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YOUNG *v.* CLAYTON, STATE TREASURER.

5-228 264 S. W. 2d 41

Opinion delivered January 25, 1954.

[Rehearing denied February 22, 1954.]

 [redacted]

Edward E. Stocker and *Cooper Jacoway,* for appellant.

Tom Gentry, Attorney General, and *Roy Finch, Jr.,* for appellee.

GEORGE ROSE SMITH, J. This is a representative suit brought by the appellant against the State Treasurer and the State Auditor. The plaintiff is the owner of refunding bonds issued under Act 4 of 1941 (Ark. Stats., 1947, Appendix to Title 13, p. 773) and sues on behalf of all the bondholders. The theory of the complaint is that Act 4 pledged certain highway revenues as security for the payment of the refunding bonds, that this pledge constituted a contract between the State and its bondholders, and that the contract has been impaired by the Revenue Stabilization Law of 1945 and subsequent legislation. Ark. Stats., Title 13, Ch. 5. The chancellor found that there had been no impairment of the contract, and the complaint was dismissed for want of equity.

The principal issue may be stated quickly. Section 12 of Act 4 of 1941 provided that revenues coming into the State Highway Fund in each fiscal year should be allocated as follows: A. The first $10,250,000 was set aside for highway maintenance and debt service. B. The next $2,500,000 was set aside for new construction and maintenance. C. The next $750,000 was set aside for five enumerated purposes that we need not detail. D. "The highway revenues coming into the State Highway Fund in any fiscal year not specifically allocated to the foregoing purposes may be used for the construction of new roads, for maintenance, or for calling in and redeeming bonds under § 5 of this act, as the legislature may

direct." (The lettering of the subsections is that used in *Clayton* v. *Little Rock,* 211 Ark. 893, 204 S. W. 2d 145.)

It is provided in substance by the Revenue Stabilization Law of 1945, and by later statutes on the subject, that every State agency and activity shall contribute to the support of the legislative, executive, and judicial branches of the State government. To this end, the Treasurer is directed to deduct three per cent from all general and special revenues and to transfer the amount so deducted to the General Revenue Fund. Ark. Stats., § 13-511; see also Act 118 of 1953, § 12. The appellant's contention is that, although it is proper to charge the actual expenses of collection against the highway revenues pledged for the security of the refunding bonds, the three per cent deduction exceeds the actual costs of collection and therefore amounts to a diversion of the funds to purposes not specified by Act 4 of 1941.

This basic contention, that the pledged revenue cannot be charged with substantially more than the actual cost of its collection and administration, is sustained by the decision in *County Board of Education* v. *Austin,* 169 Ark. 436, 276 S. W. 2. There a statute authorized the county collector and treasurer to charge certain fees for the collection of taxes, including school taxes. It was further provided that these fees, after the salaries of the collector and treasurer had been paid therefrom, should be covered into the county general fund. Since the constitution forbade the diversion of school funds, the statute was held invalid to the extent that it permitted the school fund to be charged with more than its share of administrative expenses. "Certainly the school fund should not be made to bear more than its just proportion of the salaries of the collector and treasurer. This fund, however, should be required to bear its just proportion of these salaries. To so require would not be a diversion of such fund because the school fund must be collected and paid into the treasury and must be handled and disbursed after it is covered into the treasury. So the act of the officers in collecting and handling the school fund

is germane to the purpose for which it is raised." In like manner the highway revenues pledged by the refunding law must be collected, handled, protected, and disbursed, and the Highway Fund may be required to bear its just share of these administrative costs. By the same reasoning, however, money cannot be diverted from highway purposes under the guise of a service charge that materially exceeds the amount fairly attributable to the cost of collecting and administering the funds.

The appellees do not question the controlling force of the *Austin* case; instead their argument is that only allocations A and B, comprising the first $12,750,000 of highway revenues, have been pledged as security for the bonds, leaving the State free to spend the rest as it pleases. The language of the statutes does not support this conclusion. It has been recognized all along that the refunding laws constitute contracts binding upon the State. *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023; *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980. Allocations A and B of the 1941 contract are mandatorily devoted, in specified amounts, to debt service, new construction, and maintenance. Allocations C and D allow, it is true, some leeway to the legislature, in that one or more of several designated highway purposes may be furthered with these funds. But the point is that this orbit of legislative choice is nevertheless confined to the various highway aims enumerated in subsections C and D; there is nothing to indicate that the General Assembly may in its discretion apply the pledged highway revenues to governmental functions outside the scope of § 12 of Act 4. That this restriction adds to the security of the bonds cannot be questioned, since the highway system must be maintained in a travelable condition if income is to be produced from motor vehicle fuel taxes and license fees, which are the main components of the highway revenues.

The appellees point out that we have characterized allocations C and D as "gratuities," but the reference

must be read in its context. In the earlier *Clayton* case, cited above, several cities and counties contended that they were entitled to a certain share of allocation C as a matter of right; but we held, quoting the statute, that the $750,000 allocated in subsection C is subject to distribution "as the Legislature may from time to time prescribe." Since the statute leaves the General Assembly free to choose among five enumerated purposes, no particular beneficiary "has a vested interest in the gratuity to be received from the state funds." Later on, in *Pickens* v. *McMath,* 215 Ark. 332, 220 S. W. 2d 602, we again said, in discussing the *Clayton* case, that allotments C and D are in the nature of gratuities. But on its facts the *Pickens* case simply held that bonds issued for highway construction and maintenance could be secured by a pledge of subsection D funds. That subsection expressly authorized expenditures for new construction and maintenance, and the 1949 bond issue came fully within the purview of the statute. None of our prior cases involved, as this one does, the suggestion that highway revenues may be diverted from highway purposes; so they afford no support for the argument now made by the appellees.

It is our conclusion that the State's contract with its bondholders precludes it from turning the pledged revenues into channels other than those contemplated by the refunding laws. The complaint charges that such a diversion has already occurred and asks that the misappropriated money be restored to the Highway Fund and that future diversions be enjoined. The remaining question, and a more difficult one, is whether the bondholders have made a case entitling them to this relief.

It will be remembered that in the *Austin* case the statute permitted the salaries of the county collector and treasurer to be deducted from their fees for the collection of taxes. In the case at bar the plaintiff, apparently acting upon the analogy of that case, takes the position that highway revenues can be charged only with their proportionate part of the cost of operating the State

Revenue Department and the State Treasurer's office. Upon this premise the plaintiff introduced in the trial court a stipulation showing (a) the amount of highway revenues for each of the five fiscal years between June 30, 1947, and June 30, 1952; (b) the amount of the State's total revenues for those years; and (c) the actual cost of operating the Revenue Department and the Treasurer's office for those years. On the basis of these figures, taken alone, the Highway Fund has contributed $1,871,-020.26 more than its proportionate part of the operating expenses of the two agencies mentioned. Thus the plaintiff's prayer for relief involves a request that that sum of money be transferred to the State Highway Fund from the General Revenue Fund (or from its successor, if identifiable. See Act 118 of 1953).

In considering this request we think it necessary to put more emphasis than usual upon the issues that we are *not* deciding. We do not intend, for example, to approve for all time the plaintiff's theory that only the expenses of the Revenue Department and the Treasurer's office are proper charges against revenues devoted to specified purposes. That issue may well involve a question of fact, and we would not lightly disregard the General Assembly's considered opinion that other factors should enter into the calculation. Act 490 of 1949, § 1; Act 118 of 1953, § 12. Neither do we mean to approve by implication the appellant's delay of eight years in bringing the 1945 Stabilization Law to our attention or his attempt to disturb the allocation of State funds long after the close of the fiscal year.

The single ground upon which we rest today's decision is that the plaintiff has failed to prove that the funds allegedly diverted are still available for a retransfer to the Highway Fund. Of course, the plaintiff had the burden of proof, but he shows only the balance in the General Revenue Fund on the last day of each of the five fiscal years in question. It is stipulated, for instance,

that the balance on June 30, 1952, was $3,102,617.99. But there is nothing in this record to show that the balance did not at some time during the preceding fiscal year fall far below the amount now in controversy—even down to nothing. We think that it was of primary importance for the plaintiff to show that the balance in the General Revenue Fund has continuously been sufficient to warrant our granting him at least some relief.

This distinction is plainly one of substance rather than of form. If the State Treasurer, acting under a misconception of the law, erroneously credits tax funds to the wrong account, mandamus will lie to compel him to correct his mistake. As long as the funds are still in his hands the writ merely requires him to correct a bookkeeping error. But if, as we must assume to be true in this case, the funds have passed beyond the Treasurer's control, the correction involves more than a bookkeeping entry. Such a correction would require the sovereign to replace funds already expended; in substance it would amount to a suit against the State. Consequently legislative authority is needed for such a replacement.

The authorities on this issue are in agreement. Exactly in point is the case of *Davis* v. *Pensioners Protective Ass'n,* 110 Colo. 380, 135 P. 2d 142. There the Colorado constitution dedicated certain tax money to the payment of old age pensions. The legislature passed an act providing that five per cent of the tax money should be used for specified administrative expenses. It was shown by the plaintiff, just as it is here, that the charge was excessive and that the excess had been applied to other purposes. The court held the statute unconstitutional, but it refused to order the state treasurer to restore the credit to the old age pension fund. "Without a showing, and there is none in the record, that the defendants or some of them acting in their official capacities, are empowered to re-transfer such funds, we know of no way, and none is suggested, in which the defendants could comply with a court's order that such diverted funds be now applied to the payment of old age pensions. The General Assembly alone represents the legislative.

one of the three coordinate branches of the state government. It is not subject to control in a purely legislative function, such as the appropriation or allocation of money, by the judicial branch of the government. In the case at bar the courts can do no more than declare to be unconstitutional the act of the General Assembly providing for diverting funds from their constitutionally prescribed use.''

The fact that in a situation of this kind the burden of proof is on the plaintiff was stressed in *State ex rel. Hillsborough County* v. *Amos,* 100 Fla. 1335, 131 S. 122. The relators sought by mandamus to compel the state comptroller to remit certain funds to Hillsborough County. But there, as here, the proof was defective; it failed to show that the comptroller had not already paid the money into the state treasury, putting it beyond his control. In denying relief the court said: ''When a writ of mandamus is sought to compel the comptroller to disburse moneys, his ability as well as his duty to comply with the command of a peremptory writ, and also relator's right to have the duty performed, must clearly appear. . . . The requirement is not met in the absence of a clear showing that the funds sought are in the hands or under the control of the comptroller in such manner that he has the authority and ability to disburse them. That vital element of relators' right to the writ cannot be left to inference or conjecture. . . . Whether or not the comptroller has remitted these funds to the treasurer pursuant to the comptroller's existing practice in these matters does not appear. That the comptroller has done so is not negatived by the petition. If these funds are in the state treasury, mandamus will not lie against the comptroller to command the disbursement of funds over which he has no control, even though the comptroller has mistakenly paid the funds to the treasurer under a misconception of his duty under the statute. Nor could such fund be withdrawn from the treasury except pursuant to an appropriation made by law.'' Much to the same effect is *Board of Revenue of Jefferson County* v. *Birmingham,* 205 Ala. 338, 88 So. 16, where it

was held: "However, mandamus cannot be awarded in this instance, for the reason that the entire road fund in question has been expended, and there is no other fund from which it can be lawfully replaced. Mandamus is not the proper remedy in cases of misappropriation."

Since the appellant has not shown that the funds now in controversy are still in the General Revenue Fund we cannot grant his request that a mandatory injunction be issued to require the State Treasurer to restore this money to the credit of the Highway Fund. Neither do we think that in these circumstances the Treasurer should be enjoined from permitting a diversion of highway money in the future. As we have already said, whether the charge against highway revenues exceeds reasonable administrative costs may present a question of fact. A continuing injunction would require the Treasurer to determine that issue of fact correctly throughout the indefinite future, else he might be held in contempt of court. We do not think it seemly for the judiciary to impose such a burden upon the executive branch of the government. Rather, the Treasurer should be left free to obey the law as laid down by the General Assembly, and, with respect to any fiscal year subsequent to June 30, 1952, the burden will be on the bondholders to assert their rights if they have reason to think that an unlawful diversion of funds has occurred.

The conclusion we have reached makes it unnecessary for us to determine whether Act 260 of 1935 might be relied upon as a justification for the three per cent deduction attacked by the appellant.

The chancellor was in error in his conclusion that an excessive service charge against the Highway Fund would not involve a breach of the State's contract with its creditors. But the chancellor's action in dismissing the complaint was correct, for the reason that the proof does not entitle the plaintiff to relief against the State Treasurer or the State Auditor. The decree must therefore be affirmed.

MILLWEE, J., not participating.

GRIFFIN SMITH, Chief Justice, concurring. I would affirm the case under Act 260 of 1935. Before the highway bonds now outstanding were issued through a refunding process the General Assembly found, "as a matter of fact", that a maximum charge for collecting and for the services rendered the collecting agencies was "equal to three per cent of the amount collected by the several statutory agencies, and that such an amount should be, and the same is hereby fixed, as the correct sum to be collected from all funds coming into the hands of or passing through the regularly designated collection agencies, officers, or departments, and going into the state treasury".

It is common knowledge that General Revenue, from which constitutional officers and their maintenance were paid, was depleted in 1935, and that in 1932 and during the first month of 1933 state warrants were being sold at a shameful discount. Act 260 was the law-making body's effort to correct this evil. Whether the Act at *that* time, if challenged, would have been held a violation of the obligation of contract through impairment of the bonds then outstanding is beside the point. Validity of the enactment was not challenged and new bonds were issued with notice to purchasers that the highway fund was subject to assessment.

I would therefore hold that under the showing in the case at bar the appellant is barred by the legislative finding which became a part of the condition when the state sold its bonds.

HARMON *v.* THOMPSON.

5-275 263 S. W. 2d 903

Opinion delivered January 25, 1954.

S. M. Bone, for appellant.

W. J. Arnold, for appellee.

George Rose Smith, J. This controversy centers upon a deed executed in 1938 to Dave Harmon and his wife Gertie. Dave died in 1945 and Gertie died in 1951. This suit to recover the forty acres in question was then brought by the appellant, who is Dave Harmon's son by an earlier marriage and is his sole heir. The appellant contends that the 1938 deed vested the fee in Dave Harmon, subject to a joint life estate in Dave and Gertie. The appellees are Gertie's three sisters, her only heirs. In the court below they asked that the deed be reformed. The chancellor denied reformation, but he construed the deed as having created a tenancy by the entirety in fee simple. Since Gertie survived her husband the court awarded the property to Gertie's heirs.

The land in dispute was inherited by Gertie Harmon and her three sisters, as tenants in common. On December 15, 1938, the four sisters, inserting the following somewhat unusual language in both the granting and

habendum clauses, conveyed the property "to Dave Harmon and Gertie Harmon and unto his heirs and assigns forever." The deed was acknowledged on January 2, 1939, and was recorded the next day. By their prayer for reformation the appellees seek to have the references to "his" heirs and assigns changed to read "their" heirs and assigns.

The chancellor was correct in refusing to reform the instrument, for the proof lacks that clear and convincing character that is required in a case of this kind. *Meador* v. *Weathers,* 167 Ark. 264, 267 S. W. 787. The deed was typed upon a printed form. We conclude from our examination of the document that the word "his" was first typed in the blanks provided in the granting and habendum clauses, and that the word "their" was then typed over the original insertions. It is possible that the order of typing was the other way around; but in any event the typed words were stricken with pen and ink, and in their place the word "his" was written in both clauses. When the deed was recorded the day after its acknowledgment the word "his" was copied into the public record.

Although all three of the appellees were available as witnesses, only Myrtle Fields was called to testify. Upon being asked, more than fourteen years after the event, whether the changes were on the deed when she signed it, Mrs. Fields replied: "If they were, I did not see them." This is really the only direct proof supporting the argument that the deed was altered after its execution. The other testimony, offered without objection, is directed principally to various declarations by Dave Harmon that the land was to go to his son, and to similar declarations by Gertie that it was to go to her family. It is pretty clearly indicated that the pen-and-ink changes were made by the officer, now dead, who took the acknowledgment. When it is observed that no effort to obtain reformation was made during the years when Dave and Gertie Harmon might have testified, that the evidence of their declarations is in conflict, and that only one of the three persons seeking relief has come forward with her recol-

lection of the transaction, we are left without that abiding certainty of the truth which we should have before ordering reformation.

A minor contention of the appellees is that a resulting trust in Gertie Harmon's favor is presumed to have arisen from the conveyance. This argument is without merit. Dave Harmon paid his three sisters-in-law eight hundred dollars for their interest in the land, and of course, no trust resulted to Dave's wife when he himself paid the purchase price. *Strouthers* v. *Bogenshutz,* 108 Ark. 276, 157 S. W. 406. Gertie Harmon conveyed her own undivided interest to herself and her husband; and, since the passage of Act 86 of 1935, Ark. Stats., 1947, § 50-413, a tenancy by the entirety may be created in this manner. *Ebrite* v. *Brookhyser,* 219 Ark. 676, 244 S. W. 2d 625. Such a tenancy may exist in a life estate as well as in the fee. *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538. A wife's gift to her husband is closely scrutinized by a court of equity; but Gertie did not bring the matter into court during her lifetime, and we are not convinced that Dave overreached his wife or abused their relationship of confidence.

Reformation being denied, the remaining issue is that of interpreting a grant to a husband and wife and to *his* heirs and assigns forever. The chancellor treated the latter clause as surplusage and accordingly concluded that a tenancy by the entirety in fee simple was created. The appellees cite only two cases to support this result, but one of them is hardly in point. The deed construed in *Ellis & Co.* v. *Walker,* 101 Miss. 326, 58 So. 97, contained so many grammatical errors that the court was induced to regard the use of "his" as merely another clerical mistake. In the case at bar this vital word was deliberately inserted with a pen and cannot be treated as an inadvertence.

More to the point is the second case cited by counsel, *Bost* v. *Johnson,* 175 Tenn. 232, 133 S. W. 2d 491. There the deed was to a husband and wife and to her heirs and assigns. Tennessee had a statute similar to

Ark. Stats., § 50-403, which provides that the use of the word "heirs" is not necessary for the creation of an estate in fee simple. Relying upon this statute, the Tennessee court reasoned that a grant to A means the same thing as a grant to A and his heirs. Upon this reasoning it was held that the husband and wife took identical estates in fee as tenants by the entirety.

We are not at all persuaded that this view is sound. It is doubtless true that the statute requires the same effect to be given to a deed to A as is given to an entirely different deed to A and his heirs. But that consideration is obviously not controlling when the two phrases appear side by side in the same instrument. The contrast in wording certainly carries the implication of a similar contrast in meaning. Especially is this true in the case at bar, since the doctrine of the Tennessee case would mean that the grantors' deliberate substitution of the word "his" for the word "their" was a completely ineffective gesture, leaving undisturbed the legal effect of the original language.

The view adopted in Tennessee is decidedly a minority holding. It can hardly be doubted that a layman would interpret a conveyance to a husband and wife and thereafter to *his* heirs as creating a life estate in the grantees with a remainder to the husband's heirs. It happens that this lay interpretation is not quite correct, since there comes into play the Rule in Shelley's Case—a rule that is not concerned with the grantor's intention. Under this rule the word "heirs" is treated as one of limitation rather than as one of purchase; so the effect of such a conveyance is to make the husband and wife tenants by the entirety for life only, with a vested remainder in that spouse whose heirs are singled out. Rest., Property, § 312, Comment *r;* Powell on Real Property, § 379; *Badgley* v. *Hanford,* 12 N. J. Law J. 75; *Den ex dem. Hardenbergh* v. *Hardenbergh,* 5 Halstead 42, 18 Am. Dec. 371; *Cotten* v. *Moseley,* 159 N. C. 1, 74 S. E. 454; *Sprinkle* v. *Spainhour,* 149 N. C. 223, 62 S. E. 910, 25 L. R. A. N. S. 167. (In the *Sprinkle* case the court expressly rejected the argument, followed in Tennessee,

that a different result is required by a statute dispensing with the necessity for using the term "heirs" in the creation of a fee simple.) It follows that the deed now in question created a life estate in Dave and Gertie Harmon, as tenants by the entirety, with a vested remainder in Dave Harmon. The appellant, as the heir of Dave Harmon, is accordingly the owner of the property.

Reversed.

WARD, J., concurs.

DRIVER *v.* DRIVER.

5-267 263 S. W. 2d 914

Opinion delivered January 25, 1954.

Green & Green and *Oscar E. Ellis,* for appellant.

E. H. LaMore and *Herrn Northcutt,* for appellee.

WARD, J. R. D. Driver, appellant, filed a complaint in the Fulton Chancery Court against W. D. Driver, appellee, to confirm his title in certain lands. The complaint states: That appellant, by oral contract, purchased the lands from the appellee; That at or about the time the contract was made he was placed in possession by

appellee and that he paid the full purchase price of $2,500, and; That he has been in possession approximately 2 years during which time he has paid the taxes and made improvements amounting to approximately $2,500. The prayer of the complaint was that the court vest title in appellant and confirm his title in the lands as against the appellee.

At the time the complaint was filed appellee resided in Howell County, Missouri, where he was served by the sheriff of that county with a summons to which was attached a copy of the complaint, all under the provisions of Ark. Stats., § 27-339. A Warning Order appears in the record but there is no showing that it was ever published.

The record as originally filed in this court on August 17, 1953, shows: That appellee appeared specially on August 7, 1952, and filed a motion to quash service on the ground that the complaint stated a cause of action *in personam* and that therefore the alleged service was insufficient; That, on April 14, 1953, the court overruled the said motion stating that the suit was for confirmation of title and that the service was good for that kind of a suit, and; That appellee appeared specially on April 14, 1953, and filed a demurrer to the complaint on the ground that it did not contain facts sufficient to state a cause of action.

Attached to the original record is a stipulation signed by the attorneys for both sides, as of date August 25, 1953, amending the record to show the following motion and orders: 1. A "warning order" which is the same as the one shown in the original record, but not shown to have been published; 2. A "motion to quash service" which is, for the purpose of this opinion, the same as the one shown in the original record except that it contains no date and no date of filing is shown, and; 3. An "order" dated April 8, 1952, which quashed service of the warning order and shows appellant's exceptions, but there is nothing to show what date the order was filed or that it was ever filed.

The final order of the trial court was made and filed on July 30, 1953, which, omitting the immaterial parts, reads as follows:

". . . it appearing to the court that on April 14, 1953, this court, by order then made and entered of record, held that the service obtained by plaintiff against and upon the defendant was only good for confirmation of title and the same day the defendant filed a demurrer to the complaint which was by the court sustained. . . .

"The only question adjudicated by the court in the order of April 14, 1953, in sustaining said demurrer, is that the complaint does not state a cause of action for confirmation of title.

"The said order gave the plaintiff to this date to amend and now comes the plaintiff and elects to stand upon his complaint as being sufficient for confirmation of title and decides not to plead further on that issue.

"Whereupon the court dismisses said complaint as to its sufficiency to state a cause of action for confirmation of title."

In view of the state of the record shown above it clearly appears that appellant chose to stand on his complaint as stating a cause of action for confirmation of title, and so we will consider the demurrer to the complaint from that standpoint. Such being the case, the trial court properly sustained the demurrer.

A suit to quiet or confirm title independent of the statute, as in this case, can only be maintained when the petitioner holds a legal title. In the case of *Weaver* v. *Gilbert,* 214 Ark. 800, 218 S. W. 2d 353, at page 805 of the Arkansas Reports, the court expresses this rule in the following language:

"It is also the rule that equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession holding the legal title, the remedy at law being otherwise adequate."

Ark. Stats., § 34-1907 permits a petitioner to maintain a suit to quiet or confirm title even though he can-

not show "a perfect claim of title" to any particular tract or tracts of land though it shall be held to constitute a *prima facie* title, but he can do so only on condition that he can show color of title and payment of taxes for a period of more than 7 years. In this case color of title and payment of taxes for 7 years was not alleged, and appellant declined to amend.

In affirming the action of the trial court it is pointed out that we do so without prejudice to any rights appellant may have to bring a transitory action for specific performance of his contract with appellee, or any other action he may have a right to bring not inconsistent with this opinion.

THE MCGEHEE BANK OF MCGEHEE *v.* CHARLES W. GREESON & SONS, INC.

5-189 263 S. W. 2d 901

Opinion delivered January 25, 1954.

Edwin E. Hopson, Jr., and *Wm. C. Medley,* for appellant.

L. B. Smead, for appellee.

ED. F. MCFADDIN, J. The McGehee Bank recovered judgment in the *Desha Chancery Court* against Charles

W. Greeson, an individual. Later the McGehee Bank (hereinafter called "Bank") placed the said judgment of record in *Calhoun County,* under authority of § 29-130 Ark. Stats.; and then had writ of execution and also writ of garnishment issued by the Clerk of the *Calhoun Chancery Court.* These writs were served: the execution on some road building machinery, and the garnishment on a firm indebted to Chas. W. Greeson & Sons, Inc. (hereinafter called "Greeson Corp."). Thereupon, Greeson Corp. filed the present suit in the Calhoun Chancery Court, seeking, *inter alia,* to enjoin the Sheriff of Calhoun County from proceeding under the execution and to restrain the garnishee from holding funds under the garnishment. The allegations were that the Greeson Corp. was entirely distinct from Chas. W. Greeson, the individual, against whom the judgment had been obtained in the Desha Chancery Court; and that the road building machinery and the garnished funds were property of the Greeson Corp. The Calhoun Chancery Court entered a decree quashing the writ of garnishment and permanently enjoining any procedure under the execution; and from that decree the Bank prosecutes this appeal.

Many interesting questions are argued in the briefs but there is one proposition that necessitates an affirmance of the Chancery decree; and that is the invalidity of the writ of execution and writ of garnishment.

As to an execution, the general rule is that it must issue out of the Court which rendered the judgment unless there be Statutes empowering some other authority to issue the execution. In 21 Am. Jur. 29, in the article on "Executions", the text says:

"The general rule is that a writ of execution is issuable only out of the Court which rendered the judgment, and that an execution issued by the Clerk of a Court other than the one rendering the judgment, unless authorized by some Statute, is void."

See *Williamette Real Estate Co.* v. *Hendrix,* 28 Ore. 485, 42 P. 514, 52 Am. St. Rep. 800; *People* v. *Wallace,* 332 Ill. 427, 163 N. E. 820; *Stoll* v. *Allen,* 202 Okla. 514, 215 Pac.

2d 559; and see also 33 C. J. S. 188. Likewise as to garnishment after judgment, the general rule is that the writ can issue only out of the Court which rendered the judgment unless Statutes empower some other authority to issue the garnishment. See 23 C. J. 362; 28 C. J. 192; and 38 C. J. S. 335.

With the general rules thus stated—to the effect that a writ of execution as well as a writ of garnishment after judgment must issue out of the rendering Court unless Statutes provide otherwise—we come to a study of the Arkansas Statutes on the point. Counsel for appellant have cited us to no Arkansas Statute changing the general rule, as heretofore stated; and our search has likewise failed to disclose any such Statute applicable to Circuit Court judgments or Chancery Court judgments.

We do have a Statute relating to judgments of Justice of the Peace Courts; and that Statute is contained in § 26-1121 et seq. Ark. Stats. It provides that when a certified copy of the Justice of the Peace judgment is filed in the office of the Circuit Clerk, execution may be issued out of the Circuit Court on such judgment.[1] This is Act 135 of 1873, as amended by Act 333 of 1941. The interesting point is that by the said Act of 1873, the Legislature provided that when a judgment of the Justice of the Peace Court was duly filed in the Circuit Court, then (§ 26-1123 Ark. Stats.) the said judgment ". . . shall be carried into execution in the same manner and with like effect as the judgments of such circuit courts." So the Legislature knew how to provide for an execution out of a court other than the rendering court. Yet when the Legislature adopted Act 56 of 1891 (as now found in § 29-130 Ark. Stats.), the Legislature merely provided that a judgment of a Chancery Court or Circuit Court rendered in one County could be placed of record in another County, ". . .

[1] An interesting case involving Circuit Court execution on a Justice of the Peace judgment is *Winkler* v. *Baxter*, 114 Ark. 422, 170 S. W. 94. It was decided prior to Act 333 of 1941. Section 31-514, Ark. Stats., concerns writs of garnishment on Justice of the Peace judgments, and is not applicable to Circuit and Chancery Court judgments.

and from that time the judgment shall be a lien on the defendant's lands in such county." This Statute fails to say that the execution will be issued by the officials in the County in which the judgment has been recorded. In § 30-106 Ark. Stats. there is the form of execution, which says that it is issued on a judgment which the plaintiff ". . . late in our court recovered . . ."; and that quoted language certainly means that it is the rendering court that issues the execution. Furthermore, § 30-114 Ark. Stats. provides that "Executions issued upon any judgment, order or decree rendered in any court of record may be directed to and executed in any county in this State"; and this further supports the conclusion that the Court rendering the judgment is the one to issue the execution.

The Statutes, concerning the issuance of garnishments, are contained in § 31-501 et seq. Ark. Stats.; and § 31-513 provides: "Writs of garnishment may be issued from the Circuit Court of one County to any other County in the State." Thus it is the court in which the suit is pending or the judgment was rendered that has authority to issue the garnishment. We find no Statute providing otherwise in a situation like the one here existing. In *Mo. Pac. Rd. Co.* v. *McLendon,* 185 Ark. 204, 46 S. W. 2d 626, we said:

"The remedy given by garnishment is purely statutory, and the statute must be strictly construed."

We therefore conclude that the Chancery Court of Calhoun County was correct in quashing the garnishment and in enjoining any proceeding under the execution, since these writs had been issued by the Clerk of the Chancery Court of Calhoun County, who had no authority to issue such writs on a judgment rendered by the Desha Chancery Court.

Affirmed.

5-278 264 S. W. 2d 399

Opinion delivered February 1, 1954.

[redacted]

Charles B. Thweatt, for appellant.

Goodwin & Riffel, for appellee.

GRIFFIN SMITH, Chief Justice. Lewis and Frances Rhoton, now deceased, left a daughter, Frances Rhoton Askew. Mrs. Askew, as executrix and trustee for her brother, Riffel G. Rhoton, under the mother's will, sued to have a lien declared and foreclosed on Lot 10, Block 11, Faust's Addition to Little Rock. The lot was sold by the Rhotons to W. L. Fodrea March 1, 1921, for $2,500. Of this amount $100 was paid in cash and a note for $2,400 payable in installments of $20 over a period of 120 months was executed, each payment to draw interest at 8% from date.

Fodrea took possession at once and erected a sheet iron building on the back part of the lot. He paid taxes and met installment payments until 1930. Early in 1932 Mrs. Rhoton, with Fodrea's consent, took possession of a residence on the property, whereupon Fodrea moved into the sheet iron building where he remained until death. From proceeds of a judgment assigned by Fodrea Mrs. Rhoton collected $1,048.08 and applied it to the indebtedness. Through what appears to have been a coöperative purpose to make the property produce revenue the residence was converted into apartments of small capacity—six in all. In this undertaking Mrs. Rhoton spent $4,700 of her own money and made other improvements costing $593. In 1934 Fodrea paid $300 additional, but with this exception nothing more was paid, either as principal, interest, insurance, taxes, or upkeep.

Mrs. Askew's suit was filed in May, 1945, before Fodrea died. The decree resulting in this appeal was rendered in July, 1953.[1]

Much of the matter in controversy was stipulated after records had been examined and preliminary evidence heard. In a comprehensive opinion dealing with the various items the Chancellor found that unpaid obligations were in four categories: (1) Balance of original note, with interest, $1,862.49; (2) permissive expenditures for construction, etc., with interest, $11,644.60; (3) authorized expenditures made by Mrs. Rhoton in 1934—'7—'9 and '41, with interest, $1,710; (4) taxes and rental expenses, $15,256.56, with interest.[2]

The lien was found to be $16,790.52, but with interest added it amounted to $30,473.65. But the appellant was entitled to a credit of $8,250 plus interest, or $12,805.71.

[1] An order of Jan. 11, 1952, recites the death of W. L. Fodrea May 16, 1951; that Mrs. Charlseye H. Braun and Mrs. Margaret D. Goforth (daughters) were his sole heirs, and that Mrs. Braun was appointed administratrix June 4, 1951. The cause of action was revived in their names. In a separate answer of April 14, 1952, Mrs. Goforth stated that all of her interests had been conveyed to Mrs. Braun. [Lewis Rhoton died in 1936 and Bessie Riffle Rhoton, his wife, died in 1944.]

[2] In all instances interest was computed to Dec. 31, 1952.

Embraced within "taxes and rental expenses" were allowances for furniture purchased from time to time by the plaintiff. It was stipulated that furniture was not provable as an element entering into rental value of the property. The Chancellor, therefore, took the view that with the exception of the reconstructed sheet iron building in which Fodrea resided appellant's predecessor was in possession with Fodrea's complete acquiescence and that the joint enterprise contemplated a hands-off policy by Fodrea and a duty upon Mr. Rhoton's part to rebuild the property, purchase furniture, assume the obligation of renting and collecting, and in other respects cause the property to yield a maximum return.

It is not denied that $425 of the money Mrs. Rhoton spent in rebuilding went into the separate structure Fodrea occupied for so many years; that he did not pay taxes, upkeep of any kind, or even utility bills for his own quarters. Therefore, said the Chancellor, (in effect) the stipulations could be fairly construed as a willingness upon Mrs. Rhoton's part to apply whatever time and effort might be required to keep the property in demand condition, solicit tenants through advertisements, and by telephone when inquiries were made; purchase at her own expense the needed furniture,—and, in short, to generally supervise all operations necessary in producing an income.

On the other hand Fodrea was not willing or able to either pay the original debt in full, or compensate Mrs. Rhoton for added investments. After the apartments were built Mrs. Rhoton's expenditures had been considerably greater than Fodrea's original $2,500 contract.

Over a period of twenty years gross rental collections amounted to $29,611.52. Witnesses skilled in real estate transactions testified regarding the relative value of property furnished and unfurnished. Taking into account the implied contractual relationship of the parties, the court found that unfurnished the apartments

would have yielded $8,250, or 27.86% of the gross income of $29,611.52, and that with interest this should be $12,805.71. The net balance was then ascertained to be $17,667.94, for which judgment was rendered, with an order of foreclosure.

The method of computation is challenged. In particular it is urged that the ratio of rental income in relation to furnished apartments and the naked property as rebuilt for apartment purposes is grossly unjust. There was testimony that ordinarily apartment property unfurnished was thought of as having three-fourths of the value of furnished quarters. But there was also testimony that because of undesirable conditions attaching to the apartments in question there were protracted periods — particularly during the depression years—when for want of furniture the quarters would have been occupied only about 30% of the time.

We are affirming the Chancellor's findings in spite of the seeming discrepancy. In Fodrea's response and motion, made May 29, 1947—slightly more than two years after the complaint was filed—there is a recognition of rights accruing to Mrs. Rhoton superior to the ordinary relationship of mortgagor and mortgagee in possession. Mention is made of the plaintiff's undertaking "to make certain repairs and betterments to the improvements situated upon the lands described in the complaint and to advance the funds for the payment thereof upon condition that the defendant would consent that they take and hold possession and custody of said improvements as thus repaired and bettered, rent the same, collect the rentals derived therefrom, *pay thereout the reasonable cost of operation, including taxes and insurance,* and apply the net rentals to the liquidation of the balance [of the debt]."

In the same pleading there is a reference to the plaintiff's right to retain "the necessary and reasonable costs and expenses incurred and expended in the production of such rentals."

The rule that a mortgagee in possession is not entitled to recover the value of permanent improvements

to the land, but only the cost of ordinary repairs, is not disputed. *Morgan* v. *Mahony,* 124 Ark. 483, 187 S. W. 633. Nor is it contended that one who takes possession for the purpose of enforcing his lien is not a mortgagee in possession in respect of rights and obligations resulting from such possession. *McGinnis* v. *Less,* 147 Ark. 211, 227 S. W. 398. See, also, *Denham* v. *Lack,* 200 Ark. 455, 139 S. W. 2d 243.

When it is remembered that Mrs. Rhoton handled the property with Fodrea's complete acquiescence during the depression period and no doubt, by the policy pursued, created a condition that gave Fodrea a home for life tax-free, utilities-free, and unhampered in all respects, and when weight is given to other factors, such as the death of all persons who could verify or deny essentials; the long-time acquiescence of Fodrea in financial administration and management of the property, and the utter impossibility of saying at this late date that the parties were not in complete accord regarding Mrs. Rhoton's management,—with these facts before us we are not willing to say that the Chancellor erred in appraising the weight of evidence, or in the theory upon which the case was decided.

Affirmed.

George Rose Smith, J., dissenting. The various matters alluded to in the final paragraph of the majority opinion, such as laches, estoppel, etc., have all been eliminated by the parties' stipulations. These litigants have agreed to the penny upon every item of income and every item of expense. The only questions submitted to the trial court, and the only ones now before us, relate to the apportionment of the rent and to the appellees' right to compensation for Mrs. Rhoton's services. I think the chancellor was in error in his division of the rents.

It is stipulated that the total rent from these furnished apartments was $29,611.52. The chancellor allocated only $8,250.00 of this amount to the buildings, with the remaining $21,361.52 being attributed to the presence

of the furniture. This is the "seeming discrepancy" which the majority decline to correct.

The chancellor based his conclusion upon the opinion of expert witnesses, who testified that apartments of this kind would be hard to rent as unfurnished units. These witnesses submitted detailed calculations to show that had the property been rented without furniture the total income would have been slightly less than the figure selected by the chancellor. One of them, upon cross-examination, conceded that if the rents were to be divided equitably an allocation of $7,500 to the building and $22,000 to the furniture would be "utterly absurd." Yet that is the division now being approved.

Even though the testimony of these witnesses be accepted as correct, the theory of their calculations cannot fairly be applied to this case. It is shown that both the apartments and the furniture were of low quality, the furniture being worth only about $500 at the time of the trial. Any attempt to speculate upon what the apartments would have rented for without the furniture is just as irrelevant as a converse attempt to determine what the furniture would have rented for without the apartments. Either approach is like saying that the last straw alone is responsible for breaking the camel's back. The case before us involves an agreed amount of rent that is attributable both to the buildings and to the furniture. If we lay aside the artificial theory advanced by the appellees' expert witnesses, the evidence shows clearly enough that about a fifth of the rents should be credited to the appellees as a return upon the furniture. I would modify the decree to that extent.

ARKANSAS AND OZARK RAILWAY *v.* TOWN OF BUSCH.

5-277 264 S. W. 2d 54

Opinion delivered February 1, 1954.

H. G. Leathers, for appellant.

J. E. Simpson, for appellee.

ED. F. MCFADDIN, Justice. This is a direct attack on the order incorporating the Town of Busch, in Carroll County.

On March 9, 1953, the County Court of Carroll County granted the petition of Ernest Huffman and 21 others and declared the Town of Busch to be incorporated. (See § 19-101 *et seq.* Ark. Stats.) Within 30 days thereafter, The Arkansas and Ozark Railway (appellant here) filed the present proceeding in the Carroll Circuit Court, seeking, under § 19-105 *et seq.* Ark. Stats., to annul the order of incorporation, and alleging, *inter alia*:

". . . that this proposed town is approximately 3 miles long and in most places ¼-mile wide; that it runs from the state Highway No. 62 to the Missouri line; that the area is thinly settled and has therein one store belonging to the agent for petitioners, Mr. Ernest L. Huffman, whose expressed principal reason for the incorporation of the town is to enable him to sell gasoline at Missouri prices; that the proposed incorporated town does not contain the requisite number of inhabitants; that the limits of said town are unreasonably large."

The allegations of the complaint being denied, the cause was heard by the Circuit Court; and judgment was entered sustaining the County Court's order of incorporation. From an unavailing Motion for New Trial, there is this appeal.

We conclude that the Circuit Court order is without substantial evidence to sustain it, and therefore, must

be reversed, and the incorporation of Busch must be annulled. § 19-106 Ark. Stats.[1] provides that ". . . if it appears to the satisfaction of the court . . . that the limits of said proposed incorporated town are unreasonably . . . large . . . then the said court . . . shall order the record of said incorporated town to be annulled; . . ." In the case at bar, all the evidence established the situation mentioned in the quoted Statute. The area of the proposed Town of Busch extends two and three-quarter miles along the public road from Mr. Huffman's store on the South to the Missouri line on the North; and the area is about one-quarter mile wide. There is only one store in the proposed town: no church, and no schoolhouse. Mr. Huffman owns all the land on the public road that is in the Town, and only 21 other people live in the entire area sought to be incorporated. Mr. Huffman—the moving spirit in the incorporation effort—admitted on cross-examination, that his desire to sell gasoline at the Missouri prices was a substantial factor in the effort for incorporation.[2]

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[1] For some of our cases involving either collateral or direct attack on original incorporation of towns see: *Waldrop* v. *K. C. So. Ry. Co.*, 131 Ark. 453, 199 S. W. 369, L. R. A. 1916B, 1081 (and Annotation); *Bragg* v. *Thompson*, 177 Ark. 870, 9 S. W. 2d 24; *Bridges* v. *Gateway*, 192 Ark. 411, 91 S. W. 2d 592; and *McCarroll* v. *Arnold*, 199 Ark. 1125, 137 S. W. 2d 921.

[2] Here are portions of Mr. Huffman's testimony:

"Q. Did you testify before the County Court that the main purpose of this Incorporation was to sell gasoline at Missouri prices?

"A. I said one of the reasons. I don't know whether I said it was the main reason or not, but I said it was one of the reasons.

"Q. Well, you wouldn't say that you didn't say it was the main reason?

"A. No, I wouldn't say that.

"Q. It is the main reason, isn't it?

"A. Well, I think we should have one there, and I'll tell you why. Nineteen miles stretch from there to Gateway, without any filling stations is very inconvenient for a lot of people. . . .

"Q. So, you and Albert got together on the proposition to put the station there and conceived the plan, then, of running this to the Missouri line, in order to sell this gas at Missouri rates, didn't you?

"A. Well, I don't know, I asked him.

"Q. But, that's what first suggested the idea of the town there, wasn't it?

"A. Well, I've thought about it for years.

"Q. Selling gas at Missouri prices?

"A. Surely."

Thus a tract of rough terrain, about one-quarter mile wide and extending two and three-quarter miles along the public road from Huffman's store to the Missouri line, is sought to be incorporated into a town; and limits of the town were designed in order that Huffman might sell gasoline at the Missouri prices. We conclude that all the testimony shows that the limits of the proposed Town of Busch are unreasonably large; and that the Circuit Court should have entered a judgment annulling the County Court order of incorporation.

The Circuit Court judgment is reversed and the cause remanded, with directions to enter a judgment in accordance with this opinion, and for further proceeding as specified in § 19-106 *et seq.* Ark. Stats.

INTERNATIONAL ASSOCIATION OF MACHINISTS, A. F. L. LOCAL 924 *v.* GOFF-MCNAIR MOTOR COMPANY.

5-280 264 S. W. 2d 48

Opinion delivered February 1, 1954.

Edwin E. Dunaway, for appellant.

Rex W. Perkins, for appellee.

ROBINSON, J. The appellees Goff-McNair Motor Co., Green Chevrolet Co., and Lyle Bryan Motor Co., hereinafter referred to as the employers, are automobile distributors and filed this suit to enjoin peaceful picketing by some of their employees who were out on strike. A temporary injunction was granted, and on final hearing it was made permanent. The Machinists Union, C. A. Buskel, and Willis Sisemore, bargaining agent and representatives of the employees, have appealed.

It is the contention of the employers that the union members by means of picketing were attempting to force an agreement providing for a closed shop. The employees claim they had withdrawn their demand that Article 16 of the proposed agreement, in effect providing for a closed shop, be incorporated in the contract, and that the employers were not acting in good faith in claiming that the suggested Article 16 had not been abandoned. During the negotiations the union submitted a proposed contract, Article 16 thereof being as follows:

"Union Members. The refusal of any or all employees who are members of the union to work with an employee who is not a member of the union will not be considered as a violation of this agreement."

In turn the employers demanded a provision in the contract embracing substantially Amendment 34 to the constitution of Arkansas, known as the Freedom to Work Amendment; Act 101 of the General Assembly of 1947, the enabling act for Amendment 34; and Act 143 of 1943, known as the Anti-Violence Act. The parties did not break off negotiations by agreement, but Mr. Buskel, who was the chief negotiator among the representatives of the employees, at the end of the meeting on July 30 stated he would let the employers know when it would be agreeable to hold the next meeting. He contacted

the employers no further, and on September 17 the union members went out on strike and started picketing the employers' place of business.

Even if the employers did demand that an amendment to the constitution and certain acts of the legislature be written into the contract, this would not be asking the union to agree to something unlawful because the constitution and laws of the state would be a part of the contract regardless of whether they were mentioned in the written agreement. On the other hand this court has held that the demand by a union that a collective bargaining agreement contain a provision in violation of Amendment 34 to the Constitution and Act 101 of 1947, coupled with picketing in an attempt to enforce such demand, is grounds for the issuance of an injunction prohibiting such picketing. *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45; *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154; *Lion Oil Co.* v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569. See also *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834.

