with issuance of the certificate, but intrastate convenience and necessity were not shown unless we assume without evidence that the government's unexpressed interest must be taken for granted. No other shipper of explosives or the ingredients or materials entering into the manufacturing process had the slightest concern respecting the method of making these shipments.

The burden of establishing the necessity and convenience contemplated by the lawmaking body rested upon the applicant, who in this case did not go beyond the profit element to himself and to his prospective associate, Luper Transportation.

Appeals from a circuit court's judgment coming from the public service commission are heard *de novo.* But in *Arkansas Express Co.* v. *Columbia Motor Transport Company,* 212 Ark. 1, 205 S. W. 2d 716, stress was placed upon the general rule that in making determinations anew the commission's findings are not to be dis-

regarded as surplusage. Like chancery appeals where the decree is persuasive, full effect must be accorded factual findings, and when the evidence is evenly balanced the administrative agency's views must prevail. This is particularly true in respect of technical matters where affairs not ordinarily contested before courts are being explored. The rule has no application here because the testimony is not in equipoise, nor is the subject-matter of a character requiring extraordinary talent as a prerequisite to an understanding of the related issues.

Our conclusion is that circuit court did not err in reversing the commission's findings, and the judgment is affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* PALMER, *et al.*

5-201 261 S. W. 2d 772

Opinion delivered November 9, 1953.

W. R. Thrasher, William L. Terry and *John L. Hughes,* for appellant.

Ben M. McCray, for appellee.

J. Seaborn Holt, J. September 10, 1951, the Arkansas State Highway Commission, proceeding under § 76-510, Ark. Stats. 1947, by its petition, called upon the Saline County Court for an order condemning a right of way over certain land of appellees in that county. Thereafter, on August 7, 1952, the Saline County Court

made and entered its condemnation order as requested by the Highway Commission. Appellees' land was physically entered and the roadbed constructed by the Highway Department pursuant to this order.

At this point, appellees filed claim for damages in the County Court against both the Highway Commission and Saline County. Their claim was allowed by the County Court against both the Highway Commission and the County, in the amount of $490.50.

Appellees duly appealed to the Saline Circuit Court and appellant, Highway Commission, demurred to the appeal on the ground that it was, in effect, a suit against the State of Arkansas over which the Circuit Court had no jurisdiction. This demurrer was overruled December 8, 1952, and exception properly saved by appellant, Highway Commission.

A jury trial followed on December 9, 1952, which resulted in a verdict for appellees in the amount of $6,000 against both the Arkansas State Highway Commission and Saline County. Thereafter, on December 22, 1952, the Highway Commission filed motion for a new trial and on March 10, 1953, within the same term of court, the trial court heard and overruled this motion. Saline County did not file a motion for a new trial. The State Highway Commission alone has appealed.

For reversal, the Highway Commission argues that the trial court erred in overruling its demurrer. We agree. This demurrer alleged: "1. That the defendant, Arkansas State Highway Commission, is a part of the Government of the State of Arkansas. 2. That the appeal of plaintiff constitutes a suit against the State of Arkansas. 3. That this court (Circuit Court) is without jurisdiction to hear and determine a suit against the State of Arkansas."

The judgment here was against the Highway Commission, a State agency, and was, in effect, a judgment against the State and could not be maintained in the circumstances. *Arkansas State Highway Commission* v.

Nelson Brothers, 191 Ark. 629, 87 S. W. 2d 394; *The Federal Land Bank of St. Louis* v. *Arkansas State Highway Commission,* 194 Ark. 616, 108 S. W. 2d 1077.

Section 76510, above, provides: "Assistance of county court to widen or straighten road.—The State Highway Commission may call upon the county court to change or widen, in the manner provided by § 5249 of Crawford & Moses' Digest [§ 76-917], any State Highway in the county where the State Highway Engineer deems it necessary for the purpose of constructing, improving or maintaining the road. In the event the county court should refuse to widen the road as requested, the Commission may refuse to construct, improve or maintain that portion of the road until a suitable right of way is provided. [Acts 1929, No. 65, § 55, p. 264; Pope's Dig., § 6905]," and § 76-511 provides:

"Procurement of right of way after refusal by county court.—Where the State Highway Commission petitions any county court asking for right of way for any state highway, and where the county court fails to grant such petition and make court order procuring such right of way within sixty [60] days after such petition is presented, then the highway commission may take such steps as they deem expedient to acquire such right of way, either by purchase, exercise of their right of eminent domain, or otherwise; and in such event, one-half of the cost of acquiring such right of way shall be deducted from the next payment due any county by reason of any appropriation out of the State Highway Fund or State Revenue from gasoline (motor vehicle fuel) or auto license tax to the county or county highway fund of such county. [Acts 1929, No. 205, § 2, p. 1015; Pope's Dig., § 6963; Acts 1941, No. 281, § 1, p. 732]."

These sections set forth two alternative methods by which rights of way might be acquired. The first method (§ 76-510) gives the Highway Commission the authority to call upon the county court to change or widen any state highway where deemed necessary by the State Highway Engineer. The statute further provides that if the county court should refuse, the Commission could then refuse to

construct, improve or maintain the road "until a suitable right of way is provided."

The second method (§ 76-511) provides that where the Highway Commission petitions the county court asking for right of way for a state highway, and the county court fails to grant the petition within sixty days, then the Highway Commission itself can acquire the right of way, by purchase, eminent domain or otherwise, and in such event the Highway Commission can deduct one-half the cost from the county's next turnback fund.

Here, the Highway Commission proceeded under the first method, § 76-510. The County Court, acting within its power, did not refuse the request of the Highway Commission, but granted its petition, furnished the right of way, and properly entered its order condemning appellees' land, and, by so doing, the County became liable for all damages for such taking, (§ 76-510).

In the case of *Ross* v. *State Highway Commission,* 184 Ark. 610, 43 S. W. 2d 75, we said: "It may be first said that the county had power and authority to condemn and pay for the right of way at its own expense, even though the road to be improved was a part of the State's highway system. It was so expressly decided in the case of *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. 2d 23. See also other cases there cited. In such a proceeding the county would be liable for any damage then or thereafter accruing through the exercise of this right of eminent domain. *Independence County* v. *Lester,* 173 Ark. 796, 293 S. W. 743. * * *

"It was pointed out in the England case, *supra,* that the highway commission might exercise the right of entry and condemnation on its own account and at its own cost and expense, and, where it does so, it must pay the damages thus occasioned. In other words, the highway commission or the county may condemn land for State highway purposes, and the agency which does so must pay the damages resulting from its action."

We said in *Arkansas State Highway Commission* v. *Kincannon, Judge,* 193 Ark. 450, 100 S. W. 2d, 969: "The

highway commission has taken no action in regard to the condemnation of property belonging to interveners, and their intervention is, in effect, a suit against the state, which, upon the authority of *Arkansas Highway Commission* v. *Nelson,* 191 Ark. 629, 87 S. W. 2d 394, cannot be maintained. *State Highway Commission in Arkansas* v. *Kansas City Bridge Co.,* 81 Fed. 2d 689. But the effect of the former opinion in this case, and in that of *Highway Commission* v. *Nelson, supra,* is that, while the property owner may not sue the state, or the commission acting in its name, for damages, he may restrain the commission from taking his property until the damages have been paid, or provision for payment made."

It is true, as indicated, that had the County refused, when called upon by the Highway Commission, to condemn the land of appellees, after sixty days, the Commission could have brought an action in the Circuit Court under § 76-511 to condemn the property, and in that event, it would have been obligated to pay all damages, but could have charged back to the county fifty per cent of the cost. The Highway Commission, however, did not elect to follow this procedure. See *Arkansas State Highway Commission* v. *Pulaski County,* 205 Ark. 395, 168 S. W. 2d 1098.

But, appellees say that in any event, appellant's appeal should be dismissed because of failure to present its motion for a new trial to the trial court within the statutory period of thirty days from date of judgment, and strongly rely on our recent case of *Reasor-Hill Corporation* v. *Golden, Judge,* 220 Ark. 100, 247 S. W. 2d 9, to support their contention. Assuming without deciding that a motion for a new trial was in fact necessary, still we do not agree.

The motion for a new trial, as indicated, was filed December 22, 1952, within a few days after the judgment was entered on December 9th. The motion was not presented until March 10, 1953. It appears, however, that it was presented within term time.

Our holding in the Golden case above did not make it mandatory that a motion for a new trial be presented within the thirty day period in all cases, but we recognized that there might be circumstances which would justify a trial judge in hearing such motion after the thirty days had expired, when such hearing was had within the same term of court, as here. Some discretion thus is allowed. So here, there were presented such circumstances as warranted the action of the court on hearing the motion on a later date. The record shows that within the thirty-day period, by letter dated December 19, the trial judge was asked to hear the motion along with several other similar motions in right of way cases, on some convenient date, after the first of the year.

On this point, the court made the following statement for the record: "The Court will say that the hearings were set on two previous occasions, for motions for new trial, and they were continued at the request of the attorneys for the State. But I will say this, that the attorneys for the State then have, on subsequent occasions requested hearing on dates that I could not grant because of conflicts with other courts. Mr. McCray: Were these requests made within 30 days, Judge? The Court: No, they were not made within . . . after the dates were set for hearing, and were set down for hearing, then the requests for further hearings were made after that time, which would be after the 30 days, yes."

In these circumstances, we fail to see any abuse of the discretion accorded the trial court.

Accordingly, the judgment against the State Highway Commission is reversed and the cause dismissed.

HOLT *v.* GREGORY, *et al.*

5-120 260 S. W. 2d 459

Opinion delivered November 9, 1953.

[redacted]

E. D. McGowen, Bon McCourtney and *Claude B. Brinton,* for appellant.

Frank Sloan, for appellees.

WARD, J. This is the second appeal in this case. The decision on the first appeal is found in the case of *Holt* v. *Gregory,* 219 Ark. 798, 244 S. W. 2d 951. Many of the facts stated in the opinion on the first appeal will not be repeated in this opinion.

Appellant urges several assignments of error, some of which will be noted later, but most of our consideration will be given to the question of an agreement to apply payments as it relates to the former decision referred to above.

The former decision, without detailing any facts relating to such an agreement, contains this paragraph:

"We hold, in the circumstances here, where there was no agreement to the contrary, that appellee had the right to apply the $1,450 (proceeds from the sale, *supra*) first to the $700 note and the balance on the $2,400 note. The assignee of the bank stood in the shoes of the bank."

At the second trial appellant again introduced the same evidence he introduced at the first trial tending to show that there was an agreement for appellee, Mode Gregory, to apply said sum on the $2,400 note. Without detailing this evidence it suffices here to say that it was sufficient to present a jury question. The trial judge evidently thought, as appellees now earnestly contend, that this issue had been concluded by the above-quoted language from our former opinion, because he refused to allow this question to go to the jury by refusing appellant's instruction pertaining thereto. This situation presents the interesting question before us.

The case of *Missouri Pacific Railroad Co., et al.* v. *Foreman,* 196 Ark. 636, 119 S. W. 2d 747, is called to our attention by appellees in support of their contention that our decision on the first appeal is the *law of the case* on the second trial and that, therefore, the trial judge, on the second trial, correctly excluded the question from the jury. There are other decisions of this court such as *Hartford Fire Insurance Co.* v. *Enoch,* 79 Ark. 475, 96 S. W. 393, and *Hallum* v. *Blackford,* 202 Ark. 544, 151 S. W. 2d 82, which contain language equally as favorable to appellees' contention. We cannot, however, agree with appellees' interpretation of the holdings in these decisions to which reference has been made. Rather, we might say we do not agree with the application which appellees seek to make here. It appears that the confusion arises over what is meant by the phrase "the law of the case." We will illustrate our view by applying the phrase to this case as it relates to our former decision.

It will be recalled that when this evidence regarding an agreement was introduced at the first trial it was con-

sidered by the trial judge (sitting as a jury) and that the trial judge (as a jury) decided it did not prove an agreement. Thus we may say the trial judge made two decisions in this connection. One was that the evidence presented a jury question, with which we agree. The other was that the evidence did not amount to an agreement to apply the payment on the $2,400 note, on which matter we express no opinion because it is a jury question. Our first decision simply said that where there was no agreement, the payee could apply as he saw fit. In this instance, of course, Gregory applied the money, first, to the $700 note. Now, upon the second trial, when the same evidence (as to an agreement) was presented, it again raised an issue for the jury. The *law of the case,* therefore, would dictate, it seems to us, only that the jury should have been instructed not to make a certain finding from the evidence, but to apply the rule of law which we announced (on the first appeal), *i. e.,* if there was no agreement then the payee could apply as he saw fit.

We believe the above explanation will clarify the opinions in the cases above referred to and show them to be harmonious with our expressed view.

For example, in the *Foreman* case the court, at page 639, said:

"This holding of the court on the first appeal becomes the *law of the case* on this appeal, if the evidence shown by the record on this appeal is the same, or substantially the same, as that shown by the record on the first appeal. The evidence on the question of liability on the second trial, we hold, was substantially the same as that on the first trial. Hence, the former opinion to the effect that appellee had made out a case sufficient to go to the jury is *the law of the case* on this appeal, and it is binding on the court upon a consideration of the same question." (Emphasis supplied.)

From the above language it is clear that *the law of the case* means that, on substantially the same evidence, the question should, as here, be resubmitted to the jury.

We have repeatedly and uniformly held that, in law cases, where a case is reversed on one issue, as was the case here, the entire matter goes back for a new trial on all issues. In *Harrison* v. *Trader,* 29 Ark. 85, at page 95, the court approved this language:

"When a judgment is reversed, the rights of the parties are immediately restored to the same condition in which they were before its rendition; and the judgment is said to be mere waste paper."

Heard v. *Ewan,* 73 Ark. 513, at page 514, 85 S. W. 240, contains this statement:

"The error was in the trial by jury. The jury cannot be recalled, and the corrected instruction given. The vice of the error destroyed the force of the jury trial, and the point to progress from anew is necessarily the trial itself, and not any given point in the trial. Therefore the case stands when remanded in the attitude it was in just prior to going into the trial."

See, also, *American Standard Life Ins. Co.* v. *Meier,* 220 Ark. 109, 246 S. W. 2d 128. Frequently in chancery cases, but not in law cases, we remand cases for further development on one or more issues. Even if this rule obtained in law cases it would not apply here because we did not, on the first appeal, remand the case for a trial on any certain issue or issues.

Notwithstanding there is language in the *Hartford Fire Insurance Co.* case, *supra,* and the *Hallum* case, supra, which apparently sustains appellees' contention on this issue, yet a careful reading shows they are not contrary to the view we take. In the former case it is stated: "The rule of *the law of the case* has no application to questions of fact, and nothing said on a former appeal as to the facts can bind the trial court upon a second trial, or can be conclusive on a second appeal." The latter case discusses the same issue which is before us and *the law of the case* was considered, but the effect of the holding was that if certain evidence was sufficient to make a jury question at the first trial the same evi-

dence at the second trial, after a reversal, would also make a jury question.

We therefore conclude that the trial court in this instance should have allowed the jury to consider the question whether there was an agreement to apply the payments.

In support of the conclusion we have reached we call attention to another aspect of the case. As stated previously, on the first appeal the opinion did not set out the evidence which the trial court (as a jury) concluded was not sufficient to amount to an agreement for application of payments. Since we did not detail the evidence it is unreasonable to say we meant to pass on the sufficiency of the evidence. It is more reasonable to say we only meant to express enough facts to make clear the declaration of law there announced. This court recognized and approved the same idea we have expressed in *Mayo* v. *Arkansas Valley Trust Co.,* 137 Ark. 331, 209 S. W. 276, where it was said:

"It is true that we made certain observations concerning the facts as we understood them from the record, but that was not intended as an adjudication of the facts, but merely as a statement for the purpose of forming a basis for announcing the law on the subject."

Appellant complains that the court erred in rejecting certain portions of his testimony relative to the value of the restaurant equipment, and in not directing a verdict for the value of two fans and some equipment alleged to have been disposed of by appellees. In our opinion, whatever error, if any, the court may have committed in rejecting the said testimony was harmless because we find in the record no evidence to support appellant's allegation that there was a conversion by appellees. For the same reason appellant was not entitled to an instructed verdict on the other matters even though, as contended by him, the value was admitted.

For the reasons stated, the judgment of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice McFaddin dissents.

Campbell, County Judge *v.* Little Rock School District, *et al.*

5-115 262 S. W. 2d 267

Opinion delivered November 16, 1953.

Tom Downie and *John T. Jernigan,* for appellant.

Phillip Carroll and *Rose, Meek, House, Barron & Nash,* for appellee.

GRIFFIN SMITH, Chief Justice. Little Rock School District was joined by a taxpaying citizen in petitioning circuit court for an order requiring Arch Campbell as county judge to review and approve or reject a petition filed pursuant to provisions of Act No. 10 of the extraordinary session of the Fifty-Eighth General Assembly, approved May 3, 1951.

The Act undertakes to vest in the electors of each county power to authorize the employment of appraisers, abstracters, and such other persons as may be needed, "to appraise all real property, both urban and rural, and/or personal property within the county for the purpose of making such appraisals available to the county assessor and equalization board as an aid and guide to such officials in their work of assessing and equalizing property values for ad valorem tax purposes."

The machinery for putting the plan in motion is a petition signed by ten percent of those voting for circuit clerk in the preceding general election. This petition is filed with the county clerk for review by the county court. The court's duties in examining the petition are quite similar to those delegated to the secretary of state under Amendment No. 7 to the constitution. If approval is certified an order must be entered directing three outstanding property owners of the county, to be named in the order, to forthwith enter into negotiations and conditionally contract for the employment of such qualified appraiser or appraisers, abstracters, and such other persons as may be needed to appraise the property under consideration. Such contract of appraisal shall be for a sum certain, together with all other terms and conditions of the contract.

This contract must be in writing and signed by the parties, but it does not become binding unless approved by a majority of the county's electors who have a right to express themselves in a special election.

Within thirty days from the time this conditional contract is filed with the county clerk—where it shall remain, subject to inspection—the county court is directed to enter an order submitting the question to the people. This election shall be not less than thirty nor more than sixty days from the date of the court's order.

Judge Campbell declined to review the petition, taking the view that the Act was beyond the legislative power in requiring him to name three persons who in turn would make the conditional employment contracts and thereby bind the county for payment of such sums as might be agreed upon by persons other than the court.

Quite clearly the proceeding is not under Amendment No. 7, for the Act provides for a special election, and the number of petitioners may be 10% instead of 15% as directed by the Amendment.

Section 28 of Art. 7 of the constitution invests the county court with exclusive original jurisdiction in all matters relating to county taxes, the disbursement of money for county purposes, "and in every other case that may be necessary to the internal improvement and local concerns of the respective counties."

Judge BATTLE's opinion in *Parkview Land Co.* v. *Road Improvement District No. 1,* 92 Ark. 93, 122 S. W. 241, is to the effect that in the absence of constitutional provision respecting the manner in which jurisdiction of the county court is to be exercised, the legislature has a right to give directions. In *Board of Directors of Jefferson County Bridge District* v. *Collier,* 104 Ark. 425, 149 S. W. 66, Judge MCCULLOCH cited *Road Improvement District* v. *Glover,* 89 Ark. 513, 117 S. W. 544, and the Parkview Land Company case. He said that the two decisions dealt with statutes authorizing construction of roads by improvement districts and imposing upon county courts the obligation of maintenance. The holding in *Burrow* v. *Floyd,* 193 Ark. 220, 99 S. W. 2d 573, was that circuit court in retaining control of road tax funds for future apportionment usurped the county court's jurisdiction. Few subjects have been made clearer by our

decisions than that the county court has exclusive original jurisdiction to audit, settle, and direct payment of all demands against the county. *Shaver* v. *Lawrence County,* 44 Ark. 225; *Chicot County* v. *Kruse,* 47 Ark. 80, 14 S. W. 469.

Now we must assume that the legislature in prescribing how obligations might be incurred (and evidenced by written contract) intended that the county court should be under compulsion to pay these expenses—and this without audit or power of scrutiny except the right to appoint three property owners to act in that behalf. Concisely stated, any contract tentatively negotiated by appointees of the court would become absolute with substituted approval of the voters, and thereafter the court would be required to allow the claim. This is jurisdiction by indirection in a matter embraced within the constitution.

We have held that obligations may be imposed upon a county and that the court is without discretion in respect of payment. *Jeffery, County Judge,* v. *Trevathan,* 215 Ark. 311, 220 S. W. 2d 412. But there the legislative authority had fixed the amount that should be paid for the publications involved.

There is a fundamental difference between the situation with which we now deal and such cases as *State* v. *Craighead County,*[1] *Jackson County* v. *Nuckolls,*[2] *Jackson County* v. *Pickens,*[3] *Phillips County* v. *Arkansas State Penitentiary,*[4] *Burrow, County Judge,* v. *Batchelor,*[5] and *Lyons Machinery Company* v. *Pike County.*[6] The distinction lies in the fact that here the county court is required to name three property owners to whom the legislature delegates the power to make conditional contracts affecting county revenues derived from tax sources. The two steps—provisional contract and approval by the people—may bind the court to allow obligations to an extent unascertainable at the time appointments are made.

[1-6] See 114 Ark. 278, 169 S. W. 964; 102 Ark. 166, 143 S. W. 1065; 208 Ark. 15, 184 S. W. 2d 591; 156 Ark. 604, 247 S. W. 80, 248 S. W. 11; 193 Ark. 229, 98 S. W. 2d 946; 192 Ark. 531, 93 S. W. 2d 130.

Another question raised is whether the subject-matter falls within the governor's call for the special legislative session. Since the appeal is decided on grounds of delegated authority invested in individuals to conditionally contract for the payment of obligations in a situation where audit and approval by the county court are circumvented, it is not necessary to consider whether the subject was embraced within the call.

Reversed, with directions to quash the writ of mandamus.

Mr. Justice GEORGE ROSE SMITH not participating.

Mr. Justice WARD dissents.

ELLIOTT *v.* ELLIOTT.

5-194 262 S. W. 2d 149

Opinion delivered November 16, 1953.

Eugene Coffelt, for appellant.

Rex W. Perkins and *Jeff Duty,* for appellee.

GRIFFIN SMITH, Chief Justice. Max and Bobbie Elliott, whose first marriage was solemnized in February, 1944, were divorced in 1948. They remarried in July of that year and lived together until May 26, 1949, then separated. Bobbie (the wife) procured a divorce in September, 1949, on the ground of "unmerited reproach, contempt, studied neglect, abuse, and many other things habitually and systematically pursued."

When the decree was rendered the couple's three children were infants, the oldest being three and a half years old. Bobbie was given the custody, "subject to the right of the defendant [father] to have said children visit with him and his parents two week ends out of each month, [these] visits to be either on succeeding or alternate week ends". There was a finding that the father had agreed to pay $80 per month to aid in the support and maintenance of his children. Personal property was divided upon a consent basis.

In November, 1952, Max petitioned for a modification of the decree and asked for full custody of the children. His claim was predicated upon allegations of changed conditions and his present ability to discharge the duties of a father.

Facts revealed by admissions in the petition and at trial were that Bobbie is employed by Southwestern Bell Telephone Company at Tulsa, Oklahoma. Her weekly salary is $51. The children are with her mother and father not far from where their father resides. They attend church, go to school by a convenient bus route, and with the exception of short periods in a hospital when tonsils were removed they have been healthy. Max testified that prior to his divorce from Bobbie they agreed that she should have custody of the children. The arrangement was made "outside of court", but he "guessed" it was presented to the judge. At any rate, "that is what we agreed on".

The distance from Benton county to Tulsa is slightly more than 100 miles. Bobbie visits the children week ends, sends them some money, buys toys and small neces-

sities, and procures desirable things for them, but in the main they are supported by her mother and father who receive the $80 payments. There is no friction between Max and his former *in-laws,* but on the contrary their relationships have been cordial except for minor incidents, such as the father's defeated desire to see the children or have them with him when they were ill.

Bobbie spends $20 to $25 a month telephoning the children or for bus fares from Tulsa at a cost of $5.50 for the round trip. There was an abundance of testimony sustaining the mother's contention that the children were in a wholesome environment. The father's principal complaint is that he is occasionally deprived of visitations on week ends. This, the evidence indicates, is because Bobbie is not able to obtain leave during mid-week and the conflict necessarily occurs. She is willing for the father to have the children at other times, but feels that the economic circumstances which keep her in Tulsa justify the course of conduct she has pursued.

Max Elliott is now married to a woman who is 21 years of age. She was first married when but sixteen and has a four-year-old child as a result of that union and an infant by her present husband. The child by her first husband lives with its maternal grandparents. While Mrs. Elliott did not join in the petition for custody of her husband's three children by his first wife, she is willing to care for them and thinks they should be allowed to grow up with the new baby—this in spite of the fact that her own four-year-old child is not in that situation.

On the issue of fitness to confer upon Bobbie's three children the care, supervision, and affection they are entitled to, Max testified that his monthly income from the government because of a 70% disability was $236, but that he was employed at $60 per week. This would amount to $7,952 per year from the two sources. After deducting monthly payments of $80 directed in the decree of 1949 appellant's income would be $6,992. He testified that it cost between $350 and $400 per month to maintain

"the four members of my family." Presumptively this reference was to the new wife, her four-year-old child, and the four-months-old baby, and himself. This would leave a differential of $2,192. Nothing was said about taxes, and it is possible that the living expenses mentioned by petitioner included these items.

The petitioner admitted that he had been a bootlegger, but insisted that his former wife assisted in the illegal transactions. When asked whether he could name one person in Arkansas who would testify in support of this imputation he replied that the witnesses were not available. Max and his present wife had also been arrested for contributing to the delinquency of a minor—a girl seemingly so promiscuous that in addition to petitioner and his wife, seven boys were involved. A plea of guilty with a $25 fine resulted from the charge against Max, but the present Mrs. Elliott (who was not divorced at the time, but who was keeping steady company with Max) was released when Max entered his guilty plea. In extenuation Max contended that he was not guilty, but "took the rap" to keep the other boys from going to the penitentiary.

The chancellor declined to modify the order of custody. There was no appeal from the decree that the respondent's cross-action for an increase of the monthly allowance should be denied, hence that issue is not before us.

Affirmed.

TEARE, *et al. v.* DENNIS, *et al.*

5-167 262 S. W. 2d 134

Opinion delivered November 16, 1953.

F. J. Healy, for appellant.

Wm. C. Jenkins and *Rex W. Perkins,* for appellee.

J. Seaborn Holt, J. Appellants sued appellees in the Fayetteville Municipal Court to recover $117, alleged balance due on the following contract: "THE NEW ERA ADVERTISING COMPANY, Dallas, Texas—(Stamped) Accepted October 13, 1949 by O. F. C. Byamp, The New Era Adv. Co.—Reserve for us the right to use your copyrighted On The Map Service in advertising the grocery business in newspaper and other media of Springdale, State of Arkansas only, for a period of ONE YEAR ONLY from the date hereof.

"For our rights to use the above copyrighted series for said period we agree to pay you at Dallas, Texas, at the rate of Three Dollars ($3.00) per change, total One Hundred and Fifty-Six Dollars ($156.00) payable Thirty-

nine Dollars ($39.00) by check herewith and Eleven dollars and seventy Cents ($11.70) on the first of each month, beginning Dec. 1, 1949, until the whole account has been paid.

"The New Era Advertising Co. agrees to ship by * * * as soon as possible Fifty-two mats size about (2 Col.) and reading matter both as we think best. We agree not to give anyone else in the above place the right to use the above copyrighted series during the term of this agreement nor thereafter until we have offered to sell you at the same rate and terms as stated above, the right to the additional use of this copyrighted series, for the ensuing year providing there shall be no default by you.

"All checks and remittances are to be made payable to the New Era Advertising Co. only. Thirty days after failure to meet any of the payments due, the whole amount remaining unpaid shall be due and payable.

"The undersigned agrees to arrange for publication in newspapers and other media and pay the costs of same and that the New Era Advertising Co. is in no way responsible for the cost of publication. It is understood that we will not continue to use any of the materials supplied by the New Era Advertising Co., after this contract is terminated.

"This entire agreement is subject to the acceptance of the New Era Advertising Co. at Dallas, Texas, and is not subject to revocation or cancellation upon acceptance. Neither party will be held responsible for any provisions or representations not embodied in writing herein. Firm —Dennis & Harger Groc., By (s) Kenneth Dennis (Official Title). Date Oct. 13, 1949—Address Hway 71 North, Springdale, Ark."

Appellees defended on the ground of "Fraud, Deceit and Inequitable Conduct" on the part of appellants' agent in the procurement of said contract in that "appellants' agent induced the signing of the contract by representing that he represented the Springdale Newspaper, which was false, that $156.00 was the total cost of the ads

for a period of one year, when in fact the cost of the ads was in addition to the price of $156.00, or about $14.00 for an ad each week, * * * hence no liability resulted on the contract."

Trial resulted in a verdict for appellees, and, on appeal, the Circuit Court, sitting as a jury, affirmed the action of the Municipal Court.

For reversal here, appellants stoutly insist that even though the contract in question were procured by fraud and misrepresentation, the undisputed evidence shows that appellees, by their acts, waived this defense and ratified the contract. We have concluded that appellants' contention must be sustained.

In brief, the following facts appear: Appellees were engaged in the retail grocery business in Springdale, Arkansas; October 13, 1949, appellants' salesman called upon appellees at their place of business soliciting an order for appellees' advertising service, which order was procured from appellees by the execution of the above contract, signed by appellee, Kenneth Dennis, on behalf of the partnership. Dennis testified that he was not sure whether he read the contract before signing. "Q. But you did go ahead and sign it without reading it, didn't you? Did the salesman tell you not to read it, or prevent you in any way? A. No, he didn't say not to read it. Q. Did you make any attempt to read it? A. Well, I don't know. I can't remember."

The contract was forwarded to appellants' office in Dallas, Texas, accepted, and the plates for printing the advertising matter were shipped to, received, and accepted by appellees. Following receipt of the plates, appellees, without complaint, made use thereof by running two of the advertisements in the Springdale News, for which appellees paid $14.00 for each ad. "Q. Now Mr. Dennis, you—did you ever run one of these ads in the Springdale News? A. We ran two—yes. Q. What did it cost you for one time? A. We only run a small ad, and I think it was fourteen dollars. Each ad—the space cost fourteen dollars. Q. And he (the salesman) told you that the hun-

dred and fifty-six dollars—whatever it was—was the total cost for the ads per year? A. Yes.''

In the circumstances, as indicated, we hold that appellees lost their right to avoid the contract for fraud, by waiver and ratification, after they were in full possession of all the facts, by going ahead, publishing and using the material.

The general rule, which is in accord with our own, is: ''Fraud inducing a contract may be waived, and a contract obtained by fraud, being voidable and not void, may be ratified by the party who was induced by the fraud to enter into the contract. Ratification or its equivalent is shown where with actual or constructive knowledge of the true facts a party by acts of commission or omission shows a clear intent to affirm the contract despite the fraud, as where he accepts the benefits thereof or acts in a manner inconsistent with repudiation. After the defrauded party with knowledge of the facts has elected to treat the contract as valid, he cannot change his position and assert that it is invalid.'' 17 C. J. S., § 165 b., page 520. See *Smith* v. *Bank of Marianna,* 176 Ark. 1146, 5 S. W. 2d 335.

Accordingly, the judgment must be, and is reversed. Inasmuch as the case seems to have been fully developed, judgment is entered here for $117.00 for appellants, which the undisputed evidence shows to be due appellants on the contract.

EDWARDS *v.* EDWARDS.

5-185 262 S. W. 2d 130

Opinion delivered November 16, 1953.

Jim Merritt, for appellant.

Paul Johnson, for appellee.

J. Seaborn Holt, J. The parties here were married October 11, 1952, and separated October 30, 1952. November 18, appellant, Clara Edwards, brought suit for temporary separate maintenance and support, and pending hearing on the merits (without objections), the trial court awarded appellant $40.00 for each of the months of November and December, 1952, and set the cause for hearing on the merits for January 2, 1953. The cause was heard on January 2, and when all the evidence was completed, the court, without objection, allowed each of the parties to amend their pleadings and ask for an absolute divorce. This appeal followed.

For reversal, appellant says: "It was error not to find for or against one of the parties to the action; it was error to fail to find in response to the issues projected by the pleadings. If the finding was for appellant

and the divorce awarded to her, it was error not to decree her one-third of the appellee's personal property and a one-third interest, for life, in his real property; and it was error to award the appellant the lump sum of $100.00 as alimony."

The trial court found: "That an intolerable situation has grown up or been occasioned by the acts of the parties which makes it practically impossible for the parties to continue their marital relationship or live together again as husband and wife; the defendant has paid to the Clerk in open Court the sum of $80.00 as ordered by the Court at a hearing of this cause on December 8, 1952, to the credit of defendant and in addition thereto, the defendant will pay unto the plaintiff the sum of $100.00 adjusted support, also the sum of $60.00 as attorney's fee for the plaintiff's attorney; and the Court costs. The defendant will not be required to expend or to pay or be liable for any other sum or sums to the plaintiff," decreed that the bond of matrimony existing between Clara Edwards and Joe Edwards "be, and the same is hereby dissolved, set aside and for naught held. It is further ordered by this Court that the defendant and cross-complainant pay unto the plaintiff and cross-defendant the further sum of $100.00 as adjusted support and maintenance for the plaintiff and cross-defendant. It is further ordered that upon the payment of this amount, the cost of this action, and the sum of $60.00 to Jim Merritt, attorney for the plaintiff and cross-defendant, that the defendant and cross-complainant be, and he is hereby released, relieved and not required to pay any further moneys or be liable to the plaintiff and cross-defendant in anywise hereafter, by reason of the marriage as heretofore mentioned in this decree."

The record reflects that both parties had been previously married. Joe Edwards' wife died in 1939. They had reared seven children, giving to each a college education. Appellant also had grown children. During the short time the parties lived together, there was almost constant bickering and quarreling between them. This unhappy situation appeared to stem largely from appel-

lant's demands that appellee give her certain interest in his property. At the time of the marriage, appellee owned a 120 acre farm a few miles from Monticello, which he occupied as his home and appellant was renting a small house in Monticello at a monthly rental of $25.00. Appellee testified that he insisted that Mrs. Edwards move to his home with him on the 120 acre farm but appellant refused to move unless appellee deeded the farm to her.

Witness Lafayette Sawyer, tended to corroborate appellee's testimony. He testified: "Well, Mr. Edwards took me down there, he said well he was going to move his wife out to his place and when we got down there he asked her, told her that he had a truck out there to move her out and she said, 'No, I'm not a-goin' out,' and he said, 'Well, do you mean to say that you're not goin' out there without I deed you my property?' and she said, 'You should do it, it wouldn't be nothing but right,' and he said, 'Well, I'm not a-gonna do that, I just as well get my shaving outfit and go,' and that was all that I heard said. * * * Did you and Mr. Edwards leave then? A. Yes, sir. Walked right on out the door, got in the truck and left."

Immediately following the marriage, appellant had her lawyer investigate the property holdings of appellee. She testified:

"Q. Do you recall admitting on cross-examination at the other hearing that you did make investigations about Mr. Edwards' property after your marriage? A. I did.

"Q. You also admitted that you requested Mr. Edwards to convey his home to you? A. Well that was on advice from my lawyer. * * *

"Q. Didn't you have a conversation with Mr. Edwards that very morning about moving out there and you told him you wouldn't move until he made the deed to you to the place? A. Well I was just merely testing him out. I didn't have the least idea he would do it except when my lawyer thought we could test him out on it.

"Q. Well you weren't joking about it were you, Mrs. Edwards? A. Well I didn't have the least idea that he would do it.

"Q. You weren't joking with him when he came out to Mr. Sawyer's and you told him you wouldn't move until he made the deed to you. A. I didn't tell him that. I didn't tell him that then."

There was testimony that appellee had strong religious beliefs opposing the marriage of one, who had a divorced spouse living, and the minister, who performed the marriage ceremony, shared appellee's belief and told him before the marriage that he would not perform the ceremony if appellant had a living divorced husband. Appellant had assured appellee that her divorced husband was dead, which was not true.

Appellee testified: "After we were married, after Brother Joe brought it up I just asked her if she had been married another time, how come her not to tell me and she said, 'Well, I didn't count that a marriage, I counted that as if I was living in open adultery all the time I was with old man Walls.' " The record reflects that following this testimony, Mrs. Edwards was again on the witness stand, but she did not deny this testimony of Mr. Edwards.

Many witnesses testified, but no useful purpose would be served in detailing their testimony here. From all of the testimony, it appears to us, that their quarrels and bickerings have gone so far that a reconciliation is unlikely between these people and there appears to be no hope of their ever living together again. It appears to us that appellant's primary purpose in entering into this marriage was to secure property from appellee and that she would not live with him unless she acquired it.

If appellee's testimony is true and is corroborated, we think it sufficient, though somewhat weak, to entitle him to a divorce in the circumstances presented here.

The principles of law announced in *Bell* v. *Bell,* 179 Ark. 171, 14 S. W. 2d 551, apply with equal force here.

There we said: " 'The testimony is not very satisfactory on the question of divorce, but, after considering the whole of the testimony carefully and the situation and condition of the parties, we are of the opinion that the preponderance of the evidence entitles the (plaintiff) to a divorce. It is perfectly apparent from the testimony of both of them that they were continually quarreling with each other, and that there was no likelihood of their becoming reconciled to each other. Each of the parties had children by a former marriage, and there was no hope of them ever living together again. Hence we are of the opinion that a preponderance of the evidence will sustain a decree granting the plaintiff * * * a. divorce from the defendant * * * on the statutory ground of indignities rendering (plaintiff's) condition in life intolerable.' In the present case it may be said that the testimony is not very satisfactory, but, as in the Collins case, each of the parties had been married before and had children by former marriages, and there is no hope of them ever living together again."

The Chancellor, who saw and heard the witnesses, found, as indicated, that an "intolerable situation had grown up" that made it practically impossible for these parties to continue their marital relationship. We cannot say that this finding is against the preponderance of the testimony.

From the court's decree, above, it appears that the court did not by specific words award a divorce to appellee, Joe Edwards; however, since we try the cause *de novo* here, we hold that the preponderance of the evidence warranted a decree of divorce to appellee and that appellant was not entitled to a divorce in the circumstances.

Our rule is well established that pleadings may be amended at any time by the parties, absent objections, and also may be treated as amended to conform to the proof as was done here. (*Pettigrew* v. *Pettigrew,* 172 Ark. 647, 291 S. W. 90.) There was no error, therefore, in the court's action in this regard.

Since was are holding that appellee,—and not appellant,—was entitled to an absolute divorce, then under our well established rule, appellant (having been denied a divorce) was not entitled to alimony as a matter of right or a property settlement under § 34-1214, Ark. Stats. 1947, as argued by appellant. In the circumstances, the allowance of alimony was within the sound discretion of the trial court. "It was in the discretion of the chancellor to allow or disallow the appellant alimony. It was his duty to consider all the circumstances in exercising his discretion, and we cannot say there was an abuse of discretion." *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 339.

Modified and affirmed.

MATLOCK *v.* DIXON.

5-178 262 S. W. 2d 449

Opinion delivered November 16, 1953.

Eugene W. Moore, Arnold M. Adams and *H. J. Denton,* for appellant.

Arthur N. Wood, for appellee.

MINOR W. MILLWEE, Justice. This is an action by the appellee, Tommy Dixon, against the appellant, J. N. Matlock, on an oral contract to buy, cut and market certain timber in southern Missouri. Both parties agree that on April 17, 1950, they entered into an agreement whereby they would each pay one-half the expense of cutting and marketing, and divide the profits equally. It is appellant's contention, however, that subsequently another agreement was made whereby appellant would furnish certain winching equipment needed in the joint venture, and appellant would pay appellee $45 per thousand feet for the timber cut.

Appellee stoutly denied any change in the terms of the original agreement and contended that he had not received his due share of the profits, while appellant, in his answer and cross-complaint, asserted that appellee had not paid his one-half part of certain expenses incurred in the joint venture, and that appellant had been damaged by appellee's failure to fulfill certain obligations imposed upon him by the contract.

This same cause of action was filed by appellee against appellant in the Circuit Court of Taney County,

Missouri, on January 9, 1951. On April 16, 1951, the parties appeared in court and asked that the cause be dismissed, the defendant waiving any damages on the attachment bond which had been required. The court dismissed the case and recited that the defendant waived any and all damages he may have sustained by reason of the attachment issued therein.

On July 18, 1951, appellee filed this suit against appellant in the chancery court of Marion County, Arkansas, and caused summons to issue and personal service to be had upon him by the sheriff of Marion County leaving a copy of the same at the home of his father, J. M. Matlock, where it is alleged that appellant regularly made his home, and ran an attachment upon certain real estate of appellant in Marion County, Arkansas. In addition to the personal service of summons, appellee caused the clerk of the court to publish a warning order informing appellant of this suit pending against him and had appointed as attorney *ad litem* L. H. Cavaness, who made his report to the court on the 19th day of November, 1951. By special appearance, appellant filed his motion to quash the writ of summons and attachment. The motion was overruled. Then, also by special appearance, appellant demurred to the complaint, which demurrer was overruled. Finally, appellant filed an answer and cross-complaint, not reciting that he was appearing specially.

A final hearing of the cause was had on December 1, 1952, and a decree awarding appellee $1,307.61 and costs was rendered, from which this appeal has been taken.

Appellant urges first that the court erred in overruling his motion to quash, and that the record is silent as to any action taken by the attorney *ad litem.* While the final decree does not mention the report of the attorney *ad litem,* a separate order entered December 3, 1951, notes the making of such report.

In the motion to quash, appellant alleged that he had been a resident of Missouri for more than a year and that

the purported personal service was, therefore, void. But the trial court observed that a divorce had been granted to appellant in the Marion chancery court a few months previously, and at that time appellant had sworn that he was a resident of Arkansas. The personal service was valid under Ark. Stats., § 27-330, and appellant's apparent attempt to juggle his residence to meet the situation at hand was thwarted. Hence, whether appellant was a resident of Arkansas or Missouri, good service was had on him by one of the alternative methods and the motion to quash was properly overruled.

Appellant next contends that the court erred in overruling his demurrer, because the complaint was indefinite and uncertain. He obviously places no great faith in such argument; indeed, he passes over the point without argument. It is apparent from the record that appellee made his complaint definite and certain as soon as he obtained the necessary information through orders of the court.

Appellant argues that by appellee's taking of interrogatories, he made appellant his witness and is bound by appellant's answers, and that it was error to permit appellee to introduce testimony derogatory to the answers to the interrogatories. The transcript does not reveal that the answers were introduced in evidence or read to the court. Ark. Stats., § 28-401, provides: "In actions by equitable proceedings, either party may annex to his complaint, answer or reply written interrogatories to any one or more of the adverse parties, concerning any of the material matters in issue in the action. The answers to which, on oath, may be read by either party, as a deposition between the party interrogating and the party answering."

There is no showing that these interrogatories were read, but, even if they had been, they would, by statute, be treated as depositions, and the law governing depositions would be applicable to them. In 16 Am. Jur., Depositions, § 113, it is said:

"Ordinarily, the mere taking of a deposition, without offering it in evidence, does not make the

deponent the witness of the party at whose instance it is taken. As a general rule, however, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, except in case where the deponent is an adverse party. In the determination of how far a party putting in evidence answers to interrogatories propounded to the adverse party is bound thereby, it is to be remembered that such answers are generally treated as admissions. Where the answers contain matter which is adverse to the interest of the party producing the testimony, it is clear that the latter is not conclusively bound by such replies. While the party calling for them may put them in evidence for the admissions they contain, he is no more bound by their statements against his interest than he is bound by the statements of a witness he may call and who may testify in part against his interest. He can still introduce evidence contradictory of such statements and leave it to the jury to determine wherein the truth lies.''

The appellant next urges that the lower court should have sustained his plea of *res adjudicata.* It is not disputed that both the prior suit and the instant suit filed by plaintiff were based upon the same cause of action and were between the same parties. The complaint in the prior suit in Missouri and the complaint in the instant case alleged the identical cause of action for identical injuries. The judgment of the Missouri court recites: ''Comes the plaintiff by his attorney and also comes the defendant by his attorney and the plaintiff says he will not further prosecute this cause against the defendant and asks that the same be dismissed; the defendant waiving any damages on the attachment bond.

''It is therefore ordered by this court that this cause be and the same is hereby dismissed at the cost of the plaintiff and that execution issue against plaintiff for said costs.

"It is further ordered by the court that the defendant waives any and all damages he may have sustained by reason of said attachment issued herein."

Missouri Revised Statutes, 1949, § 510.150, recites: "A dismissal without prejudice permits the party to bring another action for the same cause, unless the action is otherwise barred. A dismissal with prejudice operates as an adjudication upon the merits. Any voluntary dismissal other than one which the party is entitled to take without prejudice, and any involuntary dismissal other than one for lack of jurisdiction or for improper venue shall be with prejudice unless the court in its order for dismissal shall otherwise specify."

Thus, this dismissal is *res adjudicata* unless (1) it is a voluntary dismissal which the party is entitled to take without prejudice, (2) an involuntary dismissal for lack of jurisdiction or improper venue, or (3) the court otherwise specified. We hold that this dismissal falls within the first category. Missouri Revised Statutes, 1949, § 510.130, provides: "A plaintiff shall be allowed to dismiss his action without prejudice at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward. . . ." In the case of *Potter, et al.* v. *McLin, et al.*, 240 Mo. App. 708, 714, 214 S. W. 2d 751, the plaintiffs dismissed their case after the jury had been impaneled and sworn and much of the evidence on the part of the plaintiffs had been introduced. The record did not recite that it was dismissed without prejudice, and an action was brought in chancery court to have the record so state. The court, in discussing Mo. Stats., § 510.130, said: ". . . the plaintiffs did dismiss their action 'before the same is finally submitted to the jury,' and were therefore entitled to a dismissal 'without prejudice.' Under such circumstances neither the plaintiff nor the court need to specify that such a voluntary dismissal so made is 'without prejudice'."

The appellant relies strongly on the case of *Hannibal* v. *St. Louis Public Service Co.*, Mo. App., 200 S. W.

2d 568. In that case, the cause was dismissed when plaintiff failed to appear to prosecute. In a later suit on the same cause of action, the court expressly held that the dismissal was an involuntary one, under § 100, Laws Mo. 1943, p. 385, Mo. R. S. A. § 847.100, now § 510.140 R. S. Mo. 1949, V. A. M. S., which provides: "For failure of the plaintiff to prosecute or to comply with this code or any order of court, a defendant may move for dismissal of an action or of any claim against him." Thus, this was a judgment taken by default, and the case is inapplicable here. In a later case, the Missouri Supreme Court held that even where the court's order of dismissal on its own motion did not specify whether the dismissal was with or without prejudice, it would be held to be without prejudice and not an adjudication on the merits where the order of dismissal was without notice to plaintiff and an opportunity to be heard on the question of whether the dismissal should be with prejudice. *Crispin* v. *St. Louis Public Service Co.*, 361 Mo. 866, 237 S. W. 2d 153. See, also, *Bindley* v. *Metropolitan Life Insurance Co.*, 358 Mo. 31, 213 S. W. 2d 387. Since the dismissal of the Missouri action was voluntary in the instant case, the chancellor correctly overruled the plea of *res adjudicata.*

Appellant also contends that the evidence is insufficient to make out a case for appellee. We do not detail the testimony. The preponderance of the evidence supports the chancellor's findings to the effect that the parties' original agreement was never changed, and that appellant failed to account to appellee for $1,162.31 under this agreement. The testimony reflects that appellee was uneducated and inexperienced in business, while appellant was an experienced businessman, that appellant withheld information to which appellee was entitled and sought to prevent a company buying the timber from furnishing such information. Although appellee was hard pressed to obtain information that should have been freely furnished by parties engaged in a joint venture, we hold that the decree is supported by ample evidence.

Affirmed.

5-172 262 S. W. 2d 270

Opinion delivered November 16, 1953.

Tom Kidd and *Wootton, Land & Matthews,* for appellant.

H. A. Tucker and *John H. Freeman,* for appellee.

George Rose Smith, J. This is the second time that the appellant, Josephine Rice, has brought suit in Arkansas to enforce claims for separate maintenance awarded to her in New York and reduced to judgment there. In 1948 Mrs. Rice was successful in her suit to enforce a New York judgment for installments then delinquent. *Rice* v. *Rice,* 213 Ark. 981, 214 S. W. 2d 235. Later on the New York court, upon constructive service only, increased the amount of the weekly award to Mrs. Rice. She now sues upon two judgments, one representing delinquencies accrued before the increase in the award and the other representing delinquencies at the increased rate. In the court below it was held that the New York court was without jurisdiction to increase the award upon constructive service, and upon that finding the circuit court refused to enforce either judgment.

As stated in our former opinion, Mrs. Rice obtained in 1940, at a time when both parties were residents of New York, a decree for separate maintenance and an allowance of $10 a week. This amount was raised to $15 a week in 1943, while the court still had personal jurisdiction over the husband.

Rice moved to Arkansas in 1945, and, although this is not shown by the record, we are told in both briefs that in 1946 he obtained a divorce in Arkansas upon constructive service of process. His failure thereafter to make payments for Mrs. Rice's maintenance led to the earlier case. After that decision Rice again fell behind in his payments, and on October 26, 1951, the New York Supreme Court, after the service of constructive notice upon Rice, entered judgment against him in the sum of $1,179.02, representing past-due installments at $15 a week, interest, and an attorney's fee. It was clearly error for the trial court to refuse to enforce this judgment, for the cause of action is controlled in all respects by our previous opinion.

A more difficult question is presented by Mrs. Rice's attempt to enforce the other New York judgment. In 1951 she petitioned the New York Supreme Court, wherein the case was pending, to increase her weekly allowance from $15 to $100. Constructive notice was again served upon Rice in Arkansas, and he concedes in his testimony that he had actual notice of the request for a greater allowance. He made no defense to the petition, however, and on August 4, 1951, the court entered a decree raising the award to $100. Rice still made no payments. On January 8, 1952, again upon constructive service, the New York court reduced the delinquent installments, with interest, to judgment in the sum of $2,320.22, this being the second judgment sued upon.

Under the Constitution of the United States this judgment is entitled to full faith and credit. The New York court had personal jurisdiction over the appellee when the separate maintenance suit was filed, and it lay within New York's power to retain that jurisdiction throughout the case, even though the defendant became a nonresident. As the court said in the leading case of *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 33 S. Ct. 550, 552, 57 L. Ed. 867; "Ordinarily jurisdiction over a person is based on the power of the sovereign to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to Article IV, § 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause." To the same effect, upon facts more like those in the case at bar, is *Laing* v. *Rigney,* 160 U. S. 531, 16 S. Ct. 366, 40 L. Ed. 525.

Thus it cannot be doubted that New York had under the federal constitution the power to retain its jurisdiction over this appellee even after his removal to Arkansas. By the statutes of New York that jurisdiction was in fact retained. Section 1170 of the Civil Practice Act (Laws of New York, 1948, Ch. 212, § 5) provides that in actions for separate maintenance the court may at any time after final judgment annul, vary, or modify its maintenance order. The effect of this statute is to write a reservation into every judgment for maintenance, *Fox* v. *Fox,* 263 N. Y. 68, 188 N. E. 160; *Waddey* v. *Waddey,* 290 N. Y. 251, 49 N. E. 2d 8; and the continuing power over the defendant may be exercised even though he has left the State and is served by constructive process only. *Schneidman* v. *Schneidman,* 188 Misc. 765, 65 N. Y. S. 2d 876. This procedure is by no means novel to us, since we too uphold the assertion of such continuing jurisdiction upon constructive notice only. *Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851; *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954.

Having retained control of the case, the Supreme Court of New York had full authority to increase Mrs. Rice's maintenance award, despite the appellee's nonresidence. In New York, as here, a husband's duty to support his wife may continue after separation or divorce, and under New York law the reserved power to modify the order includes the authority to make an award by amendment even though no allowance was made in the original decree. *Fox* v. *Fox, supra.* Nor does it matter that Rice obtained a divorce in Arkansas upon constructive service. That decree may be entitled to full faith and credit in New York to the extent of dissolving the marriage; but it cannot, for want of personal service, affect Mrs. Rice's pecuniary right to support under the law of New York. *Estin* v. *Estin,* 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, cited and discussed in our earlier opinion.

Reversed.

5-182 262 S. W. 2d 129

Opinion delivered November 16, 1953.

W. R. Thrasher, William L. Terry and *John L. Hughes,* for appellant.

Ernest Briner, for appellee.

GEORGE ROSE SMITH, J. In all but two material respects this case is similar to, and is governed by, our decision last week in *Arkansas State Highway Commission* v. *Palmer,* 222 Ark. 603, 261 S. W. 2d 772. In both cases the Highway Commission applied to the county court of Saline County for an order condemning a right of way for a state highway. Both applications were granted by the county court. This case differs first from the Palmer suit in that these landowners, after the rendition of the condemnation order, refused to permit the Highway Com-

mission to enter upon their lands. The Commission thereupon brought suit in the Saline Chancery Court for a restraining order. On January 14, 1952, the chancellor entered an order restraining the appellees from interfering with the Commission's entry upon the land, but the order was conditioned upon the Commission's depositing $15,000 to guarantee the payment of any damages that the appellees might suffer by reason of the entry. The Commission promptly made the required deposit and began construction of the highway.

In this case, as in the Palmer litigation, the landowners filed a claim in the county court and, after a hearing on the claim, appealed from an allowance which they thought to be inadequate. Both cases were tried before a jury in the Saline Circuit Court, this one resulting in a verdict and judgment for the appellees in the sum of $17,000. The second point of distinction between this and the earlier case is that here the court's jurisdiction to render judgment against the State was not questioned either at the trial in the circuit court or in the motion for a new trial. Nevertheless the Commission relies upon the court's lack of jurisdiction as the principal ground for reversal.

We think the Commission's position upon this issue must be upheld. Of course it is true that when the State voluntarily undertakes litigation and submits itself to the jurisdiction of the courts, it must be treated as other litigants and must be bound by the actions of its attorneys. But the point is that the State is not lawfully subject to liability in this case. The Palmer case and its predecessors have established the rule that in a proceeding such as this one, brought under Ark. Stats. 1947, § 76-510, the State is immune from liability; the sole responsibility rests upon the county, as a result of the county court's action in granting the request that a right of way be provided at county expense. To permit the State's attorneys to subject the sovereign to liability would be to ignore those fundamental principles which hold that the State's immunity to suit cannot be waived, *Ark. State Highway Com'n* v. *Nelson Bros.*, 191 Ark. 629,

87 S. W. 2d 394, that the State is not bound by the unauthorized acts of its agents, *Woodward* v. *Campbell,* 39 Ark. 580, and that the State is not estopped by an erroneous construction of law on the part of its representatives. *Terminal Oil Co.* v. *McCarroll,* 201 Ark. 830, 147 S. W. 2d 352. Since there is no authority in law for the rendition of this judgment against the State, it must be set aside.

After upholding the State's assertion of its freedom from direct liability, we obviously cannot sustain its further contention that the jury's verdict is excessive. That verdict and judgment are primarily the responsibility of Saline County, and the county has not seen fit to appeal. Perhaps, as counsel suggest, the State will ultimately bear a substantial part of the liability as a result of having made the $15,000 deposit as a condition to entering upon the land. But there the State voluntarily subjected itself to liability in order to proceed with the condemnation, and, having disclaimed responsibility upon the main issue, the State cannot rely upon the chancery case as a basis for arguing that its nonexistent liability is excessive. The possibility of a too liberal verdict against the county should have been considered before the chancery case was instituted.

Reversed.

Mr. Justice McFaddin, and Mr. Justice Millwee dissent.

Morgan, et al. *v.* Norful, et al.

5-136 262 S. W. 2d 139

Opinion delivered November 16, 1953.

Bernard Whetstone, for appellant.

Walter L. Brown and *L. B. Smead,* for appellee.

WARD, J. Involved on this appeal is the question whether the evidence presented by the plaintiffs in a suit for the conversion of timber was sufficient to make a jury question. The trial court directed a verdict in favor of the defendants and this appeal follows.

Appellants R. W. Morgan, Asa S. Morgan and Charles M. Morgan in their own right and R. W. Morgan as executor are the owners of approximately 1,100 acres of land. They filed suit for the conversion of approximately 250,000 feet of timber cut from said land alleging that it had been converted by the appellees, Vernon Whitten, Otis Norful and Douglas Norful.

Since the only question involved is the one mentioned above it is deemed necessary to set out only such testimony as tends to show that there was substantial evidence to make a question for the jury, and in doing so we will treat the testimony in the light most favorable to appellants under the well established rule of this court.

FACTS. It was stipulated that appellants were the owners of the land in question and that they gave no one

authority to cut any timber. *Emmett Miller* testifying for appellants stated in substance that he had visited the lands in question at least once a month or more often and that he saw Otis and Douglas Norful on the land nearly every time he was there, and sometimes he saw them there at night, and that they were cutting and hauling away timber both day and night. *Homer Holloman* testified for appellants that he saw Otis Norful cutting and hauling timber off the land three or four times, and stated that Otis said he was putting the logs at a place near the mill owned by appellee, Whitten. Here we state that it is not denied that Whitten was the owner of a sawmill at Mt. Holly and that this was the only sawmill at that place. *Dick Welch* testified for appellants in substance that prior to the filing of this suit he saw Otis cutting and hauling timber from this land and that he asked Otis to pay him $10 which he owed; that Otis replied that he would go to the mill (meaning Whitten's mill at Mt. Holly) and get the money; that Otis drove his truck loaded with timber from appellants' land up to Whitten's mill, went into the office and came back and paid him the $10; and that there was between 700 and 800 feet of logs in the load. He left and did not see Otis unload the logs at Whitten's mill. *Lyle Dews* testified for appellants that he had cruised the land in question and found that from March 1, 1948, to March 1, 1950 [the period in question] approximately 250,000 feet of timber had been cut and removed, of which about 50,000 feet was hardwood, valued at from $12.50 to $15.00 per thousand feet, and the balance was pine valued at approximately $25.00 per thousand feet. Witnesses *E. J. Nutt* and *N. T. Rutledge* both testified as to the value of both hardwood and pine timber during the period in question. *R. L. Lewis* testified that he saw Otis and Douglas cutting and loading logs on the land in question and Otis stated that he was hauling the logs for Whitten. Witness also stated he saw one Early Utsey driving a team [presumably for Otis and Douglas] and that he saw him take a load of logs from the land in question to Whitten's mill or rather he saw the load turn into the mill on a tramway which

could only go to the mill. Witness told of a conversation with Otis in which he said, "Otis, who all was out there with you the time I came over there in the woods where you was loading on that load of logs?" Witness stated Otis' reply was "Mr. Lynn, you be quiet."

Vernon Whitten, one of the appellees, testified in answer to interrogatories that he was the owner and manager of the Mt. Holly Lumber Company; that he attended to all purchases of logs and timber for said mill; that he purchased some logs from Otis and Douglas Norful but that he did not know the amount of the logs purchased, the dates of the purchases, or from what lands they were cut.

It is our opinion that the testimony related above constitutes substantial evidence from which the jury might have found that Otis and Douglas Norful had cut and removed timber in some amount and for some value from the lands of appellants, and that consequently the trial court was in error in refusing to submit the evidence to the jury for consideration.

AS TO WHITTEN. It is apparent from the above that appellee, Whitten, is not in the same situation from a factual standpoint as Otis and Douglas Norful respecting the question under consideration. However, in view of the testimony above referred to and in view of other matters hereinafter mentioned, we are of the opinion that the trial court was in error in directing a verdict in favor of Whitten.

While it is true that there is no direct proof that Whitten purchased any timber cut from appellants' land, we think there are facts and circumstances from which a jury might have concluded that he did. One indicative circumstance is here noted. The testimony shows that when Otis went to Whitten's office to get the $10 to pay a loan from Welch he drove up to the vicinity of the mill with 700 or 800 feet of timber on his truck; and that he drove his truck down the tramway from the road to the mill, a distance of approximately 75 yards. It might appear to reasonable minds that Otis was delivering the

truck load of timber to Whitten's mill and that, if he was not doing so, he would have parked his truck and walked to the office. It might be significant also that Whitten did not more fully answer the interrogatories which were attached to appellants' complaint. He was asked to list the dates of purchases, the exact description as to quality and quantity of each purchase, the amount paid for each purchase and the description or identity of the land from which the timber was cut, of all logs or timber purchased by him or any of his agents or employees from Otis and Douglas Norful or either of them between the dates of March 1, 1948, and March 1, 1950. It will be noted however from the above abstract of Whitten's testimony that his answers were incomplete if not evasive and this matter was called to the attention of the trial court by appellants. From all the above we have concluded that the testimony introduced by appellants amounts to substantial evidence and that the matter should have been submitted to the jury for its consideration. We are unable to say that fair-minded men might not have been honestly convinced that Whitten bought some timber cut from appellants' land and particularly the one load consisting of 700 or 800 feet which was hauled to his mill by Otis Norful. The rule in this connection is well illustrated by language used in the case of *Missouri Pacific Railroad Company, Thompson, Trustee,* v. *Kagy,* 201 Ark. 150, at page 154, 143 S. W. 2d 1095, at page 1097.

"The rule is that where fair-minded men might differ honestly as to the conclusion to be drawn from the facts, either controverted or uncontroverted, the question should go to the jury, and it is the province of the jury to pass on the weight of the evidence and the credibility of the witnesses, . . ."

In accordance with the above view the cause is reversed and remanded.

The Chief Justice dissents from the reversal as to Whitten.

Opinion delivered November 16, 1953.

Rehearing denied December 14, 1953.

Bon McCourtney, Malcolm Ward and *Claude B. Brinton,* for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Mrs. Vanteen Dean Smith was tried on an information charging her with first degree murder for the poisoning of her husband, Harold Dean. She was convicted of second degree murder, and brings this appeal.

I. *Sufficiency of the Evidence.* We recite and view the evidence in the light most favorable to the Jury verdict, as is our rule on appeal.[1] The appellant (hereinafter called "Vanteen") operated a café in Riverdale, Poinsett County. Her husband, Harold Dean (hereinafter called "Harold"), was engaged in the fishing business with Gene Mote, and they were also drinking companions. The Dean living quarters were across the street from Vanteen's restaurant.

Gene Mote testified that on the afternoon of November 12, 1951, Mote went to Harold's room, while Vanteen was present and Harold was in bed drinking whiskey for a cold; and that Mote then borrowed Harold's truck for the announced purpose of going to Caraway to get some poison to kill rats. Mote testified that he went to Caraway, purchased a bottle supposed to contain strychnine, returned to Riverdale, again visited with Harold about 6:30 P. M.; that Vanteen asked Mote if he got what he went after, and he told her he did. Mote testified that the bottle of strychnine was then in his coat pocket; that he removed his coat and put it on a chair in the café; that later he went back to Vanteen's restaurant for his coat, and Vanteen was then engaged in mixing a drink for Harold Dean, in which Mote thought there was sugar, water, and whiskey; that Vanteen handed the drink to

[1] See *Wooten* v. *State,* 220 Ark. 755, 249 S. W. 2d 968, and cases there cited.

Mote and told him to take it to Harold; that he did take the drink to Harold, who drank it about 9:00 P. M. on the night of November 12th. Mote testified that when he got his coat on that trip, the bottle of strychnine was not in his pocket.

By other evidence it was established that Harold Dean died about 11:00 or 11:30 that night, which was about two or two and a half hours after drinking the contents of the glass that Mote brought to him. Mote further testified that approximately 30 days after Harold's death, he told Vanteen: "You killed my buddy"; and in that conversation, Mote quotes Vanteen as saying: "If they do dig him up, and he is poisoned, and if I go to the pen, you will go with me."

Vanteen had been "dating" Clyde Smith before Harold's death, and she married Clyde Smith shortly after Harold's death. Mrs. Lawery, Clyde Smith's mother, testified that she worked for Vanteen in the restaurant; that Harold had threatened Clyde because of his attentions to Vanteen; that Vanteen told Clyde in the presence of the witness, in the afternoon of November 12th: "Clyde, if my plans work like I want to, and I think they will, you won't have to leave Riverdale." Mrs. Lawery also testified that on three occasions, Vanteen had asked her to get some strychnine so Vanteen could put it in Harold Dean's whiskey.

Other witnesses testified as to damaging statements made to them by Vanteen. For example: Charlene Austin testified that on the afternoon before Harold's death, Vanteen told the witness: "I won't have to live with Harold another night."

Dr. Nettleship, State Chemical Examiner and a Pathologist of many years experience, testified that he performed an autopsy on the body of Harold Dean several months after his death; that strychnine in fatal quantities was found in the liver, kidneys, and intestines of Harold Dean; and it was witness' opinion that Harold Dean died from strychnine poisoning. The defense claimed that Harold Dean died from natural causes; or

that if he died from strychnine, it was either self-administered, or administered by someone other than Vanteen.

It was disclosed in the trial that Gene Mote, Clyde Smith and Vanteen Dean Smith had each been separately charged with the murder of Harold Dean, but only Vanteen was tried at the trial from which comes this appeal. The Court instructed the Jury that if it found that Gene Mote was an accomplice, then the defendant could not be convicted on the uncorroborated testimony of Gene Mote. We have detailed only enough of the testimony to establish that there was sufficient evidence to take the case to the Jury and support the verdict. In view of issues subsequently to be discussed, we here state that the evidence was sufficient to have supported a conviction for first degree murder.

II. *Rulings Relating to Admissions of Evidence.*

(a) After the evidence for the defendant had been concluded, the State called James Price on rebuttal, who testified that two or three nights after Harold's death, the witness saw Vanteen and Clyde Smith spend the night together in the Rock Palace Tourist Court. It is claimed that this evidence was not rebuttal. In *Walker* v. *State,* 100 Ark. 180, 139 S. W. 1139, a similar claim was made; and in holding that the Trial Court had committed no error, we cited what is now § 43-2114, Ark. Stats., and said: "It rests within the sound discretion of trial courts to permit testimony to be adduced out of time, ..." To the same effect, see *Bobo* v. *State,* 179 Ark. 207, 14 S. W. 2d 1115. We hold that there was no abuse of discretion by the Trial Court in the ruling here challenged.

(b) The witness, J. L. Wright was permitted to detail certain testimony over defendant's objection. Later the Court told the jury:

"The Court, at this time, is holding that that testimony was improperly admitted and I am now asking and telling the jury to disregard that testimony, not consider it for any purpose whatsoever. . . ."

Notwithstanding the statement of the Court as just quoted, appellant insists that the error of the Court in first admitting the testimony could not be cured by the subsequent withdrawal of the testimony and the Court's admonition. We have more than a score of cases, each holding that error in admitting testimony can be cured by the Court subsequently withdrawing the testimony and admonishing the Jury.[2] The evidence here involved comes within the purview of this rule.

III. *Instructing on Second Degree Murder.* The Trial Court instructed the Jury on both first degree murder and second degree murder, and the Jury returned a verdict of guilty of second degree murder. The defendant all the time contended that she was either guilty of first degree murder, or guilty of nothing, and she now vigorously insists: that by § 41-2205, Ark. Stats.: "All murder which shall be perpetrated by means of poison . . . shall be deemed murder in the first degree"; and that since she was charged with the crime of murder by poisoning, it was error to instruct on murder in the second degree, citing, *inter alia, Allen* v. *State,* 37 Ark. 433; *Thompson* v. *State,* 88 Ark. 447, 114 S. W. 1184; and *Thurman* v. *State,* 211 Ark. 819, 204 S. W. 2d 155.

The contention here urged was first discussed by this Court in *Allen* v. *State,* 37 Ark. 433, which was a case of murder committed by poisoning; and in that opinion, Chief Justice English said:

"Until the Legislature shall think proper to enact that upon a charge of murder perpetrated by means of poison, etc., the jury must find the accused guilty of murder in the first degree, or acquit him, we know of no remedy except that of appropriate charges to the juries by the Circuit Judges."

The Legislature has not changed the law in this particular since the decision in *Allen* v. *State,* rendered in 1881. At common law there were no degrees of murder, and

[2] See *Eyer* v. *State,* 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B 30; *Goynes* v. *State,* 184 Ark. 303, 42 S. W. 2d 406. And see cases collected in West's Ark. Digest, "Criminal Law," § 1169 (5).

every murder was punishable by death.[3] The Arkansas Revised Statutes of 1837, in defining murder, in Chap. 44, Div. 3, § 1, contain no degrees or grades of murder; and § 7 of the same chapter and division said:

"The punishment of every person convicted of murder shall be death."

To remedy this situation and lessen the punishment in some cases of murder, the Arkansas Legislature, by Act of December 17, 1838,[4] provided in § 1, as found on page 121:

"That all murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree,[5] and all other murder shall be deemed murder in the second degree,[6] and the Jury shall in all cases of murder, on conviction of the accused, find by their verdict, whether he be guilty of murder in the first or second degree;[7] . . ."

This Act of 1838 is the law today, and our cases have even recognized that there are two classes of first degree murder: (a) those committed by poison and attempts to commit the named crimes; and (b) those committed by willful, etc., and premeditated killing.[8]

In some of our cases, under the peculiar facts presented, we have held that the Court committed no error in refusing to charge on second degree murder when the indictment charged first degree murder and all the evidence showed that offense. See *Clark* v. *State,* 169 Ark.

[3] See 26 Am. Jur. 161, *et seq.*

[4] At that time the Acts were not numbered, but were cited by date of approval and page in the printed volume.

[5] This portion of the Act is now found in § 41-2205, Ark. Stats.

[6] This clause of the Act is now found in § 41-2206, Ark. Stats.

[7] This portion of the Statute is now found in § 43-2152, Ark. Stats.

[8] For some cases making the distinction in the grades of first degree murder, see Judge BATTLE'S opinion on re-hearing in *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356; and see, also, *Sheppard* v. *State,* 120 Ark. 160, 179 S. W. 168.

717, 276 S. W. 849; *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477; *Simmons* v. *State,* 184 Ark. 373, 42 S. W. 2d 549; and *Jefferson* v. *State,* 196 Ark. 897, 120 S. W. 2d 327.

In other cases we have held that the Court committed no error in charging on second degree murder when the indictment charged first degree murder, even when committed by poisoning or attempt to commit one of the other named offenses. See *Allen* v. *State,* 37 Ark. 433; *Webb* v. *State,* 150 Ark. 75, 233 S. W. 806; and *Harris* v. *State,* 170 Ark. 1073, 282 S. W. 680.

It would be a work of supererogation to discuss all the cases and distinguish each on its facts.[9] The best summary we have found is that in *Rogers* v. *State,* 136 Ark. 161, 206 S. W. 152, in which Mr. Justice Wood discussed and catalogued our cases in this language:

"Where the indictment charges murder in the first degree, and the undisputed evidence shows that the accused, if guilty at all is guilty of murder in the first degree, then it is not error for the court to refuse to give instructions authorizing the jury to return a verdict of guilty of one of the lower degrees of homicide. *King* v. *State,* 117 Ark. 82-88, 173 S. W. 852; *Dewein* v. *State,* 114 Ark. 472, 484, 485, 170 S. W. 582; *Thompson* v. *State,* 88 Ark. 448, 114 S. W. 1184; *Ringer* v. *State,* 74 Ark. 262; *Allison* v. *State,* 74 Ark. 444-453, 86 S. W. 409; *Jones* v. *State,* 52 Ark. 345, 12 S. W. 774; *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829; *Allen* v. *State,* 37 Ark. 433; *Curtis* v. *State,* 36 Ark. 284. But, on the other hand, it is not prejudicial error for the court to give an instruction on the lower degree in such case, because the error is one that results in the defendant's advantage. While it is error to give an abstract instruction, yet, under the settled rule of this court, if it affirmatively appears that the rights of the accused are not prejudiced thereby, the judgment will not be reversed

[9] Extensive Annotations on various phases of the question here discussed are found in 12 L. R. A., N. S. 935; 21 A. L. R. 603; 27 A. L. R. 1100; and 102 A. L. R. 1019. In the article on "Homicide" in 26 Am. Jur., textural statements appear on pages 544 and 551.

for such error. *Autrey* v. *State,* 113 Ark. 347, 168 S. W. 556; 14 R. C. L. p. 783, § 49.

"Such is the case here. The verdict shows that the jury believed the defendant guilty and they so found. Had the instructions on the lower grades of homicide not been given, the jury, finding the defendant guilty, must have returned their verdict for murder in the first degree. Such verdict, under the State's waiver, would have called for life imprisonment. The instructions on the lower grades of homicide, therefore, were in appellant's favor, and he can not complain of the error of the court in giving them. The exact point is ruled by the cases of *Vasser* v. *State,* 75 Ark. 373-381, 87 S. W. 635; *Burnett* v. *State,* 80 Ark. 225, 96 S. W. 1007. See also *Paxton* v. *State,* 108 Ark. 316-320, 157 S. W. 396; *Glenn* v. *State,* 71 Ark. 86, 71 S. W. 254; *McGough* v. *State,* 119 Ark. 57, 177 S. W. 398."

IV. *Oral Instructions.* After deliberating for some time, and before reaching a verdict, the Jury returned into open Court and asked the further elucidation of the law; and the Court orally answered the Jury's questions, in keeping with § 43-2139, Ark. Stats. Nowhere in the bill of exceptions is there any mention that the Court's answers were oral. So, even if Art. VII, § 23, of the Constitution applies to a situation such as the one here, nevertheless there was a waiver of the provision for written answers. *Richardson* v. *State,* 80 Ark. 201, 96 S. W. 752; *Hlass* v. *Fulford,* 77 Ark. 603, 92 S. W. 862. We have carefully studied the record and conclude: (a) that the said answers made by the Court do not contain the vices that the appellant claims; and (b) that the Court committed no harmful error in said answers.

All the other assignments have likewise been found to be without merit, so the judgment is affirmed.

5-190 262 S. W. 2d 136

Opinion delivered November 16, 1953.

[redacted]

Talley & Owen, Dean R. Morley and *Max Howell,* for appellant.

Mehaffy, Smith & Williams and *B. S. Clark,* for appellee.

ROBINSON, J. This is a personal injury case; there was a verdict for the defendant in a jury trial; the plaintiff has appealed and urges for reversal two of the assignments of error set out in the motion for a new trial; first, that the verdict is contrary to the evidence, and second, the giving of Instruction No. 13 at the request of the defendant.

On March 19, 1950, the appellant, Mrs. Henry Keatts, Jr., was driving an automobile south on Broadway in the city of Little Rock. When she reached the point where

15th Street intersects Broadway, the defendant, George B. McAllister, who was driving his automobile eastward on 15th Street, entered Broadway and his car collided with the automobile operated by Mrs. Keatts.

On February 26, 1952, Mrs. Keatts filed this suit against McAllister, alleging that she received numerous injuries to her body and her muscles, tendons, and ligaments, and a severe and permanent shock to her entire nervous system. Defendant denied the material allegations of the complaint and pleaded contributory negligence as a defense.

In contending that the verdict is contrary to the evidence, appellant in effect says there is no substantial evidence of contributory negligence, and therefore that issue should not have been submitted to the jury. The issue of contributory negligence was submitted to the jury by the appellee's Instruction No. 5 to which appellant made only a general objection; furthermore the same issue was submitted by appellant's Instruction No. 1. An alleged error of the trial court in instructing the jury on an issue not raised by the evidence is harmless where both sides request an instruction on that issue. *National Fruit Products Co.* v. *Garrett,* 121 Ark. 570, 181 S. W. 926. In *Little Rock & M. R. Co.* v. *Moseley,* 8 Cir., 56 Fed. 1009, it is held that a party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction relating to the same matter on the ground that there was no evidence in relation thereto. In *Coddington* v. *Berry Dry Goods Co.,* 199 Ark. 1110, 137 S. W. 2d 249, it is said: "Appellant complains that certain instructions given at the request of appellees were erroneous; but even if this be true, appellant cannot complain because he requested instructions on the same matters." In *The Home Company* v. *Lammers,* 221 Ark. 311, 254 S. W. 2d 65, it is said: "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."

Instruction No. 13 deals with the right of plaintiff to recover for mental anguish. However, we need not decide the correctness of this instruction since there was a general verdict for the defendant, although it was stipulated Mrs. Keatts' medical expenses amounted to $70. Therefore the jury must have found there was no negligence on the part of the defendant or contributory negligence on the part of the plaintiff; otherwise there would have been a verdict for the plaintiff for at least her medical expenses or a nominal sum as damages and her costs. In *Graves* v. *Jewell Tea Co.,* 180 Ark. 980, 23 S. W. 2d 972, it is said: "By returning a verdict for appellees [the defendant in trial court], the jury must have found either that Hewitt [the driver of defendant's truck] was not negligent or that 'she [the plaintiff] contributed to her injuries by some act on her part of omission or commission.' " In *Kihlken* v. *Barber,* 129 Ohio St. 485, 196 N. E. 164, the Ohio court said: "The verdict was a general one and was for the defendant, and it was not disclosed by answers to interrogatories or otherwise upon which issue the finding was based. The jury may have reached its conclusion upon the ground that the defendant was not negligent, or upon the ground that, under the instructions given, the defendant was relieved from liability because of the contributory negligence of the plaintiff."

Likewise in the case at bar the jury may have reached a conclusion that there was no negligence on the part of appellee or that there was negligence on the part of appellant which contributed to cause the collision, these issues having been submitted to the jury by the instructions of both parties. Therefore whether Instruction No. 13 was a correct declaration of the law as to the right of the appellant to recover for mental anguish is immaterial.

Affirmed.

5-205 262 S. W. 2d 142

Opinion delivered November 23, 1953.

Talbot Field, Jr., and *Shaver, Tackett & Jones,* for appellant.

W. S. Atkins and *Bobby Steel,* for appellee.

J. SEABORN HOLT, J. July 2, 1952, a truck alleged to be owned by appellant, Fred Wright, and driven by Richard Russell, an alleged employee of appellant, on Highway 71, south of Wilton, Ark., "sideswiped" a Ford truck driven by appellee, Harris, resulting in such serious injuries to appellee that his left arm had to be amputated. Appellee sued Fred Wright for damages and a jury awarded him $5,585. This appeal followed.

For reversal, appellant argues (1) that the court erred in giving its Instruction No. 1, (2) in refusing to instruct a verdict for appellant at the close of all the evidence, because the testimony showed that the truck in question was "owned by Wright Lumber Company, Inc., a corporation, and was being driven, on a mission for said corporation, by one of the corporation's employees, Richard Russell; or, conversely, because there is no legally competent evidence in the record tending to prove that the truck was owned by defendant, Fred Wright, the President of the corporation, or that Russell was an employee

of Fred Wright or was on any mission whatsoever for said Wright when appellee received his injury. (3) That the court erred in admitting certain testimony, hereinafter discussed, over the objections and exceptions of the appellant."

The conclusion that we have reached makes it necessary for us to consider only whether the admission of the testimony—presently set out—to which appellant objected and excepted, constituted prejudicial error. We hold that it did, in the circumstances, and that the judgment must be reversed on this account.

Appellee's witness, Milton Mosier of the State Police, on direct examination, testified that, on learning of the collision between the two trucks involved, he, in company with the sheriff and Jack Jennings, went to the point where the collision happened, to investigate, and in this connection testified: "I was checking one of the trucks and Jack and the sheriff were checking the other one, and one of them found blood on the bunker and I went back there and examined it and I found cloth and blood and flesh on the bunker of the Russell truck. Q. Who was driving the truck? A. Richard Russell. Q. Did he tell you who he worked for? A. Yes, sir. Q. Who was that? BY MR. SHAVER: I object. BY THE COURT: Overruled. BY MR. SHAVER: Save my exceptions. A. Fred Wright."

Mosier further testified that he contacted appellant, Fred Wright, either the following day or shortly thereafter, and that Fred Wright told him that it was his (Wright's) truck that was involved.

Bearing in mind that the question of ownership of the truck driven by Russell and whom he, Russell, represented, was a hotly contested issue in the case, appellant asserting that the truck was owned by Wright Lumber Co., Inc., and driven by its employee, Russell, and appellee contending that the truck was owned by appellant, Fred Wright, individually, and driven by his agent, Russell, it seems obvious that the testimony of Mosier to the effect that Russell told him that he (Russell) was driv-

ing Wright's truck at the time of the collision, if admissible—and we hold that it was not—strongly supported appellee's contention that the truck belonged to Wright, that Russell was Wright's agent, and therefore any liability would fall on Wright and not the company.

No rule of law appears to be better settled than that neither agency nor the extent of the agent's authority may be proved by his own declarations or actions, as was attempted here. This court said in the early case of *Turner* v. *Huff, et al.,* 46 Ark. 222: "An agency cannot be proved by the declarations of the agent *in pais,* and in the absence of the party to be affected by them. 2 Wharton on Evidence, Sec. 1183." See also *Standard Mutual Benefit Corp.* v. *State,* 197 Ark. 333, 122 S. W. 2d 459.

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

Justice McFaddin not participating.

MILLER, *et al. v.* YOUNGER, *et al.*

5-192 262 S. W. 2d 146

Opinion delivered November 23, 1953.

Aurelle Burnside, for appellant.

A. D. Pope, for appellee.

GRIFFIN SMITH, Chief Justice. The mistake that has troubled mankind for so many centuries resulted in the conception of Wayne Younger out of wedlock. He was born in El Dorado August 9th, 1945. The mother, who remained unmarried, died December 11th, 1951, and her parents, Joe and Lois Miller, have appealed from a final order whereby Hosie and Edith Younger's petition for adoption was given final sanction July 31, 1952.

On behalf of the adopting petitioners it is contended that their son, Hosie Younger, Jr., is the child's father; that he has consistently acknowledged the relationship and initially paid the mother's expenses incidental to the ordeal of birth. It is also asserted that as a member of the armed forces he directed that an allotment for the boy's benefit be made to the child's mother, "and, at this time, under the G. I. Bill of Rights, makes for it a monthly allowance, changing it at the death [of the boy's mother] . . . to be payable to his mother, Edith J. Younger." Attached to the petition of Hosie and Edith Younger is the verified consent of Hosie Younger, Jr., in which he refers to the boy as "my child," etc.

It is insisted by appellants (a) that they are the nearest of kin; (b) the interlocutory order was without notice to them, and (c) these jurisdictional errors appear on the face of the record.

The final judgment contains a recital that the court's action was based on the several pleadings mentioned, "and upon oral testimony introduced in open court." Such testimony has not been brought up by bill of exceptions. The probate clerk's certificate is that the twelve pages of typewritten matter contain a true and complete transcript of the record and proceedings. This recital is in conflict with statements in the decree and cannot be accepted as evidence that oral testimony was not heard. *Weaver-Dowdy Co.* v. *Brewer,* 129 Ark. 193, 195

S. W. 367; *Massey* v. *Kissire,* 149 Ark. 215, 232 S. W. 24, (opinion on rehearing, p. 222 of the Arkansas Reports). It should be borne in mind, however, that the clerk's duty is to certify the record, not a bill of exceptions containing oral testimony heard by the court. *Beecher* v. *Beecher,* 83 Ark. 424, 104 S. W. 156.

Section 56-102, Ark. Stat's, fixes the place where the petition for adoption must be filed. That issue is not present here. Section 56-103 requires the petition to be verified. Subdivision (e) directs that the name of the person having custody of the minor be stated, except where there is a guardian. If it is alleged that both parents are dead, or that either is not living, the guardian, if there be one, must be identified. Where the allegation is that no guardian is known to the petitioner, then the name of a near relative is to be given, or in the alternative it must be stated that no close relative is known. Section 56-104 requires that all persons whose consent to the adoption is required be notified in the manner set out.

Section 56-106 (c) reads: "In case of illegitimacy, the consent of the mother shall suffice except where paternity has been established by judgment or order of a court of competent jurisdiction".

Although appellants allege that the child's mother placed it in their care shortly before she died, and that they are the rightful custodians, the assertion that it was wrongfully taken from them by the putative father's parents is not disclosed by any evidence. If appellants were custodians they were entitled to notice. This, however, is a factual issue susceptible of determination by the probate judge; and the same judge had power to make a finding that Hosie Younger, Jr., was the child's father. But irrespective of this issue the court could have found that appellees, when their petition was filed, were rightful custodians. This could not be true if we were permitted to treat as true the allegations contained in appellants' motion to vacate the interlocutory order; but in view of the recital that evidence was heard, it must be held that the assertion of custody cannot, in the absence of a bill

of exceptions, contradict the judicial recital and the integrity it imports.

Affirmed.

Mr. Justice WARD concurs.

RUSS *v.* CIVIL SERVICE COMMISSION OF PINE BLUFF.

5-169 262 S. W. 2d 137

Opinion delivered November 23, 1953.

Murry & Anders and *Brockman & Brockman,* for appellant.

R. A. Eilbott, Jr., for appellee.

ED. F. MCFADDIN, Justice. Appellant, L. D. Russ, was discharged from the Fire Department of Pine Bluff. His claim—that such discharge was improper and illegal—was denied by the Civil Service Commission of Pine Bluff, and by the Jefferson Circuit Court. The procedure has been followed just as stated in the case of *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750.

Russ now argues two points, which we discuss:

I. *Power of the Chief of the Fire Department to Discharge—Rather Than to Merely Suspend—Russ.* The Civil Service Commission of Pine Bluff had rules and regulations governing the Fire Department. Sec. 6 of the rules, in reference to the power of the Chief of the Fire Department, says:

"Sec. 6. He shall have power to summarily suspend any member of the department from duty, for flagrant violation of the rules and regulations where the reputation and discipline of the department would suffer if such action were not taken. He shall promptly report such suspension to the Civil Service Commission."

Appellant claims that under the above section, the Fire Chief could only *"suspend"*; and appellant says "suspend" is entirely different from "discharge". After a study of all the Pine Bluff Civil Service rules and the procedure under them, as well as the language of Act No. 326 of 1949, we reach the conclusion that the appellant's claimed distinction between "suspend" and "discharge" is not sound. In 83 C. J. S. 925, cases from many jurisdictions are cited to sustain the text:

"In connection with employment, 'suspend' may refer to a permanent discharge from employment, or it may mean to remove, either temporarily or permanently, from employment."

Furthermore, even if the Fire Chief could only "suspend", nevertheless the Civil Service Commission of Pine Bluff did in effect "discharge": so appellant's first point is without merit.

II. *Sufficient Cause for Russ' Dismissal.* In the Fire Department in Pine Bluff, the grades, from highest to lowest, were: (a) Fire Chief; (b) Assistant Fire Chief; (c) Captain; (d) Driver; (e) Hoseman. Russ was a regular Hoseman for Station No. 3, and had been so employed for approximately 18 months. He had also served infrequently as a Driver at that station, as it was customary for Hosemen to serve as Drivers, in order to learn

the work and be able to pass the examination to the higher grade. On July 29, 1952, the regular Driver at Station No. 3 went on two-weeks vacation, and Russ was told that he would be the Driver for that time. There was no vacancy as Driver, and Russ had not taken the examination to become a Driver. He was to do the work only during the vacation of the regular Driver.

Russ definitely and positively refused to serve as Driver unless and until he received the pay of a Driver, which was about $15.00 per month more than the pay he was receiving as a Hoseman. The Captain of Station No. 3 informed the Fire Chief of Russ' refusal, and on July 30th, Russ and the Fire Chief had a telephone conversation, in which Russ again refused to serve as Driver. Thereupon, the Fire Chief gave Russ written notice of his discharge, effective immediately. It was shown that after Russ' refusal, the Captain of Station No. 3 served as the Driver. It was also shown that the Hoseman did not receive Driver's wages, unless there was a vacancy in the rank of Driver, which vacancy did not exist at the time of Russ' refusal.

Russ admitted his refusal to act as Driver unless and until he received the extra pay. He admitted full knowledge of the rules of the Civil Service Commission, which provided, *inter alia*:

"Sec. 49. The following acts, infractions, or violations of the rules and regulations shall be deemed, upon conviction, as sufficient cause for dismissal from the service: '1. Willful disobedience of lawful orders . . .' "

Under all the evidence in this record, we conclude that the Circuit Court was correct in sustaining the Civil Service Commission of Pine Bluff in its action in discharging Russ for wilful refusal to obey the lawful order to act as a Driver during the vacation period of a fellow fireman.

Affirmed.

The Chief Justice concurs.

5-191 262 S. W. 2d 145

Opinion delivered November 23, 1953.

Walter Killough and *Claude F. Cooper,* for appellant.

Giles Dearing, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellee C. G. Bridges, to quiet his title to three lots in the City of Wynne, Arkansas. He asserted title under a warranty deed from Mr. and Mrs. G. J. Durham executed October 29, 1941, together with possession and the payment of taxes for more than seven years. Although the appellant, Ella Brown, was not made a party defendant, she filed an answer and cross-complaint in which she asserted title to the lots under a deed from the State of Arkansas. The chancellor found that appellee had acquired title by seven years adverse possession and entered a decree quieting his title to the lots.

It is undisputed that appellee has resided on the lots in question since January, 1942, following his purchase from the Durhams in 1941. He paid no taxes on the lots until 1946 when he paid taxes for the year 1945. He also paid taxes for the years 1946 to 1951, inclusive, and has

made certain improvements. In January, 1950, he procured a quitclaim deed from Paving Improvement District No. 3, to which the lots had forfeited for delinquent assessments.

Appellant's claim to the lots is predicated on a tax deed from the State of Arkansas dated December 19, 1945. In 1942, the lots sold to the State for the 1941 taxes and were certified to the State by the county clerk December 15, 1944. A decree was entered in the Cross Chancery Court on May 28, 1945, confirming the State's title to the lots. Although there is some evidence that appellant also paid taxes for 1945, she could not recall having paid any taxes on the lots and did not introduce any tax receipts.

Appellant contends that the chancellor erred in holding that appellee acquired title to the lots by adverse possession. This contention must be sustained unless title to the lots was already in either the State or an improvement district at the time of the sale to the State in 1942. *Bridwell* v. *Rackley,* 206 Ark. 381, 175 S. W. 2d 389; *Belcher* v. *Wheat,* 215 Ark. 377, 220 S. W. 2d 811. If appellant's deed from the State is valid, appellee had not held possession for the full seven years when he instituted this suit. There is some evidence that title to the lots was already in the State at the time of the 1942 sale. Records were also exhibited to the court at the trial from which appellee says the court found that title to the lots was in an improvement district at the time of the 1942 sale, and that the State was, therefore, without power to make the sale. None of the records bearing on these issues were introduced nor did the chancellor require appellee to refund to appellant the amount paid for her State deed.

Since the proof was not fully developed on the question of whether the lots were subject to taxation for the year 1941, we have concluded that justice would be best served by a further hearing on that issue. The decree is accordingly reversed and the cause remanded for that purpose.

ROBERTSON, *et al. v.* SLOAN, *et al.*

5-171 262 S. W. 2d 148

Opinion delivered November 23, 1953.

Martin & Haley, for appellant.

Carroll C. Hollensworth, for appellee.

GEORGE ROSE SMITH, J. This appeal presents a single question: Did a certain deed executed in 1908 convey to the grantee the fee simple title to the eighty acres in controversy, or did the deed create a mere life estate in the grantee, with remainder to his bodily heirs? The chancellor took the latter view and accordingly adjudged the land to belong to the appellees, who are the grantee's bodily heirs.

On August 10, 1908, Dixon Sloan conveyed this property to his son, David M. Sloan, "and unto his bodily, or his brothers and sisters heirs and assigns forever." When David sold the land in 1913 he purported to convey the fee simple, and by subsequent conveyances David's title has passed to the appellants. David died in 1946,

and thereafter his children brought this action, which was transferred to equity, to recover the property.

We agree with the chancellor's conclusion that the grantor's rather awkward language amounts in substance to a conveyance to David for life, with a remainder (*a*) to David's bodily heirs, or, if David should leave no bodily heirs, then (*b*) to the heirs of his brothers and sisters. Since David was in fact survived by bodily heirs clause (*a*), had it stood alone, would have created a life estate in David with the remainder in fee to his bodily heirs. Ark. Stats. 1947, § 50-405; *Horsley* v. *Hilburn,* 44 Ark. 458.

The appellants insist, however, that the addition of clause (*b*) brings the instrument within the Rule in Shelley's Case, so that the fee simple vested in David himself. We do not find this argument convincing. In its simplest form the Rule in Shelley's Case declares that a conveyance to A for life with remainder to his heirs vests the fee in A, since the term "heirs" is treated as a word of limitation rather than as one of purchase. In more complex cases the same result is held to follow if the remainder, no matter how it may be described, is in effect a grant to the life tenant's heirs. Rest., Property, § 312, Comment *g*. No better illustration of the latter aspect of the Rule could be found than that presented by our leading case on the subject, *Hardage* v. *Stroope,* 58 Ark. 303, 24 S. W. 490. There the conveyance was to the grantee for life with remainder to her bodily heirs, but if she left no bodily heirs the property was to be divided under the law of descent and distribution. We held that this language necessarily included all the life tenant's heirs, saying: "It is obvious that the intention of the deed in question was to convey the land in question to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. . . . The deed comes within the rule in Shelley's Case."

Similarly, in the case at bar the Rule comes into play only if it can be said that the remainder to the heirs of David's brothers and sisters necessarily encompassed all of David's own heirs, other than his descendants. But such an assertion cannot be maintained. In at least two respects clause (*b*) falls short of designating all persons who would inherit upon David's death without issue. First, upon David's dying without descendants his father would have stood first in the line of inheritance, and, since this particular property was ancestral, the senior Sloan would have taken the fee. Ark. Stats., § 61-110. Yet the elder Sloan would not have been an heir of David's brothers and sisters had they left children of their own. Second, the remainder to the heirs of David's brothers and sisters obviously does not include the brothers and sisters themselves, who would have taken had David left neither lineal descendants nor lineal ascendants. Ark. Stats., § 61-101. Hence clause (*b*) did not bring this deed within the Rule in Shelley's Case, and the trial court correctly held that by reason of clause (*a*) the appellees are the owners of the land.

Affirmed.

ARKANSAS GAME & FISH COMMISSION *v.* KIZER, *et al.*

5-198 262 S. W. 2d 265

Opinion delivered November 23, 1953.

Ed E. Ashbaugh, for appellant.

John L. Anderson, for appellee.

George Rose Smith, J. This is the second appeal in a suit brought by the appellee landowners to compel the White River Drainage District to maintain the surface level of Old Town Lake at an elevation of 159 feet above sea level. By intervention the Game and Fish Commission and the appellant landowners contended that the lake should be maintained at a level of 169 feet to protect the fish in its waters. After hearing the testimony of many witnesses and after considering a report submitted by a board of three civil engineers appointed by the court, the chancellor originally entered a decree fixing the water level at 162 feet.

Upon the first appeal we held that the trial court erred in considering the engineers' report without permitting these appellants to cross-examine the men who had prepared it. The case was accordingly remanded so that an opportunity for cross-examination might be provided. *Ark. State Game & Fish Com'n* v. *Kizer,* 221 Ark. 347, 253 S. W. 2d 215. After remand the three engineers testified at a second hearing, and in the decree now challenged the chancellor again fixed the water level at 162 feet. We confine this opinion to the two points now argued by the appellants.

First, it is contended that if the testimony of the court's board of engineers be disregarded, the only expert opinion in the record shows that the normal elevation of the lake's surface is 164 feet above sea level. We do not so construe the testimony. There is abundant proof that the level of this lake has varied from a low of about 158 feet to a high of about 169 feet. In addition to fluctuations resulting naturally from wet or dry seasons, the lake's depth has also been affected by the drainage district's manipulation of its artificial drainage system. Any attempt to determine the lake's normal level must take all these factors into account.

The appellants' argument is based almost entirely upon the testimony of an engineer, E. G. Green, who said at the first trial: "The average [elevation], I would think, would be about 164 feet; rather, that would be normal." But in other respects Green's testimony strongly supports the chancellor's decree. Green said, for example, that an elevation of 164 feet would be hazardous in the spring, owing to the threat of flood waters at that time of year. Furthermore, Green had been an engineer for the drainage district for some twelve years, and at the first trial he testified: "I try to keep an elevation of 162 feet. Now it is 161.6. . . . That is two or three tenths [of a foot] lower than it should be."

Finally, Green was one of the three engineers appointed by the court, and at the second hearing he qualified his earlier statement in this way: "I didn't hear the question asked: if 164 feet was the normal elevation of the lake. I certainly didn't answer that it was normal. I said 164 feet would keep the water within the banks of the lake. Those banks are several feet high, and you would vary from 158 feet to 166 or 167 feet, but it isn't the normal water." The appellants would have us ignore this and all other testimony taken after remand, for the reason that in some jurisdictions it is held that a trial court must hear the case as presented by the litigants and cannot call a witness upon its own initiative. *South Covington etc. Co.* v. *Stroh*, 23 Ky. Law Rep. 1807, 66 S. W.

177, 57 L. R. A. 875. We do not reach this question, for the objection does not fairly apply to the quoted excerpt from Green's testimony at the second hearing. Green was not a new witness selected by the court alone; he had been called at the first hearing both by the plaintiffs and by these appellants. Since a court may on its own motion recall a witness for clarification of testimony already given, *The Kawailani,* 9th Cir., 128 F. 879, the chancellor was at least entitled to consider such of Green's later statements as were merely explanatory of his earlier testimony. When we review the record in this manner we do not find the decree to be contrary to the preponderance of the evidence.

Second, the Game and Fish Commission complains of the court's action in allowing to its board of engineers fees totaling $1,300, of which $966.67 was taxed as costs against the Commission. This issue was expressly reserved in the first opinion, and we now hold that the chancellor was without authority to assess this item against the Commission.

It is suggested that these court-appointed engineers were in effect masters in chancery, whose fees may therefore be taxed as costs. The board's procedure, however, did not resemble that by which a master must be guided. Ark. Stats. 1947, Title 27, Ch. 18. A master not only reports his findings to the chancellor but also submits a transcript of the evidence taken, so that the court may determine whether the findings are supported by the testimony. For this reason a master in chancery cannot base his conclusions upon evidence not in the record. *Pierce* v. *Scott,* 37 Ark. 308; *Greenfield* v. *Peay,* 137 Ark. 552, 209 S. W. 730. Yet here the board of engineers neither took testimony nor confined themselves to the record. Instead, they studied the available records and gauge readings of the lake, examined the surrounding topography, took soundings of the lake's depth, and, without submitting any of these matters to the court, recommended that the lake level be fixed at 162 feet. There is little similarity between the board's conduct and that of a master.

It is plain enough that the three engineers appointed by the court served merely as expert witnesses; so the question narrows down to whether a court may employ such experts and tax their compensation as costs over the objections of the litigants. The marked scarcity of decisions on the point indicates pretty convincingly that the court lacks this authority. One of the few cases in point, which we approve, is *International Fastener Co.* v. *Francis Mfg. Co.,* 204 App. Div. 526, 198 N. Y. S. 455, affirmed by memorandum opinion, 236 N. Y. 673, 142 N. E. 330. There the defendant consented to the referee's appointment of an expert accountant, but counsel gave notice from the outset, as the Commission did here, that the payment of this expert's fee was not agreed to. It was held that the charge could not be taxed as costs, for the reason that costs "are a creature of the statute and cannot be taxed except by its authority."

Our own cases point to the same conclusion. We have often held that the allowance of costs is purely statutory, since at common law neither party was entitled to recover his costs. *Thorn* v. *Clendenin,* 12 Ark. 60; *Wilson* v. *Fussell,* 60 Ark. 194, 29 S. W. 277; *Boynton Land & Lbr. Co.* v. *Hawkins,* 122 Ark. 374, 183 S. W. 959. California, Rhode Island, and Wisconsin have statutes permitting the court to select an expert witness, and that procedure is contained in the Model Expert Testimony Act, which makes provision for the expert's compensation. 9 U. L. A. 429, and Commissioners' Note to § 1. We have no similar statute, however; somewhat to the contrary, we have held that in a criminal case the State may require any physician to give expert testimony without being entitled to more than an ordinary witness fee. *Flinn* v. *Prairie County,* 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669; *Clark County* v. *Kerstan,* 60 Ark. 508, 30 S. W. 1046. In the absence of statutory authority, the fees now in question cannot be treated as costs.

That part of the decree which taxes these costs against the Commission is set aside, and as so modified the decree is affirmed.

5-200 262 S. W. 2d 920

Opinion delivered November 23, 1953.

Rehearing denied January 11, 1954.

[redacted]

Mahony & Yocum, for appellant.

Spencer & Spencer, for appellee.

WARD, J. Henry Lum, an employee of the State Highway Department, while working with a crew of men in replacing a bridge on Highway No. 82 about one mile west of El Dorado, met his death by electrocution. While the dragline crew was attempting to place a heavy tile in position, the cable on the dragline made contact with a

high voltage wire belonging to the Arkansas Power and Light Company and in some manner the deceased contacted the cable and was severely burned on his hands and feet, resulting in death. Suit was instituted by Mary Cain Lum, widow of the deceased, in her own right and as next friend of Leona Pearl Lum, age 13, and Omer Dean Lum, age 4, resulting in a substantial judgment in favor of appellees.

Factual Statement. The Highway Department crew of which the deceased was a member was engaged in removing a small wooden bridge and replacing it with a large tile culvert. The culvert was to consist of several joints of tile each of which was about 5 feet in length, approximately 66 inches in diameter, and weighed approximately 7,000 pounds. Each joint of tile was placed in position by means of a dragline, and in each tile there was a hole midway between the ends through which the cable on the boom of the dragline could be inserted and attached. The accident occurred while the highway crew was attempting to place in position the last joint of tile. After the cable had been attached to the tile by the deceased and two others an attempt was made to lift it by the machinery described above, and in doing so the cable made contact with the high voltage electric wire. One of the things which apparently caused the contact with the live wire was that when the lift was attempted the joint of tile rolled over in the direction of the high voltage line and this was, apparently, due to the fact that the hole in the tile through which the line was attached was not on the top side of the tile as it was then lying but was on the side away from the high voltage line.

At the place where the tile was being substituted for the old bridge the surface of the highway is some 9 or 10 feet higher than the ditch or swag in which the tile was being placed. The highway right of way at this point is 60 feet wide and the concrete slab is 18 feet wide. Appellant's wires, which ran along the north side of and close to the north boundary of the highway, were situated in this manner: One of the supporting poles was located 86 feet east of the old bridge and another one was located

194 feet west of the bridge. The poles were about 35 feet in length and were set in the ground about 5 feet, not on the highway right of way. It is approximately 31 feet from the east pole to the center of the highway and approximately 32 feet from the west pole to the center of the highway. The cross arms are 8 feet in length and support 3 wires attached with insulators. The wire on the south side of the cross arm—the one with which contact was made—is approximately 25 feet above the ground at the east pole and is approximately 27 feet above the bottom of the swag in which the men were working. The distance from the contacted wire to the ground on each side of the swag is approximately 23½ feet. The contacted wire carried 13,800 volts, and the point where it was contacted was approximately 25½ feet from the north edge of the pavement and was about 18 feet higher than the pavement. The ground under the wire was not suited for traffic and was not ordinarily so used.

The testimony, about which there is practically no dispute as it relates to the issues involved, discloses the following facts and circumstances immediately attending the fatal injury: Just before the operator of the dragline attempted to lift the tile as stated above he made a practice swing of the boom in the presence of the deceased to see if it would clear the electric wire [which was later contacted] and it showed that the wire would be cleared by 4½ or 5 feet; the foreman, Mr. Batson, the deceased, and one other man connected the cable with the tile and just before the lift was attempted the foreman cautioned everyone to get back from the tile to a place of safety; the deceased did move away some 5 to 10 feet although at the time the accident occurred no one was looking at the deceased or knew exactly how he made contact with the electric current; due to the position in which the tile was lying at the time the cable was attached it was recognized that it would have a tendency to roll to the north [in the direction of the contacted wire] and consequently a piece of wood was placed on the north side of the tile to hold it in place; however when the lift began the joint

of tile did roll or swing to the north and the cable attached to the boom made contact with the wire; although no one saw the deceased put his hands on the cable or tile the conclusion must be drawn that he did so. The deceased was burned severely on his hands and feet and the evidence discloses that this could not have happened without his having touched the tile or the cable. In the complaint the following allegation appears: "That the deceased, Henry Lee Lum, in moving out of the way of the cement tile placed his hand thereon and received the full impact of the power carried by the high line of the defendant." The contacted electric line was not insulated.

There is no allegation or contention by appellees that the wires, poles, or cross arms were in any way defective or that they were not up to standard in every respect, excepting of course the elevation and the lack of insulation of the wires.

The allegations of negligence contained in appellees' complaint are:

1. In failing to insulate the power line in the area of the "filled" portion of the highway.

2. In failing to maintain the same vertical clearance between the highway surface and the power line at the point of the "fill".

3. By maintaining the power line so close to the highway surface as to render the use of the highway by equipment which they knew, or should have known, would be used thereon, dangerous.

4. In failing to maintain a safe vertical clearance distance between the lines and highway at a place where death occurred.

Allegation (1) need not be considered separately for the reason, as later shown, there was no duty on appellant to insulate the wire in question provided there was no negligence in maintaining it at the height it is shown to be. Allegations (2) and (4) need not be separately dis-

cussed because they are included in the general issue of negligence as later set out.

As we see it the main allegation of negligence is contained in subdivision (3) and as applied to the facts in this case, it may be more fully stated in the following way: Did appellant know, or by the exercise of ordinary care and foresight should it have known that its wires were so located as to constitute a dangerous situation, and should it have anticipated that the bridge would at some time have to be repaired, and by the use of equipment such as was used here, and further that in the process of such a repair operation injury was likely to result because of contact with the wire in the manner it happened here?

At the close of the evidence offered by the appellees and again at the close of all of the evidence offered by both parties appellant requested a directed verdict on the grounds, (1) that the appellees have not shown any negligence on the part of appellant and (2) that all of the evidence shows that deceased was guilty of contributory negligence as a matter of law. The trial court overruled these motions and a reversal is urged on the grounds above stated. The conclusion we have reached makes it unnecessary to consider the second ground because, in our opinion, there is no evidence of any negligence on the part of appellant.

It is not disputed that the deceased as well as all other members of the highway crew was fully aware of the position and location of the electric wires and that the same condition relative to their location existed during the 8 or 10 days the crew had been working. It is not disputed that appellant had a right to place its lines on its own right of way and had a right to construct and maintain the same as provided in Ark. Stats., § 35-301. The evidence shows that the wire at the point of contact was close to 18 feet higher than the surface of the highway, that it was approximately 25 feet north of the blacktop and that it was approximately 27 feet above the bottom of the swag in which the men were working and ap-

proximately 23½ feet above the ground on each side of the swag.

The National Electrical Code was introduced in evidence and both sides cited portions dealing with the vertical height of high voltage lines. We agree with appellant that it specifies a vertical height of 18 feet in rural areas such as the location under consideration and 20 feet in urban areas. The fact that traffic was sometimes heavy on highway No. 82 at this point was immaterial because it is not established that heavy traffic had any connection with the accident. Conceding that appellant should have known that the bridge would some day have to be repaired and that equipment similar to that here used would have to be employed still it does not seem reasonable that appellant could have known or anticipated the combination of circumstances and events which caused the injury to the deceased in the manner in which it occurred here. It is unreasonable to say appellant should have anticipated that the cable would be attached to the tile in such a manner that it would cause the tile to roll or swing when it was lifted or that it could anticipate that some employee would be close enough to it to cause contact with the cable in the event it made contact with the highline.

The degree of care on the part of appellant in erecting and maintaining its wires is set forth in *Morgan* v. *Cockrell,* 173 Ark. 910, 294 S. W. 44. In this case the trial court instructed the jury [instruction No. 1 at page 913 of the Arkansas Reports] that the power company owed "the public a high degree of care" to keep its wires properly suspended. In reversing the trial court on this point the court said:

"The trial court appears to have had an erroneous view of the degree of care required of appellant in the maintenance and operation of its light wires for giving service to the city, as shown in instruction No. 1, which stated that it 'owed the public a high degree of care,' and that, if the defendant 'failed to exercise a high degree of care,' etc., and the deceased was injured 'while in the

exercise of ordinary care for his own safety,' plaintiff should recover, apparently requiring the use of a higher degree of care of the appellant than ordinary care, as required under the law.''

The court then, after citing and quoting from a number of cases, said:

''It will be seen from these decisions that it has long been the settled law in this State that electric companies, in the stringing and maintaining of their wires in the streets of the cities to give service to the public, are only bound to the exercise of ordinary and reasonable care for the protection of all who have right to the use of the streets, such reasonable and ordinary care varying with the circumstances of each case, having in view the dangers to be avoided and the likelihood of injury therefrom, which may require a high or the highest degree of care under the particular circumstances. The court erred in disregarding this rule in giving said instruction No. 1, . . .''

From the above quotation it will be noted that the circumstances and surroundings in each case may have some bearing on the degree of care, and appellees lay stress on the fact that Highway No. 82 at this point was heavily traveled. We cannot agree that this circumstance has any bearing here because, as previously stated, it is not alleged or contended that the accident was in any way caused by or connected with traffic on the highway at that time.

The evidence shows that the contacted wire was 2 feet and 3 inches over on the right of way at one point but it is not clear at just what point, therefore, it is argued, appellant was a trespasser. Again it is not pointed out how this particular fact contributed to the accident. Moreover the answer to this contention is found in *Arkansas Power & Light Co.* v. *Prince,* 215 Ark. 182, 219 S. W. 2d 766.

The contention of appellees that the absence of insulation on the contacted wire is also answered in the *Prince* case, in *Arkansas General Utilities Company* v.

Wilson, Admr., 197 Ark. 351, 122 S. W. 2d 956, and other decisions of this court. The applicable rule is that a power company has the duty of either *insulating* or *isolating* its wires in a particular case. As before stated, we are here holding that appellant's wire was properly isolated under the circumstances. This view makes it unnecessary to consider testimony tending to show the futility of insulating a wire carrying 13,800 volts.

In view of all the facts and circumstances in this case we are unable to see disclosed any act of negligence on the part of appellant which a jury could say was the proximate cause of the accident. Negligence on the part of appellant cannot be presumed because there was an accident. In *Export Cooperage Company* v. *Ramsey*, 133 Ark. 336, 202 S. W. 468, this court, quoting from *St. Louis and San Francisco Railroad Co.* v. *Wells*, 82 Ark. 372, 101 S. W. 738, said:

"Negligence of the company can not be inferred merely from the occurrence of the accident. That must be proved, and the burden of establishing it is on the party who alleges it."

It is recognized generally as well as by the courts that electric utility companies, such as appellant, must meet the public demand for a ready and adequate supply of power. In doing so they are not insurers against accident or injury, and are not held liable for such as can not be reasonably foreseen. The duty imposed in such instances is well stated in Vol. 29 C. J. S., pages 573-4, under the general heading of electricity:

"Electrical companies are not insurers of the safety of the public nor of those whose occupation is likely to bring them into dangerous contact with their appliances, and hence are not liable for injuries unless guilty of some wrongful act or omission. The failure of a power company to anticipate and guard against events which may reasonably be expected to happen is negligence, but a failure to anticipate events occurring only under unusual circumstances is not negligence. There can be no recov-

ery against an electric company in the absence of a breach of some duty owing to the injured person."

Since, as we see it, the only alleged act of negligence on the part of appellant that could be relied on here by appellees is the position, relative to vertical height, of the contacted wire, and since we conclude that this condition was not the proximate cause of the accident and, further, that it is not shown appellant violated any custom or safety code in the installation or maintenance of its wires in this instance, the judgment of the trial court is reversed and the cause of action is dismissed.

Justices HOLT and MILLWEE dissent.

ARKANSAS-MISSOURI POWER COMPANY *v.* DAVIS, *et al.*

5-202 262 S. W. 2d 916

Opinion delivered November 23, 1953.

Reid & Roy, for appellant.

Gerald Brown and *Kirsch & Cathey,* for appellee.

ROBINSON, J. Appellee James A. Davis, an employee of Paragould Poster Advertising Company, while acting in the due course of his employment, received serious electrical burns when he lost control of an aluminum ladder which he was attempting to hook onto a large signboard and it came in contact with an electric wire carrying 33,000 volts belonging to appellant Arkansas-Missouri Power Company. Appellee St. Paul-Mercury Indemnity Company is the carrier of the workmen's compensation insurance covering Davis. A jury returned a verdict for appellees against the power company in the sum of $20,000. The appellant raises two issues on appeal, contending first, that there is no substantial evidence of any negligence on its part; and second, that appellee Davis is guilty of contributory negligence as a matter of law.

The signboard is 12′ x 15′ and located on private property leased by the Paragould Poster Advertising Company at the intersection of U. S. Highway No. 63 and State Highway No. 117 in Greene County. The power company's 33,000 volt electric line was constructed in 1936 and is located on the right-of-way of Highway No. 63. The signboard was constructed in 1946 and sits at an angle to the electric line; the end of the signboard over which appellee Davis was attempting to hook the ladder at the time he was injured was approximately 4 feet from the electric wire. According to measurements made some time after the date of the injury, the line was about 18′ above the ground. Appellee contends, however, that according to the evidence, the jury would have

been justified in finding that at the time the injury occurred on February 19, 1951, the electric line was only a little over 16 feet from the ground, which would be less than the minimum required by the National Safety Code; and at such height the line would be even less than 4 feet from the signboard. This point is immaterial because in view of the evidence in the case, it was a question for the jury to say whether the power company was negligent in maintaining the line in such proximity to the signboard regardless of whether it was 3 feet or 4 feet.

On the particular day in question appellee along with a fellow employee, Eldors L. Staggs, went to the signboard to place a new sign thereon. They stopped their truck near the sign and each took a ladder to be used in connection with their work. The ladders had hooks on one end, and in using them these hooks were placed over the top edge of the signboard. Staggs placed his ladder over the signboard and returned to the truck for additional supplies; Davis attempted to hook his ladder over the top of the sign at the end which was nearest to the electric wire. In doing so he lost control of the ladder through slipping or otherwise, and it came in contact with the electric line which was as heretofore stated approximately 4 feet from the corner of the signboard, resulting in the burns to Davis. The evidence is not clear as to just what caused Davis to lose control of the ladder; it is alleged in the complaint that he slipped and there is some evidence to the effect that this happened. On the other hand, according to the evidence the ladder may have become overbalanced; but in any event the evidence is not sufficient to say that Davis was negligent as a matter of law in letting the ladder get out of control. Nor can we say as a matter of law that Davis was negligent in attempting to work on the sign at all with the 33,000 volt electric wire only 4 feet therefrom; the wire had been there about 15 years and the signboard had been there about 5 years; Staggs had changed the signs on the board 60 or 70 times, and Davis had done the same at least half a dozen times without any untoward happening.

In the circumstances we can not say that Davis was doing something which an ordinarily prudent person would not have done; nor can we say that in the same or similar circumstances an ordinarily prudent person would not have lost control of the ladder.

"What will constitute contributory negligence on the part of the person injured must depend upon the circumstances of each case. If from those circumstances reasonable men might differ as to whether the person did or did not exercise ordinary care, the question must be left to the jury for its determination." *St. Louis & S. F. Railroad Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850. See also *Capitol Transportation Co.* v. *Carter,* 204 Ark. 295, 161 S. W. 2d 746, and *Bush, Rec.,* v. *Jenkins,* 128 Ark. 630, 194 S. W. 704.

On this point appellant cites *Hines* v. *Consumers' Ice & Light Co.,* 173 Ark. 1100, 294 S. W. 409; *Arkansas Power & Light Co.* v. *Prince,* 215 Ark. 182, 219 S. W. 2d 766; *Bulman Furniture Company* v. *Schmuck,* 175 Ark. 442, 299 S. W. 765; *Gullett, Adm'x* v. *Arkansas Power & Light Co.,* 208 Ark. 44, 184 S. W. 2d 819; and *Southwestern Gas & Electric Co.* v. *Bianchi, Adm'x,* 198 Ark. 996, 132 S. W. 2d 375; but all these cases are distinguishable by the facts from the case at bar. Appellant stoutly relies on the case of *Arkansas Power & Light Co.* v. *Hubbard,* 181 Ark. 886, 28 S. W. 2d 710. In that case Mrs. Nettie Hubbard was injured when she was attempting to set in a hole a long pine pole to which a sign had been fastened near the top. In attempting to raise the pole, Mrs. Hubbard received a severe shock when it fell against a transmission line. There the court held that she was guilty of contributory negligence as a matter of law; but the facts in that case are clearly distinguishable from the facts in the case at bar.

Next we come to the point of whether there is any substantial evidence of negligence on the part of the power company in maintaining the line at such a short distance from the signboard. Not only was it the duty of the power company to see that its wires were properly

installed in the first instance; but it was also the duty of the company to maintain the lines in such condition. " 'From the very nature of its business, an electric company using highly charged wires owes the legal duty, irrespective of any contract relation, toward every person who, in the exercise of a lawful occupation in a place where he has a legal right to be, is liable to come into contact with the wires, to see that such wires are properly placed with reference to the safety of such persons,' etc. 9 R. C. L. § 20, p. 1210. It follows, of course, from the principle thus announced, that the wires should be inspected at reasonable intervals, mended, and kept in repair." *Arkansas Light & Power Co.* v. *Cullen,* 167 Ark. 379, 268 S. W. 12.

In *Arkansas Power & Light Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846, the power company owned the electrical distribution system in the city of Waldo, Arkansas. In 1928, which was subsequent to the time the electric system was constructed, a two-story brick building was erected on Main Street, the second story being 4½ feet from the inside electric wire. Virgil L. Cates, an employee of an oil company, while attempting to hang a sign on the building, was electrocuted when a fellow employee jerked on the wires they were using to hang the sign and they came in contact with Cates and the high voltage electric line. There the court said: "It is true the two-story house was built after appellant's wire was put up; but when the building was erected it was the duty of the appellant to use ordinary care with reference to the building and proximity to the wire after the erection of a two-story building." The court quotes from *Curtis on Electricity,* 699: "The duty of an electric company in reference to keeping its appliances in safe condition is a continuing one; not only must it exercise a high degree of care in the original selection and installation of its electric apparatus, but thereafter it must use commensurate care to keep the same in a proper state of repair. The obligation of repairing defects does not mean merely that the company is required to remedy such defective conditions as are brought to its actual knowledge.

The company is required to use active diligence to discover defects in its system. In other words, an electric company is bound to exercise due care in the inspection of its poles, wires, transformers, and other appliances."

In the same case the court quotes from *1 Joyce on Electricity,* 735: "A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have a right to go, either for work, business, or pleasure, to prevent injury."

The court further said in *Arkansas Power & Light Co.* v. *Cates,* supra,: "It is argued by appellant that the injury would have occurred if the wires had been 8 or 10 feet from the building, and they state that the evidence of Dice that they should have been at least 6 feet from the building, cannot indict the appellant company with negligence. . . . But, at any rate, we think under all the authorities that the negligence of the company was a question for the jury."

We have in the case at bar testimony of experts as to whether permitting the line to remain at a distance of only 4 feet from the signboard after the erection of the sign was in accordance with well-recognized safety measures generally followed by those constructing and maintaining high voltage lines. Lee Harvill, produced as a witness by appellee, testified that he is engaged in all phases of electrical business as far as construction is concerned, including the construction of electrical transmission lines; that he has been in that business for 25 years and has constructed lines for Arkansas Power & Light Company, Empire State and Empire Electric Company of Joplin, all the co-ops of the state, and Ka-Mo Electric Co-op; that he has built hundreds of miles of electrical transmission lines in the last 20 years and built them all over Arkansas, Oklahoma, Missouri, Texas, Louisiana, and Mississippi. Mr. Harvill testified that the construction of the line was all right if the signboard had not been there; but it was a different matter with

the signboard being located as it was. "Q. Without the sign being there, it was all right; but with the sign there, what would be your opinion with reference to the construction? A. The wire should have either been raised or removed, or the sign put some other place, because the hazard was there."

The witness Harvill further testified that if he had been building the line he would have constructed it so that there would have been an additional 10 feet of space between the wire and the signboard; and further: "Q. As a matter of practice in the utility industry, Mr. Harvill, when there is a construction which at the time it is made does not involve another structure, and later there is created a structure which develops a hazard, what are the customary practices on the part of the utility companies relative to raising or removing—relative to the raising or removal of their line? A. Where it is known by them they move it. Q. They move it? A. That's right." There is no contention here that the electric company did not know of the location of the signboard with reference to the electric wire. Furthermore Mr. William P. McCormick, an electrical engineer employed by appellant company, testified: "Q. And you knew it was its [the power company's] duty, even if its lines were originally constructed in a safe condition, to make changes if an additional hazard had been later developed? A. Yes, sir."

Also Mr. Paul M. Zander, an expert called as a witness by appellee, testified as to the location of the electric line with reference to the signboard, and then stated: "Q. Viewing this situation as you found it to exist, would the clearances which you found here, particularly along the right hand side of this signboard—I mean by that the right six feet—would the clearances which you found to exist at that particular point be sufficient, according to the generally accepted standards of the engineering profession and the industry? A. I would say no." Witness further stated that the effect of inadequate clearance between the signboard and the electric line would be to increase the hazard. "Q. Would you say that a 33,000

volt wire would be a hazardous thing so far as the possibility of contact was concerned? . . . A. Yes, I would."

We think the testimony of Harvill and Zander was sufficient to take the case to the jury on the question of whether the defendant power company was negligent in permitting the electric line to remain within about 4 feet of the signboard after the construction of the board. The testimony of these two witnesses is one of the distinguishing features between this case and the case of *Arkansas Power & Light Co.* v. *Lum,* 222 Ark. 678. It might be asked, how can it be said that the power company should have anticipated the very thing that did happen, but that the injured party be relieved from any duty to foresee what might happen even though he realized the dangerous qualities of electricity. The answer is that the questions of negligence and contributory negligence were peculiarly within the province of the jury to decide, there being sufficient evidence to justify the submission of both issues.

We can not say as a matter of law according to the testimony in this case that there was no negligence on the part of the power company in permitting its 33,000 volt electric line to remain within 4 feet of the signboard; nor can we say as a matter of law according to the evidence in the record that appellee is guilty of contributory negligence. These two are the only issues involved.

Affirmed.

SCHIRMER *v.* LIGHT, JUDGE.

5-333 262 S. W. 2d 143

Opinion delivered November 23, 1953.

Q. Byrum Hurst and *C. A. Stanfield,* for petitioner.

T. J. Gentry, Attorney General and *Eugene R. Warren,* for respondent.

GRIFFIN SMITH, Chief Justice. The Attorney General, by proceedings in the nature of *quo warranto,* questioned in Clay circuit court the right of Dr. Jacob Sass Schirmer to practice as an eclectic physician, or in the alternative require him to show that license No. 657 issued November 10, 1920, was valid. No facts in avoidance appear upon the face of the certificate, a copy of which is in the record.

Schirmer demurred, contending the state's admission that he had been licensed placed exclusive jurisdiction in the Eclectic State Medical Board. When the court ruled adversely Schirmer applied to this court for prohibition. The writ issued November 16, 1953, coupled with a statement that a formal opinion would follow.

Contention of the Attorney General is that §§ 34-2201 and 34-2203 confer authority to maintain the procedure, the pertinent language being: "Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him . . . by the state . . . to prevent the usurper from exercising the . . . franchise". In support of this

position our attention is called to *State ex rel. Robinson, Prosecuting Attorney,* v. *Jones,* 194 Ark. 445, 108 S. W. 901. Judge Butler's comment was that, independent of the statute relied upon, the state is authorized to maintain actions to oust all persons from offices to which they are not eligible, "or the right to hold which they may have forfeited."

In the present proceeding reliance is placed upon the court's holding that the state may question in its courts the status of any person to hold office where that right has been forfeited; but since the right to operate under a franchise is likewise subject to judicial inquiry the Attorney General thinks we should construe the law as liberally as language will permit and hold that a physician licensed by a board comes within the reach of the remedy at common law or the statutory expression when so broadened. This point was argued orally when the petition for prohibition was considered.

We do not find in any of our cases that the court has gone to the extent suggested. Such a rule would permit the Attorney General to inquire into the status of all practicing physicians, pharmacists, engineers, dentists, and all persons required to pass an examination as a prerequisite to entering a profession.

In *Eclectic State Medical Board* v. *Beatty,* 203 Ark. 294, 156 S. W. 2d 246, the plaintiff undertook to enjoin the Eclectic Board from revoking his license. This pertinent sentence appears at page 301 of the Arkansas Reports: ". . . we have reached the conclusion that the jurisdiction to hear evidence and to revoke or refuse to revoke the license of the appellee was vested by law in the Eclectic State Medical Board, and the chancellor was without jurisdiction, under the pleadings in this case, to enjoin said board from hearing and determining this question."

So, in the case at bar, power was placed with the Board to determine whether an outstanding license was fraudulently procured; and until opportunity has been given that agency to hear evidence and make a finding,

circuit court is without jurisdiction. The method by which the Board's action may be reviewed is not presented at this time.

ASHLAND OIL & REFINING COMPANY *v.* BOND.

5-187 263 S. W. 2d 74

Opinion delivered November 30, 1953.

Rehearing denied January 18, 1954.

McKay, McKay & Anderson, for appellant.

Mahoney & Yocum, for appellee.

George Rose Smith, J. This was originally an action at law brought by Durbin Bond to recover the sum of $12,737.85, alleged to be due to Bond as his share of the proceeds from the sale of oil produced from a well as to which Bond and the defendant, Ashland Oil & Refining Company, are colessees. The complaint asserts that Ashland, as the operating lessee, has wrongfully charged to Bond certain expenses incident to reworking the well. Ashland's principal defense is that Bond's share of these expenses should be deducted from his *pro rata* part of the income from the venture. The cause having been transferred to equity, trial resulted in a decree for Bond.