The trial court prepared a written opinion which shows that the utmost care, attention, and study was given to the case; and it is the Chancellor's opinion that the weight of the evidence proves the employees had not abandoned their demand for a contract providing for a closed shop in violation of the laws of this state. In regard to the facts as shown by the record, we quote from the able opinion of the trial court:

"To resolve the matter a consideration of the proof is necessary. The crucial meeting seems to have been that of May 8, the 5th negotiating session. Both before and after that meeting, according to McNair, Pratt, Bryan, Dickson and Duty, the latter two being attorneys representing some of plaintiffs at the meetings but not at the trial, Article 16 was discussed at great length and always as related to, but say the plaintiffs, in conflict with Amendment 34 and Act 101. It was the insistence of the companies that Article 16 should be countered by provisions substantially incorporating the

freedom to work amendment or that the article should be dropped. They say that on May 8 defendant Buskel proposed that the Union would drop Article 16 if they would drop the incorporation of provisions consonant with Amendment 34 and Act 101. In short, they say Buskel's offer was only conditional, was never unequivocally withdrawn and was in fact insisted upon up to and including the last meeting on July 30. Opposed to this is testimony in chief of Buskel. He says that he officially receded from Article 16 on May 8, has not insisted upon it since, and is not today (the day of trial) demanding a closed shop, nor that Union members quit if non-Union men are working. Defendant Willis Sisemore, and witnesses Bill Cox and Roy Hillion, who attended most of the meetings, confirm the withdrawal of Article 16 on May 8, and that they would not refuse to work with a non-Union man; but each of these three also testified that his statement on the witness stand is the first time he had ever said he would work in an open shop; and Sisemore testified he has never heard Buskel express agreement on a contract provision for an open shop. Cox, as did the others, took the oath of Union obligations and testified that a part of that obligation is not to work with a non-Union man. Hillion testified there was nothing in the obligation as to working or not working with non-Union men. Mr. Cox also answered, on cross examination, that he remembered the conditional withdrawal by Buskel and upon being asked if this withdrawal was thereafter unreservedly made, he first answered 'no', later changed his answer to the affirmative, and it is possible his apparent contradiction was due to confusion or misunderstanding.

"The testimony of Buskel is interesting. A substantial portion of his cross examination consisted of directing to him a number of questions embracing his statements made at various negotiations meetings and asking him if he made the statements. It would be well to note here the apparent confusion that arose at the trial over the stenographic transcripts of these meetings. The Court declined to require plaintiffs' counsel

to make these transcripts available to defense counsel for the reason that they were private property procured and paid for by plaintiffs, and available to defendants since their taking, on the same terms. After some discussion, counsel for plaintiffs offered to place any one or all of the transcripts into evidence, and this defense counsel would not agree to. The Court is not disposed, even if he deemed it proper, which he does not, to speculate upon the apparent inconsistency of defendants' eminent counsel in asserting a right to examine the transcripts while declining to agree to their being put into the evidence. In any event, there is no doubting the propriety of their use as bases for cross examining Buskel, and the Court entertains no doubt as to the accuracy of the portions so used. Mr. Buskel made it plain that such questions were distasteful to him, and it is in evidence that he made the reporting of the meetings a basis for unfair labor practice charges against defendants before the NLRB; a proposition which has heretofore been rejected by that body.

"To return to this line of questioning: Some statements attributed to him Buskel denies; others, he restricts his denial to his having said them at the initial meeting on April 8; still others, he concedes he possibly might have said something like that. Nearly all of the statements tend to illustrate his position on compulsory unionism; 'That the boys in the shop would take care of non-Union men'; that if trouble were encountered with an employer 'someone would start throwing rocks pretty quick'; 'that there would be some knocking of heads'; that if he is going to deal with an employer he is going to deal with him 100% union; that if an employer were faced with the problem of Union employees refusing to work with non-Union men, but unable to fire them on that account, his answer is 'get all Union men'. Apart from this type of examination, Buskel in spontaneous testimony states that he has never written a contract where Union men will work with non-Union men and he would never write one. This, despite other of his testimony that he has negotiated and now has operative in other states, open shop contracts.

"The Court finds it impossible, under fairest appraisal, to reconcile Buskel's inconsistency in testimony; his assertion of recession from Article 16 and his willingness to negotiate an open shop contract with his statements at negotiations and at trial, which to the Court make inescapable the conclusion that he was at all times demanding a closed shop, if not in the express terms of Article 16, then certainly in his conception of how it should and would be applied. His apparent dislike for lawyers, regular courts of law, and preservation by amanuensis of contract discussion, is certainly his prerogative, but it smacks of a want of candor and a distaste for open covenants openly arrived at, that casts a shadow upon the otherwise clear light of credibility. Even if other proper considerations were laid aside and only under the test of mere preponderance of testimony, making due allowance for the prejudice that undoubtedly exists in some degree on both sides, it must be concluded that the allegations of the complaint relative to defendants' demands for a closed shop are established. This finding made, it follows that the picketing for an unlawful purpose—to force a closed shop—must be permanently enjoined." We can not say the trial court's findings are contrary to a preponderance of the evidence.

We have not overlooked the recent case of *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union,* 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228, dealing with the jurisdiction of the state courts to issue injunctions against picketing in labor disputes. But here the Chancellor is being sustained in the finding that the picketing is for the purpose of forcing the employers to agree to an unlawful provision in a collective bargaining agreement. The National Labor Relations Act does not apply to the situation existing here. In *International Union* v. *Wisconsin Board,* 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, it is said: "It seems to us clear that this case falls within the rule announced in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, that the state may police these strike activities as it could police the strike activities there, because 'Con-

gress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.' There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve, or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned." Likewise the National Labor Relations Act does not give the federal Board authority to "investigate, approve, or forbid" the union conduct in the case at bar.

Appellants contend that even if the finding of the Chancellor is sustained, the decree should be modified so as to prohibit only picketing for the purpose of obtaining a closed shop; but we think the language of the court in *Self* v. *Taylor, supra,* is applicable: " 'Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted.' The injunction does not prevent appellants from bargaining in good faith for a legal contract. If legitimate differences arise not connected with the closed shop demand, which would warrant peaceful picketing, they may apply to the Chancery Court for appropriate modification of the injunction. If such modification is erroneously denied, an appeal always lies to this court."

Appellant also contends that the court erred in two instances with reference to the admissibility of testimony. We have examined these assignments of error and find they are without merit.

While the cause was pending on appeal and before it was submitted, the appellee filed a motion to dismiss on the ground that the strike had been called off by the employees and the question involved is therefore moot. Appellant resisted this motion on the ground that in the event it should be held by this court that the injunction should have been dissolved by the trial court, there might be an element of damages involved; and further that the controversy between the parties had not been settled, and that substantial rights would be affected

by the outcome of this case. We therefore considered the case on its merits.

Affirmed.

BARTLETT *v.* STANDARD LIFE AND ACCIDENT INSURANCE COMPANY.

5-286 264 S. W. 2d 46

Opinion delivered February 1, 1954.

F. C. Crow, for appellant.

Savage, Gibson & Benefield, McMillen & Teague and *Graves & Graves,* for appellee.

GEORGE ROSE SMITH, J. This is an appeal from the trial court's action in setting aside, after the lapse of the term, a default judgment against the appellees. The circuit court found in effect that the defendants' failure to appear on the day of trial resulted from unavoidable casualty or from the clerk's misprision. Ark. Stats. 1947, § 29-506. It is the appellant's contention that the entry of judgment by default was due solely to the negligence of the defendants' counsel.

Bartlett brought suit for $507.30 upon a policy of casualty insurance, joining as defendants the insurer and its local agent. Summons was served on the corporate defendant on December 6, 1952. The company's general counsel, a firm of Oklahoma attorneys, filed an answer for both defendants on December 29, which was within

the time allowed. Thereafter, without notice to the defendants, the case was set to be tried on January 21, 1953. On that day the defendants failed to appear, and the plaintiff took judgment by default.

At the ensuing April term of court the judgment was set aside for the reasons mentioned above. In vacating the judgment the court found that its clerk had neglected in two respects to comply with the court's rules: First, when the answer was filed the clerk should have mailed to the defendants' attorneys a copy of the court's rules and of the court calendar. This was not done. Second, when the case was set for trial the clerk should have immediately notified counsel, but this also was not done. It was on the basis of these two omissions that the trial court granted the defendants' motion to vacate the judgment.

The circuit court is clothed with a sound discretion in a matter of this kind. *United Order of Good Samaritans* v. *Bryant,* 186 Ark. 960, 57 S. W. 2d 399. In this case we find no abuse of that discretion. It is true, as argued by the appellant, that the insurer's Oklahoma attorneys were at fault in merely filing an answer, without attempting to find out when the case would be tried. But this oversight was not the sole cause for the defendants' failure to appear on the day of trial. Had the circuit clerk performed the duties imposed upon him by the court's rules the defendants would have received notice of the impending trial. It is familiar law that a litigant should not be prejudiced by an act of the court. *Metropolitan Life Ins. Co.* v. *Duty,* 197 Ark. 1118, 126 S. W. 2d 921. Here the defendants' misfortune would have been prevented either by diligence on the part of their lawyers or by the clerk's discharge of his duty. Neither factor can fairly be said to outweigh the other. When it is remembered that the vacation of the judgment simply leads to a trial on the merits, which is all the plaintiff was entitled to in the first place, we are not willing to say that the trial court was in error.

Affirmed.

5-284 264 S. W. 2d 51

Opinion delivered February 1, 1954.

J. E. Still, for appellant.

D. H. Crawford, for appellee.

WARD, J. Appellants, defendants below, seek here to reverse a chancery decree which quieted title in appellees to a small parcel of land on the ground of adverse possession. Most of the material facts are not in serious dispute.

One John Wood, prior to 1930, was the owner of a strip of land across the west side of the Northwest quarter of the Southeast quarter of Section 20, Township 7 South, Range 19 West. On January 30, 1930, Wood conveyed to George W. Burris a portion of said land described as: commencing at the Northwest corner of said Northwest quarter of the Southeast quarter and running East 6.62 chains to place of beginning, thence South 20 chains, thence West 165 feet, thence North 20 chains, thence East 165 feet to the point of beginning.

On February 24, 1939, Burris conveyed the same land, by the same description, to appellees. On February 17, 1939, after the death of John Wood, his executor conveyed to C. E. Wade, by a metes and bounds description a parcel of land 272 feet wide off of the west side of said northwest quarter of the southeast quarter. Thus it will be seen that the north and south boundary line, as set out in the deeds mentioned above, between the two parcels of land was a common line 1,320 feet running from the north boundary to the south boundary of said forty. We will hereafter refer to this line as the true line. C. E. Wade later died and his widow and children are the appellees.

The proof shows that when Burris purchased from Wood in 1930 he had a surveyor run a line and thereupon built a fence along what he conceived to be the west side of his property. Later it developed that said fence began at the south end of the true line and ran north along or close to the true line approximately 800 feet where it veered slightly to the west and, running northerly, intersected the north line of said forty 20 feet west of where the true line intersected the north line of the same forty. Therefore the parcel of land in controversy is that portion of land east of the fence and west of the true line between the two parcels of land.

This suit was instituted by appellees to quiet title to the disputed parcel of land described above, claiming to own the same by adverse possession. The chancellor, finding the issues in favor of the appellees, quieted their title, and in our opinion the proof sustains his finding. The testimony shows that soon after Burris bought the east parcel of land from Wood in 1930 he had a surveyor run out the west line of his property and built a fence along the line staked out by the surveyor as above stated and that this fence has been maintained at the same location from that date to shortly before this suit was instituted. Burris stated that he claimed the land west as far as the fence and that he used the disputed land for a cow pasture. Burris further stated that when he

sold the land to appellees in 1939 that the fence was on the same line and that he placed appellees in possession up to the fence. Appellee Williams testified; that when he bought the land from Burris in 1939 the fence was still there and he understood that the fence was his west line, and; that the fence was maintained on the same line except for two gaps which he permitted to enable appellants to haul dirt. He further testified that he occupied and used the land as an orchard and that he built a hedge just east of the fence which finally grew to a great height. A plat was introduced in evidence which had been prepared by a surveyor in connection with Wade's Addition to Arkadelphia in 1946. Contained in the description on the plat is the following: "Note in checking over the above described property it was discovered that there was only 252 feet between the two very old land lines already having been under fence for several years, so we platted what was left." It is obvious from what has already been said that if the fence had been built on the true line there would have been 272 feet instead of 252 feet as mentioned above.

Under the well established rule regarding adverse possession, many times announced in the decisions of this court, the above facts are ample to support the chancellor's finding that appellees and their predecessor Burris had been in the actual, open, adverse and notorious possession of the disputed parcel of land for more than the required 7 years. Typical of the cases defining adverse possession is *Terrell* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489, where the court, quoting in part from another authority, used this language:

" 'Notorious possession contemplates possession that is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood.' On the question of notice, the textwriter says: 'The true owner must have knowledge or notice that the possession is hostile; and this may and must consist either of actual knowledge or of constructive notice arising from the openness and notoriety of the possession. * * * Possession which is so open, visible and notorious as to give

the owner constructive notice of an adverse claim need not be manifested in any particular manner; but there must be such physical evidence thereof as reasonably to indicate to the owner, if he visits the premises and is a reasonable man of ordinary prudence, that a claim of ownership adverse to his is being asserted'."

Appellants do not controvert the facts set out above except that they show that neither Burris nor Williams ever told C. E. Wade or any of the appellees that he was holding the land adversely to them, and except that it was attempted to show by evidence, which we deem insufficient, that appellees and Burris were holding and occupying the disputed land with their permission. It is well settled of course, as indicated by the above citation, that actual notice of one claiming land by adverse possession is not always essential.

We deem it necessary to call attention here to an apparent error in the description of the land as contained in the court's decree as it is copied in the record. The first line of the description in the decree reads: "Beginning at a point 6.62 chains east of the *northeast* corner of the northwest quarter of the southeast quarter . . .". We take it that where the word *northeast* was used above it was meant to use the word *northwest,* otherwise the land described would be one-quarter of a mile east of the land it was evidently meant to describe. Also in the same description later on there appear to be two more errors which we describe in this way:

(a) The first part of the description contains these words: "and running thence west *165* feet more or less to a point in Walnut Street which is directly north of the northeast corner of Wade's Addition . . .". It appears clear to us where the figure "165" is used that it was meant to use the figure "185". All of the proof, including the admission of appellants, show that the north end of the fence intersected the line 20 feet west of the northwest corner of appellees' true description. In other words the north boundary of appellees' property according to their deed was 165 feet from east to

west and the court's decree evidently meant to give them another 20 feet.

(b) Where it is evidently sought to describe the line running along the west side of the disputed parcel of land the description reads "Thence runs south *to* a certain fence, and follows said fence, . . .". It appears to us the word "along" should have been used instead of the preposition "to" used above.

We can feel sure that the description in the decree meant to describe the parcel of land lying immediately east of the old fence to conform with the proof. We are therefore remanding the cause with directions to the lower court to enter a decree describing the disputed parcel of land to conform with the views expressed above.

BEAVERS *v.* SMITH.

5-285 264 S. W. 2d 617

Opinion delivered February 1, 1954.

[Rehearing denied March 8, 1954.]

Coffelt & Gregory, for appellant.

Wood & Smith, for appellee.

J. Seaborn Holt, J. This suit is a contest between the father of two boys,—one approximately eleven years of age and the other ten,—and their foster grandmother, over their care and custody. The case has been before us on two former occasions (in June, 1948, and again in 1949, *Smith* v. *Smith,* 213 Ark. 636, 212 S. W. 2d 10 and *Smith* v. *Smith,* 215 Ark. 862, 223 S. W. 2d 772) and on each, we affirmed the decree of the trial court which had awarded the custody of these children (one being erroneously referred to as a little girl) to their grandmother (appellant here). On petition of appellee April 27, 1952, the trial court, on August 28, 1953, took these children from appellant and awarded appellee their care and custody, and this appeal is from that decree.

The question now presented is whether, since the court's last order in 1949 continuing the care and custody of these children in appellant, appellee has shown such changed conditions as would warrant a modification of that decree, and an award of the custody to appellee, the burden being on him. We hold that appellee has failed to meet the burden imposed and that the trial court erred in modifying its former decree. Reference is made to our former opinions above for statements of essential facts. After a careful review of the testimony, we find no substantial change in conditions affecting the welfare of these children, since custody was awarded appellant. It is conceded that appellant and her husband, Dan Beavers, are good people, and are suitable, financially able, and anxious to continue to have the care and custody of these boys. In fact, it seems that both are bestowing upon these children all the love, care and affection that would be expected of natural parents.

About the only change shown by appellee is the fact that he now owns a home in Louisiana, is financially able to care for the boys, and has a child by his second wife, and she now joins him in his plea to have their

custody. The fact remains, however, as pointed out in our former opinions, that appellee gave these children to their grandmother willingly, practically abandoning them, and they have remained with appellant and her husband (grandparents) all of their lives except for about sixty days. For almost ten years, appellee contributed nothing to their support and appeared indifferent to their well being. Not until June, 1952, did he make any contribution towards their support and then only in obedience to an outstanding court order, and apparently in preparation for the present litigation.

Both children testified that they wanted to remain with their "grandmother and granddaddy." During all this time, with appellee's assent, ties of love and affection have grown strong between these children and their grandmother which appellee is obligated to respect.

In a long line of cases, we have consistently adhered to the well established rule: " 'In determining the custody of a minor child, the welfare of the child is the supreme and controlling consideration. In the comparatively recent case of *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, we said: '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. * * * A decree fixing the custody of a child, is, however, final on the conditions then existing and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child.' See, also, *Phelps* v. *Phelps,* 209 Ark. 44, 189 S. W. 2d 617. 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. *Kirby* v. *Kirby, supra,* and *Seigfried* v. *Seigfried* (Mo. App.), 187 S. W. 2d 768;' *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455.

"We also said in *Graves* v. *French,* 209 Ark. 564, 191 S. W. 2d 590, (quoting from *Verser* v. *Ford, et al.,*

37 Ark. 27): 'This is a contest for the custody and nurture of an infant girl of tender age, whose mother died at her birth, and who, from the first two or three days of her existence, has been cared for and kept by the grandparents. The father now demands the child again, having since married, and being in circumstances to provide and care for it. * * * The father has shown himself to be a moral man, with the means of discharging his parental obligation. Certainly, under the circumstances, if he had been in possession of the child, no chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care. But it cannot be ignored that the case does not present that attitude. The child was placed where she is by the father's assent, and has so remained. By his assent ties have been woven between the grandmother and granddaughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder,' " *Smith* v. *Smith,* 213 Ark. 636, 212 S. W. 2d 10.

" '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 right be ignored. * * * The courts will not always, however, award the custody of infants 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.' * * * " *Henry* v. *Janes,* 222 Ark. 89, 257 S. W. 2d 285.

In *Mantooth* v. *Hopkins,* 106 Ark. 197, 153 S. W. 95, where the factual situation was strikingly similar to the present case, we said: " 'When, therefore, the court is asked to lend its aid to put the infant into the custody of the father and to withdraw it from other persons, it will look into all the circumstances and ascertain whether it will be for the real, permanent interest of the infant;

and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint and endeavor as far as possible to administer conscientious duty with reference to its parental welfare. It is an entire mistake to suppose that a court is at all events bound to deliver over an infant to its father, or that the latter has an absolute vested right in its custody.' "

The decree is reversed with directions to restore the care and custody of these children to appellant with the privilege to appellee to visit them at all reasonable times and for proceedings consistent with this opinion, including support money, costs in both courts to be paid by appellee.

The Chief Justice not participating.

WARD, J., (dissenting). I cannot agree with the last paragraph of the majority opinion which gives appellee, the father of the two children, only "the privilege . . . to visit them at all reasonable times . . ." It is true that the father allowed the children to be placed with their foster grandmother but it also appears that at the time he did so he was not in position to keep them himself. It is not disputed that the father now has a home and that his character is such that he would not exercise any bad influence on the children. To my mind it is very unjust for this court to deny him the privilege of having the children with him in his home for a reasonable period of time when they are not in school. This right to a parent has been recognized many times by this court. See *Burnett* v. *Clark,* 208 Ark. 241, 185 S. W. 2d 703; *Drewry* v. *Drewry,* 214 Ark. 540, 216 S. W. 2d 888; *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492; and *Kirby* v. *Kirby,* 189 Ark. 937, 72 S. W. 2d 817.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL No. 249 *v.* E. W. DANIELS PLUMBING & HEATING COMPANY, INC.

5-226 264 S. W. 2d 597

Opinion delivered February 1, 1954.

[Rehearing denied March 8, 1954.]

Martin, Dodds & Kidd, for appellant.

Mehaffy, Smith & Williams, for appellee.

WARD, J. The question to be decided is the validity of an injunction issued by the Chancery Court of Pulaski County to prevent peaceful picketing. The defendants below (appellants here) were Sheet Metal Workers International Association, Local No. 249, and E. P. Eilmes,

individually, and as an officer and representative of said local union. Eilmes was joined as defendant as Representative of the Class pursuant to Ark. Stats., § 27-809. All of the defendants will be referred to as "Union."

Appellees here are the two original plaintiffs, E. W. Daniels Plumbing and Heating Co., Inc., and H. H. Ketcher, Jr., d/b/a Ketcher and Company, and the two intervenors, J. E. Hornibrook, d/b/a J. E. Hornibrook Company, and J. Louis Edwards, d/b/a Edwards Sheet Metal Company. All the appellees are members of the Union Section of Sheet Metal Construction Association of Arkansas (hereinafter called "Association"), a non-profit Arkansas corporation. Hereinafter we will refer to appellees as "Contractors."

Set out in the record is a copy of a contract, as of date March 1, 1952, entered into between Union on the one part and the Union Employer Section, Sheet Metal Contractors Association of Arkansas, Inc., on the other part. For the Union the contract was signed by J. W. Lucas and for the Association the contract was signed by J. E. Hornibrook, president, and Ben J. Booth, Chairman. Among other things the contract covers the rates of pay, hours of work, holidays, rules and working conditions of all employees of the employer-contractors engaged in the manufacture, fabrication, etc., of all sheet metal work, used in fabrication and erection "and all other work included in the jurisdictional claims of the Sheet Metal Workers International Association." Other parts of the contract will be referred to in connection with issues hereinafter discussed.

It was, and is, the contention of appellees that while the above contract was in full force and effect on March 5, 1953, the Union called a strike causing its members, who were employed by appellees, to picket employers' places of business. On June 2, 1953, appellees filed a complaint in Chancery Court alleging among other things that:

"The plaintiffs entered into a collective bargaining contract with the defendants on March 15, 1952, retro-

active to March 1, 1952, which contract is presently in full force and effect due to failure of defendants to give written notice of change of the terms thereof as required by Article XI, Section 1 thereof. A copy of the aforesaid contract is attached hereto, made a part hereof as though fully set out herein, and marked 'Exhibit A' for identification.

"The defendants have failed and refused to comply with the aforesaid contract since March 1, 1953, and at this time are engaged in picketing the businesses of the plaintiffs in an effort to coerce, force and compel the plaintiffs to waive and relinquish their rights under the aforesaid contract and to enter into another contract, and such purposes and objectives of the defendants are unlawful.

"Through the aforesaid picketing, the defendants are harassing the plaintiffs, causing them to suffer embarrassment, inconvenience and irreparable damages without an adequate remedy at law."

The prayer in the complaint asked for a temporary restraining order against the picketing and it was granted.

Appellants filed an answer denying the execution of the contract and any rights of appellees thereunder and alleged their right to picket peacefully under § 6 of Article 2 of the Arkansas Constitution and under Amendment 14 to the United States Constitution. After a hearing at which both sides introduced testimony the temporary injunction was made permanent.

Before considering the principal contention of appellants that the trial court had no power to enjoin peaceful picketing we will first dispose of certain other grounds urged by appellants for a reversal.

1. *Validity of the Contract.* Appellants insist that the plaintiff contractors have no interest in or rights under the collective bargaining agreement mentioned above because the agreement was not signed by them individually. This objection is not well taken. The Association represented its members just as Local No. 249

represented its members and the contract was signed by the representatives of both parties in the light of this knowledge. It appears from the record that the wording of the contract was prepared by the Union or its national affiliate. It is almost a replica of a "STANDARD FORM OF UNION AGREEMENT" introduced as an exhibit, the first paragraph of which is as follows:

"This agreement entered into this.....day of .....19.....by and between.....(Name of Contractor or Contractor's Association)..... hereinafter referred to as the Employer, and Local Union No....., of Sheet Metal Workers' International Association of.....(Specify Jurisdiction of Local Union)....., hereinafter referred to as the Union." The minutes of a meeting held by the Union on March 1, 1953, indicate that it recognized the force and benefits of the contract notwithstanding the fact it apparently thought the contract had expired because of a failure to effect an agreement with the contractors as to a wage increase. The members present at that time voted 102 to 11 that since there was no contract there would be no work. This expression could only mean that the members considered that they had been protected by this same contract while it was unquestionably in force, because they had worked and apparently were content to work under its terms. The contract itself shows that it was to be signed by a contractor only in case the contractor was not a member of the Association, and it is not contended that appellees were not members. On September 11, 1952, after the matter of signatures to the contract by members of the Association was raised by appellants, the Association wrote the business agent of Local No. 249 explaining that such signatures were not necessary. So far as the record reflects this ended the matter and no objection thereafter was made by the Union. All of the evidence convinces us that the strike was not called by the Union because it thought the contract was not valid or binding.

2. *Mutuality of the Contract.* We are not convinced by appellants' argument that the contract lacked

mutuality. Of course it did not compel appellees to hire members of the union, nor did it force the members to work for appellees, but obviously there were benefits which the union employees, as well as the contractors, expected to receive as a result of the contract. It is not reasonable that Local Union No. 249 and the International Union would have prepared and approved, as they did here, a contract which they thought was lacking in mutuality. There is little doubt that the Union's attitude in this regard would have been just the reverse to the contention now made if the contractors had insisted on paying wages lower than those specified in the contract.

3. *Expiration of the Contract.* Appellants also contend that the contract had expired when the strike was called because (a) the Union had proposed substantial changes and because (b) the ninety days notice provided for in the contract had been given.

(a) It is insisted, supported by numerous authorities, that a notice of proposed substantial amendments to a contract serves to prevent the operation of an automatic renewal clause. Regardless of whether this legal contention is correct or not it has no bearing in this case, because we find that no such proposal was made here by appellants. The contention is based on the fact that by a letter dated September 11, 1952, to the Association appellants suggested that the contract should be signed by appellees. It has already been pointed out that this letter was answered and that apparently the matter was thereby concluded to the satisfaction of appellants. Moreover, this question of signatures to the contract was a legal matter relating to its execution and was in no sense a proposed amendment.

(b) It is next urged that the contract did not expire until March 15, 1953, and that therefore the notice given by the Union on December 5, 1952, was a full compliance with the ninety days notice provision. The only apparent justification for this contention is that the contract is shown to have been signed on March 15, 1952,

but the provisions of the contract negative this contention. Article VI of the contract reads as follows:

"Section 1. This agreement shall become effective on the 1st day of March 1952, and remain in full force and effect until the 1st day of March 1953, and shall continue in force from year to year thereafter, unless written notice of change is given not less than ninety (90) days prior to the expiration date and until conferences relating to such requested change have been terminated by the execution of a new agreement or otherwise, this agreement shall remain in full force and effect."

It is elementary that contracting parties can fix an expiration date of their own choosing and in this instance it clearly appears that the chosen date was March 1, 1953. Also, according to the record it was recognized on behalf of appellants that the notice given on December 5, 1952, was not a sufficient notice because the Association was asked to waive the deficiency, but it also appears that the Association did not choose to do so.

4. *Peaceful Picketing.* Appellants present an able argument and an imposing array of authorities to the effect that, conceding the contract was valid as to mutuality and that it had not expired, the injunction granted by the trial court is in violation of their rights under the State and Federal constitutions as heretofore indicated. We can not agree with this contention.

In discussing the matter under consideration it is well to keep in mind what is the true question. It is not: Can the Union bargain away its right of free speech or, in other words, its right to strike? The question is: Can the Union bargain away the right to strike for a reasonable period of time under the facts and circumstances of this case? As held in the case of *Lion Oil Company* v. *Marsh,* 220 Ark. 678, 247 S. W. 2d 569, there is no constitutional prohibition against a labor union bargaining away the right to strike or the right to use the incidental coercive weapons [picketing] essential

to the effectiveness of such action for a reasonable time where the contract relationship sought to be evaded was originally thought mutually beneficial to both sides.

However, notwithstanding the above, it is insisted that a state court has no power to enjoin picketing under the circumstances of this case where, as we see it, the purpose of the picketing was to force the breach of a contract. Appellants point out that the picketing in this instance was for a lawful purpose and that consequently this case is not controlled by the *Lion Oil* case, *supra,* but we again do not agree. A careful consideration of the *Lion Oil* opinion impels the conclusion that it holds picketing to force the breach of a lawful contract to be picketing for an unlawful purpose. If there is need for any extrinsic confirmation that the court in the cited case did base its opinion on this exact ground, it may be found in the fact that there were dissenting opinions and also in the dissents themselves. In one dissent it was specifically pointed out that: "The fundamental question in this case is whether the appellees are striking for an unlawful purpose . . . The majority hold that the strike is in breach of the Union's contract and is therefore for an unlawful purpose." It would be surplusage to add anything here to the reasons given in the cited case to sustain the same conclusion in this case. It is pointed out moreover that many years ago in the case of *McConnell* v. *Arkansas Brick & Manufacturing Company,* 70 Ark. 568, 69 S. W. 559, this court expressed its view on the violation of a lawful contract. One head note in the Arkansas Reports gives some indication of what was involved and its language is significant: "Injunction is the proper remedy to prevent the board of penitentiary commissioners from *unlawfully* rescinding a valid contract for the lease of state convicts." (Emphasis supplied). On Page 590 of the Arkansas Reports it was said:

"It is, in fact, expected that, when the defendants are advised of the law under which they perform their duties, they will govern themselves accordingly."

The facts in the cited case are not at all like the facts in the present case and reference to it is only for the purpose of showing this courts attitude toward the sancitity of contracts.

It might be argued that the recent case of *Joseph Garner and A. Joseph Garner, et al.* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776 (A. F. L.), et al.*, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228, decided after the *Lion Oil* opinion was handed down, destroys the force of the last mentioned opinion. We are not called on to decide the question whether the *Joseph Garner* case is in conflict with the *Lion Oil* case in some other respects but we do not concede the conclusion suggested above because the former case did not involve the breach of a contract as is the situation here. The force of the *Lion Oil* opinion regarding the question here considered is not affected because the suggested conflict between the two cases stems not from the issue here involved but from the fact that both cases involved interstate commerce, while in the case under consideration interstate commerce is not involved.

There has been, it seems to us, much confusion and misunderstanding stemming from the apparently popular conception that "the right to picket" is identical to "the right of free speech." It will be recalled that appellants' defense in this case, as stated in their answer, was based on § 6 Article 2 of our State Constitution and on Amendment 14 to the United States Constitution. Said § 6 guarantees "the free communication of thoughts and opinions" and guarantees that "all persons may freely write and publish their sentiments on all subjects . . ." We note here that the rest of the sentence following the above quote is often overlooked. It reads: ". . . being responsible for the abuse of such right." The 14th Amendment prohibits any state from depriving "any person of life, liberty, or property, without due process of law;". One of the most important of these privileges is the one of free speech as guaranteed by the First Amendment to the United States Constitution. Many decisions of our courts emphasize the fact that there are some differences between the right to picket

and the right to free speech. Typical of such cases is the case of *Hughes, et al.* v. *Superior Court of California for Contra Costa County,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718, from which we quote language bearing on this point:

"The domain of liberty, withdrawn by the 14th Amendment from encroachment by the states . . . no doubt includes liberty of thought and appropriate means for expressing it. But while picketing is a mode of communication it is inseparably more and different. Industrial picketing 'is not then free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated'. . . . the very purpose of a picket line is to exert influence, and it produces consequences different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent."

Basing its opinion in part upon the above quoted language the United States Supreme Court in the *Hughes* case held that "the 14th Amendment did not bar the State of California from the use of the injunction to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers," and in so doing it upheld the Supreme Court of California which in turn held that such picketing was unlawful even though pursued in a peaceful manner. In reaching its conclusion in that case the United States Supreme Court further stated: "The constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations," and that "Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance," and also that "The fact

that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial."

In the case of *International Brotherhood of Teamsters, Etc. Union, Local 309, et al.* v. *Hanke, et al.*, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773, the United States Supreme Court affirmed the decision of the Washington State Supreme Court in upholding an injunction against picketing by a labor union to compel compliance with a demand for a union shop where the injunction was challenged on the ground that it infringed on the right of free speech as guaranteed by the 14th Amendment. In reaching its decision the court again recognized that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech," and that "picketing is indeed a hybrid." The opinion cited the case of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed. 1229, 57 S. Ct. 857, and referring to the matter of picketing quotes with approval: " 'Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern'." Again it was specifically recognized in the opinion that the State of Washington had the "power to make the choice of policy" which she had made.

In the case of *General Building Contractors' Ass'n et al.* v. *Local Unions Nos. 542, 542-A and 542-B et al*, 370 Pa. 73, 87 A2d 250, 32 A. L. R. 2d 822, the Supreme Court of Pennsylvania sustained an injunction against peaceful picketing in a situation where the facts are somewhat similar to those in the case here and where there was involved a breach of a collective bargaining agreement. The court there held that the right of the State to enjoin picketing was not affected by the Labor Management Relations Act or any other federal legislation even though interstate commerce was involved. Because interstate commerce was involved the opinion might appear to be in conflict on that point with the *Garner* case above mentioned but the grounds on which the decision is based are applicable here and are in harmony with other State and Federal decisions. The question

before the court was stated in this way: "No more is involved here than an action in equity to preserve the existence of a valid and subsisting contract and to compel parties thereto to recognize, adhere to and perform duties and obligations, contained therein." In concluding it was said; "Prevention of violation of obligations contained in a contract by injunctive relief is a power traditionally exercised by courts of this Commonwealth."

In addition to what has already been said it appears to us that there are other common sense reasons why appellants should be enjoined from using economic force to breach or force a recision of a lawful contract. It is not easy to understand how appellants and organized labor in general would be benefited if they are permitted by the courts to so disregard their contractual obligations. The right of labor to organize and contract as a unit is a privilege which has been achieved by them after a long, tenacious fight. This dearly won right has brought to organized labor manifold benefits which reason dictates they should want to defend and preserve. One of the chief benefits is the right of labor, through its personal representatives, to sit across the table from the heads of industry and bargain for wages and working conditions. It must be obvious that these benefits rest entirely upon contractual relationships as do most property rights in general. The rights of property, resting almost exclusively on contractual relationships, are recognized to be fundamental and sacred. Not only does the constitution guarantee freedom of speech but it also guarantees other rights and in some instances the two must necessarily be considered together and frequently with certain concessions to each. Article 2, § 2 of our State Constitution states that all men "have certain inherent and inalienable rights" among which are those of "acquiring, possessing and protecting property . . .". Article 2, § 22 of the same constitution specifically states that "The right of property is before and higher than any constitutional sanction."

In the case of *Young* v. *Gurdon,* 169 Ark. 399, 275 S. W. 890, this court reaffirmed these rights in this language:

"Under our governmental system the right of an individual to acquire and possess and protect property is an inherent and inalienable right and declared to be higher than any constitutional sanction."

For the reasons stated above the decree of the trial court is affirmed.

GEORGE ROSE SMITH, J., concurring. This concurring opinion pertains only to the discussion that constitutes the majority opinion's fourth subdivision, "Peaceful Picketing." I am unable to agree with all that is said and with all that is implied in that section of the opinion.

My disagreement really goes back to the case of *Lion Oil Co.* v. *Marsh,* now followed by the majority. There it was held that picketing in violation of a contract is so unlawful and so contrary to public policy that it may be prohibited by injunction. Since my dissent was based on the belief that there had been no breach of the contract, I did not think it necessary to go farther and discuss the matter of public policy. In the case at bar, however, the appellants have in fact violated their agreement, and I concur to add what was left unsaid in the earlier case.

It seems to me that the responsibility for selecting the State's policy in a matter of this kind lies not with the courts but with the people, speaking either through their constitution or through their legislators. It is only in rare instances, usually involving a moral issue so plain as to admit of only one answer, that the judiciary should be expected to announce the State's public policy. And even then the determination may be set aside by statute. For instance, it has long been our view that a provision in a promissory note permitting the holder to recover his attorney's fees is contrary to public policy. That rule was changed by Act 350 of 1951, and I do not suppose that any one doubts its constitutionality.

It did not, and does not, seem to me that the situation presented by the *Marsh* case was one calling for a judicial

declaration of the State's public policy. All that was involved was a breach of a private contract. One who violates his agreement is not usually treated as having put himself completely beyond the protection of the law. If, for example, a mortgagor should deliberately and inexcusably repudiate his obligation, a court of equity would still be scrupulously careful to afford him every safeguard permitted by law. Again, Amendment No. 1 to our present constitution, however much it may have been justified in the light of history, was nevertheless a repudiation of public debts that were technically owed. Of course, I do not condone contractual violations; but I do not think such conduct so fundamentally affects the State's notions of right and wrong as to demand a judicial enunciation of the sovereign's position in the matter.

It must be conceded, however, that the *Marsh* case did lay down the State's policy, and in today's opinion the court reaffirms its position. Even though it is my view that this declaration should more appropriately have been embodied in a statute, there is no constitutional objection to the course taken by the majority of the court. For this reason I feel bound to recognize the *Marsh* case as a controlling precedent and therefore to concur in the result now reached.

Even so, I should like to add a word on another point. The court seems to assume that if the picketing be shown to be in violation of contract an injunction will issue as a matter of course. That is certainly not the law. The usual remedy for breach of contract is an action at law for damages; it is only in cases of irreparable injury that injunctive relief is appropriate. Walsh on Equity, §§ 66 and 67. Here the evidence of irreparable injury is pretty scant. The business of the appellees has not been paralyzed by the strike, for substitute workers have been employed. It is shown that in a few instances deliveries have been delayed by the picket line, and each appellee complains of being embarrassed by the picketing. But, although the preponderance of the evidence indicates rather clearly that no damage has been sustained that could not be compensated by a money judgment, this case is not to be

tested by the weight of the testimony. At the close of the plaintiffs' case the defendants demurred to the evidence and elected to stand on the demurrer when it was overruled. The question, therefore, is whether there is any substantial evidence of irreparable injury, *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, and that question must be answered in the affirmative.

ED. F. MCFADDIN, Justice (dissenting). My dissent goes to that part of the majority opinion beginning with Section "4. *Peaceful Picketing.*" In that Section,—the principal portion of the opinion—the majority is holding that equity may enjoin peaceful picketing whenever the Union has breached a collective bargaining contract; because (insists the majority) anything that encourages a breach of contract is an "unlawful purpose." Here is the language of the majority:

". . . it is insisted that a State Court has no power to enjoin picketing under the circumstances of this case where, as we see it, the purpose of the picketing was to force the breach of a contract. . . . A careful consideration of the *Lion Oil* opinion impels the conclusion that it holds picketing to force the breach of a lawful contract to be picketing for an unlawful purpose."

Now the foregoing is the foundation on which the majority builds its argument in support of the injunction in the case at bar. The strike in the present case was *wrongful* in the sense that it was in violation of contract, but it was not *unlawful* because there was no breach of the peace shown to have been committed, or threatened to be committed. At the penalty of repetition, I copy what I said on this point in my dissenting opinion in *Lion Oil Co.*[1] v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569:

" 'Unlawful' means 'in violation of law.' In *State* v. *Bulot,* 175 La. 21, 142 So. 787, the Supreme Court of Louisiana said that the term 'unlawful' means 'that which is not lawful, or that which is contrary to some express pro-

[1]In Arkansas Law Review, Vol. 7, p. 147, there is a case note on the *Lion Oil* case; and the writer of that case note accurately foretold the opinion of the U. S. Supreme Court in *Garner* v. *Teamsters Local,* 98 L. Ed. (Adv. Op.), p. 161. See also Annotation, 32 A. L. R. 2d 829.

vision of the law,' and that 'unlawful purpose' means for the purpose of doing something that is prohibited by law. I realize that the word 'unlawful' may sometimes refer to mere civil violations, as distinct from criminal violations,[2] but the general meaning of 'unlawful' is 'violation of law.'[3] Certainly that is the meaning of the words 'unlawful purpose' in connection with labor disturbances. In the case of *Cole* v. *State*, 214 Ark. 387, 216 S. W. 2d 402,[4] we discussed the words 'unlawful assemblage' in connection with our Freedom-to-Work statute; and we there committed this Court to the view that an *unlawful assemblage* was one for the accomplishing *of an act forbidden by law*. That case and its reasoning are clearly against the majority holding in the case at bar. There is no law that adjudges a fine or other criminal penalty against a person who violates a contract. All that the defendants have done in this case is to violate a contract, and such is not *unlawful* within the purview of our labor laws. So I insist that an injunction against picketing should not issue in this case, because the purpose of the picketing[5]

It seems clear to me that the majority is creating an entirely new conception of "unlawful purpose" which it proposes to apply only in labor cases.[6] I insist that the

[2] See 66 C. J. 35.

[3] See *Kelly* v. *Worcester*, 97 Mass. 284.

[4] This case was affirmed by the U. S. Supreme Court in a *unanimous* opinion. See 338 U. S. 345, 70 S. Ct. 172, and 94 L. Ed. 155.

[5] For Annotations on the validity of statutes and ordinances forbidding picketing, see 35 A. L. R. 1200, 108 A. L. R. 1119, 122 A. L. R. 1043, 125 A. L. R. 963, and 130 A. L. R. 1303.

while wrongful—was not unlawful."

[6] Neither side has argued a point that has occurred to me while I was working on this dissent. It is this: Quite irrespective of "unlawful purpose" and "public policy," the law generally is that in some instances equity will issue an injunction to prevent a breach of contract; and that since the picketing in the case at bar is designed to bring about a breach of the contract, then an injunction might issue against such picketing. Such thought was suggested to me by the language contained in the opinion of Mr. Justice GEORGE ROSE SMITH in the case of *Smith* v. *Ark. Motor Freight Lines*, 214 Ark. 553, 217 S. W. 2d 249. That was a case in which the Union and the employer had made a contract covering wages, working conditions, and the like. One provision of the agreement was that the employer might employ other than Union members, but after 30 days, such employees must become members of the Union if they continued to work for the employer. The suit was filed by the Union, alleging that the employer had retained non-union members for more than 30 days, and the prayer was

law on "unlawful purpose" as it exists generally should be applied to this case, instead of some new conception of "unlawful purpose" designed to apply only in labor cases.

The majority says that it is declaring the public policy of Arkansas to be that equity will enjoin picketing when the picketing is in violation of a contract. I cannot believe that such a declaration of public policy is in line with what the Supreme Court of the United States had in mind when it was discussing "public policy" in such cases as *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718, and *International Brotherhood* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773. But there is no necessity for me to enter into a discussion of "public policy"; because the determination of whether the majority's present declaration of "public policy" is in accordance with the Federal Constitution and laws is a matter that the United States Supreme Court will ulti-

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for specific performance *and an injunction* against the continued employment of persons not belonging to the Union. The Chancery Court decided against the Union on a misunderstanding of the law governing class actions, and the Union appealed. But the appellee (employer) took a cross-appeal, and argued that a contract for personal services could not be specifically enforced. Of course, this was not a contract for personal services; but Mr. Justice GEORGE ROSE SMITH, in answering the appellee's argument, said:

"A sufficient answer would be that appellants also ask for an injunction to enforce appellee's negative covenant against the retention of non-union employees, and injunction is the normal means of enforcing such a covenant. Walsh on 'Equity,' § 67."

The Freedom-to-Work Amendment was not briefed, but the case indicates that injunction is proper to prevent the breach of a contract governing wages, working conditions, and the like. So it might be argued that injunction was the proper remedy in the case at bar to prevent a breach of the contract by the Union; and that the picketing was designed to cause a breach of the contract. In support of such argument, there might be cited *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, 134 Am. St. R. 88, in which it was said in effect that an injunction restraining the breach of a contract is a negative specific performance thereof, and that the jurisdiction of equity to grant such injunction is substantially coincident with the jurisdiction to compel specific performance, and that when a contract may be specifically enforced, then equity will restrain its breach by injunction if such is the only practicable mode of enforcement. Other cases involving injunctions to prevent breach of contract may be found in West's Arkansas Digest, "Injunction," Key No. 57, *et seq.*

As aforesaid, the foregoing line of reasoning has not been urged in the case at bar. If successfully urged, it could at most only result in my concurrence herein; because I would still be obliged to dissent from that portion of the majority opinion which discusses "unlawful contract" and "public policy."

mately determine. My duty is performed when I have done my best to follow—not my own personal desires but my understanding of—the previous decisions of the United States Supreme Court and this Court. That duty impels the present dissent.