There is no dispute in the record concerning any material fact. In 1946 Bond owned an undivided one-fourth interest in this leasehold, and Ashland owned the other three-fourths. It was then suggested that the well be reworked, but Ashland took the position that the probability of success did not justify the expense that might well be involved in such an undertaking.

In 1948, however, the colessees decided to rework their well. Ashland sent to Bond a written instrument, referred to as an A. F. E., the material parts of which we copy:

"Authority For Expenditure

"Tulsa, Okla., March 2, 1948. Auth. No. 198
"Authority is requested to pull tubing, cement off open hole 7406′-7410′. Test Cotton Valley section between 6900′ and 7020′ and reperforate Smackover higher in section.

"Requested by W. K. Lawrence, Approved by .....
"Detailed Estimate

[Here follows an itemized statement of the work to be done and its estimated cost, the estimates totaling $10,500.00.]

"Partnership Property

"Ashland Oil & Refining Company .....¾—$7,875.00
"Durbin Bond .....¼—$2,625.00"

After Bond had approved and returned this A. F. E., the company began reworking the well in July, 1948. So many difficulties were encountered that Ashland ultimately spent $53,553.72 in the course of successfully obtaining the production of oil. Bond knew that the work was in progress; but the principal report that was furnished to him, on August 27, 1948, is so technical in its language that we are unable to say whether Bond should have known that the original limitation of $10,500 was being greatly exceeded. In the view we take, however, it is immaterial whether Bond had that knowledge.

In December of 1948, after the job of rehabilitating the well had been substantially completed, Bond still owed $2,026.38 upon his original commitment under the A. F. E. He tendered that amount in a letter to Ashland but stated that he considered the additional charges against him to be unauthorized. Ashland declined the tender, insisting that Bond was liable for one-fourth of the total outlay. In 1949 Ashland began purchasing the total production from this well and from another well owned by these parties, but as purchaser Ashland withheld payments to Bond until the amount due him exceeded the amount claimed by Ashland for expenses incurred in reworking the first well. When Ashland tendered, in November of 1949, what it considered to be Bond's first share in the profits, Bond refused the tender and filed this suit. The chancellor, in rejecting Ashland's main contention, quite properly credited against Ashland's liability the sum of $2,026.38 that was still due upon Bond's initial commitment under the A. F. E.

We think Ashland's position in the matter is sound. It is a rule well established and plainly just that when

one tenant in common has drilled a producing oil well upon the common property he must be given credit for his reasonable expenses upon being required to account to his cotenant for the oil withdrawn from the land. *Prairie Oil & Gas Co.* v. *Allen,* 8th Cir., 2 F. 2d 566, 40 A. L. R. 1389; *New Domain Oil & Gas Co.* v. *McKinney,* 188 Ky. 183, 221 S. W. 245; *Earp* v. *Mid-Continent Petroleum Corp.,* 167 Okla. 86, 27 P. 2d 855, 91 A. L. R. 188. Our decisions have recognized the same principle by their holding that a tenant in common who innocently cuts timber is liable only for its value "in the tree," *Paepcke-Leicht Lbr. Co.* v. *Collins,* 85 Ark. 414, 108 S. W. 511, a measure of damages that permits one to recoup the cost of felling the trees and cutting them into logs. *Burbridge* v. *Bradley Lbr. Co.,* 218 Ark. 897, 239 S. W. 2d 285.

The chancellor based his opinion primarily upon the fact that the A. F. E. limited Bond's estimated liability to $2,625. We do not régard the terms of the A. F. E. as being conclusive in the present dispute. It must be remembered that under the rule stated in the preceding paragraph Ashland would have been entitled to its reasonable expenses of production even if there had been no A. F. E. or other contract. The question is: Did the parties intend by the A. F. E. to substitute a different rule for that which would otherwise have been applied by law? Quite plainly they did not. Of course they were free to agree that even in the event of production Ashland should bear all costs not expressly assumed by Bond. But there is not a word in the A. F. E. to indicate that these parties meant to go to that extreme. The instrument is entitled "Authority For Expenditure"; by approving it Bond merely authorized Ashland to expend up to $2,625 on his behalf in reworking the well. It is obvious that the terms of the A. F. E. were intended to limit Bond's liability if the venture *failed* to result in a producing well. Aside from questions of estoppel, Ashland acted at its peril in exceeding the authorized limit of $10,500, and it is only because oil was found that Ashland is able to invoke the rule which

compels Bond to bear his share of the disbursements. Bond is certainly justified in insisting upon his right to participate in the profits; but there is neither a contractual basis nor an equitable basis for his contention that he should contribute only $2,625, leaving Ashland a burden of $50,928.72 as its reward for having assumed the risks of failure.

Later in his opinion the chancellor indicated that he did not find Ashland's expenditures to have been necessary. The trouble is that there is literally no evidence to the contrary. Ashland proved in detail the work that was done, and its cost. R. E. Adair, who supervised the reworking of the well, testified that an ordinarily prudent operator would have done the same work in similar circumstances. Bond offered no proof to rebut this *prima facie* showing. Rather to the contrary, the record includes much correspondence between the parties, but there is no intimation that the reasonableness of any item has ever been questioned.

It is argued that Ashland did not raise the theory of cotenancy in the trial court and cannot urge it here. We do not agree. The relationship between the parties was described in Bond's complaint and was admitted by Ashland's amended answer. In the latter pleading Ashland averred: "The plaintiff cannot in equity accept the benefits of the work and expenditures by the defendant without paying his proportionate part therefor." It was after this equitable defense had been interposed that the cause was transferred to chancery by agreement. Not only the pleadings but, as we have seen, the proof as well was directed to the issue now relied on by the appellant. The question is not raised here for the first time.

The cause must be remanded for the entry of a decree consistent with this opinion, but there is one matter that we do not intend for this opinion to foreclose. Ashland seems to have withheld Bond's returns from two different wells as an offset against expenditures made upon one well only. This dual withholding was erroneous, for Bond's *pro rata* responsibility for ex-

penses was not a personal liability that Ashland could have enforced by an action *in personam;* it was merely an offset against Bond's claim to income from the reworked well. Consequently whether Ashland now has a complete defense to the complaint depends upon whether Bond's one-fourth of the total production from the reworked well has yet equaled Ashland's claim for reimbursement.

Reversed and remanded.

McINTOSH *v.* PONDER, JUDGE.

3-336 262 S. W. 2d 277

Opinion delivered November 30, 1953.

Frierson, Walker & Snellgrove, for petitioner.

Hout & Thaxton, for respondent.

GRIFFIN SMITH, Chief Justice. An automobile owned and driven by Josephine Graham, and one driven by Wendall McIntosh, collided at a highway intersection in Lawrence county. Mary Alice Wilmans and J. A. Gregory were in the Graham car as passengers. In separate actions they sued McIntosh, alleging acts of negligence as proximate causes of injuries and damages they sustained. The three plaintiffs asserted they were residents of Jackson county where the actions were brought. Summonses directed to the sheriff of Greene county were partially prepared by J. L. Ball, clerk, commanding McIntosh to answer within 20 days from July 28, 1953.

Acting upon the assumption that the process was insufficient for reasons presently to be mentioned, McIntosh sued Graham, Gregory, and Wilmans August 21st in his home county of Greene. He asked for a judgment against the three jointly and in severalty to compensate damages alleged to have been sustained in the same accident. A summons directed to the sheriff of Jackson county was issued when the complaint was filed and it was duly served.

August 31st McIntosh filed in Jackson circuit court his verified motion to quash the three summonses presumptively issued by the clerk of that court, expressly limiting his appearance to this purpose. From an order permitting the plaintiffs to amend the summonses and treating the amendments as relating back to the date of issuance McIntosh has asked for prohibition.

The three summonses were numbered 1539, 1540, and 1541 and are captioned "State of Arkansas, County of [blank]; Action by Ordinary Proceedings. The State of Arkansas, to the Sheriff of Greene County: You are commanded to summon Wendall McIntosh to answer before noon on the first day the court meets in regular or adjourned term after 20 days from the service of this writ upon him a complaint filed against him in the Circuit Court of said county by Josephine Graham and warn him that upon his failure to answer, the complaint will be taken for confessed. And you will make due returns

of this summons within 20 days after the service hereof. Witness my hand and seal of said court this 28th day of July, 1953. J. L. Ball, Clerk".[1]

It is first pointed out that the court whence the complaint issued is not shown; that an examination of the paper without other information indicates that the action is in Greene county; that the sheriff of Greene county was instructed to warn McIntosh that his answer should be made "in the circuit court of said county"; and, since no other county is mentioned there is a natural inference that upon failure to answer [there] the complaint will be taken for confessed.

Unfortunately from the standpoint of identification the issuing court's seal is so badly impressed that at least half of the wording cannot be read. Even with a standard magnifying glass—the use of which would not be required of a defendant or his attorney—the name of the issuing court is a virtual blank.

Counsel for the respondent concedes that the process is defective, but insists that it is not void, hence the defects when overcome would render the service good and it would relate back to the date of issuance.

The point is important because jurisdiction of the litigating parties by the court first empowered to adjudicate the subject matter is exclusive as to actions within the state. *Wasson, Bank Commissioner,* v. *Dodge, Chancellor,* 192 Ark. 728, 94 S. W. 2d 720.

To constitute jurisdiction in personal proceedings there are three essentials: The court must have cognizance of the class of cases to which the one to be tried belongs; the proper parties must be present, and the point decided must, in substance and effect, be within the issue. *Rankin* v. *Schofield,* 81 Ark. 440, 98 S. W. 674.

Petitioner in the case at bar relies upon *Files* v. *Robinson,* 30 Ark. 487, and what Chief Justice English said in that case, where a summons similar to those here chal-

[1] The three summonses are alike in that matters urged in avoidance are identical.

lenged was issued. "The paper issued by the clerk in this case as a summons," says the opinion, "is wanting in several features to make it a writ. It does not state the court in which the suit was brought . . . nor the place where the court was held. . . . The defendants were required to file their answer 'in this office,' but what office that was, or where located, does not appear on the face of the paper. The person who issued the paper styles himself 'clerk,' but of what court is not stated. He set his 'seal of office' to the instrument, but of what office does not appear; nor is the paper made returnable to any court, or at any time."

Under the Act of March 27, 1871, not repealed at the time the Robinson judgment was entered,[2] the clerk was authorized to enter default judgments. Attention was directed to the procedural requirements under the code practice by which a defendant served with defective process might move to quash; or, if judgment had been taken by default, the court might be asked to set it aside before an appeal was taken or writ of error had issued. It was then said that an application to the clerk to quash the summons or vacate the judgment would have been unavailing, "for he had the power to do neither". Nor would the defendant's remedy have been sufficient under a holding that he might wait until court convened and then move to set the judgment aside before appealing if the ruling should be adverse, for in the meantime execution might issue. [Under the present procedure a judgment without service might not be set aside, for in such a proceeding it is not sufficient to show that there was no record evidence of service of process, but it must also be shown that the judgment defendant had no actual notice of the proceeding against him. *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575, and related cases.]

From the Files-Robinson decision we get the definition of a valid writ in a holding where dictum enters into the discussion to such an extent that we cannot say with certainty that the court intended to lay down a general

[2] See note to Gantt's Digest, p. 804.

rule that the deficiencies there pointed to rendered the summons void. But in the case at bar the right of McIntosh to litigate the issues in Greene county had intervened, and the court erred in overruling the petitioner's motions to quash.

Priority in a race of diligence becomes a vexatious question when there is reasonable probability that each litigant is maneuvering to obtain trial in the county best suited to his or her convenience. Courts, however, are not concerned with motives. We are required to pronounce the meaning of legislative Acts, the reasonable inferences that arise from them, or in the absence of statutory command, then to determine from a standpoint of practical observation what the answer ought to be.

Arkansas Statutes, §§ 27-301-306, are legislative guides respecting essentials of a summons. It shall be directed to the sheriff of the county ". . . and command him to summon the defendant or defendants named therein to answer the complaint filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the complaint being taken for confessed."

From the face of these writs the defendant had a right to believe that the complaints had been filed in Greene county—the only county named. Assuming that McIntosh promptly acquiesced in the course his attorneys took when they discovered the omissions, this would not necessarily be true in every case where a person had been sued, hence we do not feel at liberty to brush aside the vice complained of and say that the knowledge of the defendant should be read into the process. The writ is granted.

5-223 262 S. W. 2d 657

Opinion delivered November 30, 1953.

[redacted]

Coffelt & Gregory, for appellant.

Talley & Owen and *Robert L. Rogers II,* for appellee.

J. SEABORN HOLT, J. Appellee, Realty Company, sued appellant on a claim for a real estate commission, and a jury awarded appellee $525.00. From the judgment is this appeal.

September 19, 1952, the following instrument, captioned "Offer and Acceptance," was signed and executed by the parties: "To Jernigan Realty Company, Agent. You are hereby authorized to offer for my account the sum of Ten Thousand Five Hundred Dollars for the following described property: 3519 West 3rd Street, Little

Rock, Ark.; being legally described as W 89.5′ of N 90′ of Lots 16-17-18, Block 4, Beach Addition to the City of Little Rock, Ark.

"This amount is to be paid in the following manner: Cash or trade as per statement below—$2,500.00. Loan to be assumed or placed for my account Loan to Seller—$8,000.00. Balance payable Loan basis 60.00 monthly, 5% int.—Total $10,500.00.

"TRADE OR OTHER SPECIAL CONDITIONS—Subject to procurement of loan by purchaser to above specifications, prepayment right reserved by purchaser on loan.

"GENERAL CONDITIONS—It is understood that the seller shall furnish abstract of title continued to date showing merchantable title insurance, pay all taxes now due or delinquent, and make conveyance to me by warranty deed, date of which shall fix time for dating of notes and adjustment of rents, interest and insurance. Possession given 30 days or sooner.

"Attached hereto is check for $500.00 as earnest money which 500.00 ck Dep. 9-19-52 WW shall apply as part of purchase price if this offer is accepted within 5 days from date; otherwise to be returned to me. If for any reason I fail to carry out my part of this agreement said earnest money is to be forfeited as liquidated damages. Signature J. D. Parker, Address 818 Byrd St., L.R. Receipt of earnest money as stated above is hereby acknowledged—Wanda Wallace, Agent.

"The above offer is hereby accepted this 19th day of September, 1952. (Signed) Mary Alice Odem, Owner. (On reverse side) 9-19-52—I agree to pay Jernigan Realty Company the regular rate of commission being 5% of purchase price—(Signed) Mary Alice Odem—(Printed in ink) Mary Alice Odem."

It appears undisputed that appellee produced a purchaser who was ready, able and willing to buy on the basis of appellant, owner and seller, carrying the $8,000.00

balance on the $10,500.00 selling price, after a cash payment by appellee of $2,500.00. Appellant refused to convey on these terms, insisting that under the provisions of the above instrument, she was to sell and convey the property for a cash consideration, only, and that the loan was to be procured by the purchaser from some other source, not from her, and that appellee had not furnished a buyer in accordance with the contract.

At the trial, the court agreed with appellant's contention that the contract was ambiguous, as a matter of law, and submitted the case to the jury on the issue as to the intent of the parties as set forth in the contract, at the time it was made, in the following instruction offered by appellant: "You are instructed that the court holds in this case, as a matter of law, that the contract sued on herein is ambiguous, and for this reason, oral testimony has been admitted in support of both the contentions of the plaintiff and the defendant touching upon the intent of the parties at the time the contract was entered into. It is now for the jury to determine the question 'What was the intent of the parties, and the meaning of the agreement between them, at the time the agreement was entered into?' If you find, from a preponderance of the evidence, that J. D. Parker was to pay Mrs. Odem $10,500.00 in cash for the property, and that Mrs. Odem herself was not to finance or loan any part of the purchase price, then the plaintiff cannot recover. If, on the other hand, you find from a preponderance of the evidence that Mrs. Odem agreed to loan the plaintiff $8,000.00 herself, on the purchase price of the property or to carry an indebtedness on the property in the said sum of $8,000.00, and that the plaintiff was not to procure said loan from some other source, but solely from Mrs. Odem, then the plaintiff would be entitled to recover. It is for the jury to determine, from all the facts and circumstances in the case, what the intent of the parties was at the time of their agreement."

The court further correctly told the jury to resolve all doubts against the party (appellee here) who prepared the contract.

Appellant earnestly argues that in addition to the above instruction, the court should have given her Instruction No. 2 and erred in refusing to give said instruction. This instruction was as follows: "You are instructed that if at the time of the entering into the agreement between the plaintiff and defendant, the minds of the parties did not meet; that is, that the plaintiff intended one thing and the defendant another, then there would be no contract between the plaintiff and defendant, as alleged in the complaint, upon which the plaintiff could recover, and your verdict should be for the defendant." She says: "There is but one question to be decided on this appeal, that is, whether or not the court erred in refusing to give appellant's requested instruction No. 2 over appellant's exceptions."

It appears undisputed that the parties here signed and adopted the above contract as the complete expression of their intention. By so doing, they have, in effect, integrated such agreement and become bound by it, even though it should develop that the contract might have a meaning different from that which the parties supposed it to have.

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." Section 228, Ch. 9, Restatement of the Law on Contracts, and § 230, subdivision (b): "Where a contract has been integrated the parties have assented to the written words as the definite expression of their agreement. * * * Where * * * they integrate their agreement * * * they have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have."

In the circumstances, the trial court, having determined that there was an ambiguity in the contract, that the intention of the parties does not clearly appear upon

its face, properly, in the above correct instruction offered by appellant, left the determination of this question to the jury. There was no error in its refusal to give appellant's requested instruction No. 2 since it did not properly declare the applicable law.

We said in *Wisconsin & Arkansas Lumber Company* v. *Fitzhugh,* 151 Ark. 81, 235 S. W. 1001: "Where a written contract is ambiguous, and it becomes necessary to construe it, all doubts must be resolved and the contract construed most strongly against the party who prepared it. *Ford* v. *Fix,* 112 Ark. 1, 164 S. W. 726; *Clark* v. *J. R. Watkins Medical Co.,* 115 Ark. 166, 171 S. W. 136. 'Where the intention of the parties to a written contract does not clearly appear upon its face, the determination of the question should be left to the jury.' *Jones* v. *Lewis,* 89 Ark. 368, 117 S. W. 561; *Massey* v. *Dickson,* 81 Ark. 337, 99 S. W. 383."

Affirmed.

JOHNSON *v.* SPENCER, *et al.*

5-212 262 S. W. 2d 290

Opinion delivered November 30, 1953.

C. M. Martin and *E. B. Kimpel, Jr.*, for appellant.

Spencer & Spencer, for appellee.

ED. F. MCFADDIN, Justice. This suit—for the balance due attorneys—is an aftermath of the cases of *Daniels* v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401, and *Johnson* v. *Daniels,* 221 Ark. 276, 254 S. W. 2d 946. These two cases involved, *inter alia,* the heirship of Jim Edwards; and Mary Johnson was held entitled to a portion of the estate. We are here concerned with the claim of her former attorneys.

J. V. Spencer and J. V. Spencer, Jr., are, and have been for many years, attorneys in El Dorado, practicing under the firm name of Spencer & Spencer, and hereinafter called "the Spencers." In July, 1948, Mary Johnson made a contract with the Spencers to represent her in the Jim Edwards litigation, and agreed that said attorneys should have one-half of all recovery. This employment was evidenced by a contract and recorded deed of July 17, 1948. Mary Johnson also contracted with attorney C. M. Martin to represent her; and Martin, for Mary Johnson, brought suit against the Spencers on December 10, 1948, in the Union Chancery Court, to cancel the contract and deed held by the Spencers. On November 22, 1949, a consent decree was entered by the Court in that cause (No. 10456), in which the Mary Johnson contract and deed to the Spencers were both cancelled, and, in lieu thereof, a money judgment was rendered against Mary Johnson in favor of the Spencers. This decree provided in part:

"IT IS THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED, AND DECREED, That the defendants J. V. Spencer and J. V. Spencer, Jr., be and they are hereby awarded judgment

against Mary Johnson, the plaintiff herein, in the sum of Five Hundred Dollars ($500.00).

"It is the further order of this Court, that J. V. Spencer and J. V. Spencer, Jr., be awarded judgment against the plaintiff in the sum of Twelve Hundred and Fifty Dollars ($1,250.00) in addition to the Five Hundred Dollars, previously ordered. This amount, however, to be paid by the said Mary Johnson when title to her interest to the property involved in this lawsuit is finally quieted and confirmed in her, and this amount shall constitute a lien on her interest in said property, and if said amount be not paid within thirty days (30) after her title to her interest is finally quieted in her, then the property to be sold to satisfy this judgment."

The $500.00, mentioned in the consent judgment, was paid, and the present litigation involves the balance of $1,250.00. In the case of *Johnson* v. *Daniels,* 216 Ark. 374, 226 S. W. 2d 571, 15 A. L. R. 2d 1401, this Court determined the interest of Mary Johnson in the Estate of Jim Edwards; and a decree was entered in the Union Chancery Court on November 8, 1951, in keeping with our opinion. Thus the interest of Mary Johnson was quieted and confirmed; and after waiting more than thirty days for the $1,250.00 to be paid, the Spencers,[1] on December 18, 1951, filed further proceedings in the case of Mary Johnson v. Spencer,[2] seeking the payment of the balance of $1,250.00 awarded in the consent judgment heretofore copied.

C. M. Martin, *et al.,* as the other attorneys for Mary Johnson, resisted the Spencers' efforts to collect the $1,250.00. The basis of the resistance were: (1) that when the consent judgment was entered in favor of the Spencers, on November 22, 1949, the Union Chancery

[1] The Spencers were joined by Clark, their assignee, who is also a party appellee here.

[2] The Spencers and their assignee also filed intervention in the case of *Johnson* v. *Daniels,* No. 10462, in the Union Chancery Court, seeking the same relief as in the case of *Johnson* v. *Spencer,* since both cases involved the interest of Mary Johnson. Oil was produced from the lands, and impounded royalties are also involved.

Court had decreed that Mary Johnson's interest in the Jim Edwards property was a 1/22nd interest; (2) that later the Supreme Court of Arkansas—by including the "Patsy line"[3]—reduced Mary Johnson's share to a smaller interest; (3) that the balance of $1,250.00 due the Spencers should be likewise reduced in the same proportion, as such was in the contemplation of the parties when the consent decree was entered; and (4) that C. M. Martin, *et al.,* have a deed to one-half of Mary Johnson's interest, and the Spencer lien cannot extend to more than one-half of the interest remaining in Mary Johnson after the Martin deed is recognized.

The Chancery Court heard the evidence on the issues joined, and decreed that the Spencers were entitled to recover the $1,250.00 against the interest of Mary Johnson. From that decree comes this appeal.

I. *The Consent Judgment.* Mary Johnson and Martin, *et al.,* as her attorneys, agreed to a consent judgment, which was entered on November 22, 1949, and which definitely stated that $500.00 would be paid that day and $1,250.00 would later be paid to the Spencers, "when title to her interest to the property involved in this lawsuit is finally quieted and confirmed in her." That consent judgment had reference to whatever interest Mary Johnson had in the property. The language is definite and unambiguous. Appellants claim that they should be allowed to prove their conversations with the Spencers before the entry of the consent judgment, in order to clarify the claimed ambiguity relating to "her interest"; and on this matter of clarifying an ambiguity, appellants cite many cases from this and other States, and also general texts. Among others, appellants cite *Webb* v. *Herpin,* 217 Ark. 826, 233 S. W. 2d 385; *Norrell* v. *Coulter,* 218 Ark. 870, 239 S. W. 2d 280; *Renaldo* v. *Board* (Cal.), 12 Pac. 2d 32; *Toms* v. *Holmes* (Ky.), 171 S. W. 2d 245. Also statement from text being 49 C. J. S. 862, 869 and 870; and 50 C. J. S. 162.

[3] See the opinions of this Court heretofore cited for a full discussion of the "Patsy line."

But there is no ambiguity in the consent judgment here involved, so the antecedent conversations are immaterial, and the appellants' cases are not controlling. The chancellor, in deciding the case, aptly said of the consent judgment:

"It's a consent judgment for that full amount. It sets forth clearly that it's to be a lien on her interest in the property in controversy. There can't be any other construction of it. The decree, on its face, still shows that it would become a lien when her interest was quieted and confirmed. That is what it means on its face. Now, just the fact that she thought she was going to get more than she got in the final windup wouldn't authorize the Court to change, just by oral testimony, the decree, on what the parties would testify that they understood they were settling on . . ."

II. *Martin's Claim to Superiority.* Martin claimed that his deed to one-half of the Mary Johnson interest was superior to the Spencers' lien for $1,250.00. This issue was raised by the pleadings and evidence and must be decided; and we hold that Martin's claim to superiority is without merit. He went into the Chancery Court in the case of *Mary Johnson* v. *Spencer,* and agreed to the consent judgment of November 22, 1949, which provided that the Spencers would have a lien for $1,250.00 "on her interest in said property". Martin did not have a deed of record at that time: his deed was not recorded until 1951. As an active attorney, he allowed a consent judgment to be entered which subjected the entire interest of Mary Johnson to the lien of the Spencer judgment. Where one stands by and fails to assert a claim, he later cannot be heard to assert it against the interest of those who relied on his silence.

In *Trapnall* v. *Burton,* 24 Ark. 371 (an opinion by Albert Pike), there is this language:

"If a person who has the claim to, or is the owner of property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is

estopped from setting up his claim or title, against the purchaser. *Shall* v. *Biscoe,* 18 Ark. 142; *Corbett* v. *Norcross,* 35 N. H. 99; *Storrs* v. *Barker,* 6 J. C. R. 344."

To the same effect see *Keylon* v. *Arnold,* 213 Ark. 130, 209 S. W. 2d 459; *Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993; *Hill* v. *Village,* 215 Ark. 1, 219 S. W. 2d 635; and *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579.

We therefore affirm the judgment against the entire interest of Mary Johnson.

ARKANSAS STATE HIGHWAY COMMISSION *v.* SMITHERS.

5-196 262 S. W. 2d 279

Opinion delivered November 30, 1953.

W. R. Thrasher, William L. Terry and *John L. Hughes,* for appellant.

Ben M. McCray, for appellee.

PER CURIAM Opinion. The facts and issues in the present case are, in all essentials, identical with those detailed in the case of *Arkansas State Highway Commission* v. *Palmer,* 222 Ark. 603, 261 S. W. 2d 772; and on the authority of that case, the judgment against the State Highway Commission in the present case is reversed, and the cause dismissed.

Opinion delivered November 30, 1953.

[redacted]

W. M. Thompson, for appellant.

Shelby C. Ferguson and *S. M. Bone,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Wayne Orr, and appellee, Otis Carpenter, were rival candidates for Democratic County Central Committeeman for Richwoods Township in Sharp County in the run-off Democratic Primary election held August 12, 1952. The returns as certified by the central committee showed 119 votes to have been regularly cast for appellant and 115 for appellee in the two precincts of Richwoods Township; and that four absentee ballots were cast for

appellant and eleven for appellee, making appellee the winner by a vote of 126 to 123. Appellant filed this contest in circuit court alleging that all the absentee ballots were illegal and void and asking that such ballots be thrown out and appellant declared elected. The correctness of the trial court's rejection of this contention is the decisive issue on this appeal.

The evidence discloses that when the official ballot for the second primary was printed the names and number of candidates for township committeeman were unknown. At the direction of the Secretary of the Democratic Central Committee, the county clerk, in mailing the absentee ballots, would type in the names of the candidates for township committeeman for the various townships on a typewriter in blank spaces left on the ballot for that purpose. In this manner the names of appellant and appellee were typed on the absentee ballots for Richwoods Township before they were mailed to the absentee voters.

Appellant argues that the typing of the candidates' names on the absentee ballots amounted to write-in ballots, and that such is prohibited by Ark. Stats. § 3-826 as construed by this court in the recent case of *Davidson v. Rhea,* 221 Ark. 885, 256 S. W. 2d 744. We cannot agree with this contention. It is obvious that write-in votes are those written in by the voters such as were involved in the Davidson case, *supra.* The typing of the names of the candidates on the ballots in the instant case did not constitute voting of any kind and no voter wrote in the name of either candidate.

The pertinent issue here is whether legal voters are to be denied their right of franchise because they used ballots upon which the candidates' names had been placed by the use of a typewriter instead of some other form of printing and no objection to the form of the ballot is made until after the election. Even if it be conceded, without deciding, that the typing of the candidates' names is not a substantial compliance with Ark. Stats. § 3-811 as amended by §§ 3-823 and 3-826, still the ap-

pellant may not object to the validity of the election on account of such irregularity where he did not avail himself of the opportunity to have it corrected before the election was held.

This court is committed to the rule that the mistake of an officer charged with responsibilities incident to an election will not have the effect of disfranchising the voter whose evidence of the right to participate in the election was irregular. In *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257, we reaffirmed the following principles announced in *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229: "To hold that all prescribed duties of election officers are mandatory, in the sense that their nonperformance shall vitiate the election, is to ingraft upon the law the very powers for mischief it was intended to prevent. If the mistake or inadvertence of the officer shall be fatal to the election, then his intentional wrong may so impress the ballot as to accomplish the defeat of a particular candidate or the disfranchisement of a party. And it is no answer to say that the offending officer may be punished by the criminal laws, for this punishment will not repair the injury done to those affected by his acts. It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to affect an obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provision affects an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void." See also, *Ellis* v. *Hall,* 219 Ark. 869, 245 S. W. 2d 223.

Another Indiana decision that is in point here is the case of *Schafer* v. *Ort,* 202 Ind. 622, 177 N. E. 438. There,

in the election of a township trustee, the name of a person was erroneously printed on the ballot and after two votes were cast the election board struck the erroneous name from all the remaining ballots and wrote in its place the name of the proper candidate of one of the political parties. The court held that the provisions of a statute that "the names of the different candidates for said township office shall be printed" on the ballots could be regarded as mandatory only before, but not after, the election, saying: "The problem is to secure a free and untrammeled vote and a correct record and a return thereof, and a departure from the statute which does not deprive legal voters of their right to vote or permit illegal voters to participate in the election or cast uncertainty on the result does not affect the validity of the election." See also, annotation 165 A. L. R. 1263.

So here the ballots challenged were cast by legal voters and no ballots were voted or counted other than those which had the names of both candidates typed in by the election officials. It is difficult to see how any prejudice could have resulted to either candidate, or how any voter could have been misled. The vote was the voice of the people, legally raised, and we hold that the absentee ballots were correctly counted by the trial court. In view of this holding, it is unnecessary to determine whether appellant was disqualified as a candidate by failing to file his party pledge within the time prescribed by Ark. Stats. § 3-205 and the rules of the Democratic Party.

Affirmed.

THE CITY OF SEARCY, *et al.* *v.* HEADLEE, *et al.*

5-290 262 S. W. 2d 288

Opinion delivered November 30, 1953.

Culbert L. Pearce, for appellant.

J. E. Lightle, Jr., and *Yingling & Yingling,* for appellee.

MINOR W. MILLWEE, Justice. Appellees are property owners in Street Improvement District No. 6 of Searcy, Arkansas. They brought this suit to require the district and its depositories to distribute and refund to appellees, and other property owners of the district, a surplus fund which remained after the purpose for which the district had been organized was accomplished and all its bonds, interest and other indebtedness had been paid. State Highway No. 67 traverses the paving district and state aid has been extended to the district at various times.

The appellant, City of Searcy, filed an intervention and answer in the suit alleging that under Act 310 of 1953 the city was entitled to an order directing the commissioners to turn over said surplus funds to it to be used for repairing the paved streets of the district. Appellees filed a demurrer and motion to dismiss the intervention and answer on the grounds (1) that the city would be an improper party to appear for the state

of Arkansas and (2) that the matters raised by the city were *res judicata* under the decision in *Searcy Federal Savings and Loan Ass'n* v. *City of Searcy,* 221 Ark. 360, 253 S. W. 2d 211. After the appointment of a master to make an accounting and a determination of the amounts to be refunded to the property owners of the district, the chancellor entered an order on April 13, 1953, dismissing the intervention and answer and holding that the City of Searcy had no title or interest in said surplus funds but that such funds belonged, and should be distributed to, the property owners of the district.

This appeal is from an order entered June 8, 1953, in which the trial court overruled appellant's motion to set aside the order of April 13, 1953, adopted the report of the master and held that Act 310 of 1953 is unconstitutional insofar as the same could be applied to the instant case.

It is agreed that the facts set forth in the master's report are true. This report shows that the state aid funds and the monies collected from the taxpayers of the district had been commingled and each had lost its separate identity. The report further showed surplus funds on deposit to the credit of the district on June 8, 1953, in the sum of $8,561.81; and that state aid funds which now constitute any part of the remaining surplus are negligible, since only $76.91 remained in the hands of the commissioners on October 7, 1944, and all funds paid the district by the State of Arkansas were paid prior to that date. Hence the surplus involved here is made up almost entirely, if not altogether, of monies collected from the tax paying property owners of the district.

Section 1 of Act 310 of 1953 recites: "In instances where state aid has been extended to paving and other special improvement districts within cities and incorporated towns, and all bonds and other obligations of such districts have been retired, or money set aside with the paying agents in amounts sufficient to provide for their retirement, then all moneys and other assets in the hands of the Commissioners of such districts, or in

the hands of the paying agents, in amounts exceeding the full debt service requirements of such bonds and other obligations, shall be paid over to the respective treasurers of such cities and incorporated towns for credit to the street fund, there to be used for the repair and maintenance of its streets . . ."

Article 19, § 27, of the Constitution of Arkansas, requires the consent of a majority in value of the owners of real property to the imposition of assessments for local improvements in municipalities.

Amendment 13 to the Constitution, authorizing cities to issue bonds for construction of streets etc., provides that "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." In *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795, an act of the Legislature authorizing the use of surplus funds of a paving district collected for the purpose of constructing a pavement to be used for the purpose of making repairs without the consent of the taxpayers of the district was held unconstitutional as attempting to authorize a diversion of funds collected for one purpose to be appropriated to another use. In *City of Stuttgart* v. *McCuing,* 218 Ark. 34, 234 S. W. 2d 209, we held that surplus funds in excess of the money necessary to retire the bonds and complete the work for which the funds were collected under Amendment 13 belonged to the taxpayers and that the city had no authority to divert said funds to some other purpose. See also, *Street Improvement District No. 419* v. *Lewis,* 216 Ark. 595, 226 S. W. 2d 813.

It is noted that Act 310 of 1953 does not limit its application to funds derived from state aid. It is unnecessary to determine here whether it would, if so limited, be constitutional. Under our decisions, it is clearly unconstitutional as applied to funds collected in the form of tax assessments from the property owners of the district, such as are involved here. Neither the city nor the Legislature has authority to divert such

funds to another purpose without the consent of the property owners in violation of the Constitution. It follows that the chancellor correctly held said act unconstitutional insofar as it is applicable in the instant case. The decree is accordingly affirmed.

PACIFIC FINANCE CORPORATION *v.* TINSLEY.

5-203 262 S. W. 2d 282

Opinion delivered November 30, 1953.

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

Stein & Stein, for appellee.

ROBINSON, J. This case involves the question of usury. On September 26, 1951, which was prior to the decision in *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973, appellee Griffin L. Tinsley bought from "Wally's Used Cars" an automobile for which he executed his promissory note in addition to trading in another automobile. The promissory note was transferred to appellant Pacific Finance Corporation.

On August 28, 1952, Tinsley filed this suit alleging a usurious rate of interest had been charged, and asked that the note given as part of the purchase price for the automobile be declared null and void. The chancellor held the transaction to be usurious and that the note given as part of the purchase price was therefore void.

As heretofore stated, the sale of the automobile and the execution of the note were completed prior to the date

the decision in the *Hare* case became final. The material facts in the case at bar are essentially the same as the facts in *Crisco* v. *Murdock Acceptance Corporation,* 222 Ark. 127, 258 S. W. 2d 551, and that case is controlling here. Hence the court erred in holding that usurious interest had been charged.

Reversed with directions to enter a decree not inconsistent herewith.

PHILLIPS, *et al. v.* CARTER, *et al.*

5-183 263 S. W. 2d 80

Opinion delivered November 30, 1953.

Rehearing denied January 18, 1954.

Walter R. Barnes and *Floyd E. Barham,* for appellant.

Kincannon & Kincannon, for appellee.

WARD, J. We are called on in this appeal to consider what constitutes adverse possession by some of several tenants in common. The land involved is 40 acres de-

scribed as SE¼ NE¼ Section 17, Township 7N, Range 28W.

The land in question was the property and homestead of Reuben Carter who died about 1922 and his wife, Susan Carter, who died about 1907. They left surviving them several sons and daughters among whom was a son, C. C. Carter, who is now deceased, and his heirs and widow, the appellees herein, brought this suit to quiet title. One of the daughters of Reuben and Susan was Mollie Carter Phillips who is now deceased and her heirs, the appellants, claim their interest in the land by virtue of being the descendants of the said Reuben and Susan Carter.

The complaint filed by appellees sought to quiet title on two separate grounds, to-wit: (1) That there was an agreement between C. C. Carter and the other heirs that if he (C. C. Carter) would remain on the land and take care of Reuben and Susan Carter they would convey to him their interest in the land; and, (2) That they had been in the peaceable, adverse, and notorious possession of said land and had paid the taxes thereon for more than 7 years. The trial court, without making any detailed finding of facts and law, decided in favor of appellees on the ground last mentioned above, and made no reference to the other ground.

Facts. When Reuben and Susan Carter died they were living on the land in question and living with them was their youngest son, C. C. Carter. After the death of his father and mother, C. C. Carter and his wife, Mary, [who is still living and is one of the appellees] continued to live on the land, paying all taxes, and making certain improvements. Three of C. C. Carter's brothers, John, Reuben and Frank, together with David Griffith, one of the sons of his sister Hanna, executed and delivered to him their quitclaim deeds to said land soon after the death of Susan Carter.

(1) *Regarding the Agreement to Convey to C. C. Carter.* Without going into the testimony, it suffices to say that we find no evidence, as apparently was the finding of the chancellor, to establish that such an agreement

was ever made. Appellees were unable to point to any testimony that would justify the holding that such an agreement was ever made or carried out.

(2) *Adverse Possession.* The general rule, many times announced by the decisions of this court regarding adverse possession by a co-tenant, is that the occupant must do something, over and above occupancy, amounting to notice to the other co-tenants that he is holding adversely to their interest before the statute of limitation will begin to run. In *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, it was stated:

"The fundamental principle of law which Appellants insist is controlling is conceded by Appellees; one tenant in common cannot claim adverse possession against a co-tenant by the mere act of occupancy."

In *Morris* v. *Ferrell,* 102 Ark. 679, 143 S. W. 583, in considering this same question the Court said:

"The possession of one joint tenant, tenant in common or coparcener, is the possession of another, and, until the tenant in possession does acts amounting to an ouster or disseisin of his co-tenant, the statute of limitations does not begin to run in his favor. When one tenant enters as sole owner, and his possession is openly and notoriously adverse to his co-tenant, it amounts to a disseisin. An ouster or disseisin is never to be presumed from the mere fact of sole possession, but it may be proved by such possession accompanied with a notorious claim of exclusive right. To make the possession of one tenant in common adverse against the other, it is unnecessary that notice should be given of adverse intent, but the intent must be manifested by outward acts of unequivocal kind."

Again in the case of *Hildreth* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353, this rule was announced:

"The general rule is that the possession of a tenant in common is the possession of his co-tenants, and that in order for the possession of a tenant in common to be

adverse to his co-tenants, knowledge of such claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed."

The reason for the rule relative to co-tenants is well expressed in the case of *Singer* v. *Naron,* 99 Ark. 446, reported as *Singer* v. *Nolan* in 138 S. W. 958:

"The reason that the possession of one tenant in common is *prima facie,* the possession of all, and that the sole enjoyment of the rents and profits by him does not necessarily amount to a disseisin, is because his acts are susceptible of explanation consistently with the true title. In order, therefore, for the possession of one tenant in common to be adverse to that of his co-tenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed."

A careful reading of the testimony in this case convinces us that neither appellees nor their father before his death in 1948 did anything connected with or in addition to many years of occupancy which would be calculated to put appellants on notice that they were holding the land adversely to appellants' interest. The acts of possession, payment of taxes, and repairs on the dwelling are all consistent with co-tenancy as explained in the *Singer* case, *supra.* Appellees were unable to point out any specific acts on their part which, under the decisions heretofore cited, amounted to notice that they were denying appellants' title to the land.

It is submitted by appellees that the decisions in *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970, *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, and *Toomer* v. *Murphy,* 198 Ark. 610, 129 S. W. 2d 937, are authority for an affirmance here. However, a careful analysis of these cases shows that in each instance there was some fact or circumstance, over and above what appears here, to indicate an adverse holding by the co-tenant—a point at which the statute of limitations would begin to run.

It is urged also that appellants should be barred by laches because they remained silent for so many years during which time appellees [and their father] were occupying and improving the land. We have never held that laches applies in these circumstances or that it takes the place of some act amounting to notice of intent as heretofore defined.

Not only is there a lack of testimony on the part of appellees as indicated above but there is testimony tending to show that appellees' father, C. C. Carter, was occupying the land by permission of the other co-tenants. One of the heirs of Reuben and Susan Carter testified that he talked with C. C. Carter and told him that the heirs were not going to bother with the land at all until after his death provided he would keep up the taxes and take care of the place.

"Q. In other words both Mr. and Mrs. C. C. Carter could live there as long as they paid the taxes and the upkeep? A. Yes, sir."

There is also evidence to the effect that appellees were attempting to buy the interest of some of the appellants after the death of C. C. Carter. From the testimony of one of the appellees we quote:

"Q. Then you stated that you attempted to buy Mollie Phillips descendants' interest in this farm? A. We did.

"Q. And they still have an interest in the farm, do they not? A. I don't think they do.

"Q. Then why did you want to buy it? A. Well, at that time—

"Q. That was this year, wasn't it? A. No, sir, not this year.

"Q. When was it? A. In 1950. That's when I think it was."

This testimony is, of course, not conclusive that appellees were acknowledging appellants' interest in the land but it is a circumstance to be considered.

There was introduced in evidence a letter [apparently admitted by the Court] dated August 8, 1950, purporting to be from one of the appellees [or his wife] acknowledging that appellants still had an interest in the place or rather an admission that appellees meant to give appellants a portion of the money in event the place was sold.

Pursuant to the above expressed views the decree of the trial court is reversed.

McCLAIN *v.* McCLAIN.

5-195 263 S. W. 2d 911

Opinion delivered November 30, 1953.

Rehearing denied January 11, 1954.

Carl Langston, for appellant.

George W. Shepherd, for appellee.

J. Seaborn Holt, J. The parties here were married in November, 1941. November 14, 1952, appellee, Trudie McClain, sued appellant for divorce on the grounds of drunkenness for more than a year, cruelty, and indignities, and asked that all property rights between them be adjudicated, that he be restrained temporarily from occupancy with her and enjoyment of the two acre tract upon which they lived and operated a beer and sandwich shop.

Appellant answered with a general denial, asserting that separation of the parties was the fault of appellee, and not his fault,—in effect, a plea of recrimination. He pleaded no affirmative defense, but prayed that the relief for which appellee prayed be denied and that she be required to account for all property which they jointly owned and that he "be awarded possession of all real and personal property" located on the two acre tract, including the beer and sandwich shop, known as "Red Gates Inn."

Prior to trial on the merits, the court, on sufficient showing by appellee, and execution of proper bond, granted to her the temporary injunctive relief prayed.

March 4, 1953, trial was had on the merits. The court denied appellant's prayer that the prior injunctive relief granted appellee be set aside, denied any damages to appellant resulting therefrom and granted appellee an absolute divorce.

The court found "that the business being conducted upon the premises hereinafter described, known as 'Red Gates Inn,' was a joint venture and that said business shall be and is hereby terminated as of the date of this decree; and the Court further finds that the fixtures now located in said building and used in connection with the operation of said business are jointly and equally owned by plaintiff and defendant.

"It is the further order and judgment of this Court that the fixtures and furnishings located upon the premises hereinafter described shall be left in the pos-

session of the plaintiff, and she is hereby granted the right to use all of the same in connection with her use and occupancy of the premises hereinafter described."

The court further found that the two acre tract in question was owned by the parties as an estate by the entirety and granted to appellee, Trudie McClain, "the sole and exclusive possession of the same, together with the buildings located thereon, together with all fixtures and furnishings located thereon; and the defendant, Edley McClain, is hereby permanently enjoined and restrained from molesting the plaintiff in her use and occupancy in any manner of said premises above described."

There was a further finding that the rental value of this real estate and premises was $50.00 per month and appellee was ordered to pay appellant, Edley McClain, $25.00 per month as his half of the rental value of the real estate and premises and to pay $25.00 per month on the unpaid balance due and becoming due on the purchase price of said property. The court further directed that two automobiles and certain livestock be sold and the proceeds equally divided between the parties, that appellee "immediately make an inventory of all of the salable merchandise found to remain as of March 6, 1953," and that a one-half interest in said merchandise is granted to each of the parties and that appellee "is hereby granted the right to continue the operation of a business upon said property but same shall not become a joint venture for the reason that the joint venture between plaintiff and defendant known as 'Red Gates Inn' ceased to exist as of the date of the entry of this decree, to-wit: March 6, 1953."

From the decree is this appeal.

It appears from the testimony that these parties by their joint efforts acquired an estate by the entirety in two acres of land which they occupied as a homestead and upon which they operated a beer and sandwich shop known as "Red Gates Inn." Trudie McClain, appellee,

obtained a beer license and operated the business with the help of her husband for several years. She was in active charge of the business. Each of the parties became addicted to excessive drinking of intoxicating liquor. Bickerings, quarrels and violent abuse were frequent between them. On one occasion, appellant became violent, threatened the life of appellee, fired a pistol at her, and threatened to burn the premises. An intolerable situation was presented. Appellant had been treated by a number of doctors for excessive alcoholism and had been committed to the State Hospital for treatment for its excessive use.

From the testimony of a number of witnesses, it appears that neither of these parties is without blame. We have concluded, however, without detailing the testimony, that appellee was the lesser offender. Where, as here, the evidence appears almost equally divided, the findings of the Chancellor, after a patient and painstaking hearing, who saw and observed all of the many witnesses presented, is persuasive on us and sufficient to tilt the scales in appellee's favor.

On trial *de novo* here, we cannot say that such findings were against the preponderance of the testimony. *Mewbern* v. *Mewbern,* 201 Ark. 741, 146 S. W. 2d 708; *Hensley* v. *Hensley,* 213 Ark. 755, 212 S. W. 2d 551; and *James* v. *James,* 215 Ark. 509, 221 S. W. 2d 766.

Appellant argues that the trial court erred in directing appellee to pay him only $25.00 per month as his half of the rental value of the real estate (2 acres) which they own as tenants by the entirety and was occupied as their homestead, and says that there is no evidence as to rental value of this property and that the court's action was arbitrary. We do not agree.

On the facts presented, it was within the discretion of the trial court to award this entire homestead tract, its use, benefits and occupancy to appellee for her life, without allowing appellant any rental, and subject only to the right of survivorship of appellant. Appellant, therefore, is in no position to complain. We

said in *Heinrich* v. *Heinrich,* 177 Ark. 250, 6 S. W. 2d 21, where a similar question of the possession of a homestead held by entirety was involved:

"Appellant contends, under the rules announced in the two cases cited, that the power and authority of the trial court was limited to making a division of the rents thereafter accruing from the property in question between appellant and appellee. This would be true with reference to any lands not embraced in the homestead, but not as to homestead land. There is nothing on the face of the record to show that the five-acre tract in question was not a homestead, so we must indulge the presumption that the testimony reflected that fact. This presumption brings the case clearly within the rule announced in *Woodall* v. *Woodall,* 144 Ark. 163, 221 S. W. 463, to the effect that courts may award to the innocent party in divorce suits the possession, for a limited time, or absolutely (meaning for life) of a homestead held by entirety."

We find no error in the action of the trial court in awarding appellee the injunctive relief against appellant which she prayed. Such action was within the court's power and the procedure followed appears to be in accordance with the provisions of §§ 22-404, 32-102 and 32-103, Ark. Stats. 1947.

Finding no error, the decree is affirmed.

ED. F. MCFADDIN, Justice (concurring and dissenting). I concur in so much of the opinion of this court as fixes the property rights; but I dissent from so much of the opinion of this Court as awards Mrs. McClain an *absolute* divorce. I am of the opinion that Mrs. McClain should have only a *limited* divorce, rather than an *absolute* divorce.

Because *limited divorces* have almost "passed out of style" in our reported cases in the last thirty years, I think it well that Judges and others interested in marital relations should again give serious consideration to the granting of *limited divorces*: certainly such *limited di-*

vorces would prevent remarriage of either spouse and might bring about a reconciliation. Therefore, at the risk of being academic, I desire to briefly review this matter of *limited divorces* in order to show why chancery courts in Arkansas should resume the custom of granting only a limited divorce in a case in which the complaining party has been guilty of any wrong.

Our Statutes and cases envision three kinds of proceedings in cases of marital difficulties:

(1) A separate action for maintenance, which is a transitory action that may be prosecuted in chancery. Section 34-1201, Ark. Stats.; *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *Shirey* v. *Hill,* 81 Ark. 137, 98 S. W. 731; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Savage* v. *Savage,* 143 Ark. 388, 220 S. W. 459; and *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096.

(2) A limited divorce—that is, from bed and board but not from the bonds of matrimony. In the old cases this is called by its Latin name, "divorce *a mensa et thoro.*" Section 34-1202, Ark. Stats., says[1] that the Chancery Court ". . . shall have power to dissolve and set aside a marriage contract, not only from bed and board, but from the bonds of matrimony. . . ." This "bed and board" divorce is the *limited divorce.* See *Bauman* v. *Bauman,* 18 Ark. 320, 68 Am. Dec. 171; *Crews* v. *Crews,* 68 Ark. 158, 56 S. W. 778; *Gray* v. *Gray,* 98 S. W. 975; *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369; *Crabtree* v. *Crabtree,* 154 Ark. 401, 242 S. W. 804, 24 A. L. R. 912; and *Clyburn* v. *Clyburn,* 175 Ark. 330, 299 S. W. 38.

(3) An absolute divorce. This is called a divorce from the bonds of matrimony, and the old cases refer to

[1] It is interesting to note a fact that seems to have been overlooked by the Digesters of Arkansas Statutes: all of what is now § 34-1202, Ark. Stats., from the beginning down through the sixth section, is the *same law that has existed verbatim* (with the exception of circuit court and chancery court terminology) since Statehood. See Chap. 51, § 1 of the Revised Statutes of 1837; Chap. 58, § 1 of English's Digest of 1848; Chap. 59, § 1 of Gould's Digest of 1858; § 2195, Gantt's Digest of 1874; § 2556 of Mansfield's Digest of 1884; § 2505 of Sandel & Hill's Digest of 1894; and § 2672 of Kirby's Digest of 1904. In other words, ever since Statehood, the courts have had authority to grant both limited and absolute divorces.

it by its Latin terminology, *i.e.*, "divorce *a vinculo matrimonii.*" See § 34-1202 as above quoted, and nearly every divorce case in our Reports, save only the few cited in Sec. (2) above.

For convenience in terminology, I will hereafter use the words "limited divorce" in referring to divorces from bed and board (*i.e.*, divorce *a mensa et thoro*); and I will use the words "absolute divorce" in referring to the divorces from the bonds of matrimony (*i.e.*, divorce *a vinculo matrimonii*). When the court grants a *limited divorce,* neither spouse can remarry, whereas when an *absolute divorce* is granted, either spouse is privileged to remarry at any time. The distinction between the two types of divorces is stated in 17 Am. Jur. 147, as follows:

"At common law and under the statutes in many states there are two distinct kinds of divorces—namely, the divorce *a vinculo matrimonii* or absolute divorce, and the divorce *a mensa et thoro.* The divorce *a vinculo matrimonii* or absolute divorce dissolves the marriage bond changing the status of the parties, while the divorce *a mensa et thoro,* sometimes called a decree of separation from bed and board, does not affect the status or dissolve the marriage, but merely relieves the parties from their obligations and rights as to cohabitation, support, and property interests."

Likewise, the distinction is stated in 27 C. J. S. 522, as follows:

"Divorces are of two distinct types, absolute or *a vinculo matrimonii,* and limited or *a mensa et thoro.* An absolute divorce or divorce *a vinculo matrimonii,* sometimes termed simply a divorce, terminates the marriage relation. A limited divorce or divorce *a mensa et thoro,* sometimes called a legal or judicial separation, suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force."

When we read some of our cases in which the same person has been married four or five times, it seems that the courts ought to do something to prevent such a matrimonially-inclined person from being able to roam at

large, and certainly a *limited divorce* would prevent a subsequent marriage. Back in 1857 when this Court decided the case of *Bauman* v. *Bauman,* 18 Ark. 320, divorces were rare; and there was no necessity to put a restriction on re-marriage. But now the number of divorce cases reaching this Court is alarming; and some check should be put on the remarriage of parties, both of whom have been at fault. Furthermore, *limited divorces* have a tendency to encourage reconciliation.

Section 34-1209, Ark. Stats., says that if both parties have been guilty of any offense complained of in the divorce action ". . . then no divorce shall be granted or decreed." This is called the "recrimination section"; and originally our cases strictly and literally followed that law, so that a person seeking a divorce must show himself or herself to have been *entirely guiltless* before a divorce would be granted. See *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840; *Strickland* v. *Strickland,* 80 Ark. 451, 97 S. W. 659; *Healey* v. *Healey,* 77 Ark. 94, 90 S. W. 845; and *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. 2d 1013. Those cases should still be the rule today in all instances, in which the Court grants an absolute divorce; and the doctrine of "comparative guilt" should be the rule to be applied in cases of *limited divorce.*

Gradually we have developed the doctrine of "comparative guilt," and have awarded a divorce to the *least guilty* of the two parties.[2] Thus in *LeMaster* v. *LeMaster,* 158 Ark. 206, 249 S. W. 589, we held that where a preponderance of the evidence showed that the husband was *chiefly responsible,* the wife was granted a divorce. In *Hensley* v. *Hensley,* 213 Ark. 755, 212 S. W. 2d 551, we followed this doctrine of "comparative guilt," and said:

". . . and while we find that she was not without fault, we also find that appellee was the chief offender, and we think a divorce should be granted appellant. *LeMaster* v. *LeMaster,* 158 Ark. 206, 249 S. W. 589."

[2] For Annotations dealing with this doctrine of "comparative guilt" or "comparative rectitude," see 63 A. L. R. 1132, 159 A. L. R. 734, and 21 A. L. R. 2d 1267.

And in the case at bar, there is this language in the majority opinion:

"From the testimony of a number of witnesses, it appears that neither of these parties is without blame. We have concluded, however, without detailing the testimony, that appellee was the lesser offender."

Now I maintain that this doctrine of granting an absolute divorce on the basis of "comparative guilt" is in direct opposition to our Statute, § 34-1209, as above quoted.[3] I further insist that under the case of *Crews* v. *Crews,* 68 Ark. 158, 56 S. W. 778, we should grant only a *limited divorce* where both parties are at fault; we can decide which is the *least guilty* of the parties and grant that one a *limited divorce.* In *Crews* v. *Crews,* Chief Justice BUNN quoted the findings of the Chancellor:

". . . upon consideration the court finds that both parties are to a degree in fault and that neither is entitled to an absolute divorce, but finds that a decree of divorce from bed and board should be rendered. . . ."

Thus in *Crews* v. *Crews,* the Court allowed a *limited divorce* on the basis of "comparative guilt"; and I insist that when both parties have been guilty even to different degrees, then the only kind of divorce that should be granted is a *limited divorce.* I think the case of *Crabtree* v. *Crabtree,* 154 Ark. 401, 242 S. W. 804, does not in any way modify or overrule *Crews* v. *Crews*; and I think that chancellors should be encouraged to grant only a *limited divorce* to the *lesser guilty* of the two parties, and that an *absolute divorce* should be reserved to be granted only to a person who is *entirely without guilt or fault.* This would be a return to our old holdings; and sometimes a return to the old moorings is a very fine thing. In the hope that such may occur in divorce cases, I am writing this dissent.

[3] We have some cases which in effect disavow the doctrine of "comparative guilt." See *Evans* v. *Evans,* 219 Ark. 325, 241 S. W. 2d 713.

4758 262 S. W. 2d 647

Opinion delivered December 7, 1953.

[redacted]

Bates, Poe & Bates, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

WARD, J. Appellant was convicted for contributing to the delinquency of a minor and from the verdict of the jury and judgment of the court he prosecutes this appeal, based on several allegations of error.

Since the insufficiency of the evidence is not included in the allegations relied on by appellant we deem it necessary to set out only such as is necessary to an understanding of the questions hereinafter discussed.

Appellant was convicted for contributing to the delinquency of Tom Stahl, and in the course of the trial testimony was introduced which tended to show that the same conduct complained of had occurred in connection with other persons. Much of appellant's brief is devoted to the alleged error contained in the court's instruction No. 11 as it is copied in his brief. As so copied it contains this language: "So, if you find from the evidence beyond a reasonable doubt that the defendant did . . . by any act, cause, encourage or contribute to the delinquency of the prosecuting witnesses *or any of them* . . ." It appears however that the italicized words were lined out of the instruction and were erroneously left in the transcript by the clerk and that he made the correction after it was used by appellant's attorney. Appellant was of course advised of this discrepancy by appellee's brief but he makes no contention that the instruction as corrected was not the one given to the jury. If the transcript is incorrect the burden was upon appellant to have it corrected at the proper time and in the proper manner. In this instance however we are not left in doubt

because there is a notation at the bottom of the instruction signed by the trial judge stating that it was corrected before it was given to the jury. As so corrected it contains no error.

Appellant alleges as error the refusal of the trial court to give his requested instruction No. 20 which would have told the jury it must find that Stahl committed some act of delinquency before it could find the defendant guilty of contributing to his delinquency. The requested instruction was not a correct declaration of the law and therefore the court did not commit error in refusing to give it. See *Williams* v. *City of Malvern,* 222 Ark. 432, 261 S. W. 2d 6.

As part of its instructions the trial court submitted for the consideration of the jury Ark. Stats. § 45-204 which describes delinquency and Ark. Stats. § 45-239 which deals with persons contributing to delinquency. Appellant argues that this was error because much of the statutes had no direct bearing on the charge. Regardless of any merit that might be contained in appellant's contention we are not at liberty to consider it here because the objection made was *en masse* and no specific objection is shown to have been made. There were other correct instructions given in the case and consequently an objection *en masse* was not sufficient. See *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376.

Another allegation of error is that the trial court refused to give appellant's instruction No. 19 which would have told the jury in effect that if other witnesses participated in the commission of the offense they would be considered as accomplices. This refusal by the court was not error because there is no testimony in the record on which to base such an instruction even though it had been otherwise correct. Since there was no testimony tending to show that Stahl in any way gave his consent he was therefore not an accomplice, and further corroboration was not necessary. See *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37.

Again it is contended by appellant that the court erred in allowing the state to introduce testimony tending to show that appellant had on previous occasions engaged in similar conduct with other minors. We recognize of course the general rule that the commission of a crime can not be established by proof of the commission of other crimes, but that is not the situation here. The record discloses that after the introduction of the testimony complained of the court offered to admonish the jury to consider it only for the purpose of identifying the accused; and that, although appellant did not accede to this request, the court did so instruct the jury. Moreover, such testimony was not inadmissible in this case. We so held in *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594, where, under a very similar situation the court said: "This court has repeatedly recognized and declared that evidence of other crimes recent in point of time and of a similar nature to the offense then being tried is admissible as bearing on the question of intent." Also in *Gerlach* v. *State, supra,* it was again said: "We have frequently held that evidence of other crimes of a similar nature to the one on trial and recent in point of time is admissible as bearing upon intent or purpose."

Finally appellant assigns as reversible error certain remarks made by the trial court in the presence of the jury. The first comment by the trial court occurred when appellant was attempting to show that he had deposited money in a bank at Clarksville the next morning after the offense was supposed to have been committed. Upon objection by the prosecution the court remarked:

"Mr. Poe, the fact that he did business in Clarksville at the bank on the 11th would not preclude his having been here on the night of the 10th."

We cannot however consider this contention on the part of appellant because the record reflects no objection was made. The other comment by the trial court objected to occurred in this manner. A certain witness for the state by the name of Bill testified that he saw the license number of the car which it was contended appellant was using at or near the time the offense was

committed. The prosecuting attorney had the number written down on a piece of paper and offered to introduce it, and the court remarked that he didn't think it should be used as an exhibit but could be used to refresh the witness' memory. Thereupon the witness read the number.

"Q. Do you recall, Bill, what State the license represented? A. No, sir. Oh yes, it was an Arkansas license but I don't know what county.

"Q. I will ask you Bill if you recall what year, do you remember what year the license represented? A. No, sir.

"Q. What month was this?"

Thereupon the attorney for appellant stated:

"I am going to object. If he doesn't know what year it was I am going to object to all of this testimony."

THE COURT: "Mr. Poe, the court knows that in January the license of either year might be upon an automobile. The owner might have purchased a new license and have it on the car at that time or he might still be operating with the old license.

MR. POE: I want to renew my objection and take my exception."

It will be observed that the objection made by appellant was not an objection to the comment of the court but rather an objection to the admissibility of the testimony offered by the witness. The testimony was not inadmissible and it is not so contended. If appellant was under the impression that the remark made by the court was prejudicial it was his duty to so inform the court and give it an opportunity to make a retraction or explanation to the jury.

We have considered other contentions made by appellant but find in them no reversible error.

Affirmed.

5-233 262 S. W. 2d 456

Opinion delivered December 7, 1953.

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

James M. Gardner, for appellee.

MINOR W. MILLWEE, Justice. During the pendency of a divorce action by appellant against appellee, appellant petitioned the court for alimony *pendente lite,* temporary attorney fees and costs. On September 17, 1952, the court issued an order directing appellee to pay $250 monthly temporary maintenance to appellant, $500 temporary attorney fees, and $75 temporary court costs. Upon petition of appellant, on November 20, 1952, previous orders were modified to allow appellant $400 monthly for her temporary maintenance effective November 10, 1952.

On December 24, 1952, a final decree was rendered granting appellee a divorce and approving a property settlement made by the parties on November 29, 1952. The property settlement agreement provided that appellee should pay appellant $106,000 and transfer to her certain personal property located in their home in Osceola, Arkansas. Appellee paid appellant $6,000 when the agreement was executed and the balance, which was payable within 30 days, was paid on or prior to entry of the divorce decree on December 24, 1952. Under the terms of the agreement, appellant released appellee of all claims

she might have against him by reason of their marital relations. The agreement further provided: "It is mutually understood and agreed by the parties that this agreement is a complete settlement by and between said parties of all claims, that they may have against each other, by reason of their marital relations and owners of property by the entirety and that, upon the complete execution of this contract, all property rights between the parties shall have been determined and settled."

It was stipulated that appellee failed to comply with the terms of the property settlement requiring him to deliver certain personal property to appellant. Appellant petitioned the court for an order requiring appellee to deliver the property and also to pay $400 alimony which, it was alleged, was in arrears. After the filing of the petition, but before it was passed on, appellee did deliver certain of the property sought in appellant's petition. On January 8, 1953, the court made an order finding that it was impossible for appellee to deliver the property, and ordering him to pay its value in the sum of $658.15. In this order, the court also found "that all alimony due this plaintiff has been paid as ordered by the court and/or agreed upon by the said parties in said agreement . . ." This appeal is from the order of January 8, 1953.

Appellant contends that the court's evaluation of the undelivered property was arbitrary, and not in accordance with appellant's own "undisputed" testimony fixing the value at a higher figure. The fact that some of the property was returned between the time of the hearing at which appellant testified as to its value and the time of the order of the court might reasonably account for the lower valuation made by the court. Further, this Court has repeatedly held that the testimony of a party to a suit, or even of one interested in the result of litigation, is not to be treated as undisputed or uncontradicted. *Elliott* v. *Foster,* 216 Ark. 104, 224 S. W. 2d 353; *American Republic Life Insurance Company* v. *Presson,* 216 Ark. 771, 227 S. W. 2d 969. We cannot say that the

court's determination of the value of the unreturned property is against the preponderance of the evidence.

Appellant also insists that the chancellor erred in failing to render judgment in her favor for unpaid temporary alimony accruing from November 20 to December 24, 1952, at the rate of $400 monthly. A careful examination of the record fails to disclose the amount or date of any payments made by appellee for temporary alimony pursuant to the various orders of the court. The total proof on the question was appellant's testimony that she was not paid anything in December. Whether any amount was due and payable at that time is not disclosed. We are committed to the general rule that the entry of a final divorce decree supersedes an order for temporary alimony. See Tracy v. Tracy, 184 Ark. 832, 43 S. W. 2d 539, where we said that temporary alimony is allowed under our statutes (Ark. Stats., §§ 34-1210 and 1213) if necessity exists during the pendency of the divorce proceeding. We have also repeatedly held that the question of the allowance of alimony *pendente lite* is within the sound discretion of the chancellor and unless there has been an abuse of this discretion, his action will not be disturbed on appeal. *Gladfelter* v. *Gladfelter,* 205 Ark. 1019, 172 S. W. 2d 246. In view of the paucity of the proof on the question, we cannot say there was an abuse of discretion in the court's holding that appellee had discharged his obligations as to temporary alimony under the orders of the court and the agreement of the parties.

Affirmed.

PACIFIC FINANCE CORPORATION *v.* SLAYTON.

5-204 262 S. W. 2d 452

Opinion delivered December 7, 1953.

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

T. O. Abbott, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether a contract for the loan of money, admittedly usurious, was discharged by action of the parties when a new obligation was incurred by the borrower in circumstances claimed by the lender to have been wholly independent of the outstanding debt. The second note does not show upon its face (nor is such fact reflected by the contract) that the vice now complained of was brought forward.

As an aid in purchasing a used Plymouth car, Jack E. Slayton procured of appellant a loan of $675 February 15, 1952. Installment payments were $45 over a fifteen-month period. General Motors Acceptance Corporation was paid $478.19. Added to interest of $42.19 was $39 identified by the single word "charges"—the two items amounting to $81.19. Other deductions were: Fire and theft insurance, $8.75; group installment credit disability certificate, $33.75; insurance premium on car, $66.25; differential paid the borrower in cash, $6.87.[1]

[1] From these figures it will be seen that in order to procure $486.06 ($478.19 x $6.87) appellee obligated himself for $108.75 to pay insurance premiums, $42.19 in interest, and an unidentified "charge" of $39, —a total of $189.94.

We do not find it necessary to say whether Slayton was unduly persuaded to subscribe for insurance he now contends was in part forced upon him. The admission of counsel representing Pacific Finance that inclusion of the service charge of $39 constituted usury simplifies the issue to a determination of whether the chancellor erred in finding that the second loan for the same amount, made May 21, 1952, was a device intended to conceal the illegal contract heretofore referred to.[2]

Before bringing his action to cancel the second loan Slayton, according to his assertions, offered to pay the amount due, with interest at ten per cent. This was refused.

The answer admits that installments on the first loan were paid on the fifth of March and April, but alleges that default was made May 5th.

R. N. Hardy of Dallas, Texas—regional manager for Pacific Finance in the territory embracing Arkansas, Oklahoma, New Mexico, and Texas—testified that the first loan was in strict compliance with Act 203 of 1951 and his company had no reason to apprehend that service charges would render contracts usurious when the amount so exacted, with interest, brought the total above ten per cent per annum.

Hardy says he first talked with Slayton May 21. The manager's duty was to check accounts for delinquencies, get in touch with those who had failed to pay on time, and ascertain the cause of failure. The company did not bother if an obligation well secured showed default when explanations showed that the debtor was ill, out of work, or otherwise temporarily handicapped. The purpose in calling Slayton was to ascertain if the person who made the note still resided at the ad-

[2] Comparatively recent cases dealing with usury are *Strickler* v. *State Auto Finance Company*, 220 Ark. 565, 249 S. W. 2d 307; *Winston* v. *Personal Finance Company of Pine Bluff, Inc.*, 220 Ark. 580, 249 S. W. 2d 315. In the last two cases loans thought to have been made in compliance with Act 203 of 1951 were found to be usurious. [But see *Hare* v. *General Contract Purchase Corporation*, 220 Ark. 601, 249 S. W. 2d 973; *Crisco* v. *Murdock Acceptance Corporation*, 222 Ark. 127, 258 S. W. 2d 551.]

dress originally given. Hardy was positive that in "reviewing the slow book" he contacted Slayton—or, rather, in the normal course of business this would have been the procedure. Hardy's impression was that Slayton explained the delinquency by saying he was out on strike, was ill, or that work had stopped because of the steel shortage; "but," said the witness, "in my conversation with him (after the emergency had been explained) I pointed out that he was qualified for additional money from the company and suggested that if he needed it that he ought to see a banker, a lending company—or, if he preferred, we would be glad to consider a loan for him. He apparently chose us and came to the office three or four hours later."

Slayton testified that just before the second loan was made the finance company called him, saying it had a "new deal." In response he went to the company's office. Following explanatory conversations, the substance of which is in irreconcilable conflict, a new note was executed for $675. According to Hardy the first loan was not (to his knowledge) mentioned during Slayton's second visit to the office. After completing this transaction the check was handed to Slayton, who was informed that it would be cashed at the office if this should be his wish. Hardy thought the car was good security for a loan of from $1,100 to $1,500. The cashier was seemingly not advised "as to exactly what Mr. Slayton wanted to do, so when I got there he was attempting to pay off the other deal—which was perfectly satisfactory as far as we were concerned."

The second check was for $632.81—($675, less interest of $42.19). Hardy's calculations, taken at random from his testimony, would seemingly produce this result: The first note for $675 included interest of $42.19 (as did the second), but $90 had been paid, so the overall sum had been cut to $585. There was an interest rebate of $31.98, thus reducing the debt to $553.02. From proceeds of the check for $632.81 Slayton paid this item and kept $79.79. The Chancellor, therefore, was correct

in finding that credit had not been given for the usurious charge of $39.

The trial court was not willing to believe Hardy's version of the transaction, which would include these inconsistent statements: At a time when Slayton was financially deficient because of a strike, steel shortage, or unemployment, and could not meet an obligation of $45 per month, he wholeheartedly (and without reference to the existing debt) obligated himself for an additional $45, there having been no suggestion that the outstanding note would be retired. But on an impulse, as he passed the office of appellant's cashier, the check was cashed, the old debt was paid, and Slayton walked out with nearly $80 of new money.

A Chancellor is not required to believe incredulous testimony where its acceptance sets a pattern varying from what intelligent men ordinarily do or fail to do in similar circumstances. Here the appellant's explanations were not persuasive, and our conclusions touching motives are substantially the same.

Slayton insists there was no surrender of the first mortgage or reissue of insurance policies. It is not inconceivable that a man in financial need to such an extent that monthly payments of $45 could not be met would bind himself for double that amount in order to have the use of ready cash; but in the circumstances here the facts are so decidedly opposed to appellant's explanations that the decretal order must remain intact.

Affirmed.

GASTINEAU, *et al.* *v.* CROW.

5-220 262 S. W. 2d 654

Opinion delivered December 7, 1953.

J. E. Simpson, for appellant.

A. B. Arbaugh, for appellee.

J. Seaborn Holt, J. This litigation involves a dispute over the ownership of about four acres of land in Newton County.

Appellee, Mrs. Crow, brought this suit to reform a deed which she made to appellants, alleging in effect that a mutual mistake had been made as to the number of acres conveyed.

Appellants entered a general denial and affirmatively pleaded laches and limitations.

Trial resulted in a decree in favor of Mrs. Crow and this appeal followed.

As we read the record presented, it supports the following summation of the facts as found by the Chancellor:

"September 6, 1946, plaintiff (Mrs. Crow) sold to defendant Newton County lands. She says she sold to him all that part of the W ½ of the NW ¼, Section 8, Township 16 North, Range 20 West lying east and south of the center of Buffalo River. His theory appears to be that she sold him the entire half quarter. Deed was executed and placed in escrow with the Newton County Bank to be delivered upon payment of the purchase price. Defendant took possession of the land south and east of the river and returned to Chicago. Apparently he had some ponds made on the lands. Returning from Chicago, he procured a substituted deed from the plaintiff on July 23, 1947. In 1948, the parties went to the Newton County Abstract office owned by Guy A. Moore and where Mr. Moore and George Jinks worked to procure a correction deed which was never executed. . . .

"Plaintiff (appellee) says that she and her daughter went down the lane from her home to the river with the defendant and pointed out to him the line which was to make the northwest boundary of the lands sold him; that she pointed out to him that the line was to be the center of the river; that she didn't want to sell any north and west of the river because that portion joined with the other lands which she owned; that the defendant told her he did not want any on that side of the river; that this corner which was reserved by plaintiff embraces about four acres, about half of which is in meadow while the other is waste land. She is corroborated by her daughter, Oza, who was with them at the time. The defendant doesn't directly deny this conversation. He says that the original deed (of September 6, 1946) conveyed to him only to the center of the river. . . .

"Plaintiff (appellee) says that in July, 1947, the defendant went to her after his return from Chicago and told her that he had had some legal difficulties with

parties digging some ponds for him and that in order to clear his title of any impediments on account of these difficulties he wanted plaintiff (appellee) to execute to him a substituted deed of that date. Just what these difficulties were or just what effect they could have upon his title necessitating a substituted deed does not appear of record. She says that in order to accommodate the defendant she went to the abstract office where it appears Mr. Jinks already had the deed prepared; that she executed it without reading it in the thought that it conveyed only the lands which she had originally conveyed. In this, she is corroborated in most respects by the testimony of her daughter, Oza. The defendant doesn't directly contradict the testimony of the plaintiff (appellee) and her daughter. . . .

"Plaintiff (appellee) says that she was in the tax collector's office in the Courthouse at Jasper in 1948 with the defendant in an effort to straighten up the tax records; that she discovered that defendant had caused the entire eighty acres to be assessed in his name; that she inquired of him and he made known to her that his substituted deed covered the entire eighty acres; that she told him such was a mistake because he hadn't bought the entire eighty acres; that he told her that if there was a mistake he would correct it and that they went to the abstract office to get a correction deed; that for some reason the deed was not procured that day and they came back to the abstract office the following day to get it done; that while Mr. Jinks was preparing the deed for execution it was suggested that defendant's wife would have to join in the execution; that the wife was not present and defendant explained to them that his wife didn't come on account of a headache; that plaintiff (appellee) then suggested that they go on with the preparation of the deed and take the deed down to defendant's wife for her execution and acknowledgment; that the defendant was not willing to do this; that thereupon some argument arose and the final result was that defendant declined to execute the deed. In most material respects, plaintiff (appellee) is here again corroborated by the testimony of her daughter, Oza. De-

fendant doesn't dispute the material portions of this testimony. . . .

"Plaintiff (appellee) remained in possession of all this northwest corner of the one-half quarter section at all times up to the time of the trial (farming it). Defendant paid taxes on it from 1947 to time of trial."

The decree contained this recital: "It is therefore adjudged that the deed executed by plaintiff in favor of the defendant July 23, 1947, by which she conveyed to the defendant all of the W ½ of the NW ¼ of Section 8, Township 16 N., Range 20 W., be and the same is hereby cancelled and held for naught as to all that portion thereof lying north and west of the center of Buffalo River; that title to that portion of said west half of said quarter lying north and west of the center of Buffalo River be quieted and confirmed in plaintiff."

In circumstances such as are presented here, the law is well established that in order to reform a deed or other written instrument "the evidence must be 'clear, convincing unequivocal and decisive,' and must establish the right beyond a reasonable doubt. *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52. This rule does not require that the fact be established entirely beyond dispute. The only requirement is that there be more than a mere preponderance, and the evidence must be of sufficient weight to establish the issue beyond reasonable controversy or doubt." *Adcox* v. *James,* 168 Ark. 842, 271 S. W. 980.

We hold that the evidence here fully meets this requirement. The Chancellor saw and heard the witnesses and was convinced that the testimony of Mrs. Crow and her witnesses was true.

While the case comes to us for trial *de novo,* after giving due consideration to the findings of the Chancellor, we cannot say that the appellee has failed to meet the burden cast upon her by "more than a mere preponderance" of the evidence.

Appellant argues that if Mrs. Crow "executed the second deed in 1947 without reading it, it was at her

own peril'' and that her acts amounted to ratification. The answer to this contention is that the testimony shows (as indicated) that she was led to believe this second deed conveyed the same land as that described and conveyed in the first deed of September 6, 1946, and she was lulled into security by that belief. In a similar situation, we said in the *Adcox* v. *James* case, *supra:* ''Again it is contended that appellee is barred from relief on account of his own negligence in failing to read the deed. The answer to this contention is that he was led to believe that the deed conveyed the interest which he had purchased, and was lulled into security by that belief, hence he is not barred by his failure to read the deed. *St. L. I. M. & S. Ry. Co.* v. *McConnell,* 110 Ark. 306, 161 S. W. 496.''

On the defense of laches and limitations, appellants say: ''Limitation and laches run hand in hand. . . . Laches has deprived appellants of two valuable witnesses,'' one by death and the other by paralysis. This defense is untenable for the reason that it appears undisputed that appellee has at all times, up to the time of trial, been in possession of this four acre tract in dispute, claiming it and farming it. Her claim, therefore, was never allowed to grow stale. ''c. Possession of Property—One in peaceful possession of property which is the subject of adverse claims is not chargeable with laches for delay in instituting suit in equity, to enforce or protect his right.'' 30 C. J. S., § 116, page 538. See also *Grayson* v. *Bowlin,* 70 Ark. 145, 66 S. W. 658.

Finding no error, the decree is affirmed.

JONES *v.* PFEIFFER.

5-221 262 S. W. 2d 455

Opinion delivered December 7, 1953.

John Harris Jones, for appellant.

Rhine & Rhine, for appellee.

ED. F. MCFADDIN, Justice. The question to be decided is whether the Chancery Court abused its discretion in restoring this cause to the docket of pending cases. We hold that no abuse of discretion has been shown.

On May 24, 1950, Wesson filed suit to obtain judgment and foreclosure of a mortgage executed to him by G. R. McClure and Mardis Bennett McClure, his wife. Service was duly obtained; and Mrs. McClure filed answer. The cause remained on the docket of pending cases until February 4, 1952; and during such interim, (a) Wesson assigned the note and mortgage to Pfeiffer, and (b) Mrs. McClure divorced G. R. McClure and married Jones. No timely pleadings were filed suggesting these interim events; and on February 4, 1952, when the Chancery Court sounded its docket, someone—not then the attorney for Pfeiffer or Mrs. Jones—informed the Court that Wesson had obtained his money. Thereupon, the Court, on its own motion, made the docket page notation, "Settled Dismissed". The Clerk carried this notation into the record of the court proceedings of February 4, 1952.

On December 5, 1952, Pfeiffer filed, in the same cause, his pleading, reading in part:

"Comes E. M. Pfeiffer, and represents to the Court that under date of April 12, 1951, while the above en-

titled cause was pending in this court, he purchased an assignment of this cause of action together with the note and mortgage upon which it was based; that at that time the cause was continued with consent of all parties; that sometime later without the knowledge and consent of this assignee, the court, on its own motion, marked the docket in this cause settled and dismissed. It is further represented that this indebtedness has not been settled and the case should not have been dismissed. . . .

"WHEREFORE, this assignee moves . . . that the docket notation 'settled and dismissed' be stricken from the record as an error and that this cause proceed to trial."

To the foregoing pleading, Mrs. Mardis Bennett (McClure) Jones filed response, and claimed that the "Settled Dismissed" entry of February 4, 1952, was a final judgment and *res judicata* of the mortgage foreclosure suit. The Chancery Court heard the evidence on Pfeiffer's motion and Mrs. Jones' response, and then set aside the dismissal notation and restored the cause to the docket of pending cases.

Without discussing the procedural method by which the cause has reached this Court, and without discussing our cases on voluntary and involuntary non-suits, we nevertheless conclude that the Court's ruling is justified under § 29-506 *et seq.* Ark. Stats. The evidence showed an unavoidable casualty to have occurred so as to make proper the ruling of the Chancery Court here challenged. See *Collier* v. *Miss. etc. Co.,* 164 Ark. 54, 261 S. W. 39; and see also *Pinkert* v. *Reagan,* 219 Ark. 822, 244 S. W. 2d 961, and cases there cited. The result of the Chancery Court holding—now affirmed—is that the case of *Pfeiffer* v. *Jones* may be tried on the foreclosure issues.

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

Justice George Rose Smith dissents.

5-227 262 S. W. 2d 905

Opinion delivered December 7, 1953.

Rehearing denied January 11, 1954.

Ras Priest and *Kaneaster Hodges,* for appellant.

Pickens & Pickens, for appellee.

GEORGE ROSE SMITH, J. This case arises from the dissolution of a partnership between M. O. Volentine and E. L. Terrell. In his complaint Volentine asserted that Terrell was indebted to him in the sum of $510.19 for money advanced to the firm by Volentine, and the prayer was for the foreclosure of a mortgage given by Terrell and his wife to secure such advances. Terrell denied the debt, and by counterclaim he sought to recover $1,687.50 as the balance due him from the partnership business. The chancellor sustained Volentine's claim to the extent of $499.30 and Terrell's counterclaim to the extent of $722.50, resulting in a judgment for Terrell for the dif-

ference of $223.20. Both parties appealed, but Terrell's abandonment of his cross-appeal leaves for our consideration only the three items as to which the chancellor found in Terrell's favor.

In April of 1949 Volentine, Terrell, and H. A. Tucker formed a partnership for the sole purpose of bidding for, and performing, a contract with the federal government for the clearance of about 2,200 acres of land in Pike County. To this venture Volentine contributed operating capital in cash, and Terrell and Tucker contributed machinery and other equipment. In substance the agreement was that when the work for the government had been completed and paid for, Volentine would be entitled to the return of his advances, Terrell and Tucker would be entitled to the return of their property, and any remaining profits would be divided.

The firm's bid for the job was accepted by the government, and work was begun. On June 13, 1949, Volentine and Terrell together bought Tucker's interest in the firm, and the next day these two formed a new partnership for the completion of the contract with the government. Shortly before that work was completed and paid for, Volentine and Terrell had a conference in the city of Glenwood and arrived at a partial settlement of the partnership affairs. Whether that settlement covered the three items now in dispute is the question presented by this appeal.

As to two of the items, totaling $310, the issue is solely one of credibility. Both parties testified that the Glenwood conference resulted in an agreement for the division of certain tangible assets then being used on the job. Volentine, who is corroborated by a bookkeeper whom he alone had the authority to employ and discharge, states that the settlement also included the two intangible items now in question—a claim for an insurance deposit and a claim upon certain promissory notes held by the partnership. Terrell denies that these claims were mentioned at the conference. The chancellor accepted Terrell's version of the matter, and we cannot say

that he was in error in doing so. To begin with, the trial court had the advantage of observing the witnesses as they testified. In addition, it is conceded that two other intangible assets—the firm's bank account and the final installment to be paid by the government—were not mentioned during the Glenwood discussion. The chancellor may reasonably have concluded that the settlement then reached was confined only to the physical properties which were being used by the partners in the immediate vicinity.

The third item in dispute, a $412.50 claim on Terrell's part, presents a question of law rather than one of credibility. In May of 1949, while the three-man partnership of Volentine, Terrell, and Tucker was still in existence, Terrell paid Tucker $825 for a half interest in three saws and a jeep owned by Tucker. When Volentine and Terrell bought out Tucker a month later they paid him for the other half interest in this property, which was included in the assets with which Volentine and Terrell began business. Two months later Terrell suggested that as a result of this transaction Volentine owed him $412.50 (half the amount that Terrell had paid to Tucker), but it is not contended that Volentine ever recognized the obligation. Volentine testified that Terrell relinquished this claim at the Glenwood conference, but Terrell says that the matter was not mentioned.

Even if Volentine's recollection of the Glenwood discussion is rejected, this issue is concluded by the terms of the written Volentine-Terrell partnership agreement, which provides that the partnership is to be "on a 50-50 basis as to assets and profits, except as to the amounts owing by the firm to M. O. Volentine." By entering into that agreement Terrell recognized Volentine's half interest in all assets of the firm, and there is nothing in the parties' later conduct that changes this ratio of ownership as to the property bought from Tucker. There is no proof that Terrell's later assertion of the present demand led to a modification of the contract. If Volentine is right in saying that Terrell gave up this claim at Glen-

wood, that ends the matter. And if Terrell is right in saying that this item was not referred to, then the written contract governs.

As to the first two items the decree is affirmed. As to the third the decree is reversed, and, since foreclosure is sought, the cause is remanded for further proceedings.

BUNCH *v.* LAUNIUS, CHANCELLOR.

5-259 262 S. W. 2d 461

Opinion delivered December 7, 1953.

Tom Gentry, for appellant.

J. Bruce Streett, Rawlings, Sayers, Scurlock & Eidson, for appellee.

GEORGE ROSE SMITH, J. This is a petition for a writ of prohibition to prevent the Union Chancery Court from proceeding further with a suit that was brought to enjoin picketing on the part of Local Union 568 of the International Brotherhood of Teamsters. Upon the matter being presented to the writer during the court's summer recess, the petition was treated as an appeal, and temporary relief was granted. The cause has now been submitted for consideration by the court as a whole. The petitioner's contention is that the local union, being an unincorporated association, cannot be sued as an entity, without one or more of its members being joined in a representative capacity.

The plaintiff below is Red Ball Motor Freight, Inc., a corporation operating as a motor carrier in interstate commerce. In its complaint Red Ball alleges that a large majority of its employees are members of the Union of Transportation Employees, and Red Ball has a contract with that union. It is further alleged that Local 568 of the Teamsters Union, which does not have a contract with Red Ball, has wrongfully called a strike against Red Ball and is picketing its premises in Union County. It is also stated that the employees of another carrier, Arkansas Motor Freight Lines, refuse to cross the Teamsters' picket line, with the result that Red Ball cannot interchange freight with Arkansas Motor Freight Lines.

Red Ball pleads that the Teamsters' picketing is unlawful for three reasons: First, the union, by interfering with the interchange of freight between two public utilities, has brought about a discrimination in service that violates the Arkansas monopoly and antitrust laws. Sec-

ond, the union's demands that certain of its employees be reinstated are contrary to Amendment 34 to the Arkansas constitution. Third, the union has threatened to establish a picket line at the premises of Arkansas Motor Freight Lines, in violation of the secondary boycott provisions of the Taft-Hartley Law. 29 U. S. C. A., § 158 (b, 4). The prayer is that the picketing be enjoined and that Red Ball recover $15,000 in damages.

The original defendants were Local 568 (which was sued merely in its association name), Arkansas Motor Freight Lines, and J. B. Ward, who was alleged to be the person actually picketing Red Ball's premises. Upon this complaint the chancellor, after an *ex parte* hearing, issued a temporary injunction forbidding picketing.

Three weeks later the petitioner, who is a member of Local 568 and appears for all its members, filed this petition for prohibition. After the oral arguments of counsel were heard last summer, temporary action was withheld until the objection to the trial court's jurisdiction was first presented to the chancellor. *Monette Rd. Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59. The chancellor was promptly requested to dissolve the injunction, but the motion was denied. Thereafter, written briefs having been submitted, temporary relief was granted. Ark. Stats. 1947, § 27-2102; *Boyd* v. *Dodge, Chancellor,* 217 Ark. 919, 234 S. W. 2d 204.

It is conceded to be the law in Arkansas that an unincorporated labor union cannot be sued in its society name, in the absence of a statute so providing. *Baskins* v. *United Mine Workers of America,* 150 Ark. 398, 234 S. W. 464; *District No. 21 U. M. W.* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. Counsel for Red Ball contend, however, that the Taft-Hartley Act permits a labor union to be sued as an entity in the state courts when a violation of that statute is charged. We think it clear that this contention is not supported by the language of the Act.

Section 301 (29 U. S. C. A., § 185) provides that in suits for violations of labor contracts a labor union may be sued as an entity "in the courts of the United States,"

but the judgment is enforceable only against the assets of the union and not against those of its members. Section 303 (29 U. S. C. A., § 187) permits anyone injured by certain unfair labor practices (including a secondary boycott) to bring suit "in any district court of the United States subject to the limitations and provisions of [§ 301] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and . . . recover the damages by him sustained and the cost of the suit." It is argued that when the two sections are read together § 301 allows a union to be sued as an entity in the federal court and § 303 extends that jurisdiction to the state courts.

This argument hinges upon that part of § 303 which makes it "subject to the limitations and provisions" of § 301. We do not think that this clause has the effect of completely embodying the earlier section in the later one. In addition to the fact that the clause in question refers grammatically to suits in the federal courts rather than to suits in the state courts, there are two clear-cut answers to the argument now made. First, to say that § 303 is "subject to" the limitations and provisions of § 301 plainly implies a restriction and not an enlargement. Hence even if the clause makes § 301 applicable to state court litigation it means not that the union is suable as an entity but that the plaintiff is restricted to collecting his judgment from the assets of the union.

Second, there is no reason to think that Congress meant for § 303 to apply to injunction suits in the state courts. It is important to remember that Congress does not permit even the federal courts to issue an injunction in a case like this one. At least since the passage of the Norris-LaGuardia Act (29 U. S. C. A., §§ 101 *et seq.*) the federal courts have been closely circumscribed in granting injunctive relief in labor disputes. See *United Packing House Workers* v. *Wilson & Co.*, 80 F. Supp. 563. Section 303 of the Taft-Hartley Law refers only to actions for damages; it has nothing to do with suits for injunction in either the federal or state courts. Nor will it do to say that equity, having acquired jurisdiction for one

purpose, will retain it for all purposes. That statement begs the question, for the basic issue is whether equity has jurisdiction in the first place. That jurisdiction does not exist under Arkansas law, and the gap is not filled by a federal statute that at most authorizes an action for damages in a court of law.

After the chancellor refused last summer to dissolve the temporary injunction Red Ball amended its complaint by joining several members of Local 568 as representatives of the organization as a whole. Such a representative suit is maintainable in equity and has the effect of bringing all members of the union into court. *Smith* v. *Ark. Motor Freight Lines, Inc.*, 214 Ark. 553, 217 S. W. 2d 249. The amended complaint supplies an effective answer to the request for prohibition, for the chancellor now has jurisdiction over the members of the union. In this respect the case at bar differs from the *Bourland* case, *supra,* since that was in subtance an action in tort, and we concluded that the chancery court not only had no jurisdiction but also could acquire none.

The amended complaint, however, does not meet the petitioner's alternative request that his petition for prohibition be treated as an appeal from the interlocutory injunction. Ark. Stats., § 27-2102; *Boyd* v. *Dodge, supra.* Counsel for Red Ball suggest that this petitioner, not having been a party when the temporary injunction was issued, cannot appeal from that order. We held in the *Bourland* case that members of the unincorporated union were in a position to ask for a writ of prohibition, and the same principle necessarily applies to an appeal. Unless this is true there could be no appeal from this injunctive order, since the union cannot proceed in its society name.

An appeal goes beyond the issue of jurisdiction and tests as well the correctness of the order. That this temporary injunction was erroneously issued is settled by the *Baskins* and *Bourland* cases. Upon the basis of the amended complaint the chancellor may of course reassert his ban against picketing, although he is not shown to

have taken such action as yet. But the error in the original order is not entirely eliminated by the amendment to the complaint. A formal amendment may relate back to the filing of the original pleading, but the rule is otherwise when the new pleading goes to a matter of substance, such as change in the party defendant. *Schiele* v. *Dillard,* 94 Ark. 277, 126 S. W. 835. If Local 568 sustained compensable damage by reason of the injunction against picketing, that cause of action evidently could not be extinguished by a procedural step taken after the right of action had vested.

Reversed.

CLARK *v.* FARNSWORTH & CHAMBERS CO., INC.

5-206 262 S. W. 2d 458

Opinion delivered December 7, 1953.

Talley & Owen, Max Howell, Norman D. Price and *Gene Worsham,* for appellant.

Rose, Meek, House, Barron & Nash, for appellee.

ROBINSON, J. Appellee Farnsworth & Chambers Co., Inc., hereinafter referred to as Farnsworth, was the contractor in the construction of what is known as the Granite Mountain Housing Project in Little Rock. The contract called for the construction of 100 dwelling units and one administration building. Farnsworth estimated the labor on masonry involved would cost $375,319 but this figure did not include the cost of Social Security, State Unemployment, Federal Excise Tax, Workmen's Compensation, and Public Liability, which amounted to a little less than 7% of the payroll. Appellant H. L. Clark is experienced in the construction of masonry work; he and Farnsworth have contracted in regard to this kind of work on several occasions at various places throughout the southwest.

They entered into an agreement on the Granite Mountain project whereby for the consideration of $140 per week plus $25 per week as an expense allowance, Clark would supervise the masonry work; and it was further agreed: "All expenses connected with the above and all payroll insurance and taxes will be totaled at the end of the job and H. L. Clark and Farnsworth & Chambers will split equally all profit saved from the $360,000 which was the top figure mentioned." In other words, if Clark could get the masonry done for less than $360,000 for labor, he and Farnsworth would split equally the amount saved below that figure.

When the job was partially completed, Farnsworth discharged Clark claiming that his supervision of the work was entirely unsatisfactory. Clark filed this suit contending that he was wrongfully discharged and that at the time of such discharge 54.9% of the work had been

completed at a cost of $148,000 which he alleged was about $56,000 less than 54.9% of $360,000. Clark further alleged that if he had been allowed to complete the work, he would have saved an additional $44,000 which added to the $56,000 he claimed he had already saved, would have totalled $100,000 to be split equally between him and Farnsworth.

Upon the trial of the issues, the Chancellor held, first, that Clark was not wrongfully discharged; and second, that even if 54.9% of the work had been completed, the cost thereof had not been less than 54.9% of $360,000 when all items to be charged properly against the work were taken into consideration. There is no contention by appellant that he would be entitled to any amount saved subsequent to his discharge, provided Farnsworth was justified in letting him go. Incidentally the record shows that the completed project cost $398,-675.46 for masonry labor.

To sustain his contention that he was wrongfully discharged, appellant in addition to his own testimony relies on the evidence given by John A. Woodson to the effect that the work was up to average, and Ray Inman, one of the bricklayers, who testified that no complaint was made as to his work on the inside partitions; also the testimony of Marvin Ivy that he never heard anyone complain about the cleaning of the building; the testimony of Ted Brewer who said that the building was cleaned properly; and W. R. Inman whose testimony indicated that if the masonry was put up in an unworkmanlike manner it was due to urging on the part of Mr. Langley, superintendent for Farnsworth, that the employees put out more quantity of work of less quality.

On the other hand, it was shown that Clark did not cooperate in helping to schedule the job; that it was of the utmost importance to Farnsworth to complete each unit as rapidly as possible; and regardless of Clark's being urged to cooperate in this respect he had practically all of his crews working on the outside walls with only one crew doing the inside work, and as a result when 69 or 70 of the units had been completed so far as the

outside walls were concerned, only 13 had been completed on the inside. This caused the contractor to run behind schedule and hence to be late in finishing the job.

It was only after repeated urging that Clark was prevailed upon to see that the anchors for partitions and roofs were installed properly. The architects protested: "The attention of the foreman in the field has been called several times to the fact that they are leaving out anchors for the partitions and anchors for the roof; this is an item that must be corrected without our inspector having to point out every one to the foreman." And at a later date the architects made a formal written complaint: "Reference is made to our memorandum of 4/21/51 regarding wall anchors. The brick masons are still omitting the partition anchors and wall ties except when someone stands right at their elbow and reminds them. Some method will have to be devised to get these items in as specified." When these anchors were not installed in the first instance, it was necessary to knock a hole in the wall and then restore the damaged masonry.

The superintendent of the entire job complained that Clark did not coordinate his work to the extent of keeping supplies ahead of the workers; masons drawing $3.25 per hour would be idle awaiting the necessary brick, mortar, tile, and scaffolding. The quantity of mortar needed was not correctly estimated, and as a result unused mortar was left over at night and ruined. A window opening was omitted.

From the architect's diary: "Rooms, Building A-412, one brick layer at $3.25 per hour and two helpers working six days trying to straighten up brick walls"; and then another instance: "Rooms, Building A-412, tore out tile on inside and replaced; reset door and window frames"; and later: "Building A-450, two top layers of tile and exterior walls taken out and relaid. One window was 1″ too low and tile was laid crooked in wall."

Moreover Mr. Woodson, an inspector, wrote: "Tile and exterior wall must be leveled plumb and true to a line; all headjoints of equal thickness; also headjoints as

near as possible; having to cut out and replace too many tile to obtain a passable job. Every tile that is taken out and replaced weakens the wall." Mr. Hawn, the architect's representative, also criticized the work, referring to untrue lines, a wall out of plumb, and warped brick work, and that when he made a suggestion, Clark replied that he would "do the work like he wanted to and not like I say to do it."

There was an excessive droppage of mortar on walls, grade beams, and concrete floors. Also the walls were not properly cleaned. Mr. Lynch, representing the architect, said the walls were "smeared with lime mortar. . . . Apparently no effort had been made to wipe the face of the brick down. More than one cleaning operation was necessary." In trying to scrape the excessive droppage of mortar from the floors, picks and shovels and special scrapers were used, and on some floors an electric grinder had to be used; and in removing it, the floors were chipped and had to be patched. It was a very tedious and expensive operation.

From the record we cannot say that the Chancellor's finding that Farnsworth was justified in discharging Clark is contrary to a preponderance of the evidence.

Appellant's contention that he had completed 54.9% of the work before his dismissal for less than half of the $360,000 is not supported by the evidence. Clark testified that the cost of the masonry up to the time of his discharge was $149,091.53. However, the testimony produced on this point is not satisfactory. He says he arrived at this total by a memorandum of the costs which he kept in his pocket; but he did not produce this memorandum at the trial. To prove the payroll figures he relied on a summary prepared by the clerk of the Housing Authority. It is obvious that this summary is not complete; it does not take into consideration all of the items properly chargeable against the job, for instance the common labor. The Chancellor made a finding that the entire labor cost was $172,515.18, to which should be added 6.712% as Social Security, State Unemployment,

etc. This makes a total of $184,494.40; and $28,409.14 should be added as the cost of cleaning the brick which was an item to be charged. Thus it will be seen that the total amount properly charged to the construction of the masonry is in excess of 54.9% of the $360,000.

It might be added that Farnsworth produced in court all the records pertaining to the cost of the masonry, and before the Chancellor made a finding in the matter, appellant was given an opportunity to audit the records to determine if Farnsworth's version of the cost was correct; appellant did not take advantage of this offer.

The Chancellor's findings are supported by a preponderance of the evidence. Hence the decree is correct and is therefore affirmed.

Mr. Justice GEORGE ROSE SMITH not participating.

MCKNIGHT *v.* MCCLELLAN.

5-230 262 S. W. 2d 659

Opinion delivered December 14, 1953.

Donald S. Martz, Rieves & Smith and *Catlett & Henderson*, for appellant.

Ted McCastlain and *Hale & Fogleman*, for appellee.

ROBINSON, J. Appellant McKnight rented to appellee McClellan farm land to be planted in rice. According to the contract between the parties, McKnight was obligated to do certain things such as furnishing water, etc. McClellan was to do the work and the parties were to divide the crop half and half. There was a crop failure, which McClellan contends was the fault of McKnight in not furnishing the water as provided by the contract. McKnight contends the failure was due to improper cultivation on the part of McClellan. There was a judgment in favor of McClellan in the sum of $6,604.90. McKnight appeals.

On appeal appellant argues two points only. First, that the court erred in giving Instruction No. 5 requested by appellee. The instruction deals with the measure of damages; it is as follows: "If you find for the plaintiff, F. C. McClellan, the measure of his damages will be for such a sum as you may find is one-half of the market value of the rice the land would have produced if water and canals for irrigation purposes had been furnished, less the amount it would have cost after the breach of the contract to complete the production, harvesting and marketing of the crop that would have been produced if water and watering facilities for irrigation purposes had been furnished."

Appellant now contends Instruction No. 5 is an incorrect statement of the measure of damages, but we are not called upon to decide that question because the specific objections made at the trial did not touch on that point. Appellant objected to the instruction specifically for the reason: "it is argumentative and places undue emphasis on the breach of the contract and the failure of the defendant to furnish water facilities for irrigation purposes." No contention was made that it was not a correct statement as to the measure of damages. An erroneous declaration by the court in an instruction as to the measure of damages cannot be raised for the first time in the motion for new trial; *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Gilbert, Adm.*, 206 Ark. 683, 178 S. W. 2d 73.

The other point argued by appellant is that the court erred in refusing to give appellant's requested instruction No. 3 which reads: "Even if you find from a preponderance of the evidence in this case it was the duty of the defendant, McKnight, to make the water available for the rice when the plaintiff, McClellan, needed it, and McKnight failed to perform in this respect; if you further find the loss in the crop was not the result of the failure on the part of McKnight to make the water available when needed, but rather was due to the failure on the part of the plaintiff, McClellan, to properly prepare the seed bed for the rice, or to properly plant the rice, or to replant the rice, or his failure in any other respect, any of such acts resulting in obtaining such a poor stand of rice upon which an ordinarily prudent rice grower would not apply water, then the defendant, McKnight, is not liable for any loss or damage to the rice crop involved in this litigation, and under such circumstances you should find for the defendant, McKnight."

The court is not required to give a multiplicity of instructions covering the same point; *Menser* v. *Danner,* 219 Ark. 130, 240 S. W. 2d 652; and appellant's requested instruction No. 3 was fully covered by Instructions Nos. 1, 4, and 8. The second paragraph of Instruction No. 1 is as follows: "The defendant, McKnight, contends that he, McKnight, did not breach the contract as alleged and as contended for by the plaintiff and for this reason plaintiff is not entitled to recover in this suit, and denies that McClellan substantially performed his obligations under the contract in that he, McClellan, failed to plant and cultivate the rice crop in a good and husbandlike manner and that he is, therefore, not entitled to recover in this suit. The defendant, McKnight, also in this suit, upon his contention that he substantially performed his obligations under the contract seeks to recover damages for the alleged breach of McClellan in failing to plant and cultivate the rice crop in a good and husbandlike manner."

Instruction No. 4 is as follows: "You are instructed that where one of the parties to a contract fails mate-

rially to perform his obligations thereunder and thereby renders it impossible or useless for the other party to perform his obligations, the other party is not required by law to further attempt to carry out his obligations but may treat the contract as being at an end and sue for damages for the breach." And No. 8: "If you find the evidence preponderates in favor of the defendant, McKnight's, contentions, then your verdict should be for him in such a sum of money as you find from a preponderance of the evidence equals the rental value of the land the plaintiff was furnished to farm." Thus it will be seen that the proposition covered by appellant's requested instruction No. 3 refused by the court is fully covered by other instructions.

Affirmed.

HARRISON *v.* STATE.

4759 262 S. W. 2d 907

Opinion delivered December 14, 1953.

Rehearing denied January 11, 1954.

W. H. McClellan, for appellant.

Tom Gentry, Attorney General and *Thorp Thomas,* Assistant Attorney General, for appellee.

J. Seaborn Holt, J. On a charge of rape, a jury found appellant guilty of assault with intent to rape, and fixed his punishment at a term of three years imprisonment, under § 41-607, Ark. Stats. 1947, which provides: "Whoever shall feloniously, wilfully, and with malice aforethought assault any person with intent to commit a rape, and his counsellors, aiders, and abettors, shall, on conviction thereof, be imprisoned in the penitentiary not less than three (3) nor more than twenty-one (21) years." This appeal followed.

—1—

For reversal, appellant first challenges the sufficiency of the evidence. The prosecuting witness, and victim of appellant's lust, testified that she was sixteen years of age and a student in the Arkadelphia High School; that she and appellant, Harrison, were returning in an automobile from Hot Springs to Arkadelphia, on Saturday night, June 27, 1953, and at a point where the "Tower Road" (a side road) led from the highway "he stopped and backed up and went up that little road." He had previously told witness what he was going to do to her. She saw a spring nearby and asked him to get her a drink of water and she planned to get out and run as he got the water, but that he did not give her a chance, but stood by her while she drank. After she drank the water, he immediately drove further up the road, stopped again and "told me what he was going to do again, so I started screaming and everything and he told me if I didn't shut my damn mouth he'd cut my throat. He had something in his hand and I got scared and I was so scared I couldn't do anything." He had her under the steering wheel and was holding something on her throat (which, on cross examination, she said was a knife) and that while she was resisting and screaming, and without her consent, he had intercourse with her. Other sordid details we do not set out.

Appellant admits that he had intercourse with the prosecuting witness, but insists that it was with her consent. The testimony is in conflict. There were only two people present at the time, appellant and the prosecuting witness. The jury evidently accepted the testimony of the prosecuting witness as true. It was not necessary that her testimony be corroborated. *Underdown* v. *State,* 220 Ark. 834, 250 S. W. 2d 131. The jury was the sole judge of the credibility of the witnesses and the weight to be given the testimony. We hold that there was ample evidence to support the jury's verdict. *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351 and *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813.

—2—

Appellant next earnestly argues that the trial court erred in instructing the jury that it could find the appellant guilty of the lesser offense of assault with intent to commit rape, for the reason that he (appellant), in the circumstances, was either guilty of rape or no crime at all, and that an attempt to commit rape was not included in the charge of rape. We do not agree.

In *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747, we said: " 'An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter. Mans. Dig., § 2288; *Davis* v. *State,* 45 Ark. 464; 1 Bish. Cr. Law, § 809. * * *

" 'If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not follow that a conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict and the offense is less than the crime charged.' "

It was therefore clearly permissible for the jury to convict appellant of the lesser crime of assault with intent to rape, when charged with rape.

—3—

Appellant next argues that the court erred "in permitting Leon White, the father of the prosecuting witness * * * (and) the prosecuting witness to remain in the courtroom and not under the rule," during the trial. We find no merit to this contention. The court's action here was clearly within its sound discretion and we find no abuse of that discretion prejudicial to appellant's rights. *Chambers* v. *State,* 168 Ark. 248, 270 S. W. 528.

—4—

Appellant next argues that the court erred "in permitting Dr. W. A. Ross to answer the question of the prosecuting attorney as to what the finding of semen during his examination of the prosecutrix indicated to

him," his answer being to the effect that from his examination that it was his opinion that intercourse had taken place. In the circumstances, the opinion of this doctor was properly admitted. "When a witness has, by experience and education, gained special knowledge and skill relative to matters involving medical science, he is entitled to give his opinion thereon. 1 Greenleaf on Evidence, §§ 430c, 441b; 5 Enc. Ev. 534." *Miller* v. *State,* 94 Ark. 538, 128 S. W. 353.

—5 (a)—

Next appellant contends that the court erred in permitting Officer Otis Pennington to testify as to what he remembered about a statement made by the appellant during an investigation by the prosecuting attorney and the sheriff. The record reflects the following on this issue: "Q. What did he say, if you recall, what did he purport to tell happened on that morning? A. I wouldn't know all that he said. MR. McCLELLAN: If your Honor please, if he is going to tell about the statement, I want the complete statement or none at all. THE COURT: He can repeat everything that was said that he recalls, so long as the defendant was present. MR. McCLELLAN: I want to object to his testifying about a statement by the defendant unless he tells all the statement that was made. THE COURT: The court agrees that he will have to tell all he recalls that was said. MR. McCLELLAN: I still want to object unless he tells all that was said; not all that he remembers but all that the witness' statement contained. THE COURT: I have ruled on the objection."

In the circumstances, there was no error in permitting this witness to tell all that he remembered of appellant's statement. It appears that appellant's counsel cross-examined this witness, Pennington, at some length. He, therefore, had ample opportunity to bring out before the jury any portions of appellant's statements omitted by Pennington.

—5 (b)—

Appellant further argues that "the court erred in sustaining the objection of the State to the introduction of a pocket knife as an exhibit to the testimony of the witness, Otis Shepherd, over the objections and exceptions of the defendant." We find no error here for the reason that the proper foundation had not been laid for the introduction of this testimony. The record reflects that during the examination of witness, Otis Shepherd, and at the time the appellant offered to introduce the knife in question, the following occurred: "THE COURT: Q. Had you seen this knife in his (appellant's) possession earlier that evening? A. Not that evening, but I had seen it days before. I had seen it before. I don't recall seeing it that evening. I mean earlier that evening. THE COURT: Q. You don't know whether he had that knife that evening or not? A. I don't know. That's the knife I found in my car. THE COURT: The objection is sustained. The knife will not be introduced."

The above is the foundation upon which appellant sought to introduce the knife. This appears to be the only time at which appellant sought its admission. We hold, on the showing made, that the knife had not been properly identified and therefore there was no error. See *Walker* v. *State,* 215 Ark. 530, 221 S. W. 2d 402.

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Appellant next argues that the court erred in refusing his requested instructions No. 7 and No. 9. We do not agree. His instruction No. 7 would have told the jury that it was the duty of the prosecuting witness "to resist with all the force and strength that is within her power, consistent with her safety, and to continue to resist as long as she is physically able." This instruction was properly refused in that it would require the prosecutrix to resist as long as she was physically able. This she was not required to do under the law. "The law does not require of the woman, who seeks to protect her chastity, that she shall resist as long as either

strength endures, or consciousness continues." *Zinn and Cheney* v. *State,* 135 Ark. 342, 205 S. W. 704.

Appellant's requested instruction No. 9 has been approved by this court in the above case of *Zinn* v. *State.* However, we find that the trial court gave substantially the same instruction covering, in effect, all points in appellant's instruction No. 8, as modified by the court. It is not error to refuse to give an instruction which is fully covered by another. The court is not required to multiply instructions. *Bly* v. *State,* 213 Ark. 859, 214 S. W. 2d 77.

Appellant also alleges error in the court's refusal to give his requested instruction No. 13. This instruction would have told the jury that if the prosecutrix failed to make a complaint, or if she exhibited friendliness after the act, that they could consider either or both of such findings on the question of consent. The answer to this contention is that the court gave appellant's instruction No. 12, which was, in effect, and substantially the same, as No. 13. What we have said in the above paragraph applies with equal force to this contention. There was no error.

Finally, appellant argues that the court erred in refusing to give his requested instructions No. 17 and 19. No. 17 was as follows: "Before the defendant can be convicted of assault with intent to rape, you must believe from the evidence that he assaulted the prosecuting witness, and at the same time intended to use whatever force was necessary to overcome her and have sexual intercourse with her, and unless you so find you should acquit him of assault with intent to rape."

The court covered this instruction in another to the jury, as follows: "Before you can find the defendant guilty in this case, you must find beyond a reasonable doubt; First, that the defendant made an unlawful assault upon the prosecuting witness; Second, that the assault was made by the defendant with the intention of using whatever force or intimidation that was necessary to overcome the prosecuting witness and have sexual

intercourse with her; Third, that the defendant actually had sexual intercourse with the prosecuting witness; and Fourth, that the sexual intercourse was accomplished forcibly and against the will of the prosecuting witness. Unless you find beyond a reasonable doubt that the defendant committed each and all four of these acts, it will be your duty to find the defendant not guilty."

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Instruction No. 19 was substantially and, in effect, the same as Instruction No. 18, which the court gave. As has been indicated, the court was not required to repeat or multiply instructions on the same issue. *Lee and Stewart* v. *State,* 200 Ark. 964, 141 S. W. 2d 842.

Other assignments of appellant have not been overlooked, but after a consideration of all, we find no merit to any of them.

The judgment is affirmed.

Justices George Rose Smith and Robinson dissent.

Sam Robinson, Justice, dissenting. The majority opinion sustains the trial court in refusing to permit the knife to be introduced in evidence on the ground that the only foundation laid for its introduction is the testimony of Otis Shepherd. Shepherd's testimony is only one link in the chain of evidence constituting the foundation for the introduction of the knife. The majority should have considered also the testimony of the prosecutrix and John Beard, Lola Burrow, Rosalie Burrow, and the defendant Harrison; and when so considered, it will be found that the evidence is overwhelming to the effect that the knife which the defendant sought to introduce in evidence by the witness Shepherd belonged to the defendant Harrison, and that Harrison did not have the knife in his possession at the time the prosecutrix claims he threatened her with it. Of course it would be a jury question to say in the circumstances whether the defendant threatened the prosecutrix with some other knife; however there is no evidence indicating that the defendant had two knives.

In *Walker* v. *State,* 215 Ark. 530, 221 S. W. 2d 402, cited by the majority, the proffered testimony in regard to the ownership of the knife was hearsay; and furthermore there was no competent evidence in the record as to the ownership of the knife.

Although it is not disputed that the parties engaged in sexual intercourse, the jury by its verdict of guilty of assault with intent to rape thereby acquitted the defendant of the rape charge. To constitute the crime of assault with intent to rape, two things are necessary; there must exist the intent to rape and there must be an overt act toward the commission of the offense. *McDonald* v. *State,* 160 Ark. 185, 254 S. W. 549. There is no evidence in the record going to prove either element except the testimony of the prosecutrix, bearing in mind the jury found the defendant not guilty of rape.

As to the element of intent, the prosecutrix says the defendant stated he was going to rape her. The defendant denied making any such threat; no one except the two were present and therefore their testimony was the only direct evidence available on this point.

As to the overt act, the prosecutrix testified that in making the assault the defendant put a knife at her throat. The defendant denies this and in corroboration of his denial offered evidence tending to prove his contention. In support of his claim that he had no knife at the time of the alleged assault, it was shown that the prosecutrix and the defendant along with others had visited various places of amusement during the night, that while at one of these night spots defendant had let Bill Sturgis have his knife; and as defendant, Lola Burrow, Rosalie Burrow, Joan Beard, Otis Shepherd, and the prosecutrix were leaving the night club in Shepherd's automobile, defendant asked Sturgis, who was standing nearby, for the return of his knife and Sturgis handed the knife to Joan Beard who was sitting next to the window in Shepherd's car. It was shown that Joan put the knife in her lap and did not give it to defendant Harrison. It is the contention of the defendant that he never again had the knife in his possession. Later

Harrison and the prosecutrix transferred to an automobile belonging to Lola; but Lola, Rosalie, Joan, and Shepherd stayed in Shepherd's car. It was while the defendant and the prosecutrix were in Lola's automobile that the assault is alleged to have occurred.

The witness Joan Beard says that she went to sleep on the back seat of Shepherd's car and when she awoke, the knife was under her head. Shepherd says that he found defendant's knife in the back seat of his, Shepherd's car. He testified that he turned the knife over to the attorney for the defendant and identified it in court. Shepherd could not say he had seen the knife in the defendant's possession the night of the alleged offense; and for this reason, over the objection and exception of the defendant, the court held the knife was not admissible in evidence.

It will be recalled that although Shepherd could not say he had seen the defendant with the knife on the night in question, there was other evidence to the effect that on the night of the alleged assault, but prior thereto, the defendant had the knife, and that it was later found in Shepherd's automobile and therefore could not have been in the defendant's possession at the time the prosecutrix said he assaulted her with a knife. Furthermore it was shown by Otis Pennington, a deputy sheriff, that a short time after the alleged assault occurred he arrested defendant but on searching him found no knife.

For a conviction the state depended on the testimony of the prosecutrix to the effect that the defendant threatened her with a knife. Defendant denies that he had a knife at the time of the alleged assault, and produced substantial evidence corroborating his statement; but with the knife ruled out the evidence introduced by the defendant with reference to having no knife at the time of the alleged assault was actually harmful to him instead of being beneficial. Defendant says that on the night in question he had loaned his knife to Bill Sturgis; he introduced evidence to the effect that Sturgis later

handed the knife to Joan; that Joan put the knife in her lap and did not give it to the defendant; that later Joan went to sleep on the back seat of the automobile and on awakening found the knife under her head. It was shown that Shepherd, the owner of the automobile, later found the defendant's knife on the back seat of the car. It was further shown that the defendant was never anywhere near Shepherd's car, in which the knife was found, subsequent to the time of the alleged assault.

All of this evidence has a tendency to discredit the testimony of the prosecutrix with reference to defendant having assaulted her with intent to rape, and that the overt act of the assault consisted of threatening her with a knife. But one question was not answered to the satisfaction of the jury, and that was "Where is the knife?" It would naturally occur to a juror that if it is true defendant's knife was found on the back seat of Shepherd's automobile, then why was the knife not introduced in evidence?

The prosecuting attorney could very logically argue the case in this manner and it can be seen that the ruling was highly prejudicial to the defendant. Defendant says he did not have his knife when alone with the prosecutrix; that it was on the back seat of Shepherd's automobile; and yet it was not introduced in evidence. An analogous situation existed in *Ford* v. *State,* 220 Ark. 517, 248 S. W. 2d 696, which we reversed by reason of the court's refusal to permit a knife to be introduced in evidence where a similar foundation had been laid for the introduction of the knife, and where the question of whether the deceased had a knife was important to the issue. Here the question of whether defendant had a knife at the time of the alleged assault was very important to the issue since if he had no knife, the prosecutrix stood impeached on a very material point.

"An article of personal property, the relevancy of which has been shown by its identification with the subject matter of the crime, may be exhibited to the jury in the courtroom, either as direct evidence of a relevant fact, or to enable them to understand the evidence or

to realize more completely its cogency and force, or to assist the jury in solving a material, controverted, or doubtful point." *Underhill's Criminal Evidence,* 4th Edition, § 115.

"The intention to do great bodily harm . . . by means of an assault, may be inferred from the circumstances. Circumstantial evidence is usually the only available evidence of intention aside from the declarations of the accused. The intention may be inferred from the force or direction, or from the natural or contemplated result of the violence employed, from the weapon or implement used by the accused." *Underhill's Criminal Evidence,* 4th Edition, § 596. Likewise where, as here, the defendant is accused of using a weapon in making the assault, the fact that he had no such weapon is strong circumstantial evidence going to disprove the charge.

A sufficient foundation was laid for the introduction of the knife, and it is my conclusion that the trial court erred in sustaining the state's objection to its introduction by the witness Shepherd. Therefore I respectfully dissent.

Mr. Justice George Rose Smith joins in this dissent.

Plunkett-Jarrell Grocery Company, *et al. v.* Terry.

5-219 263 S. W. 2d 229

Opinion delivered December 14, 1953.

Rehearing denied January 11, 1954.

Moore, Burrow, Chowning & Mitchell and *Townsend & Townsend,* for appellant.

J. B. Milham and *Kenneth C. Coffelt,* for appellee.

Ed. F. McFaddin, Justice. Appellee, Terry, recovered judgment against appellants because of their conversion of his merchandise, book accounts, and other property. The appellants urge only one point for reversal: i. e., the instructions regarding damages for conversion of the book accounts.

For many years, appellee, A. O. Terry, was a country merchant in Saline County, operating a store and two

sales trucks to adjacent rural areas. On November 22, 1949, Terry went from his store to Little Rock, for the announced purposes of buying merchandise and paying some bills from cash on his person. He visited one or two wholesale houses in Little Rock, and then suddenly disappeared. A diligent search by his family and friends failed to disclose any trace of Terry. It was thought that he had met with foul play; but it now develops that he suffered a claimed attack of amnesia. Some time the latter part of January, 1950, a former friend recognized Terry in a church meeting in Hattiesburg, Mississippi, and called him by name. Terry claims that this act restored his memory and the recollection of his real personality. He returned to his home and family, and later instituted this action against the appellants, Plunkett-Jarrell Grocery Co., Cameron Feed Mills, and Merchants Wholesale Grocery Co.,[1] because of the events that occurred while he was away.

Terry disappeared on November 22, 1949, and at that time, owed the appellants, and other creditors, an aggregate of approximately $9,000.00. The Terry family and the clerks continued to operate the store and sales trucks without any advice from, or consultation with, anyone, until November 29, 1949. On the last mentioned date, Mrs. A. O. Terry and her daughter, Miss Doris Terry, went to Little Rock (whether voluntary or on urgent request from appellants is disputed); and met with representatives of the three appellants and other creditors, to consider the status, and plans for the continued operation, of the Terry business. As a result of that meeting, Mrs. Terry and her daughter signed the following instrument:

"We, Mrs. A. O. Terry and Miss Doris Terry, wife and daughter respectively of A. O. Terry, do hereby agree to operate the A. O. Terry Store, Route 3, Benton, during the absence of A. O. Terry. We agree that we will retain all money received in the business, above the costs

[1] One of these appellants is a corporation and the others are partnerships, and some of the partners are sued individually; but these are details unimportant to an understanding of the present issues.

of operation, for the payment of the accounts owed by A. O. Terry."

It is claimed that by this instrument, and subsequent conduct, the appellants took over the store and all of its assets, and made Mrs. Terry and her daughter the agents of the appellants at all times from and after November 29, 1949. That is the theory on which the plaintiff filed this action for damages.

The store continued to operate until January 10, 1950, when the appellants, as creditors, filed a petition in bankruptcy against A. O. Terry, alleging his insolvency and an act of bankruptcy. Terry returned from his amnesia trip in time to resist the bankruptcy petition. After several hearings, he established that he was not insolvent; and on December 1, 1951, the bankruptcy proceedings were finally dismissed by the Bankruptcy Court. Terry refused to accept a return of any of his assets held by the Receiver in Bankruptcy, and filed this action[2] against the appellants, claiming damages for conversion.

Terry's theory—and confirmed by the Jury verdict herein—was, that the appellant creditors converted his entire stock of merchandise, equipment, notes and accounts, on November 29, 1949, when they placed Mrs. Terry and Miss Doris Terry in charge of the store as their agents. The appellants claim that they acted in entire good faith in an effort to help the Terry family and did not take over the Terry assets, but merely advised and counseled the wife and daughter. But the Jury accepted the theory of A. O. Terry, and rendered a verdict awarding Terry damages against the appellants in amounts as follows:

"Merchandise	$3,412.29
Open Accounts	$4,500.00
Gault Note & Mortgage	$550.00
Three Trucks	$1,500.00"

[2] Terry first filed an action in Saline County, but it was dismissed on a question of venue. See *Terry* v. *Plunkett-Jarrell Groc. Co.*, 220 Ark. 3, 246 S. W. 2d 415.

From the judgment on that verdict there is this appeal, and appellants frankly state in their brief herein that insofar as they are concerned: "The only question involved in this appeal is whether there can be a conversion of an open account." Thus, we do not consider whether the creditors actually converted the Terry Assets, or merely acted in an advisory capacity to the Terry family: that question is foreclosed by the Jury verdict and the concession of appellants' counsel, as above quoted.

We come then to the issue of the legal possibility of the conversion of Terry's book accounts; because the Trial Court, over the objection and exception of the appellants, instructed the Jury that if the verdict should be for the plaintiff, then the Jury would fix as an element of damages "the fair market value of the accounts owing plaintiff by store customers not to exceed $9,000.00, the amount sued for, plus 6% interest per annum from date of conversion to date."[3]

In their brief, appellants state their contention as follows:

"Appellants respectfully contend that there can be no action for trover or conversion of an open account. There is not one scintilla of evidence that the books of accounts[4] or accounts receivable were not in Terry's

[3] The Court also refused the appellants' instruction, as follows: "You are instructed that even though you find for the plaintiff, you are further instructed that on the issue of conversion of his book accounts or accounts receivable, you will limit his recovery, if any, on that issue to the actual moneys which were collected on said accounts between November 29, 1949, and January 10, 1950, which a preponderance of the evidence herein shows to have been collected thereon and actually paid over or delivered to these defendants." The last part of the instruction just copied was erroneous, because when the jury found there was in fact a conversion by the defendants on November 29, then whether the money was actually "*paid over*" to the defendants would not be the test. Even under the appellants' theory, the test would be the amount actually collected by appellants or their agents.

[4] In the plaintiff's argument, the words are used "open account"; but the uncontradicted evidence here shows that the accounts were "book accounts." There is a *slight* difference between "open accounts" and "book accounts." In 1 Am. Jur. 265, it is stated: "The term 'open account' means, ordinarily, an account based upon running or concurrent dealings between the parties, which has not been closed, settled, or stated, and in which the inclusion of further dealings between the

store from the time of his disappearance until January 10, 1950. They were there for collection by Terry had he been there. The alleged seizure of the accounts receivable by the appellants through their agents, Doris Terry and Mrs. Terry, could in no manner affect the appellee's title to his claims against his customers. They were still claims owing Terry and not the appellants. They could still be collected by Terry and not the appellants. Appellants did not gain title to them by any such alleged seizure or conversion."

Appellants frankly state that they have been unable to find any Arkansas cases directly in point; but to sustain their views of the applicable law, appellants cite us to *Knox* v. *Moskins Stores,* 241 Ala. 346, 2 So. 2d 449; *Vogedes* v. *Beakes,* 38 App. Div. 380, 56 N. Y. S. 662; and *Ill. Minerals Co.* v. *McCarty,* 318 Ill. App. 423, 48 N. E. 2d 424. Typical of these cases is the quotation from *Knox* v. *Moskins,* as contained in appellants' brief:

" 'Trover lies only for wrongful appropriation of personal property specific enough to be identified, 39 Cyc. 2011; Cooley on Torts (4th Ed.), p. 496. The term "accounts", as here used, means a demand or claim or right of action. It is a mere incorporeal right to a certain sum, or to the collection of a debt. In this sense it has no tangible entity and will not support an action of trover. 1 Corpus Juris 596, § 1, 1 C. J. S. Account, p. 571.' "

The trouble with the appellants' argument is, that the quotations and statements are borrowed from old cases that were based on the common law forms of action. At common law, every action had to go within the well defined groove prescribed for it, and if the action failed to fit within such groove, then the cause was lost. Some of the old common law actions[5] were

parties is contemplated"; and in 1 Am. Jur. 268, a book account is defined: "A 'book account' may be defined, generally, as an account based upon transactions creating a debtor and creditor relation, evidenced by entries made in a book regularly kept and used for that purpose. A 'book account' is a chose in action, and is property." According to the evidence in the case at bar, the Terry accounts were "book accounts."