THE HOME INDEMNITY COMPANY *v.* SNOWDEN.

5-262 264 S. W. 2d 642

Opinion delivered February 1, 1954.

[Rehearing denied March 8, 1954.]

Herman Spears, Graham Moore and *Nelson, Norvell & Floyd,* for appellant.

Hale & Fogleman, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Robert B. Snowden, recovered a verdict and judgment against appellant, The Home Indemnity Company, for $8,533.85 which appellee had paid to settle a damage suit filed against him in the United States District Court of Arkansas by Mrs. Fred Lingner for the alleged negligence of appellee and his agents resulting in the death of Mrs. Lingner's husband while working in a frozen food locker plant belonging to appellee at Wharton, Texas.

At the conclusion of all the evidence in the case appellant moved for a directed verdict in its favor on the grounds: (1) that there was no evidence that appellee was guilty of any negligence that caused the death of Fred Lingner; (2) there was no evidence that appellant or its agents were guilty of bad faith in refusing to settle the suit pending against appellee in the United States District Court of Arkansas. Appellant's principal contention on this appeal is that the trial court erred in refusing to sustain the motion for a directed verdict on either or both grounds. In testing the sufficiency of the evidence to support the verdict on these issues we are required to consider the evidence in the light most favorable to appellee, and in support of the verdict, under our well settled rule.

Appellee, a resident of Crittenden County, Arkansas, owned a number of frozen food locker plants in 1947. One of these plants was located at Wharton, Texas, and was under lease to L. M. Guffey. In April, 1947, appellant issued to appellee its public liability insurance policy against injury or death, limited to $5,000 for any one person and $10,000 for any one accident, arising out of operation and maintenance of the said locker plant.

In May, 1947, appellee entered into a contract to sell the locker plant to L. M. Guffey, conditioned upon the installation of certain equipment and the making of certain repairs by appellee. Appellee agreed to send Joe Tirello, his construction foreman in locker plant work, to Wharton to install two locker doors and fix obvious insulation leaks. He also agreed to order and pay for

one 5 HP Frigidaire compressor and authorized Guffey to make a contract with a competent refrigeration man to install the compressor at appellee's expense.

Guffey entered into a contract with Fred Lingner, a refrigerator contractor, to install the compressor, and Lingner employed E. B. Van Hoesen, another refrigerator man, to assist him in performing the work. Van Hoesen testified that during the course of the work, Tirello made an additional oral contract with Lingner to disconnect a certain unit theretofore in use and to connect two of the three units that had theretofore been used to operate two vaults, to one vault only, the 5 HP unit operating the other. Tirello directed Lingner to blow the old gas out of the line by the use of air. The blowing of the old gas out of the lines was done by opening the lines and letting the compressors pump air from the open air into the lines; the atmosphere was humid and moisture was pumped into the lines. Methyl chloride, a toxic gas marked dangerous on the container, was used to refill the lines. The system was apparently working all right, so Tirello left and returned to Memphis. The moisture in the lines condensed, froze up, and stopped circulation of the refrigerators. Lingner and Van Hoesen opened valves in an attempt to let gas blow moisture out and dry the system, and the gas got into the room. The gas made both men sick and Lingner died on June 2, 1947, from methyl chloride poisoning.

When appellee was notified of the incident he sent Tirello back to Wharton and another contractor was hired to correct and complete the repair work. Guffey declined to go through with the purchase, but after Snowden agreed to indemnify him against any liability for the death of Lingner another contract of sale to Guffey was agreed upon in July, 1947. About this time, Mrs. Lingner called on Richard B. Cole, an attorney of Houston, Texas, who began to investigate the matter and later took a statement from Van Hoesen. Snowden had purchased his insurance from an agent named Blount, and some time after the incident and before November 27, 1947, he

reported it to Blount. As a result, the attorneys for appellant in Memphis wrote to Mr. Snowden on the latter date requesting a letter from Snowden setting out the details of the occurrence and asking for a copy of any agreement with Lingner's widow as to a settlement, in order that they might complete their file and investigation. On December 2, 1947, appellee answered the request. In this letter, Snowden stated certain facts in connection with Lingner's death which led him to believe Lingner was an independent contractor and that his own errors caused his demise. He also expressed the belief that a claim would in all probability never arise, but recommended an accurate assembly of the facts while they were still fresh in the minds of all concerned and the taking of Guffey's deposition. Appellant's Memphis attorneys acknowledged appellee's letter on December 10, 1947, and advised that A. A. Nowlin, appellant's claim manager at Dallas, Texas, had been asked to handle the matter since the accident occurred in Texas.

On May 26, 1949, Mrs. Fred Lingner, as administratrix of the estate of her husband, filed separate suits against appellee in the United States District Court of Arkansas and the District Court of Wharton County, Texas, through her attorneys Richard B. Cole and Gordon & Gordon of Morrilton, Arkansas. The complaint alleged damages in the sum of $83,950 on account of the death of Fred Lingner which allegedly resulted from the negligent acts of appellee and his representative and agent, Tirello, who was also joined as a party defendant.

After receipt of appellee's letter of December 2, 1947, and before the filing of the suit by Mrs. Lingner on May 26, 1949, appellant made no investigation of the case. No effort was made to "assemble the facts" or take the statement of Guffey or any other prospective witness until June 23, 1949, when an answer was about due in the Lingner suit. On that date, R. B. Eades was sent to Wharton from appellant's Dallas office to make an investigation.

Shortly after the suits against appellee were filed, he was advised by counsel for appellant that "while all

necessary steps will be taken for the protection of our mutual interests, this is to advise you that you may, if you care to do so, and at your own expense, employ personal counsel to protect your interests over and above the limits of your policy." Snowden employed Davis, Brown, McCloy and Donelson of Memphis.

On June 13, 1949, appellee's personal counsel and appellant's attorneys held a conference to discuss the defense of the case. Appellant's attorneys, as on other occasions, urged the proposition that appellant would not be liable under its policy if it were shown that Lingner was an employee of appellee as alleged in Mrs. Lingner's complaint. During this time, attorneys for appellee began negotiating with counsel for Mrs. Lingner for a settlement, and requested that appellant contribute to such a settlement. Attorneys for appellant denied this request both orally and in letters of June 18 and June 25, 1949, and again asserted their contention that the policy excluded coverage of liability to employees of Snowden. This contention was alleged in the answer, and it was not until the trial of the instant case that appellant admitted that Lingner was an independent contractor.

Attorneys for appellee investigated the case thoroughly and ascertained that a serious question would be presented as to whether Tirello, as appellee's agent, had told Lingner the details of how the job was to be done and that his instructions could have been a possible cause of Lingner's death, and being a question of fact for a jury to determine, the damages could have been most substantial, the deceased being a relatively young man with a good earning capacity, leaving a widow and two minor children.

After considerable negotiation, appellee's attorneys obtained offers of settlement from Mrs. Lingner's attorneys in the amount of $8,000. A conference with reference to the proposed settlement was held on June 22, 1949, at which the appellant refused to contribute to a settlement. On June 24, 1949, appellee submitted his check for $3,000 to appellant's attorneys and demanded

that they settle the claim. The same day appellee's attorneys received a letter from appellant reiterating that there was no liability under the information furnished by appellee and that if deceased were an employee of Snowden, there would be no liability against the appellant. In another letter from appellant's attorneys on June 25, 1949, the settlement offer was again rejected. On July 1, 1949, Snowden wrote the home office of the appellant in New York, outlining in detail the dealings with the company's attorneys and demanding settlement of the claims. No reply was received to this letter.

Mrs. Lingner's attorneys pressing the matter, Snowden gave his check for the full settlement August 16, 1949. On August 26, 1949, releases were executed by the Lingners, and the case disposed of in Wharton County, Texas, and the case was dismissed in Arkansas on September 8, 1949. On October 14, 1949, appellee demanded that appellant reimburse him in the amount of the full settlement of $8,467.77. This demand was refused on February 15, 1950, and thereafter this action was brought on March 29, 1951.

The policy involved here contained the usual provisions that insurer should have the right to make such investigation and settlement of any claim or suit as it might deem expedient, and that no action would lie against insurer until the amount of insured's obligation to pay shall be determined by judgment or by agreement of the claimant, insured and the insurer.

In support of their respective contentions on this appeal, counsel on both sides have cited numerous cases from other jurisdictions involving the questions under consideration. The facts in none of these cases are exactly parallel to those in the instant case. Some of them are similar to our own case of *American Fidelity and Casualty Co.* v. *McKee,* 198 Ark. 601, 130 S. W. 2d 12, where this court held that the insured was authorized to make a settlement of the injured persons' claims, and entitled to reimbursement from the insurer, if the latter unjustifiably refuses to defend a suit, even though the

policy purports to avoid liability for settlements made without the insurer's consent. From the many cases involving suits similar to this one, certain principles and rules have been formulated which are applicable here.

In 29 Am. Jur., Insurance, § 1077, it is said: "Under liability or indemnity policies in which the insurer assumes the duty of defending or settling suits against the insured, this obligation is one requiring due care and a strict performance in utmost good faith. In such case, the insurer owes the duty to exercise reasonable care in conducting the defense, and is liable for damages resulting to the insured by reason of its negligence in performing such duty." In § 1079, the author further says: "It is generally agreed that under policy provisions giving the insurer the right to defend and settle claims against the insured, the insurer may be held liable to the insured for any damage to the insured ensuing where the insurer acts with bad faith toward the insured and improperly refuses or fails to compromise the claim involved. Moreover, there is authority to the effect that this liability of the insurer to the insured also obtains if the insurer negligently fails to settle a claim against the insured."

While the insured is generally prohibited from making a settlement of a claim under policies giving that right to the insurer, a different rule obtains where the insurer itself, in bad faith, breaches the contract by arbitrarily refusing to settle. As is stated in 45 C. J. S., Insurance, § 937b: "The provision against settlement by insured cannot be taken advantage of by insurer, where it unreasonably delays to take any action, after notice of the claim, or where it breaches its contract, by refusing to defend or settle and denying liability, or by withdrawing from the case, in either of which cases insured is released from its agreement not to settle, and has the right, provided he acts in good faith and with due care and prudence, to make a settlement of the claim or suit; and the amount paid in such settlement, if reasonable, may be recovered from insurer." See, also, Appleman, Insurance Law and Practice, § 4690.

The trial court in its instructions submitted the respective contentions of appellee and appellant to the jury as to whether appellee, or his agent Tirello, was guilty of any negligence that caused the death of Fred Lingner; also as to whether appellant was guilty of bad faith in defending and refusing to settle the suits pending against appellee. We have carefully examined these instructions and find that they fairly submitted these issues to the jury under the principles announced above, and other rules applicable in such cases. We are also of the opinion that the evidence adduced by appellee was substantial and sufficient to sustain the jury's conclusion on the issues of appellee's negligence and the bad faith of appellant. It follows that the jury's determination of liability against the appellant must be affirmed.

However, a majority of the court are of the opinion, in which the writer does not concur, that the trial court erred in refusing to instruct the jury that if they found for appellee, they would assess his damages at not more than $5,000, the policy limit. This error may be cured by reducing the judgment to $5,000. With this modification, the judgment is, therefore, affirmed.

Robinson, J., dissenting. The majority has affirmed this case on the theory that there was sufficient evidence to go to the jury on the question of bad faith and negligence on the part of the insurance company; but no evidence is pointed out which indicates the appellant at any time acted in any manner other than a fair-minded and reasonably prudent person would have acted in the circumstances. In the first place, the insured did not notify the insurance company of the happening of the accident for about six months after it occurred. The appellant company, according to the terms of the policy, could have seized upon the late notice to deny liability on its part, but did not do so and waived the policy provision specifying the time in which notice must be given. This certainly does not indicate bad faith. In my opinion there is not a line of testimony in the record from which an inference can be drawn that the insurance company was negligent or did not act in the utmost of good faith.

When Mr. Snowden gave notice, six months after the date of the mishap, he stated that Lingner was an independent contractor and died by reason of his own negligence. According to the record, Snowden gave the correct information. The deceased, Fred Lingner, was a refrigeration contractor; he was an expert in that capacity and so held himself out to the public; that is the reason he was employed in the first instance. It is true the evidence shows that Tirello, an employee of Snowden, directed Lingner to use air in blowing out the pipes; but such act injured no one; and by no process of the imagination can it be considered that this method of removing old gas from the pipes was the proximate cause of the injury to Lingner. In fact, one could with as much logic contend that the manufacturer of the plant was liable. Lingner, a contractor employed because he was an expert engaged in repair work on refrigerators, used poisonous gas to refill the refrigeration system; when Tirello left Wharton to return to Arkansas, the refrigeration plant was working in a satisfactory manner; and it was after he left that Lingner of his own accord opened the valves permitting the poisonous gas to escape, thereby causing his own death.

Although the majority stresses the fact that the insurance company made no investigation, nothing is pointed out that could have been discovered by an investigation which would have caused a revaluation of the case. The failure of the company to make an investigation was not due to negligence nor bad faith; it was simply due to the fact that when it received notice of the mishap more than six months had expired. Nothing had been said or done that would indicate that anyone contemplated filing a lawsuit. It was the opinion of the insurance company that it had received correct information from Mr. Snowden as to how the accident occurred, and that to begin an investigation at that late date would serve no purpose other than possibly to stir up a lawsuit.

The majority appears to make a point of the fact that the insurance company advised the insured that he could select a lawyer of his own choice to represent him in the

matter if he cared to do so; this was not a suggestion that the insurance company would not defend the case according to the best of its ability, but there was only $5,000 in insurance and Snowden had been sued for $83,950; and in these circumstances it was natural and proper that the insurance company suggest that perhaps Mr. Snowden would want his own lawyers as well as the insurance company lawyers to see after the case.

Mrs. Lingner had also alleged in her complaint that Lingner was an employee of Snowden; the insurance company made no contention that this allegation was true, and sought no evidence to show that it was true; but it merely called Snowden's attention to the fact that if this allegation was true, the insurance company would not be liable as the policy did not protect Snowden in the event of injury to employees.

Mr. Snowden employed counsel and they immediately started negotiations for a settlement; and in a very short time reached an agreement with the plaintiff that the case be settled for about $8,000. Immediate demand was made upon the insurance company that it pay its full liability on the policy, $5,000. Undoubtedly the insurance company would have been willing to contribute a portion of the limit of the policy to a settlement of the cause, not because it was considered that Mrs. Lingner had a case and could recover or that there was any danger of a recovery, but purely to retain the good will of a policyholder, plus the nuisance value of a case of this kind. Snowden had been sued for $83,950 and his policy of insurance protected him only to the extent of $5,000. The premium on the policy was only $10; he could have had more protection if he had wanted it. When he was sued for such a large sum and had such small protection, he became extremely apprehensive; apparently he would be good for a judgment for the entire amount and rather than take that chance, he personally paid the $8,000 as settlement in full.

All of the evidence points to the fact that there was no liability, and in all probability no jury case could be

made; and no experienced lawyer representing the insurance company in this case would have advised the company to pay to the fullest extent of its liability. In my opinion the insurance company was neither negligent nor acting in bad faith in refusing to pay the full amount for which it was liable under the terms of the policy.

It is hard to imagine a case where the plaintiff would be less likely to recover than the one filed against Mr. Snowden; and to say that he is entitled to indemnity in the case at bar is to say that in all cases where one who is good for a judgment is sued for a large sum and only has a small amount of insurance, the insurance company must pay by way of a settlement the full amount of the policy, at the insistence of the insured, regardless of the merits of the case. I cannot subscribe to that doctrine. In my opinion the cause should be reversed and dismissed.

Therefore I respectfully dissent.

BRINKLEY HEAVY HAULING CO. *v.* YOUNGMAN.

5-283 264 S. W. 2d 409

Opinion delivered February 8, 1954.

Moore, Burrow, Chowning & Mitchell and *Wright, Harrison, Lindsey & Upton,* for appellant.

Sharp & Sharp, for appellee.

George Rose Smith, J. This claim under the Workmen's Compensation Act arises from the accidental death of P. L. Youngman. The Tulsa Construction Company, as principal contractor, agreed to lay a gas pipeline for a subsidiary of the Arkansas Power & Light Company. In connection with this project Tulsa subcontracted the heavy hauling to Brinkley Heavy Hauling Company, a partnership in which the decedent was the active partner. While the work was in progress a large pipe accidentally rolled off a loaded truck and struck Youngman, killing him instantly. The appellees, his widow and children, filed this claim for compensation. The Commission found that Youngman was an employee of his own firm and was also a special employee of Tulsa, the principal contractor. An award was accordingly entered against both defendants and their insurance carriers. This appeal challenges both phases of the joint award.

We consider first the liability of the Brinkley partnership. This firm was composed of a farmer, a furniture dealer, and Youngman, who alone had experience in the trucking business. These three men formed a partnership for the purpose of purchasing a heavy hauling concern. Their agreement was that Youngman should devote his entire time to the business, not only as superintendent of the firm's employees but also as an active worker in the field. The other two partners contributed the firm's original capital, but they were not expected to, and did not, devote their time to the business. By the agreement Youngman was to receive one-fourth of the gross profits, with any remaining net gains then being divided equally among the three partners.

Youngman met his death in the course of his active participation in the business. The venture was still in its first year, and no profits had yet been distributed. Through a drawing account Youngman had been receiving about $300 a month, which would have been deducted from his share of the income had any profits been realized.

In these circumstances it cannot be said that Youngman was an employee of the partnership. It is of course true, as the Commission observed, that it is possible for a partner to deal with his own firm. A member of a mercantile partnership might, for example, purchase merchandise from the company, and title would pass from the firm to the partner. But this case involves no such special agreement. The partnership contract itself contemplated that Youngman would be the only active partner. His preferential one-fourth interest in the profits was not the result of a special contract of employment, by which Youngman relinquished his authority as a partner and assumed a subordinate role. Instead, his status as a worker in the field was simply an important part of the arrangement by which the three men did business together.

With the lone exception of Oklahoma, the authorities are unanimous in holding that a partner, even though he be the sole active member of the firm, is not an employee of the partnership for the purpose of workmen's compensation. Larson on Workmen's Compensation Law, § 54.30; 4 Ark. L. Rev. 498. In several states the rule has been changed by statute, and we think legislation to be the appropriate method for bringing partners within the scope of the compensation law. As Larson points out: "There are two serious obstacles to such an extension of coverage by judicial decision. The first is that a partnership is not, except for a few specific purposes, an entity separate from its members. Therefore, since the partnership is nothing more than the aggregate of the individuals making it up, a partner-employee would also be an employer. The compensation act cannot be supposed to have contemplated any such combination of employer and employee status in one person . . . Even if, however, this conceptual difficulty could be surmounted, there would remain a far more stubborn obstacle, which is the fact that in any ordinary partnership each partner has by law an equal share in management, and is therefore in actual possession of the powers of the employer. Unless he has contracted away those powers, which he can theoretically

do, he is as much the employer as anyone can be, not as a matter of conceptual reasoning but as a matter of actual functions and rights." *Op. cit.*, §§ 54.31 and 54.32.

Neither of these considerations was discussed by the Oklahoma court in arriving at its minority view. The case of *Ohio Drilling Co.* v. *State Industrial Com'n,* 86 Okla. 139, 207 P. 314, 25 A. L. R. 367, was one of the earliest American decisions on the question. There the court stressed the fact that the statutory definition of an employer included a partnership, and from this premise the court concluded that a partner might be an employee. A similar argument could be based upon our own definitions of employer and employees, Ark. Stats., 1947, § 81-1302; but its fallacy lies in the failure to take into account the statutory scheme as a whole. The Act contemplates that the employer is himself liable for the Commission's award. "The primary obligation to pay compensation is upon the employer and the procurement of a policy of insurance by an employer to cover the obligation in respect to this Act shall not relieve him of such obligation." Section 81-1305. For a person to be at once an employer and an employee would manifestly involve the contradiction of liability to himself.

Furthermore, we have repeatedly emphasized the matter of control as the most vital factor in the determination of the employer-employee relationship. Who, on behalf of the Brinkley partnership, controlled Youngman's activities in connection with this subcontract? Obviously no one did, except Youngman himself. Indeed, the partnership arrangement contemplated that when Youngman was at the scene of the work he should be vested with the complete authority of the firm. In this situation his status was the antithesis of that of an employee, as far as Brinkley is concerned.

With respect to the Tulsa Construction Company, a different conclusion must be reached. The original written contract between Tulsa and Brinkley required the subcontractor to receive the pipe at a railroad siding, haul it to the site of the work, and string it along the

ditch in which Tulsa was to complete the laying of the pipeline. It is shown that Tulsa's superintendent designated the place at which each load of pipe was to be deposited. Tulsa argues, however, that this assumption of control was merely incidental to the relation between a contractor and its subcontractor and therefore falls short of changing Youngman's status to that of a special employee of Tulsa. See *Erickson* v. *Kircher,* 168 Minn. 67, 209 N. W. 644; *Security Union Ins. Co.* v. *McLeod,* (Tex.) 36 S. W. 2d 449; *Gibson* v. *Industrial Com'n,* 81 Utah 580, 21 P. 2d 536.

The trouble with this argument is that the original contract was modified shortly before Youngman's death. In the early stages of the work unforeseen wet weather was encountered, making it very expensive for Brinkley to tow its trucks through the mud between the public highway and the ditch on the pipeline right-of-way. The project was proving to be so costly to Brinkley that the partners decided to abandon the work, even though this decision involved their forfeiting the ten percent of their compensation that Tulsa had been holding back each week, as permitted by the contract.

To prevent Brinkley from quitting the job Tulsa agreed that it would assume the responsibility and expense of towing the trucks from the highway to the ditch and of unloading the pipe at the site of the work. It was after this modification of the contract that Youngman was killed, at a time when he was assisting employees of both concerns in an effort to move a truckload of pipe that had bogged down in the mud.

We think the Commission's finding that Youngman was at the time of his death a special employee of Tulsa involves primarily an issue of fact. Tulsa's assumption of complete responsibility for this phase of the project carried with it the correlative power of control. There is ample evidence to support the Commission's conclusion that under the modified contract Tulsa alone had the right to control the operation after the loaded trucks left the highway. This being true, the Commission was

warranted in concluding that Youngman was subject to Tulsa's orders when the incident occurred that led to his death.

The award against Tulsa is affirmed; that against Brinkley is reversed.

SAM ROBINSON, J. (dissenting). Our Workmen's Compensation Law defines the terms "employer" and "employee." Ark. Stats., § 81-1302(a) provides: " 'Employer' means any individual, partnership, association, or corporation carrying on any employment, or the receiver or trustee of the same, or the legal representative of a deceased employer." Paragraph (b) provides: " 'Employee' means any person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied. . . ." In *Scobey, Adm.,* v. *Southern Lumber Company,* 218 Ark. 671, 238 S. W. 2d 640, 243 S. W. 2d 754, we quoted from *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26, as follows: "We have many times held that the Workmen's Compensation Law should be broadly and liberally construed; and that doubtful cases should be resolved in favor of the claimant. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S. W. 2d 899, and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31."

Was Youngman an employee of the partnership within the meaning of the statute? The definition of an employee is broad: " 'Employee' means *any person* . . . in the service of an employer under any contract of hire . . . expressed or implied." The statute says "*any* person" and does not except a partner who is in the employment of the partnership. In my opinion the fact that Youngman owned an interest in the partnership did not preclude him from being an employee. He did the same hard manual labor as other employees of the firm, while the other partners did no similar work for the partnership. It is true that he also acted in the capacity of

foreman, but the Workmen's Compensation Law does not exempt a foreman from its benefits.

The majority, while conceding that it is possible for a partner to contract with the partnership, contend that in this instance there was no special agreement whereby Youngman could be said to be working for the partnership in the capacity of an employee. I do not agree. The partners contracted that for his work Youngman was to receive 25% of the gross profits of the business; he was to receive this amount for his work regardless of the fact that he, as a partner in the business, and the other partners might not receive one dime by reason of their investment in the partnership. It can hardly be said that this arrangement was not the result of a special agreement. In fact, Youngman had been receiving about $300 a month by drawing against the 25% of gross profits as compensation for his labor. He was to receive 25% of the gross profits in addition to the same amount that would be received by the other partners on the net income.

Most of the cases which hold that a partner is not entitled to compensation under Workmen's Compensation Laws are bottomed on the theory that one cannot recover against himself, and to allow a partner to recover against a partnership would in effect violate that principle. This might be a good theory under the common law, but it is not sound in connection with a modern Workmen's Compensation Law. The Workmen's Compensation Law is not based on the theory of negligence or non-negligence. In many instances an employee has the right to compensation under the compensation law where there would be no liability whatever on the part of the employer under the common law. Workmen's Compensation Laws are based on public policy and humanitarian purposes, and not on the theory of liability or non-liability under the common law. "The liability is based not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because and in the course of which he has been injured." *McGregor & Pickett* v. *Arrington*, 206 Ark. 921, 175 S. W. 2d 210.

In the very recent case of *Glassco* v. *Glassco,* 195 Va. 239, 77 S. E. 2d 843, decided by the Supreme Court of Virginia on October 12, 1953, it was held that even though it is a settled doctrine in that state that a wife cannot maintain a tort action against her husband, she is entitled to compensation for the death of her son while he was an employee of the husband and father. "This contention (of non-liability under the compensation law) is based on a misconception of the right to, and liability for, compensation benefits under the Act. A proceeding under the Act is not one to recover damage for a wrong, for the employer's liability is not based upon tort. *Burlington Mills Corp.* v. *Hagood,* 177 Va. 204, 13 S. E. 2d 291; *Fauver* v. *Bell,* 192 Va. 518, 65 S. E. 2d 575. It is a proceeding to enforce a liability imposed by statute for an injury received by, or death of, an employee in the course of and arising out of his employment. As to an employer coming within its terms the Act imposes a legal obligation to compensate financially the injured employee for such an injury, or the employee's dependents, in case of death. Thus, the statute reads into every contract of employment within the purview of the Act the obligation of the employer to pay, and the right of the employee or his dependents to recover, such benefits." Then the Court points out the definitions of "employer" and "employee" as set out in the Act, which definitions are substantially the same as those in our statute, and mentions the fact that no exception is made because of family relationship between employer and employee; likewise in the case at bar our statute makes no exception as to a partner.

The majority in the case at bar refuses to follow the Oklahoma case of *Ohio Drilling Co.* v. *State Industrial Commission,* 86 Okla. 139; 207 Pac. 314, 25 A. L. R. 367; that case holds that in circumstances similar to the facts in the case at bar a partner is entitled to compensation. The law announced in that case is sound; and to give effect to our announced policy of construing the Workmen's Compensation Act in favor of the claimant, the Oklahoma case should be followed in this state.

For the reason set out herein, I respectfully dissent from that part of the opinion which reverses the cause as to Brinkley.

Justices McFaddin and Millwee join in this dissent.

Wood *v.* Wood.

5-294 264 S. W. 2d 407

Opinion delivered February 8, 1954.

Bobbie Jean Gladden Farabee, for appellant.

House, Moses & Holmes and *Thomas C. Trimble, Jr.,* for appellee.

Robinson, J. This suit was filed in the Chancery Court on May 7, 1953, alleging that a deed purporting to bear the signature of appellant, Vona I. Wood, is a forgery—that is, that appellant's signature thereon was forged—and asked that the deed be declared null and void. The Chancellor held the signature to be genuine.

Appellant, Vona I. Wood, and appellee, Marvin E. Wood, were married on the 27th of January, 1945; subsequent to the marriage William Wood, father of Marvin, purchased from George F. Branch and wife a house and

lot and had the same deeded to Marvin and Vona as an estate by the entirety. Later Marvin and Vona separated and at Vona's insistence they agreed to a divorce. On August 24, 1949, they went to the office of Mr. Madrid Loftin, an attorney, to engage him to file a divorce proceeding on behalf of Marvin. Mr. Loftin, after attempting in vain to persuade Vona to return to Marvin and to recede from her position of demanding a divorce, prepared a divorce suit wherein Marvin was plaintiff.

It is agreed that Mr. Loftin prepared the complaint and several copies of a precedent for the decree which Vona signed in Loftin's office. Later Vona went to the sheriff's office where she was served with a summons and signed a waiver. The precedent for the decree provided that Vona was to have custody of their minor child, two years old at that time, and was to receive $10 per week as maintenance for the child.

Now comes the disputed question. The next day after the divorce, the deed in issue dated August 24, 1949, conveying the property to W. M. Wood, father of Marvin, was filed for record. Vona says it is a forgery and Marvin claims it was prepared by Mr. Loftin at the time of the preparation of the divorce papers, and that it was signed by Vona in Loftin's office at the time she signed the precedent for the decree. Marvin says this was by agreement, that Vona felt they should deed the property to Marvin's father because they still owed him the purchase price on which they had paid nothing.

The questioned document was produced in evidence. In support of her contention that her purported signature thereon is a forgery, Vona herself says she did not sign the deed; also produced in evidence were several specimens of her signature admitted to be genuine. Three experts connected with Little Rock banks testified that in their opinion the signature on the deed was not the genuine signature of Vona; but two of these witnesses were not positive that the signature on the deed was different from some of the admittedly genuine signatures introduced in evidence.

On the other hand, Mr. Loftin states that he prepared the deed by agreement of the parties and that Vona did sign it in his office. Mrs. Loftin, a notary public, states that the deed was signed in her presence and that she took the acknowledgment; and her acknowledgment appears on the deed. Miss Mary Ellen Pannell testified that she was Mr. Loftin's secretary at the time and that she typed the deed; and her testimony indicates that Vona signed it. An expert from one of the local banks testified after comparing the questioned document with admittedly genuine signatures that in his opinion the signature on the deed is Vona's. Subsequent to the divorce, Marvin retained possession of the property and later married again and lived on the property with his second wife. The suit alleging forgery was not filed for nearly four years after the divorce.

The original deed and specimens of the admittedly genuine signature of appellant are in evidence; and after examining the entire record we reach the same conclusion as that of the Chancellor, that Vona's signature on the deed is genuine.

Appellant complains that she was not allowed to introduce competent testimony of a circumstantial nature tending to prove her allegation of forgery; but that appellee was allowed to introduce evidence of a similar character tending to prove the signature is genuine; that she was restricted in her cross-examination of some of the witnesses; and that the trial court persisted in taking over examination of some of the witnesses, all to the prejudice of appellant. We have examined these points and do not find any ruling of the court on the admissibility of evidence prejudicial to appellant. She received a fair trial and the finding of the Chancellor is sustained by a preponderance of the evidence.

Affirmed.

5-193 264 S. W. 2d 413

Opinion delivered February 8, 1954.

U. A. Gentry, for appellant.

J. Bruce Streett, for appellee.

Davis & Allen, Keith & Clegg and *McKay, McKay & Anderson, Amicus Curiae.*

WARD, J. The question considered here relates to the confirmation of tax deeds purporting to convey undivided interests in oil, gas and minerals under land, where such interests had been previously severed from the fee title to the land and had so forfeited for non-payment of taxes. No questions of fact are involved but the pleadings present a question of law not heretofore decided by this court.

Pleadings. On September 14, 1951, Manie Schuman and eight other persons filed a petition in the Chancery Court of Ouachita County, under the provisions of Ark. Stats., § 34-1918 *et seq.*, alleging; that they had acquired through various tax sales certain mineral interest in and under certain lands; that the lands, or a portion of them, were occupied by the owners of the fee, subject, however, to the mineral interest which had been conveyed and severed from the freehold; that no one was in actual possession of said lands who was claiming mineral interest adversely to the plaintiffs, and; that said plaintiffs had paid the taxes on said mineral interest for more than three years in succession. Tax receipts were filed in court, and attached to the petition, as exhibits, were 25 deeds from the Commissioner of State Lands, some made to individual plaintiffs and some to two or more, showing the mineral interest conveyed and the year for which said interest forfeited for non-payment of taxes, but not showing in whose name the forfeitures occurred. The petition was verified by Manie Schuman. The prayer of the petition was that the sale of said land be confirmed and the title acquired by virtue of said deeds be forever quieted and confirmed.

Filed with the petition was the affidavit of two disinterested parties, presumably pursuant to Ark. Stats., § 34-1920, stating in substance; that they were familiar with the lands and knew of their personal knowledge that there were no adverse claimants of the mineral interest, and; that, though the surface of the lands, or a portion thereof, was occupied by various persons, none of them were claiming mineral interest adverse to petitioners.

Notice of the filing of the petition for confirmation of title to the mineral interest as described in the petition was published for six consecutive weeks as is provided for in Ark. Stats., § 34-1919.

On November 2, 1951, H. D. Robertson and Vera Schroeder, claiming to own certain royalty and mineral interest in and under the said lands, filed their demurrer to the petition on the ground that same did not state facts sufficient to constitute a cause of action. After numerous other motions and orders the said demurrer came on for hearing on March 9, 1953, it being agreed by all parties that the demurrer would be treated as if filed by each of the respective attorneys or their clients. The demurrer was sustained by the trial court on the ground that the complaint did not state a cause of action. Petitioners refused to plead further, the complaint was dismissed and this appeal follows.

The only question before this court is: Did the trial court commit error in sustaining the demurrer to petitioners' complaint?

It is pointed out by appellants that the demurrer was sustained for three reasons or on three grounds, and then it is urged, supplemented by citations to decisions of this court, that no one of the three reasons or grounds is valid or sufficient. However, because of the conclusion hereafter reached it becomes unnecessary to consider appellants' contentions, because it is elemental that if the trial court was right for any reason it must be affirmed regardless of the reasons given by it.

It is our opinion that appellants' petition, considered alone or together with the notice and affidavit, did not state a cause of action for confirmation of title to undivided interests in mineral rights, for the reason that the statutes proceeded under do not apply in this situation.

The basic statute under which appellants state this action was brought, Ark. Stats., § 34-1918, was passed in 1881 amending the original statute adopted in 1836, shown in Revised Statutes, Chapter 149. The only dif-

ference between the two statutes is that the amendment substituted the words "County Clerk, or by the State Land Commissioner" for the words "by the Auditor of State" used in the original statute. It would serve no useful purpose to set out either or both of said statutes because it is obvious that, for the purposes of this discussion, they have exactly the same meaning. It will be noted that said § 34-1918 as well as all other sections relied on here used the word "land" and that nowhere are mineral rights mentioned or referred to.

There are convincing reasons that lead us to the conclusion that the legislature never intended to make said statutes available for the confirmation of undivided interests in oil, gas or other minerals. It is common knowledge that in 1836 there were no oil or gas operations in Arkansas and that in particular oil and gas were perhaps not in production extensively anywhere in the United States. This being true it is not reasonable to suppose that the legislature in 1836 intended for the word "land" to include undivided interest in oil and gas. By decisions of this court in the case of *Missouri Pacific Railroad Co; Thompson, Trustee,* v. *Strohacker,* 202 Ark. 645, 152 S. W. 2d 557, and *Carson* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 212 Ark. 963, 209 S. W. 2d 97, 1 A. L. R. 2d 784, it was established that the meaning of a written word must be limited to its meaning as of the date it was employed or used.

A strong indication, at least, of what our decision should be here is found in the case of *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728. In that case Ark. Stats., § 37-102, which provides that unimproved and unused *land* shall be deemed as held in possession of the person who pays the taxes if he has color of title, was construed, and it was held that the word "land" did not include oil, gas or mineral rights. The pertinent language is: "The legislature undoubtedly had in mind the visible surface characteristics of land in its popular sense." It is significant that the statute construed in that instance was passed some 60 years after 1836 and about 18 years

after the enactment of the amending statute here relied on by appellants.

In any confirmation suit founded on possession the question of possession is, of course, a vital one. Many decisions of this court have definitely established a vast difference between possession of *land* and possession of *mineral* rights. In the case of *Bodcaw Lumber Company* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578, the court said, after quoting from other authorities, that:

"The rule of those authorities is that the title to minerals beneath the surface is not lost by non-use or by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse *use* of the mineral rights, persisted in and continued for the statutory period." (Emphasis supplied.)

The holding in the above case was affirmed and the same rule was reaffirmed in different language in the case of *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436. It was there said:

"Where there has been a severance of the legal interest in the minerals from the ownership of the land it has been held . . . that adverse possession of the land is not adverse possession of the mineral estate and does not defeat the separate interest in it. . . ."

* * * *

"So it may be taken as settled that the two estates, when once separated remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land even though title be asserted in the minerals all the time. The only way the statute of limitation can be exerted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to *take actual possession of the minerals by opening mines and operating the same.*"

We cannot agree with appellants' contention that it was error to dismiss the entire complaint because some

interests were included to which no defense was interposed. The record does show that some interest under some lands were not among those represented by any of the attorneys contesting the complaint, but the record also shows that all interests sought to be confirmed [in the one petition] were based on the same state of facts and governed by the same law and procedure. Therefore when the Chancellor became convinced that the petition [which had been questioned] did not state a cause of action it was his right and duty to dismiss it.

Affirmed.

George Rose Smith, J. (dissenting). I do not think that the cases relied upon by the majority support the conclusion now reached. In *Brizzolara* v. *Powell* we construed a statute that applied only to "unimproved and uninclosed" land. In holding that the statute did not apply to undivided interests in minerals we reasoned: "Since minerals within the earth are not susceptible of inclosure, we conclude that the statute does not apply to this species of property."

In the case at bar the statute refers simply to "land." It is elementary law that the ownership of land extends downward to the center of the earth and includes everything lying below the surface. For many years the State has levied taxes against mineral interests that have been separated from the surface ownership. Yet the court now holds that the State, after having acquired title to such interests by a tax sale, will not permit its vendee to confirm that title.

It seems to me to be most unfortunate that the majority have seen fit to extend the doctrine of *Missouri Pacific R. Co.* v. *Strohacker* to the case before us. There the court was attempting to ascertain the intent of the grantor in a private conveyance, and there was perhaps some plausibility in the assertion that he did not mean for the word minerals to include oil and gas. But I perceive no plausibility whatever in saying that our General Assembly, when it used the word land in 1836, had a conscious

and deliberate intent to include only those minerals that were then known to exist in Arkansas.

Nothing but mischief can result from today's decision, for a difficult and wholly unnecessary question of fact is being created in every case of this kind. Coal deposits, for example, were known to exist in Arkansas as early as 1818. Manganese, on the other hand, although well known as a mineral in 1836, was not discovered in Arkansas until a decade or more after that year. The majority would therefore attribute to the 1836 General Assembly an intention to include coal in the reference to "land" but to exclude manganese. Such a distinction seems to me entirely artificial. I think it plain that the scope of the confirmation statute was intended to be as broad as the scope of the taxing statute. The purpose of the law was to enable a purchaser to confirm the title he had acquired from the State. The meaning of the word "land," as a legal term, had been settled for centuries. We have said repeatedly that the legislature is presumed to use legal terms in their accepted sense. I cannot find a syllable in the 1836 statute to indicate that the General Assembly had in mind the untenable distinction now discovered by the majority.

I said a moment ago that a wholly unnecessary question of fact is being created. That is so for the reason that the only real grievance complained of by these appellees can be removed in a simpler and sounder manner. Their complaint is that when a tax title to, say, an undivided one-eightieth interest of the oil and gas in a certain tract is confirmed, the decree clouds the title of everyone else who owns a like interest in that tract. This difficulty is easily met by requiring the plaintiff to make his complaint more definite, as by stating the name of the person who owned the undivided interest at the time of its forfeiture or by resorting to some other description that would differentiate the various fractional ownerships. But the point cannot be raised by demurrer, for the descriptions used are legally sufficient. I would reverse the decree with directions that the demurrer be over-

ruled, leaving the appellees free to assert their grievance by a motion to make more definite.

UNION MOTOR COMPANY *v.* TURBIVILLE.

5-270 264 S. W. 2d 592

Opinion delivered February 8, 1954.

Barber, Henry & Thurman, for appellant.

Carl Langston, for appellee.

ED. F. MCFADDIN, Justice. This is an action for damages, brought by the purchaser of an automobile against the seller, for misrepresentation of the car.

In September, 1952, appellee, Mrs. L. H. Turbiville, purchased and received from appellant, Union Motor Company, a 1952 Ford automobile; and the Buyer's Order, signed by the parties, showed the following figures:

The cash price of the Ford and equipment was	$2,547.18
Mrs. Turbiville paid by delivering a DeSoto car	724.18
Leaving due a cash balance of	1,823.00
To which was added insurance and finance charges of	388.36
Making a total for which she signed Conditional Sales Note and Contract for	$2,211.36

The note was payable in monthly installments of $92.14.

Union Motor Company (hereinafter called "Union") promptly transferred the Conditional Sales Note and Contract to Kensinger Acceptance Corporation; and Mrs. Turbiville made two of the monthly payments to Kensinger Corporation. She then filed the present damage action against Union[1] for $1,000.00, alleging that Union represented the Ford car to be a new car, whereas in fact it was a wrecked and reconditioned car and worth $1,000.00 less than the contract price. That the Ford car sold Mrs. Turbiville was not a new car, was conceded at the trial, but Union stoutly denied that the car was ever represented to be a new car; and Union also pleaded waiver and estoppel. A jury trial resulted in a verdict

[1] Kensinger Acceptance Corporation was also originally made a defendant, but a directed verdict dismissing Kensinger is not contested by Mrs. Turbiville.

and judgment for Mrs. Turbiville for $800.00; and by this appeal Union seeks a reversal.

I. *Refusal Of The Court To Hear Testimony Of The Actual Value Of The DeSoto Car.* Union admitted that in selling Mrs. Turbiville the Ford car at $2,547.18, it allowed her a credit of $724.18 for her DeSoto car. But Union claimed that if the Ford was not a new car and worth $2,547.18, neither was the DeSoto worth $724.18; and Union offered to prove that it actually sold the DeSoto car for only $460.00. Such testimony was refused; and Union claims error, citing *Barham* v. *Standridge,* 201 Ark. 1143, 148 S. W. 2d 648.

The Trial Court was correct in refusing the testimony as to the amount Union received for the DeSoto car. In this case, the pivitol questions were (a) whether Union represented the Ford car to be a new car; and (b) if so, what were Mrs. Turbiville's damages. Union's disposition of the DeSoto car, whether by selling it or giving it away, would throw no light on the pivotal questions. In suing for damages, Mrs. Turbiville, in effect, elected to complete the payments on the Conditional Sales Note and Contract to Kensinger, and to look to Union for damages, which damages are the difference between the contract price of the Ford and its actual value at the time of the sale.[2] The language in *Barham* v. *Standridge, supra,* was not essential to the decision of that case. We hold that what Union received for the DeSoto car is irrelevant to the issues in the case at bar.

II. *Status Of Union.* The complaint alleged that Union Motor Company was a corporation, and this allegation was not specifically denied. In the course of the trial it developed that Union was a partnership, composed of G. H. Kensinger, W. G. Boone, and R. C. Davis. When such fact was disclosed, Union asked for an instructed verdict in its favor, which was denied;

[2] The following cases bear on the point: *Logue* v. *Hill,* 218 Ark. 797, 238 S. W. 2d 753; *Williams* v. *Maier,* 213 Ark. 359, 210 S. W. 2d 499; *Sullenberger* v. *O'Lee,* 209 Ark. 798, 192 S. W. 2d 543; *W. C. Nabors Co.* v. *Ball Chevrolet Co.,* 201 Ark. 486, 145 S. W. 2d 25; *Auto Sales Co.* v. *Mays,* 191 Ark. 884, 88 S. W. 2d 330.

and the Court treated the plaintiff's allegations to be amended to conform to the evidence. (See § 27-1160 Ark. Stats.)

The trial court committed no error in this regard. Union had furnished to Mrs. Turbiville a new car guaranty on the Ford; and this guaranty stated that it was "issued by Union Motor Co., Inc., North Little Rock, Arkansas." Thus there was a representation by Union that it was a corporation. When Mrs. Turbiville sued Union and alleged it to be a corporation, there was no specific denial of such allegation. In regard to the form and contents of an answer, § 27-1121 Ark. Stats. says, *inter alia*:

". . . provided that any allegation of the complaint or other pleading setting out the status of any party or parties as a corporation, partnership, firm or individual shall be taken as admitted unless specifically denied."

When Union failed to specifically deny the allegation of its corporate status, and the partners of Union in the course of the trial disclosed their real status, then the Trial Court correctly allowed the allegations of the complaint to be treated as amended to conform to the proof. The original variance did not mislead the defendants to their prejudice. See § 27-1155 Ark. Stats.

III. *Waiver.* Union insists that Mrs. Turbiville made two payments to Kensinger Acceptance Corporation on the Conditional Sales Note and Contract for the purchase of the Ford car *after* she knew that the car was not a new one; and because of such payments, Union insists that it is entitled to an instructed verdict, under such cases as *Pate* v. *McWilliams,* 193 Ark. 620, 101 S. W. 2d 794, and *Kern-Limerick* v. *Mikles,* 217 Ark. 492, 230 S. W. 2d 939.