[5] In Bouvier's Law Dictionary, there is an article on "Forms of Action," which lists the various common law actions.

trespass, detinue, assumpsit and trover; and *trover* was the name of the tort action that a plaintiff was required to pursue whenever he claimed anyone had taken or converted his property. Unless the plaintiff could fit his evidence into the form of the *trover* action, then he could not maintain *trover,* and would be required to file some other form of action. As to trover, Bouvier's Law Dictionary says:

"A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property. In form it is a fiction: in substance, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use."

From this definition of trover, it is easy to see why the old common law cases would hold that trover could not be maintained as the proper action for damages for conversion of open accounts; because open accounts were not "personal chattels," and trover could be maintained only for "goods or personal chattels." An account receivable was intangible, and not susceptible of that possession essential for manual delivery or manual seizure. An account receivable was personal property, but not a "personal chattel." Even in Arkansas today, (except insofar as may possibly be modified by Act 118 of 1945) an open account cannot be assigned so as to allow the assignee to bring action against the debtor without joining the assignor.[6] But even so, an account receivable is property and the owner possesses a property right in it. Our tax assessing laws require that accounts receivable be assessed as property. (§ 84-430 Ark. Stats.) So when we concede that *trover* would not lie at common law[7] for damages for conversion of open

[6] See *Jett* v. *Maxfield Co.*, 80 Ark. 167, 96 S. W. 143; and *Goode* v. *Aetna, etc., Co.*, 178 Ark. 451, 13 S. W. 2d 6.

[7] Prosser on Torts, Hornbook Series, p. 99, in discussing the common law form of action of trover and its change to suit modern conditions, says: "Another ancient restriction, based on the fiction of losing and finding, was that trover would not lie for intangible property because it could not be 'found.' But this venerable limitation likewise has been discarded to some extent by the courts. It is now held that there

accounts, we have not answered the question in this case. This is true because of the matters now to be mentioned.

The old common law form of actions,—i. e., trover and the others—have long since been abolished in Arkansas. In 1869 we adopted the Code of Civil Procedure, and the first section of that Code (now found in § 27-201 Ark. Stats.) says:

"The forms of all actions and suits heretofore existing are abolished; and hereafter there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs; which shall be called a civil action."

So, even if damages could not be recovered in a *trover* action at common law for the conversion of book accounts, still, if the damages could be recovered in any kind of action, then the damages are recoverable under our code pleading.

As regards the book accounts of the plaintiff, the burden was on him to establish (a) that his book accounts had been converted, and (b) the amount of his damages for such conversion. We have many cases in this State which define "conversion." In *Hooten* v. *State,* 119 Ark. 334, 178 S. W. 310, L. R. A. 1916C, 544, Mr. Justice Hart approved this statement from Cooley on Torts:

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent

may be an action for conversion, not only of the intangible rights represented by special instruments which give control, such as a check, a bill of lading, a bank book, an insurance policy, or a stock certificate, but also of such rights alone, as in the case of the corporate stock apart from the certificate. There is perhaps no essential reason why there might not be a conversion of a debt, the good will of a business, or even an idea, or 'any species of personal property which is the subject of private ownership'; but thus far there has been no particular need for any extension of the remedy beyond commercial securities."

Thus Prosser shows that even in trover, the old common law conceptions have been broadened to meet present day conditions. One of the cases cited by Prosser to sustain the statement that there might be a conversion of a debt is that of *Englehart* v. *Sage,* 73 Mont. 139, 235 Pac. 767, 40 A. L. R. 590, in which it was held that since a debt was subject of garnishment, its wrongful attachment would constitute conversion, for which even trover will lie. There is an Annotation following the reported case in 40 A. L. R. 594. See also Annotation in 50 A. L. R. 1167.

with it, is a 'conversion'. Cooley on Torts, 3rd Ed. Vol. 2, p. 859. 'Anything which is the subject of property, and is of a personal nature, is the subject of conversion.' Id. 856.'"[8]

In *Barnett Bros. Mercantile Co.* v. *Jarrett,* 133 Ark. 173, 202 S. W. 474, Chief Justice McCullough approved the following definition of conversion:

" 'The wrongful assumption or dominion over property of another in subversion and denial of his rights, constitutes a conversion of such property, irrespective of whether there was a demand made for the surrender and refusal to surrender said property.' "

In *Thomas* v. *Westbrook,* 206 Ark. 843, 177 S. W. 2d 931, it was recognized that conversion could be constructively accomplished; and Mr. Justice Robins said:

"Conversion is ordinarily said to consist of the exercise of dominion over the property in violation of the rights of the owner or person entitled to possession. The evidence as to appellee's conversion of the market equipment is rather meager, but it seems to be undisputed that he did change the lock on the door of the building in which the property was situated. By so doing he brought about a situation under which appellant, Willard, was denied access to the property and he (Westbrook) alone could enter the building. Such an act was held by the Supreme Court of New Hampshire in the case of *Jones* v. *Stone,* 78 N. H. 504, 102 A. 377, to amount to conversion of chattels within the building."

The evidence in the case at bar established that Mrs. Cooper was Terry's bookkeeper; and she testified that she posted the account book and that in it were listed

[8] The same statements are found in Cooley on Torts, 4th Ed., Vol. 2, § 331. We have carefully considered the case of *Gage* v. *Hall,* 126 Ark. 627, 189 S. W. 1062, in which this Court said that there could be a recovery for book accounts. But an examination of the transcript in that case shows that the jury returned a verdict for the amount shown to have been actually collected by the creditor found guilty of conversion. So that case is not authority one way or the other on the questions here at issue. Likewise, we have considered the case of *Bailey* v. *Riggs,* 189 Ark. 456, 74 S. W. 2d 396, which was an action by a note holder against a bank for surrender of a note.

the accounts due Terry from various debtors totalling between $8,000.00 and $9,000.00. The evidence establishes that this book was taken from Terry's store some time after November 29, 1949, and has never been returned to him. When the only evidence Terry had as to the names of his debtors and the items due him by such debtors has been taken from him, certainly there has been a "dominion exercised" over the property of Terry. When the book was taken in the case at bar, it had the same effect as changing the locks on the store had in the quoted case of *Thomas* v. *Westbrook (supra)*. When Terry's book containing his accounts was taken, he was effectively denied the ability to establish his claims against his debtors just as thoroughly as if promissory notes executed to him by his debtors had been taken from him. Whether the conversion be considered actual or constructive, there was nevertheless a conversion of his book accounts.

The next point is whether Terry proved his damages for the conversion of these accounts. The Jury verdict awarded him $4,500.00 as such damages; and the evidence clearly supports the verdict. Under date of November 30, 1949, Cameron Feed Mills sent out a letter to all known creditors of A. O. Terry, telling of the meeting of November 29, 1949; and in the said letter to the creditors, Cameron Feed Mills, in giving a list of the assets of the Terry store made from an inventory prepared by representatives of the creditors, listed Terry's accounts receivable as $7,593.82. Mrs. Cooper, Terry's bookkeeper, testified that on November 29, 1949, accounts due Terry (as shown on his books) totalled between $8,000.00 and $9,000.00; that she was familiar with Terry's credit business for many years past; and that 90% of the accounts—on the books on November 29, 1949—were collectible. This and other testimony of a similar nature, supports the Jury verdict of $4,500.00 damages for conversion of the book accounts.

We conclude that under the evidence in this case, the Court was correct in instructing the Jury, as it did, that it could return a verdict for "the fair market value

of the accounts owing plaintiff by store customers''; and we conclude that the Jury's verdict is supported by ample evidence.[9]

The appellee attempts to argue in this Court some claims involving an alleged cross-appeal which arises because of the failure of the Court to allow the Jury to consider certain items of damage, as claimed by Terry. We find no merit in the cross-appeal. Without going into all of the reasons for such decision, it is sufficient to say that Terry filed no motion for new trial in the lower Court, setting up such errors as he now seeks to set up in his cross-appeal, and in the absence of such motion for new trial, Terry cannot argue the matters in his claimed cross-appeal. *School Dist. No. 36 of Hot Springs Co.* v. *Gardner,* 142 Ark. 557, 219 S. W. 11; *Stacy* v. *Edwards,* 178 Ark. 911, 12 S. W. 2d 901; and *Aetna Life Ins. Co.* v. *Martin,* 192 Ark. 860, 96 S. W. 2d 327.

The judgment is affirmed on direct appeal and cross appeal.

GRIFFIN SMITH, Chief Justice, dissenting. The case is one wherein the law, through judicial delineation, takes from those who have received substantially nothing as a consequence of this controversy and gives in plenty to the plaintiff. The award goes to one whose presumptive insolvency and mysterious disappearance would have prompted any man of reason to proceed as the defendants did.

The simple story that so clearly gives emphasis to a penal course of action may be briefly stated in this

[9] We think it not amiss to point out that according to the calculation made from the evidence, it appears that a substantial sum must have been collected, or is otherwise unexplained. Mrs. Cooper testified that on November 29, 1949, the book accounts were between $8,000.00 and $9,000.00. It was shown that on January 10, 1950 (when the Receiver in Bankruptcy took over the business), the accounts receivable totalled $6,875.52; but $2,516.27 of that amount was for accounts less than 30 days old, so these must have come into existence after November 29, 1949, the date of the alleged conversion. Deducting the $2,516.27 from the total accounts of $6,875.52 in existence on January 10, 1950, there is left $4,359.25 of Terry's old accounts that had not been collected on January 10, 1950. When we take Mrs. Cooper's testimony, listing the accounts as worth $9,000.00 on November 29, 1949, and show that only $4,359.25 of them remained uncollected on January 10, 1950, it leads to the result that $4,640.75 had been collected (or otherwise unexplained) in the period from November 29, 1949, to January 10, 1950.

way: A rural merchant whose commercial obligations were slightly in excess of nine thousand dollars—takes $3,600 from the assets and silently fades away. Highly reputable wholesalers to whom the merchant was indebted conferred with the Lost Man's wife and daughter. The clear motive of these creditors was to prevent the closing of this strange customer's place of business; so Terry's wife and daughter were put in charge. Perhaps "put" is not a comprehensive word. The two were Terry's closest kin—the ones to whom in any circumstance he would have turned for aid. They, and they alone, continued physical operation of the store. It is said that a jury inferentially found otherwise. The accounts about which so much is said were in their hands. The opinion incorrectly leaves the impression that appellants took the books. How much money these two collected no living man can say. The token payments made for creditor benefits stand as monumental evidence of inefficiency of wife and daughter or failure to account. The business men who are now made to pay almost five thousand dollars for misdirected sympathy received the princely sum of $338 for the benefit of creditors. It is inconceivable that twelve jurors, or even nine of them, should have fixed a liability so completely lacking in all of the elements of justice. I would reverse the judgment and dismiss the cause for want of substantial evidence of conversion.

George Rose Smith, J., dissenting. The majority's effort to show that an open account can be converted by the taking of the creditor's account book seems to me wholly unnecessary. It has long been the rule that choses in action such as an open account cannot be the subject of conversion, but of course this does not mean that the injured person is without a remedy. "Obligations not merged in a document are not the subject of an action to recover damages [for conversion] under the rules stated in §§ 223 to 241, although interference with or appropriation of such obligations may make liable an actor under some other rule of law." Rest., Torts, § 242. Ever since the decision in *Lumley* v. *Gye,* 2 Ell.

& Bl. 216, 118 Eng. Reprint 749, it has been recognized that one who wrongfully interferes with another's contract is liable in tort. I have no difficulty in extending this principle to the wrongful taking of a merchant's account book, but I see no need for distorting the definition of conversion in order to reach the same conclusion.

My principal disagreement with the majority goes to the question of whether Terry proved damage equal to the sum allowed by the jury. On this issue the majority says: "When Terry's book containing his accounts was taken, he was effectively denied the ability to establish his claims against his debtors just as thoroughly as if promissory notes executed to him by his debtors had been taken from him." This speculation may be true; but there is no evidence to support it, and Terry had the burden of proof. He himself testified that ninety per cent of his customers had traded with him on credit for twelve or fifteen years. I rather doubt the validity of the majority's assumption that patrons of such long standing would have unanimously seized upon the absence of the account book as a pretext for repudiating their debts to the store. But in any event the burden of proof was on Terry, and he has not shown the slightest effort to collect these accounts, much less that the loss of the account book has adversely affected the possibility of collection. Thus it will not do to say that the taking of the account book establishes a loss of $4,500 merely because the amount of the open accounts exceeded that sum.

As an alternative to the above theory, which is unsupported by proof, the majority put in Footnote 9 a summary of evidence showing that at least $4,500 may have been collected by some one between November 29 and January 10. This is true, but if the judgment is to rest on that evidence it was plainly error for the court to refuse a requested instruction that would have submitted to the jury the question of the amounts actually collected.

In Footnote 3 the majority conclude that this instruction was erroneous for the reason that it limited Terry's recovery to the sums collected and paid over to the defendants, the implication being that the defendants would also be liable for money collected by their agents but not paid to them. In the circumstances this limitation was entirely proper. The facts are that the agents in question were Terry's wife and daughter, who alone collected accounts during Terry's absence. Terry's own theory of his case, as reflected by his pleadings and his proof, has never included the notion that he was seeking to recover amounts collected by his family and retained by them. No such suggestion has been made by counsel, nor could it have been advanced in this court for the first time. Yet the affirmance of the judgment upon the premise contained in Footnote 9 amounts to saying that the jury, in disregard of both the pleadings and the evidence, undertook to unjustly enrich the Terry family by permitting Terry to recover for amounts collected by his wife and daughter and not paid over to the defendants. I think the requested instruction would have fairly submitted to the jury the real issue that was in controversy, so that its refusal constituted reversible error.

SAM ROBINSON, Justice, dissenting. There is no evidence in the record that would justify submitting to a jury the issue of conversion on the part of the creditors. Terry disappeared November 22, 1949; his wife and daughter and Mrs. Cooper, a trusted employee, took over the business for Terry. In the circumstances they would have been derelict in their duty if they had failed to take charge of the business. In fact, they never permitted the store to close; they caused it to stay open and took complete charge, continuing to sell merchandise and collect accounts. It was more than a week after Terry's disappearance that the creditors conferred with the wife and daughter. At that time the wife and daughter were in full charge.

Terry had committed an act of bankruptcy; the creditors could have filed an involuntary petition in

bankruptcy, but instead of doing this they decided to go along with the Terrys to see if the matter could be worked out. The Terrys paid them $338.00 and the creditors offered certain suggestions as to how the business should be operated; but according to the undisputed evidence, the creditors have never received one penny in money or property except that which was paid to them by the wife and daughter, and this was used in the bankruptcy case and refunded to Terry at the termination of the bankruptcy proceeding.

After it was ascertained that the wife and daughter were not going to be able to pay the debts, a bankruptcy proceeding was instituted. The only thing taken out of the store by the creditors was a list of the accounts copied from the records in possession of Terry's family, who undoubtedly were acting as Terry's agents at the time. Not to this day has Terry complained of the wife and daughter taking over immediately upon learning of his mysterious disappearance. No one contends that a mere list of names with the amounts owed copied from the account books is property subject to a conversion.

In giving plaintiff's instruction No. 1 the court erred in assuming the wife and daughter were not acting as agents for Terry. This was over the specific objection of the creditors. Defendants were entitled to an instructed verdict; this was requested. Hence the creditors' requested instruction submitting the issue of conversion does not preclude them from now raising the issue of there being no evidence to sustain a verdict finding a conversion. If it can be said now that appellants are limited to the question of whether there can be a conversion of a chose in action, their position is still not untenable, because at the time a motion was made for a directed verdict it should have been granted on the ground that there was no evidence to sustain a verdict for conversion. A bare list of accounts copied from the original which was left in the hands of Terry's agents, his wife and daughter, is not property which is subject

to conversion. Therefore appellants' argument that the only issue is whether such a list is convertible is sound.

In my opinion the cause should be reversed and dismissed.

SLEDGE *v.* CORDELL, *et al.*

5-99 263 S. W. 2d 77

Opinion delivered December 14, 1953.

Rehearing denied January 18, 1954.

[redacted]

Wm. C. Gibson and *Clyde E. Pettit,* for appellant.

Walter L. Brown, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant, who is appellee's niece, instituted this proceeding for an accounting.

Appellee was the sister of appellant's mother, Emily Cordell McCallie, who died in 1931. Emily was the wife of a Presbyterian missionary and lived with her husband in Korea from 1907 until 1930, then returned to the United States. Much of appellant's childhood was spent in Korea and she spoke a mixture of English and Korean.

Appellee and her sister inherited considerable property in Union County. Other property had been acquired by settlement with relatives. Emily executed a power of attorney to appellee in 1923 (recorded in 1924). Appellee acted as agent for Emily until Emily's death, and thereafter continued to act for appellant. A fiduciary relationship existed and this action was designed to require an accounting of matters handled by appellee touching the interests of appellant or her mother.

Numerous transactions by appellee as agent for Emily were recorded, the bulk being oil and gas leases on certain real estate. It was alleged that the proceeds of these leases were unaccounted for and that appellant did not receive any of the benefits. Other transfers were in fee. Some conveyances apparently made by appellant's parents were alleged to have been effectuated through forged deeds. Other violations of the fiduciary status were alleged.

The explanation was offered that many of the oil and gas leases reciting consideration were actually executed for the purpose of obtaining development and that no money was received. Limitation was pleaded. Much of the land allegedly conveyed or subject to transaction by appellee was asserted to be the property of appellee in her own right. Attempts to examine original instruments were thwarted by appellee's assertion that the deeds, original power of attorney, and other written documents were either no longer in her possession or could not be discovered after diligent search. A counterclaim was filed as to certain property and the prayer

was for confirmation of title against the claims of appellant.

The chancellor found no violation of the fiduciary relationship and dismissed the complaint. The relief sought by appellee was granted. This appeal challenges correctness of the chancellor's ruling.

The original controversy involved three tracts of land but nonsuit was entered as to all except 200 acres in Union county. This was originally deeded to appellee and her twin sister Emily by their mother as their share of the mother's property divided among her nine children. Appellant's mother died in 1931 and her father in 1945. Numerous conveyances were made by Emily under the power of attorney. Of the moiety owned by Emily, 50 acres were deeded to her sisters. The remaining 50 acres are in controversy. Several letters from Emily were introduced as well as an abortive will, all of which indicated that only 50 acres were claimed by Emily.

The evidence strongly supports the chancellor's finding that the 200-acre tract was, though undivided by partition, subject to an agreement between appellee and Emily whereby each was regarded as half-owner of the tract, and it was handled accordingly. In the years that followed the transfer creating title appellee received the income from the half recognized as hers and Emily the income from the remainder. Each deeded and conveyed various portions and taxes were paid according to the understanding.

No accounting was demanded by Emily. No administration was instituted after the death of Emily, nor was any guardian appointed for appellant. Prior to the death of appellant's father attempts were made to execute deeds partitioning the 200 acres in accordance with the understanding of appellee and Emily but each deed contained an error and the conveyance was never completed. In 1950, however, appellee deeded appellant Emily's share and at the time expected to have a deed executed by appellant conveying her interest in return,

but after delivery of appellee's deed appellant refused to perform. The chancellor required performance and partition consonant with his finding that the agreement was made to divide interests according to the prior understanding between appellee and Emily.

Explanation of the numerous transactions under the power of attorney which recited consideration was twofold: first, that appellee was not accountable to appellant for details of transactions prior to the death of appellant's mother; and second, that in most instances the recitation of consideration did not involve the actual payment of money but only related to the development of oil, gas and mineral, and profits were prospective. Objection was constantly made that attempts to hold appellee accountable must be predicated on prior showing of title in appellant.

The record is voluminous, the printed abstract containing 442 pages. The chancellor permitted each litigant full opportunity to develop pertinent factual data and multitudinous specific transactions were examined with care. The conclusions were:

(1) Conveyances joined by appellant supporting the existence of previous mutual division between Emily and appellee (alleged by appellant to be forged) were genuine. Any inference deducible from the failure of appellee to produce the original instruments for inspection was traversed by the fact that appellant went through a great many documents in the possession of appellee during a serious illness of appellee and although appellant denied having removed these documents from appellee's possession, the opportunity to have done so was present.

(2) Of the many transactions reciting consideration for conveyance of land by appellee in her fiduciary capacity, much of the property was found to be owned by appellee individually and in other instances actual payment of consideration to appellant was made. At trial proof of receipt was sometimes made by confront-

ing appellant with a cancelled check bearing her endorsement; and at other times appellant was found to have been one of several lessors. Those who had joined with her were found to have been paid, from which the chancellor was justified in concluding that the lessees paid appellant as well.

(3) Despite the fiduciary relationship, no misapplication of trust property occurred and appellee had fully accounted.

(4) Appellant, when most of the transactions occurred, was a mature and intelligent woman, which mitigated to some degree the obligation of appellee for maintaining continuous records in the meticulous manner ordinarily required where there are trust obligations.

Appellant stresses the fiduciary factor and in effect urges us to accept as the controlling element a rule which would place on a trustee or other fiduciary the burden of explaining in detail, supported by records, every transaction concerning the trust. Conversely, appellee takes the position that appellant has rested her case entirely on conjecture and that the record is bare of tangible evidence of any violation of trust.

Undoubtedly, the existence of a reliance relationship wherein the opportunity to profit by any aberration from the norm is ever-present, creates a situation differing sharply from dealings between persons unrelated by blood or confidential association. The obligation to account is ever-present and sincerity must be shown.

However, the trust relationship, while creating this unusual burden, does not in itself impose on the trustee the duty of making formal statements unless the nature of the business handled requires punctuality and precisian. Fortunately, most trust duties are discharged in the manner intended and required by law, otherwise the concept would soon become meaningless through abuse. The beneficiary, in attacking the trustee's actions, must present proof that a trust exists, that a violation has occurred or can be deduced from essentials

inferred but unexplained, and that the violation concerned property to which the trust attached.

Here, a great deal of effort was directed to appellee's failure to account in connection with property transactions, in respect of which appellant's right was not established. As to the bulk of such transactions the duty to account was dependent upon proof of forgery, —acts not proven to the chancellor's satisfaction. Proof of ownership of some of the other tracts was attempted through circumstance or assumption and other matters not akin to a record chain of title.

The chancellor dwelt at length on his judicial observation of the witnesses, particularly the chief litigants, as an aid in reaching conclusion as to weight that ought to be accorded the testimony of each. In this he exercised a prerogative entirely within his province—an advantage denied us on appeal. Resolving conflict between verbal conclusions by taking demeanor into consideration is a rule we have long recognized.

It cannot be said that the chancellor's findings are not in harmony with preponderating evidence.

Affirmed.

Mr. Justice McFaddin concurs.

Sellers *v.* Harvey.

5-229 263 S. W. 2d 86

Opinion delivered December 14, 1953.

Rehearing denied January 18, 1954.

J. R. Wilson, for appellant.

Sigun Rasmussen, for appellee.

WARD, J. This is the second appeal in this case. In the original action in circuit court appellee recovered a $6,000 judgment against appellant for personal injuries resulting from being struck by an automobile driven by appellant. The first appeal to this court was based on the trial court's refusal to grant a new trial on newly discovered evidence, and the opinion affirming the trial court is found in *Sellers* v. *Harvey,* 220 Ark. 541, 249 S. W. 2d 120. On the present appeal we are again asked to reverse the trial court for refusing a new trial on the ground of newly discovered evidence. A different attorney has represented appellant at the original trial, on the first appeal, and on this appeal, which fact may explain a considerable amount of repetition of issues and testimony.

It is our conclusion that the order of the lower court must again be affirmed, for the two reasons hereafter discussed.

First. Appellant's brief consisting of 506 pages is not a compliance with Rule 9 (b) of this court. The abstract alone consists of 372 pages and it can hardly be called an abridgment of the transcript which contains only 327 pages including numerous exhibits. Much of the matter contained in the abstract is not material to the issues raised and is not helpful to an understanding thereof. In many instances where a brief reference to a pleading or exhibit would have sufficed the instruments have been copied wholly or substantially in full.

Second. It is our further conclusion that the trial court did not abuse its discretion in overruling appellant's motions for a new trial based on newly discovered evidence. The reasons for this conclusion are set out below.

(a) *Materiality.* This court has so often announced the rules governing the character of testimony necessary to justify a new trial on the ground of newly discovered evidence that extensive citations are not required. The opinion on the first appeal, *supra,* sets out four requirements, one of which is that the newly discovered evidence must go to the merits of the case. This has been further interpreted as meaning that it must be such as would likely bring about a different result. See: *Williams* v. *Bullington,* 195 Ark. 253, at page 257, 111 S. W. 2d 507; *Missouri Pacific Transportation Company* v. *Simon,* 200 Ark. 430, at page 435, 140 S. W. 2d 129; and, *Missouri Pacific Transportation Company* v. *Priest,* 200 Ark. 613, at page 619, 140 S. W. 2d 993. We set out below a summary of the alleged new evidence relied on by appellant.

Albert Hawkins says he was encouraged to give testimony at the trial favorable to appellee; that he knows appellee testified falsely; but that he didn't think he [Hawkins] had done so. Ed Comstock says appellee was sick and unable to work before he was injured; that appellee said he used crutches to get money out of the insurance company; and, that appellee said he had a chance to get money out of appellant. A letter from appellee's attorney to appellant, dated nine days before

the original trial, was introduced, but it merely contains an offer to settle. A statement by J. D. Dowell would show that appellee went back to work two months earlier than was claimed at the trial. The record shows a letter from the Chairman of the Workmen's Compensation Commission, dated March 16, 1951, and similar testimony to the effect that appellee exaggerated the extent of his injuries, but this tends only to impeach the testimony of appellee, and, also, this question was concluded by the first appeal. A criminal action growing out of the accident was lodged against appellant and a trial was had May 21, 1952. The transcript of the testimony in that action was introduced in this record. Appellant states it is her theory "that this criminal action was launched in an effort to frighten her into a settlement . . .," but this theory is not substantiated by any proof. It is pointed out by appellant that the testimony at the criminal trial contradicts in several instances statements made by appellee on the trial of this case. We have examined these discrepancies and find them to be in the nature of impeachment and they reveal nothing which meets the requirements for a new trial in this instance.

(b) *Diligence.* The affidavits and testimony introduced to show diligence do not meet the test. They merely show: that appellant tried to get a statement from appellee's doctor but was not successful; that appellant made inquiries as to the whereabouts of appellee; and, that appellant's husband had tried to get information concerning appellee. No attempt is made to show that diligence was exercised to secure any particular testimony which appears in the record.

There is nothing in the above summary or in the record which justifies us in concluding that the trial court abused its discretion in denying appellant's motion for a new trial based on newly discovered evidence. That the trial court did have a right to exercise discretion has been repeatedly held by this court. See: *First appeal, supra; Williams* v. *Bullington, supra;* and *Missouri Pacific Transportation Company* v. *Priest, supra.*

Who has appealed. During the hearing on appellant's motions for a new trial in this instance several parties intervened, claiming certain articles of property on which appellee had caused execution to issue in satisfaction of his judgment against appellant. After extensive hearings, the trial court allowed some of the interventions and disallowed the others. Appellant's brief seeks to have this court adjudicate the merits of those interventions which were disallowed, but we cannot do so because said interveners have not appealed. The prayer for appeal here reads as follows:

"Comes the defendant herein, by her attorney, and prays an appeal to the Supreme Court. J. R. Wilson, Attorney."

In the case of *Camden National Bank* v. *Donaghey*, 145 Ark. 529, 237 S. W. 457, this question was settled adversely to the interveners in a situation less favorable to them than is here presented. In the cited case the bank and several other parties instituted an action in chancery court and from an adverse ruling an appeal was taken in this manner:

" 'In the Supreme Court of Arkansas.'

Camden National Bank, *et al.*, Appellants,
v.
W. A. Mathews, *et al.*, Appellees.

'MOTION AND PRAYER FOR APPEAL.

'Come the appellants, Camden National Bank, *et al.*, and pray an appeal to the Supreme Court of the State of Arkansas from the judgment of the chancery court of Jefferson County, Arkansas, rendered in this behalf on the 14th day of January, 1920.

'Taylor, Jones & Taylor,
'Rowell & Alexander,
'Crawford & Hooker,
'Attorneys for Appellants.' "

It was there held that only the Camden National Bank had perfected an appeal. This holding was distinguished

in the case of *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974; it was affirmed in the case of *Wasson* v. *Lillard,* 189 Ark. 546, 74 S. W. 2d 637; and it has not been overruled.

Affirmed.

Justice McFaddin not participating.

West *v.* King, *et al.*

5-234 262 S. W. 2d 897

Opinion delivered December 14, 1953.

Jackie L. Shropshire and *J. R. Booker,* for appellant.

Digby & Tanner, for appellee.

Minor W. Millwee, Justice. Appellant, George Taylor West, filed a petition for determination of heirship in the probate court under the provisions of Ark. Stats., § 62-2914. He alleged that he was the lawful child and sole heir at law of Dr. E. W. West, a resident of North Little Rock, Arkansas, who died intestate May 25, 1952. The petition was resisted by appellees, Lula King and George West, sister and brother respectively of the decedent. They asserted that Dr. West died leaving no

children, or other lineal descendants, and that appellees were his only heirs at law. This appeal is from a judgment sustaining the contention of appellees.

The greater weight of the evidence discloses that appellant's mother was married to, and living with, Will Taylor at the time of appellant's birth on January 11, 1897. Taylor and appellant's mother separated shortly after the birth of appellant, and appellant's mother was granted a divorce and awarded the custody of appellant under a decree of the Pulaski Chancery Court on June 25, 1903. Appellant went by the name of George Taylor until 1908 when his mother and Dr. West were married. Appellant's mother died in 1949 and Will Taylor predeceased her.

In attempting to prove that he was the natural son of Dr. West, appellant offered several witnesses who testified that decedent often referred to appellant as his son after he married appellant's mother in 1908. One elderly witness stated that she had heard appellant's mother say that Dr. West was appellant's father, but this witness also testified that appellant was only about one year old in 1908 when his mother married Dr. West. This evidence was disputed by appellees' witnesses and by documentary proof in the form of the pleadings, depositions and decrees entered in a separate maintenance proceeding and the divorce suit between appellant's mother and Will Taylor in the Pulaski Chancery Court.

There is a well recognized presumption that children born to a couple lawfully married are the children of the husband. We have held that this is one of the strongest presumptions known to the law and that it continues until overcome by the clearest evidence that the husband was impotent or without access to his wife. Morrison, Adm. v. Nicks, 211 Ark. 261, 200 S. W. 2d 100. We do not concur in appellant's contention that his proof was sufficient to overcome the presumption arising from the positive documentary showing that Will Taylor and appellant's mother were lawfully married and living together at the time of appellant's birth. See *Martin* v. *Martin,* 212 Ark.

204, 205 S. W. 2d 189. There is no showing that Will Taylor was impotent or without access to his wife at the time of the conception or birth of appellant, nor is there any direct evidence that Dr. West cohabited or associated with appellant's mother during or at any time near said period. Even if appellant was born January 11, 1896, as he testified, instead of January 11, 1897, as shown by the preponderance of the evidence, his birth was legitimatized by the subsequent marriage of his mother and Will Taylor on December 19, 1896, under Ark. Stats., § 61-103.

The judgment is fully supported by the evidence and is accordingly affirmed.

PARKER, COMMISSIONER OF REVENUES *v.* MOORE.

5-238 262 S. W. 2d 891

Opinion delivered December 21, 1953.

O. T. Ward, for appellant.

R. S. Searcy, Jr., and *Graves & Graves,* for appellee.

GRIFFIN SMITH, Chief Justice. Between 1822 and 1838 the course of Red River changed to such an extent that a body of water was isolated from the flowing stream. Its present length is 2.8 miles and the average width is 200 yards. Soundings disclose a maximum depth of about six feet in dry weather, but in shallower parts mud is encountered within a few inches of the surface.

The question for determination is whether Cutoff Lake—now called Spirit Lake—is navigable. An affirmative answer would uphold the state's right to execute oil and gas leases under provisions of Act 285 of 1943. [See Act 321 of 1937]. Leases were procured from the commissioner of revenues in 1950 embracing all of the lake. Owners of adjacent lands brought two suits against the state land commissioner and the commissioner of revenues alleging non-navigability of the lake. Various assignees of lease and royalty interests were brought into the case. It is stipulated that each complaint presents the same legal question and that a determination of one disposes of the other.

Through the attorney general the land commissioner demurred, contending that the proceeding was against the state. The commissioner of revenues, although named as a defendant, intervened and cross-complained, as did the land commissioner. Each asked for specific relief, hence immunity of the state under § 20 of Art. 5 of the constitution passes from consideration.[1]

Claude A. Rankin, state land commissioner, testified regarding two government surveys: one made in 1822, the other in 1838. In 1822 the lake was a part of the bed of Red River; but after that time and prior to 1838 the river's course changed materially, leaving Cutoff Lake

[1] *McCain* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114; *Arkansas State Highway Commission* v. *Partain,* 193 Ark. 803, 103 S. W. 2d 53.

as a separate body of water. The 1838 survey included lands within the bed of the river as it existed in 1822. No conveyance of this surveyed land had been made by the state, although the leases executed in 1950 were outstanding. The lake is horseshoe in shape, with the east prong about 600 feet from the present river channel. The west prong has filled to such an extent that the area is used for farming.

It is possible that during the period of more than a century since the cutoff occurred local use of the lake to a limited extent was made, but the evidence is conclusive that during the past fifty or sixty years its navigable utility has been negligible. This is not to say that nothing akin to commerce has been transported on these waters. In its strictest sense taking fish and moving them to market is a commercial transaction; and trapping and hunting for profit and consequent use of the lake as a means of transportation for a limited distance would have some of the aspects of commerce and to that extent the waters would be navigable.

But our own decisions and decisions of the U. S. Supreme Court have given the term a practical meaning—a construction in keeping with realistic concepts of transportation. A case in point is *McGahhey* v. *McCollum*, 207 Ark. 180, 179 S. W. 2d 661. Many of the facts disclosed in the suit at bar were present in the McGahhey case. We upheld the chancellor's finding that Cook's Lake was not navigable. In the opinion written by Mr. Justice McHaney *Harrison* v. *Fite* was cited (148 Fed. 781). Judge William C. Hook of the Eighth Circuit, in dealing with an Arkansas appeal, said that it was necessary—in order to meet the test of navigability as understood in American Law—that a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should, he said, be of practical usefulness to the public as a highway in its natural state and without the aid of artificial means. A theoretical or potential navi-

gability, "or one that is temporary, precarious, and unprofitable, is not sufficient."

Nor does it follow that because a stream or body of water was once navigable that it continues so. "Changes," said Judge HOOK, "may occur, especially in small and unimportant waters, from natural causes, such as the gradual attrition of the banks and the filling up of the bed with deposits of the soil, the abandonment of use followed by encroachment of vegetation, and the selection by the water of other and more natural and convenient channels of escape."

Such considerations are factual and are to be weighed in determining whether waters once navigable have lost their commercial potential through causes that conflict with the theory of practical usability. In the case with which we are dealing it is shown that fishing was engaged in and that pleasure boats with 25-h.p. motors were occasionally on the lake.

As Judge HOOK said in the Harrison-Fite case, ". . . selection by the water of other and more natural and convenient channels of escape" is a factor to be considered in saying whether Red River as a navigable stream was subjected to changes whereby an admittedly useful channel was partially abandoned in favor of a new basin. This transition was a part of physical processes conforming to the natural laws of drainage. We agree with Judge HOOK's assertion that "To be navigable a watercourse must have a useful capacity as a public highway of transportation." It is not sufficient to conjecture that at a remote time, in some unknown way, Spirit Lake might be used as a temporary means for rafting logs, or some like endeavor.

The question is whether the lake is susceptible of public servitude as a means of transportation either now or within the foreseeable future when considered in the light of modern methods and the reasonable needs of local commerce.

Quite clearly the appeal is to be resolved upon factual grounds, and since the state's title rests on naviga-

bility, it follows that when the reason for this interest terminated riparian rights attached. "Once navigable, always navigable" is not the accepted rule. The status of the sovereign is that of a trustee acting for the common good, and as long as reasonable persons might agree that a lake or stream has commercial value in terms of transportation, or when it affords utilitarian convenience, the state's protecting hand will not permit encroachment.

But here the proof is convincing that navigation long since ceased.

Affirmed.

M. E. PEACE LUMBER COMPANY, *et al.* *v.* WYRICK.

5-242 262 S. W. 2d 894

Opinion delivered December 21, 1953.

Gannaway & Gannaway, for appellant.

Melvin T. Chambers, for appellee.

MINOR W. MILLWEE, Justice. On August 29, 1951, Steve Wyrick, an employee of appellant, M. E. Peace Lumber Company, was engaged in his regular occupation of running a rip-saw at appellant's mill in Magnolia, Arkansas. It was an extremely hot day with the temperature reaching 104 degrees. Wyrick worked in a building which had a tin roof and tin walls, and there was a dry kiln about fifty feet from the point where he was working and an open refuse fire about 150 feet away. Some time before noon, Wyrick was relieved by another employee, and about 10:30 or 11:00 a. m. that day, he was found at the rear of the mill lying on the ground and apparently unable to walk. He complained of being sick and hot. He was taken to the Magnolia City Hospital, where he seemed to be improving up until his sudden death shortly after midnight. There was medical evidence to the effect that decedent suffered a heat prostration on the day in question and that he was then suffering from several diseases, including heart trouble, which made him less able to withstand extremely hot weather. Appellee is the widow of the deceased Wyrick.

On November 28, 1952, the full Workmen's Compensation Commission, reviewing Commissioner Holmes' opinion of August 4, 1952, granted appellee's claim for an award of compensation against appellants for the injury and resultant death of her husband. The Commission found as a fact that Wyrick suffered an accidental injury, heat prostration, which arose out of and during the course of his employment, and that the heat prostration precipitated his heart failure which resulted in his death on August 30, 1951.

Appellants argue (1) that no injury could have arisen out of the employment, nor could it have been caused by it, since deceased was on the morning of his illness doing precisely the same work he had always done and there were no unusual events or occurrences; and (2) that if deceased did suffer heat prostration, there is no substantial testimony that it was the cause of his death. In awarding compensation, the Commission made the following findings on these issues: "It is well established that a workman who suffers a heat prostration, as the result of the working conditions under which he labors, has suffered an accidental injury that arises out of and during the course of his employment, and the fact that other workmen may not be affected, or that he may have been rendered more readily susceptible to the injury than they were by reason of his physical condition, cannot alter the matter. The question as to whether heat prostration is to be deemed an accidental injury within the meaning of the workmen's compensation acts has been frequently before the courts and the rule, supported by the weight of authority, is that heat prostration which results from the employee engaging in his employment, if it results from conditions under which the work is carried on, is compensable.

"As to the second question as to whether or not the accidental injury caused or contributed to the death of the decedent on August 30, 1951, we are of the opinion the evidence herein reasonably establishes that it did. The evidence is undisputed that prior to the decedent's heat prostration on August 29, 1951, he was able to and did do his work in a satisfactory manner. Following the decedent's heat prostration he was confined to the hospital and died 12 or 14 hours after his stroke. The death certificate gives the cause of the decedent's death as acute heart failure and the antecedent cause as heat prostration. It appears that no one can say with mathematical certainty the cause of the decedent's death, but the medical opinion is that it was heart failure. Dr. Carrington admits that the heat prostration could have aggravated the decedent's condition which resulted in heart

failure. Dr. Hill states that the heat exhaustion apparently precipitated the termal congestive failure. Dr. Wilson admits the causal relationship cannot be disproved. Absolute certainty is not required under the rules of evidence and reasonable doubts growing out of the evidence should be resolved in favor of the claimants.

"After carefully considering all the evidence herein, we are of the opinion the within claimants have reasonably established that the decedent's death shortly after midnight on the morning of August 30, 1951, was caused or brought about or precipitated by heat prostration on August 29, 1951."

The Commission's findings are in complete accord with the decision of this court in *Harding Glass Company* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961. In that case the workman died of a heart ailment aggravated by a heat prostration which he suffered 8 months earlier while engaged in the usual duties of his employment. In affirming an award of compensation to the widow, this court said: "While appellants cite authorities holding to the contrary, we think the better rule, and the one supported by the great weight of authority, is that a heat prostration which resulted as here, and was sustained by a workman or employee, while engaged in the employment, and which grew out of the employment, whether due to unusual or extraordinary conditions or not, is deemed an accidental injury and compensable, and we so hold." In so holding, we approved the following rule announced in *Baltimore and Ohio Railway Company* v. *Clark,* 4 Cir., 59 Fed. 2d 595: "A workman who sustains heat prostration as the result of the conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter."

In the Albertson case, *supra,* we also reaffirmed the following statement approved in *McGregor and Pickett*

v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210: "As stated in some of the cases, it is no less an accident when a man suddenly breaks down than when there is a like mishap to the machine he is operating. Nor is it a defense that the workman had some predisposing physical weakness but for which he would not have broken down. If the employment was the cause of the collapse, in the sense that but for the work he was doing it would not have occurred when it did, the injury arises out of the employment."

Appellants rely on several cases in which this court has approved the Commission's disallowance of compensation where claimant's intestate died of heart failure, but the factor of heat prostration does not appear in the cases cited. The principles adopted by this court in the Albertson case, *supra,* are in our opinion wholly consonant with the spirit and purpose of the Compensation law. Their application here calls for an affirmance of the judgment of the circuit court sustaining the findings of the Compensation Commission.

STACY *v.* WALKER.

5-245 262 S. W. 2d 889

Opinion delivered December 21, 1953.

Rhine & Rhine, for appellant.

Bryan J. McCallen, for appellee.

GRIFFIN SMITH, Chief Justice. Stacy owns 48 acres south of and adjoining Walker's 32 acres. An old fencerow delineates the dividing line. Along this fencerow for a distance of 190 feet Stacy constructed an earthen levee varying in height from 18 inches to less than three feet. Eight acres of Walker's land drains north into an old river run. The remaining 24 incline southeast with the result that Stacy's farm, prior to erection of the levee, caught discharge waters that eroded productive land.

With construction of the levee several acres of Walker's land were adversely affected. Following heavy rains water accumulated against Stacy's dam and gradually spread over an area regarded by Walker as his best cotton land. He sued for damages to the 1951 cotton crop amounting to $1,600 and for a mandatory order directing Stacy to breach the levee. From a $50 judgment for nominal damages and a decree for elimination of the levee Stacy has appealed.

Two questions are presented: (1) Was the flowage area on Stacy's land a defined waterway in respect of which Walker had acquired the right of usage? (2) If the water Stacy diverted was the accumulation of periodic rainfall and the flowage was such that the affected proprietor was justified in fending against it, did he unnecessarily injure Walker by construction of the levee? It is urged that an inexpensive ditch would have accomplished the same end. A so-called "bonded drainage ditch" is within close proximity to the affected lands.

In his relief prayer Walker asked the court ". . . to declare and establish that the defendant's land is ser-

vient to plaintiff's land with respect to the right of plaintiff to enjoy the natural and unobstructed drainage of [his] land over and across the land of defendant".

Walker was asked whether there was a well defined ditch that the water followed in crossing Stacy's land. He mentioned a natural outlet that existed prior to the obstruction complained of, explaining that the water from this natural outlet flowed south and a little east across Stacy's land, then went into the improvement district ditch. Responding to an inquiry if the flowage followed a natural channel or ditch upon entering his neighbor's property Walker replied. "It has a natural [land] contour to follow, with a small amount of washing out." And again: "There was a well defined ditch. It is the natural contour of the land that extends from my field approximately half way to the ditch."

On cross-examination Walker said that there was no "leadway or channel or 'planted levee'" on his property. The water that caused trouble came from rains:—"There is no stream coming in on my farm: it was absolutely the water that falls." There was no creek or depression "with banks" that carried the water across his own farm—"Nothing but the plowed-up levee between my farm and Mr. Stacy's. It leads the water all the way across the south side to the natural runway. It is blocked now by the levee." Nothing that Walker would term a runway is on his farm, and the water "has a more or less natural tendency to run south and east".

W. M. Brawner, an engineer in the government service, testified from experiences covering twelve years in drainage and flood control activities. With the aid of a surveyor he had made measurements on the Stacy and Walker lands and was familiar with the drainage problem. He observed a "scour" starting at an indicated point in the fencerow. Water would flow eastward from Walker's land. The scour indicated on Stacy's property was caused by this flowage. It started from a low point in the fencerow and had the effect of localizing surface water, thus causing greater erosion than would have been

the case if the water had spread over a larger area. Brawner examined Walker's land north of the Stacy levee as far as the old river run.

It was Brawner's opinion that a small drainage ditch —costing not in excess of $80—could be run from the southeast corner of Walker's land north "to this old slough". Such an undertaking, he thought, would afford complete relief from the difficulties complained of. But the witness did not believe that the amount of water impounded by the levee was sufficient to justify the expenditure. The question was asked regarding probable effect of removing the levee and Brawner replied: "We do know that [the land] will erode, because it already has, and it will continue to do so. [The result] would be equally detrimental to Walker and Stacy because scour would continue in a direction from which the water comes, and naturally Stacy's land will [deteriorate]. The more Stacy's land scours the more Walker's property will scour".

It was also Brawner's opinion that Stacy had no drainage problem "except that of protecting his property against surface water".

We think the record clearly shows that rain falling on Walker's land did not spread with uniformity, but followed slight surface depressions until it finally accumulated at points along the levee site to empty onto Stacy's property following a contour that in no sense could be regarded as a natural flowage way. This resulted in the "scouring" process spoken of by Brawner. It also created a bog with no outlet. Since it is conceded that there was no constant stream or natural watercourse other than these slight depressions, it follows that Stacy had a right to defend himself.

Under the rule announced in *Leader* v. *Mathews,* 192 Ark. 1049, 95 S. W. 2d 1138, water flowing into low places does not necessarily constitute a natural course, and where overflow occurs ". . . a landowner is justified in defending against such flood waters and can do so without incurring liability, unless he unnecessarily in-

jures or damages another." See *Brasko* v. *Prislovsky,* 207 Ark. 1034, 183 S. W. 2d 925. Judge EAKIN's opinion in *Little Rock & Ft. Smith Ry. Co.* v. *Chapman,* 39 Ark. 463, 43 Am. Rep. 280, was cited because of the comprehensive statement regarding one's right to protect his property where that result can be achieved without disproportionate prejudice to another. In *Dent* v. *Alexander,* 218 Ark. 277, 235 S. W. 2d 953, we quoted with approval from *Bohn* v. *Salt Lake City,* 79 Utah 121, 8 Pac. 2d 591, 81 A. L. R. 215, to the effect that a landowner is under no duty to receive upon his land surface water from the adjacent property. On the contrary, in the use or improvement of his land, he may repel such water at his boundary. This statement is, of course, subject to the modification that unnecessary harm must not be inflicted.

In the case at bar Stacy testified that construction of the levee—built with his own equipment and labor—cost about eight dollars. The estimate made by Brawner that for $80 Walker could drain his own land without injury to Stacy was predicated upon the employment of outside labor.

We think the evidence preponderates in Stacy's favor respecting each essential issue, hence the decree must be reversed with directions to dismiss the complaint.

HANCOCK *v.* HANCOCK.

5-239 262 S. W. 2d 881

Opinion delivered December 21, 1953.

Terrell Marshall, for appellant.

Talley & Owen, Wayne W. Owen, Dale Price and *L. Gene Worsham,* for appellee.

J. Seaborn Holt, J. After approximately twenty years of married life with appellant, appellee, on September 24, 1951, came to Little Rock, Arkansas, from their home in Bluefield, West Virginia, and on December 17, 1951, filed suit for divorce, alleging as a ground therefor, three years separation without cohabitation, § 34-1202, Ark. Stats., 1947. Later on March 1, 1952, he amended his complaint and alleged the additional ground of indignities.

Appellant's answer was a general denial and specifically pleaded lack of jurisdiction and condonation.

Trial, on testimony from written depositions only, resulted in a decree granting a divorce to appellee on January 29, 1953, and an allowance to appellant of $100 per month alimony. The decree stated no specific ground on which the divorce was granted. This appeal followed.

Conceding, without deciding, that appellee had established a *bona fide* residence here at the time suit was filed and the decree rendered, we pass to appellant's contention that appellee has failed to establish, by a preponderance of the testimony, separation for three years without cohabitation, or indignities, that would warrant a decree of divorce to him. After a careful review of all of the

evidence, we have concluded that appellant's contention must be sustained.

The record reflects that the parties here were married in August, 1932, and with the exception of the first year of their marriage, when they lived in the home of appellee's parents, they had lived together as husband and wife in an apartment in Bluefield. At no time had either party expressed a desire for divorce or had there been a legal separation. But, Mrs. Hancock did obtain an order, —still in effect, —from a West Virginia court allowing her $100 per month support money. There was testimony on the part of appellant that up to August, 1951, they cohabited as husband and wife. Appellee was away from home on numerous occasions, on business and on many drinking sprees, and because of several confinements in various alcoholic institutions. They got along well at their home when appellee was not traveling and was sober. He was kind to appellant, considerate, brought her gifts, and furnished groceries. They occupied the same bedroom and cohabitated together up to August, 1951. Appellant's daughter, Lysbeth Ann, by her first husband, had lived with her mother and stepfather since their marriage in 1932 and tended to corroborate her mother's testimony. Lysbeth was a college graduate and an employee in a Bluefield bank. There was other evidence tending to corroborate appellant.

Appellee frankly admitted that he had drunk whiskey to excess since his college days and that while he would stop at intervals, he has continued to drink intoxicants after 1947. He further frankly, if not boastfully, admitted that he had had adulterous relations with a number of other women, not only since 1951, but on many occasions in the past three to five years. While appellee denied that he had ever had intercourse or cohabited with appellant within the three years prior to his divorce suit here, his testimony lacks corroboration. That he had access to his wife is clearly shown by the evidence. In fact, appellee admitted that he spent some days and

nights in their apartment in October, 1950. With access admitted, marital relations will be presumed.

We do not attempt to detail more of the testimony. It suffices to say that the great preponderance thereof shows that appellee and appellant lived and cohabited together as husband and wife as late as August, 1951, well within the alleged three-year period. This was sufficient on the evidence presented to destroy the continuity of the three-year separation time as a ground for divorce. *McClure* v. *McClure,* 205 Ark. 1032, 172 S. W. 2d 243; *Buck* v. *Buck,* 205 Ark. 918, 171 S. W. 2d 939, and *Owen* v. *Owen,* 208 Ark. 23, 184 S. W. 2d 808.

On the question of indignities, but little need be said. This alleged ground, as above indicated, has been clearly cut off by condonation. In any event, the great preponderance, if not the undisputed testimony shows that appellee, with his admissions of his drunkenness and adultery, was guilty of such gross indignities as would preclude any claim for a divorce on this ground. Even if we were to concede that appellant was not altogether without blame, appellee was the first and chief offender and most to blame in their domestic difficulties. *James* v. *James,* 215 Ark. 509, 221 S. W. 2d 766.

We do not disturb the West Virginia court order above mentioned, which allowed appellant support money.

Accordingly, the decree is reversed and the cause remanded with directions to dismiss appellee's complaint for want of equity, with all costs in this court and in the trial court, including printing of appellant's brief and an additional fee for appellant's attorney of $150, to be paid by appellee.

5-241 262 S. W. 2d 914

Opinion delivered December 21, 1953.

Hebert & Dobbs, for appellant.

H. A. Tucker, for appellee.

ED. F. MCFADDIN, Justice. The only question on this appeal is, whether the Trial Court abused its discretion in refusing to approve the Commissioner's Report of Sale. We hold that no abuse of discretion has been shown, within the purview of our cases, some of which are *Mulkey* v. *White,* 219 Ark. 441, 242 S. W. 2d 836; and *Summars* v. *Wilson,* 205 Ark. 923, 171 S. W. 2d 944.

Mr. and Mrs. Young had been husband and wife; the real estate had been acquired after the effective date of Act No. 340 of 1947;[1] and in dividing the property rights of the parties in the divorce action, the Court ordered a sale and a division of the proceeds. It is not claimed that the property was homestead; and no question is presented as to any of the proceedings prior to the order of sale. The decree provided for sale for cash;[2] but the Commissioner sold the property on a credit of 3 months. Mr. Young, or his attorney, had the abstract of title and did not deliver it to Mrs. Young's attorney until the day before the sale, and only after

[1] In *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, we held that the Act No. 340 of 1947 could not validly be invoked against entirety estates created *prior* to such act; and in *Price* v. *Price,* 217 Ark. 6, 228 S. W. 2d 478, we recognized the Act No. 340 as valid when applied to entirety estates created subsequent to such act. The latter is the situation existing here.

[2] The sale herein was a partition sale, under the provisions of § 34-1801, *et seq.,* Ark. Stats.; and the Chancery Court had the power, under § 34-1827, Ark. Stats., to order the property sold for cash. See *Overton* v. *Porterfield,* 206 Ark. 784, 177 S. W. 2d 735.

petition filed in the case. At the sale, the property, shown to be worth $7,000.00, was sold to Mr. Young for $4,000.00, after he had voluntarily raised his own bid of $3,000.00. In resisting the approval of the Commissioner's Report of Sale, Mrs. Young showed that she could and would have borrowed $6,000.00 to use in bidding on the property, if she had received the abstract in ample time.

In *Mulkey* v. *White, supra,* we said:

"When great inadequacy of price is shown, the Courts will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to approve the sale."

The property here involved sold for a grossly inadequate price; and the other factors that the Court undoubtedly seized on were (a) the matter of the abstract, as previously stated; and (b) the error of the Commissioner in having the sale on credit instead of having it for cash, as directed by the Court.[3]

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY
v. OLSEN, *et al.*

5-224 262 S. W. 2d 882

Opinion delivered December 21, 1953.

[3] This last mentioned matter, in itself, would be sufficient to justify the refusal of the confirmation of the sale when linked with a showing that the appellee was prejudiced thereby. See *Johnson* v. *Campbell,* 52 Ark. 316, 12 S. W. 578.

Wright, Harrison, Lindsey & Upton, for appellant.

Mahony & Yocum, George M. LeCroy and *T. O. Abbott,* for appellee.

MINOR W. MILLWEE, Justice. In 1895, Adam Lockhart executed a deed to the Arkansas Southern Railroad Company covering certain lands. The instrument is entitled "Deed of Right-of-Way" and recites:

"Witnesseth: That the party of the first part for and in consideration of the sum of twelve and 15/100 dollars received from the party of the second part the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the party of the second part and unto its successors and assigns, all that piece or parcel of land, being a strip of land one hundred feet wide, for the purpose of constructing and maintaining a railroad thereon, being fifty feet on each side of the center of the main track of said railroad situate, lying, and being in the County of Union and State of Arkansas in section thirty-two, Township eighteen South, Range fifteen West, and more particularly

described as the N½ of the NE¼ and the SE¼ of the NW¼ and the NE¼ of the SW¼ of Section 32 T. 18S. R. 15 W.

"And the party of the first part agrees further that the party of the second part is to have through its agents and employees the unrestricted right and privilege to maintain said railroad over, through, and upon said land forever.

"To have and to hold the premises aforesaid with all and singular the rights, privileges and appurtenances and immunities thereto belonging or in any wise appertaining unto the party of the second part and unto its heirs and assigns forever. . . ."

The appellant is the successor in title to the Arkansas Southern Railroad Company and acquired all that company's interest in the strip of land in 1896 and has been using the strip as a railroad right-of-way since that date. Appellees claim the oil, gas and other minerals under the strip of land as the successors to the title of Adam Lockhart. There are now three producing oil wells on the strip of land in question, and on May 1, 1952, appellees filed suit against appellant to quiet their title to the mineral estate in the 100 foot strip. The chancery court decreed that the deed from Adam Lockhart to the railroad company conveyed only an easement and the court quieted title to the mineral estate of this strip of land in the appellees.

The sole question presented is whether the deed conveyed an easement or the fee simple title.

It is well settled that this court, when called upon to construe deeds and other writings, is concerned primarily with ascertaining the intention of the parties, and such writings will be examined from their four corners for the purpose of ascertaining that intent from the language employed, and, if such intention clearly appears, effect will be given thereto. Coffelt v. Decatur School District No. 17, 212 Ark. 743, 208 S. W. 2d 1.

The instrument in question is similar to the deed involved in the recent case of *Daugherty* v. *Helena and*

Northwestern Ry., 221 Ark. 101, 252 S. W. 2d 546, in which we held that an easement was conveyed, and the principles announced there are controlling here. The first factor in determining the intent of the parties lies in the title, "Deed of Right-of-Way", of the deed in question. This factor did not appear in the Daugherty case, but the strip of land was there conveyed "for a right of way", while the land was conveyed in the instant deed "for the purpose of constructing and maintaining a railroad thereon", and the railroad company was granted "the unrestricted right and privilege to maintain said railroad over, through, and upon said land forever." The deed in the Daugherty case contained neither a *habendum* nor a warranty clause, while the deed in question here contains a *habendum,* but no warranty, clause. In the Daugherty case, the deed recites a consideration of $5.00 paid for 1.32 acres, while the instant deed recites a consideration of $12.15 paid for 8.36 acres.

In urging a reversal, the appellant makes the same argument as the railway company made in the Daugherty case. In that case, we said: "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." And in *St. Louis-San Francisco Ry. Co.* v. *White,* 199 Ark. 56, 132 S. W. 2d 807, it is said: "Where the conveying language shows a purpose to authorize construction of a railway with possibility of reverter of the land to the servient estate, it has been held that such instrument creates a determinable fee and transfers the whole title from the grantor so long as the property is used for railway purposes. But the general rule seems to be that if the deed purports to convey only a right-of-way, it does not convey the land itself, but the fee remains in the grantor, and the railway company acquires a mere easement in perpetuity for railway purposes."

In 2 Thompson on Real Property, § 462, the author states: "Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed." In 74 C. J. S., Railroads, § 84 c.(1), it is said: "As a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad company acquires a mere easement in the land for right-of-way purposes." See, also, *Sherman* v. *Petroleum Exploration,* 280 Ky. 105, 132 S. W. 2d 768, 132 A. L. R. 137, and annotation beginning at p. 142.

Looking at the whole instrument involved here, its title, the nominal consideration recited, the shape of the tract conveyed, and the recited purpose of its use, it seems apparent to us that it was the intention of the parties to convey an easement rather than a fee. The decree, so holding, is affirmed.

McFaddin, J., not participating.

[redacted]

Brown, *et al.* *v.* Brown, Administrator.

5-236 262 S. W. 2d 896

Opinion delivered December 21, 1953.

[redacted]

John P. Vesey, for appellant.

L. L. Mitchell, for appellee.

George Rose Smith, J. This appeal questions the action of the probate court in allowing a fee of $150 to L. L. Mitchell as attorney for the estate of Virginia Brown, it being contended that Mitchell's services were rendered to the administrator personally rather than to the estate. Since the appellants have not brought up the testimony heard below the only question is whether error appears on the face of the record.

Mrs. Brown died on September 3, 1951, survived by seven children. Five days later a son, Austin Brown, was named as administrator of the estate. Austin approved certain claims in favor of himself and of one of his sisters. Charging that these allowances were improper, four of the other children petitioned the court for Austin's removal. After a hearing on April 1, 1952, the court accepted Austin's resignation and directed that he turn over to his successor, W. H. Baker, the balance of $497 then remaining in the estate. A year later the court directed Austin to file a final report, and the objecting members of the family excepted to Austin's taking credit for the fee paid to Mitchell.

In the absence of the testimony we must presume the court's action to have been correct. It appears from Austin's final report that the fee in controversy was deducted from the assets of the estate in arriving at the $497 balance paid over to Baker. We are told that all the heirs were aware at that time that the fee had been paid, yet they made no complaint. This is a matter that may have been explored in the proof. Again, it appears that Mitchell served as attorney for both the personal representatives. The trial court stated that it was his intention that the fee compensate the attorney for all his work. The probate court is authorized to fix or approve a fee of this kind, Ark. Stats. 1947, § 62-2208; and without the evidence we cannot say with certainty that the amount allowed is excessive.

Affirmed.

McFaddin, J., not participating.

TEMPLE, ADMINISTRATOR *v.* SMITH, *et al.*

5-237 262 S. W. 2d 898

Opinion delivered December 21, 1953.

[redacted]

Bridges & Young, for appellant.

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

WARD, J. This appeal calls on us to decide whether the finding of the chancellor is supported by the weight of the testimony.

Ed McClain, a negro farmer, was found dead in a well on his place on February 26, 1952. On March 17, 1952, a deed was filed for record, shown to have been executed on February 7, 1952, purporting to be signed by the deceased, and conveying his farm to appellee,

J. D. Smith. The deed provided that the deceased could live on the farm as long as he desired.

On July 15, 1952, suit was filed by the administrator of deceased's estate to cancel the said deed on the ground of forgery. The chancellor found that the testimony did not support the allegation of forgery and the administrator has appealed. The testimony for and against forgery is so evenly divided that it presents a close question as to which side preponderates, but, in accordance with the well recognized fact that the trial judge had an opportunity which we do not have to observe the witnesses and evaluate their credibility, we have chosen to affirm his decision.

The testimony was substantially as hereafter set out.

FOR APPELLEE

Appellee, Smith, stated in substance: I knew Ed McClain during his lifetime and bought some land from him about the 7th of February 1952 and received a deed which was acknowledged by W. E. Pope; McClain signed the deed with the understanding of what he was doing, and the certified copy of the recorded deed which is shown to me appears to be a true copy of the deed which I received but I have lost the original deed. On cross examination: I gave McClain $1,200 in cash which I had on my person; I have been trading since 1935 and can get $1,200 any time I get ready for it; I have been trading in land and timber and had some cash all along; I mortgaged the land for $800 because I wanted some more money; the deed has a 55 cent revenue stamp on it but I don't know exactly what the correct amount should have been and wasn't trying to beat the government out of $1.10; Sometimes I don't put any stamps on deeds when the consideration is not more than $10; The consideration shown in the deed is $10; I never told Mr. Vickers that I was in serious trouble, I don't say that he lied but I do say that he is old and may have forgotten. Mr. Linder the prosecuting attorney was asking me about who got McClain's money and asked me to give him

the original deed, I told him I didn't have it and he told me to meet him at 1 o'clock; I didn't give him the deed because it was at Vick and I didn't have time to go get it, he was trying to find out who killed McClain and threw him in the well but he didn't exactly leave the impression that I was under suspicion; I told him that I would go get the deed and bring it to him but I didn't because I went to Vick and got it and left it at Bill Pope's and then went down and estimated some timber on the old Harding place, I told my brother I had the deed and he and I went to Bill's house and got it and I called the prosecuting attorney and told him I would bring it over the next morning; He said to wait and that he would come and get it and I said all right; I put it in my pocket and the next morning I went down and estimated 210 acres for Hubert Savage and the prosecuting attorney was to meet me, and I went back to the hotel and had lunch and when I went to bring the deed over I felt in my pocket and it was gone; I just can't remember exactly the date on which the deed was made or the day it was recorded; At the time I mortgaged the property I had a few little hot checks out—I remember one that was presented to me. Redirect examination: I have been engaged in buying and cruising timber for many years; There is a psychological effect in offering cash and sometimes I can drive a better bargain that way—some people don't like checks. Re-cross examination: I have bought several tracts of timber and paid as high as $2,500 cash.

W. E. Pope, in substance, stated: I live at Warren and know John D. Smith and knew the deceased during his lifetime; I am a notary public for Bradley County; On or about February 7, 1952, I took an acknowledgment on a deed from Ed McClain to J. D. Smith covering the land in question at the front gate of McClain's house; I wrote the deed and I saw Ed McClain sign it and I saw the money pass between Smith and McClain; (examining the copy of the deed) The description is right but the clause giving McClain the right to live on the place at the bottom of the description doesn't seem right;

I state positively that Ed McClain did sign this deed in my presence and I so acknowledged it. Cross examination: I believe the deed was dated February 5th and it was signed between 8 and 9 o'clock in the morning in front of Ed McClain's house; Since the deed shows February 7th I imagine that is right; If a witness testified that he was with McClain all day February 7th and that McClain did not sign the deed they just don't know what they were talking about; I don't know how much money was passed it was in currency rolled up; I usually charge $5 for taking an acknowledgment but the best I remember Smith started to pay me and I asked him if he would go look at a tract of land as I was busy building my house and I didn't charge him; He did go look at the land; My wife teaches school and sometimes I take her in the morning about 7:30—I don't know that I took her on the morning of the 7th but I could drive from there to McClain's house in 30 or 40 minutes; I drove down to Preston Phillips' house and left the car there and then walked on to McClain's about a quarter mile.

G. B. Colvin, Sr. testified: I am the circuit clerk and recorder and have held such office for 10 years; Sometimes people hold their deeds for several days or weeks before they bring them in to be recorded—the time varies; I have certified to the copy of the deed presented in evidence.

FOR APPELLANT

Testimony introduced by appellant to show that the deed in question was a forgery is in substance as follows: Several witnesses who live at Johnsville and who were well acquainted with the deceased testified that the deceased stated to them subsequent to February 7th that he had not sold his land or that he was not going to sell his land and gave as his reason that he would have no place to go. Some testified that deceased told them he was going to fix up the fences on the place and plant a crop. Two witnesses testified that they went fox hunting with the deceased on the night of

February 6th; that they returned about 2 o'clock in the morning and that deceased stayed all night with one of them; and that the deceased did not return to his home until late in the afternoon of the 7th. One witness testified that he went to the deceased's home on the morning before his body was found in the well that night and that the mattress and part of the house was on fire. J. E. Vickers stated that appellee Smith told him soon after the deceased's body was found that some one had gotten him in serious trouble. The prosecuting attorney testified that while making an investigation of the deceased's death he asked appellee Smith to give him the original deed but that Smith failed or refused to do so, stating on one occasion that he would stand on his constitutional rights. No money was found on the deceased or at his home and the bank record showed that he had approximately $50 to his account.

Preparatory to rendering the decree the chancellor made a detailed statement of the facts and the law pertaining to this case, and after carefully reviewing several authorities he came to the conclusion that the testimony given by numerous witnesses to the effect that the deceased had said he had not and would not sell his property was not competent because it was not based on any positive proof of a forgery. We think it is unnecessary for us to consider this legal question. The chancellor also said, and we agree, that considering "the self-serving testimony objected to and the presumption by reason of failure to produce the deed and the failure to explain where defendant got the money he said he paid for the land, together with other evidence as to the activities of Ed McClain and the evidence of plaintiff's witnesses concerning places they had seen defendant Smith and W. E. Pope and statements they said defendant Smith and Pope made, this case on the part of plaintiff depends wholly upon circumstantial evidence and inconclusive presumptions or inferences. The burden is upon plaintiff in this case to prove the falsity of the execution and acknowledgment of the deed in question by a preponderance of the evidence."

From our view of the evidence in this case some of the appellant's testimony is not necessarily damaging to appellee's claim. For example: There is much testimony that the deceased said he was going to continue to farm his land and that if he sold he would have no place to go, but the deed itself provided that the deceased should live on the land as long as he desired. Again it is reasonable to assume that some of appellant's witnesses might have been mistaken on very material points. For example: The witnesses who said they went hunting with the deceased and that the deceased was not at home at the time the deed was supposed to have been executed on February 7. It must be remembered that it was only after the deed was recorded on the 17th of the following month that any suspicion could have arisen which made the date of February 7 important, and it is possible that these witnesses could have been mistaken as to the date. It is true that Smith's failure to produce the original deed when called for and his explanation of how he lost the deed raised suspicions against his contention but, at most, they are only suspicions. On the other hand the testimony of Smith and Pope can not be attacked on the ground of mistake. In order to reverse this case it would have to be on the ground that both of these witnesses deliberately falsified their testimony. While of course this view is entirely possible yet it is significant that the character of neither of them has been impeached.

As heretofore stated we are unable to say that the chancellor's finding in favor of appellees on the close question of fact herein presented, particularly because of his better opportunity to observe the witnesses and appraise their veracity, is against the weight of the evidence.

Opinion delivered December 21, 1953.

[redacted]

Fletcher Long, for appellant.

Carroll C. Cannon, for appellee.

WARD, J. The question raised on this appeal is whether an action for the recovery of damages to real property, based on the breach of a certain written lease agreement, is local or transitory.

The complaint filed in the Circuit Court of St. Francis County by appellant alleges that: She is a resident of Pulaski County and is the owner of a store building in Cross County; On or about April 1, 1946, she entered into a written lease agreement with appellee for a term of seven years on the first floor of said building, and; She had performed all the conditions imposed on her, but that appellee had failed to do so in certain particulars.

It is alleged that appellee agreed "to take good care of the leased premises and at all times to keep the same in good and proper repair and condition at his own expense, making all inside and outside repairs, including all sidewalks, windows, glass, and all inside and outside painting . . ." and also agreed that he would "at the end or other expiration of the demised term make all replacements and alterations as herein required, and at the expiration of this Lease, the Lessee shall deliver to the Lessor the demised premises in good order and condition, and not call upon the Lessor for any outlay whatsoever during the demised term . . ."

It is further alleged that because of appellee's failure to perform his part of the said contract the building and premises were surrendered to her in a rundown and non-usable condition, and that to put same in good order and condition it will cost her $2,467.22 for inside repairs and $5,945.00 for outside repairs, and that she will lose four months rent at $400 per month, for all of which she prayed judgment. Service was had on appellee in St. Francis County.

To the above complaint appellee filed a special demurrer alleging lack of jurisdiction of the subject matter on the ground that the complaint states a cause of action for injury to real property and is, therefore, governed by Ark. Stats. § 27-601, 4th paragraph. The cited statute provides that actions for injury to real property must be brought in the county in which the subject of the action is situated. Thus it is contended by appellee that this action would lie only in Cross County.

The trial court sustained the demurrer, stating that the complaint alleges a breach of contract but also alleges willful waste which is an injury to real estate and therefore the action is local and not transitory.

We reach the conclusion that it was error for the trial court to sustain the demurrer.

While the exact point under consideration here has never been resolved by this court there are other decisions which support the conclusion we reach. Before discussing two Kentucky decisions it is pertinent to point out the similarity between the statute of that state and our own statute, Ark. Stats. § 27-601. The Kentucky Civil Code of Practice, § 62, reads as follows:

"§ 62. *Concerning real property.* Actions must be brought in the county in which the subject of the action, or some part thereof, is situated—

"1. For the recovery of real property, or of an estate or interest therein.

"2. For the partition of real property except as is provided in § 66.

"3. For the sale of real property under title, 10, chapter 14, or under a mortgage, lien, or other encumbrance or charge, except for debts of a decedent.

"4. For an injury to real property."

Campbell v. *W. M. Ritter Lumber Co.*, 140 Ky. 312, 131 S. W. 20. Here Campbell entered into a written contract with the Ritter Lumber Company by which he sold it certain standing timber on a tract of land in Virginia, and by which the lumber company was given the right to use certain buildings and improvements on the land for a definite period. The lumber company, pursuant to the contract, went upon the land and began to move the timber but its servants destroyed three houses and destroyed partitions, doors and windows in other houses. Campbell filed suit in the Circuit Court of Pike County, Kentucky alleging the foregoing facts. The trial court sustained a general demurrer to the petition on the

ground that since the land was in Virginia no action could be maintained in Kentucky for injury to it. The court, after stating that it was not necessary to consider other decisions which held that an act of tort can not be maintained in one state to recover damages for trespass on land in another state, said that "This is an action upon a contract; and undoubtedly the cause of action upon a contract follows the person, and may be brought where he may be found," referring to other decisions of like holding. The court further said: "The gist of the action here is the breach of a contract; and for this breach of contract damages may be recovered in the courts of this state, regardless of the location of the land as to which the contract was broken."

Appellee lays much stress on the fact that the acts on his part merely amounted to waste at common law and cites cases holding that waste is the basis of an action in tort and therefore a local action. In this connection the court in the cited case had this to say: "The tenant was rightfully in possession. The action is not brought to recover for trespasses on land. It is simply an action by the lessor against the lessee on the lease, to recover for waste by the lessee in violation of his contract. Like a cause of action for other violations of contract it follows the person and may be sued on where he may be found." In the opinion the court also stated that the law imposes upon a lessee the duty to take ordinary care of the property and that the lessee is bound to turn over the property at the end of its term in as good condition as when it received it, ordinary wear and tear excepted. Likewise it is our opinion that in this case appellant, if she chose, could have brought an action in tort for the recovery of injury to her property and in such event the action should have been brought in Cross County where the property was located, but that she also had a right of action for breach of the contract entered into by her and appellee and that she had a right to sue on the contract in the county where appellee was served, as also provided by statute.

The other Kentucky decision supporting our conclusion above announced is reported in the case of *Smith* v. *Wells,* 271 Ky. 373, 112 S. W. 2d 49. The facts in this case show that Smith who owned a dwelling in Franklin County Kentucky rented it to Wells furnished. The rental agreement required Wells to take good care of the property and return it in good condition and to pay for any damage. In Smith's complaint he alleged that he had been damaged by the careless, negligent and willful acts of Wells. Service was had on Wells in Baren County, Kentucky. Wells first filed a special demurrer to the jurisdiction of the subject matter. Then, in order, he filed a motion to require appellant to elect whether he was suing in tort or on contract, a general demurrer, a motion to strike, an answer, and a motion to quash service. The trial court required appellant to elect and then it sustained the motion to quash, and dismissed the action. Smith after saving his exceptions elected to stand on his action under the contract and appealed. The appellate court after stating that Wells had waived his rights under certain of his motions and demurrers by failing to pursue them properly, held that it was error for the trial court to dismiss the complaint because the court did have jurisdiction of the subject matter although service was improperly had on Wells in Baren County. The court also held that it was error to require Smith to elect and, in discussing this question, it used language pertinent to the issue before us here. The court said:

"In the first place, the court erred in sustaining the motion to elect, since the cause of action as set out in the petition was exclusively based upon the violations of the lease contract. It is true that the pleader in describing the way and manner those violations were made employed terms usually descriptive of tortious actions; such as "negligently," "carelessly," and "willfully"; but they did not alter the character and nature of the suit as one to recover for violations of the contract. Nowhere in the petition was it intimated that the injuries sued for were the result of a tortious trespass upon

plaintiff's property by defendant. If defendant's contract obligations were violated "willfully" by him, or because of his failure to exercise the proper care to observe them, and, therefore, they were violated because of his "negligence" in that regard, the nature of plaintiff's right of action against him for damages produced would not be converted thereby from a cause of action *ex contractu* to one sounding in tort. On the contrary, the cause of action would still be, and nevertheless continue to be, one of *ex contractu.* The motion to elect was no doubt prompted in order to ascertain whether or not the proper venue of the action had been selected by the plaintiff, since if the injuries were of a tortious nature resulting in part of injury to *real estate,* as set out in the petition, then subsection 4 of § 62 of our Civil Code of Practice would localize it in the county where the real estate was situated, which in this case would be Franklin County. But if the action was one *ex contractu* and damages were sought only for its violation, then the action would be a *transitory* one and the venue would be governed by the provisions of § 78 of the Civil Code of Practice."

The reasons and conclusions contained in the two cases above discussed are supported in Vol. 1 C. J. S., page 1104, under the heading of "Actions," where we find:

"There are also certain classes of contracts which create a relation out of which certain duties arise as implied by law independently of the express terms of the contract, a breach of which will constitute a tort, and in such cases an injured party may sue either for breach of the contract or in tort for breach of the duty imposed by law, the rule being that, where there is a breach of duty imposed by law, an action in tort is not precluded because such duty arises out of a contract relation."

In support of appellant's position in this case it is also noted that she apparently had enforceable rights against appellee under the lease contract which would not be imposed on him under law, since the contract

required appellee to make "all inside and outside repairs, including all sidewalks, windows, glass, and all inside and outside painting . . ."

While appellee cites no authorities on the exact point under consideration here he ably and forceably argues that all actions for injury to real property are made local under § 27-601 referred to previously, and, in support, relies heavily on the decisions of our own court in *Jacks* v. *Moore,* 33 Ark. 31 and *Cox* v. *Railway Company,* 55 Ark. 454, 18 S. W. 630. However we find nothing in either of these cases contrary to the decision we reach.

In the *Jacks* case, where no contract was involved, the complainant alleged that Jacks entered upon his land and cut growing timber for which he prayed damages. This court properly held that the complaint showed a trespass had been committed on real estate and that the action should have been brought in the county where the land was situated, citing the same statute here relied on.

The holding in the *Cox* case affirms the opinion in the *Jacks* case but throws no light on the point in issue, although some of the language used calls for comment. A suit was filed in Pulaski County by Cox to enjoin the Railway Company from removing earth, without permission, from his land in Prairie County, and again no contract was involved. This court had no trouble in reaffirming that actions for injury to real estate were local, but considered whether an injunction suit in equity to prevent injury to real estate was governed by the same rule. In deciding that the same rule applied the court said it could find nothing to justify "the conclusion that the venue for actions to real property can be made to depend in any case upon the object of the suit or the nature of the relief sought. A cause of action is local under the code because the statute has made it so; and a party can not shift the jurisdiction from the proper county by electing to pursue a particular remedy."

The above language must be considered in the context in which it was used. The court stated that Cox had alleged a continuing trespass on his lands and the court was merely trying to explain that the provisions of the statute could not be avoided by bringing an action for an injunction. The court of course had no occasion to discuss what Cox's right might have been if he had been suing on a contract as in the case before us.

For the reasons set forth above the judgment of the lower court is reversed and the cause is remanded for further proceedings.

Justice McFaddin concurs.

Skelton *v.* Ferguson.

5-244 262 S. W. 2d 913

Opinion delivered December 21, 1953.

Chester P. Leonard and *Carlos B. Hill,* for appellant.

O. E. Williams, for appellee.

Robinson, J. Appellant Skelton filed suit to quiet the title to certain described lands. Appellees herein were made parties defendant. The complaint alleges that the plaintiff had acquired title to the property by purchase from Sewer Improvement District No. 1, Fayetteville. The certificate of purchase is made a part

of the complaint and is dated June 26, 1948. The complaint further alleges that the court had rendered a decree which cast a cloud on the title. A copy of the decree was made a part of the complaint, and shows that the court set aside the sale of the property by the Sewer Improvement District to Skelton. Attached to the complaint also is a copy of a quit-claim deed to the property from Mamie E. Stone to Skelton.

Subsequently appellant filed an amended complaint in which he claims title by adverse possession. Appellees filed a demurrer, answer, and cross-complaint. Appellant filed an additional amendment to the complaint in which he alleges the sale to the District in the first instance was void for the reason that the taxes actually had been paid. The court sustained the demurrer; appellant declined to plead further. Therefore the court entered a decree in favor of appellees on the answer and cross-complaint.

The demurrer should have been over-ruled and the cause tried on its merits. The allegations of the first amendment to the complaint are good against a demurrer. It is alleged: (1) that plaintiff is the owner; (2) that he is in actual possession; (3) that he and those under whom he claims title have had color of title for more than 7 years; (4) that he and his predecessors in title have paid taxes on the lands continuously for more than 7 years; (5) that he and his predecessors have fenced the land; (6) that he and his predecessors have been in possession for more than 7 years; (7) that no one is occupying the lands adversely to plaintiff. In a suit to quiet title, plaintiff is not required to deraign his title. *Robeson* v. *Kempner,* 182 Ark. 746, 32 S. W. 2d 616.

Reversed.

5-246 262 S. W. 2d 901

Opinion delivered December 21, 1953.

Coffelt & Gregory, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

ROBINSON, J. Appellant E. L. Steward seeks damages as the administrator of the estate of Barbara Ann Steward, aged 14, who was killed while she was a guest

in an automobile operated by Jessie Thomas, a young lady 15 years of age. The complaint alleges that the defendant, Louis Thomas, father of Jessie Thomas, was guilty of wilful misconduct in permitting his daughter to drive his automobile because she had no driver's license and because she was inexperienced and an unsafe driver. The complaint further alleges wilful misconduct on the part of Jessie Thomas in failing to keep a lookout for another car with which she collided, in failing to keep her automobile under control, and in driving at excessive speed.

The court directed a verdict for the defendant on the theory that there was no substantial evidence tending to prove wilful misconduct on the part of the driver Jessie Thomas or that the vehicle was operated in wilful and wanton disregard of the right of others.

Ark. Stat. § 75-913, which is Act 61 of 1935, provides: "No person transported as a guest in any automotive vehicle upon the public highways of this State shall have a cause of action against the owner or operator of such vehicle for damages on account of any injury, death or loss occasioned by the operation of such automotive vehicle unless such vehicle was wilfully and wantonly operated in disregard of the rights of others." § 75-915, which is a part of Act 179 of 1935, is to the same effect as § 75-913 with the exception that it uses the language "wilful misconduct of such owner or operator" instead of "wilful and wanton disregard of the rights of others."

So far as the point under consideration is concerned, we can see no practical distinction in the language of the two acts. It is hard to see how a person could act in wilful and wanton disregard of the rights of others without being guilty of wilful misconduct, or vice versa. In *Roberson* v. *Roberson,* 193 Ark. 669, 101 S. W. 2d 961, Mr. Justice Frank Smith said: "Act 179 substantially re-enacts Act 61 with the added provision . . ."

On the day of the unfortunate collision, Jessie Thomas, with her parents' permission, had taken the family automobile; and with two of her friends, Bonnie Howard and the deceased Barbara Ann Steward, as her guests, had gone for a ride in and around Benton for their mutual pleasure. Bonnie Howard lived on Third Street; and after letting her out at her home, Jessie Thomas drove the car north to Schley Street, a distance of 559 feet. In crossing that street the car driven by Jessie collided with one operated by Carl Manning. Barbara Ann was thrown from the automobile and killed.

The issue is whether Jessie's manner of driving the car at the time of the collision was such as to make it a jury question as to whether her act in so driving was wilful and wanton within the meaning of the statute. The trial court felt that the evidence did not justify submitting this issue to the jury, and we are of the same opinion. Therefore we do not reach the other point in the case as to whether the defendant Louis Thomas, the father of Jessie Thomas, acted in wilful disregard of the rights of others when he let his daughter Jessie drive the automobile.

Appellant contends that Jessie acted in wilful and wanton disregard of the rights of others by driving the automobile into the intersection without keeping a proper lookout for others that might be approaching, in not having the car under control, and in driving at excessive speed. There is evidence to the effect that the car was being driven 45 to 50 miles an hour and that Jessie did not see the car approaching from her right until the moment of the collision; and it might be said that from these circumstances she did not have her car under proper control. There was no stop light at the inter section, nor any sign warning one to drive slowly, nor anything to indicate that the intersection was other than one located in a residential section of town where no extraordinary hazard existed. But assuming the facts would justify a finding of negligence, even gross negligence, still we do not believe there is any substantial evidence going to show that Jessie's conduct was wilful

and wanton within the meaning of the statute. Wilful misconduct, or to operate an automobile in wilful and wanton disregard of the rights of others, means something more than gross negligence. *Splawn, Adm.,* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248.

Appellant relies to a large extent on *McAllister, Adm.,* v. *Calhoun,* 212 Ark. 17, 205 S. W. 2d 40. However, the facts in that case are entirely different from the facts in the case at bar. There the automobile was being driven at a speed of some 75 to 80 miles per hour and the guest in the car had repeatedly requested the driver to slow down. The court held such evidence made a question for the jury as to whether the automobile was being driven in a wilful or wanton manner. But there the court quoted from *Splawn, Adm.,* v. *Wright, supra,* as follows: "Whether an automobile is being operated in such a manner as to amount to wanton or wilful conduct in disregard of the rights of others must be determined by the facts and circumstances in each individual case." In the case at bar it is not shown that the car was being operated in a reckless manner prior to the instant of the collision, nor is there any showing that the guest in the automobile had requested the driver to slow down. It will be recalled that Bonnie Howard had been let out of the car at her home only 559 feet from the place where the collision occurred.

Appellant cites *Blashfield,* Vol. 4, Part 1, page 401, to the effect that whether in view of the surrounding circumstances any particular speed constituted recklessness, wantonness, or gross negligence, is a question of fact. We agree with this view and so held in the *McAllister* case; but this is not to say that the question of wilful misconduct or wilful and wanton disregard of the rights of others should be submitted to the jury where there is no evidence giving rise to an inference that wilfulness or wantonness existed. It is one thing to persistently pursue a course of driving in a reckless and dangerous manner over the protest of the occupants of the car and an entirely different thing to act in a negligent manner on the spur of the moment. Many

courts have defined wilful misconduct; see *Malcolm* on *Automobile Guest Law.* We think a good definition is that stated by Malcolm on page 142; " 'Wilful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom.' *Norton* v. *Puter,* 138 Cal. App. 253, 258, 32 P. 2d 172 (1934)."

In *Froman* v. *J. R. Kelley Stave & Heading Company,* 196 Ark. 808, 120 S. W. 2d 164, the driver of the automobile, after drinking both wine and beer, proceeded to drive in a reckless and dangerous manner over the protest of the guest. The court held the evidence sufficient to take the case to the jury on the wilful and wanton theory. But the court likened the wilful misconduct feature of the case to one where punitive damages were sought, *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023, and quoted Judge Hart speaking for the court in that case as follows: "It is earnestly insisted, however, by counsel for the defendant, that the court erred in submitting to the jury the question of punitive damages, and in this contention we think counsel are correct. In *St. L. S. W. Ry. Co.* v. *Owings,* 135 Ark. 56, 204 S. W. 1146, it was held that negligence alone, however gross, is not sufficient to justify the award of punitive damages. There must be some element of wantonness or such a conscious indifference to the consequences that malice might be inferred. In other words, in order to warrant a submission of the question of punitive damages, there must be an element of wilfulness or such reckless conduct on the part of the defendant as is equivalent thereto. In the case at bar there is no element of wantonness or wilfulness on the part of the person driving the car which overtook the plaintiff and ran into his car and thereby caused the injuries complained of."

In *Splawn, Adm.,* v. *Wright, supra,* it was shown that the defendant was operating the automobile over

a wet and slippery road at a speed of 40 to 45 miles per hour, and his guest had warned him to slow down. It was held this evidence was not sufficient to take the case to the jury.

In *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S. W. 2d 472, there was testimony that the car was being driven 65 to 70 miles per hour on loose gravel over the protest of a guest. The court said that although the evidence was sufficient to show gross negligence, it was not sufficient to permit a recovery under the guest statute.

Cooper v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723, is a case where the driver backed his automobile containing guests onto a main highway where it was struck by another car, one of the guests thereby being injured. This court held there was not sufficient evidence to make a jury question under the guest statute. The court said: "We have approved the language of other courts where it was said that wilful negligence is greater in degree than gross negligence; that to be wilfully negligent one must be conscious of his conduct—that is, he must, in the light of surrounding circumstances, comprehend that his act will naturally or probably result in injury. Differently expressed, wilful negligence 'involves the element of conduct equivalent to a so-called constructive intent'."

The sum and substance of our holdings is that the question of whether there was wilful and wanton misconduct must depend upon the facts and circumstances of each case, and we do not believe there is any evidence in this record going to show that the 15-year-old girl Jessie Thomas was guilty of wilful and wanton misconduct as that term has been defined by this court. Therefore the trial court was correct in directing a verdict for the defendant and the judgment is therefore affirmed.

5-232 263 S. W. 2d 483

Opinion delivered December 21, 1953.

Supplemental opinion denying rehearing January 25, 1954.

Paul K. Roberts, for appellant.

W. L. Jean, for appellee.

ED. F. MCFADDIN, Justice. The question posed by the appellants' brief is the legal sufficiency of the papers and certificate transmitted on appeal from the Municipal Court to the Circuit Court; but under the state of the record now before us, we do not reach the question posed. We affirm the case because of the failure of the appellants to bring before this Court a record showing any exception to any ruling.

On April 29, 1952, appellee, a corporation, sued appellants (C. C. Burns, et al., trading as Burns Dairy Co.) in the Municipal Court of El Dorado, for $182.00. The cause of action was based on a written contract. Trial in the Municipal Court resulted in judgment for Burns, and Local Trademarks appealed to the Circuit Court. The record before us shows that the judgment was rendered in the Municipal Court on January 22, 1953, and that the papers were filed in the Circuit Court on February 3, 1953. Such filing was well within the time allowed. See § 22-707 Ark. Stats.

In the Circuit Court, Burns filed a motion to dismiss the appeal, alleging that no legally sufficient *transcript,* certified as required by law, had been filed. The point that appellants seek to raise is that the Municipal Clerk, instead of making a "transcript", sent to the Circuit Court (a) the original papers in the cause,

(b) the covering jacket with Municipal Court notations, and (c) the judgment of the Municipal Court, which contained this certificate:

"I hereby certify that the above is a true and correct copy of the judgment rendered in the above styled cause, together with all the process and all papers relating to said suit and costs thereof, as shown on page No. 328 of Book No. 3 of the Judgment Records on file in my office in the Union County Court House, this 2nd day of February, 1953."

The appellants say that all of these do not constitute a "transcript".

The record before us contains the motion to dismiss —filed by Burns in the Circuit Court—but does not contain any ruling of the Court on the motion, or any exception saved by Burns to any ruling that might have been made on the motion. So, on the face of the record before us, there is no ruling by the Trial Court as the essential basis of an assignment to be argued here. See *North River Ins. of New York Co.* v. *Thompson,* 190 Ark. 843, 81 S. W. 2d 19.

The cause was tried to a Jury in the Circuit Court; and in the motion for new trial, Burns assigned as error the refusal of the Court to grant the motion to dismiss. We are informed in appellee's brief—and the statement is undenied by appellants—that the Circuit Court heard evidence on the motion to dismiss. No bill of exceptions is contained in the transcript here, so we do not know what testimony the Court heard on any issue. In the absence of a bill of exceptions, the assignment in the motion for new trial is unavailing. See *McKinley* v. *Broom,* 94 Ark. 147, 126 S. W. 391.

It therefore follows that the Circuit Court judgment must be affirmed.

SUPPLEMENTAL OPINION ON REHEARING

ED. F. MCFADDIN, Justice. Appellant says the record before us should be treated as a certiorari proceed-

ing to quash a void order; and that the order of the Circuit Court, in refusing to dismiss the appeal from the municipal court, is void on its face, since (says appellant) the transcript of papers and the certificate of the municipal court clerk show invalidity "on the face of the record."

The order of the Circuit Court refusing to dismiss the appeal from the municipal court in this case is in about the same category as a Circuit Court order refusing to quash service; and an exception must be preserved of record to such ruling or the point is treated as waived. Since the record before us fails to show any exception preserved of record, the point is treated as waived.

Furthermore, certiorari is a writ of discretion, and will be refused unless it be shown that the party seeking it has a meritorious defense to the action. *Whaley* v. *Whaley,* 213 Ark. 232, 209 S. W. 2d 871.

The Petition for Rehearing is denied.

WALTERS SOUTHLAND INSTITUTE *v.* WALKER, TRUSTEE.

5-235 263 S. W. 2d 83

Opinion delivered December 21, 1953.

Rehearing denied January 18, 1954.

[redacted]

Cracraft & Cracraft, for appellant.

Burke, Moore & Burke, for appellee.

George Rose Smith, J. This is a suit brought by W. W. Matthews to foreclose a deed of trust executed by the appellant to D. G. Walker as trustee, securing notes totaling $7,847.60, and also to recover judgment upon an unsecured note for $6,001.40. The notes represent advances made by Matthews to the appellant, which is a school operated by the African Methodist Episcopal Zion Church. Matthews, as bishop of the Arkansas and North Carolina conferences of the church, was in charge of the school from 1936 until 1948. He asserts that during that period he advanced funds of his own in order to keep the Institute in operation. Upon a former appeal we summarized the appellant's defense in these words:

"While appellant in its answer and cross-complaint did not specifically deny the indebtedness to appellee, it alleged that the latter had sole active charge of the receipt and disbursement of all funds of the school from 1936 to 1948 and occupied the status of a trustee toward said institution; that during said years he controlled funds belonging to the school in excess of $120,000 without adequate records and a proper accounting thereof; that he caused the deed of trust and notes sued upon to be authorized at meetings of the board of trustees held without a quorum present and without approval of the Department of Christian Education as required by the discipline of the church; and that there were certain discrepancies in appellee's financial reports to the general conference and a failure to account for funds which the church records disclosed were delivered to him for the use and benefit of appellant. Appellant prayed for an accounting and that it be given credit upon any indebtedness found due appellee for all funds received by him belonging to appellant and not properly accounted for. By amendment to the cross-complaint it was also alleged that on account of the fiduciary relationship existing between the parties and the complicated accounting involved, a master should be appointed to take proof and state an account between the parties." 217 Ark. 602, 232 S. W. 2d 448, 450.

At the first trial the chancellor considered the proof too indefinite and confusing to justify a finding that the school was entitled to any setoff against the notes sued upon. We reversed that decree and directed that a master be appointed to state an account between the parties. In doing so we said: "The fiduciary relation existing between the parties imposed upon appellee the duty to render a proper accounting of the funds handled by him particularly in matters in which he was personally interested."

Upon remand the court named David Solomon, Jr., as its master and directed him to state an account between the parties. The master, in arriving at his conclusions, considered the testimony taken at the first trial, additional testimony presented to him, and the financial records of the school. His reports to the court reflect a most painstaking and conscientious study of the complex questions in the case.

Without going into unnecessary detail, we may say that the master's analysis boils down to two basic findings of fact. First, he determined that from 1936 to 1948 the school's receipts totaled $128,541.19 and its disbursements totaled $114,586.74. After adjustments were made to reconcile certain duplications and omissions, the net shortage was found to be $12,679.67. All but $3,447.24 of this apparent deficit was incurred in the three and a half years between December 1, 1938, and May 31, 1942, and was occasioned by the fact that the school's record of disbursements for those three and a half years could not be found. In short, the master found an actual shortage of $3,447.24 and an apparent shortage of an additional $9,232.43 that was attributable to the absence of disbursement records.

Second, the master found that during the twelve years in question Matthews advanced $19,253.50 of his own money to keep the Institute in operation. Thus the master's over-all conclusions were that Matthews' advances exceeded the shortage in the accounts either (*a*) by $15,806.26 if he were excused from responsibility for

the loss of the disbursement records, or (*b*) by $7,573.83 if he were held liable for the apparent 1938-1942 deficit. The chancellor adopted alternative (*a*), and since upon that basis the school owes Matthews more than the amount sued for, the decree granted the relief sought.

The appellant's principal contention is that the chancellor erred in not holding Matthews liable for the apparent deficit of $9,232.43 that is attributable to the lack of disbursement records for forty-two months. The argument is that Matthews was a fiduciary, that a fiduciary cannot delegate his duty to keep accounts, and that in the absence of complete records every presumption of fact is against the fiduciary. The opinion in *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340, is cited to support this argument.

We do not agree that in this particular case the fiduciary's duty to keep accounts was not delegable. A trustee's duty is not to delegate the doing of those acts which he can reasonably be expected to perform personally. When the matter is one that can properly be delegated to an agent the trustee's duty is then that of properly supervising the agent's conduct. Rest., Trusts, § 171.

The law of trusts did not require Matthews himself to act as bookkeeper for the Institute of which he was president. The school had more than a hundred resident students, to be sheltered and fed. A staff of six or more teachers was maintained. Naturally enough there were many bills for groceries, utilities, repairs, salaries, etc., to be paid and recorded. At the same time Matthews' duties as bishop of two states required him to spend perhaps a third of his time in visiting the local churches under his jurisdiction. In these circumstances it was entirely proper for Matthews to entrust to his registrar the matter of keeping the Institute's books. The parent church organization had specified the bookkeeping system to be followed, and there is evidence that from time to time its representatives checked the accounts, without complaint. It goes without saying that substantial outlays were needed to operate the Institute for the three

and a half years in question. We do not feel that Matthews' inability to produce, some eight years later, the disbursement record for this period makes him liable for the entire operating expenses of the school for those forty-two months.

Furthermore, the preponderance of the testimony indicates that the loss of the records occurred after the books had left Matthews' control. Both he and the registrar testified that the accounts were complete when they were turned over to Bishop Jones in 1948. The matter was not mentioned when Jones appeared as a witness at the first trial, and he did not testify before the master. Not only does the appellee's evidence stand uncontradicted; it is logically credible. The bookkeeping system involved the use of two ledgers, one for receipts and the other for disbursements. For the forty-two months in controversy the record of receipts is available, but the disbursement ledger is missing. It is obvious that had the appellee desired to conceal the records of his stewardship he would not have preserved the damaging account of receipts while withholding the only ledger that was favorable to him, that of the school's expenditures. Since there was no conceivable reason for Matthews to do away with the disbursement record it is fair to assume that he turned it over to his successor.

The appellant's other contention is that the master was in error in finding that Matthews advanced $19,253.50 of his own funds to the school. Of this amount, $11,923.74 is shown by the school's records to have been advanced and is not questioned by the appellant. Indeed, every witness having knowledge of the facts concedes that Matthews used substantial amounts of his own funds to keep the school in operation. But the remaining $7,329.76 of Matthews' advances does not appear on the Institute's records; this figure represents the total amount of personal checks given directly by Matthews to various creditors of the school. Matthews did not take the stand to identify each check, and it is therefore contended that these outlays are not shown to have been necessary.

We think the master was right in finding that these advances were in fact made for the school's benefit. He appeared as a witness to explain his reports to the court, and in his testimony he states that from his study of the case the payees of the various checks "were all familiar names to me from other periods where transactions actually appeared on the ledger of the Institute, and entries in the ledger in the other periods were similar to these in the books." Our first opinion stressed particularly Matthews' duty to account as to matters in which he was personally interested, but the canceled checks relied upon by the master meet the standard of proof contemplated by our opinion. Considerably more than half of the amount now in dispute is represented by a check for $4,235, with which Matthews paid from his personal bank account the balance due on a mortgage to a fraternal organization. The master had reason to conclude that the other checks, for relatively small amounts, represented routine payments to local merchants, teachers, etc. There is no reason to suppose that Matthews' recollection of these details, as much as fifteen years after the events, would have added much weight to the persuasiveness of the checks themselves.

Affirmed.

JETT *v.* DYKE ASSOCIATES, INC.

5-245 263 S. W. 2d 703

Opinion delivered January 11, 1954.

Cockrill, Limerick & Laser and *Wright, Harrison, Lindsey & Upton,* for appellant.

House, Moses & Holmes, for appellee.

GRIFFIN SMITH, Chief Justice. The suit involves ownership of 290 shares of the common stock of Dyke Associates, a management corporation. Herbert L. Jett contends that the stock was given to him August 20, 1951, in fulfillment of an indefinite promise made years ago by Nathaniel Dyke, Jr., acting for himself and his two brothers who own controlling interests in extensive incorporated enterprises, the management of which requires skilled and loyal personnel.

Arthur R. Noe and Jett were associated with Dyke Bros. in a confidential capacity and as executive heads, and had served in these capacities for many years. A memorandum dated August 23, 1951—three days after Jett received the stock certificates—refers to Noe as general manager of Dyke Bros., and to Jett as assistant general manager. Jett was also executive vice-president of Cole Manufacturing Company, a Memphis corporation operated by Dyke and primarily owned by the three brothers.

Jett's connection with the Dyke brothers goes back to 1923. In recent years his salary was from $700 to $800 per month, but bonus allowances at times brought it to $30,000 per annum.

Although Nathaniel Dyke insists that Jett became dissatisfied with his employment and had periodically—for a number of years—resigned or threatened to do so, the memorandum, according to Nathaniel's testimony ". . . was prepared for confidential information of Mr. Noe, Mr. Jett, and my brothers, and was a discussion as to how we could best operate Dyke Associates. *It was given in our closest official family* . . ."[1]

Jett testified that from July, 1949, until March, 1950, he was not with the company, but gave no detailed reason for this interrupted service. It is not questioned, however, that upon resumption of work early in 1950 the previous relationship in respect of duties was reëstablished—if, indeed, an impairment of confidence on either side could be said to have occurred.

In matters affecting income, ownership, and operation of the various Dyke corporations the brothers were partners prior to their removal from Ft. Smith to Little Rock and thereafter. When the management corporation was formed in 1942 Jett and Noe were given ten shares each. Nathaniel Dyke testified that nothing was paid for this stock, the purpose being to qualify Jett and Noe as incorporators with Frank, Martin, and Nathaniel. Value of these original certificates was doubled by a stock dividend.

In 1942 Nathaniel Dyke went to Washington to serve as lumber consultant in connection with war activities. He worked as a dollar-a-year man until 1947, but seemingly kept in close contact with his business enterprises. During a part of that time Jett managed Cole Manufacturing Company at Memphis, but resided in Little Rock. Nathaniel testified that [presumptively in 1947] Secretary of the Treasury Snyder asked him to "clean house at the Federal Home Loan Bank Board." At that time

[1] Italics supplied throughout.

President Truman suggested that he take a position at $10,000 per year. Dyke had, however, entered into a bonus contract with Cole Mfg. Co. for fifty per cent of all yearly profits above $30,000. In speaking of Truman's proposal Dyke said: "I couldn't support this bonus contract—being in Washington on a salary—so Mr. Dean Acheson's partner (who is now dead) wrote an assignment of 80% of the bonus contract to be performed by Dyke Associates. . . . We had made an obligation to join a management association in New York, and they were down discussing how best to operate it."

Dyke further testified that Jett (seemingly at the time relationships were severed) held as trustee stock certificates in various corporations aggregating $300,000; that it was the partnership's policy to have stock issued to Noe or Jett, or one of the brothers, with endorsement in blank or specifically assigned. There was no testimony to show whether the corporation books reflected ownership of these shares, but in all instances except those affecting the 290 shares in question Jett disclaimed any personal interest. Noe, who held Associates stock equal to the 290 shares contended for by Jett, testified that he did not claim a personal interest.

Each owned stock individually in various Dyke corporations, some of which had been purchased and some given as bonus transactions at year's end covering periods when profits justified distribution. According to Nathaniel preferred stock was used as annuity compensation. This is stressed by the Dyke brothers to emphasize the improbability that the shares of common stock in question would have been used in the manner Jett contends they were.[2]

Substance of Jett's explanation of the transaction resulting in delivery of the stock is that two or three days before August 23, 1951, Nathaniel Dyke came to the company office he occupied, handed him the shares, and said, "Here are the certificates." Jett thought he said

[2] Bonus payments were not made to Jett in 1951, nor for 1949. Over a period of eleven years he drew in salary and bonus $179,300, of which $55,000 went for government taxes. Cash, in lieu of stock, was sometimes given as bonus compensation.

"Thank you," or something to that effect. But after delivery, and before April, 1952, Jett and Nathaniel Dyke talked about the stock, ". . . and one time he specifically told me they were my certificates without any reservation; and that was voluntary on his part."

This conversation probably occurred in December, 1951. But on April 9, 1952, Nathaniel called Jett to his office "and said he thought I had better give those certificates back to him." No reason was assigned. Jett, however, told Dyke he would like to wait and talk the matter over with Arthur Noe. On April 16th he told Dyke what his position would be and the latter commented, "Then you are not going to give those certificates back?", and Jett replied, "No, sir, you are asking too much."

Shortly thereafter Dyke wrote Jett that the certificates were being cancelled. He also listed certificates in six corporations representing 204 shares showing issuance in Jett's name, but endorsed in blank; also 898⅓ shares issued in Jett's name under a written *or oral* trust agreement "for our benefit, which requires you to endorse and deliver the certificates according to our instructions."

Included in the two lists totaling 1,102⅓ shares were the 290 claimed by Jett. Certificates (as to which Jett claimed no beneficial interest) amounting to 608⅓ had not, according to the Dyke letter, been endorsed by the trustee, but all were in Dyke's possession except the contested shares in Dyke Associates. It is fairly deducible that in referring to a written or oral trust agreement Dyke's contention as to the 290 shares was embraced within the term "oral." Jett's reply to Dyke's letter was that the 290 shares of Associates stock had been erroneously listed as property belonging to the three brothers, or to any of them.[3]

[3] Nathaniel Dyke testified that during an 18-month period before he went to Washington Cole Mfg. Co. made a net profit of $90,000 before taxes. In 1947 the profit was $369,000 *after bonuses*, and in 1948 $245,000 after bonuses. Jett was executive vice-president during these two years, but, according to Dyke, "he gave less and less time to the business." In the spring of 1947, with $400,000 in cash on hand, the Cole Company "almost ran out of lumber."

Late in 1949 the Memphis office of the Bureau of Internal Revenues placed an assessment of $200,000 against the Cole Company for 1946, 1947, 1948, "and possibly 1949." This amount was claimed in excess of taxes actually paid.[4] Either an apprehension that additional taxes would be assessed, or the fact that proceedings looking to that end had been initiated, caused Nathaniel Dyke to assign 80% of his Cole contract to Dyke Associates. According to Jett the government's active agent concluded that the contract was constructively fraudulent. Yet, at a substantially later period the claim was settled for $55,000.

Certificates numbered 18 and 36 for 135 shares are dated June 30, 1948. They were issued to Francis W. Dyke with endorsements showing immediate transfer to Herbert L. Jett. It is inferable that appellant believes that these certificates were not assigned in 1948, but that for some reason possibly having to do with avoidance of the government's tax assessment they were actually assigned in 1951 and back-dated to show interest-ownership as of 1948. Mrs. Susie Hagens Donoho of Fordyce, who was Nathaniel Dyke's private secretary in 1951, mentioned other certificates that were brought to her attention and said that Nathaniel Dyke instructed her respecting names and dates. The transaction disturbed her to such an extent that she telephoned her brother in California for advice. On cross-examination Mrs. Donoho became confused, and it is not correct to say that her testimony was reliably positive where the interests of third persons are concerned, although obviously she undertook to tell what happened as she remembered it.

While the chancellor found against Jett, he specifically rejected the idea that either of the principals was misstating any transaction as he understood the facts to be; hence the trial court's opportunity to appraise credibility because he heard the witnesses is no greater than ours. The statements of those upon whom reliance must

[4] According to Jett the assessment grew out of Nathaniel Dyke's contract with Cole for 50% of profits in excess of $30,000. At that time Nathaniel did not own any of the Cole stock.

be placed come into the record with the chancellor's affirmative expression of confidence in the veracity of Herbert Jett and Nathaniel Dyke, and Dyke on cross-examination explicitly said he did not believe that Jett had improperly gained possession of the certificates.

Arthur Noe was custodian of all the stock certificates and was secretary of most of the corporations. But obtruding is the unusual circumstance that Jett had possession of the questioned certificates and had kept them in his private lock box at a local bank since receiving them. When Nathaniel Dyke was asked whether Jett (during the time he had an office at 309 Center street where headquarters are now maintained) had access to various files in the vault and other papers of the different companies, the answer was, "I can't remember that he was ever refused access to anything." Another question and answer were: Question: "Except for not being designated the official custodian did [Jett] have just as much access and right to various records of the company as Mr. Noe did?" Answer: "Mr. Noe was the official custodian, but Mr. Jett was never refused access to anything and he had the run of the building."

It will be observed that these answers were in the nature of negative replies; but, aside from the expressions referred to there were statements that Jett had access to records.

If the result rested solely on oral testimony showing the course of conduct extending over a long period of time, the relationship of Jett to the Dyke enterprises and the partnership composed of the three brothers, Jett's unquestioned services to the organization and his own profits from salary, cash bonuses, and the acquisition of stock because of his status as an officer and employee of high value, and the admittedly abbreviated conversation Jett says attended the delivery of the certificates—in these circumstances we would agree with the chancellor that inter-party intent was not sufficient to justify a decree in favor of Jett.

Our view is that Dyke's purposes were more clearly expressed in the letter and memorandum of August 23, 1951, than in Nathaniel's testimony when the case was heard.

The letter was addressed to "ARN," "HLJ," and "FWD." Admittedly these symbols stand for Arthur R. Noe, Herbert L. Jett, and Francis W. Dyke. In the letter it was suggested that each should proceed to build up "a supporting file along the lines of the attached memo., *planning the different persons with whom HLJ and ARN had contact during the years under discussion.* . . ."

In the memorandum there is comment regarding an assumption that Nathaniel Dyke had been tendered full-time employment in Washington. During January and February, 1947, a number of Dyke meetings were held. It was decided that the best solution would be an assignment of 80% of Nathaniel's remuneration contract as manager for the Cole company. This would go to Dyke Associates. The following excerpt is important:

"Dyke Associates, Inc., was started in 1942 . . . for the main purpose of allowing top staff personnel to participate to a larger extent in the growth of the organization and increased earnings, and give them a stake in the business as whole, which could not practicably be done with Dyke Bros., since it was a partnership and was already too large for the personnel to buy any sizable share in same. It was agreed that the top staff personnel would be allowed to acquire both common and preferred stock in Dyke Associates, Inc., and receive not only remuneration in salary and bonuses, but the increment which should accompany the growth of the corporation over a long period of time."

Speaking of Noe and Jett, Dyke said:

"[They] were the two top staff associates occupying first place in these considerations and negotiations. Each already has a sizable investment in various corporations affiliated with the organization, *and these two men ac-*

quired 135 additional shares of common stock each in Dyke Associates, Inc., at the same time that Dyke Associates, Inc., accepted the assignment of 80% of the management contract held by Nathaniel Dyke, Jr., with Cole Manufacturing Company. . . . Both Mr. Jett and Mr. Noe acquired five shares each at the time of the incorporation and during 1948 the capital stock was increased from 1,500 shares of common stock to 3,000 shares of common stock, which doubled the original 10 shares to 20 for each Mr. Jett and Mr. Noe, *and also doubled their 135 shares to 270, giving each of them 290 shares common stock outstanding.* . . ."

The memorandum then refers to certain operations; to the fact that the writer was detained in New York and Washington a great deal of the time and that he occasionally had to go to the West Coast; that Francis W. Dyke had for a number of years been unable to give all of his time to the business on account of undulant fever, [therefore] ". . . it was understood by all that Mr. Jet and Mr. Noe would have to carry the burden of detail in the operation of Dyke Associates, Inc., and companies under management contract, *and that no tax would accrue to them on their common stock until they disposed of it, and it would be capital gain only* [for income tax purposes]."

Other parts of the memorandum emphasized the value of services rendered by Jett and Noe, and their long affiliation with the organization. In conclusion it contained the following:

"The only partners in Dyke Bros. are Nathaniel Dyke, Jr., Francis W. Dyke, and Martin T. Dyke, *so that while these three own more than 50% interest in the common stock in Dyke Associates, Inc., Mr. Jett, Mr. Noe, and Martin T. Dyke 3d, have a substantial ownership in the common stock of Dyke Associates, Inc., and do not have any interest whatsoever in Dyke Bros., a partnership.*"

When it is considered that the letter and memorandum were written three days after delivery of the cer-

tificates, and that ownership of a substantial interest is commented on as an existing fact, and that no tax would accrue to Jett and Noe on their *common stock* until it had been disposed of, it is difficult to understand how these statements under Nathaniel Dyke's signature can mean anything except that Jett and Noe owned what the writer said was theirs—hence we are not dependent upon the oral testimony of any of the participants.

Nathaniel Dyke insists that this memorandum was written "for discussion purposes"; but, unfortunately from that standpoint, he directed these associates to start building up "supporting files."

Our conclusion is that the certificates were either given to Jett as a part of the file-building process for reasons satisfactory to Dyke who retained in his own mind an intention he did not convey to the beneficiary—a reservation that he would later ask redelivery—or that the delivery was what Jett claimed it was, an outright gift based upon factors mentioned in the memorandum. In either event title passed and the right of recall comes too late.

Reversed, with directions to enter a decree enjoining cancellation of the certificates; or, in the alternative, if the certificates have been cancelled by official action of the board of directors, then a mandatory order should require reissuance as of the date of cancellation.

OWEN *v.* JOHNSON.

5-258 263 S. W. 2d 480

Opinion delivered January 11, 1954.

Tom Gentry, Attorney General, *John Shamburger,* Assistant Attorney General, and *H. J. Denton,* for appellant.

Emery D. Curlee, for appellee.

J. Seaborn Holt, J. Appellee, Mrs. Johnson, on August 15, 1952, filed suit (2843 in the trial court) to confirm and quiet title to a tract of land of approximately 3.5 acres, and also to other land bordering on the east bank of White River, all in the town of Cotter. She asserted title by adverse possession for some thirty-five years, and also by recorded deeds of conveyance. Appellants, Owen, *et al.,* answered with a general denial and pleaded laches as a defense. In a prior suit (No. 2834) appellants on July 28, 1952, asserted ownership and possession of the 3.5 acre tract and sought to quiet alleged title. It was agreed that the two cases should be tried as one case and decree in case No. 2843 would govern case No. 2834.

The town of Cotter intervened, claiming certain interests in a narrow strip on appellee's land outside of the 3.5 acre tract, for road or street purposes.

Claude A. Rankin, Commissioner of State Lands, on behalf of the State, intervened and alleged possession and ownership of "the following described parcel of land situate in the bed of White River and between the bases of the east and west banks thereof, to-wit:

"A part of the NE Frl. ¼, Section One (1), Township Eighteen (18) North, of Range Fifteen (15) West of the Principal Meridian in Cotter, Baxter County, Arkansas, and more particularly described as follows: Beginning at the NE cor. of a 6-acre tract in the Town of Cotter, lying at the W. end and S. and W. of Pyeatt Ave., and immediately opposite to Lots 1695 to 1700, incl., and between said lots and White River, running thence S. 30 deg. no min. W., a distance of 624 feet, to the E. bank of White River, for a place of beginning; thence continuing on the same line, and same degree 250 feet to a point on gravel bar, near the center line of White River, and 250 feet from water's edge, at low mark, on the east bank of White River, thence N. 54 deg. 00 min. W., a distance of 455 feet, along the contour of the river bed; thence N. 40 deg. 45 min. E., a distance of 250 feet, to the East bank of White River; thence S. 53 deg. 45′ E. with the meanderings of the E. bank of White River, a distance of 455 feet, more or less, to point of beginning."

Trial resulted in a decree in favor of Mrs. Johnson (appellee) confirming her title to the 3.5 acre tract and the other land described in her complaint. The court denied the claims of the town of Cotter and the Commissioner of State Lands. From this decree, appellants and interveners have appealed.

The record reflects that two surveys were made by competent surveyors of the lands involved. A survey by Mr. King, and relied upon by Mrs. Johnson, had as the starting point a pin oak tree by the foundation of an old ice plant referred to in appellee's deeds. There was evidence to support appellee's claim as to the location of the tree and the old ice plant building. Appellants and interveners claimed that the pin oak tree, which marked the corner, and referred to in the muniments of title, was

47 feet northeast of the point claimed by appellee, from which point the survey on which they relied was made.

The findings of the trial court contain the following recitals: "There are two things essentially important in determining this case. One is the location of the old ice plant building. . . . The plaintiff (Mrs. Johnson) says that the old ice plant building was at a certain point; the defendant says that it was at another point. The court must accept the theory of the plaintiff because the testimony shows that there still remains the concrete foundation of this old ice plant building, . . . that this foundation is on the identical spot claimed by the plaintiff. . . . Another essentially important point is the location of the northwest corner of the Dixon (and Owen) land. The deeds refer to a certain pin oak tree as marking the corner. The plaintiff says this tree was at a certain point on which they rely. Defendants and interveners say that the tree referred to in the muniments of title was forty-seven feet northeast of the point claimed by the plaintiff. Now the court doesn't know which is correct. . . . Mrs. Johnson and her witnesses say that her lands have been fenced for several years until within the last year sections of the fence have been removed from time to time. The surveyor, King, says that when he surveyed what was pointed out to him as the lands of the plaintiff he used this tree relied on by the plaintiff and found immediately beside the tree a portion of that old fence corner. The court must take that as strongly indicating that that was the point marking the northeast corner of the land which plaintiff had had fenced, plaintiff and her witnesses having claimed that that was the tree to which their northeast corner extended. . . . The proof shows that she has had possession except others have used portions of the lands for posts or ties or some kind of timber products, but the witness who testified to that fact said it was by permission. . . . So far as this record is concerned, the only cutting of timber that has occurred there took place a year or so ago when the son of this plaintiff, or some witness at least, inquired about it, and Mr. Denton said

they were trying to make a survey down through there and they were simply cutting the timber for the survey. . . . Mrs. Johnson and her witnesses say she has had this land claimed by her fenced for the last thirty-five years; that only within the last years have sections of fence disappeared from time to time.

"Regardless of descriptions, regardless of trees, regardless of everything else, if she has had the land fenced, claiming to be the owner, she would be entitled to a decree of confirmation. Her testimony shows that somebody, and she charges the defendants or interveners, has removed portions of the fence and put articles on the land and that they ought to be restrained from trespassing upon the lands. The court thinks that the preponderance of the testimony sustains the theory of the plaintiff and that title to the lands should be quieted and confirmed in her. . . ."

—1—

After a review of all the evidence, we have concluded that the findings of the Chancellor that Mrs. Johnson (appellee) has title to the 3.5 acre tract by adverse possession is not against the preponderance of the testimony.

—2—

We hold that the court erred in denying the prayer and relief sought in the intervention of the Commissioner of State Lands. We take judicial notice that White River is a navigable stream at the point where it borders appellee's land in the town of Cotter and therefore the State of Arkansas is the owner of the river bed, bordering appellee's land as said river bed is described in the State's intervention. "The court will take judicial notice that White River is a navigable river." *Hill* v. *McClintock,* 175 Ark. 1059, 1 S. W. 2d 564. "The riparian owner upon a navigable stream, . . . takes only to the high water mark, the title to the bed of the stream being in the State." *Lutesville Sand & Gravel Company* v. *McLaughlin,* 181 Ark. 574, 26 S. W. 2d 892.

— 3 —

The intervention of the town of Cotter must fail for the reason that we find no competent proof of ownership by Cotter of any of the lands here involved.

— 4 —

Appellants' contention that appellee's remedy was at law in ejectment is without merit for two reasons: (a) It appears that appellants made no motion to transfer to law and they are in no position to complain here. (b) It also appears that appellants pleaded as a defense laches which is cognizable only in a court of equity. *Eades* v. *Joslin,* 219 Ark. 688, 244 S. W. 2d 623.

Accordingly, that part of the decree confirming and quieting appellee's title to the 3.5 acre tract, and the other land described in her complaint extending to the high water mark on White River is affirmed. That part of the decree, awarding her any part of the river bed as claimed by the Commissioner of State Lands, is reversed with directions to enter a decree not inconsistent with this opinion. The plaintiffs and defendants in the trial court will pay their own costs. Appellants will pay all costs in this court.

BOCKMAN *v.* WORLD INSURANCE COMPANY AND MUTUAL BENEFIT HEALTH & ACCIDENT INS. CO.

5-250 263 S. W. 2d 486

Opinion delivered January 11, 1954.

Cracraft & Cracraft, for appellant.

Gannaway & Gannaway, Peter A. Deisch and *Burke, Moore & Burke,* for appellee.

J. Seaborn Holt, J. Appellant filed two separate suits against appellees, insurance companies, to recover alleged disability claims under the terms of two insurance policies. The cases were consolidated for trial. Trial to a jury resulted in a verdict for appellees, insurance companies, and from the judgment is this appeal.

The record reflects that appellant filed motion for a new trial, alleging the following grounds, relied upon here: "2. The verdict is contrary to the evidence. 3. The verdict is contrary to the law and the evidence."

The trial court denied appellant's motion, using the following language: "The court rules in respect to specification of error Number Two and Three therein set forth that it is the rule of this court not to place his judgment above the judgment of the jury as to where the preponderance of the evidence lies, but as a motion for new trial views the matter only to determine whether there is any substantial evidence to support the verdict."

Appellant stoutly contends that the above action of the trial court was an arbitrary abuse of its power and

the duties of the court under the law, and says: "The error of the trial court in this case was that though the challenge as to the sufficiency of the evidence was addressed to his sound discretion, he exercised no discretion. He considered nothing. He applied a rule of thumb adopted by him for application in all cases in his court NOT to consider any circumstances or even where the preponderance lay. He stated his rule to be that regardless of whether he was convinced that the jury's verdict was correct, he would in no case correct it. There was no necessity for the trial court to say anything, if he had felt that the verdict was in accord with the preponderance."

We have many times held that the trial court not only possesses the power, but that it is the court's duty, to determine where the preponderance of the testimony lies and if it finds that the jury's verdict is against the preponderance of the testimony to set the verdict aside. Obviously, the court, hearing the testimony and observing the witnesses, is in a much better position to judge where the preponderance lies than we could possibly be. Our duty, when the case reaches this court, is limited to a determination whether there is any substantial evidence to support the jury's verdict. We are not concerned with the preponderance. That duty rests with the trial court, as indicated.

"It has long been the established rule that the trial court not only has the power, but that it is its duty, to set aside a jury's verdict and grant a motion for a new trial if it concludes that the verdict is against the clear preponderance of the evidence." *Hall* v. *W. E. Cox & Sons,* 202 Ark. 909, 154 S. W. 2d 19.

"We cannot approve the doctrine that it is an invasion of province of the jury for the trial court to set aside a verdict which it finds to be against the preponderance of the evidence. On the contrary if it fails to do so, it surrenders its own province, ignores its duty, and by so doing destroys the integrity of the best system that thus far has been devised in this country for the administra-

tion of justice. . . . This court has said in several cases that, 'It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence,' " *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851.

We again stated the rule in *Presley* v. *Schenebeck,* 194 Ark. 1069, 110 S. W. 2d 5: "Appellant first contends that the trial court should have granted his motion for a new trial on the ground, as we understand appellant's contention, that the great preponderance of the evidence was in appellant's favor, and the case of *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922, is cited to sustain the contention. It was there said: 'Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence, and this court will not interfere with such discretion unless it be made to appear that it was improvidently exercised. "Improvidently exercised," as used above, means thoughtlessly exercised or without due consideration. Webster, New Int. Dict.: "Improvidently." ' It has been frequently held by this court and was again stated in the case cited, that where there is a decided conflict in the evidence, it is the duty of the trial court to determine where the preponderance lies when passing on a motion for a new trial, and that this court will not reverse its action in failing to grant a new trial, although we may differ with it on the question where the preponderance lies."

From the trial court's language in the present case, it appears obvious that it has not fully performed the duty required of it under our well-established rules. We interpret the court's words to mean that it was not ruling on where the preponderance of the evidence lay, but only that there was substantial evidence to support the verdict.

In these circumstances, since we have "a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedes, certiorari, *habeas corpus,* prohibition, mandamus and *quo warranto,* and other remedial writs, and to hear and determine the same," (Constitution of the

State of Arkansas, Article VII, § 4), we remand this case to permit the court to rule on the motion in accordance with this opinion, which on certification will become part of the record here.

ROBINSON, J., dissenting. As pointed out by the majority, the trial court must exercise discretion in granting or overruling a motion for a new trial which alleges the verdict is contrary to the preponderance of the evidence, and where it is shown as in the case at bar that the trial court has failed to exercise such discretion, the cause should be reversed; but my opinion is that in the circumstances of this case the cause should be reversed and remanded for a new trial rather than sent back for any other purpose.

The judgment was entered on April 30, 1953; motion for new trial was filed May 7 and amended May 13. The court ruled on the motion May 28. Before the court will again consider the motion in all probability almost a year will have expired from the date of trial; in the meantime the trial court has had a large number of cases under consideration and it will be difficult to recall all those things which should be considered in determining where lies the preponderance of the evidence.

Therefore in my opinion the cause should be reversed and remanded rather than sent back for the court to show at this late date that discretion has been exercised in passing on the motion.

Mr. Justice GEORGE ROSE SMITH joins in this dissent.

ANTONACCI *v.* ANTONACCI.

5-254 263 S. W. 2d 484

Opinion delivered January 11, 1954.

Wayne Foster, for appellant.

Carl Langston, for appellee.

ROBINSON, J. Appellant, Charles Toney Antonacci, and appellee, Sarah Ann Antonacci, were divorced by decree of Pulaski Chancery Court on October 10, 1950. Sarah Ann was given custody of their child, William Charles, then 20 months of age. The decree also required Charles Toney to pay $12.50 per week to Sarah Ann for support of the child. Later appellant went into the Army and served for a time in Korea. Sarah Ann moved to California, taking the child with her.

Soon after appellant's return to his home in North Little Rock, appellee returned with the child from California. Later she went back to California with the child, and it is disputed whether this was with the consent of appellant. Thereafter appellant filed a motion in chancery court asking that he be given custody of the child. Sarah Ann then returned to North Little Rock and resisted appellant's motion that he be granted custody of the child, and moved that she be permitted to again take the child to California. Appellee further alleged that appellant was behind $500 in his payments for the maintenance of the child.

On a hearing the court issued an order permitting appellee to take the child to California, but refused judgment for $500 on account of unpaid maintenance, and reduced the $12.50 per week payments to $12.50 every two weeks. Charles Toney appeals from the order permitting Sarah Ann to take the child to California, and Sarah Ann appeals from the order refusing to allow her the $500 in unpaid maintenance.

It is within the power of the court to permit the mother to take the child out of the state. *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450; *Gibson* v. *Gibson,* 156 Ark. 30, 245 S. W. 32; and *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8. Here it is shown that there is not much chance of the parties being remarried; appellant has been married and divorced twice since his divorce from appellee. He works for the railroad company and is able to procure a pass to ride the trains to California to see the child at any time. In addition, appellee has agreed to bring the child back to North Little Rock each year during the months of July and August, and has made a bond conditioned that she will carry out this agreement.

In addition to the fact that appellant can get a pass to travel by train to California, the court reduced the maintenance payments by half and refused to give the appellee judgment for $500 for unpaid installments of maintenance. All of this will enable the appellant to visit the child in California without any extraordinary expense to himself.