One reason Union was not entitled to an instructed verdict is because of a conflict in the evidence. Mrs. Turbiville insisted that even when people told her she did not have a new car, she did not believe them, because

she had a written guaranty from Union which described the car as a "new 1952 Ford car";[3] and that when she finally became suspicious of Union, she consulted an attorney and then made no further payments until after this action was filed.[4] So, Mrs. Turbiville's testimony, in effect, denied that she made any payments *after* she knew the car was not a new car; and her testimony denied specifically the testimony of Union's witnesses that Mrs. Turbiville knew all the time that the car was not a new car.

Thus the issue of waiver through payments became a question for the jury; and on that issue the Court instructed the jury:

"If, from a preponderance of the evidence in this case, you should find that after the plaintiff discovered the automobile in question was not a new car, that she knowingly continued making her monthly payments as they fell due, then you are told that this constituted a waiver by the plaintiff of her right to maintain this action, and your verdict should be for the defendant, Union Motor Company."

The foregoing Instruction correctly submitted the waiver issue to the jury on the conflicting testimony; and because of such conflicting testimony, Union was not entitled to an instructed verdict on waiver.[5]

IV. *Amount Of Verdict.* Finally, Union insists that the verdict for $800.00 is excessive; and we find such contention to possess merit. Mrs. Turbiville was entitled to recover the difference between the price she agreed to pay for the Ford if new, and the actual value

[3] The guaranty did so describe the car and was introduced in evidence.

[4] A court order of January 29, 1953, provided that payments thereafter made into the registry of the court were without prejudice to the claims of either party.

[5] There *might* be some distinction between the cited cases *supra* (*Pate* v. *McWilliams* and *Kern-Limerick* v. *Mikles*) and the case at bar: because in the cited cases, the payments were made by the purchaser to the seller, whereas in the case at bar, Mrs. Turbiville's note had been transferred before maturity to a third person. Payments on a negotiable note to the third person might not waive the misrepresentations made by the seller. But we bypass this point, as it is not briefed.

of the Ford on the day of the sale. The cash contract price of the Ford was $2,547.18. Mrs. Turbiville's witnesses testified [6] that the Ford was only worth $1,900.00 on the day of the sale. So the maximum damages were $647.18. It is true that the insurance and finance charges [7] added $388.36 to the contract price of $2,547.18; but obviously these items cannot be considered in fixing the cash contract price of the car. So the verdict of $800.00 was excessive by $152.82 (being the difference between $647.18 and $800.00).

If Mrs. Turbiville, within 17 calendar days, enters a remittitur [8] of $152.82, then the judgment will be affirmed for $647.18, and she will be required to pay the costs of this appeal, but will recover the costs of the trial court. Upon failure to enter such remittitur, the entire judgment will be reversed and the cause remanded because of the excessive verdict.

GRAY *v.* MCDOUGAL, ADMINISTRATRIX.

5-298 264 S. W. 2d 403

Opinion delivered February 8, 1954.

[Rehearing denied March 15, 1954.]

[6] At one place one of her witnesses did use the figure of $1,750.00; but an examination of the transcript shows that such witness was referring to another Ford car rather than the one here involved.

[7] There is no claim of usury in this case.

[8] In *Mo. Pac.* v. *Newton*, 205 Ark. 353, 168 S. W. 2d 812, we required a remittitur to prevent a reversal.

E. J. Butler, for appellant.

O. H. Hargraves and *Shaver & Shaver,* for appellee.

MINOR W. MILLWEE, Justice. J. O. McDougal, of Forrest City, Arkansas, died intestate on March 17, 1951, survived by a widow and two children. The widow, appellee herein, petitioned the Probate Court of St. Francis County, Arkansas, for appointment as administratrix of the estate, and letters of administration were issued to her on March 20, 1951.

On April 23, 1951, appellant, Mrs. Jennie May Gray, filed a claim against decedent's estate for $5,850.00 based on a promissory note for $5,000 dated February 1, 1951, payable 12 months after date and bearing interest at the rate of 7% per annum from date until paid. The note was allegedly executed by decedent and delivered to appellant, as payee, at Lawrenceville, Illinois. This appeal is from the finding and judgment of the trial court that the note in question was executed by the de-

ceased without consideration, and that the claim of appellant should be denied and dismissed.

A great preponderance of the evidence supports the finding that the note was duly executed by decedent, and counsel for appellee virtually admitted the genuineness of his signature at the trial. On the question of want of consideration, there is little conflict in the evidence.

Appellant is a widow who was reared in Arkansas, but has lived in Lawrenceville, Illinois, for the past 21 years. In April, 1950, deceased went to Lawrenceville where he was then employed and rented a room in appellant's home. Appellant and appellee began dating and he led her to believe that he was divorced. In a short time their acquaintanceship ripened into affection, and, upon appellant's insistence, deceased moved from her home. The relationship continued during the time deceased stayed in Lawrenceville, from April to October, 1950, and appellant saw deceased only occasionally thereafter.

Appellant testified that she loaned money to deceased at various times prior to his execution of the note. While she was indefinite as to the time and amount of some of these loans, she stated positively the date and amount of four cash advances in the total sum of $400 which deceased agreed to repay, and that he also owed her $100 for room and board. Appellant further stated that she paid telephone and laundry bills for deceased and loaned him the use of her car from May to October, 1950, for which he agreed to pay her. She was unable to give the amount of the bills paid and there was no agreement as to the amount due for use of the car. She insisted that the amounts of money were advanced as loans and not gifts, and that deceased gave her the note in satisfaction of the loans. She was corroborated by the testimony of her sister, Mrs. Justus, of Swifton, Arkansas, who stated that deceased told her that he had executed the note in satisfaction of said loans.

Mrs. Oscar Hoffner testified that she did house work for appellant and saw deceased execute the note and

hand it to appellant. When appellant received the note, witness heard her say, "You don't owe me that much" and deceased said, "I want you to have that and put it away and here are some other papers."

Since the note was executed, delivered and made payable in Illinois, the right of action on the note and the defenses thereto are governed by the laws of that state. *Ellis* v. *Crowe,* 193 Ark. 255, 99 S. W. 2d 568. Illinois, like Arkansas, has adopted the Uniform Negotiable Instruments Act. §§ 24 and 28 of the act (Illinois Revised Statutes, 1953, Chapter 98, §§ 44 and 48) provide: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." "Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise."

It is also settled law in both Arkansas and Illinois that, when the execution of a promissory note is admitted or shown under § 24 of the Negotiable Instruments Act, the burden of proving want or failure of consideration is on the defendant. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517; *Weiland* v. *Weiland,* 297 Ill. App. 239, 17 N. E. 2d 625. See also, Anno: 127 A. L. R. 1004. It is also well settled law in Illinois that a promissory note intended as a gift is without consideration. *Stump* v. *Dudley,* 207 Ill. App. 587.

We think it is apparent that it was the intention of the framers of § 28 of the Negotiable Instruments Act, *supra,* to make uniform the right to interpose a partial failure or want of consideration as a defense *pro tanto* whether the amount was liquidated or unliquidated. This is the interpretation placed on the section by the Ohio court under a state of facts quite similar to those involved here in *Sharp* v. *Sharp,* 4 Ohio App. 418. In holding that error was committed in the trial court's refusal to submit the question of a partial want of con-

sideration to the jury, the court said: "We do not think that the courts would be authorized in saying that the intention of the lawmaking power was to change the rule of law as to want of consideration so as to deprive the maker of a note, where the action was between the original parties to the note, from interposing the defense of a partial failure of consideration where the sum named as payable in the note was composed partly of a valuable consideration and the remainder was a gratuity or gift. To do this would be placing a construction on the general words 'absence of consideration' contrary to the general rule of the common law and not in accordance with it." This rule is followed generally in other jurisdictions, including Illinois. 7 Am. Jur., Bills and Notes, § 249; *Bechtel* v. *Marshall,* 283 Ill. 486, 119 N. E. 619.

Applying this rule to the facts in the instant case, we hold that a preponderance of evidence supports the conclusion that all of the consideration for the $5,000 note was a gift or gratuity except the sum of $500 which the evidence discloses was actually advanced as a loan to deceased by appellant in cash and for room and board. Appellee's defense of want of consideration was established as to the $4,500 balance.

In support of her contention that she was entitled to judgment for the face of the note, appellant relies on the case of *Hore* v. *Collins,* 220 Minn. 374, 19 N. W. 2d 783, 161 A. L. R. 1366, while appellee relies on the case of *Suske* v. *Straka,* 229 Minn. 408, 39 N. W. 2d 745, to support the trial judge's findings. Both of these Minnesota cases were written by the same judge. While the facts in both cases were somewhat similar to those in the instant case, it was pointed out in the first case that there was no showing at all as to the extent to which the note was a gift. In the Suske case the court found as a matter of law under testimony which it regarded as undisputed that the defendant gave the note to plaintiff as a present; and that other things which might have been a consideration were not such because the parties did not so regard them. We cannot say that the evidence in this case warrants the conclusion that deceased gave,

and appellant accepted, the note in issue entirely as a gift and exclusive of all other considerations.

That part of the court's judgment finding that there was a total want of consideration for the note in question is reversed. The cause is remanded with directions to allow appellant's claim and enter judgment in her favor for $500.

The Chief Justice dissents from the court's action in modifying the judgment.

CLARK *v.* HEATH.

5-296 264 S. W. 2d 405

Opinion delivered February 8, 1954.

Dale Hopper, for appellant.

Jack P. West, for appellee.

J. SEABORN HOLT, J. Appellee brought this suit to recover damages to his automobile resulting from a collision between his car (driven by his daughter at the time) and a truck belonging to appellant. Appellee

alleged, in effect, that the damages resulted solely from the negligence of appellant's truck driver in driving the truck. Appellant answered with a general denial and alleged that any damage to appellee's car "was due to the negligence of the driver of plaintiff's car in that the driver did not exercise ordinary care to keep a lookout for other motor vehicles including defendant's motor truck approaching same street intersection or crossing."

A jury trial resulted in a verdict for appellee in the amount of $395.46, and from the judgment is this appeal.

For reversal, appellant argues that there was no substantial evidence to support the verdict and that the trial court erred in refusing "to give at appellant's request, his required defense instruction No. 2, with reference to the duty of the driver of appellee's motor vehicle to have kept the required lookout while operating that vehicle on the public street, at its intersection with the other public street, within Forrest City, Arkansas, immediately before and at the time of the collision concerned herein."

—(1)—

There appears to be little, if any, dispute as to material facts at the time of the mishap in the forenoon of October 19, 1951. Appellee's daughter testified that while she was driving north on Izard Street in Forrest City, as she approached and entered the intersection of Izard and Broadway, appellant's truck was approaching the intersection from the west downgrade. It is admitted that the brakes on appellant's truck were not working and that he entered the intersection against the red light. Appellee's daughter also testified that she did not see the truck until it hit the automobile she was driving, until she had proceeded into the intersection and passed under the signal light which hung above the intersection and that the truck driver did not blow his horn or give any warning signal. When the collision took place, she looked back and saw the traffic light was still green. The front part of her car was hit.

As indicated, appellant's truck driver testified, in effect, that his brakes would not work, "after I had

done everything in my power to stop the truck, and not having any success in even slowing it down, I was nearing the intersections of Broadway and Izard Streets, and the stop light was red on Broadway Street and green on Izard Street. I saw Miss Heath nearing the intersection going north on Izard and I pulled the truck to the right as far as I could to avoid hitting her, but she ran into the back of the truck's bed after I had run through the light."

In the circumstances, we hold that the evidence was substantial and ample to support the jury's verdict.

Appellee's alleged contributory negligence was submitted to the jury under proper instructions, and resolved in favor of appellee, *East* v. *Woodruff,* 209 Ark. 1046, 193 S. W. 2d 664.

—(2)—

As to appellant's contention that the court erred in refusing to give his offered Instruction No. 2, we hold it to be untenable for the reason that this instruction was fully covered in other instructions given. In effect, this instruction would have told the jury that it was the duty of the driver of appellee's automobile, in approaching the intersection, to exercise ordinary care to keep a lookout for motor vehicles approaching the intersection and street crossings. This instruction was fully covered, in effect, by the following instruction which the court gave.

"You are instructed that when a vehicle enters an intersection upon a green light that vehicle has the right-of-way and the right to proceed, and the right to assume that a vehicle approaching on the red light will stop, unless the driver of the vehicle approaching on the green light knows there is an apparent dangerous situation at the intersection at the time in which case the driver of the vehicle approaching on the green light is required to exercise ordinary care in discovering the peril. In other words, if you find that the traffic light was green when the automobile of the plaintiff entered the intersection the driver of that vehicle had the right-

of-way and the right to proceed, unless it was apparent to her or she knew, or by the exercise of ordinary care, she should have known and it was apparent that the truck of the defendant was in a perilous position to her automobile and that he could not stop.''

We have many times held that the trial court is not required to repeat or multiply instructions.

No error appearing, the judgment is affirmed.

RIVERCLIFF COMPANY, INC. *v.* LINEBARGER.

5-149 264 S. W. 2d 842

Opinion delivered February 8, 1954.

[Rehearing denied March 15, 1954.]

Martin K. Fulk and *William H. Donham,* for appellant.

Wright, Harrison, Lindsey & Upton, Eichenbaum, Walther, Scott & Miller and *Wm. M. Moorhead,* for appellee.

WARD, J. This appeal involves the final settlement between the Linebarger Construction Company which constructed Rivercliff Apartments in the City of Little Rock for appellant, or more specifically it involves the alleged errors in the report of the special Master who made certain findings of fact and conclusions of law. All construction was to be performed according to the terms of a detailed contract and plans, and under the direction of an architect. For convenience the appellant, the Rivercliff Company, Inc., which is the owner of the apartments, will be referred to as "Rivercliff," and W. E. Linebarger and R. W. Linebarger, d.b.a. as Linebarger Construction Co., one of the appellees, will be referred to as "Contractor." The United States Fidelity and Guaranty Company is one of the appellees but makes no separate contentions in this action.

The specific points presented for our consideration come to us in the manner presently set out.

On September 11, 1950, the Contractor filed suit in Circuit Court against Rivercliff to recover the sum of $15,000 alleged to be due under an arbitration award made by the parties pursuant to an earlier attempt to settle their differences. Rivercliff answered that the arbitration award was void, filed a cross-complaint against the Contractor, and moved to transfer to equity. The cause was transferred, where the arbitration award was set aside, and now passes out of the case.

After numerous pleadings and amendments to the pleadings were filed the Chancery Court appointed Rodney Parham as special Master to hear testimony on the conflicting claims and to make and report findings of

fact and conclusions of law for the court's guidance and consideration.

During a period of two years and three months the Master took testimony which, together with numerous exhibits introduced, constitutes a voluminous record, and then submitted his detailed report, awarding to Rivercliff the sum of $29,696. The Master's report was approved in all respects by the court with the exception that the court found a mathematical error in the report and increased the amount due Rivercliff to $31,397, and rendered a decree for that amount.

Rivercliff has appealed from the decree of the court on two issues only, contending that "the Master [and the court] erred in his conclusions of the law applicable to the uncontested or undisputed facts." Specifically, Rivercliff has appealed on only two issues, both of which will hereafter be separately discussed. The Contractor has cross-appealed, alleging "but one issue" for affirmative relief. As these three issues are discussed below in the order mentioned the testimony [much of which is not disputed] will be referred to in each instance as it is deemed necessary.

1. *Expansion Joints.* The Master allowed Rivercliff the sum of $1,612.80 as compensation for the Contractor's failure to comply with the contract plans and specifications which called for "expansion" joints, one-half inch in width, between the brick walls and the concrete pillars at the corners of each of the four buildings —the space to be filled with oakum which is a pliable substance. It is not disputed that hard mortar was used instead of oakum, and appellant contends this caused serious cracking of the brick, resulting in damage to the extent of approximately $75,000. It is not disputed by the Contractor that the brick has cracked or that the walls are now in poor condition, nor is the amount necessary for a complete repair job seriously denied. The Contractor's defense is that the extensive damage is not the result of failing to use oakum in the joints.

The Master found that it would cost $73,565 to completely correct the condition that now exists, but he also

found that the existing condition of the walls was not the result of the failure of the Contractor to comply with the contract specifications.

After a careful review of the testimony and an examination of the plans and drawings, we reach the same conclusion the Master did as to the cause of the damage. We cannot put our reasons for this conclusion in better words than those used by the Master:

"The plans and specifications show, and an inspection by the Master, at the request of the parties, confirms that the interior or tile pumice block wall and the face brick outer wall are bonded together at the point of the expansion joint by solid brick masonry set in an especially hard mortar. The evidence discloses beyond contradiction that the expansion coefficient of the inner block wall is greater than that of the outer brick wall and I am of the opinion, based on the testimony of the experts and the physical examination, that all or the major part of the rupture of the brick would have occurred irrespective of the omission of the expansion joint or the creation of the rigid joint by the mortar between the brick and the concrete column, and that the defendant, Rivercliff Company, has not met the burden of proof of this issue, but that it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff."

Appellant presented a number of experts in the architectural and constructural field of engineering to show that no rupture in the walls would have occurred if the joints had been built as they were designed, but a like number and caliber of experts testified for appellees that the rupture would have occurred even though the joints had been constructed according to specifications. The burden was on appellant to sustain its contention, and we cannot say the Master's finding that it has not done so was against the weight of the evidence. The testimony produced on the point considered was conflicting and we recognize that the Master was in a better position than we are to properly evaluate it and correlate it with the

plans and designs because he made a personal inspection of the walls of the buildings.

In this connection appellant seeks to sustain its contention on another ground. It is pointed out that when the Contractor's attention was called to the fact that the joints had not been properly caulked and that the walls were in bad condition, the Contractor, in consideration of being paid a balance of $112,713.50 claimed due under the contract, agreed by correspondence to make all necessary repairs, and that it would enter into a contract with a reliable Waterproofing Company to do the job on a guarantee basis. The record supports this contention to some degree and it further shows that it would have cost the amount fixed by the Master to correct all the defects, but the record further shows, we think, that appellee's agreement was to correct the caulking of the joints and not to repair all damage to the brick walls. One of the letters relied on to support the alleged agreement was to the Contractor, dated December 6, 1948, in which the correction work was referred to in this way:

" '2. Caulk and waterproof expansion joints between the outside brick masonry and monolithic concrete corners. This expansion joint was filled with brick mortar which is to be removed and the joints caulked with oakum and mastic compound as per plans and specifications.' "

Another letter to appellee, dated January 18, 1949, demanded that all cracked and broken bricks be removed and replaced by new brick. In appellee's reply the next day he agreed that any broken brick would be *tuck-jointed* as had already been done on Building No. 1.

The evidence shows that the Contractor made efforts to extract the mortar from the joints and replace it with oakum but found it impracticable to do so because the condition of the brick walls was such that, in the effort, adjacent bricks would be disturbed or damaged and that the interior walls of the apartments would also be extensively damaged. In fact, it appears that to entirely correct the situation it would have been necessary to

practically remove and rebuild the corners. This being the situation it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason the Master gave appellant the amount it would have cost the Contractor to build the joints right originally, and we agree.

We have reviewed all the testimony tending to show that the Contractor agreed to do certain repair work and recognize the force of appellants' argument on this point, but, on the whole, we cannot say the preponderance of the evidence shows that he ever agreed to do all the repair work demanded by appellant, and especially that he did not do so at a time when he fully realized that he might not be legally responsible. It may be significant, as pointed out by appellees, that the joints in question were not designated as "expansion" joints in the specifications, but that this term was apparently adopted after litigation became likely.

2. *Compensation for Extra Foundation Excavation.* The Contractor filed a claim for $16,954.92 which was based on the following contention. The contract specifies that the foundation for the walls be placed one foot and three inches below the surface of the ground. The architect, evidently contemplated that most of the foundation would rest on solid rock because his estimate showed 990 cubic yards would have to be excavated, while in fact the amount turned out to be only 56 cubic yards. In all events it was obvious that some of the foundation would have to be on loose rock or dirt and, in this event, the specifications required the foundation to be some wider at the base but not deeper. When it developed in the course of excavation that much of the foundation would rest on dirt or loose rock, the owner-architect required the Contractor, in such instances, to excavate some four or five feet deeper for the foundation, and appellees' claim is for this extra expense. Incidental to the claim for extra excavation, and included in the amount before mentioned, appellees claimed $6,397.63 because the Contractor was forced to construct a quantity of concrete pipe trenches which would not have been necessary if he

had been able to cut the trenches out of solid rock as the architect evidently contemplated. This item of $6,397.63 was disallowed by the Master and the trial court on the ground that it was not shown it cost more to construct the concrete pipes than it would have cost to cut openings out of rock, and that it only amounted to substituted work. Appellee makes no objection to this part of the decree. The trial court did find that the Contractor was entitled to the difference or the sum of $10,557.29 as extra expense due to the extra excavation.

Rivercliff has appealed from the above finding, and seeks a reversal on two principal grounds.

First, by reference to the evidence, it is shown that, due to the fact that it costs more to excavate solid rock than it does to excavate loose rock, the overall result was that it actually cost the Contractor less to build the foundation in the manner in which it was built than it would have cost if there had been as much solid rock as the architect estimated. We, however, do not agree with appellant in this contention. There is practically no conflict in the testimony in this connection and it would serve no useful purpose to refer to it in detail. It is obvious that, since the specifications called for only one foot and three inches of excavation and since there was only 56 cubic yards of solid rock to be excavated instead of 990 cubic yards, the Contractor would have been able to realize a sizeable profit on this particular part of his contract if he had been allowed to construct the entire foundation at the depth specified. In the above eventuality it is not contended, nor could it be successfully contended, that appellee would not be entitled to the resulting profit, because the Contractor was to be paid a lump sum for the completed job. But the situation here is that appellant required appellee to deviate from the specifications and do extra work for which he is entitled to pay. The fact that appellee might have known, as the evidence indicates, that there was not as much solid rock excavation as the specifications showed, does not alter the situation. It might well be that knowledge of this fact by the Con-

tractor at the time he signed the contract influenced him in accepting the amount which he was to receive.

For a second ground, appellant contends that the Master and the trial court should not have made any allowance to the Contractor because the extra work was not authorized in accordance with the terms of the contract. This contention appears to be supported by the terms of the contract, which provides that extras must be approved in writing prior to execution. This provision was not complied with but it does not constitute a defense available to appellant, because, as we hold, a strict compliance with this provision of the contract was waived by appellant in this instance. It is not disputed that the extra excavation was done with the knowledge and at the direction of Smith who was not only the architect supervising the work for Rivercliff but was also a part owner of the appellant corporation. From his testimony we gather that he refused to approve an allowance for extras mainly because he did not think the Contractor was entitled to anything as a result of the changed method of constructing the foundation. It appears that other changes in construction had been made and paid for where no written change order had been previously issued. Although it was shown that several such changes had been made and paid for during the construction of the four buildings, yet Mr. Smith testified that only one written change order had been made.

We have considered the numerous authorities presented by appellant in connection with these contentions but we do not find them applicable in the situation here, and a discussion of them would serve no useful purpose.

3. *Cavity Walls.* On cross-appeal the Contractor seeks to reverse the finding of the Master [approved by the trial court] that Rivercliff was entitled to $29,212.00 because he failed to properly construct cavity walls.

Under the terms of the contract he was to construct outer brick walls so as to leave a one inch space for the circulation of air between them and the inner walls of pumice blocks, with small outlets at the base to discharge

the accumulating moisture. The two walls were to be bound together at intervals with metal ties. The Master found, and we agree, that in constructing the walls excessive mortar was allowed to drop and accumulate at the base of the walls, and that the droppings were so excessive that, in places, it formed a junction between the two walls. It also appears from the testimony that the above condition prevented the proper circulation of the air and destroyed the purpose for which the cavity walls were designed. The evidence, we think, sustains the Master's finding that the above condition has resulted in much damage to the outer walls and to the interior of the apartments, and further that the sum allowed for damages was justified. We do not understand that appellees question the evidence on which the above conclusions were reached, but he urges error on another ground as hereafter set out.

The Master stated appellees' defense in this way:

"The defense of the plaintiff to this claim is that the cavity designed by the architect was faulty in that it should have been two inches or more in width and therefore it is not liable for any resulting damage for failure to construct the same as designed."

Appellees state their objection and their defense thus:

"The defense of appellee to this claim was not simply that the cavity should have been two inches or more in width, but rather that the cavity must be at least two inches wide for the brick masons to build it without excessive mortar droppings and bridging; that in the construction of a one-inch cavity wall excessive mortar droppings in the bottom and excess bridging of the wall is the unavoidable consequence of working with the excessively narrow cavity. Thus the appellee's position is that this design defect, as well as others violating the principle of a cavity wall, are responsible for the failure of these walls to successfully turn water.

"Appellee's proof shows not that the cavity should have been two or three inches wide in order for a cavity

wall to *function* properly—which seems to be the interpretation placed on it by the lower court. Instead, this proffered proof asserts that if the cavity had been specified as two inches or more in width, it *could have been built* without excessive mortar droppings and bridging; that a *one-inch cavity cannot be built* free of excessive mortar droppings and bridging."

The distinction drawn by appellees between the two views appears to be more of form than of substance, but, in all events, we do not find that his contention is supported by the evidence. Although appellees showed that certain Building Codes and authorities recommend a cavity space of two inches, and presented expert witnesses who testified that a two-inch space was a minimum requirement, yet we think there were other testimony and facts which are sufficiently persuasive to support the finding of the Master and the court. In the first place it is significant that the specifications for a one inch cavity were known and apparently approved by all parties concerned without objection on the part of the Contractor, and that, with this knowledge, he proceeded to construct the walls. Although it might have been difficult to do so yet it does not appear that competent and careful workmen could not have built the walls without allowing mortar to fall into the cavity to the extent it did here. It was, of course, the duty of the Contractor to employ workmen of skill and it was his duty also to furnish adequate inspection. If the Contractor had done this, either the result would have been satisfactory or he would have learned shortly after beginning work that it could not be done. In the latter event he should have notified appellant and sought a change in plans, but this was not done. Also there was testimony by appellant that the brick work revealed poor workmanship, and the Master who made a personal inspection of the walls had an opportunity to evaluate that testimony. The record shows that the Master considered appellees' view point

in this connection when he made his findings, and we cannot say they are against the weight of the evidence.

The decree of the trial court is affirmed.

The Chief Justice dissents.

Justice ROBINSON not participating.

HILL *v.* ROWLES, CHANCELLOR.

5-327 264 S. W. 2d 638

Opinion delivered February 15, 1954.

Coffelt & Gregory, for petitioner.

C. Van Hayes and *Jim Cole,* for respondent.

ROBINSON, J. Boyd L. Hill is the plaintiff in a cause of action pending in the Saline Chancery Court wherein he seeks a divorce from Nellie Ann Hill. Prior to the time Hill filed suit, his wife had filed a separate maintenance action in the Pulaski Chancery Court in which case there had been a hearing and Hill had been directed to pay to Mrs. Hill $15 per week in addition to the court costs and attorney's fee. It is the contention of Mrs. Hill that since the Pulaski Chancery

Court acquired jurisdiction in the separate maintenance action, and there had been a decree in that case prior to the filing of the divorce suit in the Saline Chancery Court, that the Saline court is without jurisdiction in the divorce proceeding. Mrs. Hill has therefore filed in this court a petition for a writ of prohibition to prevent the trial of the divorce action in the Saline Chancery Court.

Attached to the petition for the writ of prohibition are all the pleadings and orders in both cases. Hill, in the suit filed by him in Saline County, alleges indignities as the ground for divorce. Mrs. Hill, in the Pulaski County action, had alleged that on June 17, 1953, the defendant had abandoned her and since that time had failed and refused to support her, although he was able to do so and she was in ill health and unable to work. The complaint was filed July 23, 1953; obviously it did not allege the statutory ground for divorce—desertion for one year. Nor was it necessary to allege grounds for divorce in order to obtain separate maintenance. *Wood* v. *Wood*, 54 Ark. 172, 15 S. W. 459; *Shirey* v. *Shirey*, 87 Ark. 175, 112 S. W. 369; *Kientz* v. *Kientz*, 104 Ark. 381, 149 S. W. 86.

Petitioner contends that the action in the Saline Chancery Court is abated by the case in the Pulaski Chancery Court. Judge Leflar in his work on *Conflict of Laws*, page 286, has this to say on the subject: "A decree for judicial separation, which used to be called a divorce from bed and board, is not really a divorce at all. It has no effect upon the marital status, which continues existent just as before the decree. The decree merely regulates the personal rights of the spouses in relation to the still-continuing marital status. It has no *in rem* effect. That being true, it follows that a bill for judicial separation is an *in personam* proceeding, and need not necessarily be brought at the domicile. In fact, it may be brought at any place at which personal jurisdiction over the defendant spouse is acquired, or at which he owns property . . . In fact it has been held that under some circumstances a valid decree for

divorce will not even supersede a prior order for the payment of fixed amounts for separate maintenance." Citing cases.

In *Butts* v. *Butts,* 152 Ark. 399, 238 S. W. 600, Chief Justice McCulloch said: "Counsel for appellant attempts to escape the application of this well-established rule of law on the ground that the prior decree of the Louisiana court granting a divorce *a mensa et thoro* was a bar to the right to prosecute the suit for divorce in this State, and that it defeated the jurisdiction of the Phillips Chancery Court. The weakness of this contention, however, lies in the fact that jurisdiction of the court to sustain appellee's cause of action depends upon the allegations of the complaint. The court thereby acquired jurisdiction to determine whether or not appellee was a resident of Phillips County, and whether there was a prior adjudication in another state which was conclusive of the rights of the parties . . . The decree of separation did not affect the status of the parties as to the continued existence of the marriage ties."

Petitioner relies on the case of *Cameron* v. *Cameron,* 235 N. C. 82, 68 S. E. 2d 796, 31 A. L. R. 2d 436. There it was held that where the wife had sued the husband for separate maintenance first, a second suit filed by the husband seeking divorce was abated by the case which had been filed by the wife. But in that cause the wife alleged abandonment which she was required to prove. In the later suit filed by the husband he alleged desertion. The issues in the two actions were so closely related that one could not be resolved without necessarily deciding the other.

Here, in the separate maintenance action filed in the Pulaski Chancery Court by the wife, she alleged abandonment, which the husband denied. He did not ask for a divorce nor assert the grounds for divorce which he later alleged in the cause filed by him in the Saline Chancery Court; but even if he had done so and the court had found in his favor, alimony could have been awarded to the wife. *Laird* v. *Laird,* 201 Ark. 483,

145 S. W. 2d 27; *Lunsford* v. *Lunsford,* 232 Ala. 368, 168 So. 188. Hence a finding by the Pulaski Chancellor in favor of the wife for separate maintenance is not necessarily a finding that the husband had no grounds for divorce.

In *Keezer* on *Marriage and Divorce,* 3rd Edition, page 577, it is said: "The fact that an order has been made against a husband for support has been held not to bar him from securing a divorce on the ground of desertion."

In *Hirsch* v. *Hirsch,* 70 Pa. Super. 583, it is held that the fact that an order had been made against a husband for support will not prevent him from securing a divorce on the grounds of desertion upon a proper cause shown.

We believe the better rule to be that even though a defendant in a separate maintenance suit has not asked for a divorce by way of cross complaint, he should not be barred from maintaining a suit for divorce at a later date. The policy of the law is to support and maintain the marriage status wherever it is reasonable to do so in the circumstances; and the husband should not be penalized because he did not ask for a divorce at the first opportunity.

The petition for writ of prohibition is denied.

BEAN *v.* HUMPHREY, STATE AUDITOR.

5-295 264 S. W. 2d 607

Opinion delivered February 15, 1954.

Wiley W. Bean, for appellant.

Tom Gentry, Attorney General, *W. R. Thrasher, Martin K. Fulk* and *Wm. H. Donham,* for appellee.

J. Seaborn Holt, J. Herbert Eldridge was appointed by the State Highway Commission as Director of Highways, effective May 1, 1953, at a salary of $1,250 per month, or $15,000 per year, which compensation was duly appropriated by the 1953 Legislature by Act 451.

By proper procedure, appellant, taxpayer, brought the present suit to enjoin the State Auditor and State Treasurer from paying Eldridge in excess of $5,000 per year, as provided by § 23, Art. XIX of the Constitution of this State.

Trial resulted in a decree dismissing appellant's complaint for want of equity and this appeal followed.

In effect, the questions presented are: Was the Director of Highways (Eldridge) a State officer within the meaning of § 23, Art. XIX, and if not a State officer, then did the General Assembly have the constitutional power to make appropriation to pay the salary of $15,000?

After a careful review of the record, we hold that the position of Director of Highways is not a State officer within the meaning of § 23, Art. XIX, above, that such Director, in the circumstances, is an employee only, and that the Legislature had the power to appropriate the Director's salary in question.

Sec. 23, Art. XIX provides: "No officer of this State, nor of any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites, more than five thousand dollars net profit per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury, as shall hereafter be directed by appropriate legislation."

The people of Arkansas, by an overwhelming vote (231,529 for, and 70,291 against) on November 4, 1952, adopted Constitutional Amendment 42, which provides: "§ 1. Commission created—Members—Powers.—There is hereby created a State Highway Commission which shall be vested with all the powers and duties now or hereafter imposed by law for the administration of the State Highway Department, together with all powers necessary or proper to enable the Commission or any of its officers or employees to carry out fully and effectively the regulations and laws relating to the State Highway Department." §§ 2 and 3 have to do with the terms of office of the Commission, §§ 4 and 5 with the removal of the Commission and filling vacancies, and § 6 provides: "Director of Highways.—The Commission shall appoint a Director of Highways who shall have such duties as may be prescribed by the Commission or by statute."

Thereafter by enabling Act 123 of 1953, the General Assembly, provided for the appointment of a Director of Highways, who would have control and management of affairs pertaining to the State highways, subject, however, to the control and approval of the Highway Commission. The Director was required to give a bond and take an oath.

At the same session of the Legislature, there was enacted, pursuant to the constitutional mandate, an appropriation Act 451, in which it was provided in § 2: "There is hereby established for the State Highway Department, for the 1953-1955 biennium, the following maximum number of regular employees and the maximum annual salaries of such employees; and no greater salary than that established herein shall be paid to any employee from appropriations hereinafter made for said department. Provided further, that it is the intention of this act to make available the maximum salaries provided herein to secure efficient, skilled employees; and in determining the annual salaries of such employees the administrative head of such department shall take into consideration ability and length of service, but it is not the intention of this act that the maximum salaries shall be paid unless such qualifications are complied with and then only within the limitations of the appropriations and funds available for such purpose."

Following this § 2, under the headnote, "Highway Maintenance, Director's office" is found:

"Item No.	Title	Maximum No. of Employees	Maximum Annual Salary Rate
(1)	Director and Executive Secretary to Commission	1	$15,000.00
(2)	Secretary to Director	1	3,600.00
(3)	Clerk-Stenographers	2	2,400.00
(4)	General Counsel	1	6,600.00"

It appears that only two witnesses testified, Mr. Orr, Chairman of the Highway Commission, and Director

Eldridge. Mr. Orr testified, in effect, that there was no contract entered into between the Commission and Mr. Eldridge, just a verbal understanding. His salary is $15,000 a year. There was no understanding as to the duration of his employment. The Commission can discharge Mr. Eldridge at any time with or without cause. Mr. Eldridge cannot exercise any functions of sovereignty. He is an employee of the Commission in the same sense as any one else. The Commission itself formulates the policies. Mr. Eldridge supplies the information at the direction of the Commission. Mr. Eldridge was employed by the Commission because of 30 odd years in all phases of highway work, including construction and administration. We needed that experience. It was at the request of the Commission that the Legislature set up this salary of $15,000 to enable the Commission to get an experienced person, and Mr. Eldridge was employed. His duty is to meet with the Commission at any time it meets, to make any recommendations or suggestions he cares to at any time, and to carry out any policy formulated by the Commission or directions which the Commission may set up, or any requests it may make of him as to work to be done. Mr. Eldridge cannot exercise any independent function. The Commission has complete supervision and control of all and any office duties. The Commission gives him certain work to do and expects him to do it. Mr. Eldridge has made numerous recommendations to the Commission which they did not follow. The Commission formulates the policies and then directs Mr. Eldridge, as Director of the Highway Department, to carry out these policies under the supervision of the Commission. Mr. Eldridge is being paid $15,000 a year. The Commission specifically gave him authority over the personnel. He can fire and hire and replace, as he sees fit. His work is co-extensive with the State of Arkansas.

Mr. Eldridge testified that he had no written contract with the Highway Department. The only thing that is written is the Commission's order that employed me. Every understanding I have had with the Highway Commission has been verbal. The Highway Commission can

discharge me at any time without notice, for any cause, or without cause. I have not been assigned any duties which I exercise independently of any supervision of the Commission. At the time I was employed by the State Highway Commission, I was a citizen and resident of the State of Texas. I cannot exercise any prerogative or sovereignty in my work. All authority which I have stems from the Commission and can be granted and taken away on a moment's notice, and any action in the case in any regard is their action can be modified or rescinded at any time they see fit. I am just performing a ministerial function of carrying out the policy and orders of the Commission.

In distinguishing between an officer and an employee, and pointing out the elements or criteria necessary to each, the text writer in *42 Am. Jur.*, page 888, (in Sections 10 to 12 inclusive), says: "A public officer is one whose functions and duties concern the public, and who exercises some portion of the sovereign power of the state. In this and in other respects he is to be distinguished from a private officer. The latter holds his position not by election or official appointment, but by contract, and his duties are performed at the instance and for the benefit of the individual or corporation employing him. . . .

"Generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. One contracting with the government is in no just and proper sense an officer of the government.

"There are points of difference between a public office and a public contract. As observed above, a public office embraces the idea of tenure, duration, and continuity. The duties connected therewith are continuing and permanent. A public contract, on the other hand, is limited in its duration and specific in its objects. Its terms define and limit the rights and obligations of the parties, and neither may depart therefrom without the

consent of the other. *Unlike a public office, a public contract does not involve a delegation of a function of sovereignty. The fact that the duties of a particular position or governmental function do not depend on contract is itself one of the criteria of a public office.*

"Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. Although every public office may be an employment, every public employment is not an office, and the word 'employee' as used in statutes has in many cases been construed as not including officers.

"When a question arises whether a particular position in the public service is an office or an employment merely, recourse must be had to the distinguishing criteria or elements of public office. . . . Briefly stated, a position is a public office when it is created by law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position in the public service which lacks sufficient of the foregoing elements or characteristics to make it an office."

Here, the Highway Director's entire actions and powers are absolutely controlled by the Commission. He was employed by an oral contract for no specific term and could draw his salary by performed contract only. His salary, duties, and tenure of employment were left absolutely up to contract with the Highway Commission and dependent on such contract. The Commission could fire him at will. He was a nonresident when appointed, and at the time could not even qualify as an officer. He

has no sovereign powers whatever, a necessary requisite to any office, and no such powers have been delegated to him by the Highway Commission or by the Legislature. The fact that Act 123 of 1953 required him to take an oath and give bond is not controlling.

In our very recent case of *Maddox and Coffman* v. *State,* 220 Ark. 762, 249 S. W. 2d 972, we said: "Since the distinction between a public officer and a public employee tends to become indistinct when the position in dispute has some of the characteristics of each, we have never attempted to frame an inflexible definition of either. Yet the governing principles are well established. A public officer ordinarily exercises some part of the State's sovereign power. His tenure of office, his compensation, and his duties are usually fixed by law. The taking of an oath of office, the receipt of a formal commission, and the giving of a bond all indicate that a public office is involved, although no single factor is ever conclusive. *Rhoden* v. *Johnston,* 121 Ark. 317, 181 S. W. 128; *Middleton* v. *Miller County,* 134 Ark. 514, 204 S. W. 421. On the other hand, mere public employment differs from a public office in that some or all of these characteristics are lacking.

"It is clear that a school teacher, whose tenure, compensation, and duties are all fixed by his contract with the school board, is an employee rather than an officer. The position of superintendent comes somewhat closer to the dividing line, but we think that it too lies on the side of employment. . . .

"If the superintendent exercises any part of the sovereign power he does so as an agent of the school board and not as one to whom the legislature has delegated authority in the first instance," and in *Rhoden* v. *Johnston,* 121 Ark. 317, 181 S. W. 128, we use this language:

"In *United States* v. *Maurice,* 2 Brock. 96, Chief Justice MARSHALL said: 'Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a con-

tract, express or implied, to do an act, or perform a service, without becoming an officer.'

"(3) There is a very interesting and useful discussion on this subject in the note to the case of *Shelby* v. *Alcorn, supra,* 72 Am. Dec., pp. 179-189, and a consideration of the authorities collated there convinces us that the statute does not create the office of road overseer, but merely provides for employment. In the first place, there is no definite tenure of office prescribed. The statute merely provides that a contract shall be entered into to cover a period of not exceeding one year. The contract may be entered into either by the county court or by the county judge in vacation, and it may be for a day or for a week, a month or a year. The emoluments of the office, also, are not fixed by statute, but are left purely to the contract to be entered into from time to time."

While it appears that the position of Highway Director has been referred to as an office, we think it was intended merely as a description of the position of employment. In *Middleton* v. *Miller County,* 134 Ark. 514, 204 S. W. 421, the question was whether a county health officer was an officer within the meaning of Art. XIX, § 5 of the State Constitution. There we said: "It is true that the position is referred to as an office, but this was manifestly intended merely as a description of the position and not as a declaration of the legislative will as to whether it should be treated as an office or an employment."

In short, we hold that essential requirements necessary to constitute the Director of Highways an officer are lacking, and in the circumstances here, he is an employee only, and as such entitled to compensation as provided by the General Assembly, not to exceed the $15,000 appropriated for such purposes.

Affirmed.

Ed. F. McFaddin, Justice (concurring). I concur in the result reached by the majority, but I arrive at my conclusion by a process of reasoning entirely different from that contained in the majority opinion, so I give my views.

I am thoroughly convinced that the State Highway Director [1] is a State *Officer*. In *Downey* v. *Toler*, 214 Ark. 334, 216 S. W. 2d 60, we held that a member of the Arkansas State Police force was a State *Officer;* and I think that holding conclusively establishes that the State Highway Director is a State *Officer*.

But, having concluded that the State Highway Director is a State Officer, I then come to a study of Art. 19, § 23 of the Constitution, which is urged by the appellant as the Constitutional inhibition against any salary in excess of $5,000 to the State Highway Director. From my study of this Constitutional Section, and the cases construing it, I arrive at the conclusion that the judgment in the present case must be affirmed under the authority of *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380.

Art. 19, § 23 of our present Constitution (adopted in 1874) reads:

"No officer of this State, nor any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites more than five thousand dollars net profits per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

Under the authority of this Constitutional provision, the Legislature passed Act 47 of 1875, which may now be found in § 12-1801, *et seq.*, Ark. Stats. The germane portions of this Enabling Act of 1875 read:

"It shall be the duty of each of the following named officers, viz: the Secretary of State, Auditor of State, Treasurer of State and Commissioner of State Lands, and of each officer of any county, city, town or village receiving fees or emoluments of office, to keep a record book, in which shall be entered on each day an account of all moneys or other funds received by him, in payment of fees or by way of emolument pertaining to his office said

[1] In Amendment No. 42, the title of the position is "Director of Highways." In Act 123 of 1953, the title of the position is "Director of State Highways"; and in Act 434 of 1953, the title of the position is "State Highway Director." These all refer to the same position.

record showing in each instance by whom, on what account and in what funds, such payment was made.

". . .

"If the total amount of the receipts of the office shall exceed in par funds, or their equivalent of value the sum of five thousand dollars ($5,000.00), then the officer shall further report the amount expended by him in the conduct of the business of his office for said year, and voucher for all such expenditures shall be produced by the officer reporting, and examined by such Judge, Mayor or other chief officer, and, if such expenditures be approved, the amount thereof shall be deducted from the gross amount or receipts as estimated as hereinbefore prescribed by the reviewing officer, and in all cases where the balance remaining in the hands of any officer shall exceed the sum of five thousand dollars ($5,000.00), or its equivalent, the excess shall at once be paid into the treasury. . . ."

With the Constitutional and Statutory provisions being as above stated, this Court decided in 1907 the case of *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380. In that case, Griffin as a Taxpayer, brought suit against Rhoton, alleging: (1) that Rhoton, as Prosecuting Attorney was a State Officer; (2) that Rhoton, as such Officer, had received in excess of $5,000.00 net per annum from the Office of Prosecuting Attorney; and (3) that Rhoton had failed and refused to pay the said excess into the Treasury. The prayer was for an accounting and a payment of the excess.