Appellee has a job that she can go to in California where she earns from $65 to $70 per week, whereas here in Arkansas she can only earn about $32.50 per week. Appellee much prefers to live in California; she is happy there and appears to take good care of the child. We do not think that the Chancellor erred in refusing to require appellee to remain somewhat a prisoner in Arkansas because of the unfortunate divorce proceeding.

No doubt in refusing to allow the appellee judgment for $500 for unpaid installments of maintenance the court took into consideration the fact that permission was given for the child to be taken out of the state and there might be some expense to appellant in the event he wished to visit the child in California.

The cause is affirmed both on appeal and cross-appeal.

5-243 263 S. W. 2d 716

Opinion delivered January 11, 1954.

[redacted]

Tom Gentry, Attorney General, *James L. Sloan,* Assistant Attorney General, *Talley & Owen, Gene Worsham* and *Dale Price,* for appellant.

H. B. Stubblefield, for appellee.

ED. F. MCFADDIN, Justice. By this suit appellee Thompson, as a citizen and taxpayer, challenged the constitutionality of Act 273 of 1953. He named State Auditor Humphrey and State Treasurer Clayton as defendants; and prayed that they be enjoined from performing

anything required of them by the said Act 273. Other citizens and taxpayers intervened as defendants, and filed answers; and the case was heard upon evidence offered by the said intervenors. The Chancery Court held the Act to be violative of both Amendment 14 and Amendment 19 of the Arkansas Constitution, and entered a decree granting the plaintiff (appellee) his prayed relief. The State Officials and the intervenors unite as appellants to challenge the decree.

Before discussing the issues, we set out the caption and two of the sections of the Act 273 of 1953, to-wit:

"AN ACT to Establish a Vocational School in All Counties Having a Population of Less Than 6,000 According to the 1950 Census, to Establish a Construction Fund and for Other Purposes. . . .

"Section 1. There is hereby established a Vocational School in all counties having a population of less than 6,000 according to the 1950 census. . . .

"Section 13. For each such school coming within the provisions of Section 1 there is hereby appropriated out of the General Revenue Fund $200,000 for each such school so qualifying to be used as a construction fund for establishing such schools."

I. *Was This Suit Premature?* The State Officials (Humphrey as Auditor, and Clayton as Treasurer), demurred to the complaint, and elected to stand on their demurrer. They claim that the Act 273 was approved by the Governor March 11, 1953; that it had no emergency clause; that it could not and did not go into effect until June 11, 1953, which was 90 days[1] after the final Legislative adjournment; that this suit was filed April 1, 1953; that the decree was rendered in the Chancery Court on June 5, 1953; and that both of these dates of judicial action were prior to the date that the Act 273 went into effect. The State Officials claim that until the Act 273

[1] The 1953 Legislature adjourned March 12, 1953; and Amendment No. 7 to the Constitution regulates the effective date of an Act that does not have a valid emergency clause. See *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980.

became a law, it could not be attacked in the Courts. They cite, *inter alia,* the following: *Files* v. *Robinson,* 30 Ark. 487; *State* v. *Little Rock, etc., R. Co.,* 31 Ark. 701; *State ex rel. Brunjes* v. *Bockelman* (Mo.), 240 S. W. 209; *Board of Regents* v. *Engle,* 224 Ky. 184, 5 S. W. 2d 1062; *Price* v. *Hopkins,* 13 Mich. 318; *Board of Iroquois County* v. *Keady,* 34 Ill. 293; and *City of St. Louis* v. *Alexander,* 23 Mo. 483.

Even though the Act 273 did not go into effect and become a law until June 11, 1953, nevertheless, between the dates of the Legislative adjournment and the effective date, the Act hung like a suspended sword. It was known that the Act, if valid, would become effective on June 11, 1953, unless before that date a referendum petition should be filed under Constitutional Amendment No. 7; and it was realized that immediately after June 11, 1953, each of the State Officials herein involved could proceed to perform the duties required of him under the Act. Certainly Thompson as a citizen and taxpayer could and should be allowed to "take time by the forelock" and seek an injunction to prevent any action being taken under what he perceived to be an unconstitutional Act. The purpose of an injunction is to prevent injuries from occurring or continuing: and Thompson sought an injunction herein. A case in point is *Pierce* v. *Society,* 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. Rep. 571. The State of Oregon in 1922 enacted a law which stated that such law would take effect on September 1, 1926. In 1924—at least two years before the effective date of the law—suits were filed to enjoin its enforcement. The cases were decided by the Supreme Court of the U. S. on June 1, 1925—more than one year before the effective date of the law. The contention was made—just as here—that any suits involving the law were premature until the law became effective; but in denying the contention and affirming the issuance of an injunction, the Supreme Court of the U. S. said:

"The suits were not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been possible

prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."

We therefore hold that Thompson's suit for injunctive relief was not premature,[2] and that the Chancery Court was correct in overruling the demurrer of the State Officials.

II. *Is the Act 273 Violative of Constitutional Amendment No. 14?* This Amendment, adopted in 1926, reads in part:

"The General Assembly shall not pass any local or special Act. . . ."

We have a number of cases decided under Amendment No. 14. One of our earlier cases arising under it was *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617, in which we said:

"The exclusion of a single county from the operation of the law makes it local, and it cannot be both a general and a local statute. . . . The courts look to the substance and practical operation of a law in determining whether it is general, special or local, and if its operation must necessarily be special or local, it must be held to be special or local legislation, whatever may be its form. . . . A local law is one that applies to any subdivision or subdivisions of the State less than the whole. . . . A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some person, place or thing from those upon which, but for such separation, it would operate. . . ."

In *Smalley* v. *Bushmiaer,* 181 Ark. 874, 31 S. W. 2d 292, as well as in *Cannon* v. *May,* 183 Ark. 107, 35 S. W. 2d 70, the questioned Legislative Act applied to only one

[2] For cases pointing out that injunctions may be granted before acts of injury in situations somewhat analogous to those in the case at bar, see *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855; *Truax* v. *Raich,* 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7; *Gallardo* v. *Porto Rico Co.,* 18 Fed. 2d 918; and *Cleveland* v. *Davis,* 9 Fed. Supp. 337.

County, and in each case we held the Legislative Act to be void as violative of Amendment No. 14. In *State ex rel. Burrow* v. *Jolly,* 207 Ark. 515, 181 S. W. 2d 479, the Act 73 of 1943 attempted to apply to Counties having a population of not less than 18,300, and not more than 18,350. In holding the population classification of the Act to be violative of Constitutional Amendment No. 14, we said:

"The general principle was stated by Chief Justice HART in *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. 2d 991. The Amendment, said the Chief Justice, was intended to prevent arbitrary classification 'based on no reasonable relation between the subject-matter of the limitation and classification made.' It was then said: 'The classification of counties and municipalities is legitimate when population or other basis of classification bears a reasonable relation to the subject of the legislation, and the judgment of the Legislature in the matter should control unless the classification is . . . made for the purpose of evading the Constitution. If the judgment of the Legislature must control in all cases, the Amendment could serve no purpose, and the people might just as well not have initiated and adopted it.'

"A quotation from Ruling Case Law, cited in *State ex rel. Atty. Gen.* v. *Lee,* 193 Ark. 270, 99 S. W. 2d 835, asserts that in determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation rather than to its title, form, and phraseology, 'because otherwise prohibitions of the fundamental law against special legislation would be nugatory.' . . .

"Our view is that the so-called 'classification' is but an attempt by technicality to evade what the courts have heretofore said the people meant when by amendment to the Constitution they struck at the evil flowing from local and special laws."

Our most recent case applying Amendment No. 14 to a situation similar to that here involved, is *Wilson* v.

State, 222 Ark. 452, 261 S. W. 2d 257; and we there called attention to the article in the Arkansas Law Review (Vol. 3, No. 2) which lists and discusses many of our cases. When we consider Act 273 of 1953 in the light of our previous holdings, it is clear that the said Act violates Amendment No. 14. By judicial notice as well as by stipulation in the record, we know that Perry County is the only County in the State having a population of less than 6,000, according to the 1950 census: so the Legislature, in using the census figure, was obviously trying to avoid mentioning by name the only County in the State affected by the Act—*i.e.,* Perry County.

Furthermore, the intervenors introduced school men to show that a vocational school was needed in Perry County; but even these school men admitted that population afforded no basis on which to justify the classification, because here is the testimony of one such witness:

"Q. It has been shown here that the 1950 Federal Census showed Perry County to have a population of 5,978 and that the same census shows Montgomery County to have a population of 6,680. Would you know of any reason why that differential in population would make Perry County need a vocational school more than Montgomery County?

"A. None. . . .

"Q. And there would be no reason for Perry County having any special need over these counties that have a few more population than Perry County?

"A. I wouldn't know of any, no, sir."

But appellant intervenors argue that the State has a right to provide for a school by name, and that when we consider Act 273 of 1953 along with Act 145 of 1927 (which, with amendment, is now § 80-2501 *et seq.,* Ark. Stats.), it is manifest that the Act 273 was to supplement the law in regard to vocational schools, as found in § 80-2501 *et seq.,* Ark. Stats. It is clear that the Legislature could have taken up the general matter of vocational schools—as it did in § 80-2501 *et seq,* Ark. Stats.—

and enacted general legislation regarding them; but the fact remains that the Legislature did not enact such general legislation by Act 273 of 1953.

The various Arkansas Legislatures, beginning in 1927, passed Acts affecting salaries of Clerks—such as the one held void in *Cannon* v. *May, supra*—and then finally by Act 380 of 1947 the Legislature took up the question of Clerks' salaries generally over the entire State, and passed the Act that is now found in § 23-110 *et seq.,* Ark. Stats., which latter is law based on classification of Counties by population over the entire State. The distinction between Act 150 of 1929—held void in *Cannon* v. *May, supra*—and the Act 380 of 1947—found in § 23-110 *et seq.,* Ark. Stats.— demonstrates the clear distinction between local or special legislation on the one hand, and general legislation on the other. That same distinction is apparent between local Act 273 of 1953 here involved, and the general act on vocational schools, as found in § 80-2501 *et seq.,* Ark. Stats.: the local act affects only one locality arbitrarily selected; while the general act affects all parts of the State similarly situated.

Act 273 of 1953 is clearly local and is void as violative of Amendment No. 14 to the Constitution; and the Chancery Court was correct in so holding.

III. *Does the Act No. 273 of 1953 Violate Amendment No. 19 of the Constitution?* The Chancery Court also held that the Act 273 was violative of Amendment No. 19; and the briefs filed herein are addressed to that holding. It is conceded that the Act 273 failed to receive three-fourths the vote of the membership of each House of the Legislature. Appellee argues that even if the Act related to the 1953-54 fiscal year, nevertheless the appropriation bills passed by both Legislative Branches had exceeded the 2½ million dollar figure for the biennium when the bill for Act 273 went to the Governor. Appellants argue that the test of the 2½ million dollar figure is to be determined as of the time when the Governor signs the bill rather than when it is sent to

him. These matters are interesting, but we find it unnecessary to decide them in this case because we hold the Act 273 to be void as violative of Amendment No. 14 to the Arkansas Constitution.

Affirmed.

George Rose Smith, J., dissenting. The majority seem to overlook the fact that Act 273 created not a county school but a State institution. This institution was to be built with State funds and to be operated under the supervision of the State Department of Education. Section 6 of the Act requires that the rules for admission to the school be uniform throughout the State. We must conclude that the Legislature, for reasons which do not concern the courts, decided that there was a need for another State vocational school.

We must further assume that the Legislature knew that Perry County was the only county having a population of less than 6,000 according to the 1950 census. Not to make that assumption would be to say that the members of the General Assembly voted for Act 273 without knowing how many schools they were creating, nor how much money they were appropriating. Hence Act 273 states in effect that the only school being created is to be located in Perry County. The question is whether that designation of the school's site violates Amendment 14.

It seems plain to me that it does not. No one doubts the Legislature's authority to establish a new State institution of learning. Over the years there have been created a State university, a medical school, a school for the deaf, a school for the blind, several agricultural colleges, etc. Each new institution must obviously be located somewhere, and there is nothing in the Constitution to prevent the Legislature from making that determination. A matter of this kind does not lend itself to general legislation in the sense that every county must be provided with a State university of vocational school of its own, and for that reason the ban against local legislation is inapplicable. There is no more basis for condemning Act 273 as

a local law than there is for taking the same position with respect to statutes authorizing the construction of new buildings at the University of Arkansas, the State Hospital, or any other State agency. As we said in *Matthews* v. *Bailey,* 198 Ark. 830, 131 S. W. 2d 425; "The State may legislate with respect to its own affairs. Amendment No. 14 to the Constitution has no application here."

Since the majority have not found it necessary to say whether Act 273 required a three-fourths vote for its passage I express no opinion on that question.

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

ANDERSON *v.* MELTON.

5-263 263 S. W. 2d 909

Opinion delivered January 11, 1954.

Rehearing denied February 15, 1954.

Wm. J. Kirby and *Sam Montgomery,* for appellant.

Charles A. Wade, for appellee.

MINOR W. MILLWEE, Justice. There was a collision between an automobile driven by appellee and a truck driven by appellant in North Little Rock, Arkansas, on May 6, 1952. Appellee filed an action in the Pulaski Circuit Court on July 30, 1952, alleging that the collision was due to appellant's negligence, and praying damages to his automobile in the sum of $600.

Appellant was duly served with summons on August 16, 1952. On August 19, 1952, appellant wrote a letter to counsel for appellee stating that the accident was not due to his fault and that he and appellee had an agreement to settle the matter out of court. The letter further stated: "So if Mr. Melton cannot remember our agreement then neither can I. Since I have sufficient evidence to do so I shall also file suit against Mr. Melton for speeding and reckless driving." Appellant filed no answer or other pleading in the circuit court action, and on October 22, 1952, a default judgment was rendered against him in the sum of $450.58.

At a subsequent term of court on March 5, 1953, appellant filed the instant action, under Ark. Stats., § 29-506, to vacate the default judgment. He alleged that a settlement of the damages growing out of the collision was reached by the parties at the scene of the collision and that the taking of the default judgment constituted a fraud upon the court. It was further alleged that an insurance company, and not the appellee, was the real party in interest and that the allegations otherwise in appellee's complaint also constituted a fraud on the court. In his response to the motion to vacate, appellee alleged that the matters set up therein should have been pleaded as a defense to the original action and did not

constitute grounds for vacating said judgment after term time.

At the hearing on March 27, 1953, appellant orally moved to amend his motion to vacate to include any of the grounds provided in Ark. Stats., § 29-506, but the record does not disclose that the motion was ever acted upon. Subsequently, however, the court did permit appellant to plead the matters set out in the motion to vacate as an unavoidable casualty under the seventh subdivision of § 29-506. This appeal is from the order of the trial court overruling the motion to vacate the default judgment.

At the hearing on the motion to vacate, appellant offered evidence, denied by appellee, tending to show that the parties agreed at the scene of the accident to settle the damages by appellant's paying appellee $50 when appellee's car was repaired. Evidence was also offered to show that there was insufficient evidence of damage to appellee's car adduced at the original trial upon which to predicate the default judgment. It is insisted that under the agreement to settle appellant was lulled into a false sense of security which amounted to either a fraud upon the court or an unavoidable casualty preventing him from appearing and defending the original action. We cannot agree with this contention and hold that the circuit judge correctly overruled the motion to vacate.

This court has repeatedly approved the rule stated in *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517, as follows: "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. (Citing cases.)

"It is also settled that the mere fact that a larger judgment was rendered than the facts justified does not

show that a judgment was procured by fraud. The remedy for such an erroneous judgment is by way of appeal. *Estes* v. *Lucky,* 133 Ark. 97, 201 S. W. 815."

It is equally well settled that a judgment will not be vacated where the party against whom it is rendered totally fails to show legal diligence. As the court said in *Trumbull* v. *Harris,* 114 Ark. 493, 170 S. W. 222: "It is the duty of a litigant to keep himself informed of the progress of his case and a party seeking relief against a judgment on the ground of unavoidable casualty or misfortune preventing him from defending must show that he himself is not guilty of negligence and he cannot have relief if the taking of the judgment appears to have been due to his own carelessness." See also, *Weller* v. *Studebaker Bros. Mfg. Co.,* 93 Ark. 462, 125 S. W. 129; *Awbrey* v. *Hoopes,* 145 Ark. 502, 224 S. W. 959; *Bickerstaff* v. *Harmonia Fire Insurance Co.,* 199 Ark. 424, 133 S. W. 2d 890.

In the early case of *Izard County* v. *Huddleston,* 39 Ark. 107, the court said: "The statute to vacate judgments by this proceeding is in derogation not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have confidence in the judgments of our official tribunals as settlements of their controversies and there should be some end of them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed."

It is apparent from the pleadings and proof in the instant case that the matters relied upon to set aside the judgment were intrinsic to the matters and issues actually adjudicated in the judgment of October 22, 1953, and did not relate to matters extrinsic of that hearing. It is clear that no fraud, as defined by our cases, was practiced on the court in obtaining the judgment. The only reasonable conclusion to be drawn from the evidence is that appellant lost his defense, if he had any, to appellee's asserted cause of action through his own total lack of legal diligence. The judgment is accordingly affirmed.

POWELL *v.* TAYLOR.

5-266 263 S. W. 2d 906

Opinion delivered January 11, 1954.

Rehearing denied February 15, 1954.

Lookadoo & Lookadoo, for appellant.

Bobby Steel and *Shaver, Tackett & Jones,* for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by six residents of Gurdon to enjoin the appellees from establishing a funeral home in a residential district within the city. The defendants intend to remodel a dwelling known as the Taylor place and to use it as a combined residence and undertaking parlor. The plaintiffs, who own homes nearby, objected to the proposal and offered to reimburse the defendants for the preliminary expenses already incurred. This effort to dissuade the defendants having failed, the present suit was filed. The chancellor denied relief upon the ground that the neighborhood is not exclusively residential.

On this particular subject the law has undergone a marked change in the past fifty years. Until about the

end of the nineteenth century the only limitation upon one's right to use his property as he pleased was the prohibition against inflicting upon his neighbors injury affecting the physical senses. Hence the older cases went no farther than to exclude as nuisances in residential districts, such offensive businesses as slaughterhouses, livery stables, blasting operations, and the like.

Today this narrow view prevails, if at all, in a few jurisdictions only. It is now generally recognized that the inhabitants of a residential neighborhood may, by taking prompt action before a funeral home has been established therein, prevent its intrusion. In 1952 the Supreme Court of Louisiana reviewed the more recent decisions in twenty-two States and found that nineteen prohibit the entry of a mortuary into a residential area, while only three courts adhered to the older view. *Frederick* v. *Brown Funeral Homes, Inc.,* 222 La. 57, 62 S. 2d 100. In a case-note the matter is summed up in these words: "The modern tendency to expand equity's protection of aesthetics and mental health has led the majority of jurisdictions to bar funeral homes or cemeteries from the residential sanctuaries of ordinarily sensitive people." 4 Ark. L. Rev. 483. These decisions rest not upon a finding that an undertaking parlor is physically offensive but rather upon the premise that its continuous suggestion of death and dead bodies tends to destroy the comfort and repose sought in home ownership.

We have already announced our preference for the view that permits the citizens of a residential district to make timely objection to its invasion by a funeral home. In *Fentress* v. *Sicard,* 181 Ark. 173, 25 S. W. 2d 18, we set aside the chancellor's injunction only because the neighborhood was changing to a business district, having already acquired drug stores, filling stations, grocery stores, etc. In that opinion we said, with reference to the proposed mortuary: "If the district of the location was an exclusively residential one, its intrusion therein would ordinarily constitute a nuisance, and could be prevented by injunction."

It is our conclusion in the case at bar that the neighborhood in question is so essentially residential in character as to entitle the appellants to the relief asked. The Taylor place is situated at the corner of Eighth and East Main Streets, and the testimony is largely directed to the area extending for two blocks in each direction, or a total of sixteen city blocks. In a relatively small city an area of this size may well be treated as a district in itself, else there might be no residential districts in the whole community. Gurdon is a city of the second class, having had a population of 2,390 in the year 1950. It is not shown to have adopted a zoning ordinance.

This square of sixteen blocks is bounded on the west by a public highway which is bordered by commercial establishments, their exact nature not being shown in detail. Otherwise the neighborhood is exclusively residential in appearance and almost so in its actual use. A seamstress living two doors east of the Taylor place earns some income by sewing at home. The couple in the house just south of the Taylor place rent rooms to elderly people and take care of them when they are ill. J. T. McAllister lives diagonally across the intersection from the Taylor place. He is in the wholesale lumber business and uses one room as an office, keeping books there and transacting business by telephone and with persons who call. A photograph of this home shows that there is no sign or anything else to indicate that business is carried on there. Farther up the street an eighty-year-old dentist has a small office in his yard and occasionally treats patients. The testimony discloses no other commercial activity within the area.

On the other hand, the residential quality of the neighborhood is convincingly shown. A real estate dealer describes it as the best residential section in Gurdon. Estimates as to the value of various homes range from $15,000 to $35,000. Many inhabitants of the area confirm its residential character and earnestly protest the entry of the mortuary. One, whose wife suffered a mental illness some years ago, says that he will be forced to move away if the funeral home is established. Another

testifies that he will not build a home on his vacant lots across the street from the Taylor place if it is converted to a funeral parlor. A third testifies that she lost interest in buying the house next to the Taylor place when she learned of the defendants' plans. It is true that other witnesses state that they have no objection to the proposal, and the chancellor found that property values will not be adversely affected. But we regard the residential character of the vicinity as the controlling issue, and the evidence upon that question preponderates in favor of the appellants.

Reversed.

MINOR W. MILLWEE, Justice, dissenting. As I read the opinion of the majority, it is now the law in Arkansas that the operation of a modest undertaking parlor in a mixed residential and business area of a city of the second class constitutes a nuisance *per se* and may be abated as such by injunction. This holding is so foreign to the traditional attitude of this court and the general legislative policy of this state that I must respectfully dissent.

While the majority conclude that the area in question here is "essentially" residential, they proceed to apply the so-called "modern rule," which is, in those jurisdictions which recognize it, only applicable when the affected area is "exclusively" or "purely" residential. Since this goes far beyond any of the authorities cited by the majority, I suppose it should be dubbed the "ultra modern rule." It is perfectly apparent from the detailed description of the majority that the area affected here is a mixed commercial and residential one and that the chancellor was eminently correct in holding that it was not "exclusively" residential. This determination by the chancellor is in my opinion fully supported by the great preponderance of the evidence.

Moreover, the majority failed to mention the fact that appellees' contemplated operation does not include the holding of funerals or the maintenance of noisy ambulances—factors which usually accompany the operation of a funeral home. Nor does the instant case contain

factors presented by the proof in the cases relied on by the majority, such as the escape of noxious odors, the depreciation of values in surrounding properties, the ability of neighbors to see the taking in or carrying out of bodies or that they will be rendered more susceptible to contagious diseases. On the contrary, it is undisputed that the structure planned by appellees will greatly improve the beauty of the neighborhood, that there will be no noise from ambulances and no escape of odors or gases. It was further shown that within a radius of two blocks from appellees' property there is a nursing home, a dentist office, a real estate office, a lumber office, a seamstress place of business, service station, boat factory, lumber company office, church and a hospital. Two blocks away is the business district on Highway 53, and three and a half blocks away is a bulk gas plant. This could hardly be called a purely residential section.

In denying an injunction, the able chancellor stated in the decree: "The rule is well settled that no injunction should be issued in advance of the construction of a legal structure, or in advance of the operation of a legal business, unless it be certain that the same will constitute a nuisance; and, where the claim to relief is based on the use which is to be made of a lawful business, the Court will ordinarily not interfere by injunction in advance of actual operation.

"Since the funeral home in the instant case is not a nuisance *per se* and may be operated in such a manner as to not become a nuisance, the rule that Chancery Courts will not issue an injunction in advance of actual operation, but will leave the complainants to assert their rights thereafter, if the contemplated use results in a nuisance, is applicable and controlling in the case at bar."

Under our decisions it is difficult to see how the trial court could have reached any other conclusion. The rule which he declared has been consistently applied in numerous cases involving most every character of lawful business or operation. Among these are: a livery stable, *Durfey* v. *Thalheimer*, 85 Ark. 544, 109 S. W. 519; a cotton

gin, *Swaim* v. *Morris,* 93 Ark. 362, 125 S. W. 703; a filling station, *Fort Smith* v. *Norris,* 178 Ark. 399, 10 S. W. 2d 861; a cemetery, *McDaniel* v. *Forrest Park Cemetery Co.,* 156 Ark. 571, 246 S. W. 874; a hide and fur business, *Fort Smith* v. *Western Hide and Fur Co.,* 153 Ark. 99, 239 S. W. 724; an ice plant, *Bickley* v. *Morgan Utilities Co., Inc.,* 173 Ark. 1038, 294 S. W. 38; a tuberculosis sanatorium, *Mitchell* v. *Deisch,* 179 Ark. 788, 18 S. W. 2d 364; a quarry and rock crusher, *Jones* v. *Kelley Trust Co.,* 179 Ark. 857, 18 S. W. 2d 356; a tabernacle, *Murphy* v. *Cupp,* 182 Ark. 334, 31 S. W. 2d 396; a sawmill, *Eddy* v. *Thornton,* 205 Ark. 843, 170 S. W. 2d 995; a bowling alley, *Kimmons* v. *Benson,* 220 Ark. 299, 247 S. W. 2d 468.

In the McDaniel case, *supra,* we adopted the following as a well settled rule: "The unpleasant reflections suggested by having before one's eyes constantly recurring memorials of death is not such a nuisance as will authorize the intervention of equity." In the Kimmons case, *supra,* we reaffirmed the rule that we would decline to enjoin the erection of a lawful business structure where there is a doubt that it would prove to be a nuisance. Certainly appellees are entitled to the benefit of that doubt by the great preponderance of the evidence in this case.

About the only businesses or operations which this court has seen fit to enjoin as nuisances *per se* are: a gaming house, *Vandeworker* v. *State,* 13 Ark. 700; a bawdy house, *State* v. *Porter,* 38 Ark. 637; and the standing of a stallion or jackass within the limits of a municipality, *Ex parte Foote,* 70 Ark. 12, 65 S. W. 706. To this select group must now be added the operation of a modest undertaking parlor, where no funerals are to be held, in an area of a city of the second class which is "essentially" but not "actually" or "exclusively" residential.

It should be a matter of common knowledge that there are scores of undertaking establishments located in residential, or mixed residential and commercial, areas of the smaller municipalities in this state with hundreds of thousands of dollars invested in them. Under the rule proclaimed today these enterprises are placed in a most pre-

carious position. And in the future many citizens, such as the appellees, will be denied the privilege of pursuing a dignified and lawful calling in places where their services would be highly welcome and most sorely needed. I cannot agree to this rule.

Justice McFaddin joins in this dissent.

GANTT *v.* SISSELL.

5-253 263 S. W. 2d 916

Opinion delivered January 11, 1954.

Rehearing denied February 15, 1954.

W. S. Atkins and *Will Steel,* for appellant.

John L. Wilson, Bert B. Larey and *Shaver, Tackett & Jones,* for appellee.

WARD, J. On October 31, 1951, Mrs. J. W. Burnett left her home in Texarkana to drive her mother, Mrs. Nettie Gantt (appellant), to Murfreesboro. When they were about 3 miles northeast of Nashville on Highway No. 70, the Lincoln automobile which Mrs. Burnett was driving collided with a Ford car going in the opposite direction driven by Wesley Floyd Sissell, appellee, resulting in injuries to Mrs. Gantt. A suit for damages was filed by Mrs. Gantt against Sissell on the ground that the collision was caused by his negligence or by the concurring negligence of him and Mrs. Burnett.

This appeal from a jury verdict in favor of Sissell does not question the sufficiency of the evidence to support the verdict, making it unnecessary to set out in detail the conflicting testimony as to how the collision occurred, and so we will refer to the testimony only to the extent that is necessary to understand a discussion of the several assignments of error hereinafter mentioned.

1. An Arkansas State policeman by the name of Carl Chambers who arrived at the scene of the collision shortly after it occurred and made notes of his measurements and observations was sick and unable to appear as a witness for Sissell on the day set for trial, and appellee moved for a continuance on that ground, setting out in the motion what the testimony of the witness would be. In order to avoid postponement of the trial, however, appellant agreed that if the witness were pres-

ent he would testify that the Lincoln car driven by Mrs. Burnett skidded out of control. At the time appellant made no objection that said testimony was incompetent although she did object to certain other portions of the witness' statement and they were excluded by the court. Later during the trial when the witness' statement was introduced in evidence with the court's approval appellant objected and saved her exceptions. Under the attending circumstances, the admission of this testimony was not error. It is true that there was no accompanying testimony to lay the foundation for the policeman's statement yet it appears from the record that appellant was fully aware, when the agreement referred to above was made, that the witness could have qualified if he had been present in person. Had the court ruled otherwise than he did, appellee would have been misled in waiving his motion for a continuance and agreeing to a trial without the benefit of a material witness.

The full written report of the policeman was offered in evidence by appellee but was refused by the court on objection by appellant. We do not agree with appellant that it was reversible error for the court to allow appellee to insert the report in the record since the jury had no opportunity to see or consider it.

2. We do not agree with appellant that there was any error in connection with appellee's attempt to introduce testimony to show that Mrs. Burnett had reimbursed appellee for damages to his automobile and injuries to his person. On cross-examination Mrs. Burnett and her husband were asked if they had reimbursed appellee, and both of their answers were in the negative, and no prejudice could have resulted to appellant. On rebuttal, appellee's attorney asked him if he had been so reimbursed and his answer was in the affirmative. Objection was made by appellant and the court directed the jury to disregard the answer if they heard it. Thereupon appellant again objected on the ground that if any payment was made, it was not shown to be with the consent and knowledge of Mrs. Burnett, and the court again

sustained the objection. Following this, appellee's attorney asked him if he had been paid with the knowledge and consent of Mrs. Burnett. Objection was made, but the court properly allowed the witness to answer in the affirmative.

Later, on cross-examination of appellee by appellant's attorney, he was asked the following question: "Q. Now, you stated that you had been paid for the damages to your car and your personal injuries with the knowledge and consent of Mrs. Burnett. How do you know Mrs. Burnett knew that?" Appellee's answer was to the effect that Mrs. Burnett's husband told him of the payment, and, on objection by appellant the court excluded the answer from the jury. Then appellant's attorney made the following objection: "Now, I ask that that question to *Mrs. Burnett* whether she took part or consented to his being paid be stricken from the record." As stated above, this objection was not well taken because Mrs. Burnett's answer was in no way prejudicial to appellant. Apparently, the objection was intended to apply to the question propounded to appellee and not to Mrs. Burnett.

3. Appellant's other contentions relate to certain instructions given and refused by the court. We find no reversible error as is indicated in the following discussion of each separate assignment.

(a) Appellant's requested instruction No. 1 was refused by the court and this is assigned as error. The requested instruction, which correctly defined appellee's liability in the event that the collision was the result of negligence on his part and on the part of Mrs. Burnett, was fully covered by the court's instruction No. 1 which reads as follows:

"You are instructed that it is a general rule of law in our state that where one is injured as the result of the concurring negligence of two parties, the injured party may, at his or her election, sue one or both of the joint tortfeasors. In this connection, if you find from a preponderance of the evidence that the defendant Sissell

was guilty of negligence as defined in these instructions and that such negligence so contributed to the collision that it would not otherwise have happened, then Mrs. Gantt would be entitled to recover from Mr. Sissell, notwithstanding the negligence, if any you find, of Mrs. Burnett, the driver of the car in which Mrs. Gantt was riding."

Appellant's theory of the case was correctly presented to the jury in appellee's requested instruction No. 1, given by the court which reads:

"You are instructed that by proximate cause is meant the cause which sets all others in motion, and unless plaintiff has proved to your satisfaction, by a fair preponderance of the evidence, not only that the defendant was negligent, but also that his negligence was *a* proximate cause of this accident, the plaintiff cannot recover and your verdict must be for the defendant. You are further instructed that the word 'proximate' as used in 'proximate cause' is intended to mean direct or immediate as opposed to 'remote'."

(b) It is seriously contended by appellant that it was error for the court to give appellee's instruction No. 2 which reads as follows:

"You are instructed that the basis of this accident is negligence and you cannot infer negligence on the part of the defendant from the mere happening of an accident. The law imposes upon the plaintiff the duty of proving his or her case by the preponderance of all the evidence, and this burden rests upon the plaintiff throughout the entire trial and applies at every stage thereof, and you cannot find a verdict in favor of the plaintiff unless and until the plaintiff has proved by the preponderance of all the evidence that the defendant was guilty of negligence charged against him and that such negligence was *the* proximate cause of the injury complained of by the plaintiff." (Emphasis supplied.)

The essence of appellant's contention is that the word "the" which is underlined in the above instruction

makes the instruction erroneous under the holding in the case of *Lydon* v. *Dean,* 222 Ark. 367, 260 S. W. 2d 465, but we do not agree because there is a material and substantial difference between the two cases. In the *Lydon* case where it was held error for the court, in a similar instruction, to substitute the word "the" for the letter "a," the decision is based on the fact that without the correct instruction containing the letter "a" there was no other instruction which presented plaintiff's theory of the case based on the concurring negligence of the two parties. Such is not the situation here, for, as has already been pointed out, there were other instructions which properly presented appellant's action for damages against appellee based on the concurring negligence of both appellee and Mrs. Burnett. Because of the nature of the holding in the *Lydon* case, it may be susceptible to the criticism of being technical and there is no reason here to extend it beyond the limits therein specified.

(c) Finally, it is insisted that the court erred in giving appellee's requested instructions No. 8 and No. 16. Said instruction No. 8 contained the same alleged vice as set forth in instruction No. 2 quoted above and must be rejected for the reasons already stated. Moreover, the error here complained of was invited by appellant's requested instruction No. 2, which was given by the court and which reads as follows:

"If you find, from a preponderance of the evidence, that the defendant, Wesley Floyd Sissell, at the time of the collision complained of, was guilty of negligence as defined in these instructions and that such negligence, if any, was *the* proximate cause of the collision and injuries to the plaintiff, Mrs. Gantt, if any, then and in that event you are told that the defendant would be liable and you should find for the plaintiff, Mrs. Gantt."

The court committed no error in giving appellee's instruction No. 16 which also contains the words "the proximate cause" because by this instruction the jury was correctly told that it might find that appellee was

not guilty of any negligence and that Mrs. Burnett's negligence was the proximate cause of the collision. This instruction correctly submitted appellee's theory of the case, and there is no contention that it was not justified by the testimony when taken together with all the other instructions.

For the reasons above stated the judgment of the lower court is affirmed.

GREGORY *v.* REES PLUMBING COMPANY, INC.

5-256 263 S. W. 2d 697

Opinion delivered January 18, 1954.

Frank Sloan and *W. B. Howard,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

ED. F. MCFADDIN, Justice. Appellee, Rees Plumbing Co., Inc. (hereinafter called "Rees"), filed this action against the appellant, Mode Gregory, on an itemized account for $1,180.29, for materials and labor furnished in installing a boiler in Gregory's cleaning establishment in Jonesboro. Gregory's defenses were: (a) that the contract price was $153.23, plus some extras, making the total amount due Rees to be $341.33, for which Gregory offered to confess judgment; and (b) that the charges in excess of $341.33 were not only erroneous but also exorbitant. The cause was tried to a jury in February 1953, and resulted in a verdict and judgment for Rees for $1,001.00. To reverse that judgment Gregory brings this appeal, and urges the assignments now to be discussed.

I. *Improper and Prejudicial Arguments by Rees' Attorneys.* There are several arguments of which Gregory complains:

(a) We quote from the record which appellant brings to us by what is conceded[1] to be equivalent to a bystander's bill:

"In the closing argument for plaintiff, Berl S. Smith, counsel for plaintiff, told the jury that plaintiff's claim was just and should be allowed; and that the jury should not consider or be deterred by the fact that defendant Mode Gregory disagreed with plaintiff's contentions, as it was not unusual for Gregory to disagree, in that this was the second case said defendant had in this term of court, and that defendant was in litigation at all times and every time the court met. Whereupon, defendant's counsel, W. B. Howard, objected to the argument, asked the court to instruct the jury to disregard it, and further asked the court to tell the jury that defendant had been in several lawsuits in this court in the past two years and that defendant had won everyone of such lawsuits. The court responded to this objection by telling the jury that the argument of Mr. Smith was improper and that they should not consider

[1] The concession makes it unnecessary for us to consider the matter of a bystander's bill. See § 27-1751, Ark. Stats.

such improper argument; but the court refused to tell the jury that defendant had been involved in previous litigation wherein he had been successful in every instance. At this time, Mr. Smith stated that he was sorry that he made the argument and that it had just 'slipped out'."

It will be observed that after Mr. Smith apologized for the argument, the appellant's counsel was apparently satisfied and did not urge any further objection, or request any further admonition to be made by the Court, or save any exceptions [2] to the failure of the Court to give any further admonition. In *Kiech* v. *Hopkins,* 108 Ark. 578, 158 S. W. 981, we said:

"Unless the party affected excepts to the failure on the part of the Court to remove, or to attempt to remove, the prejudice of the improper argument, he will be deemed to have waived any error predicated thereon. *Meisenheimer* v. *State,* 73 Ark. 407; *Southwestern Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254."

In *Jenkins* v. *Quick,* 105 Ark. 467, 151 S. W. 1021, and also in *Ft. Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 272, 171 S. W. 99, we held that arguments, no more improper than that here involved, were cured when the Court admonished the Jury and the attorney apologized for the improper argument and withdrew the statement. The cited cases are ruling on the point here at issue.

(b) We again quote from the record which appellant brings to us by what is conceded to be equivalent to a bystander's bill:

"He [3] then continued with his argument and in attempting to explain why one of the original invoices was captioned as billed to the Fidelity and Casualty Company for work at Leachville, Arkansas and why plaintiff's bookkeeper was not called as a witness on this matter, Mr. Smith stated that Harold Rees was an honest man and wanted only what was coming to him, that

[2] The case was tried in February 1953, which was before enactment of Act 555 of 1953.

[3] *i. e.,* Mr. Smith, attorney for Rees.

plaintiff's counsel wanted him to have only what was coming to him; and that he, Berl S. Smith, knew the entire claim was just, true and correct because he had *personally* checked the books and records of the plaintiff corporation. The attorney for the plaintiff then said that W. B. Howard was an able opponent and had done a magnificent job with nothing to work with, and that a good example of Howard's ability to make something out of nothing was the action of counsel in connection with the appearance and testimony of the witness Ralph Burton, of which, the said Berl S. Smith stated in substance 'Now we see the Master calling for a witness and then having the court issue an attachment, then cross-examining his own witness'."

It is conceded that Gregory's attorney offered no objection to any of the argument as contained in the quotation just given, and that it was not until the Motion for New Trial that any objection was ever made to the portion of the argument last quoted. In *Graves* v. *Jewel Tea Co.,* 180 Ark. 980, 23 S. W. 2d 972, an objection to an argument was made for the first time in the Motion for New Trial, and we said of such objection:

"This was insufficient to present the question to the Lower Court, or to this Court on appeal. *Sanderson* v. *Marconi,* 149 Ark. 97, 231 S. W. 554."

Again in *Caldwell* v. *State,* 214 Ark. 287, 215 S. W. 2d 518, we said:

"Furthermore, an objection to an improper argument comes too late if made for the first time after the jury has retired. *Snow* v. *Cleveland Lbr. Co.,* 224 Ala., 564, 141 So. 243; *Matthews* v. *Dudley,* 212 Cal. 58, 297 Pac. 544; *Bond* v. *Bean,* 72 N. H. 444, 57 A. 340, 191 Am. St. Rep. 686; see, also, 64 C. J. 286, and cases collected in West's Decennial Digest, 'Trial', Sec. 131 (2)."

The cited cases establish that Gregory has not presented us with a record showing timely objections on the arguments involved in this sub-topic.

(c) Finally on this matter of improper argument, Gregory claims that the effect of the combined argu-

ments as heretofore quoted in (a) and (b) was so devastating to Gregory's case that no objections, exceptions, or Court admonitions could have erased the effect of these arguments from the mind of the Jury; and so Gregory claims that he is entitled to a reversal under the authority of the case of *German-American Ins. Co.* v. *Harper,* 70 Ark. 305, 67 S. W. 755.

In the said German-American case, when the improper argument was made *and was objected to,* the Trial Court admonished the Jury to disregard the argument; but we held that the argument was so prejudicial that it could not be cured by the admonition given. Accordingly, we awarded a new trial. But in the case at bar, and under the state of the record, the extreme ruling of the German-American case does not apply. Here, after Mr. Smith apologized for the improper argument as quoted in sub-topic (a), he continued without any further objection of any kind. Gregory's attorneys could not remain silent and chance the result of a favorable Jury verdict, and then, after an unfavorable verdict, be heard for the first time to make the claims about the argument being so devastating to their cause. We hold that the arguments here involved were not of the character discussed in *Wilson* v. *State,* 126 Ark. 354, 190 S. W. 441.

Furthermore, in passing on the Motion for New Trial on this point, the learned Trial Judge said:

"In this case it is my considered opinion that the remarks of plaintiff's attorney did not affect the result and that no prejudice resulted to defendant therefrom . . .

"Both plaintiff and defendant were ably represented in this case. It was tried by a jury who impressed me that they, in this case and all others tried before them, were honestly seeking to ascertain the truth. They were not the type to be easily influenced by matters outside the record. The motion will be denied, and this opinion shall become a part of the record in this cause."

We adopt the findings of the Trial Court and deny appellant any relief in the matter of improper argument.

II. *Newly Discovered Evidence.* The judgment was rendered in favor of Rees on February 11, 1953, and the Motion for New Trial, based on the claim of improper argument, was overruled on April 22, 1953. Thereafter —on July 25, 1953—Gregory filed another Motion for New Trial; and it was on the ground of newly discovered evidence.[4] He claimed that he had just discovered that the installation of the boiler by Rees violated a number of rules and regulations of the Arkansas Boiler Inspection Division; and that these violations had not been earlier discovered because Gregory had been led to believe that Reese had caused the installation to be examined and approved by the State Boiler Inspection Division.

Conceding without deciding (a) that the rules and regulations of the State Boiler Inspection Division are valid in every respect, and (b) that Rees, in installing the boiler for Gregory, violated the rules here involved, nevertheless we hold that Gregory waited too long to urge such violations. With the exercise of reasonable diligence, Gregory could and should have discovered all of this boiler inspection matter before the trial of the case in February, 1953. His Motion for New Trial should have been denied because of lack of due diligence. Section 5 of Act 127 of 1937 is now found in § 81-505 Ark. Stats., and it is the applicable Statute on the inspection of boilers. This statute says:

"No owner or user of a steam boiler, or engineer or fireman in charge of it, shall operate or allow it to be operated without a certificate of inspection issued by the Commissioner of Labor, . . ."

When Gregory accepted the completed installation from Rees and commenced using the boiler, he should at that time have required Rees to furnish him a certificate issued by the Commissioner of Labor, as provided by the statute just quoted. The law imposed on Gregory the inhibition against using the boiler without such certificate, and the alleged "misleading" by Rees could

[4] Subdivision 7 of § 27-1901, Ark. Stats., is the applicable Statute regarding newly discovered evidence.

not have excused Gregory for failure to have the boiler certificate. Furthermore, when Rees filed this action against Gregory in December, 1952, Gregory should then have demanded such certificate if Rees had led him to believe that a certificate had been issued. Instead, Gregory admitted in his answer that he owed $341.33 for the installation. Certainly when Gregory knew Rees was claiming more than Gregory thought due, Gregory should then have investigated to see if Rees had complied with the boiler inspection law. It was too late for Gregory to wait until after the trial and then seek to offer a defense that should have been presented at the trial.

The judgment is affirmed.

JOHNSON *v.* MCADOO.

5-173 263 S. W. 2d 701

Opinion delivered January 18, 1954.

M. C. Lewis, Jr., for appellant.

C. T. Cotham, for appellee.

ED. F. MCFADDIN, Justice. The question here presented is whether the Chancery Court was in error in sustaining the cross-complaint of appellee, Nellie McAdoo, and in cancelling the deed she had executed to J. H. A. Johnson in 1923. The appellants are the heirs at law of Johnson; and we agree with them that the Chancery decree should be reversed.

Lucy McAdoo Johnson was the daughter of the appellee, Nellie McAdoo, and also the wife of J. H. A. Johnson. Lucy McAdoo Johnson died intestate, a citizen and resident of Garland County, Arkansas, on August 17, 1923, survived only by her said husband and her said mother, and the child or children of Lucy's brother and sister. At the time of her death, the record title to a vacant lot was in Lucy McAdoo Johnson. Twelve days after Lucy's death, Nellie executed to J. H. A. Johnson a deed to the said vacant lot. Then J. H. A. Johnson signed a waiver of his right to be administrator of Lucy's estate, and requested that Nellie be appointed administratrix. Nellie was appointed, and Lucy's estate was administered, and the Probate Court records reflect that Nellie received in excess of $2,000.00 in cash from the said estate. By consent, J. H. A. Johnson and Nellie McAdoo divided the household furniture in the home where the Johnsons had lived.

J. H. A. Johnson entered into possession of the vacant lot deeded him by Nellie, as aforesaid; and built a house on the lot, and exercised full control of the property from 1923 until his death in 1949. After the death of J. H. A. Johnson, Nellie McAdoo asserted a claim to the lot she had deeded to J. H. A. Johnson in 1923, and undertook to collect the rent from the tenants. When the appellants brought this suit to enjoin Nellie from disturbing the tenants, she cross-complained, asserting that the deed she signed in 1923 was void for several reasons, hereinafter to be discussed.

In one place in her testimony, Nellie McAdoo claimed that she furnished one-half of the purchase money for the vacant lot when her daughter, Lucy, bought it in 1923, and that Lucy was therefore Trustee for Nellie to the extent of said one-half interest. In another place in her testimony, Nellie McAdoo claimed that all she had ever intended to convey to J. H. A. Johnson was a 10-year lease on the property, and not the fee. In another place in her testimony, Nellie McAdoo said that she was so grief-stricken over the death of her daughter, Lucy, that she was in no suitable mental condition to understand

what she was doing when J. H. A. Johnson forced her to go to the office of the Notary Public who prepared the deed and took Nellie's acknowledgment. Thus, Nellie claimed: (a) that she was entitled to a resulting trust for a one-half interest, and by inheritance to the other one-half interest; (b) that the deed in fact should be reformed to be a 10-year lease; and (c) that the deed should be entirely set aside because of undue influence, etc.

The decree of the Chancery Court was in favor of Nellie McAdoo,[1] notwithstanding the appellants' pleas of limitations, statute of frauds, and estoppel; but we cannot find sufficient evidence in the record to support the decree of the Chancery Court. Nellie McAdoo's testimony contains many glaring inconsistencies. Some of these are: (a) she testified that she was 81 years of age at the time of the present trial in 1952, and that she was "past 70" when Lucy died in 1923: simple arithmetic shows this error. (b) She testified that Lucy had been dead only 3 days when J. H. A. Johnson obtained the deed in question: yet the record shows a time lapse of 12 days. (c) She testified that she received nothing from Lucy's estate except a part of the household furnishings: yet the Probate Court records show that she received over $2,000.00 in cash. (d) She testified that she thought she was only executing a 10-year lease to J. H. A. Johnson when she signed, in 1923, the deed here in question: yet all the evidence in the record shows that she never asserted any claim to the property until after J. H. A. Johnson's death in 1949. The alleged 10-year lease ex-

[1] In its Findings 5 and 6, the Chancery Court accepted the testimony of Nellie McAdoo at full value, and said: "5. That at the time this 'Special Warranty Deed' was executed by Nellie McAdoo to her son-in-law, J. H. A. Johnson, just 12 days after the death of her daughter to whom she was deeply attached, and while she was so weak mentally that she was unable to guard herself against imposition or to restrain importunity or undue influence, Nellie McAdoo was incompetent to execute a deed and in fact she did not understand that the instrument which she signed was a deed, and thought that she was executing a *ten year lease.*

"6. That the deed or contract which was executed by the defendant to her son-in-law, J. H. A. Johnson, was an unconscionable contract, and that imposition and oppression was practiced upon Nellie McAdoo by her son-in-law, in whom at that time she had implicit confidence, and that the parties to this deed were not on an equal footing."

pired in 1933; and for sixteen years thereafter, Nellie McAdoo remained entirely quiescent until after the death of both J. H. A. Johnson and the Notary who took Nellie's acknowledgment to the deed in question. Then she came forward with the claims here made, filled with the inconsistencies which we have mentioned.

The testimony of Nellie McAdoo is entirely unsupported in essential matters. Without prolonging this opinion to discuss the applicability of limitations, estoppel and also the statute of frauds, we prefer to base our reversal on the absence of that *quantum* of proof necessary to set aside the deed, acknowledged, recorded, and suffered to remain unchallenged for so long. See *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253; *Morris* v. *Cobb,* 147 Ark. 184, 227 S. W. 23; *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649; and *Franklin* v. *Hempstead County Club,* 216 Ark. 927, 228 S. W. 2d 65. In *Morris* v. *Cobb, supra,* we said:

"Again, appellant is in the attitude of impeaching the deed purported to have been executed and acknowledged by him. He could only do this by clear, cogent and convincing evidence. *Bell* v. *Castleberry,* 96 Ark. 564; *Polk* v. *Brown,* 117 Ark. 326. His evidence does not meet this requirement."

The judgment of the Trial Court is reversed and the cause remanded, with directions to award the property to the appellants, as against Nellie McAdoo,[2] and to require her to account and pay any rent money she has collected since the death of J. H. A. Johnson, less the necessary property expenses, as may be determined by the Court.

[2] The Trial Court held that Nellie McAdoo, as the mother of Lucy McAdoo Johnson, was Lucy's sole heir at law, and entitled to the fee in this property which was not ancestral. Under the holding in *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, we think that § 61-110, Ark. Stats., would be the governing statute, rather than § 61-101, Ark. Stats.; and that all that Nellie McAdoo had was a life estate in the property, with remainder to the heirs of the brothers and sisters of Lucy McAdoo Johnson, and as to such heirs, limitations would not ordinarily commence to run until the death of Nellie McAdoo. We mention this point so that our present opinion will not be misinterpreted; but we leave the point undecided, as it is not briefed or presented.

5-252 263 S. W. 2d 708

Opinion delivered January 18, 1954.

[redacted]

Oscar Fendler, for appellants.

Taylor & Sudbury and *Claude F. Cooper,* for appellees.

GRIFFIN SMITH, Chief Justice. Ownership of a deposit in Farmers Bank and Trust Company at Blytheville is the subject of this appeal.

S. F. Powell died April 6, 1952. A son, Lee, died December 5, 1951. Lee was survived by his widow, Zouline, and Waelon, a 19-year-old son. S. F. Powell

was survived by his widow, Almedia, and by two sons and a daughter: Ernest and Lawrence Powell, and Gracie Powell Bishop. At the time of his death S. F. Powell was "85, 86, or 87" years of age. Almedia was his fourth wife. They married August 30, 1947.

The controversy revolves around a bank signature card executed December 29, 1951, at a time when Powell's balance in his checking account was $11,599.62. At death his balance was $10,828.48. In addition to the checking account Powell had a time deposit of $2,000, and owned $5,000 in bonds. Neither the time deposit nor the bonds is an issue here.

The evidence discloses that at various times Powell had executed wills, but would become dissatisfied and destroy them.

On December 29 Powell went to the bank and talked with its president, B. A. Lynch. Effect of testimony given by Lynch is that Powell desired to convert the checking account into a joint tenancy with right of survivorship. Act 260 of 1937; Ark. Stat's, § 67-521. Language of the statute is that "When a deposit shall have been made by any person in the name of such depositor and other person, and in form to be paid to either of them, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants," with survivorship rights. The Act's title defines the rights of parties "in bank deposits in *two* names," and § 1 mentions "another person" (singular) and refers to "either of them." Here the deposit was not originally *made* by Powell in his and another's name, but assuming, without deciding, that unrestricted directions to the bank to permit designated persons to check against the balance and to take the remainder following the depositor's death meet the statutory requirements, still in the case at bar we are met with Powell's express directions to Lynch limiting the rights of Almedia and Ernest Powell to any balance

that might remain after the principal depositor's death. [See marginal note No. 1 for directions to the bank].[1]

The signature card reads: "Title of account, S. F. Powell, Almedia Powell, W. E. Powell." These names were inserted by Lynch, and the three authorized signatures are appended. But to the right of these signatures, with a bracket cutoff, there was written: "After death of S. F. Powell."

Collateral facts tending to show intent are these: On the day the card was signed Powell and Almedia executed two warranty deeds. One conveyed 50 acres to Ernest, with a reservation that the grantee pay rent to Almedia during her lifetime; the other conveyed 40 acres to E. L. Powell and Gracie Powell Bishop as tenants in common, subject to a life estate in the grantors. A further provision was that if Gracie Bishop should predecease S. F. Powell, her rights would vest in E. L. Powell.[2]

A decree in Waelon's favor was predicated upon factual findings that S. F. Powell did not intend to relinquish dominion over the deposit until after death and that a trust was not established. While Lynch was certain that survivorship had been discussed and that Powell expressed a desire to have the account altered to accomplish that end, the printing copied in Marginal Note No. 1 was not read to him, and Lynch did not know whether Powell read it. A fair inference is that he did not. A high probability is that Powell expected to retain

[1] On one side of the card relied upon by appellants the printed heading is, "Joint Account—Payable to Either or Survivor." Beneath this heading the wording is: "We agree and declare that all funds now, or hereafter, deposited in this account are, and shall be our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account, or any part thereof, may be withdrawn by, or upon the order of, either of us or the survivor. S. F. Powell, Almedia Powell, W. E. Powell."

[2] After notifying Farmers Bank not to permit Ernest and Almedia Powell to withdraw any of the money, the original suit was filed by Zouline Powell, Lee's widow, and Waelon's mother. They named as defendants W. E. Powell, Almedia Powell, and Farmers Bank & Trust Co. James Terry, administrator of the estate of S. F. Powell, intervened.

the money as his own while living, but in the meantime desired an arrangement whereby his wife and Ernest could draw checks for his use. This conclusion is reinforced by the fact that after the card was signed neither Ernest nor Mrs. Powell utilized the account for individual purposes. Checks were written by Ernest, but all were signed "S. F. Powell," by Ernest, etc., and were for debts or purchases personal to S. F. Powell.

Act 260 was no doubt intended primarily for the protection of banks, for § 1 concludes, ". . . and such payment and the receipt and acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by one of such joint tenants not to pay such deposit in accordance with the terms thereof."

Consonant with our own decisions, the chancellor found that four essentials must be present in the creation of a joint tenancy: unity of interest, unity of title, unity of time, and unity of possession. *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125. Mr. Justice Robins quoted certain language that the court approved, then said: "Each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time, . . . and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole." The same requisites are emphasized in *Burns* v. *Nolette,* 83 N. H. 489, 144 A. 848, 67 A. L. R. 1051.

There is abundant evidence that either before or shortly after the last will was destroyed by Powell he stated that his intentions were to have all of the children share in his estate. Almedia testified that on December 27, when her husband first mentioned his purpose to make deeds to the realty, he said in effect: "As to my money, I am not going to do anything about that. I have one porch to fix and improvements to make and will spend the biggest part of it." She added, however, that Powell had said that when he got through with the

improvements he would leave the money to his wife and Ernest.

Ernest was not present when his father signed the deposit card, but when he (Ernest) affixed his signature and returned to the automobile where his father and stepmother were, the former said, "That is the way I want my money to go after my death." The bank president testified that Powell commented: "If I get to where I can't attend to business, Mrs. Powell and Ernest can attend to it for me." A factual finding was that Lynch did not, in his first testimony, recall whether anything was said about the right of survivorship; there was no lengthy discussion and "Powell did not indicate to [Lynch] that he wanted anything else, other that they could take care of the business if he couldn't."[3]

Appellants rely upon *Pye* v. *Higgason,* 210 Ark. 347, 195 S. W. 2d 632, insisting that the facts in that case and those here are so similar that no practical distinction can be drawn. Judge McHaney's opinion cited *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837, where it was held that a bank deposit in the joint names of husband and wife became the property of the widow as surviving tenant by the entirety, independent of Act 260 of 1937. But the Black case went further and said that the statute was not limited to deposits of husband and wife, "but applies to joint deposits of any two persons, and was, we think, passed for the protection of the bank in which the deposit was made."

In the Pye case an account was maintained in the Commercial Loan & Trust Company as shown in the fourth footnote.[4] It will be observed that there was no qualifying language, such as the restrictions directed by Powell to be placed upon the signature card.

[3] Quoted from the Chancellor's opinion.

[4] The direction was: "Below please find duly authorized signatures which you will recognize in payment of funds or the transaction of other business on my account. We, R. P. Pye and Miss Lill Higgason, have opened up a checking and savings account with the Com. L. & T. Co. These accounts are opened in this manner, R. P. Pye, and Miss Lill Higgason, payable to either of them and in the event of death payable to the survivor. It is our purpose to create an estate of entirety and we authorize this said bank to consider these two accounts as same."

Burks v. *Burks,* 222 Ark. 97, 257 S. W. 2d 369, comments on the trend of modern decisions to make a check the basis of a gift *causa mortis* where creditors are not concerned and where payment would carry out the unrevoked wishes of the donor. It was also said that where all of the testimony, and an indorsement on the check itself, disclosed an intent upon the donor's part that at the instant of death the money on deposit represented by the check should pass to the payee, effect should be given to such express wishes and to the factual transaction. In that case the check was a setting aside of the amount indicated, and there could be no doubt regarding the donor's purpose.

Even where statutes similar to Act 260 are in effect, some courts have declined to permit the established law of descent and distribution to be invaded where the lawmakers had not affirmatively shown an intent to alter existing rights. In *Godwin* v. *Godwin,* 141 Miss. 633, 107 So. 13, W. F. Godwin had his account changed so that it was in the name of "W. F. Godwin or Wife." The evidence showed that Godwin applied to the banker for advice as to how he might conduct his account so that his wife might have the balance remaining to his credit at death. The banker advised him (pursuant to § 3613 of Hemingway's Code) that if he made the account in the manner heretofore indicated and gave his wife the privilege of checking on it, it would become a joint account; and, in the event of the husband's death, proceeds would pass to the wife.

The court held that when the bank paid the money to Mrs. Godwin it was discharged, but she was accountable to the estate. Said Mr. Justice McGowen in writing the opinion: "The section [of the statutes], the latter part of which applies to joint deposits in a bank, . . . is a part of the chapter on banking, and does not undertake to deal with or in any wise amend our laws on descent and distribution of estates of decedents. Its main purpose was to provide for the release and discharge of a bank . . . However clear the intention of Mr. Godwin that his wife should have this fund, it

has been so repeatedly held by this court that there must be a delivery of the property intended to be donated, as to seem not to require an extended review of this question."

Our own cases, however, (where two persons were concerned) have held that such a relationship may be created with the right of survivorship. But the intent must be clear and free from inconsistent restrictions.

In view of the testimony of numerous witnesses who had heard Powell say he intended that his children should share equally in his property, the fact that he directed Lynch to restrict the account, the understanding of Mrs. Powell that her husband was "not going to do anything about the money"; Ernest's actions in signing his father's name to checks and in applying the funds to his father's affairs,—these and other facts and circumstances disclosed confused purposes of a character justifying the chancellor in reaching the conclusions he did.

Affirmed.

George Rose Smith, J., concurring. I concur for the reason that S. F. Powell, by directing that the joint bank account be ineffective until his death, undertook to retain complete title to the account until his own death. The arrangement was therefore testamentary and fails for noncompliance with the statute of wills.

Adams *v.* Summers.

5-276 263 S. W. 2d 711

Opinion delivered January 18, 1954.

Francis T. Donovan and *George F. Hartje,* for appellant.

Guy H. Jones, for appellee.

MINOR W. MILLWEE, Justice. On May 3, 1950, appellee, Mrs. H. V. Summers telephoned the "44 Taxi" service and requested a cab to take her to the Conway Memorial Hospital where she was employed as a practical nurse. Appellant Noel Moss, a cab operator, responded to the call in a car marked with "44 Taxi" on the door, and Mrs. Summers got into the front seat of the cab with the driver. She had thrown over her shoulders, but not buttoned, a large coat fastened at the neck with a pin; her arms were not in the sleeves of the coat. According to Mrs. Summers's testimony, upon arriving at the hospital she paid her fare to Moss, who reached over and opened the right front door, and just as she alighted Moss closed the door on her coat and drove off throwing her to the ground and dragging her some distance. While Moss denied that he closed the door on Mrs. Summers's coat, he admitted that he did not watch to see whether she had alighted safely before he drove off and stated that he knew nothing about the accident until he was called back to the hospital later.

On March 17, 1952, Mr. and Mrs. H. V. Summers brought this action for damages against appellant Jason Adams, doing business as "44 Taxi", and appellant Noel Moss as the agent, servant, and employee of Adams. The complaint alleged that Mrs. Summers had suffered various injuries; that she had formerly earned $200 per month as a practical nurse, and that by reason of her injuries she was permanently and totally disabled from performing any work or labor. Mr. Summers sought sums expended for medical care and hospital bills, and he asked damages for the loss of services of his wife.

From a judgment awarding Mrs. Summers $9,000 and Mr. Summers $1,000, appellants prosecute this appeal.

Appellants objected to various questions propounded by the attorney for appellee, on the ground that they were leading. Without setting out these questions, it is sufficient to say that the trial judge correctly ruled that they were posed in proper form.

Next appellants contend that error was committed in allowing the introduction of an advertisement published in a Conway newspaper in February, 1950, proclaiming that Jason Adams had purchased and assumed the management of the "44 Taxi Company," on the ground that the witness who testified concerning the ad had no personal knowledge of who inserted and paid for the ad and had not personally kept the newspaper's record book of advertising accounts from which he testified. In this connection the advertising manager of the newspaper testified that he solicited and handled all advertisements for the paper and that it was his duty to see that all ads were authorized. The permanent record of advertising accounts was kept under his supervision by another employee, and witness checked and verified the accounts at the end of each month. When witness was asked to state whether this record reflected the charge to Jason Adams in February, 1950, for the ad in question, appellants objected on the ground "that Adams was not the owner of the 44 Taxi at that time." Witness then testified, without objection, that the advertising record showed the charge to Jason Adams for the ad in question and that said account was paid in Jason's name on March 9, 1950. Witness further stated that he knew the account was correct and identified the ad in question as a part of the permanent records of the newspaper kept under his supervision, and it was introduced over appellants' objections and exceptions. In his testimony, Adams did not deny publication of the ad, or the truth of its contents, but merely stated that he did not remember publishing or paying for it.