The Supreme Court of Arkansas held: (1) that Rhoton was a State Officer; but (2) that Art. 19, § 23, of the Constitution was not self-executing; and (3) therefore, no action could be brought under that Constitutional provision until the Legislature passed an Enabling Act broad enough to cover such action; and (4) that the Enabling Act of 1875 did not extend to the Office of Prosecuting Attorney. The Court pointed out that the Enabling Act, as heretofore quoted, listed only the following State Officers: Secretary of State, Auditor of State,

Treasurer of State, and Commissioner of State Lands. Therefore Griffin's action as a Taxpayer against Rhoton failed, because the Constitutional provision (Art. 19, § 23, the same as here involved) was not self-executing, and the Legislature had never extended the Constitutional provision to cover the Officer there involved. Here are some of the pertinent excerpts from that opinion:

"Is the provision in question self-executing?

"Judge COOLEY laid down the following general rule for determining whether or not such provisions are self-executing: 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.' Cooley's Const. Lim. (7th Ed.), p. 121.

". . .

"We are of the opinion that the provision is not self-executing, and that it is inoperative without legislation putting it in force."

Griffin v. *Rhoton, (supra),* was decided by this Court in 1907; and I cannot find any Legislative enactment thereafter which could be called an Enabling Act to make Art. 19, § 23, of the Constitution apply to the office of State Highway Director. In fact, the 1875 Enabling Act —Act 47 of 1875—has never been broadened. So the effect of the holding in *Griffin* v. *Rhoton* has not been modified by the Legislature.

Furthermore, we have frequently cited *Griffin* v. *Rhoton (supra),* on this point that Art. 19, § 23 of the Constitution is not self-executing. Some of the cases are: *Ark. Tax Comm.* v. *Moore,* 103 Ark. 48, 145 S. W. 199; *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183; *Cumnock* v. *Little Rock,* 168 Ark. 777, 271 S. W. 466; *State* v. *Landers,* 183 Ark. 1138, 40 S. W. 2d 432; and *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875.

Neither in *Griffin* v. *Rhoton,* nor in any of the subsequent cases, has this Court ever attempted to draw any distinction to the effect that part of Art. 19, § 23, of the Constitution might be self-executing as to salaries, but not self-executing as to fees. Neither has there been any attempt in any of the cases to say that Art. 19, § 23, was self-executing as a Constitutional limitation on the power of the Legislature to fix salaries. No: the case of *Griffin* v. *Rhoton (supra),* held that Art. 19, § 23, of the Constitution was not self-executing; and every subsequent case has assumed that the whole Section was so classified, and not a part of it.

It is not a question of what I would decide today if the matter were now here without a previous opinion.[2] The point is, that *either* we must now overrule retrospectively *Griffin* v. *Rhoton (supra),* and every case that followed it, *or* we must follow *Griffin* v. *Rhoton,* which holds that Art. 19, § 23, of the Constitution is not self-executing. Faced with that alternative, I prefer to follow *Griffin* v. *Rhoton.* The results are: (1) that Art. 19, § 23, of the Constitution is not self-executing; (2) that the only Enabling Act passed by the Legislature to execute the said Constitutional provision is Act 47 of 1875 (§ 12-1801, *et seq.,* Ark. Stats.); and (3) that said Act of 1875 does not apply to the Director of State Highways. Until the Legislature enacts a more comprehensive Enabling Act to Art. 19, § 23, of the Constitution, then under *Griffin* v. *Rhoton,* this Court cannot declare void a salary appropriation like the one in the case at bar.

Therefore, I vote to affirm the decree of the Chancery Court.

GRIFFIN SMITH, Chief Justice, dissenting. It has never been supposed that the functions of a court include the right to read out of the constitution and statutes their

[2] If the matter were one here on first impression, I am inclined to believe that I would follow the reasoning contained in the opinion of the Court of Appeals of Kentucky in *Shipp* v. *Rodes,* 196 Ky. 523, 245 S. W. 157, which holds that generally prohibitive and restrictive Constitutional provisions are self-executing and may be enforced by the Courts, independently of Legislative action. The Kentucky Constitutional provision was in most essentials similar to our Constitutional provision.

obvious essentials, and to substitute matters of convenience thought by some of the judges to be wholesome from a standpoint of public emergency.

Perhaps nothing is more accurate by way of summation than the general but erroneous belief that Chief Justice HUGHES of the U. S. Supreme Court once remarked that the constitution is just what the judges say it is. The statement was taken from context and is not a correct presentation of what that great official said.

But today we are having brought home to us the factual realization that in Arkansas the constitution—far from being the fundamental law of the land—is what a majority of the court says it is or is not.

Amendment No. 42 was conceived and adopted in consequence of a praiseworthy purpose to measurably remove the Highway Commission from the control of any governor. To what extent the plan may succeed depends upon sincerity of the state's chief executive and an unswerving course by the commissioners: a hands-off policy upon the one hand and a refusal upon the other to be influenced or coerced.

In an opinion fortunate from the standpoint of expediency and in its recognition that the constitutional maximum of $5,000 per annum allowable to state officers is not sufficient to compensate a competent engineer as Highway Director, but unfortunate in that resort is had to strange reasoning in disregard of constitutional and statutory provisions, the court's majority holds that one designated by statute as an officer is nothing more than an employee, and by parity of logic says that neither the General Assembly nor framers of the constitution, including Amendment No. 42, knew very much about what they were doing.

The gist of the majority's pronouncement is that the Director is not a state official within the meaning of Art. 19, § 23, of the constitution, Amendment No. 42, or any of our statutes. True, the opinion mentions what is judicially termed Enabling Act No. 123 of 1953, but whether

through inadvertence or carelessness the substance of that Act is bypassed does not appear from any affirmative language. Stress is then placed upon Act 451, which appropriates for highway maintenance, the director's *office,* and miscellaneous highway expenditures. We are then relegated to 42 American Jurisprudence for a determination of what the law in Arkansas is,[1] together with the very comprehensive statement of Chief Justice MARSHALL that although an office is an employment, it does not follow that every employment is an office, for "A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without being an officer".[2]

In contradiction of the very statute cited as an enabling act, the majority says, "In short, we hold that the essential requirements necessary to constitute the Director of Highways an officer are lacking, and he is an employee only".

Now let's see what the lawmaking authority has said. As has been shown, Amendment No. 42 creates the State Highway Commission and invests it *with all the powers and duties now or hereafter imposed by law for the administration of the State Highway Department, together with all powers* necessary or proper . . ."—to do what? "To enable the Commission *or any of its officers* or employees to carry out fully and effectively the regulations and laws relating to the [Department]".

No finesse of construction is involved when one draws from this language the idea, (a) that the Commissioners are officers, and (b) that the commission is authorized to engage two classes of persons—officers and employees. Since the commissioners are officers and the Amendment speaks of "its officers or employees", the meaning is too clear to admit of a suspicion of a doubt.

[1] For a discussion of the propriety of citing a work of this nature see article by GEORGE ROSE SMITH, published in Arkansas Law Review, 1947, Vol. 1, No. 2.

[2] With this statement no rational person would disagree. It would not, for instance, be urged that a contractor who for stipulated sum, builds a highway, is an officer; nor could it be said that a school professor who does not exercise any of the sovereign powers of the state is an officer. Many such examples might be mentioned.

Now the only employment mandate contained in the Amendment, § 6, is that the *Commission* shall appoint a Director of Highways who shall have such duties as may be prescribed by the Commission *or by statute.*

It is now enlightening to turn to that portion of Act 123 not mentioned in the majority opinion—a statute expressly referred to as an enabling act and constructively approved. Section 3 of Act 123 says that the Director "shall be the chief executive officer of the State Highway Department", and § 4 is an imperative that he take an oath "that he will faithfully and honestly execute *the duties of the office* during his continuance therein".

Act 251 of 1949 was a legislative effort to change the Director from an officer to the role of an employee in order to justify an annual salary of $7,500. Section 2 of the Act eliminated the word "office" from the secondary oath the Director was required to take. But in 1953, with full knowledge that Amendment No. 42 required the appointment of a Director, the status was restored.

This, however, is not all. Methods by which possession of land taken for state highway purposes under the right of eminent domain is set out in Act 115 of 1953. In any proceeding instituted "by and in the name of the state", involving the acquisition of any real property or any interest therein, or any easement for public highway purposes, the petitioner [State of Arkansas] may file with the condemnation petition, or at any time before judgment, "a declaration of taking signed by the Director of Highways, declaring that said real property or any interest therein or any easement is thereby taken for the use of the State of Arkansas."

Is this an act of sovereignty?

The history of the office of Director of Highways is interesting. By Act 65 of 1929, Ark. Stat's, § 76-305, the Treasurer of State could not pay money on warrants drawn against the highway fund unless they were countersigned by the State Highway Engineer; and at one time bonds had to be countersigned by the Director.

Judge BUTLER, in *Arkansas State Highway Commission* v. *Nelson,* 191 Ark. 629, 87 S. W. 2d 394, quoted with approval this statement from a Florida case: "The road department is a state agency and component part of the state government. The product of its work is state property. It exercises a part of the sovereign power of the state, . . ." etc. Under Act 115 of 1953 a part of the sovereign power of the state—the initiation of proceedings to take private property for public purposes—is committed to the Director. Does he act as an employee, or as an officer?

In mentioning various Acts the purpose here is to stress the legislative concept of the *office of director.* Some of these Acts may have been amended, some superseded, and any reference to them is not for the purpose of calling attention to existing substantive law, but to illustrate how the General Assembly felt when it was treating the subject. For example, consider Ark. Stat's, § 76-201, where it was provided that any Commissioner, or the Director of Highways, could be removed by the Governor without the consent of the Senate for inefficiency, negligence of duty, *or misconduct in office.*

Section 76-203 imposed upon the Governor the duty of appointing a Director of Highways, who would be "*the chief* executive officer of the State Highway Department". Incidentally, this is the exact language employed in Act 123 of 1953.

Section 76-207, Ark. Stat's, provided that wherever [in the law then applicable] an authority is granted or duty imposed upon the chairman of the State Highway Commission, "*the same shall be vested in the office of the Director of Highways*".

Section 76-209, Ark. Stat's, permitted the Director of Highways to employ in the Highway Department the personnel set out in detail.

Section 76-215 compels the Director to swear that "I will [not] use any information or influence I may have *by reason of my official position* to gain any pecuniary

reward'', and by § 76-220, Ark. Stat's, premiums on bonds required of *officials or employees* of the Highway Department were payable as public obligations.

The Governor, State Comptroller, and Director of State Highways were made an official board by Act 115 of 1935, Ark. Stat's, § 76-228.

In *Downey* v. *Toler, Judge,* 214 Ark. 334, 216 S. W. 2d 60, we held that members of the Arkansas State Police were officers, and in actions involving official duties they could be sued in Pulaski County only.

An opinion written by Judge FRANK G. SMITH, *Carter* v. *Bradley County Road Improvement Districts,* 155 Ark. 288, 246 S. W. 9, dealt with the status of the State Highway Engineer who was required (like the present Director) to subscribe to an official oath. Carter, the engineer, had contracted with road improvement districts to do certain work. In a statement of facts Judge Smith said that Carter ''took the oath of office'' prescribed by the applicable statute. It required all officers and employees of the [Department] to take *the oath of office* provided by the constitution, and in addition a separate oath not to be interested in contracts, etc.

At that time the Engineer's duties were to make surveys, investigations and inspections, and prepare such maps, plans, specifications, estimates and reports, and do such other technical work as might be required by the Department, and ''He shall, under the direction of the [Commission] perform such other duties as may be required by law and may be proper and convenient for carrying out the purposes of this Act''. After citing *Bradley County Road Improvement District* v. *Jarratt,* 144 Ark. 260, 222 S. W. 14, the opinion said that the law announced in *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296, was applicable.

Tallman was a commissioner of a drainage district and had been employed by the commissioners to supervise construction of a ditch. ''The law under which he was proceeding'', says the decision, ''did not provide that any

contract made by a commissioner with the drainage district should be void, *but it did require the commissioner to make oath that he would not, directly or indirectly, be interested in any contract* made by the board". The opinion then goes to this point: "So here the oath of the highway engineer must be treated as a prohibition against entering into contracts whereby he became interested, directly or indirectly", in the result.

Quite clearly Judge SMITH, and this Court's majority, held that Carter was a public officer. Reinforcing this construction is a paragraph in the opinion on rehearing, also written by Judge SMITH: "It is argued that we should not hold the contract in question void as against public policy, for the reason that on March 11, 1919, *while Carter was filling the office of State Highway Engineer,* the General Assembly passed a number of acts" [urged in absolution].

For venue purposes an action on the official bond of the Sheriff of Montgomery County was restricted to that county. But effect of the opinion was much broader. It included members of a posse who assisted the sheriff, and who were sued in Polk county. *Edwards* v. *Jackson,* 176 Ark. 107; 2 S. W. 2d 44.

A reconciliation of today's opinion with what this court has formerly said, and with the statutes and constitution, can only be achieved by applying the famous comment of Mr. Justice ROBERTS of the U. S. Supreme Court. In characterizing a particularly objectionable decision the justice likened it to a railway ticket, good for today and one way only.

WATTS *v.* MAHON.

5-105 264 S. W. 2d 623

Opinion delivered February 15, 1954.

J. H. A. Baker, for appellant.

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

J. Seaborn Holt, J. The parties to this litigation (except Lucille Mahon, who is the daughter of appellee, Dessie Mahon) are the brothers and sisters of James Berry Watts, who died intestate, November 10, 1951, without issue.

Appellants brought this suit, alleging, in effect, that they, along with the appellee, Dessie Mahon, "are the only heirs of the said James Berry Watts" and, as tenants in common, they and Dessie Mahon are entitled to all of Berry Watts' property owned by him at his death, which included real estate in the city of Russellville, War Bonds, cash, a Chevrolet automobile and other personal property. They asked that the Chancery Clerk be appointed as commissioner to take charge of said property and for partition.

Appellees, in an answer and cross complaint, denied that appellants had any interest in any of said property, and alleged that "a number of years prior to the death of James Berry Watts, the defendants, Dessie Mahon

and Lucille Mahon, were living at Leslie in Searcy County, Arkansas, with Mrs. Martha E. Watts, deceased, the mother of James Berry Watts, deceased, and the said James Berry Watts requested that the defendants and his mother move to Russellville and all live together; * * * and James Berry Watts at that time advised the defendants that he desired that they all live together, share the home, which was at that time rented property, as one family, and for several years James Berry Watts, Mrs. Martha E. Watts and these defendants lived together by common consent and agreement.

"That the deceased, James Berry Watts, with the knowledge and consent of the defendants and with the understanding that the property would be jointly owned and that when it was paid out the said James Berry Watts, deceased, would make a deed or a will to said defendants, Dessie Mahon and Lucille Mahon, and his mother, Mrs. Martha E. Watts, now deceased, thereby creating an estate by the entirety, the survivors, or survivor, taking the property; * * * that the purchase price (of the real property in question, $956.26) was to be paid by the deceased, James Berry Watts" and appellees;

That James Berry Watts "and the defendants herein, as well as Mrs. Martha E. Watts, now deceased, were to share the property jointly, keep the payments paid on the purchase price, pay the taxes and pay the insurance and that in line with said agreement, the said James Berry Watts, Mrs. Martha E. Watts and these defendants met all of the obligations pertaining to the purchase price of said property, paid the taxes and insurance and made improvements, it being distinctly understood by the deceased, James Berry Watts, that he would convey by warranty deed or by will any and all interest he had in said property herein described.

"That * * * the said James Berry Watts, Mrs. Martha Watts and the defendants herein lived together, the defendant, Lucille Mahon, working regularly and putting the proceeds from her labor into the home, improvements thereon, taxes and insurance, and the said

James Berry Watts putting the proceeds of his labor into the home, improvements thereon, taxes and insurance."

They further alleged that they, appellees, complied with their part of the agreement, but that James Berry Watts failed to convey this home property to them, either by will or deed, as promised. They asked the court to vest title to all the property involved in them, including the title to the automobile in question.

A trial resulted in a decree in favor of appellees on all issues except their claim to the automobile, which the court found to belong to Berry Watts' estate.

A large amount of testimony was presented, some of which is in irreconcilable conflict. The rule is well established that in order for appellees to sustain their contention that Berry Watts entered into an oral contract with them to convey the real property involved to them by will or deed, they must assume the heavy burden of establishing such contract by clear, satisfactory and convincing testimony.

"The validity of an oral contract to make a will has long been recognized and such contracts have often been enforced by the courts. (Citing cases) But it is equally well settled that the testimony to establish such a contract must be clear, satisfactory and convincing. (Citing cases) As was said by the court in the case of *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926, wherein it was sought to establish such a contract, 'it is not sufficient that he establish it by a preponderance of the testimony, but that he must go further and establish the contract by evidence so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt,' " *Jensen* v. *Housley, Administrator,* 207 Ark. 742, 182 S. W. 2d 758, and in *Offord* v. *Agnew,* 214 Ark. 822, 218 S. W. 2d 370, we said:

" 'In most of the cases, if not all of them, sustaining oral contracts to devise or convey lands upon performance of the consideration therefor, the plaintiffs have performed usually at sacrifices to themselves and

performed services not easily compensated in money. * * * In *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82, it was said that the evidence "clearly establishes the fact that plaintiff went to live with his uncle under an agreement that the latter was to convey the property to him in consideration of the care and attention to be bestowed during the latter's lifetime, and that plaintiff occupied the premises pursuant to that agreement and made substantial improvements," and further said, "In order to assume the obligations imposed upon him by the contract, he made an entire change in his surroundings and changed his occupation and place of residence." In the Speck-Dodson case, similar facts were shown relative to plaintiff's change of residence and occupation.'

"It is noted that in our former cases the promisee, as a consideration for the agreement of the promisor to convey or devise lands, has agreed to render services or perform acts in the future. In other words the agreement to make a will is supported by a prospective rather than a past consideration. As in other contracts, a promise to make a will cannot be enforced without consideration."

After a review of all the testimony, we have concluded that appellees have met this burden of proof imposed upon them.

Dessie Mahon testified positively and in detail that Barry Watts induced her, with her daughter, to move from Leslie to Russellville in 1930 to live with him. In 1938, Dessie Mahon, her daughter, Berry Watts, and the mother of Dessie Mahon and Berry Watts acquired and moved into the home involved here on the promise that they would all live together as one family, jointly pay out the balance due on the home, share all expenses, including insurance, taxes and improvements, and in consideration that he would will or deed this property to them. There was other testimony from many disinterested witnesses that tended strongly to corroborate appellees.

Mrs. Jean Vincent testified that she and Berry Watts worked for two cooperage companies in Russellville from

1935 to 1944 and that she has known appellee from 1940 and related: "On numerous occasions, Berry told me they were the only family he had that was close to him that he cared anything about or that cared anything about him. * * * I knew when he bought the place at 1309 South Arkansas Ave., Russellville, that he was buying the home and that his sister, Mrs. Dessie Mahon, and his niece, Lucille Mahon, were helping to make the payments on the home. I also knew Berry intended to make his sister and his niece a deed to the place or intended to will it to them, subject to his lifetime. * * * Berry told me he wanted everything he had to go to his mother (deceased), his sister, Dessie Mahon, and his niece, Lucille Mahon. * * * Berry and I were very close. We had numerous long talks at different times, and always during our conversations, Berry expressed great concern for his mother, his sister, Dessie, and his niece, Lucille."

Mrs. Velma Keltner, a near neighbor, who visited appellees in their home almost daily since 1948, testified: "Q. When, you understood that in the case of the death of Berry and Mrs. Watts, it went to Lucille and her mother, and in the case of the death of Mrs. Mahon it would go to Lucille. A. Yes, that was the general talk in the community. Q. Did you ever see any of the Watts over there visiting? A. Not very often, they never did even come. They all looked after each other. Q. You didn't see any of the Watts look after Grandma Watts? A. No. Q. Did any of them ever come to look after Berry when he was sick? A. No, they always looked after them."

T. B. Price testified: "On several different occasions in conversation with me Berry expressed a deep feeling for Miss Lucille Mahon, a feeling such as a father would express towards his daughter. In conversation in midsummer of 1949, while standing in our front yard, Mr. Watts said he would like to build a rental house on the back lot, and further said, 'It might not do me much good but it would "Punk" and Dessie, as they will get

what I have.' 'Punk' is the name, nickname, of Lucille Mahon."

The Chancellor, after giving to this case a patient and extended hearing, made findings containing these recitals: "That in about the year 1929, Berry Watts secured a divorce from his wife in this court and soon thereafter requested his mother, Mrs. Martha Elizabeth Watts, his sister, Mrs. Dessie Mahon, and his niece, Miss Lucille Mahon, a daughter of Dessie Mahon, to move from Leslie, Arkansas to Russellville, Arkansas, and make their home with him, and agreed at that time that all four of them should live together as one family;

"That in compliance with said request and agreement, Mrs. Martha Elizabeth Watts, Mrs. Dessie Mahon and Miss Lucille Mahon did move from Leslie to Russellville in 1930 and from that time until July 1951, lived together as one family, sharing the home and paying the expenses, and by common consent, agreeing that in the event of the death of either of them the other three would become the owners of the property, and Mrs. Martha Elizabeth Watts, the mother of Berry Watts and Dessie Mahon, died in July 1951, after a long illness. * * *

"The court further finds that there was an agreement among all four of said parties, to-wit: Martha Elizabeth Watts, Dessie Mahon, Lucille Mahon and Berry Watts, that they all should be joint tenants in and to the real estate hereinabove described and that Berry Watts would draw up a will or execute his deed to the others so that they should share and share alike in said property as joint tenants;

"That the defendants, Dessie Mahon and Lucille Mahon, made the payments, paid the taxes and made improvements on said property and, under the contract and agreement, took possession of said property and continued in the possession thereof up to the time of the death of Martha Elizabeth Watts and Berry Watts, and, under said agreement, the defendants, Dessie Mahon and Lucille Mahon, are now in possession of said property and have been at all times since 1938 when said property was first acquired.

"The court further finds from the testimony introduced in behalf of both the plaintiffs and the defendants that it was the intention of the deceased, Berry Watts, that his sister, Dessie Mahon, and his niece, Lucille Mahon, become the owners of said property and that the defendant, Lucille Mahon, after her graduation from College in 1940, has been steadily employed and has assisted in keeping all of the expenses paid, including the expenses of the severe illness of Berry Watts, who was unable to work for approximately fifteen months.

"The court further finds that the * * * automobile * * * belongs to the estate of James Berry Watts, deceased, and must be delivered to the duly appointed, qualified and acting administrator."

We think the testimony as a whole supports this fact summation by the trial court, and the decree thereon.

On the whole case no error appearing, the decree is affirmed.

DAVIS *v.* GOLDEN, JUDGE.

5-307 264 S. W. 2d 833

Opinion delivered February 15, 1954.

Jay W. Dickey and *Hendrix Rowell,* for petitioner.

Max M. Smith, for respondent.

GRIFFIN SMITH, Chief Justice. The question is whether Cleveland Circuit Court was without jurisdiction in respect of an action by J. H. and Neoma von Tunglen, whose 16-year-old son, Jimmy Dale, died from injuries received while riding (presumptively as a guest) in a delivery truck owned by Helen M. Davis and driven for her by J. W. Stringfellow. Ark. Stat's, § 27-610.

The mishap causing young Tunglen's injuries occurred in Cleveland County, where he lived with his parents. Helen Davis and Stringfellow reside in Jefferson County. In the Jefferson County suit it was alleged that an automobile driven by Lester Smith, also a resident of Cleveland County, was negligently maneuvered in such a manner as to be the proximate cause of Stringfellow's wreck and von Tunglen's injuries.

Under this conception of liability, Helen Davis and Stringfellow sued Smith in Jefferson County June 22, 1953, and procured service June 24th. Stringfellow's personal injury claim was for $25,000, while the owner of the truck asked $1,400 to compensate property damages. A complaint by the von Tunglens was filed June 27th, with Helen Davis, Stringfellow, and Smith as defendants. Service on the first two was procured in Jefferson County July 2nd. The petition for prohibition followed action of Cleveland Circuit Court in refusing to quash the service.

There is no contention that the action by Helen Davis and Stringfellow in Jefferson County should abate, and presumptively it will proceed to judgment. The sole issue is the right of J. H. and Neoma von Tunglen to maintain their suit in Cleveland County.

The decision in *Kornegay* v. *Auten, Judge,* 203 Ark. 687, 158 S. W. 2d 473, is decisive of the controversy. Construction of the Venue Act affected two distinct transactions. First, it was held that the court of the county in which the first suit was brought ac-

quired jurisdiction, the injury having occurred in that county and the decedent having resided there. But as to persons residing in Monroe County who were not included as defendants in the first action, their right to maintain the suit in Monroe County was unimpaired. See *Sims* v. *Toler, Judge,* 214 Ark. 732, 217 S. W. 2d 928.

Here the action brought by the von Tunglens was an independent cause, prosecuted in the county of their residence, in the county where the negligence is alleged to have occurred, and in the county where the decedent had lived. It is possible that inconsistent judgments may be rendered, but the lawmaking power has not seen fit to provide the remedy petitioners ask, hence the writ must be denied.

BROACH *v.* MCPHERSON.

5-303 264 S. W. 2d 629

Opinion delivered February 15, 1954.

Paul K. Roberts, for appellant.

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

ROBINSON, J. Involved in this appeal is the issue of liquidated damages and attorney's fee in a case wherein appellant Broach, a night watchman, recovered a judgment against appellee McPherson, operator of a rice mill, for minimum wages and overtime due according to the Fair Labor Standards Act, 29 USCA § 206-207.

Broach first filed this suit on June 27, 1951, alleging that as a night watchman he had not been paid the minimum wages and overtime as provided in the Federal Act, it being alleged, of course, that the defendant was engaged in interstate commerce. On a trial there was a directed verdict for the defendant on the theory that there was no substantial evidence to show that McPherson, the defendant, was the owner of the mill, or that the mill was engaged in interstate commerce. On appeal to this court the cause was reversed and remanded for a new trial. 220 Ark. 457, 248 S. W. 2d 355.

At the second trial of the case there was a jury verdict for the defendant, McPherson. Broach appealed to this court where the cause was reversed with directions to enter a judgment in his favor on the theory that the evidence showed that as a matter of law he was entitled to recover both unpaid minimum wages and unpaid overtime as provided by the Fair Labor Standards Act. Opinion delivered April 27, 1953, 222 Ark. 62, 257 S. W. 2d 565.

When the matter again came on for a hearing in the trial court, the parties agreed that Broach was entitled to judgment for unpaid minimum wages in the sum of $140.00 and unpaid overtime in the sum of $412.67. The only issue on appeal now is the question of the amount of liquidated damages and the attorney's fee allowed by the circuit court.

In addition to the sum the parties agreed on as the unpaid minimum wages and overtime, the court allowed 50% thereof as liquidated damages. Appellant Broach contends that it is mandatory that the court allow as liquidated damages 100% of the amount found to be due as unpaid wages. Also the court allowed $400 as

attorney's fee, and appellant contends that in the circumstances of this case he should be allowed an amount equal to the amount of the judgment for wages. On cross appeal appellee contends the court erred in allowing any liquidated damages, and that the attorney's fee should not be over $275.00.

The Fair Labor Standards Act of 1938 as amended, 29 USCA § 206-207, fixes the rate of pay, and § 216 (b) provides: "Any employer who violates the provisions of § 206 or § 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." In 1947 the Portal-to-Portal Amendment was adopted. 29 USCA § 260 provides: ". . . If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in § 216 (b) of this title." Under this section it is within the discretion of the trial court to allow or disallow liquidated damages where the employer acts in good faith in connection with the wages paid. In *Neal* v. *Braughton*, 111 Fed. Sup. 775, Judge Miller of the U. S. District Court for the Western District of Arkansas said: "Plaintiff has asked for an equal amount as liquidated damages, but the court feels that under the circumstances in the case liquidated damages should not be allowed . . . The court is convinced that the defendants had reasonable grounds for believing that their actions were in conformity with the Act and that the actions were in good faith, and therefore plaintiff should not recover liquidated damages."

In the case at bar the trial court found specifically that the employer did act in good faith. The employer defended on the theory that the employee Broach worked as night watchman for two separate business concerns,

and that one of these firms was not engaged in interstate commerce; and that for the time Broach worked for the business that was engaged in interstate commerce he was paid in accordance with the Fair Labor Standards Act. The trial court found there was sufficient evidence to go to the jury on that theory, and the jury found for the defendant. Although the cause was reversed by this Court on the theory that Broach, the night watchman, was working for only one person and one business, the court was sharply divided on the question, three of the justices dissenting. Therefore the trial judge, the jury, and three members of this Court found from the evidence that McPherson had not violated the Fair Labor Standards Act, and it can hardly be said that appellee was not acting in good faith in making his contention in that respect. Therefore it is within the discretion of the court to allow or disallow liquidated damages.

Appellant contends that appellee did not plead good faith in the answer filed, and therefore can not benefit by the statute giving the court discretion in good faith cases. We believe the answer filed by defendant which sets up a defense which the trial court, the jury, and three members of this Court thought was a good defense, is a sufficient plea of good faith. Although some of the earlier cases decided before the adoption of the Portal-to-Portal Amendment held a special plea of good faith was necessary, the later cases have not made that requirement. In *Anderson* v. *Arvey Corp.*, 84 Fed. Supp. 55, it does not appear that the defendant specifically pleaded good faith, but there the court said: "The Court, however, is satisfied that the defendant acted in good faith and had ample reason to believe that its acts or omissions were not in violation of the Fair Labor Standards Act, and accordingly relieves the defendant of the payment of liquidated damages." In *Thompson* v. *F. W. Stock & Sons, Inc.*, 93 Fed. Sup. 213, it is said: "The defendant has shown 'to the satisfaction of the court that the act or omission' which gave rise to this action was in good faith; and viewing all the facts as they existed at the date of the violations, the court is of

the opinion that the defendant had reasonable grounds for believing that its conduct was not a violation of the Fair Labor Standards Act. The court therefore will award no liquidated damages."

Next, appellant contends that the trial court should have allowed more than $400 as attorney's fee, and we agree with appellant in that respect. 29 USCA § 216 (b) provides: ". . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." This has been a long, hard-fought law suit, and to set out here in detail every step taken by the attorney for appellant would unduly extend this opinion. But it is shown that the cause was tried twice in the circuit court and has been appealed to this court three times. The record and briefs show that appellant's attorney has been untiring and diligent in his preparation of the case for trial, and in his research of the law; and whereas the trial court allowed him a $400 fee, we believe that $800 would be more in keeping with the amount of the judgment, the quantity of work involved, and the ability shown by the record. In *Maddrix* v. *Dize,* 155 Fed. 2d 1019, there was a judgment for $1,052.10 and the trial court allowed a fee of $75. The appellate court increased the fee to $700. In *Mid-Continent Pipeline Co.* v. *Hargrave,* 129 Fed. 2d 655, $750 was allowed as attorney fee where there was a judgment for overtime compensation for $1,295.92. In *Burke* v. *Lecrone-Benedict Ways, Inc.,* 63 Fed. Sup. 883, an attorney's fee of $750 was allowed, although only $210.76 was allowed as liquidated damages.

The attorney's fee is hereby increased to $800, and as modified the judgment is affirmed.

5-289 264 S. W. 2d 640

Opinion delivered February 15, 1954.

[redacted]

Richard W. Hobbs, for appellant.

Roy Mitchell, Q. Byrum Hurst and *M. C. Lewis, Jr.,* for appellee.

GEORGE ROSE SMITH, J. This appeal questions the action of the trial court in overruling a demurrer to the appellees' complaint. The only issue is whether that pleading states a cause of action.

Seven patrons of Garland County School District No. 1 brought this representative suit against the district and its directors. The plaintiffs alleged that at the 1952 school election the voters authorized the issuance of bonds for the construction of a school building "in the Western part of the District." It is averred that the language just quoted, which appeared on the ballot, was intended to mean, and was understood by the electors to mean, the western third of the district. The directors of the district, however, have construed the phrase to refer to the western half of the district. Pursuant to that interpretation the directors have successively selected three building sites only slightly west of the center of the district. The first two sites were disapproved by the County Board of Education, acting under Ark. Stats., 1947, § 80-509(b); but the County Board has not yet acted upon the third selection.

The complaint alleges that the directors have acted arbitrarily in choosing sites approximately in the center of the district. The prayer is that the court interpret the phrase, "the Western part of the District," that the court itself select a site for the new building, and that the directors be required to abide by the court's choice.

We think the complaint fails to state a cause of action. The matter of determining the location for the new building is not within the province of the courts. The authority and the responsibility for conducting the district's affairs are vested by law in the board of directors. "It was never contemplated that the chancery court should supervise or direct the conduct of the school and board of directors in the operation of the school." *Merritt* v. *Dermott Spec. Sch. Dist.,* 188 Ark. 243, 65 S. W. 2d 33. Although it is true, as the appellees point out, that arbitrary action on the part of a school board is subject to judicial review, the court even then does not substitute its judgment for that of the board. All that equity does is to restrain a course of conduct found to be arbitrary; the choice of a more reasonable plan is then left to the directors. In the case at bar the third selection is not yet final, in that the County Board of Education has not given its necessary approval. But even if that board had acted it is not the court's place to lift the matter from the hands of the two administrative agencies and to make for them the choice that the law commits to their discretion.

There remains for consideration that part of the prayer which asks the court to define the western part of the district. In the past it has not been the practice of our courts to render advisory opinions entailing no other relief, but the situation has been changed to some extent by the adoption (with some modifications) of the Uniform Declaratory Judgments Act. Act 274 of 1953; Ark. Stats., Title 34, Ch. 25. That statute authorizes the rendition of a declaratory judgment or decree when it will terminate a controversy or remove an uncertainty, even though no further relief is sought. Since the case

at bar does involve an actual controversy we have considered the applicability of the new statute.

We have concluded that the present complaint cannot be sustained as an effort to invoke the provisions of Act 274. In the first place, the plaintiffs do not by their allegations purport to be proceeding under this statute. To the contrary, it is rather plain that they are not proceeding under Act 274, as it had not yet become effective when this suit was filed in May of 1953. And second, all necessary parties have not been brought into court. The Act requires that all persons "shall be made parties" who have any interest which would be affected by the declaration. Ark. Stats., § 34-2510. Elsewhere the courts have very sensibly stressed the importance of this requirement, for it is evident that no controversy would be terminated by an adjudication not binding upon everyone concerned. *Updike Inv. Co.* v. *Employers' Liability Assur. Corp.,* 128 Neb. 295, 258 N. W. 470; *Kilroy* v. *O'Connor,* 324 Mass. 238, 85 N. E. 2d 441. A declaratory decree in this case would not bind the County Board of Education, which, though not a party hereto, is required to approve whatever school site is chosen. It follows that a decree would not end the dispute, since the County Board would still be entitled to an opportunity to be heard on the question. We need not now go so far as to say, as some courts have, that the presence of all necessary parties is jurisdictional; for in any event we regard the defect as sufficiently fundamental to be reached by demurrer.

Reversed, the demurrer to be sustained.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY
v. BOWIE.

5-279 264 S. W. 2d 632

Opinion delivered February 15, 1954.

William H. Donham, for appellant.

Francis T. Donavan and *George F. Hartje,* for appellee.

MINOR W. MILLWEE, Justice. This appeal is from a judgment for $2,000 in favor of appellee, Effie A. Bowie, in an action on a 20-year pay life insurance policy issued by the appellant to appellee's son, Bun W. Bowie, who died May 1, 1949. Appellant defended the action on the ground that the policy expired April 1, 1949, for non-payment of premium and was not in effect when Bowie died. This was the sole issue presented to the trial court, sitting as a jury, under a state of facts which were for the most part stipulated and are to the following effect.

The policy or certificate in question was issued to Bowie, a member of appellant's Wright, Arkansas, camp on January 1, 1949. Bowie elected to pay his premiums upon a monthly basis and paid the premiums for January and February, 1949. On February 15, 1949, Bowie became ill and disabled with cancer of the lung which caused his death on May 1, 1949. On April 20, 1949, J. C. Noggles paid the premiums and camp dues on the policy for the months of March and April, 1949, to H. A. Archer, Financial Secretary of the Wright, Arkansas, Camp, who executed and delivered a receipt for the payment. At the time of the payment of the March and April premiums and dues, Archer knew that Bowie was ill and in the hospital at Conway, Arkansas, but did not know the nature of his ailment. Archer also testified that if a policy lapsed it was the policy of appellant company to accept delinquent premiums and dues for a period of one or two months and sometimes longer and reinstate the policy. Archer did not notify appellant's National Secretary of the illness of Bowie at the time he accepted the premiums nor did he notify appellant later. Appellant's National Secretary had no actual knowledge of Bowie's illness prior to his death and stated that Archer was unauthorized and forbidden to waive any of the provisions of the constitution laws and by-laws of the society. Appellant required all premium payments to be made to the local financial secretary.

On May 27, 1949, proof of death was duly made. On July 8, 1949, appellant denied liability in a letter to ap-

pellee and tendered a refund of the premiums paid April 20, 1949, which tender was rejected.

According to appellant's constitution and by-laws, which were incorporated into the policy by the terms thereof, if the premium was not paid when due on the first of the month, then on the last day of the month the policy terminated. The policy further provided that after 15 days from suspension and within 3 months thereof, the policy could be reinstated by the payment of all delinquent premiums, and that such payment would be received and retained by the Society without waiving any of the provisions requiring good health of the insured as a prerequisite to reinstatement until such time as the secretary of the Society should have received actual, not constructive or imputed, knowledge that the suspended member was not in fact in good health when he attempted to reinstate his certificate. The policy also provided that payment of the delinquent premiums after the policy had been suspended for more than 15 days should be held to be a representation on the part of the insured that he is in good health at the time of the payment; and that if such representation is not true, the policy was voided. Section 127(a) of the constitution provided that no officer, employee or agent of the society had authority or power to waive any of the reinstatement provisions.

In holding that the policy was in force and effect at the time of Bowie's death, the trial judge rendered a well considered opinion in which he made extensive findings of fact and conclusions of law. The court first stated that the question of waiver of the condition of reinstatement by the local camp secretary would not be considered in view of Ark. Stats., § 66-3310, which provides that the constitution and by-laws of a fraternal benefit society may prohibit the waiving of such provisions by any subordinate officers. This holding is in accord with the decision in the leading case of *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132, 219 S. W. 759, 14 A. L. R. 903, where the court, in giving effect to the statute, nevertheless held that the doctrines of estoppel was applicable and judgment for the insured was affirmed. In that case

the court reaffirmed the rule followed in many subsequent cases to the effect that in the matter of collecting and reporting premiums and dues the local camp clerk is the agent of the society and that the latter is liable for such conduct of the clerk as would estop the society from denying that dues were paid as required by the constitution and by-laws.

In reaching the conclusion that appellant was estopped from denying reinstatement in the instant case, the trial court found: "Based upon the universal holding that the soliciting camp secretary is the agent of the Society and that the Home Office is charged with the camp secretary's knowledge, then when Archer collected and accepted the delinquent dues from Bowie, or from Noggles for Bowie, with a knowledge that Bowie was sick and in a hospital, then the Society was chargeable with Bowie's illness, constructively, at least, and if it ignored the illness of Bowie, retained the dues, did not advise Bowie of his suspensions, if any occurred, and Bowie continued on to his death under the belief that he was a member in good standing and that he contributed in no wise to mislead the defendant society, then if such occurred and the court finds such to have been the facts, then defendant would be estopped to plead a forfeiture of the policy for a failure upon the part of Bowie, to affirmatively prove and establish his health condition. So the court accepts the legal principles of law included in the cases cited by the defendant, as well as the laws, by-laws and constitution of the Society as being legal and enforceable, but holds that by the habit, custom and conduct of defendant and its camp secretary in the acceptance of the delinquent dues, in not advising the insured of a suspension, or of indicating his suspension with a knowledge of his illness, it is estopped to plead a forfeiture of the policy. . . . The knowledge of the pending illness of Bowie, by Archer, as Camp Financial Secretary, of defendant Society, at the time the delinquent dues for March and April were collected and retained is controlling on the question of estoppel."

The court based its decision on the Newsom case, *supra,* and the cases of *Sovereign Camp W. O. W.* v. *Pearson,* 155 Ark. 328, 244 S. W. 344; *Order of Railway Conductors of America* v. *Skinner,* 190 Ark. 116, 77 S. W. 2d 793; and *Woodmen of the World Insurance Co.* v. *Garner,* 200 Ark. 696, 140 S. W. 2d 414. In the Newsom case the court said: "The principle of estoppel in equity stands upon the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect and meaning to their actions which common sense and justice dictate. A fraternal insurance association, such as appellant, is as much subject to the operation of its principles as any other association of persons or as an individual." See also *Libbey* v. *Haley,* 91 Me. 331, 39 Atl. 1004.

"In 2nd May on Insurance, § 361, it is said that, 'Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured and others known to the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief.'

"This doctrine of equitable estoppel is as applicable to fraternal societies as to old line companies."

The above language was also approved in the Pearson case where the company defended on the same ground that is interposed here and the evidence showed that a general custom had been established in the local camp of allowing members in arrears to be reinstated by paying delinquent dues without complying with the requirements of the by-laws for reinstatement, just as in the case at bar.

In the Garner case, after referring to the Society's attempt to avoid the rule of estoppel announced in the Newsom case by provisions in its constitution and by-laws, the court said: "Appellant cannot thus relieve it-

self of the burdens of a positive rule of law by an *ex parte* declaration in its constitution, laws and by-laws, stating the conditions under which it will be relieved by waiver and estoppel. It would appear to be as much against public policy as it would for a railroad to contract against its own negligence, or that of its officers and agents.''

It is true that the facts in the instant case are not identical with those in the above mentioned cases nor in the following cases upon which appellant relies for a reversal: *Sovereign Camp W. O. W.* v. *Anderson,* 133 Ark. 411, 202 S. W. 698; *Deloach* v. *Ozark Mutual Life Insurance Co.,* 148 Ark. 414, 230 S. W. 268, 14 A. L. R. 921; *Sovereign Camp W. O. W.* v. *Barnes,* 154 Ark. 486, 234 S. W. 55; *Modern Woodmen of America* v. *Seargent,* 188 Ark. 1098, 69 S. W. 2d 397; and *Hohenschutz* v. *Knights of Columbus,* 208 Ark. 358, 186 S. W. 2d 177. It is also true that conflicting results have been reached in some of these cases and it would serve no useful purpose to differentiate the facts in the numerous cases bearing on the issue. However, in those cases in which the doctrine of estoppel has been considered and applied, there is a uniform holding that the local secretary of a fraternal benefit society, like the soliciting agent of an old line company, is the agent of the society and that the latter is responsible for his knowledge, conduct and acts within the apparent scope of his authority regardless of contrary provisions in the constitution and by-laws of the society.

After careful examination and consideration of the numerous cases bearing on the difficult question presented, the trial court concluded that appellant was estopped from denying reinstatement and setting up a forfeiture of the policy. In our opinion the undisputed evidence is substantial and sufficient to sustain this conclusion, and the judgment is affirmed.

Justice George Rose Smith dissents.

5-264 264 S. W. 2d 635

Opinion delivered February 15, 1954.

W. F. Reeves and *N. J. Henley,* for appellant.

Eugene W. Moore and *J. Smith Henley,* for appellee.

ED. F. MCFADDIN, Justice. This is a proceeding brought by appellants as Taxpayers of Searcy County, Arkansas, against appellees as County Judge, Clerk, and Treasurer, of Searcy County, challenging the validity of appropriations made by the Quorum Court of Searcy County in a special session.

Martin, *et al.,* as Taxpayers, filed this injunction suit against Bratton, *et al.,* as County Officials, alleging, *inter alia,*[1] that Bratton as County Judge called the Quorum Court of Searcy County into special session on May 4, 1953; that among other items, there was an attempted appropriation of $20,000 ". . . from the County General Fund to allow the County Judge to use it as he sees

[1] The complaint also attacked the order calling the Quorum Court into special session, and the validity of other appropriations. These may be presented when the case is tried on remand.

fit and deems necessary." The complaint alleged: "That the appropriation of the $20,000 from the General County fund was not authorized by law, to be used by the County Judge for any purpose which he thought a public necessity."

Bratton and the other County Officials demurred to the complaint; and the Chancery Court order sustaining the demurrer recited:

". . . the demurrer . . . is hereby sustained insofar as the petition of plaintiffs relates to the proceeding of the Quorum Court of Searcy County, Arkansas; and that the plaintiffs decline to plead further in relation thereto; . . ."

The Court then ascertained by stipulation that there would be sufficient revenue to pay the $20,000 appropriated and sustained the appropriation as against the attack made.

On this appeal the appellants insist that the $20,000 appropriation was not for a purpose allowed by law.[2] So the question posed is the validity of an appropriation of money "to allow the County Judge to use it as he sees fit and deems necessary." The answer to this contention necessitates a study of our Constitution, Statutes, and cases,[3] regarding the County Quorum Court and the purposes for which it can lawfully appropriate money.

Art. 7, § 30 of our Constitution says:

"The justices of the peace of each county shall sit with and assist the county judge in levying the county taxes, and in making appropriations for the expenses of the county in the manner to be prescribed by law; . . ."