Ark. Stats. § 28-928 recites: "In any court of record of the State, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event

or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." This act is identical with the federal statute (28 U. S. C. A. § 1732). In *Hoffman* v. *Palmer,* 129 Fed. 2d 976, affirmed 318 U. S. 109, 87 L. Ed. 645, 63 S. Ct. 477, it was held to be the intention of Congress, in enacting the statute, to bring the decisions of all federal courts into line with the modern rule to the effect that it is sufficient to show that an entry made in the regular course of business is contained in a book of regular entries maintained in the establishment without producing the particular person who made the entry or having him identify it. A similar rule prevails in many jurisdictions in the absence of statute. 32 C. J. S., Evidence, § 693b (1) (b). There is also clear precedent for the admission of records of established accuracy though the person making the record is not present, or his absence fully accounted for, in *Bush* v. *Taylor,* 136 Ark. 554, 207 S. W. 226. Too, Mrs. Summers testified on direct examination that she knew of her own knowledge that appellant Adams operated the "44 Taxi" and that she had seen it advertised in the paper. We hold that the advertisement of Jason Adams's to this effect, so notifying the general public and prospective passengers, was properly introduced in evidence.

Appellants also contend that a mistrial should have been declared because the matter of insurance was mentioned on two separate occasions at the trial. The first instance occurred when Mrs. Summers was asked to relate a conversation she had with Moss and she stated he wanted to know whether she expected him or the insurance [company] to pay. The court promptly sustained appellants' objection and admonished the jury to disregard the remark. Appellants saved no exceptions to the ruling and admonition of the court and did not ask for a mistrial. The second instance occurred in the following manner when Mrs. Summers was being cross-examined by counsel for appellants: "Q. Do you

remember giving a statement to Mr. Tankersly about this accident? A. Who is Mr. Tankersly? Q. Do you remember anyone coming out there and getting a statement from you or you signing a statement? A. No, sir. Q. You don't remember that? A. No, sir. Q. Didn't you say that my name is Effie Summers, I am 50 years of age, white, married, and reside at 531 Center Street —MR. JONES: If your honor please, I don't know what this is all about. BY THE COURT: Let her examine it. Is it purported to be a signed statement? MR. JONES: Is this an insurance report, I want to see it—MR. HARTJE: I object to that statement and ask the court not to consider what he said here. I am going to ask the Court to pass this case until the next term of court. THE COURT: Ladies and gentlemen of the jury. The remark has been made here about insurance. I have admonished you once before and I want to admonish you again, not to consider any statement with reference to insurance coverage. It has no place in the trial of this case pro or con, and you are not to consider it for any purpose. Let me see the statement that you are using as a basis for your question. WITNESS: I want to know who this party is that he had reference to. (Mr. Hartje hands instrument to the Court.) THE COURT: That statement is not admissible because it is not signed by her. Any part or portion of the purported statement that Mr. Hartje used as the basis of his questions you are directed not to consider that for any purpose at all and totally disregard it. I want you to keep that clear in your minds; go ahead, Mr. Hartje."

Now "Mr. Tankersly" was never identified and it may well have been that he was an insurance adjuster. If so, error was clearly invited by counsel for appellants. It should also be noted that counsel was not being exactly candid with the witness or the court in his method of interrogation; and that there were no exceptions taken nor a request for a mistrial made after the jury was admonished not to consider the whole matter. Aside from the fact that exceptions were not taken to the rulings of the trial court, we have repeatedly held that error

in bringing the insurance angle into a case can be cured by proper cautionary instructions of the trial judge where the error is not so flagrant as to produce a deep-seated and irremovable prejudice. *Central Coal and Coke Co.* v. *Orwig,* 150 Ark. 635, 235 S. W. 390; *Malco Theatres* v. *McClain,* 196 Ark. 188, 117 S. W. 2d 45; *Beatty* v. *Pilcher,* 218 Ark. 152, 235 S. W. 2d 40. Under the circumstances presented here, we are of the opinion that the prompt action of the court eliminated any prejudice resulting from the references to insurance.

Appellants also urge error in permitting the following question and answer: "Q. Is it more reasonable that a person of her size, sex and age would suffer more bruises and lacerations and shock from being drug by an automobile than a smaller person or a man or a younger person? A. Yes, sir." The witness in this interrogation was a doctor whose qualifications were admitted. Appellants contend that the jury was given the impression that there were probably more injuries than the doctor had told the jury about, and that the doctor's answer amounted to an opinion by one who was not an expert on the susceptibility to injury of persons of variated sizes, sexes, and ages. It is hard to see how appellants' case was prejudiced by this answer; also, it seems reasonable that a doctor, in his years of treating diverse persons for injuries, would become reasonably expert on the effect of certain accidents on persons differing in age, sex, and size. Appellants also objected to the following question and answer: "Q. As her doctor, did you do everything you could to mitigate her suffering? A. Yes, sir." Appellants say this interchange left the jury with the impression that medical science could do no more for appellee and that she would continue to suffer pain indefinitely. It is quite possible that that is precisely what the doctor did intend to tell the jury, and he was competent to do so.

Appellants also challenge the sufficiency of the evidence to support the verdict. The most serious question is the sufficiency of the evidence to support the finding of agency upon which the verdict against Jason Adams

was predicated. However, the newspaper advertisement discussed above announced Jason Adams to be the owner and operator of "44 Taxi." Adams admitted a modicum of control over the drivers when he testified that he would not allow them to drive while intoxicated, and the cabs bore the marking "44 Taxi" on their sides. These facts tended to show the existence of the employer-employee relationship. Appellants offered evidence to the effect that Adams did not own the cab operated by Moss and some of the other drivers who merely paid rental for use of the taxi stand when they chose to work. This presented a fact question for the jury's determination as to whether Moss was an employee or an independent contractor and the finding of the jury on this issue is binding on us. *Wright* v. *McDaniel,* 203 Ark. 992, 159 S. W. 2d 737; *Boone* v. *Massey,* 212 Ark. 280, 205 S. W. 2d 454; *Rose* v. *Black and White Cab Co.,* 222 Ark. 210, 258 S. W. 2d 50.

In *Plunkett-Jarrell Grocer Co.* v. *Freeman,* 192 Ark. 380, 92 S. W. 2d 849, the court quoted with approval from *Callas* v. *Independent Taxi Owners' Association,* 66 F. 2d 192: "There was no direct evidence as to who was the owner of the truck that inflicted the injury, nor as to who was in charge of it when the injury occurred. There was evidence, however, that the truck bore the name of the defendant company. This was sufficient to establish not only *prima facie* that the defendants were the owners of the truck, but also that it was then in charge of their servant or employee. This was presumptive evidence, and as has frequently been ruled, was quite sufficient to carry the case to the jury." See, also, *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 218, 35 S. W. 2d 1010. It has also been held that ownership of the cab is not a prerequisite of liability for a passenger's injuries under circumstances similar to those in the instant case. *Economy Cabs* v. *Kirkland,* 127 Fla. 867, 174 So. 222; 13 C. J. S., Carriers, § 701; Blashfield, Cyclopedia of Automobile Law and Practice, § 2213.50. The evidence here is sufficient to sustain the verdicts and the trial court correctly

refused to direct a verdict in favor of either of the appellants.

We cannot agree with appellants' further contention that the verdicts are excessive. According to the medical evidence offered by appellees, Mrs. Summers was rendered totally and permanently disabled to pursue her profession as a nurse by the injuries which she sustained and which resulted in thrombophlebitis and a coronary insufficiency. She incurred medical and hospital expenses of more than $3,800 and sustained a total loss of income from her profession by reason of her injuries. She has and will continue to suffer considerable pain, according to the testimony.

We have considered other assignments of error argued by appellants and find no prejudicial error in the record. The judgments are, therefore, affirmed.

HARDY *v.* HARDY.

5-112 263 S. W. 2d 690

Opinion delivered January 18, 1954.

Rose, Meek, House, Barron and *Nash,* for appellant.

Frank J. Wills and *Barber, Henry & Thurman,* for appellee.

J. Seaborn Holt, J. M. W. Hardy died testate November 13, 1929. He left surviving, his widow, Corinne Hardy, and three children, McCombs Hardy, born Jan-

uary 3, 1915, and Hope and Robert Hardy, twins, born February 6, 1926. The will named the First National Bank of El Dorado, Arkansas and Corinne Hardy, executors and trustees, and was duly probated in Pulaski County November 19, 1929. It directed the payment of all debts, gave to Mrs. Hardy the home, its contents, automobile, one-third of all personal property, "I may own at the time of my death," and one-third for life, of all his remaining realty, and that it was Mr. Hardy's purpose to give her the equivalent of what would be her dower interest in his estate in addition to the specific gifts. It directed that "the trustees and executors as soon as feasible and at any event within 2 years," set apart his wife's share and vested them with uncontrolled discretion and provided that their judgment should be final. It further provided: "The judgment of my said trustees, however, in prorating the income and profits from the main trust estate between my said children, so as to preserve equality of distribution between them shall be absolute and uncontrolled, and my trustees shall never be charged with any liability to any of my beneficiaries herein for mere errors of judgment." He also directed that the remainder of his estate go to trustees "to be held and administered for the sole use of my three children equally," and "for the gross income received or derived from the trust estate, or from the principal thereof, if the trustees deem that advisable, there shall be paid and discharged all taxes and assessments, costs, charges and expenses in the administration and protection of the trust estate, and the protection of this trust and its defense against legal or equitable attack both during and after the probate administration upon my estate including such compensation for their services as trustee as may be just, reasonable and customary."

The will further directed that the trustees deliver and vest absolutely in fee in each child at twenty-one, one-fourth of its share, at twenty-six, an undivided one-fourth, at the age of thirty, the balance, and when the youngest child reached thirty, the trust to terminate, and any unexpended balance of the special funds to be paid

to the child for whom it was set apart, with the further provision for the creation of three special trusts of $25,000 each for the education and maintenance of the three children.

The inventory and appraisement showed the following assets:

"Residence at 2400 Broadway, devised to wife	$37,640.00	
Specific personalty, bequeathed to wife	10,385.00	
Total specific gifts to wife		$ 48,025.00
Undivided ⅕ int. in 64,498.02 acres of cut over land in Bradley County	25,799.20	
Undivided interests in fee or minerals of lands in Union County and in Louisiana, Virginia and Mississippi	27,077.37	
Undivided ½ int. in fee and royalties in lands in Union and Ouachita Counties	133,643.20	186,519.77
Cash in banks and life insurance to estate	91,044.98	
Stocks	332,442.85	
Notes	2,426.42	
Other personalty	9,000.00	
Total personalty other than specific legacy		434,914.25
		$669,459.02"

The First National Bank of El Dorado, after serving as trustee for approximately two years, resigned on March 30, 1932, and there was filed an itemized statement of the transactions of the two trustees. On the same day a decree was entered in the Pulaski Probate Court accepting the bank's resignation, approving its acts, discharged the bank as trustee and vested all assets and powers of the trust in Corinne Hardy as surviving trustee, and directed her, as trustee, to file annual reports on February 1st of each year, following her appointment as trustee.

The decree further recited that "under the powers conferred by said will, the said trustees allotted to Corinne Hardy one-third in kind as near as could be of the personal property of said estate, and an undivided

one-third for life in all the real property of said estate," in addition to specific gifts.

On October 30, 1931, it appears that a decree had been entered adjudging that Corinne Hardy take her interest in the estate, as provided in the will, after she had elected to take under the will. Following the resignation of the bank as trustee and Corinne Hardy's appointment as sole trustee, she proceeded to administer the estate.

She filed her annual reports as the law required. In none of these annual reports did Corinne Hardy make any demand or claim for any fees for services as such trustee until she filed her sixteenth annual report on February 28, 1948.

McCombs Hardy, appellant, resisted his mother's claim for fees for services, as trustee, questioned her actions in administering the estate, and after Corinne Hardy had asked the Pulaski Probate Court for instructions, the court appointed Mr. Charles B. Thweatt, a prominent local attorney, to state an account between Corinne Hardy, trustee, and her three children, beneficiaries, under the will.

The record reflects that the Master heard testimony over an extended period, made a thorough study of the applicable law and authorities, and prepared a most scholarly and comprehensive report covering more than fifty pages, which he submitted to the court.

Thereupon, after consideration of the report and other testimony, decree was rendered as follows: "Being well and sufficiently advised, the court doth approve and confirm the Master's Report except as follows:

"(a) The Master surcharged Corinne Hardy, individually, with the sum of $5,950 which was paid to Cooper Jacoway from trust funds for his services in connection with the Bradley County timber lands and the partitioning thereof. The court directs that $1,983.33 of this amount be charged to McCombs Hardy and that only $3,966.67 be surcharged against Corinne Hardy.

"(b) The Master surcharged Corinne Hardy, individually, with $9,371.40 of the fees and expenses paid to Cooper Jacoway, exclusive of the fees paid for the Bradley County partition suit. The court reduces the amount to be surcharged against Corinne Hardy, individually, to $7,371.40 and directs that the Trust be charged with $2,000.

"(c) The Master found that Corinne Hardy had waived compensation for services up to and including the year 1947. The court sets aside that finding and directs that she be allowed 5% of the gross income from the Trust, and that McCombs Hardy be charged with a proportionate share thereof.

"(d) The Master allowed a fee of $30,000 for extraordinary services, one-third to be paid by McCombs Hardy. The court increases the fee to the trustee for such services to $60,000, and directs that one-third be charged to McCombs Hardy.

"The trustee is directed to file an accounting as of April 10, 1951, charging McCombs Hardy with the amounts herein directed to be charged against him and surcharging Corinne Hardy with the amounts herein directed. McCombs Hardy, Robert Hardy and Hope Hardy shall each be credited with one-third of the amount surcharged to Corinne Hardy, individually, and the account of each beneficiary shall be charged with one-third of the items directed in the Master's Report and in this Decree to be charged to the Trust.

"The Court overrules the motion filed by William McCombs Hardy to charge Corinne Hardy, individually, with a portion of the Master's fee of $7,500 and stenographic costs of $983 paid to Frances Copeland.

"Exceptions by all parties to all rulings.

"Dated 9-18-52."

Appellant, McCombs Hardy, has appealed from that part of the decree allowing Corinne Hardy $60,000 as fees for services rendered as trustee, and also contends

that the trial court erred "in reducing a surcharge against the trustee from $5,950 to $3,966.67 * * * and in reducing a surcharge of $9,371.40 to $7,371.40 * * * and in not charging Corinne Hardy, individually, with a portion of the accounting costs."

Corinne Hardy, joined by her two children, Hope and Robert, have cross-appealed, and all assert that "the Chancellor should be affirmed on direct appeal but reversed on cross-appeal with direction to surcharge the trustee's account only with her share of a reasonable fee in the Bradley County Partition suit attributable to her personal interest herein and with the further direction that she be allowed reasonable compensation based on annual income for 1948 and subsequent years and the balance due her under her husband's will."

—(1)—

We first consider the trial court's allowance of $60,000 as compensation to Corinne Hardy for services rendered the estate as trustee. She argues that for the period from 1932 through 1947, she was, under the law, entitled to 5% of the gross income from the trust, with 6% interest, but in any event that she is entitled to the above amount for services rendered in the nature of extraordinary services to the trust estate beyond the range of the ordinary duties of a trustee and which should be paid as a termination fee.

After a careful review of the record, we have reached the conclusion that Corinne Hardy, as trustee, is not entitled to any fees for services rendered on either of the above theories, which we shall consider together.

It appears practically undisputed that from the filing of her first annual report until her sixteenth annual report was filed in February, 1948, although each report showed that there was sufficient funds in her hands with which to pay fees for services,—for a period of nearly seventeen years,—she made no such claim for services. McCombs Hardy testified, that on several occasions during that period, his mother told him that she did not intend to charge any fees for services. Mrs.

Hardy did not deny her son's statement, but said she had in the background of her mind to charge for her services later. McCombs Hardy further testified, that in conducting his business and using the proceeds from his interest in the estate delivered to him by the trustee, he was relying upon his mother's promise to make no charge for her services.

Mrs. Hardy was a wealthy woman in her own right when she became trustee and was, it appears, not dependent on her interest in her husband's estate. It must be also borne in mind that she individually, and personally, had a substantial interest in the estate to protect, as well as the interests of her children. The preponderance of the testimony, as we view it, shows clearly, as found by the Master, that Corinne Hardy has waived any claim that she might have asserted to fees for services up to 1947. The Master's report recites: "A settlement of personal property was made with McCombs on January 24, 1947. It was complete with the exception of certain specific items which were to be later divided. No fee for the trustee was charged or mentioned at the time of the settlement. It is my opinion that the trustee has waived her right to compensation based on a percent of annual income for services prior to 1947."

The evidence further reflects that McCombs Hardy married in 1946, over the violent objections of his mother, and thereafter, she refused to allow him to bring his wife into her home and McCombs refused to go to his mother's home without his wife. It appears that there was no apparent reason for Mrs. Hardy's objection to the marriage. There is not a syllable of evidence of criticism against this young woman whom McCombs chose for his wife. However, it appears that from the date of McComb's marriage, his mother assumed an antagonistic and unnatural attitude toward him, wholly without cause, and thereafter, she proceeded to deal with her own son at arms' length, as she would a stranger. She refused to deliver to him his interests in the estate which were due him under the clear and unambiguous directions con-

tained in the will, and on two occasions, he was forced to go to the expense and worry of bringing suits to enforce his obvious rights. *Hardy* v. *Hardy,* 217 Ark. 296, 230 S. W. 2d 6, and *Hardy* v. *Hardy,* 217 Ark. 305, 230 S. W. 2d 11.

The duties of a trustee have been many times announced in our decisions. The text writer in 54 Am. Jur. 246, *et seq.,* announced some of the general rules as to the duties of trustees in this language: "A trustee must act in good faith in the administration of the trust, and this requirement means that he must act honestly and with finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length in the workaday world, but with a punctilio of honor the most sensitive. * * *

"A trustee in his administration of the trust is under the duty of acting exclusively and solely in the interest of the trust estate or the beneficiaries. * * * He may not without breach of duty take part in any transaction concerning the trust, where he has an interest in such transaction adverse to that of the beneficiary. * * *

"A trustee is at all times disabled from obtaining any personal benefit, advantage, gain, or profit out of his administration of the trust. * * * Any benefit or profit obtained by the trustee inures to the trust estate, even though no injury was intended and none was in fact done to the trust estate," and in the recent case of *Hardy* v. *Hardy,* 217 Ark. 296, 230 S. W. 2d 6, we said:

" 'As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty.' * * *

"In the performance of duties imposed upon a trustee it is the general rule that the trustee must exercise skill, prudence and caution and that he represents and

must protect the interest of all the beneficiaries and that he must act honestly and in utmost good faith. In administering the trust, the trustee must act for the beneficiaries and not for himself in antagonism to the interest of the beneficiaries; he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the beneficiaries and from placing himself in any position where his self-interest will, or may, conflict with his duties. * * *

" 'The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.' "

In the case of *Cook, et al.* v. *Stockwell, et al.,* 206 N. Y. 481, 100 N. E. 131, in which similar facts were involved, as here, where it appeared that the trustees had paid to the beneficiary the full net income of the trust fund without deducting any commission, that court said: "These facts warrant the conclusion that the trustees intended to waive any claim to commissions on the income. The statute allows commissions to executors and trustees; but they may waive them, if they wish, and, if there be any evidence of a waiver, their legal representatives are in no position to dispute it. The case falls, plainly, within our recent decision in *Olcott* v. *Baldwin,* 190 N. Y. 99, 109, 82 N. E. 748; where the trustees for eighteen years paid to the beneficiary the full net income of the funds, without deducting their commissions."

The rule is stated in Scott on Trusts, Vol. 2, p. 1396, § 242.8, in this language: "If the trustee pays income to the beneficiaries who are entitled to income and does not deduct the compensation to which he is entitled, evidencing an intention to make no claim to such compensation, he cannot thereafter require the beneficiaries to pay him such compensation, nor is he entitled to such compensation out of income subsequently accruing."

As to extraordinary services,—in effect, services beyond the line of the ordinary duties of a trustee,—compensation for such extraordinary services "will be allowed a trustee for services in the administration of

the trust of a character not usually rendered by trustees; for example, a trustee who is also a lawyer may be allowed compensation for necessary services of a professional character rendered for the trust estate." 54 Am. Jur., § 532, page 420.

We think the preponderance of the testimony shows that Corinne Hardy rendered no services in handling this trust,—in which, as indicated, she was individually and personally interested,—which did not fall within the classification of an ordinary trustee.

Briefly, she collected and distributed income, invested surplus funds and securities, and held timber lands that had been turned over to her as assets of the trust, which appear to have materially increased in value through the years. While it is true that on occasions she loaned money to the trust (again protecting her own interest as well as that of her children's trust) but this money was repaid to her, so we are unable to find anything that she did that she was not required to do under the will, and as trustee. "A trustee may reasonably be allowed compensation for any specific service, not included in the ordinary range of a trustee's duties and not covered by the commissions awarded, even though he had agreed to render the ordinary services of a trustee gratuitously; but the rule allowing compensation for extraordinary services does not apply to services which the trustee is required by will to perform as one of the ordinary duties in the trust management," 65 C. J., § 813, p. 915, and in Restatement of the Law of Trusts, ch. 7, § 242, p. 742, the text writer says:

"d. Extra Services. In the absence of a statute providing a definite rule fixing the amount of the trustee's compensation, a trustee who renders professional or other services not usually rendered by trustees in the administration of the trust, as for example services as attorney or as real estate agent, may be awarded extra compensation for such services. In fixing the amount of such compensation the court will allow an amount which under all the circumstances it considers to represent the fair value of the services."

While, as indicated, the timber lands which the trustee continued to hold through the years have substantially increased in value, we do not think Mrs. Hardy has shown such foresight and skill in holding this land intact that would warrant extraordinary compensation. She was doing only her plain and ordinary duty as trustee, as we see it.

In the case of *In re Brannan's Estate,* 215 Pa. 272, 64 A. 537, the court said: "Real estate owned by the decedent was a single property which the trustees sold for $80,000. Upon this gross sum in addition to the commission of 2½ per cent. which was allowed by the auditing judge, the accountants claimed as compensation $6,242.40. The basis of this claim was the increase in value of the property above its assessment at the death of the testator. This increase, however, was only a reflex of the natural growth of the city values during the period covered by the trust. The trustees were enabled by these conditions to lease advantageously and afterwards to sell the real estate, but the foresight and skill displayed in the transaction were not of a character to demand an extraordinary recompense, and were fairly measured by the auditing judge."

In Bogert Trusts-Trustees, Vol. 4, Part 2, p. 386, § 976, ch. 46, we find this language: "Allowances of extra compensation, over and above the statutory rate or the amount usually granted by the court in the exercise of the discretion, are discouraged, and should never be given for the performance of the ordinary duties of a trustee."

—(2)—

The record discloses that Corinne Hardy paid Cooper Jacoway $23,393.94 attorney's fees. Of this amount, the item of $5,950 was dealt with by the trial court in paragraph (a) of the above decree and the item of $9,371.40 was dealt with in paragraph (b) of the decree. As indicated, the Master, after most careful consideration, had surcharged Corinne Hardy, individually, with these two items (aggregating $15,321.40) and we

think on the record he was warranted in so doing. We hold that the trial court erred in disturbing the Master's report and findings as to these two items and that no part thereof should be charged to McCombs Hardy. It appears, as pointed out by the Master, that Corinne Hardy had an undivided interest in the Bradley County lands of 36.77% and a one-third interest for life in all of the other lands. These interests were clearly outside of the trust. The Master found that she had litigated the two cases (above referred to) to this court. She was required to pay costs in these cases, which she charged to trust funds. We hold, as indicated, that the Master's findings and report should not be disturbed.

There was no error in the decree charging the Master's fee of $7,500 and stenographic costs of $983.00 to the trust, and the court's refusal to charge these two items to Corinne Hardy, individually.

The decree is reversed on direct appeal and affirmed on cross-appeal.

ED. F. MCFADDIN, Justice (dissenting in part). The majority opinion says: "The record reflects that the master heard testimony over an extended period, made a thorough study of the applicable law and authorities, and prepared a most scholarly and comprehensive report covering more than fifty pages, which he submitted to the Court."

I thoroughly agree with the above quoted statement; and I believe that the master's report was correct and the Chancery Court should have approved it in every detail.

Therefore, my conclusion is to reverse so much of the Chancery decree as failed to follow the master's report, and to reinstate the master's report *in toto*.

5-268 263 S. W. 2d 689

Opinion delivered January 18, 1954.

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

GEORGE ROSE SMITH, J. By this suit Nova Coffey Hughes seeks to obtain cancellation of a declaration of trust involving a house and lot in the town of Nettleton. The defendants are the plaintiff's former husband, Elmer Coffey, Sr., and the couple's six-year-old son, Elmer, Jr. After a hearing at which no testimony was offered by the defendants the chancellor dismissed the complaint for want of equity.

Elmer and Nova Coffey were divorced in October of 1948, custody of their child being awarded to Mrs. Coffey. On September 18 of that year Mrs. Coffey had

bought the property now in question, making her down payment with funds received under a property settlement entered into in connection with the contemplated divorce. On the day the house and lot were purchased Mrs. Coffey executed the declaration of trust that she now seeks to cancel. By that instrument she declared that she held the property in trust for her son. The declaration provides that during the child's minority the income from the property shall be used for the support of Mrs. Coffey and the child. After the child attains his majority the income is to be used for the mother's support alone. Mrs. Coffey reserves the power to convey the property to her son at any time, and if it has not been so conveyed during her lifetime the title shall pass to Elmer, Jr., at her death. Mrs. Coffey did not reserve in the instrument the power to revoke or modify the trust. Her husband joined in the instrument to release his curtesy, and the declaration was duly acknowledged and recorded on the day of its execution.

We find no basis in fact or in law for canceling this instrument. Mrs. Hughes, in testifying at what amounted to an *ex parte* hearing, did not contend that her approval of the document had been obtained by fraud, duress, or undue influence. She merely says that, although she signed some papers in the office of her husband's attorney, she has no recollection of having signed this instrument. Neither this attorney nor the notary public who took the acknowledgment was called as a witness. We need not cite cases to show that a solemn written instrument, vesting valuable property rights in the infant beneficiary, cannot be set aside upon such flimsy evidence.

Nor is there merit in the appellant's various arguments that the instrument is invalid as a matter of law. It is said that no consideration is shown to have been paid for the declaration of trust, but none was necessary. Rest., Trusts, § 28. It is likewise immaterial that the instrument fails to specify how the income is to be divided between the mother and the child during the latter's minority, for the law imposes upon the trustee the duty of dealing impartially with two or more benefici-

aries. *Ibid.*, § 183. Finally, the instrument is not testamentary in character, since the child's interest vested upon the execution of the declaration, even though his possessory enjoyment was postponed. *Ibid.*, § 56.

Affirmed.

CITY OF MARIANNA *v.* GRAY.

5-274 265 S. W. 2d 496

Opinion delivered January 25, 1954.

Rehearing denied March 22, 1954.

G. H. Burke and *F. N. Burke,* for appellant.

D. D. Panich, for appellee.

J. SEABORN HOLT, J. Whether the trial court correctly overruled appellants' demurrer to appellee's amended complaint is the question presented. We have concluded that the court erred in refusing to sustain the demurrer.

It appears that this is the second appeal in this case, *City of Marianna* v. *Gray,* 220 Ark. 468, 248 S. W. 2d 379. On the former appeal, we held that the trial court erred in overruling the demurrer. On remand, appellee amended his complaint. Appellants, as on the

former appeal, demurred on the ground that appellee had again failed to state a cause of action. As indicated, the trial court overruled this demurrer. Appellants elected to stand on their demurrer, refused to plead further, prayed, and were granted an appeal.

After a careful consideration of appellee's amended complaint, we hold that it contained, in effect, the same facts and allegations that were alleged in his original complaint, and amounted to no more than enlargements thereon. His allegations that the City of Marianna had acted in an arbitrary, unreasonable, and discriminatory manner were also made in his original complaint, and were but opinions and conclusions which are not admitted on demurrer.

Appellee's making a plat a part of his amended complaint, which was not made a part of his original complaint, added no new material facts. In both the original and amended complaint, appellee alleged, in effect, that his store was located at 114 West Main Street, that its size is 30′ x 11.9′, that he had no means of ingress and egress thereto except through the front door, that he could obtain no other means of ingress and egress, that the City had designated certain parking space for the exclusive use of physicians, that the spaces marked and designated for meters vary in length, and that the City has marked off thirteen spaces for meters on the north side of West Main Street in the block in which his store building is located and are one foot longer than the spaces on the opposite (south) side of the street. The plat tended to verify and explain these locations and added no new facts.

We hold that the enlarged allegations in the amended complaint present no issues that were not fully considered and decided in our former opinion and that that opinion is controlling here. No useful purpose could be served in reiterating what we there said.

The decree is reversed and the cause is remanded with instructions to sustain appellants' demurrer.

Opinion delivered January 25, 1954.

Rehearing denied March 8, 1954.

Frank J. Wills, for appellant.

Yingling & Yingling, for appellee.

ED. F. MCFADDIN, J. The question posed is whether a certain restrictive covenant should be cancelled as a cloud on the title of the plaintiff property owners. The

Chancery Court granted the prayed relief; and by this appeal the defendant challenges the correctness of the decree.

For several years prior to April, 1946, the Lakeside Lumber Company (a partnership composed of Paul Leird and others, and hereinafter called "Lakeside") owned a tract of approximately 115 acres situated East of the City of Searcy. Near the center of this 115-acre tract there was an artificial body of water covering several acres and called "Lake Doniphan." The mill and houses of Lakeside were on the East side of Lake Doniphan; and the lands on the West side of Lake Doniphan were wooded and used for pasture purposes. The lake served as a source of water for the mill and also as a swimming pool for the mill's employees.

On April 15, 1946, (after it was already known that U. S. Highway No. 67 would be re-routed so as to pass through this 115-acre tract) Lakeside conveyed to the appellant, Linder Corp. (hereinafter called "Linder"), the Lakeside mill and equipment and all of the 115-acre tract lying East of the center line of Lake Doniphan; and the deed from Lakeside to Linder contained this restrictive covenant as regards the lands lying West of the center line of Lake Doniphan:

"We the undersigned further covenant with the said Linder Corporation that we will file a plat and bill of assurance subdividing the property which we now own on the West side of Lake Doniphan into six (6) building lots and that we will restrict the use of said lots to residential purposes requiring that no residence be built thereon to cost less than Seven Thousand, Five Hundred Dollars ($7,500.00)."

The foregoing quoted language will be hereinafter referred to as "the restrictive covenant." Lakeside did not file the plat or bill of assurance, but in July, 1947, conveyed all of its lands lying West of the center line of Lake Doniphan to appellees, Pyeatt and Vaughan by a Deed which stated that the conveyed lands were subject

to "the following encumbrances, to which this conveyance is made subject, to-wit:

"(1) A right-of-way for U. S. Highway No. 67 as now surveyed and under construction across portions of the above described lands.

"(2) The following covenant contained in the deed from Lakeside Lumber Company, the partnership aforesaid, to Linder Corporation, which is of record in the office of the Circuit Clerk and Ex-Officio Recorder of White County, Arkansas, which reads as follows:

"'We the undersigned further covenant with the said Linder Corporation that we will file a plat and bill of assurance subdividing the property which we now own on the West side of Lake Doniphan into six (6) building lots and that we will restrict the use of said lots to residential purposes requiring that no residence be built thereon to cost less than seven thousand five hundred dollars ($7,500.00).'

"The grantees herein assume the aforesaid undertaking and covenant in the aforesaid deed to the Linder Corporation, and do hereby agree to save the grantors harmless from any loss, damage or expense hereafter incurred by the grantors by reason of any failure, if any, of the grantees to fulfill said covenant."

It will be observed that the restrictive covenant contained in the deed from Lakeside to Linder was carried verbatim in the deed from Lakeside to Pyeatt and Vaughan.

Instead of dividing the lands lying West of the center line of Lake Doniphan into six lots and restricting all of the said lots as to cost of residential buildings, as stated in the foregoing restrictive covenant, the said Pyeatt and Vaughan in 1950 subdivided the said lands into *23 lots* known as "Lakewood Addition", and omitted all restrictions on two of the lots. Pyeatt and Vaughan then sold some of the 23 lots to other parties, who are co-plaintiffs with Pyeatt and Vaughan in this suit.

On October 13, 1952, Pyeatt and Vaughan and the other owners of lots in Lakewood Addition filed this present suit against Linder claiming: (a) that the restrictive covenant contained in the deed from Lakeside to Linder, and also in the deed from Lakeside to Pyeatt and Vaughan, was ambiguous and void; (b) that the said restrictive covenant was arbitrary, unreasonable and void; and (c) that the said restrictive covenant worked an undue hardship and should be declared void due to changed conditions. Linder resisted the complaint on all points, but the Chancery Court granted the prayed relief; and Linder has appealed.

I. *Parol Testimony To Explain The Restrictive Covenant.* The cases uniformly hold (a) that when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed; and (b) that if the language is plain and unambiguous, it is unnecessary and improper to inquire into the surrounding circumstances or the objects and purposes of the restriction for aid in its construction, because when the language is clear and unambiguous it needs no evidence to explain it. Some of the cases so holding are *Highland Realty Co.* v. *Groves,* 130 Ky. 374, 113 S. W. 420; *Porter* v. *Johnson,* 232 Mo. App. 1150, 115 S. W. 2d 529; *Hilsinger* v. *Schwartz,* 99 N. J. Eq. 288, 133 Atl. 184; *Moore* v. *Kimball,* 291 Mich. 455, 289 N. W. 213; and *Woodward* v. *Carey,* 321 Mich. 163, 32 N. W. 2d 428. Other cases sustaining the rule may be found in 26 C. J. S. 518.

On the theory that the language used in the restrictive covenant here involved was ambiguous, the Chancery Court allowed the plaintiffs to introduce oral evidence relating to the circumstances existing and conversations between the parties at the time when Lakeside conveyed to Linder the land East of the center line of the Lake, and also when Lakeside conveyed to Pyeatt and Vaughan the land West of the center line of the Lake. We hold that the language in the restrictive covenant was plain and unambiguous and that the said testimony, as to the circumstances and conversations,

should not have been received. Lakeside agreed with Linder that Lakeside would subdivide "the property we now own on the West side of Lake Doniphan into six building lots . . ." That language is about as clear as the English language can be made. It referred to the entire tract and not merely the part fronting on the Lake. When the restrictive covenant said "into six building lots" it meant six, and could not be understood to mean *not less than six building lots*. When Pyeatt and Vaughan received their deed from Lakeside it contained the same clear, unambiguous language in the restrictive covenant. Thus there was no ambiguity to be explained; and the Chancery Court was in error in allowing oral evidence to be introduced which in effect sought to vary or contradict the clear and unambiguous language.

II. *The Restriction As Arbitrary.* The plaintiffs argue that the restrictive covenant was arbitrary and void; and they cite our case of *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446, in which we quoted the rule as follows:

"'Stated another way, equity should entertain jurisdiction to cancel a restrictive covenant in a deed where it would be oppressive and inequitable to give the restriction effect as where the enforcement would have no other result than to harass or injure the one without accomplishing the purposes for which originally made.'"

Oral testimony was properly admissible on this question, but such oral testimony established that there was a real reason why Linder wanted to limit the number of lots into which the West side property could be subdivided: on the East side of the Lake, Linder had more than 50 houses for its employees, and these employees used the Lake for swimming; also Linder used water from the Lake to operate its wood mill. An excessive number of people, living in the property West of the Lake and using the Lake, would materially interfere with Linder's use. Thus the restriction imposed by Linder was not designed to merely harass and injure the persons owning the property West of the Lake but was

to accomplish a real benefit for the property East of the Lake.

III. *Change In Character Of The Neighborhood.* The plaintiffs urged in the Trial Court that there had been such a change in the character of the neighborhood of the property West of the Lake—between the date of the restriction in 1946 and the filing of this suit in 1952—that the restrictive covenant had become obsolete. A discussion of this matter of "Change in Character of the Neighborhood" may be found in 14 Am. Jur. 646 et seq.; and Annotations may be found in 54 A. L. R. 812 and 4 A. L. R. 2d 1111. In *City of Little Rock* v. *Joyner* we recognized that a change in the nature of the neighborhood might make the enforcement of the restrictive covenant to be oppressive and inequitable.

But the facts shown in this case present no such situation as to render the restrictive covenant void on this basis. When Lakeside conveyed the property to Linder in 1946 it was well known that the highway was to be re-routed so as to pass through the Lakeside property West of Lake Doniphan. Vaughan introduced a sketch that he made before Pyeatt and Vaughan purchased the property from Lakeside, and in that sketch (which is Exhibit 5 in the record) Vaughan showed the location of the new highway with its various intersecting roads and showed the proposed subdividing of the property. It was intended at that time that residences would be built on the property West of the Lake, and that is exactly what has happened. There has been no change of neighborhood within the purview of the cases. This is a case in which real estate developers want to make 23 lots out of an addition instead of merely 6 lots, as provided by the restrictive covenant.

It follows that the decree of the Chancery Court is reversed and the cause is remanded with directions that the complaint be dismissed for want of equity, and for further proceedings not inconsistent with this opinion.

Mr. Justice Ward dissents.

DUNCAN *v.* BAXTER.

5-260 264 S. W. 2d 395

Opinion delivered January 25, 1954.

Rehearing denied March 1, 1954.

John F. Gibson, for appellant.

Clifton Bond and *DuVal L. Purkins,* for appellee.

ROBINSON, J. This is a case wherein a landlord obtained from the government a loan on cotton produced by a tenant, the money thus obtained being divided properly with the tenant. But later, upon the sale of the cotton, the landlord was paid an additional sum which he did not divide with the tenant. The tenant filed this suit alleging that he is entitled to ¾ of the additional sum received by the landlord; the landlord contends that he

became the owner of the tenant's interest in the cotton upon a final settlement of the parties in the farming operation. Over the objection and exceptions of appellant, the cause was transferred to equity and there was a decree in favor of the landlord. The tenant appeals. We only reach the issue of whether equity has jurisdiction of the cause.

The appellant, Paul Duncan, was the plaintiff in the Circuit Court and alleges in his complaint that in the fall of 1947 he and the appellee, John Baxter, entered into an agreement whereby Duncan rented from Baxter farm lands, and as rent Baxter was to receive ¼ of all cotton produced; that during the crop year of 1948 477 bales of cotton were produced, which by agreement of the parties were placed under loan with the Production & Marketing Administration of the Department of Agriculture of the U. S. government. At that time the money paid by the government was properly accounted for. The complaint further alleges it was agreed between the parties that if the government paid any additional sum upon the sale of the cotton, Duncan was to receive ¾ of such amount and Baxter ¼; that in 1951 the government sold the cotton and it brought in excess of the original loan, plus expenses, $14,310 which was paid by the government to Baxter; that Duncan was entitled to ¾ of that sum which Baxter has failed and refused to pay to him; and prayed judgment against Baxter for $10,732.50.

Baxter filed a motion to require the plaintiff to make the complaint more definite and certain. The court granted the motion and required plaintiff to name in the complaint his sharecroppers that might have an interest in the proceeds of the cotton. These sharecroppers of Duncan's were his employees. *Hardeman* v. *Arthurs,* 144 Ark. 289, 222 S. W. 20. The court erred in requiring the plaintiff to name them in his complaint, as it only tended to confuse and becloud the real issue. It was no concern of Baxter as to whether they were ever paid by Duncan as Baxter was in no way morally or legally obligated to look after the interests of Duncan's employees any more so than it was Baxter's duty or obligation to

look after any other creditor of Duncan, and they are not parties to this litigation.

Next, Baxter filed an answer and motion to transfer the cause to equity which was done over the objection and exception of Duncan. Later, after the case had been transferred to the Chancery Court, Baxter filed an amended and substituted answer and motion to transfer to equity. Appellant filed a motion to transfer the cause back to Circuit Court which was overruled over the objection of appellant.

The answer alleges that in March, 1950, the relationship of landlord and tenant between the parties was terminated; that at that time Duncan was indebted to the Bank of Dermott in an unnamed amount and was indebted to Baxter in the amount of $12,865.62; that the bank had a mortgage on Duncan's personal property to secure its indebtedness; that Duncan delivered to Baxter the personal property; that the value of the personal property was not sufficient to offset Duncan's debts to both the bank and Baxter; and that Duncan had released all of his interest in the cotton to Baxter in addition to turning over his equipment as aforesaid; and that this constituted a final settlement between the parties. In addition several principles of equity are alleged as applying to the case; estoppel, necessity of an accounting, the existence of a trust, request for the reformation of a contract, a lien, equitable conversion, and no adequate remedy at law. However, no facts are pleaded which support any of these principles of equity. In fact the answer itself shows that none of these doctrines is applicable. The mere allegation of an equitable principle is a conclusion, and when no facts are alleged to support such principle the allegation is not sufficient to give equity jurisdiction. In *Cosby* v. *Hurst,* 149 Ark. 11, 231 S. W. 194, Chief Justice McCulloch, speaking for the court, said: "Nothing is added to the force of the complaint by the formal statement that appellee had no adequate remedy at law. That was a mere conclusion, and according to the facts alleged there was no reason why a gar-

nishment in an action at law would not have afforded an adequate remedy."

As to the allegation of estoppel, appellee says appellant is estopped from claiming a part of the money contended for because his interest in the cotton was transferred to Baxter at the time of the final settlement. If Duncan transferred his interest in the cotton to Baxter as alleged, that in itself is a complete defense for Baxter and the principle of estoppel does not enter the picture at all.

As to an accounting, it is claimed that one is necessary to determine the amount Baxter received from the government on the Duncan cotton, and yet the answer specifically alleges that both parties have a record of each bale of cotton grown and produced in 1948 by Duncan or his sharecroppers, and the bale numbers, compress weights, and loan price received; and it does not appear that any accounting would be necessary to determine the final amount paid by the government.

The answer alleges that in the event the court should find that it was not agreed at the time of the final settlement that Duncan's interest in the cotton was transferred to Baxter, the court should now reform the agreement in that respect. Of course, if there was no agreement between the parties that Duncan's interest was transferred to Baxter, then the court has nothing to reform. The court cannot make a contract for parties that the parties themselves do not agree to, either expressly or by implication.

As to a lien, Baxter needs no lien to effect the collection of his interest; he has the whole. He is either liable to Duncan for ¾ of it or he is not so liable. There is no contention that he is not entitled to keep the ¼.

The answer also alleges equitable conversion, but there are no facts alleged to support a conversion.

It is also alleged that there is no adequate remedy at law, but there is such a remedy as shown by the pleadings. In fact, this is a simple question to be decided by

a jury as to whether at the time of the final settlement between the parties it was agreed that Duncan released his interest in the cotton to Baxter. If as a part of the final settlement it was agreed that Baxter should own all interest in the cotton, that is the end of the matter. On the other hand, if Duncan's interest in the cotton was not released in the final settlement, then Baxter is liable to Duncan for ¾ of whatever amount was received from the government on the cotton in 1951.

Reversed with directions to transfer to Circuit Court.

ED. F. MCFADDIN, Justice (dissenting). I dissent from that portion of the majority opinion which holds that the case should not have been transferred to equity. The rules enunciated throughout our cases are: (a) that if either the relief sought or the defense made is cognizable exclusively in chancery, then the case should be transferred to equity; and also (b) that if the law court cannot afford complete and adequate relief, the cause should be transferred to equity. *Daniel* v. *Garner,* 71 Ark. 484, 76 S. W. 1063; *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467; *Smith* v. *Pinnell,* 107 Ark. 185, 154 S. W. 497; and *American Surety Co.* v. *Vann,* 135 Ark. 291, 205 S. W. 646.

Measured by the foregoing rules, I earnestly maintain that this case was properly transferred to equity. The majority opinion says:

". . . no facts are pleaded which support any of these principles of equity. In fact the answer itself shows that none of these doctrines is applicable. The mere allegation of an equitable principle is a conclusion, and when no facts are alleged to support such principle, the allegation is not sufficient to give equity jurisdiction."

As I read the pleadings, the grounds for equity were sufficiently and minutely detailed. The complaint of the plaintiff established a trust, and here is the allegation:

"That by virtue of the agreement entered into by the defendant, John Baxter, the defendant, John Baxter, agreed that he would pay to the plaintiff his *pro rata* share of the proceeds of the government loan which might

be received from said cotton by virtue of its disposal or sale by the United States Government.

"Plaintiff states that the United States Government did dispose of the 477 bales of cotton which was produced by the plaintiff, Paul Duncan, and according to their loan agreement, paid the net proceeds of said sale to the defendant, John Baxter."

The Government loan agreement, referred to in the foregoing quoted section of the complaint, was an exhibit, and has this language in it, signed and agreed to by Baxter as the producer:

"4. The producer agrees that if any tenant or sharecropper has an interest in the cotton, such tenant or sharecropper will be paid his *pro rata* share of the proceeds of the loan and his *pro rata* share of any additional proceeds received from the cotton."

Thus Duncan's case was bottomed on the theory of an express trust growing out of the foregoing and last quoted language. I maintain that Duncan's complaint showed on its face the essential of equity jurisdiction—that is, the enforcement of a trust. Equity has exclusive jurisdiction of trusts. *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848; *Ferguson* v. *Rogers,* 129 Ark. 197, 195 S. W. 22; *Blanton* v. *First National Bank,* 136 Ark. 441, 206 S. W. 745; and *Simpson* v. *Brooks,* 208 Ark. 1093, 189 S. W. 2d 364.

But when we examine Baxter's answer and motion to transfer to equity, we find *detailed allegations* concerning the necessity of equitable intervention. Baxter had pleaded that Duncan entered into a full and complete settlement with him and released all of his interest in the government loan cotton, so in his answer and cross-complaint and motion to transfer to equity, Baxter made these detailed allegations:

"That if Duncan in the face of his release and relinquishment to Baxter at the time of the mutual termination of their relationship has any claim against Baxter from the proceeds of the ultimate sale of the cotton, the receipt

and release of Duncan executed by Dermott State Bank and Baxter should be cancelled and set aside for mutual mistake, and, Baxter be allowed to assert his claim against Duncan for the balance owing Baxter by Duncan to the extent of $12,865.62, together with interest. That only a Court of Equity can rescind and set aside the mutual agreement voluntarily executed and made between Baxter and Duncan at the termination of the landlord and tenant relationship, and, determine, impress or fix a lien for such unpaid advances to Duncan made by Baxter. That if Baxter is held to account to Duncan for any sums received by Baxter as Trustee for Duncan, his sharecroppers and Baxter, only a Court of Equity can declare the trust, fix the respective interests in said trust funds and impress Baxter's lien to the extent of Baxter's part in such proceeds, if any, for which Baxter is held to account.

"That unless this cause is transferred to the Chancery Court, Baxter has no complete and adequate remedy at law to set aside for mutual mistake his receipt to Duncan which he executed at the termination of their relationship and for an accounting on sums due him by Duncan; for determination of the extent of his liability as a Trustee, if any, to Duncan, his tenants and himself; or, the recovery of $12,865.62 owing Baxter by Duncan and for which sum Baxter would be entitled to have a lien impressed in the nature of an equitable conversion on any money which may be determined Baxter may have received from the United States Government as Trustee and for which he might be held to account to Duncan."

Thus there were detailed allegations of the defenses of (a) recision because of mutual mistake, (b) the necessity of bringing in sharecroppers to have an accounting, and (c) the trust feature of the case. The significant fact is that when the case was transferred to equity, the Court did declare a *trust* in favor of some of the sharecroppers to the extent of $911.58; and that amount of money was paid by Baxter into the Registry of the Chancery Court. This certainly made a case for equity jurisdiction under the authorities previously cited in regard to exclusive equity jurisdiction in the matter of trusts.

In the light of the foregoing, I respectfully dissent from the majority, which has held that this case should not have been transferred to equity.

Justices MILLWEE and WARD join in this dissent.

CITY OF BERRYVILLE *v.* BINAM.

5-218 264 S. W. 2d 421

Opinion delivered January 25, 1954.

Rehearing denied March 1, 1954.

J. E. Simpson, for appellant.

H. G. Leathers, for appellee.

MINOR W. MILLWEE, Justice. Appellee, W. H. Binam, brought this action against appellant, City of Berryville, on March 5, 1952, to recover back salary allegedly due him as city marshal for the months of October, November and December, 1951, and January and February, 1952, at the rate of $100 per month. Although the city denied it was indebted to appellee in any amount, it tendered with its answer "the sum of $1.00 per month for the full time for which plaintiff has not been paid." Trial by the circuit judge, sitting as a jury, was concluded November 24, 1952, and the case taken under advisement. On February 2, 1953, the court entered judgment for appellee for $1,500, representing back salary of $100 per month for October, 1951, to December, 1952, inclusive.

According to the testimony offered by appellee, he was elected city marshal for a two-year term in April, 1948. By Act 307 of 1949, the time of holding municipal elections was changed from April to November, with the elected officials taking office January 1 thereafter. This act extended appellee's term to January 1, 1951. Appellee was not a candidate for city marshal in the election held in November, 1950, but instead was a candidate for and elected to the office of constable.

Another person elected marshal in November, 1950, failed to qualify, and appellee did not qualify as constable. According to his testimony, he held over as city marshal and was still serving as such at the time of the trial in November, 1952.

At the time of appellee's election, Ordinance 152, passed in 1945, was in effect and, as published, provided for a salary of $100 per month for the office of city marshal. On March 15, 1950, the city council passed Ordinance 166 which purported to amend "Ordinance 153B" so as to fix the city marshal's salary at $1.00 per month effective January 1, 1951.

On January 2, 1951, the city council voted to employ appellee as "police officer", to serve at the pleasure of the council at $100 per month "as in the past." According to the testimony offered by appellant, this was agreed to by appellee. However, appellee stoutly denied he ever agreed to this arrangement and maintained that he continued to serve as city marshal as in the past.

On September 27, 1951, the mayor wrote a letter to appellee notifying him the city council had directed his discharge as "police officer" effective September 30, 1951, because he had failed to carry out "orders" of the council and his "duties as police officer." Appellee ignored this notice, and according to his testimony continued to serve as city marshal, in which capacity he was still serving on the date of trial.

For reversal of the judgment, appellant contends that a vacancy occurred in the office of city marshal by virtue of appellee's abandonment of the office and his acceptance of employment as "police officer." "Under certain conditions, a public office may become vacant by reason of the abandonment thereof on the part of the incumbent. In such cases, however, it is necessary to show that the incumbent has manifested a clear intention to abandon the office and its duties, although such intention may be inferred from conduct." *State* v. *Green and Rock,* 206 Ark. 361, 175 S. W. 2d 575.

Ark. Stats., § 19-1103 provides that a city marshal "shall continue in office until his successor is elected and qualified." Section 19-1112 provides that whenever a vacancy occurs in the office the city council shall proceed to elect a city marshal for the unexpired term. Under § 19-907, the compensation of a city marshal may not be increased or diminished during his term of office. An officer who holds over and continues to perform the duties of his office after expiration of his term is entitled to compensation up to the time he ceases to discharge his duties. 62 C. J. S., Municipal Corporations, § 529; McQuillin, Municipal Corporations (3rd Ed.) § 12.202. The period of holding over in such cases is as much a part of the officer's term of office as the regular period fixed by

law. 67 C. J. S., Officers, § 48c; McQuillin, Municipal Corporations, (3rd Ed.) § 12.110. Thus, in *State* v. *Moores,* 61 Neb. 9, 84 N. W. 399, the court held that where a police judge held over beyond his fixed term, the period of his holding over was as much a part of the term of office as that which preceded it and his salary could not be diminished during such period, under a constitutional provision similar to § 19-907, *supra.*

At the time of the instant proceedings, the city council was without statutory authority to elect a city marshal except in case of a vacancy.[1] Nor was the city council authorized to abolish the office of city marshal and establish in its place the office of "police officer" either directly or by the device of making the salary so low that nobody would aspire to the office, as was attempted here. A city marshal is a public officer and not a mere employee. *Thomas* v. *Sitton,* 213 Ark. 816, 212 S. W. 2d 710. It is generally held that a municipal office created by the legislature cannot be abolished by ordinance without express authority. McQuillin, Municipal Corporations, (3rd Ed.), § 12.118.

Whether appellee intended to and did abandon the office of city marshal in January, 1951, was a question of fact to be determined by the trial court upon evidence that is in sharp dispute. There is substantial evidence to support the trial court's finding that there was no abandonment of the office of city marshal by appellee and that he continued to serve in that capacity until the date of trial. There is also substantial evidence to support the court's finding that Ordinance 152, as passed and published, provided for a salary of $100 per month for the office of city marshal instead of a yearly salary of $100, as appellant now contends. Under the circumstances, it is our conclusion that the trial court was justified in holding Ordinance 166 ineffective to reduce appellee's salary during the period he held over as city marshal under § 19-907, *supra.*

[1] But see Act 172 of 1953 (Ark. Stats. § 19-1103.2) which provides that the marshal of cities of the second class may be either elected or appointed by the mayor with the approval of the city council.

There was no objection to any of the testimony offered by appellee tending to show that he continued to perform his duties as city marshal from October, 1951, to November, 1952, inclusive, nor did appellant plead surprise at such testimony. Appellee only sued for 5 months' salary because that was all that had accrued at the time he filed the suit. It was within the sound discretion of the trial court to treat the complaint as amended to conform to the proof on this point and to render judgment accordingly. *Nance* v. *Eiland,* 213 Ark. 1019, 214 S. W. 2d 217. However, since the trial was concluded on November 24, 1952, there is no evidence to sustain the court's finding that appellee served as marshal during the month of December, 1952. The judgment will, therefore, be reduced to $1,400. As so modified, the judgment is affirmed.

STATE, EX REL. ATTORNEY GENERAL *v.* WILLIAMS.

5-271 264 S. W. 2d 417

Opinion delivered January 25, 1954.

Rehearing denied March 1, 1954.

Tom Gentry, Attorney General and *Thorp Thomas,* Assistant Attorney General, for appellant.

William C. Daviss, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

GRIFFIN SMITH, C. J. The action resulting in this appeal was to abate a public nuisance. Ark. Stat's, Title 34, §§ 34-101 - 34-106.

The prosecuting attorney for the Seventeenth Judicial Circuit alleged that Bert Williams was the owner of a building immediately south of the City of Stuttgart, known as Log Cabin Inn, where public dancing was conducted and beer was sold.

The place was leased to Ray Dunnigan and was operated by him in such a manner as to constitute a public nuisance. The circuit judge, presumptively under authority of § 34-106, issued a temporary order restraining Williams and Dunnigan, their agents, employees, families, and lessees, from operating the dance hall and beer parlor "at any time until otherwise ordered or elsewise directed by the court." The defendants were directed to appear January 2d and show cause why the temporary order should not be made permanent.

Apparently no hearing was had until July 21, 1953. At that time the court ordered the building closed for a year from December 22, 1952, for all purposes, . . . "except it may be occupied as a residence or as a store, or as a service station, or [used for] any other legitimate business, [but] no beer, wine, liquor, or any intoxicant may be sold at this place, and . . . no public dancing shall be permitted."

The state has appealed, insisting that it was entitled to an order perpetually abating a public nuisance. *Futrell* v. *State,* 207 Ark. 452, 181 S. W. 2d 680.

Appellee Williams says in his brief that Dunnigan had agreed to vacate and close the building at the urgency of Williams before the December order was made, "and was no longer interested in the controversy."

An objection by appellee is that there was no motion for a new trial, hence errors relied upon were not brought to the trial court's attention. Section 34-102 confers jurisdiction upon chancery and circuit courts, and 34-105 applies chancery rules of procedure; and this is true whether the action is before a chancellor or a circuit judge. It follows that motion for a new trial was not required.

The judgment recites essential facts showing that those against whom the original proceedings were prosecuted either maintained the nuisance or permitted it to exist. It is true that a perpetual padlock order does not issue except as punishment for contempt, but the offending individuals may be enjoined from engaging in the activities found by the trial court to constitute a nuisance. So here such persons will be perpetually prohibited from using the property or permitting it to be used for the sale of beer, wine, liquor, or any intoxicants; nor may it be used for public dancing. This requires a modification of the judgment to include the word "perpetual". In respect of residential use and such occupancy as the trial court mentioned, the judgment is affirmed.

FIREMEN'S INSURANCE COMPANY OF NEWARK, N. J. *v.* MOTLEY.

5-269 264 S. W. 2d 418

Opinion delivered January 25, 1954.

Rehearing denied March 1, 1954.

McMillen & Teague, for appellant.

Sam M. Levine, for appellee.

J. Seaborn Holt, J. This is a suit on two fire insurance policies, issued to appellee, James Motley, by appellant, one in the amount of $1,000 and the other $500. Appellee alleged in his complaint that the two policies covered "the furniture, fixtures, equipment, machinery, supplies and improvements located in the property belonging to the plaintiff at 711 North Cedar, Pine Bluff, Arkansas," that this property was destroyed by fire, and asked for judgment for $1,500.

Appellant denied any liability on the ground that the policies covered only the furniture and equipment contained in a frame building on the front of Lot 711 North Cedar Street and did not cover the contents of a "metal clad" building (in which the fire occurred) on the rear of the lot and says: "Whether or not the policies covered on this rear building is the sole issue in this appeal."

On a trial, (jury having been waived) the court found in favor of appellee for the amount claimed ($1,500), and this appeal followed.

The parties stipulated: "It is stipulated between the parties that the cleaning and pressing equipment was contained in two structures, one a building desig-

nated as 711 North Cedar, which was a frame building, and the other a tin building about 12 feet by 12 feet situated about 4 feet to the rear of the first mentioned building, and that the press was installed in the frame building and the cleaning equipment and machinery was in the other building, and the two buildings were connected by pipe through which the steam was conveyed from the tin structure to the other building; that all of the contents of the metal building was destroyed, and none of the contents of the other building.

"The frame building was situated on the front of the lot facing the street and was used for receiving and for pressing—the other building was situated to the rear of the frame building on the back of the lot and was a completely separate building, the only connection that we know of being the steam pipe, and the boiler was in the back building. The construction was different—the front building was frame, and the back building was 'metal clad.' "

The rear "metal clad" building contained the equipment for doing all cleaning, including tumblers, washers and solvents. Appellee testified that the value of his equipment in the front frame building was about $325.00 and that in the "metal clad" building about $1,800. He did not carry insurance on the buildings. Both policies were renewals and made effective in 1947, at the time when appellee had moved his business, machinery and equipment to 711 North Cedar St. The $1,000 policy contained the following location and coverage clause: "On furniture, fixtures, equipment, machinery, supplies, and improvements and betterments in the one story, approved roof, frame building *occupied as cleaning and pressing shop,* situated 711 North Cedar Street, (Serial No. 6019), Pine Bluff, Arkansas," and the following specific coverage: "2. Furniture, Fixtures, Equipment, Supplies and Improvements and Betterments Coverage —When this policy covers on FURNITURE, FIXTURES, EQUIPMENT, SUPPLIES AND IMPROVEMENTS AND BETTERMENTS, it shall include all such items usual or incidental to the business of the occu-

pancy described on the first page of this policy, including awnings and signs if the insured is not the owner of the building (except motor vehicles and aircraft), while contained in the described building (s) or on land only while in cars, vehicles or in the open anywhere on the premises or within 100 feet of the building (s) described."

The $500.00 policy described the building as: "The one Story, approved Roof, frame Building * * * *Cleaning & Pressing Shop* situated No. 711 North Cedar Street, Rate Serial No. 6019 * * * in Pine Bluff, Arkansas," and the coverage as: "Item 3. $500.00 on Furniture, Fixtures, Equipment, Supplies, and Improvements and Betterments (except motor vehicles and aircraft) used in connection with the business (including awnings and signs if the insured is not the owner of the building) owned by the insured or for which the insured may be liable; all only while contained in or attached to the above described building or while within 100 feet thereof whether in the open or in vehicles, *including cleaning and pressing machinery.*"

Appellee testified that when he purchased this insurance, he contracted for coverage of all the cleaning and pressing equipment. "Q. James, when you bought this insurance what did you buy it to cover? A. I bought it to cover the cleaning and pressing equipment— Q. You meant everything? A. Yes, sir, used in the cleaning and pressing operation, yes, sir."

Mr. Guest, appellant's agent, who sold the insurance to appellee and induced him to increase his coverage to $1,500.00 testified: "Q. Both of the policies do specifically refer to cleaning and pressing machinery don't they, and equipment? A. That is what is in them. * * * Q. Yes, you insured his cleaning and pressing equipment, didn't you? A. Yes, sir."

Appellee had nothing to do with the drafting of the policies and any uncertainty or ambiguity as to the property insured or its location must be, under our well established rules, resolved against the insurance com-

pany and in favor of the insured. That construction most favorable to the insured, which will sustain his claim, will be adopted.

"Under well-settled principles, where the provisions of a policy are susceptible of two equally reasonable constructions, one favorable to the insurer and the other to the insured, the latter will be adopted. This is because the language is chosen by the insurer with the aid of experts employed for the purpose of writing the policy, and the insured has no voice in the matter. Therefore, where either of the two constructions may be adopted, it is fair that that which will sustain the claim and cover the loss will be chosen," *Wolff* v. *National Liberty Insurance Company,* 191 Ark. 146, 83 S. W. 2d 836.

It appears undisputed here that the equipment and machinery were in two structures, almost adjacent, in fact about four feet apart, and contained equipment essential to one operation and were actually connected by a steam pipe designed for the passage of steam, generated in one building and used in another. As indicated, while the location in the policies was 711 North Cedar Street, which was a designation of the premises on which both buildings were located, the $1,000 policy contained this language: "Occupied as cleaning and pressing shop," obviously meaning the machinery and equipment used both for the cleaning and pressing operation. The policies here insured against loss of cleaning and pressing equipment and on the entire machinery and equipment owned by appellee at his cleaning and pressing shop.

"As a rule, place and locality are essential elements in describing the property insured, although, in determining to what extent locality is important, reference must be had to the character of the property, and consideration must be given to the primary object of the insured in effecting the insurance, as well as to the uses to which the property will, in all reasonable probability, be put." *Couch's Cyclopedia of Insurance Law.* Vol 3. § 747, page 2428.

"If the location of the property is designated by a general description or in comprehensive terms, the policy attaches to the property anywhere within the place as described. Thus a policy on property described as in a certain building or place may cover property in adjoining or connected buildings and places, especially where the description relates to property in a manufacturing plant or general place of business, unless it is apparent from the terms of the policy and the surrounding circumstances that property so situated was not intended to be covered." 44 C. J. S., § 322, page 1253.

Of strong significance is the evidence that the value of appellee's property, his office furniture and pressing equipment in the front frame building was only about $325.00 (a fact which appellant's agent knew) and the value of appellee's equipment in the "metal clad" building was approximately $1,800.00. The question naturally arises: Why would appellee, if it were intended to protect property only worth $325.00, pay for more than four times this amount of insurance?

We conclude that there was ample testimony to support the judgment.

Affirmed.