[2] Appellants say in their brief: "The sustaining of the demurrer prevented the uncovering of the intentions of the defendant Bratton to get the whole of the county general funds in his hands to spend for anything he desired, . . ."

[3] For other cases—in addition to those cited herein—involving various questions arising in connection with Quorum Courts, see: *Polk County* v. *Mena Star*, 175 Ark. 76, 298 S. W. 1002; *Ladd* v. *Stubblefield*, 195 Ark. 261, 111 S. W. 2d 555; *Cotham* v. *Coffman*, 111 Ark. 108, 163 S. W. 1183; *Watson* v. *Union Co.*, 193 Ark. 559, 101 S. W. 2d 791; and *Jeffery v. Trevathan*, 215 Ark. 311, 220 S. W. 2d 412.

Section 17-401, Ark. Stats., fixes the time for the annual meeting of the Quorum Court, and concludes with this sentence:

"In case of emergency, the county court may call a special meeting of said (quorum) court, and a majority shall have jurisdiction and power to act upon any matter authorized by law and designated in the order calling such meeting."

Section 17-409, Ark. Stats., provides the order of business at the annual meeting of the Quorum Court, and in the 7th sub-division of the paragraph numbered "Sixth," says that the Quorum Court shall make appropriations ". . . to defray such other expenses of county government *as are allowed by the laws of this state.*"[4] From the italicized language, it is clear that, at the annual meeting, the Quorum Court can only make such appropriations for expenses of County government ". . . as are allowed by the laws of the state." Certainly a special meeting of the Quorum Court could have no greater power in that respect than is possessed by an annual meeting; so this appropriation must be tested against the "laws of the State" to see if it is a valid appropriation.

Counsel for appellees have cited us to no Statute or case and our search has likewise failed to discover any—that allows the Quorum Court to turn over $20,000, or any other amount, to the County Judge "to use it as he sees fit and deems necessary." That such an appropriation is not within the purview or spirit of our Statutes is shown by a study of § 17-412 and § 17-414, Ark. Stats. These provisions clearly envision (1) that all appropriations by the Quorum Court must be for a specific purpose allowed by law; (2) that after the appropriation is made, then any allowance of a claim against that appropriation must be by the *County Court* and not by the *County Judge;* and (3) that the County Court order of allowance must specify the appropriation against which the claim is allowed before the money can be drawn out of the Treasury. Although the County Judge presides over the

[4] Italics our own.

County Court, it is the *County Court* that makes the order of allowance, and not the *County Judge.* Art. 7, § 28, of the Constitution so provides. See also *Lyons* v. *Pike County,* 192 Ark. 531, 93 S. W. 2d 130. In the case at bar, the Quorum Court by its appropriation of the $20,000 "to allow the County Judge to use it as he sees fit and deems necessary," attempted to entirely by-pass the functions of the County Court, because the appropriation was to be used by the County Judge, rather than by the County Court.

A study of our adjudicated cases further demonstrates the invalidity of such attempted appropriation. In *Presley* v. *Deal,* 192 Ark. 217, 90 S. W. 2d 757, the Quorum Court appropriated a sum of money to pay what it considered to be unusual expenses of the County Judge. This appropriation was challenged and held invalid. This Court cited what is now subdivision 7 of § 17-409, Ark. Stats., and said:

"It is contended by appellee that subdivision No. 7, above quoted, gives the quorum court authority to make the appropriation here involved. It will be noticed that the other expenses mentioned for which an appropriation may be made must be such 'as are allowed by the laws of this State.' We have been unable to find in the laws of this State, and none has been called to our attention by counsel, where authority is given for the quorum court to appropriate money to pay expenses of the county judge. We do not think that *Easterling* v. *Cook,* 175 Ark. 574, 299 S. W. 1009, is authority for the contention here made. On the contrary, we are of the opinion that the recent case of *Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. 2d 374, announces the principle that controls this case. It was there held that there was no authority in the law for the county court to purchase a law library for the use of the prosecuting attorney."

The language just quoted is determinative of the case at bar. There is no provision in the Statute that allows the Quorum Court to turn over $20,000, or any other sum of money, to the County Judge "to use as he sees fit and deems necessary." Clearly the Chancery

Court was in error in sustaining the demurrer to that portion of the complaint involving such appropriation.

The appellees argue that the questions heretofore just discussed are now moot because the fiscal year of the County has expired and the $20,000 has probably been spent. But that does not make moot this case involving public funds. In *Dotson* v. *Ritchie,* 211 Ark. 789, 202 S. W. 2d 603, there were involved some questions growing out of an election contest, and it was claimed that the lapse of time had made the case moot. We reviewed the contention and said:

" 'It is urged, however, that the case is now moot, and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief, but is not moot in the sense that it is important to decide a practical question of great public interest, which may arise in any future election.' "

If the money has been illegally spent, the law provides a method whereby a recovery may be attempted. The point here at issue is whether the appropriation was valid. The fact that there may be further pursuit of any money illegally expended certainly keeps this case from being moot.

Due to the peculiar state of the record, we think this cause should be remanded in order that the case may be fully developed. When the Trial Court sustained the demurrer of the County Officials, the Trial Court limited all issues to the question of the amount of revenue to come into the Treasury. It is possible that the defendants may desire to introduce the records as to the wording of the Quorum Court appropriation order; or they may desire to show that the Quorum Court was assembled after due and regular notice [5] and for a purpose authorized by law. All of these matters should be allowed to the defendants. So, due to the peculiar state of this record, we reverse the decree and remand the cause, with directions to overrule the demurrer of the defendants and

[5] As to special meetings of Quorum Court, see *Cleveland Co.* v. *Pearce,* 171 Ark. 1145, 287 S. W. 593.

allow the defendants to offer whatever pleas they desire, and for the case to be developed in full by both sides as to all points and matters covered in the pleadings. It is so ordered.

S & C MOTORS *v.* CARDEN.

5-248 264 S. W. 2d 627

Opinion delivered February 15, 1954.

Ernest T. Briner, James M. McHaney and *Owens, Ehrman & McHaney,* for appellant.

GRIFFIN SMITH, Chief Justice. Elmer Carden, Jr., while a resident of California, procured from a California corporation styled S & C Motors, a Ford custom convertible coupe. A title-retaining agreement—designated conditional sales contract—was executed January 19, 1952. Credit was given for Carden's old sedan, leaving a balance of $2,197.80 payable monthly at $122.10. The first payment (due March 3d) was made, but the purchaser defaulted on the April obligation.

Eighteen days after the second payment fell due Carden entered the U. S. military service. On May 17,

1952, the parties made a new agreement in writing whereby the original payments were reduced to $40 for eleven months. In respect of total liability it was provided that a final payment of $1,574.83 would mature April 25, 1953. A further provision was that all other terms of the original contract should remain in full force.[1]

Under the re-negotiated contract Carden's first $40 remittance was due May 25, 1952. Three such payments were made, but the obligation maturing August 25 was neglected. Carden drove the car to his parents' home in Saline County, where on October 21, 1952, the automobile company sought to replevy. A redelivery bond was filed. Prior to trial in December, 1952, Carden returned to California and was sent overseas.

The case was heard by the judge, a jury having been waived. The company appeals (a) from the court's finding that the defendant was entitled to benefits under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended in 1942, but (b) contends that if the Act is applicable the court abused its discretion in allowing $320 in delinquent installments to be paid, and then directing acceptance of $40 per month not only during the period covered by the re-negotiated contract, but until the item of $1,574.83 should be liquidated—approximately forty additional months. No allowance was made for the fact that the company was being compelled to carry the diminishing balance more than three years beyond the initial agreement; nor was the defendant required to pay interest on these judicially deferred installments.

[1] The cause was tried upon a stipulation of facts disclosing the figures shown above. The new agreement, however, recited a balance of $2,075.70, and "that the obligor will pay the company the sum of $2,014.83," and that the final installment is $1,574.83, and "Furthermore, if the obligor is still in the active military service and unable to pay the final installment of the revised agreement as written above when it becomes due, the company will grant a further extension of said installment to be payable in monthly installments in such amounts as the parties hereto may agree upon at the time," etc. [There is a seeming discrepancy of $60.87. When $440 is deducted from $2,075.70 the remainder is $1,635.70 instead of $1,574.83 as set out in the agreement.]

Appellant addresses itself, first, to the proposition that § 517, Title 50, U. S. C. A., being a 1942 amendment to the Act, was intended to permit what the automobile company undertook to do. The wording is that "Nothing contained in this Act shall prevent . . . (b) the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property which is security for any obligation or which has been purchased or received under a contract, lease, or bailment, pursuant to a written agreement of the parties thereto [including the person in military service . . . or their assigns] *executed during or after the period of military service* of the person concerned, or during the period specified in . . . [§ 516]".

Prior to the 1942 amendment (Public Laws—Ch. 888, Art. III, § 301 (1) the enactment read: "Provided, that nothing contained in this section shall prevent the modification, termination, or cancellation of any such contract, or prevent the repossession or retention of property purchased or received under such contract, pursuant to a mutual agreement of the parties thereto, or their assigns, if such agreement is executed in writing subsequent to the making of such contract and during or after the period of military service of the person concerned."

The slight change in phraseology [2] between the Act of 1940 and the 1942 amendment now appearing as § 517 does not justify a conclusion that the service man who contracted subsequent to his induction was deprived of all rights intended to be conferred under congressional authority.

But there is nothing in the record, other than a failure to pay, showing that undue hardships would result from enforcement of the contract; and while court procedure is imperative (§ 531), the law gives relief only in cases of disclosed hardship.

Section 533 applies to the owner of property who seeks to resume possession, or to rescind or terminate a

[2] For brevity some of § 517 has been omitted.

contract for purchase. Where the action has been stayed, as here, the court may, "unless in his opinion an undue hardship would result to the dependents of the person in military service, appoint three disinterested parties to appraise the property and, based upon the report of the appraisers, order such sum, if any, as may be just, paid to the person in military service or his dependent, as the case may be, as a condition of . . . resuming possession of the property, or rescinding or terminating the contract."

It is stated in appellant's brief that the automobile is now in possession of Carden's mother and father, who executed the retention bond; that it is being used by them, is deteriorating through such use, and that security for the unpaid balance is rapidly diminishing.

In these circumstances we think the trial court should proceed under § 533.

Reversed.

THIEL, SPECIAL ADMINISTRATOR *v.* MOBLEY.

5-281 265 S. W. 2d 507

Opinion delivered February 15, 1954.

[Rehearing denied March 29, 1954.]

Rhine & Rhine, for appellant.

Cecil Grooms, for appellee.

WARD, J. On this appeal appellant seeks to reverse a judgment of the Greene County Probate Court which invalidated the will of Hattie Mobley. Appellee, Peyton Mobley, was the husband of Hattie Mobley, and after her will was probated he filed a petition contesting it on the grounds of lack of mental capacity and undue influence. The testatrix died of cancer, and it was alleged that her lack of mental capacity resulted from the use of opiates to relieve pain. It was alleged that undue influence was exerted on the testatrix by her daughter, Fay Lawrence, who is one of the principal beneficiaries.

A careful consideration of all the testimony leads us to the conclusion that the trial court was in error in setting aside the will.

Background. Mr. and Mrs. Mobley had been married and had lived together as husband and wife for about 41 years when she died on November 29, 1952. During all the years of their married life Mrs. Mobley ap-

peared to take an active if not a dominant part in all their business transactions which consisted of farming operations. When they were married in 1911 neither one had any property to speak of but they had accumulated about $1,000 by 1936 when they purchased a small farm. In 1942 this farm was sold for a profit and the proceeds used to purchase a more valuable farm, which latter farm was also sold at a profit in 1948 when the farm on which they were living at the time of Mrs. Mobley's death was purchased for $10,000. In each instance the title to the farm was taken in the name of Hattie Mobley. Sometime after 1950 it was learned that Mrs. Mobley had cancer and after two operations she returned to her home in the latter part of 1951 where she remained except for trips to the hospital for checkups. Her condition was such that along about July, 1952, her doctor prescribed morphine and barbiturate compound for pain and rest.

There are two children; a daughter, Fay Lawrence, who lives nearby and who is an invalid, and a son, Dalton Mobley, who is married and also lives nearby. On October 21, 1952, Hattie Mobley executed a will in which she gave her husband, the appellee, the sum of $500 and gave the farm to their son and daughter and also gave them the residue of her personal property which was not of consequential value.

In setting the will aside the chancellor apparently laid more stress on the lack of mental capacity, but undue influence was also noted, and we shall, therefore, consider both grounds.

Mental Capacity. Appellee in substance testified, that: I helped to make the deal for the different places and helped to improve them; some of the money had been saved by Mrs. Mobley from rent; part of the time I lived in St. Louis where Mrs. Mobley stayed with me during the winter months and came back to the farm in the summer; Mrs. Mobley started taking morphine about the middle of July, 1952, and continued to take tablets on up until the time of her death; for a while we lived with Fay Lawrence after we sold one of the farms; Mrs. Lawrence

was continually getting after me about my drinking habits; and on the day the will was executed my wife had not been reading on account of her weak eyes.

Several witnesses who were neighbors to Mr. and Mrs. Mobley testified that they visited Mrs. Mobley frequently during her illness both before and after the execution of the will. None of the witnesses were present on October 21 when the will was executed and none attempted to testify regarding her mental capacity at that time. Some stated that Mrs. Mobley was not normal and would not recognize them at times and seemed to be in a stupor but that at other times she appeared all right. Two or three of the witnesses were propounded a hypothetical question in which was explained the legal definition of mental capacity to execute a will and were asked if in their opinion the testatrix had such mental capacity. One answered in the negative and one stated he would not want her to handle a business deal for him.

The trial judge seemed to give much weight to a statement made by one of the two attesting witnesses. This witness stated that after he had hurriedly read the will and had gotten the impression that appellee was to receive only $5 instead of $500 as provided in the will, he asked her if she meant to turn appellee out in the cold and that her answer was "I told the children not to do that." This same witness stated that during his conversation with the testatrix she stated her personal property was not affected, apparently leaving the impression that appellee would get certain personal property under the will.

On behalf of appellant there was testimony to this effect: The two attesting witnesses stated that when they went to the testatrix's home to attest her will she was in the bed, had the will in her possession, and gave it to them, stating that it was her will. They had considerable conversation with the testatrix and one of the witnesses tried to give her a mental test which she apparently passed to his satisfaction. It was their opinion that the testatrix did have sufficient mental capacity to

comprehend what she was doing and to execute the will. The doctor who waited on her and who prescribed the medicines to relieve the pain stated that in his opinion the medicine would not and did not affect her mind, that temporarily they would make her drowsy but that at other times her mental capacity would not be impaired. Neighbors who were in close attendance on Mrs. Mobley shortly before and after the will was executed testified that most of the time there was nothing wrong with her mind and that she was mentally capable of executing the will. It is further shown that the testatrix did transact some business shortly before and after the will was executed. She endorsed one check three days before and one two days after she made her will. An examination of Mrs. Mobley's signature on a photostatic copy of the will shows it to be equally as firm and legible as her signature on an original check dated December 15, 1950, which appears as an exhibit.

The burden was on appellee, the contestant, to prove the lack of mental capacity at the time the will was executed. This court has held many times that the burden of proving mental incapacity to make a will rests on the one alleging it. See *McDaniel, Adm.* v. *Crosby, et al.,* 19 Ark. 533, and *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264.

The evidence clearly shows that, notwithstanding Mrs. Mobley was mentally retarded at times as a result of taking opiates to relieve the pain, there were intervals at which time she was not affected mentally but was fully capable of comprehending ordinary business transactions. During these latter intervals she unquestionably had testamentary capacity. There is a complete absence of proof that it was not during one of these lucid intervals that the will in question was executed, but on the other hand there is positive evidence that it was executed at a time when her mind was not affected by the medicines which she had been taking—at least not to the extent that she lacked testamentary capacity. In 56 Am. Jur., page 89, under subject of "WILLS" and under the subhead of "Lucid Intervals" it is stated: "A will executed in a lucid interval by one who was before and after

a confirmed lunatic is valid. . . ." The following section, also in point here, states that "The time to be looked to in determining the capacity of a testator to make a will, in reference to his mentality, is the time when the will was executed." This court in the case of *Scott* v. *Dodson, Executor,* 214 Ark. 1, 214 S. W. 2d 357, refused to invalidate a will where, in our opinion, the evidence pointing to lack of testamentary capacity was stronger than it is in the case under consideration. Among other things it was there stated: "Complete sanity, in a medical sense is not essential; provided, that the power to think rationally exists when the individual's will to act is exercised." A similar case with like results is *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695, where it was recognized that if other evidence tended to establish an impairment of the mind of the testator, then the manner of the disposition of the property would be admissible to be considered with such other evidence. It is argued in this case that it was not normal or natural for Mrs. Mobley to leave her husband only $500 instead of the rights he would have had in the property if no will had been executed, but we do not think this circumstance is persuasive and certainly not controlling under the evidence in this case. It must be remembered that the property was in the name of Mrs. Mobley, that she had an invalid daughter, that she knew her husband was addicted to drink, and that, as shown by the evidence, she had for sometime before the execution of the will considered the disposition of her property. While appellee's status under the will may be calculated to arouse sympathy for him, it does not reasonably follow that the disposition which the testatrix made of her own property indicates that she did not realize the full import of the disposition she made of her property in her will. The courts are not concerned with what prompted her actions as long as they appear to be reasonable. She might have felt that her son and daughter would always see to it that their father had a home. It is noted that when her daughter was asked by one of the attesting witnesses if she expected her daddy to stay by himself, she answered, "I would never turn my daddy away. I love my daddy."

Undue Influence. Undue influence is based principally on the testimony tending to show: That Fay Lawrence, the daughter, apparently did not think too much of her father's ability to control property and expressed the fear that he might squander it on drink; that she had made statements to this effect during the early part of her mother's sickness; that she had been instrumental in assisting the attorney to write the will, and; that Mrs. Lawrence had at one time indicated to her mother that a small portion of the personal property should go, as provided in the will, to one of the testatrix's grandchildren rather than another one. It was further shown that Mrs. Lawrence sent for the attesting witnesses. Mrs. Lawrence herself denied that she had in any way unduly tried to influence her mother. It does appear that Mrs. Lawrence did contact an attorney with reference to the will or the disposition of the property but it also appears that she did so at the direction of her mother.

It is our opinion that the above testimony along with other testimony of a similar nature falls short of the legal requirements to prove undue influence. In the case of *Puryear* v. *Puryear, supra,* the applicable rule was announced in the following language, citing from another case:

" 'As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause deprives the testator of his free agency in the disposition of his property. And the influence must be specifically 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 and in confidential relation with them at the time of its execution' ".

The Right to Appeal. It appears from the record that the original executor, Murphy Hubble, was re-

lated to both sides and did not want to be a party to an appeal to this court. Under the circumstances the trial court appointed George Edward Thiel, a disinterested party, as special administrator for the purpose of prosecuting the appeal.

We cannot agree with appellee in his contention that the trial court had no right to make the appointment for the purpose mentioned. Full authority for the court's action is found, under the heading of *Special Administrator,* in § 79, Act 140 of 1949, now appearing as Ark. Stats. Supp. § 62-2210.

Pursuant to the views above expressed that portion of the trial court's judgment invalidating the will is reversed and the cause of action, apparently fully developed, is dismissed.

J. Seaborn Holt, J., dissenting. The trial court found that Hattie Mobley (deceased) at the time of the execution of the will here in question lacked mental capacity and ordered its probate set aside and the will declared void. The findings of the Chancellor contained these recitals:

"In this case we have direct and positive testimony that leads me to the inevitable conclusion that whether it was occasioned by the weakness of the body or the weakness of the mind or the effects of opiates or drugs, whether or not it was caused by undue influence or what it might have been caused by, I am led to the inevitable conclusion that she did not know and understand the contents of that will. Here are the men who witnessed the execution of the will, being more familiar with the legal terms, but as he expressed it, he galloped through the will, but he determined the effect of it and asked if Peyton was to be turned out in the cold and her answer was, as I wrote it down as he stated it, 'I told the children not to do that.' And yet the will did just that. That statement could mean several different things. It could mean the instructions in the preparation of the will and told them not to give that or it might have meant the promise that that would not be done

before the will could be executed. But that is not all. She goes farther and says, 'But Mr. Ahlf, he is to get the cattle and the other personal property around here.' But that will specifically devises and bequeaths to him, $500 and $500 alone and divides all the rest and residue of the property, real, personal and mixed so the evidence is clear and conclusive and convincing that she did not, at the time of the execution of the will, know and understand the contents of the will and that is the positive testimony of the attesting witnesses, both of them, stated in detail by one and confirmed as being as Mr. Ahlf has stated it by the other. The very statements she made, the very terms show that she did not know and understand the contents of the will.''

While we try the case *de novo,* we must affirm unless we can say that such findings are against the preponderance of the testimony, and in this particular kind of a case we have frequently said that the findings of the Chancellor have persuasive authority and are entitled to weight and consideration.

In *West* v. *Whittle,* 84 Ark. 490, 106 S. W. 955, we said: '' 'And in a court of equity, where bad faith and unconscionable acts can have no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And when it is discovered that the party in whose favor the conveyance was made possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity.'

''The chancellor found that the whole substance of this transaction shows a want of capacity or undue influence; and, as said in the case of *Boggianna* v. *Anderson,* 78 Ark. 420, 94 S. W. 51, this kind of case is one where the chancellor's finding has persuasive authority, and is entitled to weight and consideration.''

"Mental weakness, though not to the extent of incapacity to execute the instrument designated, 'may render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of these, or even with unfairness, such as great inadequacy of consideration, may make a contract voidable, when neither such weakness nor any of these other things alone, or of themselves, would do so.' 8 Sup. Elliott on Contracts, § 365; *Hightower* v. *Nuber,* 26 Ark. 604; see *West* v. *Whittle,* 84 Ark. 490, 106 S. W. 955, and cases there cited; also *Jones* v. *Travers,* 116 Ark. 95, 172 S. W. 828; *Morton* v. *Davis,* 105 Ark. 44, 150 S. W. 117; *Boggianna* v. *Anderson,* 78 Ark. 420, 94 S. W. 51." *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510.

I think the preponderance of the testimony, as the Chancellor found, brings this case clearly within the above rule.

I would affirm.

Justices MILLWEE and ROBINSON join in this dissent.

O'BRIEN *v.* ATLAS FINANCE COMPANY.

5-282 264 S. W. 2d 839

Opinion delivered February 22, 1954.

Bailey & Warren, for appellant.

U. A. Gentry, for appellee.

Coleman, Gantt & Ramsey; Rose, Meek, House, Barron & Nash; John H. Cottrell, Jr., Talbot Field; House, Moses & Holmes and *Thomas C. Trimble, Jr., Amici Curiae.*

ROBINSON, J. The question is whether a usurious rate of interest was charged for a loan of money. Appellant, Arthur H. O'Brien, filed suit in Pulaski Chancery Court alleging that on the 2nd day of March, 1952, he applied to appellee, Atlas Finance Company, for a loan of $100; that the finance company agreed to make the loan but required him to execute his note in the sum of $114.04 due one year from date, and to secure the note by a chattel mortgage on a Plymouth automobile; in addition he was required to purchase a savings or investment certificate bearing interest at the rate of 2% per annum issued by the finance company in the sum of $114.04 and he was to pay for this certificate in 12 equal monthly installments; that as a matter of fact he did not want to purchase a savings certificate or make an investment in defendant's company, but only desired a loan of money; and the requirement of the loan company that he purchase an investment certificate was a mere cloak to cover a usurious loan. O'Brien alleged that the interest exacted of him amounted to usury and asks that the note and mortgage be cancelled. On a hearing the Chancellor held the loan was not usurious, and O'Brien has appealed.

No one contends the loan would not be usurious if no investment certificate had been issued, and the agreed monthly installments were made in repayment of the

loan. The evidence is convincing that in dealing with the loan company, O'Brien's sole purpose was to obtain a loan of $100 to enable him to purchase a television set, and the evidence is equally clear that appellee, Atlas Finance Company, is in the money-lending business. The sale of the investment certificate to O'Brien was merely a part of the loan transaction; the effect was to enable the loan company to collect from O'Brien monthly installments in repayment of the loan without crediting such payments to the loan; thus it would appear that O'Brien had the use of the $100 for the full 12-month period when as a matter of fact he had the use of the whole $100 for only one month. If this transaction is not usurious, then any transaction can be dressed up so as not to constitute usury although it would be clear that it was merely a scheme to evade the usury laws.

In *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, the court quoted from *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516, as follows: "Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity for disregarding the form, and examining into the real nature, of the transaction. If that be in fact a loan, no shift or device will protect it."

In *Winston* v. *Personal Finance Co. of Pine Bluff,* 220 Ark. 580, 249 S. W. 2d 315, we quoted from *German Bank* v. *DeShon,* 41 Ark. 331, as follows: "The 13th section of Article 19 of the Constitution of this State declares that '*all contracts* for a greater rate of interest than ten per centum per annum shall be void as to principal and interest.' This section is clear and unambiguous. With the wisdom and policy of it the courts have nothing to do. It is their duty to carry it into effect according to its true intent, to be gathered from its own words, without regard to the hardships incident to the faithful execution of such laws."

In the *Winston* case it was further reiterated that investment certificates or stock certificates could not be

used as a cloak for usury, and that transactions in any guise whatever, which are contrary to the Constitution, are null and void.

Appellee places great reliance on the cases of *Simpson* v. *Smith Savings Society,* 178 Ark. 921, 12 S. W. 2d 890, and *Hickingbotham* v. *Industrial Finance Corp.,* 192 Ark. 429, 91 S. W. 2d 1023. We agree that both cases are in point and justify the loan company in using the plan here involved. In each of these two cases we held the loan and purchase of the certificate were, in legal contemplation, two separate transactions; but further study and observation now convince us that the loan and the purchase is only one transaction, and that the result is usurious. Many people, however, have dealt on the strength of the two aforesaid holdings which have become a rule of property and must not be overruled retrospectively. While the language in *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S. W. 2d 1009, might have been considered as casting a doubt on the *Simpson* case and the *Hickingbotham* case, nevertheless the *Simpson* case was subsequently cited in *Winston* v. *Personal Finance Co., supra.*

Therefore in the case at bar we are confronted with the same kind of situation that confronted us in *Hare* v. *General Contract Purchase Corp., supra* . . . that is, we cannot overrule retrospectively the holding in cases directly in point which have become a rule of property; so we affirm the judgment in the case at bar, but we hereby give the public this caveat.

In any transaction entered into after the date of this opinion we will consider a course of dealings like that in the *Simpson* case, the *Hickingbotham* case, and the case at bar to be *one transaction,* and we will test it by the constitutional mandate against usury.

The caveat in the *Hare* case was not broad enough to apply to a transaction like the one in the case at bar; but the present caveat is to apply to all kinds of loans. However, we do not mean to impair our cases such as *Reeve* v. *Ladies' Bldg. Assoc.,* 56 Ark. 335, 19 S. W. 917,

18 L. R. A. 129; *Black* v. *Tompkins,* 63 Ark. 502, 39 S. W. 553; and *Farmers' Savings & Bldg. & Loan Assoc.* v. *Ferguson,* 69 Ark. 352, 63 S. W. 797, holding that loans made by true building and loan associations are not usurious; but there is a vast difference between the plan used by appellee and that of building and loan associations, although the plans are similar in form.

The judgment is affirmed with the caveat as above stated.

Justice GEORGE ROSE SMITH not participating.

GRIFFIN SMITH, Chief Justice, dissenting. In administrative affairs and national legislation we have experienced the New Deal, the Fair Deal, and a prolonged discussion of their merits as distinguished from conservatism. We have the Right Wing, the Left Wing, the Middle-of-the-Roaders, and the Neutrals; but judicially it had long been supposed that the common law processes as modified by statutes preserved the past, protected the present, and were unfailing guardians of the foreseeable future.

Such familiar terms as mandamus, prohibition, certiorari, injunction, supersedeas, quo warranto, writ of error, and habeas corpus are to be found in Art. 7, § 4 of the Constitution. But I have searched in vain for any authority—either constitutional, statutory, implied, fringe-fraught, or suspected—other than the General Amnesty Act of May 26, 1952 (officially referred to as *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973), whereby the fundamental law may be suspended, extended, or modified through utilization of the delightfully convenient judicial sedative spoken of as a *caveat.*

We now have Caveat No. 1 and Caveat No. 2. What succeeding directives of convenience will deal with cannot, of course, be now determined. We must wait until the particular point of constitutional penetration is indicated before adjusting the natural offsprings of *Caveat No. 1* and *Caveat No. 2* to their appropriate roles. The

thing to be remembered is that what cannot be reached by law and equity is attainable by the *caveat.*

I would reverse the decree and reaffirm some semblance of allegiance to the wisdom of those gentlemen who in convention at Little Rock September 7, 1874, subscribed to those basic principles so many liberty-loving people still hold dear.

HOOVER *v.* MURDOCK ACCEPTANCE CORPORATION.

5-308 264 S. W. 2d 838

Opinion delivered February 22, 1954.

Hendrix Rowell, for appellant.

Bridges & Young, for appellee.

GRIFFIN SMITH, Chief Justice. Under a conditional sales contract dated April 1, 1952, Ritchey Motor Company sold to Lawrence D. Hoover a used Plymouth automobile for $1,110. After the account had been credited with $300, the balance was payable in fifteen monthly installments of $54. Ritchey at once sold the contract to Murdock Acceptance Corporation. The purchaser's default prompted replevin. The action was met by a plea of usury, in reliance upon *Schuck* v. *Murdock Acceptance Corporation,* 220 Ark. 56, 247 S. W. 2d 1. The Schuck opinion was announced February 11, 1952. A kindred case—*Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973,—was handed down May 26, 1952.

Appellee's action was filed May 14, 1952, and Hoover's retention bond with Johnnie Neal as surety was

executed the following day. It is contended that the surety should be released, notwithstanding the trial court's determination that Murdock was protected by the Hare case caveat.

One difficulty is that Neal's suretyship was an independent undertaking. He promised to make good any loss Murdock might sustain by reason of Hoover's retention of the car. It has now been determined that Murdock was entitled to possession at the time Neal came to Hoover's assistance. Neither the record nor the bill of exceptions is abstracted, the tacit admission being that under the Hare case Murdock was entitled to prevail. Substance of Hoover's argument is that because the court extended grace in the Hare case [1] the same sense of fairness should prompt acquiescence in the suggestion that appellant's surety be relieved. It should be remembered that at the time Neal undertook to indemnify Murdock it had not been judicially found that the Ritchie-Hoover contract was tainted; nor as yet has there been such a determination.

It follows that the judgment must be affirmed.

DUKE *v.* PEKIN WOOD PRODUCTS COMPANY.

5-315 264 S. W. 2d 834

Opinion delivered February 22, 1954.

[1] The decision was by a divided court.

J. R. Wilson and *Paul K. Roberts,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

J. Seaborn Holt, J. W. G. Duke, while employed by one of the appellees, (Pekin Wood Products Company), on February 23, 1948, between seven and seven-thirty A.M., suddenly collapsed and died shortly thereafter, in a hospital, on the same day. His widow, appellant, sought compensation award under our Workmen's Compensation Act of 1939, as amended, (now Ark. Stats., 1947, §§ 81-1301—81-1349). She based her claim for recovery on the ground that her deceased husband "was afflicted with some pre-existing ailment which the doctors testified they believed was heart trouble. This heart condition had been aggravated by nervousness and the exacting supervisory work which Mr. Duke did."

Appellant's claim was denied on a hearing before a single Commissioner, and on review before the full Commission, on the finding that the decedent did not sustain an accidental injury arising out of his employment. On appeal to the Circuit Court, the action of the Commission denying the claim was affirmed and this appeal followed.

We hold that there was ample, substantial evidence to support the finding of the Circuit Court.

In these compensation cases, we have consistently adhered to the following rules: " 'The findings of the Commission, which is the trier of the facts, will not be disturbed on appeal to the circuit court if supported by substantial testimony. Act 319 of 1939, § 25b; (Citing

many cases). . . . 'In a long line of decisions since the passage of the act here in question, the rule has been clearly established that the finding of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court on appeal to that court or on appeal to this court.' . . . The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness.'" *Springdale Monument Company* v. *Allen,* 216 Ark. 426, 226 S. W. 2d 42.

"It is not our function to weigh the evidence in these compensation cases. That responsibility has been left to the Commission by the Legislature. . . . The burden of proof is on the claimant to show that injury or death of the employee was the result of an accidental injury that not only arose in the course of the employment, but in addition, that it grew out of, or resulted from, the employment." *Farmer* v. *L. H. Knight Company,* 220 Ark. 333, 248 S. W. 2d 111.

While the law must be liberally construed, general accident insurance was not contemplated, and "since the effective date of the initiated Workmen's Compensation Law (Act 4 of 1948, adopted by the people November 2, 1948, Acts 1949, p. 1420), December 3, 1948, (now §§ 81-1301—81-1349, Ark. Stats., 1947), there is no *prima facie* presumption that the claim comes within the provisions of the law." *(Farmer* v. *L. H. Knight Company, supra.)* See, also, *Birchett* v. *Tuf-Nut Garment Manufacturing Company,* 205 Ark. 483, 169 S. W. 2d 574.

There appears to be little, if any, dispute as to the facts in this case. The record supports the following findings and summation by the Commission: "William G. Duke was employed by the Pekin Wood Products Company in a supervisory capacity and he had been so employed since about June or July of 1946. He worked eight hours per day and five days per week. On Monday morning, February 23, 1948, William G. Duke reported for work at the usual time, which was 6:30 o'clock. It appears that after reporting for work that morning Mr.

Duke went from the bandsaw department in the Town and Country building to the glue room, located in the Old Mill building, to see about what materials would be coming to the bandsaw department, which was his usual custom. It appears Mr. Duke covered a distance of about 1,280 feet in going from the bandsaw department to the glue room and return. He had no steps, hills or grades to climb. In going from the Town and Country building to the Old Mill building he had to walk a little over 100 feet out in the open weather. The temperature inside the Town and Country building was 65 to 70 degrees Fahrenheit and the temperature outside in the vicinity of Helena was 33 to 36 degrees Fahrenheit. According to the workmen who saw and talked with Mr. Duke that morning, he seemed to be in good spirits, made no complaints and appeared to be in good health. After returning to the bandsaw department, Mr. Duke sat or leaned up against some lumber and visited or talked with one of the workmen for a period of five to fifteen minutes. It appears that they had nothing to do at that time as they were waiting on stock to arrive at the bandsaw department. After visiting a few minutes Mr. Duke stood up and then fell forward. It was then about seven o'clock. Mr. Duke was put on a stretcher, taken to the first aid station and then an ambulance took him to the hospital in Helena where he was examined by Dr. George R. Storm. Dr. Storm talked to Mr. Duke for a short time and had ordered the nurse to give him a hypodermic when Mr. Duke died. It was Dr. Storm's opinion that the decedent died of a coronary thrombosis. Dr. Storm was the only doctor that saw and examined the decedent after his attack about seven o'clock on the morning of February 23, 1948."

As indicated, we find no substantial evidence that the collapse of the decedent here resulted from any increased, unusual, or over taxing effort on his part as argued by appellant and that would bring it within the rule announced in such cases as *Triebsch* v. *Athletic Mining & Smelting Company,* 218 Ark. 379, 237 S. W. 2d 26, and *Scobey* v. *Southern Lumber Company,* 218 Ark. 671, 238

S. W. 640, 243 S. W. 2d 754, relied on by appellant. These cases are clearly distinguishable on the facts peculiar to each.

In the recent case of *C. & B. Construction Company* v. *Roach,* 220 Ark. 405, 248 S. W. 2d 368, which involved the death of a laborer and the claim that strain or exertion contributed at least to his death by coronary thrombosis, we said. "There was no evidence of an increased work load placed on Roach, so as to make applicable the holding in such cases as *Triebsch* v. *Athletic Mining & Smelting Company,* 218 Ark. 379, 237 S. W. 2d 26; and *Scobey* v. *Southern,* 218 Ark. 671, 238 S. W. 640, 243 S. W. 2d 754."

Affirmed.

Mr. Justice MILLWEE dissents.

JERNIGAN *v.* LINCOLN.

5-300 264 S. W. 2d 836

Opinion delivered February 22, 1954.

Julius C. Acchione and *U. A. Gentry,* for appellant.

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

GEORGE ROSE SMITH, J. This is a suit brought by the appellee, Mrs. C. K. Lincoln, to enjoin the appellant, Ewell Jernigan, from trespassing upon the north fifteen

feet of a vacant lot belonging to Mrs. Lincoln. Jernigan's defense is that Mrs. Lincoln bought the lot with notice that Jernigan had an easement entitling him to use the fifteen-foot strip in controversy. Mrs. Lincoln denies that she had notice of the easement at the time of her purchase. The chancellor decided this issue of fact in favor of Mrs. Lincoln, holding that she purchased the vacant lot without notice of the unrecorded deed relied upon by Jernigan.

For some years the Lincoln family has owned a corner lot in Little Rock, fronting on Markham Street to the north. This lot is occupied by a commercial building which does not extend all the way to the southern boundary line at the rear of the building. In 1946 Jernigan purchased a cleaning plant that lies just west of the Lincoln building and that also fronts on Markham Street. This plant, unlike Mrs. Lincoln's building, occupies the entire lot upon which it is situated. Since there is no alley behind the two structures Jernigan realized when he purchased an interior lot that he would need a means of ingress to the back entrance of the cleaning plant. To that end he acquired, by a separate deed executed in connection with his acquisition of the cleaning plant, an easement over the north fifteen feet of the vacant lot that lies behind the two improved lots. Jernigan recorded the deed to the cleaning plant but failed to record the easement deed.

The right-of-way so acquired by Jernigan has actually been used rather infrequently, for there are trees along the strip which interfere with traffic. Instead, Jernigan has reached the back door of his plant by using a driveway that is situated on the unimproved rear portion of Mrs. Lincoln's corner lot. In 1950 Mrs. Lincoln's son Charles, who was then studying law, prepared for his mother's signature a letter by which she permitted Jernigan, for an annual consideration, to continue his permissive use of the Lincoln driveway.

In 1952 Mrs. Lincoln bought the vacant lot that lies behind the two buildings. It is not contended that she herself had any notice of Jernigan's unrecorded servi-

tude. Instead, Jernigan argues that Charles Lincoln, who conducted the negotiations for the purchase, was put on notice of the fact that the easement existed.

It cannot be said that the chancellor's decision is against the weight of the evidence. All the witnesses seem to have testified with complete candor. Charles Lincoln states that Wayne Coley, who owned the vacant lot, mentioned an easement only once, when he said: "Of course you know about Jernigan's easement." Lincoln, having in mind the right-of-way across the rear portion of the improved lot, replied: "Yes, I do, because I drew it up." Coley's recollection, on the other hand, is that he explained that the purchaser would not have the use of the entire lot, as he had given Jernigan an easement over the north edge of the property.

There is a rather convincing reason for accepting young Lincoln's version of the matter. Mrs. Lincoln's objective in buying the vacant lot was the acquisition of a building site that would extend southward from Markham Street for a distance of two lots. It is reasonable to believe that her son, who by then was a licensed attorney, would have been alert to any mention of an easement that would have defeated the purpose for which the property was being bought. The appellant tacitly concedes the force of this consideration by insisting not so much that Coley's testimony should be credited but rather that even Lincoln's own version of the transaction shows that notice was brought home to the purchaser's agent. The argument is that Jernigan's permissive right-of-way across the corner lot was technically a license rather than an easement, and therefore Charles Lincoln was at fault in assuming that Coley's reference to Jernigan's easement was intended to refer to the instrument that Lincoln himself had prepared. The test, however, is whether Coley's words would have put a reasonably prudent person upon inquiry, and we are not prepared to say that they would have. Laymen are likely to regard any right-of-way across a neighbor's land as an easement; so Lincoln was not necessarily careless in failing to explore the

possibility that Coley had in mind some servitude other than the one which Lincoln knew to exist.

Affirmed.

WARD, J., disqualified and not participating.

PASKLE *v.* PASKLE.

5-299 265 S. W. 2d 497

Opinion delivered February 22, 1954.

[Rehearing denied March 22, 1954.]

Claude F. Cooper, for appellant.

Coleman & Mayes, for appellee.

ED. F. MCFADDIN, Justice. This appeal involves the care and custody of two little girls, aged 6 and 3 years, respectively; and this is the second appearance of this case in this Court. See *Paskle* v. *Paskle,* 221 Ark. 733, 255 S. W. 2d 671. On remand to the Chancery Court, the cause was tried on the evidence originally offered, plus additional evidence; and the Chancery Court refused to change the original custody order. The mother prosecutes this appeal, and therefore has the burden of proving that the Chancery decree is against the preponderance of the evidence.

It was shown that the mother, Mrs. Dorothy Paskle (now Crawford) left the children with their father, Willard Paskle in 1951; encouraged him to speedily get a divorce; and then she married Mr. Crawford the day

after the divorce was granted. It was shown that Mr. Crawford has five children by his first marriage, and one by his present marriage; and that he and his wife now want the two little Paskle girls to come to the Crawford home, on the claim that such would be better for the little girls than the present home with the father and his grandmother.

The issue in the Chancery Court was whether there had been such a change of circumstances (since the divorce decree of 1951) as to make it for the best interests of the little girls that their custody be awarded to their mother. As to changed conditions, the mother (Mrs. Dorothy Paskle-Crawford) urges: (a) that she now has a home and can take care of her two daughters, whereas she had no home when the Court made the divorce decree and custody order in 1951; and (b) that she understood the children were to be with Willard Paskle's uncle when the custody order was made in 1951, instead of with Willard Paskle and his grandmother, as at the present time. As to the best interests of the children, the mother urges: (a) that Willard Paskle is only a day-laborer and drinks intoxicants; and (b) that the grandmother is old and infirm and does not keep the house and the children clean and neat.

Against the contentions urged by the mother, the father contends that he has all the time maintained a good home for his children; that they are well and healthy; that he has looked after them all along while their mother was acquiring a new husband and a new family; and that the children would be upset and disturbed by being put into a family of six other children.

Some witnesses testified in favor of the mother, and other witnesses testified in favor of the father. It would serve no useful purpose to name the witnesses and detail the testimony of each, or to include in this opinion other facts and circumstances bearing on the issue of the custody of these children. In concluding his opinion herein, the Chancellor said:

"Taking into consideration all the facts and circumstances and the credibility of the witnesses, and weigh-

ing the testimony as best I know how, I am not convinced there is such a change in conditions that the decree should be modified."

This is a difficult case to decide: child custody cases are always difficult, and this one is particularly so. But from a review of the entire record, we cannot reach the conclusion that the Chancellor's findings are against the preponderance of the evidence. Therefore, we affirm the decree with the hope that these parents and their attorneys will now undertake to cooperate in all respects, so that these little girls will grow up to love both of their parents, and that the mother will have reasonable and proper times for visitation.

HANSON MOTOR COMPANY *v.* YOUNG.

5-304 265 S. W. 2d 501

Opinion delivered February 22, 1954.

[Rehearing denied March 22, 1954.]

John D. Thweatt and *Meehan & Segraves,* for appellant.

William C. Daviss, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

MINOR W. MILLWEE, Justice. Appellants, Jimmie Hanson and Emma O. Hanson, husband and wife, opened a Willys automobile and truck agency in the city of Stuttgart, Arkansas, in May, 1946, and employed appellee, Jerry M. Young, to sell cars and do general work. Appellee remained in their employ from about the time of the opening until September 14, 1948, when his employment was terminated by appellants. Each week of his employment, appellee received from appellants a check for $50, less deductions for social security and withholding tax, each check being marked for "labor." He also received one additional check on June 20, 1947, for $50, marked "commission on jeep."

Appellee filed this action against appellants alleging an oral contract of employment under the terms of which he was to receive 3% of the gross sales of the business and a $50 weekly drawing account. He alleged that he had not been paid any of the 3% commissions and that $12,000 was due by reason thereof.

Appellants' answer alleged that appellee was employed by them in May, 1946, at a salary of $50 per week, and that no further compensation was agreed upon. The answer also alleged that on June 2, 1948, appellee executed a written instrument in which he acknowledged the terms of employment and receipt of payment in full of

the $50 weekly salary to date, and further acknowledged that such weekly salary was in lieu of a 3% commission on the gross sales.

On trial of the cause, a verdict and judgment were rendered against appellants in the sum of $4,892.20.

The principal issues presented to and determined by the jury in appellee's favor were, (1) the terms of the original oral contract of employment, and (2) whether appellee's signature to the written instrument of June 8, 1948, was obtained by the trickery, fraud or deceit of the appellant, Jimmie Hanson. The only witnesses in the case were the parties to the suit, appellee's wife and a kinsman of Mrs. Hanson; and their testimony is in irreconcilable conflict on the issues thus presented.

The first contention for reversal is that the evidence is insufficient to sustain a jury finding that the written contract of June 8, 1948, was procured by the fraud or misconduct of the appellants or either of them. In testing the sufficiency of the evidence on this point, it must be considered in the light most favorable to appellee. In briefly so reviewing the testimony on this issue, we deem it appropriate to relate some facts that are also pertinent to the first issue presented to the jury.

Appellee had been engaged in various phases of the automobile business in and around Stuttgart, Arkansas, for 20 years in the latter part of 1945. At that time appellant, Jimmie Hanson, who operated a farm near Hazen, Arkansas, wanted to enter the automobile business if he could obtain an agency but was without previous experience and approached appellee with the proposition of securing his assistance in obtaining the Willys agency at Stuttgart and with the view of appellee's future employment in the operation of the business in the event the agency could be obtained. Hanson and appellee went to Little Rock, Arkansas, where they conferred with the managers of the Little Rock Willys Motor Company about the matter. Hanson told them that he was inexperienced in the automobile business but that appellee "knew all about the business." After another trip

or two to Little Rock by Hanson and appellee, the agency was obtained. After considerable negotiations it was orally agreed that appellee should receive $50 per week and 3% of the gross sales to be paid every 6 months. Appellee and his wife, who was employed as an abstractor, located vacant lots which the appellants purchased and upon which they erected a building in which the business was operated.

Appellee began work in May, 1946, and did general sales and all other kinds of work connected with the operation of the business except mechanical labor and the keeping of the books. At the expiration of the first period of six months, and upon several occasions thereafter, appellee made demand for the commission of 3% on the gross sales, but Hanson gave various excuses and definite promises of future payment. The last of these promises was made in May, 1948, when the commissions amounted to $10,000. In the operation of the business it became necessary to execute numerous sales and other contracts and both appellee and Hanson adopted the custom of having each other sign and witness the signature of others to various papers without reading them. On June 2, 1948, Hanson came to the parts room where appellee was working and told him he had a paper he wanted appellee to sign when he had time. When appellee went to the office, Hanson presented appellee with a paper that was folded, pointed to the bottom of the second page, and said, "Put your name right there." Appellee, in pursuance of their regular custom, signed the paper without reading it and without knowledge of its contents, thinking it was a sales contract of the kind that he frequently signed in this manner. This was the employment contract introduced by appellants which provided that appellee, as party of the second part, acknowledged that his past and future employment by appellants was at a salary of $50 per week, which had been fully paid to date. The contract also provided: "Said weekly salary was agreed upon by and between the parties in lieu of a 3% of the gross sales, a straight commission basis, due to lack of saleable merchandise which ex-

isted at the time of employment." The contract was never signed by Hanson and the typewritten words, "Party of the First Part," under the line for his signature were marked through with ink. Appellee was never furnished with a copy of the instrument.

The foregoing account of the facts as related by appellee and his wife were sharply disputed by the testimony offered by appellants. According to appellants' proof, there was never any agreement to pay appellee a commission or percentage of the gross sales and appellee duly executed the contract of June 2, 1948, after he had read it and fully agreed to its terms. Appellants insist that even if this testimony is disregarded, the evidence offered by appellee is insufficient to warrant the submission of the question of fraud in the procurement of the written instrument to the jury. They rely on such cases as *Colonial and United States Mortgage Company* v. *Jeter,* 71 Ark. 185, 71 S. W. 945, and *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, 105 S. W. 880, which hold that one who signs a contract after opportunity to examine it cannot be heard to say that when he signed it he did not know what it contained. In those cases there was no evidence that the signature of one of the parties to the contract was procured by fraud, trickery or other inequitable conduct. The rule announced in these cases is inapplicable, and they are to be distinguished from one where there is evidence tending to show that the fraud or inequitable conduct of one of the parties caused the other party to sign the contract under a mistake of fact, without reading the contract. Hence, the rule applicable here is that one who signs a contract, after opportunity to examine it, cannot say that he did not know what it contained in the absence of fraud or other inequitable conduct of the other party which caused him to sign the contract under a mistake of fact, without reading it. *Galloway* v. *Russ,* 175 Ark. 659, 300 S. W. 390; *Dodson* v. *Abercrombie,* 212 Ark. 918, 208 S. W. 2d 433. The trial court followed this rule in his instructions to the jury in the instant case.

Whether fraud existed in procuring a person to sign or become a party to a written instrument is ordinarily a fact question for the jury. *Winter Park Tel. Co.* v. *Strong,* 130 Fla. 755, 179 So. 289. While fraud is never presumed, the law requires good faith in every business transaction, and does not allow one party to intentionally deceive another by concealment or false representations. *Sanders* v. *Berry,* 139 Ark. 447, 214 S. W. 58. The duty of disclosure also arises where one person is in position to have and to exercise influence over another who reposes confidence in him whether a fiduciary relationship in the strict sense of the term exists between them or not. 23 Am. Jur., Fraud and Deceit, § 81. In *Stewart* v. *Clark,* 195 Ark. 943, 115 S. W. 2d 887, this court held that an act done or omitted which may be construed as fraud because of its detrimental effect, may justify the setting aside of a contract or deed irrespective of moral guilt. It is our conclusion that the evidence offered by appellee was legally sufficient to submit to the jury and to support its finding on the question of whether appellee's signature to the contract of June 2, 1948, was procured by fraud and deceit.

It is next earnestly insisted that the trial court erred in giving Instructions Nos. 1 and 4 requested by appellee. Instruction No. 1 reads: "The plaintiff has filed this suit alleging he was employed by defendants, a partnership, to perform services for defendants and alleges there was an oral agreement by which defendants agreed to pay plaintiff, Young, a weekly salary of $50 per week, and a commission of three per cent on the total or gross sales made by defendants while plaintiff was in the service of defendants and defendants deny these allegations in so far as the alleged commissions are concerned and those are among the questions of fact for your determination.

"If defendants, a partnership, entered into a verbal contract of employment with plaintiff by which they agreed to pay plaintiff a weekly salary of fifty dollars per week and a commission of three per cent on the gross sales made by defendants during the time plaintiff was

retained by defendants in their service and if plaintiff entered upon his services in May, 1946, and continued therein until September 14, 1948, and defendants accepted and used the services of plaintiff under such contract, then such an oral contract, if any, was a legal and valid contract.

"But if plaintiff, for a consideration, without undue advantage, deceit and fraud on the part of defendants, if any, released and waived any commissions which he had earned prior to June 2, 1948, if any, then plaintiff cannot recover such commissions, if any." Instruction No. 4 contains language similar to that used in the third paragraph of Instruction No. 1, but presented to the jury in more detail appellee's theory of fraud in procurement of the written instrument and provided that if the jury found such facts to exist they would find that such writing did not constitute a waiver of commissions due, if any.

Appellants argue that the instructions, and more particularly the third paragraph of Instruction No. 1, are abstract and misleading in that they erroneously treated the written contract of June 2, 1948, as a release, assumed that the oral contract was valid, and were calculated to lead the jury to believe that the written instrument signed by appellee was of no effect unless a consideration other than recited therein was paid. Appellants insist that no pleading was filed or evidence introduced on the theory that the written contract constituted a release or waiver by appellee of any commissions that he had earned under the oral contract; and that the court, therefore, injected a question into the case upon which there was no issue. In this connection the appellants attached a copy of the written contract as an exhibit to their answer in which they asserted that the instrument constituted an acknowledgment by appellee of his terms of employment, "and receipt in full" to the date of its execution. Under this allegation and the proof adduced on the point without objection, it is not surprising that both counsel for appellee and the court were led to believe that reliance was being placed on the written

instrument as a release or waiver of prior commissions, if any, as well as an acknowledgment by appellee of the terms of employment. Moreover, the court gave other instructions which made it clear to the jury that appellee was bound by the written instrument unless it was obtained by fraud and deceit, and further that he would not be relieved of the effect of such instrument merely by a failure on his part to read it before signing it.

While it is error to give an abstract instruction, or one predicated upon facts not disclosed by any evidence in the case, such error will not be ground for reversal if the giving of such instruction is harmless and not prejudicial. *St. Louis, I. M. and S. Ry. Co.* v. *Jackson,* 96 Ark. 469, 132 S. W. 206, 31 L. R. A., N. S. 980; *W. U. Tel. Co.* v. *Franklin,* 114 Ark. 469, 169 S. W. 234, Ann. Cas. 1916D, 466; 3 Am. Jur., Appeal and Error, § 1122; 5 C. J. S., Appeal and Error, § 1763a. In *Mo. Pac. Rd. Co.* v. *Bennings,* 186 Ark. 303, 53 S. W. 2d 599, the court said: "A verdict will not be set aside because an erroneous instruction is given, where it is immediately followed by other correct instructions, and where it is evident the jury could not have been misled."

If it be conceded that the instructions were erroneous because they were in part abstract, it is our conclusion under all the facts and circumstances that no error prejudicial to the substantial rights of the appellants resulted in the giving of such instructions. In the first place the abstract matter was invited by appellants' plea in its answer. The instructions were followed by three other instructions which correctly and succinctly laid down the rules under which the jury was to consider the written instrument. In our opinion the matter complained of, though erroneous, was not calculated to confuse or mislead the jury in their deliberation and thus call for a reversal of the case.

It is also argued that Instruction No. 4 was erroneous because it required appellee to prove fraud or deceit in the procurement of the written contract by a mere preponderance of the evidence. Appellants rely on a

line of chancery cases such as *Morrilton Ice and Fuel Co.* v. *Montgomery,* 181 Ark. 180, 25 S. W. 2d 15, and *Eaton* v. *Humphreys,* 209 Ark. 525, 190 S. W. 2d 973, which hold that a written instrument may not be canceled or reformed in equity on the ground of fraud except upon clear, satisfactory and convincing evidence, and that a mere preponderance is insufficient. In those cases fraud or mistake is pleaded as a ground of affirmative relief. But the instant action is one at law in which no cancellation of a written instrument is sought as affirmative relief, but appellee merely seeks to avoid the consequences of a written instrument. The correct rule to be applied in such cases is laid down in *Rice-Stix Dry Goods Co.* v. *Montgomery,* 164 Ark. 161, 261 S. W. 325. That case involved the question whether the maker of a note sued on was induced to execute it through fraud and misrepresentation, and it was contended that the burden of proof was upon the maker as if he were seeking to cancel the note in equity. The court said: "But the rule in these cases, to-wit, that before equity will cancel, set aside, or reform a deed or instrument for fraud, the proof of the alleged fraud must be clear, convincing, and unequivocal, has no application to actions like this at law. Here no affirmative relief of cancellation or reformation of an instrument is sought, but the defense is simply that of non-liability because of deceit and fraud in procuring the instrument which is the foundation of the action. While fraud at law, as well as in equity, is never to be presumed and must be proved, yet in actions at law one who has the burden of proof to establish fraud meets the requirements of the rule when he proves the fraud only by a preponderance of the evidence." See also, *Kansas City Southern Ry. Co.* v. *Sanford,* 182 Ark. 484, 31 S. W. 2d 963, cert. den. 283 U. S. 825, 51 S. Ct. 347, 75 L. Ed. 1439, and cases there cited.

On the whole case, we find no prejudicial error and the judgment is affirmed.

George Rose Smith, J., dissenting. I think that instructions one and four were erroneously given. By these instructions the jury were told that the written contract

had to be supported by an independent consideration. Of course that is not the law, since in an executory bilateral contract each promise is consideration for the other. There was no evidence whatever of any additional consideration having been given in this case; so the court's charge was tantamount to telling the jury to disregard the agreement. Counsel for the appellants raised this exact question by a specific objection to these instructions. Their objection should have been sustained.

LINDLEY *v.* CRIDER, SHERIFF.

4761 265 S. W. 2d 498

Opinion delivered February 22, 1954.

Rex W. Perkins, E. J. Ball and *W. B. Putman,* for petitioner.

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

GRIFFIN SMITH, Chief Justice. In an extradition proceeding responsive to a requisition by the chief executive of Missouri, Governor Cherry issued his writ to the sheriff of Washington County, directing the arrest of Lester Lindley. Lindley sought release through writ of habeas corpus. From an adverse ruling the record was brought here by certiorari.

Error is urged in two respects: First, it is insisted that the petitioner's rights were prejudiced when the court excluded some of the exhibits accompanying the requisition. Secondly, exception is taken to the court's holding that Lindley was the man named in the extradition proceedings. The latter assignment includes the defendant's contention that he is not a fugitive from justice, therefore not subject to the extradition process.

The criminal charge grew out of issuance by Walter Easley of a check payable to Bisig & Kretzer. It was signed "Lester Lindley, by Walter Easley" and bore the following certificate: "I hereby claim that I have the above amount in [the First National Bank, at Springdale, Ark.] at this time, and will leave the same on deposit there subject to this check upon presentation."

It is Lindley's contention that he was not in Missouri when the check was drawn, and that he did not authorize Easley to use his name. The check was given for "trailer repairs."

Section 43-3006, Ark. Stat's, authorizes the Governor to surrender to the demanding state any person

charged with having committed a criminal act . . . in a third state, intentionally resulting in a crime in the state whose chief executive authority issues the requisition; "and the provisions of this Act not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

We said in *State ex rel. Herbert Lewis, Sheriff* v. *Allen,* 194 Ark. 688, 109 S. W. 2d 952, that if the circuit judge had authority to entertain the petition . . . it could be considered for two purposes only: First, to establish the identity of the prisoner, and secondly to determine whether he was a fugitive. "These questions," says the opinion, "are primarily for the Governor of the asylum state, and where the requisition shows the necessary facts to entitle the demanding state to the return of the alleged fugitive, the two questions stated are the only ones to be considered."

The defendant's contention that he is falsely accused is not for the court's consideration when the cause is heard in response to the writ of habeas corpus.

It was contended in *Letwick* v. *State,* 211 Ark. 1, 198 S. W. 2d 830, that identity of the prisoner had not been sufficiently established. Judge Frank G. Smith, in writing the opinion, pointed to this statement in the Lewis-Allen case: "The Governor of Arkansas, by his act in honoring the requisition, found that appellee was a fugitive from justice. In this state of the case the rule seems to be that before [the prisoner] would be entitled to a discharge by court order the evidence would have to be practically conclusive in his favor." [*Munsey* v. *Clough,* 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 516].

In the Munsey case, *supra,* Mr. Justice Peckham, speaking for the U. S. Supreme Court, said that proceedings before a governor on petition for extradition "are summary in their nature . . . Strict common law evidence is not necessary." This evidence "must at least be satisfactory to the mind of the Governor." But the holding in *Hyatt* v. *People ex rel. Cochran,* 188

U. S. 691, 23 S. Ct. 456, 47 L. Ed. 657, is that the extradition warrant is but *prima facie* sufficient to hold the accused; that it is open to the petitioner, on habeas corpus proceedings, to show that he was absent from the demanding state at the time the crime was committed, hence could not be a fugitive from justice.

In 1935 Arkansas adopted the uniform extradition act. Section 6 appears as § 43-3006, Ark. Stat's. The construction given this section is shown in Uniform Laws, Ann., vol. 9, p. 192 *et seq.* Almost without exception it is held that an extradition provision such as § 6 falls within a state's police power and is not violative of the federal constitution.

Our conclusion is that the tender of some of the exhibits accompanying the Missouri executive's requisition did not overcome the *prima facie* verity attaching to Governor Cherry's action in directing that the accused be delivered to the demanding state; nor did a misprision in the writ's language militate against the executive's obvious intent. Neither are we able to say that evidence before the circuit court was not sufficient to identify the petitioner as the person named in the charges.

It follows that the judgment refusing to discharge the prisoner was correct. Affirmed.

Robinson, J., dissenting. This case does not come within the provisions of Ark. Stats., § 43-3006; before that section would be applicable, it must be alleged that the defendant is charged in the demanding state "with committing an act in this state or in a third state intentionally resulting in a crime in the state whose executive authority is making the demand." Here there is no allegation that petitioner committed an act in the State of Arkansas or a third state intentionally resulting in a crime in the demanding state, Missouri. In all the extradition documents introduced in evidence it is specifically charged that petitioner Lester Lindley, *while present in Andrew County, Missouri,* committed the crime of drawing a bogus check in the sum of $73.50. The complaint filed by the prose-

cuting witness alleges "On or about January 10, 1953, in Andrew County *in the state of Missouri* the defendant, *Lester Lindley, did then and there* unlawfully, willfully, feloniously," etc. The warrant of arrest issued by a magistrate of Andrew County, Missouri, directed to the sheriff, provides: "You are hereby commanded to arrest Lester Lindley who is charged with unlawfully, willfully, and feloniously, on or about the 10th day of January, 1953, writing a bogus check in the sum of $73.50 payable to Bisig & Kretzer, Savannah, Missouri, *alleged to have been committed within the jurisdiction of this court.*"

The petition from the prosecuting attorney of Andrew County directed to the Governor of Missouri, asking for a requisition upon the State of Arkansas for the return of Lester Lindley to the State of Missouri, alleges that he was a fugitive and further alleges: "The undersigned Alden S. Lance, Prosecuting Attorney for the County of Andrew and State of Missouri, represents that Lester Lindley stands charged . . . with the crime of passing a fraudulent check . . . *committed in the County of Andrew and State of Missouri,* on or about the 10th day of January, 1953. . . . That on or about the 10th day of January, 1953, *the said Lester Lindley fled from the State of Missouri,* and is now, as your petitioner believes, in the County of Washington and State of Arkansas a fugitive from justice of Missouri."

In an extradition proceeding the circuit court has authority to consider a petition for a writ of *habeas corpus* for two purposes: first, to establish the identity of the prisoner; and second, to determine the question of whether he is a fugitive. *State ex rel. Herbert Lewis, Sheriff* v. *Allen,* 194 Ark. 688, 109 S. W. 2d 952; *Swann* v. *State,* 206 Ark. 184, 174 S. W. 2d 557; and *Koelsch, Ex Parte,* 212 Ark. 199, 205 S. W. 2d 186.

According to these decisions the courts have authority to determine whether the prisoner is a fugitive. Ballentine's Law Dictionary, 2nd Edition, says a fugitive is "A person who commits a crime within a state and withdraws himself from such jurisdiction. See *People ex rel.*

Merklen v. *Enright,* 217 N. Y. App. Div. 514, 517; 217 N. Y. Supp. 288."

Hyatt v. *Corkran,* 188 U. S. 691, 23 S. Ct. 456, 47 L. Ed. 657, cited by the majority, actually supports the contention of the petitioner. There the court said: "The language of § 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State *to which such person has fled,* and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled,* shall be produced, and it makes it the duty of the executive authority of the State *to which such person has fled* to cause him to be arrested and secured. Thus the person who is sought must be the one who has fled from the demanding State, and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who

had not been in the State at the time when, if ever, the offense was committed, and who had not, therefore in fact, fled therefrom."

At the hearing on the petition for the writ of *habeas corpus,* Lindley introduced evidence that he was not in the State of Missouri on or about the 10th day of January, 1953; that he was in Dallas, Texas, at that time. This evidence was not contradicted. There was no evidence introduced to show that petitioner was in the State of Missouri at any time. Where it is shown that the one being extradited was not in the State where the crime was alleged to have been committed at the time named in the indictment, and proof showed that the alleged fugitive was not in the state at or about the time the alleged offense was committed, he is entitled to be discharged on a *habeas corpus* proceeding. *Levy* v. *Splain,* 267 Fed. 333; *Lawrence* v. *King,* 203 Ind. 252, 180 N. E. 1; *Wigchert* v. *Lockhart,* 114 Colo. 485, 166 P. 2d 988; *Ex Parte Brewer,* 61 Cal. App. 2d 388, 143 P. 2d 33; *Ex Parte Ellis,* 223 Mo. App. 125, 9 S. W. 2d 544.

COLLIE *v.* COLEMAN.

5-291 265 S. W. 2d 515

Opinion delivered February 22, 1954.

[Rehearing denied March 29, 1954.]

Ed B. Cook, for appellant.

Bruce Ivy and *Chas. P. Coleman,* for appellee.

WARD, J. The question raised on this appeal is: Are tenants entitled to a refund from cotton ginned by a Cooperative Gin Company, organized under Act 153 of 1939, where a profit is shown and where the rent contracts contemplate no such payments. The tenants here seek to reverse a decree against them.

Appellee, Charles R. Coleman, controls and rents a large body of cotton land, part of which he owns and the rest he controls as trustee. He is also a stockholder in the Little River Cooperative Gin Company which was organized in 1946 pursuant to said Act 153, and which cooperative will be hereinafter referred to as Little River. Fourteen of the appellants raised cotton on lands rented from Coleman for the years 1946, 1947, 1948 and 1949, agreeing to pay as rent one-fourth of the cotton produced. The three remaining appellants were sharecroppers for the same years under John Lott who was in turn a lessee of Coleman. All cotton raised by all appellants was ginned by Little River, and it is appellants' contention that they are entitled to a refund or patronage payments of their proportionate share of the profits realized by Little River for each of said years. The amount of refund due, if any is due, to each appellant is set out in evidence and is not questioned by Coleman or Little River. Practically all the essential facts are undisputed except

on one point which, for clarity of this opinion, we discuss first.

Rental Contracts. The contention is made by appellees that when the rent contracts with appellants were made it was agreed to and understood by all the renters that they were not to receive any refund or patronage. It appears from the record that Little River had not been incorporated when the rental arrangements were made for the year 1946. No written contracts were introduced but there is testimony that Coleman told the renters they would not get any refunds from the cotton ginnings. However, the effect of this testimony was that the renters were told they could receive refunds by making certain payments.

"Q. What agreement did you have with your various tenants pertaining to this; between you and the various plaintiffs who are plaintiffs in this case, with reference to patronage dividends?

"A. I told them at the beginning, when we started to talk about a gin and before the completion and organization, that if they wanted to share in the profits from the gin they would be allowed to take out stock on the same basis I took out stock. At that time we had not gone very far in making plans and thought we would have to put up $20 for each acre of cotton, and I told them that if they wanted to share in the profits if they would put up their $20 per acre they would be allowed to become members and share in the dividends; otherwise I would take the patronage dividends, that was the profits."

The condition proposed above on which the renters might receive refunds is not in accordance with the provisions of the By-laws of Little River and cannot be construed as an agreement by the renters to forego refunds to which they were entitled without the necessity of subscribing for stock.

On the other hand the renters stated that nothing at all was said about refunds when they rented the land. The record discloses that appellants, and apparently no

one else, gave any thought to refunds until this court rendered the opinion in *Houck* v. *Birmingham,* hereafter referred to, on June 12, 1950. The burden was on appellees to prove that when appellants entered into the rental contracts they also agreed to waive refunds to which they were entitled from cotton ginned by Little River, and we cannot say that the testimony discharges that burden.

Having concluded that appellees have not met the burden of proof on this point, our further consideration will be on the basis that the rental contracts were silent as to refunds or patronage payments.

Refunds to Non-members. Appellants rely on our opinion in the case of *Houck* v. *Birmingham,* 217 Ark. 449, 230 S. W. 2d 952, for a reversal in this case. The *Houck* case involved the same kind of cooperative gin, the same question relative to refunds, and other similar pertinent facts, and it was there held that sharecropper tenants were entitled to patronage payments. Three of the appellants here were sharecroppers, while the other appellants paid as rent one-fourth of the cotton raised. In the *Houck* opinion it was made clear that the latter class of renters were in a more favored position to claim refunds than were sharecroppers, so no distinction need be made between the two classes of renters in so far as it relates to this opinion.

In reply to appellants' reliance on the *Houck* opinion, appellees advance two arguments. First, that said opinion leads to an affirmance here, and, second, that the two cases are distinguished because the Articles of Incorporation and the By-laws of the two Cooperatives involved are not the same. We shall now examine these two arguments in the order mentioned.

First. Referring to the *Houck* opinion, appellees call attention to this language: "The nature of the cropper's right in the crops, or the proceeds thereof, depends upon the intent of the parties as ascertained from their contract." Based on this language the argument is made; that, before appellants can win they must show

it was their intent, when the rental contracts were entered into, to receive refunds, and; that no such intent is shown by the evidence. It is true that the evidence discloses no such intent on the part of the renters. In fact, it is specifically stated by appellants that they had no such intent because they never thought of refunds until the opinion in the *Houck* case was delivered. We think, however, that the above quoted language does not have the significance attached to it by appellees. The language was used in the *Houck* opinion in an effort to distinguish between the legal status of a sharecropper who receives one-half of the crop from his landlord and the status of one who pays one-fourth of the crop to his landlord. There the court was dealing with sharecroppers, and an analysis of the whole opinion shows clearly that they were entitled to refunds because of the provisions in the Articles of Incorporation and the By-laws of the Cooperative Gin and not because the sharecroppers intended or contracted to receive refunds when the rental contracts were made with their landlord.

Second. As indicated above, appellees make the argument that the opinion in the *Houck* case is not controlling here because the Articles of Incorporation and the By-laws in the Planters Cooperative, under consideration in that case, are not the same as the Articles of Incorporation and the By-laws in this case. Referring to the *Houck* case appellees state; "that case certainly is not in point with the case at bar. The By-laws of that cooperative were entirely different to the By-laws of the Little River Cooperative Gin, Inc." At another time appellees, in an effort to show that non-members are not entitled to refunds here, quote Article III in the By-laws of Little River which deals with qualifications for membership. Appellees' position in this connection is without merit. A careful comparison of the Little River Articles of Incorporation which appear in full in the record are exactly like the Articles of Incorporation considered in the *Houck* case, as is shown by a comparison of the records in both cases. The same thing is true of the By-laws of both cooperatives with the following non-essential

exception. In this case the Little River By-laws are copied in full in the record. In the *Houck* case some of the Articles of the By-laws are omitted entirely, but the following Articles do appear in full: Article III on Membership; Article IV on Non-member Patrons; Article X on Audits and Determination of Savings. The last mentioned Articles are exactly like the corresponding Articles in the By-laws of Little River and they are the only Articles in the By-laws that have any bearing whatever on the issue considered here.

In view of the above it is our conclusion that the opinion in the *Houck* case is controlling here, and it would serve no useful purpose to reiterate the reasons used and the conclusions reached in that case.

Our attention is called to the fact that appellants quoted only a part of Article IV of the By-laws pertaining to non-member patrons on which they rely for a reversal. That portion reads: "Non-member patrons shall be treated the same as members and shall participate in the distribution of the earnings on the same basis," and it is noted that practically the same language is relied on in the *Houck* case. The inference is that other language in Article IV qualifies the language quoted above. We have carefully examined all the language in said Article IV as well as in the rest of the By-laws and in the Articles of Incorporation and nowhere do we find anything which prevents non-member patrons from participating in a refund such as they here claim.

Appellees ask us to dismiss the appeal because of appellants' failure to properly abstract the record as provided for in Rule 9, and also because the appeal is not properly taken. Conceding, without deciding, that appellants' abstract of the record was deficient, the deficiency was supplied by a fuller abstract by both the appellees and the appellants. In this situation, as we have often held, the appeal will not be dismissed.

It is pointed out by appellees that the record filed by appellants in this court is defective in that it was not signed by the attorneys, by the trial judge, or by the

clerk. In this connection we refer to the fact that prior to the decree in this case this court issued an order to the effect that litigants thereafter might appeal either under the old rules or under the provisions of Act 555. This order, of course, became void when the new rules promulgated by this court became effective on January 10, 1954. Appellants, therefore, had a right to perfect their appeal in accordance with said Act 555 which they chose to do. Under said Act it is not necessary for the attorneys or the trial judge to sign the record prepared by the court reporter. The act does provide, however, that the record which is to be filed in this court shall be verified by the clerk and by him transmitted to the clerk of this court. Actually this procedure on behalf of the clerk was not literally followed here. The record discloses; that the notice of appeal and designation of the record were given as required by said Act; that on September 10, 1953, a writ of "Certiorari for Complete Record" was issued by the clerk of this court to the clerk of the trial court directing him to certify to this court a full, true and complete transcript of the record and proceedings in the trial court, and; that the clerk of the trial court did on September 19, 1953, comply with said writ by certifying to the correctness of the record and filing the same with the clerk of this court. In the above situation it is our conclusion that the procedure above described was a substantial compliance with the provisions of Act 555. However, this ruling, being made when the attorneys had no opportunity to brief the new rules, is made with the reservation that if the same question is again presented to us it will be re-examined.

There are some other features of the case which call for further consideration by the trial court. Appellees plead the 3-year statute of limitations. This suit was filed on October 27, 1950, consequently appellants cannot recover any refunds which were due prior to October 27, 1947. It also appears that some of appellants may be indebted in some amounts to appellee, Coleman. Since these matters were not fully briefed and since they must be determined before the proper refunds can be made to

each individual appellant we have chosen to refer them to the trial court for further action.

In accordance with the views above expressed the decree of the trial court is reversed in so far as it pertains to Charles R. Coleman, and the cause is remanded with directions to make findings against him in favor of each of the appellants in accordance with the facts disclosed in the record, and for any other necessary proceedings not inconsistent with this opinion. For different reasons a majority of the court affirm the trial court's decree as to The Little River Cooperative Gin, Inc., which it is shown, has paid all refunds to Coleman.

The Chief Justice and Mr. Justice SAM ROBINSON dissent; Mr. Justice GEORGE ROSE SMITH not participating.

GRIFFIN SMITH, Chief Justice, dissenting. I think the Chancellor correctly determined the controversy from a factual standpoint and that his decretal findings are not being given the weight we have heretofore accorded transactions of this nature. The majority opinion sets out some of the testimony relating to the agreements between Coleman and appellants and then by a process of reasoning productive of a desired result, says that the conversations did not mean what Coleman said the understanding was, or if this were the intention, then subsequently-adopted by-laws took precedence over the oral accord.

I haven't the slightest doubt that the arrangements were exactly as Coleman said they were, hence I would affirm as to him. But if judgments must be rendered in derogation of every consideration given the case by a Chancellor whose judicial course has been outstanding in respect of diligence and capability, I would not excuse the gin company and require the landlord to pay this unusual price while at the same time saying that liability is contractual because of the by-laws.

Opinion delivered March 1, 1954.

[Rehearing denied April 12, 1954.]

P. C. Goodwin, D. Leonard Lingo and *Harry L. Ponder,* for appellant.

Shelby C. Ferguson and *Oscar E. Ellis,* for appellee.

MINOR W. MILLWEE, Justice. On January 19, 1953, appellant, J. M. Williams, brought this action in ejectment against appellee, Ivan Welch. In his complaint, appellant alleged title by mesne conveyances from Claude Coggins to a certain 3 acres of land in Fulton County, Arkansas; that appellee was in unlawful possession of the lands; and, that appellant had the right to possession. Appellant also asked $200 damages for injuries to the lands and fences surrounding the acreage.

In his answer, appellee admitted a common source of title, Claude Coggins, and admitted that appellee was in possession of the lands, but alleged his ownership by an unbroken record title stemming from Coggins. Further, the answer alleged appellant and his grantor, P. C. Goodwin, were estopped from claiming the lands in dispute because of an agreement between the parties that the property belonged to appellee. In addition, adverse possession of the disputed lands by appellee was alleged.

At the trial to a jury, each of the parties introduced conveyances tending to show an unbroken chain of record title in himself to the 3-acre tract in controversy. According to appellant's proof, Claude Coggins and wife deeded the lands to B. F. Hall, appellant's predecessor in title, on January 30, 1936, and the deed was recorded on October 25, 1952. According to the deeds which appellee introduced, Claude Coggins and wife conveyed the lands to Cuthbert Pickren, appellee's predecessor in title, on October 16, 1943, and the deed was recorded December 23, 1946. One of the deeds in appellant's chain of title was from B. F. Hall and wife to E. A. Manes dated May 11, 1942, and recorded September 27, 1945.

The Hall-Manes deed was introduced in evidence as an exhibit to appellant's testimony. It appears that the deed was first written entirely in longhand, but that

a piece of paper containing the typewritten description of the land had been pasted over the original description written in longhand. P. T. Vail, the justice of the peace who took the acknowledgment of the deed, was unable to recall whether the typewritten matter was pasted on the deed at the time he took the acknowledgment, though he remembers it was generally in evidence at that time. He stated that if the typewritten matter was then on the deed he did not notice it. Further, there was evidence tending to show that the typewritten description pasted on the deed had also been altered and that this might have taken place after the deed was recorded.

Appellee and his father also testified that shortly after appellee purchased the lands in 1950, they went to the office of attorney P. C. Goodwin who deeded the lands in question to appellant. Appellant was then present at a conference in which Goodwin took the deeds of the parties and drew a plat of their respective lands indicating that the lands in question belonged to appellee. According to the testimony of appellee and his father, it was then and there agreed that appellee had title and right to possession of the 3-acre tract. Appellant admitted the conference but denied the agreement. While Mr. Goodwin appeared as a witness for appellant, he made no denial of appellee's version of the conference in his office. The plat which he allegedly drew at the conference was introduced by appellee.

Appellant correctly asserts that the only question raised as to the validity of his chain of title was whether there had been a material alteration, after delivery, in the Hall-Manes deed. We cannot agree with his further contention that the evidence is insufficient to show a material alteration of the deed. It is true that the title to support ejectment is not necessarily required to be shown by deeds which are absolutely perfect on their face. *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568.

It is equally well settled that a material alteration of a deed avoids it. In *Arkansas-Louisiana Elec. Co-op.*

v. *Randall,* 205 Ark. 646, 169 S. W. 2d 874, the court said: "As early as *Inglish, et al.* v. *Breneman,* 5 Ark. 377, 41 Am. Dec. 96, this court, on the effect of a material alteration in any instrument, said: 'The principle extracted from all the cases is that any alteration in a material part of any instrument or agreement, avoids it, because it thereby ceases to be the same instrument. It is a rule, founded in good sense and policy, and protects the integrity of such instrument from violation by refusing to alter them. Every sanction to their safety and uninterrupted circulation, free from alteration, should be afforded.' See, also, *Woods* v. *Spann,* 190 Ark. 1085, 82 S. W. 2d 850; *Lea* v. *Bradshaw,* 192 Ark. 135, 90 S. W. 2d 487; and *Ouachita Rural Elect. Co-op. Corp.* v. *Bowen,* 203 Ark. 799, 158 S. W. 2d 691." In *Phipps-Reynolds Co.* v. *McIlroy Bank and Trust Co.,* 197 Ark. 621, 124 S. W. 2d 222, the court, quoting from *Gist, Admr.* v. *Gans,* 30 Ark. 285, said: "But the practice of making erasures, interlineations and corrections in writings of all kinds is of such common occurrence that we do not think a presumption of fraud should be indulged and declared to exist because of their presence in a writing. The question is rather one to be determined by court or jury as the case may be in the light of all the evidence intrinsic and extrinsic, unaffected by any presumption." It is apparent from an inspection of the Hall-Manes deed that alterations were made. The question whether such alterations took place before or after delivery of the deed was correctly submitted to the jury under instructions which are not challenged, and the evidence is sufficient to sustain the finding in appellee's favor on this issue.

Appellant also contends that it was error to admit into evidence deeds offered by appellee in an attempt to show title. He argues that since his own predecessor in title took a deed to the disputed lands in 1936, then Coggins had no interest left to pass to appellee's predecessor in title by a deed dated in 1943. The able trial judge carefully and correctly instructed the jury that unless they found there had been a material altera-

tion in one of the deeds constituting appellant's apparently complete chain of title, then appellant had the paramount title because the deed from Coggins to appellant's predecessor in title was executed prior to the deed from Coggins to appellee's predecessor in title. The universal rule, repeatedly reiterated by this court, is that the plaintiff in ejectment must succeed on the strength of his own title and not on the weakness of title of his adversary who is in possession. *Dodson* v. *Thomason,* 217 Ark. 747, 233 S. W. 2d 395. Thus, even though the deed from Coggins to appellee's predecessor in title might be subject to defeasance, its invalidity would have no bearing on the jury's finding that there had been a material alteration in one of appellant's deeds which destroyed his chain of title. In 18 Am. Jur., Ejectment, § 56, it is said: "Since, in the absence of any element of estoppel, the defendant in ejectment may defeat recovery by showing title out of the plaintiff or right of possession in third persons, it necessarily follows that he may defeat such recovery by showing title in himself; and the fact that the defendant's title is insufficient is immaterial if the plaintiff is unable to show a complete and superior legal title." See, also, 28 C. J. S., Ejectment, § 35.

Another rationale upon which the admission of appellee's deed into evidence might be predicated is that the deed, though invalid, was properly introduced to support the "color of title" element essential to appellee's plea of adverse possession. See *Cofer* v. *Brooks,* 20 Ark. 542. Then, too, the rule above that plaintiff must recover on the strength of his own title admits of one exception: where the defendant is a mere trespasser invading the actual possession of plaintiff, the plaintiff can recover on prior peaceable possession alone. *Vanndale Special School Dist. No. 6* v. *Feltner,* 210 Ark. 743, 197 S. W. 2d 731. Here, introduction of appellee's deeds was important to establish that he was not a mere trespasser and to maintain the appellant's burden of proving good title in himself.

We find no error, and the judgment is affirmed.

WICKER *v.* WICKER.

5-310 265 S. W. 2d 6

Opinion delivered March 1, 1954.

M. C. Lewis, Jr., for appellant.

Earl J. Lane, Michael B. Heindl and *Q. Byrum Hurst,* for appellee.

ROBINSON, J. Appellee Arthur H. Wicker filed a divorce suit in the Garland Chancery Court. Appellant Sudie Crump Wicker, defendant in the Chancery Court, filed a motion to dismiss the cause alleging that appellee was not a *bona fide* resident of Garland County. The Chancellor overruled the motion and Sudie Crump Wicker has appealed.

The order overruling the motion to dismiss was not a final judgment from which an appeal will lie. If this court should at this time sustain the Chancellor's order overruling the motion to dismiss, the case would still stand for trial on its merits. Meantime the defendant may file some other motion. An appeal can not be taken from an order of a chancery court which is not a final order. *Davis* v. *Hale,* 114 Ark. 426, 170 S. W. 99; *Durben* v. *Montgomery,* 144 Ark. 153, 221 S. W. 855; and *Beloate, Executor,* v. *Smith,* 212 Ark. 39, 204 S. W. 2d 908.

"This court has always held, before and ever since the adoption of the Code (1869), that, where there is no final judgment, no appeal lies, and that an appeal will be dismissed for want of a final judgment." *Flana-*

gan v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. 2d 70.

Therefore the appeal in this case is dismissed and the cause is remanded for further proceedings.

NOBLIT *v.* NOBLIT.

5-329 265 S. W. 2d 520

Opinion delivered March 1, 1954.

[Rehearing denied March 29, 1954.]

Herrn Northcutt, for appellant.

Oscar E. Ellis, for appellee.

ROBINSON, J. A petition to set aside an order admitting to probate the will of G. H. B. Noblit was denied, and petitioner has appealed. Both the will and the codicil are written in longhand, and may have been written by the testator; however, neither was admitted to probate as a holographic will or codicil.

The will proper leaves both the real and personal property to the widow, and does not mention the testator's daughter, Maude; but the codicil bequeaths to her the sum of $1.00. There is an attestation clause to the will, but none to the codicil. However, the codicil is signed by two witnesses with the word "witness" following each signature. Of course, if the codicil which

names the daughter is not valid, she would inherit the same as if there were no will, since she is not mentioned in the will. Ark. Stat. § 60-507. *Yeates* v. *Yeates,* 179 Ark. 543, 16 S. W. 2d 996, 65 A. L. R. 466. However, the codicil is valid although it has no attesting clause.

"A will is perfectly valid though there is no attestation clause." *Atkinson on Wills,* page 297.

In an annotation on the subject in 76 A. L. R. 617, there is cited a long list of cases from numerous states holding that there is a presumption of proper execution even though there is no attestation clause where the attestation is merely by subscription or followed by the word "witnesses."

"Although there is some authority to the contrary, the better rule is that a presumption of due execution may arise on proof of the genuineness of the signatures of the testator and the attesting witnesses, notwithstanding the attestation clause of the will is incomplete or defective in failing to recite to observance of some formality required by statute in the execution of wills. In fact, according to many authorities, a due and proper execution of a will may be presumed on proof of the circumstances stated above, even though there is no attestation clause, as where the witnesses are merely indicated to be such by the word 'witnesses' appended to their signatures." 57 Am. Jur. 577.

Appellant argues that on the authority of *McPherson, Executor,* v. *McKay, Administrator,* 207 Ark. 546, 181 S. W. 2d 685, a duly attested will can not be superseded by a holographic codicil. Here, however, there are attesting witnesses to the codicil and it is therefore not to be classed as holographic.

Affirmed.

Mr. Justice WARD not participating.

Opinion delivered March 1, 1954.

[Rehearing denied March 29, 1954.]

[redacted]

Wright, Harrison, Lindsey & Upton, for appellant.

Goodwin & Riffel, for appellee.

WARD, J. Appellant, Richard E. Woodmansee, has appealed from a decision of the Workmen's Compensation Commission, affirmed by the circuit court, disallowing compensation under the Arkansas Workmen's Compensation laws for an injury which he received while on a duck hunting trip, which injury, appellant contends, arose out of and was in the scope of his employment.

Appellant is the vice president of the Frank Lyon Company, a corporation, and since 1943 has been the manager of its furniture department. Although the Aetna Casualty and Surety Company was made a party defendant, the Frank Lyon Company was the principal defendant and for the purpose of this opinion we will refer to it as the sole appellee.

Appellant, as manager, had five furniture salesmen working under him, and pursuant to a custom of the Company, he and the five salesmen held a meeting every Saturday morning in the Company's office at Little Rock. At these meetings problems regarding sales in the several sales territories were discussed and worked out. The salesmen were required to attend these regular Saturday morning sales meetings. From the record it appears that in 1950, prior to the incident involved here, the Frank Lyon Company bought and now owns a tract of land in Prairie County which it uses for the purpose of hunting ducks. The record does not disclose that the duck hunting land was purchased primarily for the Company's employees.

Sometime during November, 1951, a duck hunt for the salesmen was proposed in lieu of one of the regular Saturday morning sales meetings. It is not clear whether appellant or the president of the Company originated this proposal but at any rate it was made with the consent of all concerned. O. A. Mallett, a vice president, said appellant first mentioned the hunt and appellant says he thinks Mr. Lyon did, although he was not positive. In all events appellant brought the matter up in one of the meetings and Saturday, December

1, 1951, was selected by all present as a convenient date for the hunt. While, as above stated, salesmen were required to attend the regular Saturday morning sales meetings yet it seems to be agreed that no salesman's job would have been materially affected if he had declined to go on the duck hunt. It is not seriously denied by anyone that such an outing by the salesmen would have some tendency to build up their morale.

Just before leaving one of the salesmen decided that he could not make the trip because of illness, but appellant and the other four salesmen went in cars belonging to appellant and to Mr. O. A. Mallett. While appellant was engaged in hunting ducks he stumbled and fell, causing, as he contends, a serious injury to his back. There was testimony to the effect that appellant had suffered a back ailment for some years previously, but the cause and extent of his injuries are not points with which we are here concerned. Appellant's claim was disallowed by the Commission solely on the ground that his injury did not arise out of and in the course of his employment.

While many cases from the Workmen's Compensation Commission have reached this court, many of which involved an interpretation of the phrase "out of and in the course of employment," yet this court has not had occasion to develop rules in this regard applying to injuries received by employees while engaged in recreational activities in some way related to their employment. Many pronouncements in this connection have been made however by text writers and in opinions by courts of other jurisdictions. It is in order therefore to examine these authorities.

Schneider's Workmen's Compensation, Permanent Edition, Vol. 6, in dealing with recreations sponsored by an employer, lays down what seems to be the general rule:

" 'Generally, injuries suffered by an employee while watching, participating in, or going to or coming from recreational activities sponsored in whole or in part

by the employer, are not compensable, since such injuries are usually sustained while the employee is not performing any duty for which he had been either expressly or impliedly employed. In other words the injuries cannot ordinarily be said to have resulted from an accident arising out of and in the course of the employment.' "

Based on this general rule which denies compensation in recreational cases the authorities recognize certain exceptions, or, it might be more appropriate to say, they call attention to certain guide posts which point either to compensability or non-compensability. Hereafter we set out some of these exceptions or guide posts.

1. *Where employees are required to participate.*

(a) In the same treatise by Schneider it is stated:

" 'A distinction is also made where the injured employee was either required to participate in certain recreations, or from the evidence it could reasonably be inferred that the injured employee's employment contemplated his participation.' "

(b) In Larson's book on Workmen's Compensation laws at page 328 it is recognized that compensability is indicated in recreational or social activities where:

" 'The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment.' "

(c) In the case of *State Young Men's Christian Association* v. *Industrial Commission,* 235 Wis. 161, 292 N. W. 324, it was held that a medical student who was employed by the Y.M.C.A. as a counselor at its summer camp with the privilege of using the camp's recreational facilities, and while doing so was injured, could not recover because he was not engaged in anything required of him by his employer.

(d) In *Wilson* v. *General Motors Corporation,* 298 N. Y. 468, 84 N. E. 2d 781, in denying compensation to a salaried foreman who was injured while participating in the activities of the baseball team equipped by his employer the court gave one of its reasons in this language:

" 'Personal activities of employees, unrelated to the employment, remote from the place of work and its risk, not compelled or controlled by the employer, yielding it neither advantage nor benefit, are not within the compass of the Workmen's Compensation Laws.' "

(e) Compensation was allowed by the Superior Court of Pennsylvania in the case of *Miller* v. *Keystone Appliances, Inc., et al.,* 133 Pa. Super. 354, 2 A. 2d 508. Miller, a salesman on a commission basis, was injured while attending a picnic given by his employer. The Commission allowed compensation, the circuit court reversed the Commission and the Superior Court reinstated the findings of the Commission. The test to be applied and the basis of the court's decision is contained in this excerpt from the opinion:

"The test to be applied is: Did he go upon this mission voluntarily or because of the request of his superintendent? The referee advises that he went not only at the request of the superintendent, but in pursuance of the policy which the company followed with all its employees. He was therefore practically under orders and in the performance of his duty when he was injured."

2. *Regular participation or participation incidental to employment.* Regular participation in recreational activities with the consent of the employer has been recognized as an indication that such activities are in the course of employment.

(a) Schneider's work, *supra,* expresses it as an exception to the general rule:

" 'A like distinction is made where the recreation causing the injury has, by its consistent regularity, such

as games played on the employer's premises with the knowledge and acquiescence of the employer during noon hours, become a part of the daily life and routine of the employee.' "

(b) Professor Larson, *supra,* expresses the same view as to such injury when:

" 'They occur on the premises during a lunch or recreational period as a regular incident of the employment.' "

(c) In the case of *Industrial Commission of Colorado* v. *Murphy,* 102 Colo. 59, 76 P. 2d 741, 115 A. L. R. 990, in denying compensation in a recreational case the court pointed out that the games played by the company team were "new, intermittent and casual," indicating that the holding might be otherwise if the games were "long established and part of the daily life and routine."

(d) The rule announced above was recognized in the case of *Kelly* v. *Hackensack Water Company,* 10 N. J. Super. 528, 77 A. 2d 467, in holding that an employee's injury received while attending a picnic sponsored by his employer arose out of the scope of his employment, the court said:

"The employer's outing had been an annual event since 1932, except for one year (1948). Following its abandonment, there was a protest by the employees and it was reinstated in 1949. The protest included a claim that the outing was one of the 'benefits' which respondent had guaranteed to continue by the terms of the employment . . .

"Employees attending the outing were paid their regular days wages. In the event of non-attendance the employee was required to work at his regular employment."

(e) Compensation was allowed in the case of *Pacific Indemnity Company* v. *Industrial Accident Commission,* 26 Cal. 2d 509, 159 P. 2d 625, where two minor boys, employed as grape pickers, were drowned while

bathing in a reservoir provided for them by their employer. In reaching its conclusion the court pointed out that it had been stipulated that the accommodations referred to "were furnished by the employer to the employee free as an incident of their employment." It was also pointed out by the court that it was a direct benefit to the employer to have the berry pickers keep themselves in a sanitary condition.

3. *Where recreation facilities are maintained by an employer for his own interest and not merely because of altruistic motives.* Whether regarded as an exception to the general rule against compensability or as a guide post pointing to compensability it is recognized that one of the major considerations in this class of cases is to determine from all the facts and circumstances whether the recreational activity is sponsored by the employer principally with the hope that it will result in more business and profits to him or whether the activity is provided primarily with altruistic motives. This rule, sometimes difficult of application, has been repeatedly recognized.

(a) In Schneider's work, *supra,* we find:

" 'A distinction is made, however, in those cases where the recreation which caused the injury, either directly or indirectly, was sponsored by the employer as a matter of business and not because of altruistic motives. That is, the employer exercised control or domination over the recreation for the purpose of developing better service and greater efficiency among the employees, thereby reaping a direct business benefit from the recreation sponsored.' "

Schneider then combines two of the exceptions mentioned above and concludes that an injury is compensable if:

" '. . . from a consideration of all the facts and circumstances, a rational mind can trace the risk thereof to an act required or contemplated by the employment for the benefit of the employer directly or indirectly.' "

(b) Professor Larson in his work finds an indication of compensability if:

" 'The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.' "

(c) In his work on Workmen's Compensation, Vol. 1, Page 233, Campbell, considering a ball club sponsored by an employer, states:

" 'The activity, however, comes under the Act where, in addition to defraying the expenses, the employer gets advertising from the participation of the team. The same rule applies if any interest of the employer is thereby served.' "

(d) This question of benefit to the employer was considered in the case of *Clark* v. *Chrysler Corporation,* 276 Mich. 24, 267 N. W. 589. It appears that the Chrysler Corporation had instructed all of its plants to install and equip a gymnasium to afford an opportunity to its employees, on a voluntary basis, to develop and build up their bodies. While engaged in playing basketball one of the employees was injured. The claim was rejected by the court which said:

" 'The employer provided a place for recreation of employees and left the method and means of enjoyment to the will of each individual. It may be true that the benefit derived by a user of the place not only tended to improve him physically but, as well, to create a more friendly relation between employer and employee, but such physical betterment and emotional result, while desirable, do not attach to the contract of employment.' "

(e) Compensation was allowed in the case of *Piusinski* v. *Transit Valley Country Club,* 283 N. Y. 674, 28 N. E. 2d 401, where a caddy was injured while playing a practice game of golf with other caddies at a country club. The conclusion there reached appears to be based on the facts that the game was being played under the supervision of a caddy master and that the activity

would result in making the caddies more proficient as such.

The same result, based on similar reasons, was reached in the case of *Fagen* v. *Albany Evening Union Company,* 261 App. Div. 861, 24 NYS 2d 779.

Having in mind these rules and pronouncements regarding the relation of recreational activities to the course of employment, the question presented to us on this appeal is: Do the facts and circumstances of this case show, as a matter of law, that appellant's injury arose out of and in the course of his employment? Or, to the same effect, the question may be more specifically stated: Do the facts and circumstances shown by the record reveal a lack of substantial evidence to support the Commission's finding that appellant's injury did not arise out of and in the course of his employment? After careful consideration we conclude that both questions must be answered in the negative.

The question was purposely stated in the alternative above because it is inescapable that the Commission, in applying the facts [undisputed] to the rules, must use some degree of discretion and judgment in this kind of a case. This was recognized in the *Miller* case, *supra,* where the court said:

"Whether deceased was in the course of his employment when he was injured is a question of law . . . But in determining that question we must bear in mind the liberal construction that this term has received in the courts, and the exclusive function of the compensation authorities to find facts, whether from direct or circumstantial evidence, and the inferences therefrom."

Portions of the testimony in this case can be interpreted as indicating compensability while other portions, and in some instances the same testimony, can be interpreted as indicating non-compensability, but we think the latter view prevails.

(a) Even though it was desirable on the part of appellant and the company that the salesmen should

all go on the duck hunt, yet it can not be said that they were required to go, and it is not contended that the company required appellant to go. The Commission was justified in finding that appellant himself proposed the trip, and it also appears that all of the salesmen were enthusiastically in favor of it.

(b) So far as the record reflects this is the first time that appellant and the salesmen had ever hunted ducks on the company's land. It can not be argued therefore that this recreational activity was a part of their employment or that it was a plan or system of recreation to be habitually indulged in.

(c) While it is reasonable to suppose that the company might expect some indirect and intangible benefit from the fact that this kind of recreation might promote good fellowship and enhance the morale of its employees, still we are unable to say that this was the motive of the company in permitting its employees to go on this particular duck hunting trip. The Commission was justified we think in concluding that appellant and the salesmen voluntarily chose this hunting trip in lieu of the sales meeting that would ordinarily have been held on that day.

In view of what has been said we affirm the judgment of the trial court which in turn affirmed the findings of the Commission.

ROBINSON, J., dissenting. It can be seen from the majority opinion that this is a close case; in fact the majority says: "Portions of the testimony in this case can be interpreted as indicating compensability while other portions, and in some instances the same testimony, can be interpreted as indicating non-compensability; but we think the latter view prevails."

In circumstances where the question is so close, I think the employee should be given the benefit of the doubt. We have held many times that the women's Compensation Law should be broadly and liberally construed, and that doubtful cases should be resolved in favor of the claimant. *Scobey, Adm.* v. *Southern Lumber Com-*

pany, 218 Ark. 671, 238 S. W. 2d 640, 243 S. W. 2d 754; *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26; *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S. W. 2d 899; and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

Mr. Justice MILLWEE joins in this dissent.

PEOPLES MUTUAL HOSPITAL ASSOCIATION *v.* BENNETT.

5-313 265 S. W. 2d 703

Opinion delivered March 1, 1954.

[Rehearing denied April 5, 1954.]

Tom Gentry and *John Shamburger,* for appellant.

Quinn Glover and *Carl Langston,* for appellee.

ED. F. MCFADDIN, Justice. The question presented for decision is whether Lena Jordan was the owner of certain property in her own right, or as Trustee for appellant, Peoples Mutual Hospital Association, Inc. (hereinafter called "Association"). We do not, however, reach the presented question; since the procedure which the appellee invoked in the Trial Court, makes necessary a reversal and a remand for further proceedings.

The Association was the plaintiff in the Chancery Court. At the conclusion of the evidence offered by the Association, the defendant (appellee here) filed her written pleading, claiming that the evidence offered by the Association was insufficient to sustain a decree in its favor. In other words, the defendant offered a demurrer to the evidence, under Act No. 470 of 1949 (see § 27-1729 Ark. Stats. Cumulative Pocket Supplement). The Chancery Court sustained the demurrer and dismissed the case, and this appeal challenges the correctness of the dismissal.

In *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, we held that a demurrer to the evidence could be filed, in an equity case, under Act No. 470 of 1949; and that in such instance, the duty of the Chancery Court was ". . . to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered, fails to make a *prima facie* case . . ." We also pointed out that in passing on the demurrer to the evidence, the Chancellor would not weigh the evidence; he would merely act as a Circuit Judge would act when passing on a motion for an instructed verdict: that is, he would view the evidence in the light most favorable to the plaintiff, and if so viewed a *prima facie* case had been made, then the demurrer to the evidence should be denied, just as a motion for an instructed verdict would be denied by a Circuit Judge.[1]

[1] The holding in *Werbe* v. *Holt* has been followed in all subsequent cases in which the demurrer to the evidence has been an issue. Some such cases are *Poynter* v. *Williams,* 218 Ark. 570, 237 S. W. 2d 903; *Mo. Pac.* v. *United Brick Local,* 218 Ark. 707, 238 S. W. 2d 945; *Mc-*

When we test the case at bar by the holding in *Werbe* v. *Holt (supra),* i. e. give the evidence offered by the Association its strongest probative force, these matters appear:

(a) Henrietta Cullins testified: that Lena Jordan had no money of her own; that the money belonging to the Association was turned over to Lena Jordan, who was managing the Association's hospital; that Lena Jordan disposed of other property of the Association and with the proceeds acquired the property here in dispute; and that she used, exclusively, the funds of the Association in such acquisition.

(b) Theodore Jordan testified that the property here in dispute was purchased for the Association by Lena Jordan, its Agent.

(c) Wash Jordan testified that he visited the property in dispute and had a discussion with Lena Jordan, and was advised by her that the property here in dispute was being operated by Lena Jordan for the Association.

(d) From other evidence it was shown that Lena Jordan purchased the property here involved with money furnished entirely by the Association, and that she admitted that she was operating the property exclusively for the Association.

The plaintiff's evidence, given its strongest probative force, was sufficient to justify a finding of a trust in favor of the plaintiff. See *Wilson* v. *Edwards,* 79 Ark. 69, 94 S. W. 927; *Home Land & Loan Co.* v. *Routh,* 123 Ark. 360, 185 S. W. 467; *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437; *Edlin* v. *Moser,* 176 Ark. 1107, 5 S. W. 2d 923; *Shelton* v. *Lewis,* 27 Ark. 190; *Barron* v. *Stuart,* 136 Ark. 481, 207 S. W. 22; *Nelson* v. *Wood,* 199 Ark. 1019, 137 S. W. 2d 929; and *Mack* v. *Martin,* 211 Ark. 715, 202 S. W. 2d 590.

Cool v. *Jones,* 221 Ark. 123, 252 S. W. 2d 80; *Laws* v. *Melton,* 221 Ark. 466, 253 S. W. 2d 966; *Paskle* v. *Paskle,* 221 Ark. 733, 255 S. W. 2d 671; and *Hammond* v. *Stringer,* 222 Ark. 189, 258 S. W. 2d 46.

So the defendant's demurrer to the evidence should have been overruled and the defendant allowed to proceed as she saw fit. Accordingly, the decree of dismissal is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

COOPER *v.* COOPER.

5-297 265 S. W. 2d 4

Opinion delivered March 1, 1954.

Jameson & Jameson, for appellant.

Peter G. Estes and *Jeff Duty,* for appellee.

ED. F. MCFADDIN, Justice. From a decree refusing her a divorce, Mrs. Cooper brings this appeal.

Mr. and Mrs. Cooper were married in 1932, and lived together until November 29, 1952, when she refused to longer live with Mr. Cooper because of his alleged indignities. Claiming that he falsely accused her of "running around" with other men, she filed this suit for divorce and property settlement on February 23, 1953. The testimony was taken *ore tenus* on April 30, 1953; and resulted in a decree dismissing Mrs. Cooper's complaint for want of equity.

It would serve no useful purpose to recite all of the testimony of the witnesses. The gist of Mrs. Cooper's

case is her claim that Mr. Cooper falsely accused her of infidelity. His defense is that he never accused her of infidelity, but merely asked her to explain to him some of her absences. That Mrs. Cooper's conduct was such as to warrant her husband in asking for explanations is clearly established by occurrences like these:

(1) The Coopers were living in Memphis; and Mr. Cooper went to Colorado to see about a farm he owned there. When he returned to Memphis, he found that Mrs. Cooper had departed, leaving no forwarding address with anyone. She said: "I did not want him to find me." Mr. Cooper spent several months trying to locate his wife; and then found her working in a hotel in Jackson, Tennessee. She testified that she tried to get him to sue for a divorce but he would not agree to it; instead, Mr. Cooper rented an apartment and continued to live with Mrs. Cooper.

(2) Again Mrs. Cooper left. This time she went to Tulsa, ostensibly to visit her sister. Instead, she got a job working in a cafe in Tulsa and refused to return to her husband. She said she still wanted a divorce. Mr. Cooper went to Tulsa and finally persuaded Mrs. Cooper to return with him to Memphis, where he had purchased a home.

(3) Ultimately the Coopers moved to Arkansas, as she promised to live with him if he would buy a farm here. Then Mrs. Cooper went to Memphis to show their house to some prospective buyer. Instead of returning to Arkansas, she stayed in Memphis and got a job working as a cashier at a "drive-in," where her hours were from 6:00 P.M. to 2:00 A.M. Mrs. Cooper would get home from work at all sorts of hours and with various escorts.

The record is replete with testimony about Mrs. Cooper's conduct that would certainly justify her husband in asking an explanation. In *Settles* v. *Settles,* 210 Ark. 242, 195 S. W. 2d 59, we said, on this matter of false charges of infidelity as constituting indignities:

"In Schouler's Divorce Manual by Warren, § 104, p. 133, it is said:

" 'To constitute indignities, accusations of infidelity must not only be false, but must have been made without foundation and with the intent to wound, and when made in good faith and on the basis of doubts and suspicions reasonably born of appearances, they are not to be treated as indignities.'

"This principle was approved by this court in the case of *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86." See also 27 C. J. S. 588; and see also Annotation in 143 A. L. R. 623.

That Mr. Cooper loves his wife is clearly reflected by the testimony and the correspondence in the record. He has always been financially able to take care of his wife, and has always provided for her, and urged her not to work at the places that she did. As far as he is concerned, they may yet have a happy home. We conclude that the Chancery Court ruled correctly in denying Mrs. Cooper a divorce.

Affirmed.

[redacted]

WHITE *v.* GRIMMETT.

5-320 265 S. W. 2d 1

Opinion delivered March 1, 1954.

[redacted]

Ervin M. Brewer, for appellant.

U. A. Gentry, for appellee.

J. SEABORN HOLT, J. In a proceeding authorized by and in conformity with §§ 76-110 and 76-111, Ark. Stats. 1947 (Act No. 26, March 23, 1871), the Pulaski County Court, on June 22, 1933, by proper order, established a private road upon a portion of the Northwest Quarter of the Northeast Quarter (NW¼ NE¼) of Section 31, Township 2 North, Range 14 West, Pulaski County, on the petition of M. E. Bradford, who was then the owner of the Southwest Quarter of the Northeast Quarter (SW¼ NE¼) of said section. This order was as follows:

"On this day coming on for hearing a petition of M. E. Bradford, for the establishment of a private road on and across the NW¼ of the NE¼, Section 31, Township 2 North, Range 14 West, Pulaski County, Arkansas, said property belonging to N. H. Joyner, and it appearing to the court that Flake Stanley, J. W. Denson and L. C. Herrington have heretofore been appointed viewers to examine said situation and make their report to the court, laying out said road and assessing the damages for the same if in their opinion said road should be granted; and it further appearing to the court that said viewers have filed their report and recommended to the court that said road be granted as follows, to-wit:

"Begin 708 feet West of Junction of the East line of the NW¼ of the NE¼, Sec. 31, T 2 N, R 14 W, with middle of county road; thence 507 feet south to the property line of SW¼ of the NE¼, Sec. 31, T 2 N, R 14 W, Pulaski County, Arkansas, said road to be 15 feet wide.

"And it further appearing that said viewers find that said road is a necessity and should be granted and the route set forth as above described is a practical one, and a necessity to the petitioner, M. E. Bradford, and the court being well and sufficiently advised as to all matters of fact and law arising herein, and the premises being fully seen, it is by the court ordered, adjudged and decreed that said report in all things

be ratified, approved and confirmed and said road is hereby established to be located as herein described.

"And it further appearing to the court that said viewers have allowed the following sum to N. H. Joyner, to-wit: $25 for damages, and it further appearing to the court that all matters of costs, including compensation to viewers and damages to said N. H. Joyner have been paid by the said M. E. Bradford, it is further ordered, adjudged and decreed by the court that said report be ratified and confirmed in all things and that said road be established as a private road. (Signed) R. A. Cook, Judge."

Appellee, Grimmett, is the present owner of the land over which the private road was located and appellant, White, is the present owner of the SW¼ NE¼ immediately south of Grimmett's land, having acquired it in 1944 from M. E. Bradford.

August 7, 1951, Grimmett, together with other freeholders of Pulaski County residing in the community of the private road, petitioned the County Court to relocate and re-establish the present private road so as to follow quarter section lines (that is east from White's residence and improvements to his Northeast corner, thence North to 12th Street Pike, a total distance of approximately 1,114 feet, the proposed road to be 15 feet, with 7½ feet on each side of the land), part of which would be on Grimmett's land and the other on land of the present owners, including appellant, J. O. White.

Appellant, White, and others, filed Remonstrance, alleging "that the said M. E. Bradford and/or members of his family, including these remonstrants, have had the open, continuous and adverse use of said road for twenty-two years. That said private road as established is an appurtenance to the property of J. O. White, who, as grantee of the said M. E. Bradford, is now the owner of the SW¼ NE¼, Section 31, Township 2 North, Range 14 West. . . . That the proposed new location of said road (describing it) would not be on as good ground as the old and established road and would not be on the land of petitioners as is provided by law; that the change of

the road to the location prayed for in said petition would not be practical or reasonable as the nature of the soil and the contour of the land would require a great expenditure of money and the maintenance of a road located there would be at great cost.

"Remonstrants would further show to the court that the petitioners have not proposed to open as good a road as the old road, on their land and at their expense, and that for the reasons enumerated herein said petition should be denied."

On a hearing May 1, 1952, the Pulaski County Court entered a final order changing the location of said road and relocating it to coincide with quarter section lines as prayed, but to be 40 feet wide, 20 feet on each side of the quarter section and property line, and vacated the present private road. No provision was made for the opening or maintenance of this new road.

On appeal by the Remonstrants to the Pulaski Circuit Court, trial resulted in an affirmance of the County's order of May 1, 1952, and judgment vacating and relocating the present private road to coincide with the quarter section lines, and to be 1,114 feet long and 40 feet wide, 20 feet on Grimmett's land and 20 feet on White's land, and ordering $15 paid to White as damages. In said judgment no provision was made for the opening or maintenance of the new road.

This appeal followed.

Appellant, J. O. White, testified that he is now, and has been since 1944, the owner of the SW¼ NE¼, Section 31, Township 2 North, Range 14 West, Pulaski County; that his property is south of and joins Grimmett's forty on which the private road is located. His residence and improvements are located on the North part of his property 800 feet from the East line and 496 feet South of 12th Street Pike. The private road extends from his house to the 12th Street Pike. The proposed road of appellees is 1,114 feet long and the private road 496 feet long. His business is operating a bus line from Ferndale to Little Rock. "Proposed road would increase

distance to Ferndale a quarter mile each trip, buses make 6, 8 and 10 trips to improvements each day. I figure additional cost to me to go around quarter section line to be $500 per year at 11 cents per mile. My children go straight down to 12th Street to school bus, wife stands in door and watches children get on school bus. . . . I have figured 7.133 acres of Grimmett's land is cut off by present road, land cost Grimmett $98.07. Grimmett has not offered to build proposed road. County has entered no order to develop new road, nobody has offered to open new road. I offered Grimmett $100 an acre for the land cut off. Present road is on high ground, natural rock base, requires no maintenance, has no bridge on it. Pulaski County has never spent a penny on it. Proposed location has two low places, would require 24-inch tile about 100 feet in rainy weather, about 150 feet East of my house, comes over ridge 10 feet high, then another slash 250 feet long. In winter you can't walk across it, would bog over shoe tops. Would require 250-foot fill with 36-inch tile, goes across another one 8 or 10 feet wide, and there is another branch that comes through here. Tile would have to be there and would require 8-10-foot ditch and tile, or you could tie them together and build one big bridge. There was a little old road from my Northeast corner to 12th Street Pike, had galvanized pipe that won't carry water, is washed out 12 or 15 feet wide, low and should be raised about 4 feet to make a road. At highway is 3-foot ditch, old pipe is mashed up, 20 or 25 years old and rusted out. Half of new road would be usable as is."

He estimated that it would cost him approximately $3,000 to relocate the road as prayed by appellees. "I object to the taking of 20 feet of my land 1,114 feet long to construct road. I already have road. Bought that 40 from Mrs. Bradford in 1944."

S. D. Gray testified, on behalf of appellants, that he lived a little over one-half mile from 12th Street and Grimmett's land. He was acquainted with land on which road is located. It is on high ground and requires no maintenance. Is acquainted with area in proposed new

road, land is very low in spots and has some high places, is a long way from being level. About 150 feet from 12th Street, it is very low, water stands on it constantly in wet weather. There is a form of silt along the new road, it would be expensive and not very suitable. It would be impractical and maintenance would be high. He does not think it practical to change road going from a foundation that is very good to travel over to a place that takes quite a bit of upkeep, and takes quite a bit to build. Grimmett's 7.133 acres cut off by the present road is not cultivated, is scrub timber and is not pasture land, but is woods land.

Grimmett's son, Lloyd, lives on 12th Street Pike and uses 112 feet of this private road.

The above testimony appears not to be contradicted.

We are here concerned with an attempt to vacate and relocate a private road, established and located by the Pulaski County Court in 1933 in strict compliance with the above sections of the statute, relating to private roads, *Houston* v. *Hanby,* 149 Ark. 486, 232 S. W. 930.

This private road, as indicated, goes from a point on 12th Street Pike to the home of appellant, White, where it comes to a dead end. It is his only outlet. He and his predecessors have had the uninterrupted use of this road since its establishment. His immediate predecessor, Bradford, in title, as indicated, had this road established and paid all damages assessed.

Appellees appear to have proceeded under other sections of the statutes having to do with the establishment and relocation of a public road (not a private road, as here). They do not point out any specific statute on which they rely for the relief sought, and we know of no statute under which they would be entitled to such relief. On the record presented here where appellants seek to retain the continued use of this private road, we hold that appellees have failed to produce such evidence, or make such showing, as would support the judgment of the Pulaski Circuit Court.

Accordingly, the judgment of the Pulaski Circuit Court, affirming the County Court Order of May 1, 1952, and vacating and relocating the private road in question, is reversed and the cause remanded with directions to deny the relief prayed by appellees and to enter a judgment consistent with this opinion.

SCURLOCK, COMMISSIONER OF REVENUES *v.* ELLIOTT.

5-319 265 S. W. 2d 5

Opinion delivered March 1, 1954.

O. T. Ward, for appellant.

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

GRIFFIN SMITH, Chief Justice. In August, 1951, Robert L. Elliott sold his mercantile business to Melvin Arbaugh, and at the time with which we are concerned Arbaugh owed Elliott $1,296.88. An audit by the department of revenues showed that Elliott was delinquent on his gross receipts tax $1,701.46. Between September 6 and the end of the year, appropriate notice was given Elliott that the indebtedness had been ascertained and he was given the statutory time for making protest. When no response was received from the debtor the com-

missioner of revenues caused a certificate of indebtedness to be filed with the clerk of Washington circuit court. Ark. Stat's, § 84-1912. The certificate was filed January 6, 1953.

This litigation was started with a petition by the Commissioner of Revenues for a writ of garnishment intended to arrest the payment by Arbaugh of the balance he owed Robert Elliott. This balance was thereupon paid into court through interpleader.

In addition to a denial that he owed the state anything, Robert Elliott asked that the lien "against his property" be stricken from the record. John Q. Elliott (Robert's brother) intervened, claiming that after Robert placed the Arbaugh contract in escrow with the First State Bank of Springdale the debt due Robert was assigned to him. He claimed that from February, 1949, until January, 1951, he had loaned Robert $10,120 evidenced by four notes; that when Robert assigned the Arbaugh indebtedness to him Arbaugh's obligation to Robert was extinguished and that he, John Q. Elliott, was owner of the paper for value without notice of the state's claim, hence his title was paramount to the state's certificate of indebtedness. The Chancellor held that the plaintiff had failed to show that the transfer was fraudulent and dismissed the petition for garnishment.

A majority of the judges think the evidence was not sufficient to show that the assignment was colorable. An official of the bank verified essential facts regarding the assignment, and the notes were shown or tendered. John Q. Elliott testified that he advanced $5,300 to Robert in February, 1949. The payment, he said, was to aid Robert in purchasing the store he later sold to Arbaugh. Robert Elliott's letter assigning the debt was dated prior to the garnishment proceedings. See *Dixon Printing & Stationery Co.* v. *Plank,* 144 Ark. 485, 223 S. W. 36.

Affirmed.

Mr. Justice WARD dissents.

Opinion on rehearing delivered March 3, 1954.

Q. Byrum Hurst and *Wendell O. Epperson,* for petitioner.

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

OPINION ON REHEARING

PER CURIAM. This is an original action by the appellant for leave to file a petition for writ of error *coram nobis* in the circuit court pursuant to the rule adopted by this court in *State* v. *Hudspeth,* 191 Ark. 963, 88 S. W. 2d 858. The original petition was filed February 17, 1954. At that time the date of appellant's execution had been previously extended by the Governor and set for February 19, 1954, following the affirmance of appellant's conviction of the crime of murder in the first degree by this court on October 26, 1953. Petition for rehearing on the original appeal was denied November 23, 1953.

Because of the time element involved, this court was convened in extraordinary session on February 17, 1954. After hearing argument of counsel we proceeded to an examination and consideration of the petition to which were attached a petition and affidavits previously attempted to be filed by appellant in the Garland Circuit Court. These matters were carefully considered in connection with the entire record already made and in accordance with the following general rule stated in 24 C. J. S., Criminal Law, § 1606c (1): "An application made to the appellate court for permission to proceed in the lower court should make a full disclosure of the specific facts relied on and not merely the conclusions of the party as to the nature and effect of such facts. In the exercise of its discretion as to whether the petition for leave should be granted, the court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof, and will grant leave only when it appears the proposed attack on the judgment is meritorious."

It was noted that many of the allegations in the petition sought to be filed in the circuit court related to alleged errors of law which were fully considered and determined on the original appeal. There were other allegations in said petition relating to factual matters which were either known to appellant at the time of trial or could have been known by the exercise of reasonable diligence. In *State* v. *Hudspeth, supra,* we said: "A

writ of error *coram nobis* lies for the purpose of obtaining a review and correction of a judgment by the same court which rendered it, with respect to some error of fact, not of law, affecting the validity and regularity of the judgment. 34 C. J. 390." It is also well settled that the writ does not lie where the mistake of facts relied upon was known at the time of trial or could have been known by the exercise of reasonable care and diligence unless the defendant was acting under some duress such as fear of mob violence. *Bass* v. *State,* 191 Ark. 860, 88 S. W. 2d 74; *State* v. *Hudspeth, supra.* The general rule is stated as follows by the annotator in 58 A. L. R. 1286: "The party seeking to avail himself of the remedy by a writ of error *coram nobis* must show that it was owing to no negligence on his part that the fact was not made to appear on the former trial, for if, by the exercise of all reasonable care and diligence, he could have availed himself of the fact on the former trial, the remedy should be denied him." In 31 Am. Jur., Judgments, § 806, it is said: "A reason assigned for the rule is that if the applicant for the writ has knowledge of the fact, and such fact if divulged would be for his benefit, he should not be permitted to conceal it, gamble upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act."

Appellant's principal contention in the oral argument on February 17th, was based on the following allegation in paragraph II of the petition: "That if leave and permission is granted by this court for the filing of the petition for Writ of Error *Coram Nobis,* in the Garland Circuit Court, your petitioner verily believes that he will prove that the petitioner was insane at the trial of his case in the Garland Circuit Court and was insane at the time he was convicted by the jury; this question of fact was not an issue in the trial of this cause nor was it an issue before this court on appeal and your petitioner verily believes that he is entitled to this writ and to have the question of his sanity at the time of the trial determined by jury."

There were only four affidavits attached to the petition sought to be filed in circuit court which have any bearing on the issue of insanity. These are the affidavits of J. T. and Ruby Jenkins McClusky, Ray B. Davis, and Lester Cox. These affidavits contain statements similar to those found in the testimony of several witnesses at the original trial, to the effect that affiants were of the opinion that appellant was not normal mentally at the time of the killing or at the time of the trial because he had suffered from "spells" or "black-outs" on occasions prior to the trial. J. T. McClusky stated that appellant was not mentally capable and did not know what was going on at the trial because he then told affiant "that he planned to buy a new Ford and take a trip." Davis was of the opinion that appellant was "not mentally normal" prior to the trial because he had forgotten a debt which affiant owed him. In her affidavit, Mrs. McClusky, appellant's daughter, stated that she did not believe her father was sane at the time of the killing nor when the affidavit was made on February 13, 1954, because of "black-outs" he suffered prior to the date of the killing. Lester Cox, a close friend and business associate of the appellant, testified at great length at the original trial but gave no testimony indicating that appellant was insane. In none of the affidavits is it suggested that appellant suffered from a "spell" or "black-out" at the time of the trial.

The question of appellant's insanity at the time of the killing was submitted to the jury in instructions given on the court's own motion and other instructions requested by both the State and appellant. Although counsel for appellant stated in the oral argument on February 17th that he had the definite feeling throughout the two-day trial that there was something then wrong with appellant mentally, counsel admitted there was no formal plea made of insanity *existing at the time of the trial* and no request then made for further investigation of his mental condition by the State Hospital in accordance with Ark. Stats., §§ 43-1301, 1303, and 1305. This amounted to something less than reasonable diligence under the rule hereinbefore mentioned. Counsel also stated that

appellant's sanity since his confinement in the Penitentiary awaiting execution had been inquired into under the provisions of Ark. Stats., § 43-2622, resulting in a finding of sanity. The same finding had been made as to appellant's sanity at the time of the commission of the offense prior to the trial when appellant was committed to the State Hospital upon the joint petition of appellant and the State.

We have also held that where there is a suggestion of the present insanity of the accused at the time of his trial, the failure of the trial court to then institute an inquiry into that question must be corrected, if erroneous, by appeal or writ of error and not by writ of error *coram nobis*. *Kelley* v. *State,* 156 Ark. 188, 246 S. W. 4; *Sease* v. *State,* 157 Ark. 217, 247 S. W. 1036.

Even if we assume that counsel acted with due diligence in failing to ask for an inquiry into appellant's present sanity at the time of the trial or before sentence, we reach the conclusion that the supporting affidavits fail to disclose sufficient specific facts to warrant the conclusions of the affiants. The meager facts stated are woefully insufficient to sustain the conclusions of insanity alleged and the attack made on the judgment is, therefore, lacking in merit.

In the petition sought to be filed in the circuit court there were also allegations about the jurors; but these allegations were either unsupported by affidavits or failed to show that such allegations refer to facts which could not have been discovered by the exercise of reasonable diligence within the time for filing a motion for new trial prior to the original appeal.

On this petition for rehearing appellant's principal contention is that a denial of his petition amounts to a denial of due process of law under the U. S. Constitution. The United States Supreme Court held to the contrary in the case of *Taylor* v. *Alabama,* 335 U. S. 252, 68 S. Ct. 1415, 92 L. Ed. 1935, under circumstances more favorable to the defendant than those in the instant case.

The petition for rehearing is denied.

Justice Robinson dissents.

LANGSTON *v.* MOSELEY.

5-301 265 S. W. 2d 697

Opinion delivered March 8, 1954.

Bruce Ivy and *Harrison & Harrison,* for appellant.

A. F. Barham and *Henry J. Swift,* for appellee.

GRIFFIN SMITH, Chief Justice. Roy Langston, Paul Burns, and Belford Scott were sued to compensate personal injuries sustained by Henry Moseley. The court directed a verdict against Burns and Scott and the jury assessed damages at $3,000. From this phase of the controversy there is no appeal. Langston's negligence was submitted to the fact-finders and a verdict in Moseley's favor for $3,000 was returned. From a judgment on the verdict comes this appeal.

Langston was driving across a street intersection in Osceola and had passed the line used by pedestrians when he realized that the red signal light was against him. In an effort to mend the situation he backed five or six feet and in doing so drove against and under the front bumper of Burns' car, locking them. Burns endeavored to disengage the cars. According to Langston, Burns was

"raising up and down on the bumpers" when he (Langston) got out of his car. He started to the rear, but testified that he did not go all the way back. On the contrary, he acted on Burns' suggestion to back his car slightly to relieve the tension. Langston says that it was while he was undertaking to do this that Scott negligently ran into his car.

Henry Moseley's version of the transaction resulting in his injury is that he was standing not far from the interlocked cars when Burns undertook to disengage them. Langston was standing on the traffic side of the automobile, while Burns was on the right, behind the Langston car. Burns called him to assist in separating the bumpers. Moseley walked in front of Langston's car and Langston, as he followed, said, "You get up here"—indicating the bumpers. Burns was on the opposite side when Moseley was told where to go. Moseley was quite certain that Langston told him there wasn't any danger. While Moseley, assisted by Burns, was on the bumpers shaking them, Scott hit the Langston car, the impact knocking Moseley to the paving. Dr. C. W. Silverblatt testified that the injury was considered serious, involving an ankle joint. Treatment required the application of a plaster cast, which was kept in place for about eight weeks.

Langston was positive that he did not tell Moseley to get on the bumper, and that he gave no assurance of safety, but this was contradicted and presented a factual issue for the jury's determination.

There was testimony that Moseley, when he responded to the request for assistance, was on the street or traffic side of the two cars, while Burns was on the opposite side. Burns admitted calling to Moseley, but did not know whether Langston had asked for help. Traffic created considerable noise and it was possible for Langston to have called without attracting the attention of this witness. In several respects Burns contradicted statements made by Langston.

We think the court's instructions—complained of by appellant—were proper in the circumstances. Langston

was not entitled to a directed verdict. The jury was told that if it found that Burns and Langston, in their endeavor to disengage the bumpers, were engaged in a joint enterprise, and that if in furtherance of this purpose either of them asked for Moseley's assistance, then, if these contentions should be established, and if Moseley were placed in danger, and the defendants Burns and Langston did not use ordinary care to warn him of peril a reasonably prudent person would have apprehended, Langston would be liable. Appellant thinks the instructions were inconsistent and confusing, but we do not find them open to this objection. Neither may error be predicated upon the court's action in explaining to the jury why separate verdicts should be given.

It was for the jury to say whether Langston, whose act in backing his car into Burns' bumper and impeding traffic, cast upon this defendant the duty of keeping a lookout. It is conceded that this was not done. The fact that Scott violated a traffic regulation by imprudently driving on the wrong side of the street to avoid injury to himself or to others when suddenly confronted with a speeding car was, of course, a circumstance to be considered in ascertaining whether there was want of prudence in placing appellee in a precarious position without reckoning traffic dangers.

It has long been the rule that where the negligence of two or more persons concurs to produce harm, either is liable to the injured person. *Missouri Pacific Railroad Company* v. *Riley,* 185 Ark. 699, 49 S. W. 2d 397. We think there was substantial evidence that Burns and Langston were engaged in a joint adventure or joint enterprise, and that the jury had a right to consider the interest of each and the attending requirement of care.

A person responsible for only one of several causes combining to produce injury is liable if, without his negligent act, injury would not have attended. *Phillips Petroleum Company* v. *Berry,* 188 Ark. 431, 65 S. W. 2d 533.

Affirmed.

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

Ward, J. I cannot agree with the majority opinion because it ignores pertinent facts and recognized principles of law. Essentially the fact situation is this: Appellant asked appellee to help disengage the rear bumper of his car which was then sitting on the proper side of the street. While appellee was so engaged Scott drove his car [not from the rear of appellant's car where danger might have been expected] from across the street and into appellant's car, injuring appellee. This presents a typical situation calling for a discussion of "proximate cause" and "efficient intervening cause," neither of which were discussed in the majority opinion. The majority opinion erroneously assumes that the negligence of appellant and Scott were both concurrent and efficient.

With no exceptions to the contrary, the reports of this state and other states are replete with enunciations of the law of negligence which preclude a recovery here. In the early case of *Martin* v. *Railway Company,* 55 Ark. 510, 19 S. W. 314, the rule was announced that negligence is not actionable unless it is the procuring cause. In that case appellee, contrary to its contract with appellant, had failed to remove cotton from its warehouse and the cotton was later destroyed by fire. The court held there was no liability using this language:

"The mere failure of the defendant to perform its contract with the compress company was in no wise the juridical cause of the fire. There was no direct connection between the neglect of the defendant to furnish transportation according to its contract and the fire. The failure to furnish cars was one of a series of antecedent events without which, as the result proves, the fire probably would not have happened, for if the cotton had been removed there might have been no fire. But it was not the direct and proximate cause, and did not make the defendant responsible for losses caused by the fire."

In the case of *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898, 43 A. L. R. 143, in an action based on negligence

where there was an intervening cause the court at page 71 of the Arkansas Reports said:

"'Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative; for the general reason that causal connection between negligence and damages is broken by the interposition of independent responsible human action.'"

In *James* v. *James,* 58 Ark. 157, 23 S. W. 1099, the facts were: A ginner agreed to gin cotton left at a gin by a certain time and failed to do so and the cotton was subsequently destroyed by fire while at his gin. The jury was instructed to find for the plaintiff if it should find that the defendant had contracted to gin the cotton by a certain time and that he negligently failed to do so. The cause was reversed because of the above instruction. The court stated: "The failure to gin on Monday was one of a series of antecedent events without which the loss would not have occurred but such failure was in no sense the proximate cause of the loss."

In *Pittsburg Reduction Company* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A. N. S. 905, the court stated the rule applicable in the case under consideration in these words: "It is a well settled general rule that if, subsequent to the original negligent act a new cause is intervened of itself sufficient to stand as the cause of the injury the original negligence is too remote."

In *Wisconsin & Arkansas Lumber Company* v. *Scott,* 153 Ark. 65, 239 S. W. 391, where plaintiff sought to have the jury instructed on negligence of the defendant in leaving a set-screw exposed and also in allowing rubbish to accumulate, this court in reversing the lower court said:

"If the alleged defect in this respect was not the true and proximate cause of the injury, it necessarily follows that the court erred in submitting it to the jury

as a question of negligence on account of which the plaintiff might recover."

The same uniform rule on "proximate cause" can be found in any number of our decisions, among some of which are: *Meeks* v. *Graysonia, Nashville & Ashdown Railroad Company,* 168 Ark. 966, 272 S. W. 360; *Alaska Lumber Company* v. *Spurlin,* 183 Ark. 576, 37 S. W. 2d 82; *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. 2d 717; *Arkansas Power & Light Company* v. *Marsh,* 195 Ark. 1135, 115 S. W. 2d 825; and, *Central Flying Service* v. *Crigger,* 215 Ark. 400, 221 S. W. 2d 45.

In the *Marsh* case, *supra,* the court quoted with approval from Corpus Juris the following:

" 'Intervening cause as proximate cause. But an intervening cause will be regarded as the proximate cause, and the first cause as too remote where the chain of the result cannot be said to be the natural and probable consequence of the primary cause, or one which ought to have been anticipated. The law will not look back from the injurious consequences beyond the last efficient cause, especially where an intelligent and responsible human being has intervened.' "

Our decisions have also laid down a uniform rule by which we may judge what is a proximate cause or an effectual cause. In short the rule is that a person of reasonable intelligence must be able to foresee that damage might result. In the case under consideration regardless of whether or not Langston was negligent in "backing up" it cannot be said that he should have foreseen the possibility of Scott's car running into his car. In *Arkansas Valley Trust Company* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A. N. S. 1020, at page 165 of the Arkansas Reports appears a quotation of Judge BATTLE from a former decision as follows:

" 'In determining whether an act of a defendant is the proximate cause of an injury the rule is that the injury must be the natural and probable consequence of the act—such a consequence, under the surrounding circum-

stances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act.' ''

In the case of *LaGrand* v. *Arkansas Oak Flooring Company,* 155 Ark. 585, 245 S. W. 38, where this same question was discussed the court said: ". . . still the appellee would not be liable unless, in the exercise of ordinary care under the circumstances, it could have been anticipated or foreseen that the injury might have occurred to the appellant while working at the place where he received the injury.''

In the *Meeks* case, *supra,* in this connection, it was said: ''It has been uniformly held that, in order to warrant a finding that negligence is the *proximate cause* of the injury, it must appear that the injury was a natural and probable consequence of the negligence and that it ought to have been foreseen in the light of attending circumstances.''

In the *Central Flying Service* case, *supra,* it was said: ''Proximate cause has been defined as a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue.'' The general rule is announced in *Missouri Pacific Railroad Company, Thompson, Trustee,* v. *Davis,* 208 Ark. 86, 186 S. W. 2d 20, at page 98 of the Arkansas Reports.

From the above it is also obvious that appellee was not injured because of having been placed in an unsafe position or place to work. The law on this point is also well settled in the *LaGrand* case, *supra,* at page 592 of the Arkansas Reports. The court in commenting on an instruction of the lower court which stated that the defendant would not be liable ''unless, in the exercise of ordinary care under the circumstances it could have anticipated or foreseen that the injury might have occurred.'' In approving the instruction the court said: ''The master is only required to exercise ordinary care to furnish his employee a safe place in which, and safe tools with which, to do his work, and if the master, in the performance of this duty, has taken every precaution that a man of ordinary care and prudence would take under

the same circumstances, then he is not guilty of any negligence." In the case under consideration it cannot be said that Langston should have foreseen that Scott's car would run into his car, and, therefore, under this uniform rule he cannot be held liable.

In the case of *Missouri Pacific Railroad Company* v. *Horner,* 179 Ark. 321, 15 S. W. 2d 994, in discussing the rule relative to a safe place to work the court said: "There is no dispute about the appellee being injured. There are many injuries to persons and property for which the law furnishes no redress, and proof of injury alone, without proof of negligence causing the injury, does not entitle one to recover." Following the above the court quotes with approval: " 'The liability of the master for injuries to servant rests primarily on the broad principle of law that where there is fault there is liability, but where there is no fault there is no liability.' " At the last of the opinion the court commenting on an instruction said: ". . . as there was no complaint about the place to work, and especially because the appellee knew all about it and assumed the risk, this instruction, under the circumstances, should not have been given." In the case under consideration not only was there no complaint about the place but the only evidence, that of appellee, is the positive evidence that it was a safe place.

Although the principles governing the case under consideration have been, as shown above, often and uniformly announced it is necessary to turn to other jurisdictions to find cases where the facts are practically the same in effect as they are here. In all of these cases, as indicated below, it is clearly shown there is no liability in this case. In the case of *Venorick* v. *Revetta, et al.,* 152 Pa. Super. 455, 33 A. 2d 655, the following factual situation existed. Revetta's grocery truck was parked on a highway in violation of law while he was serving customers. Plaintiff who had just made a purchase was standing at the rear of defendant's truck with her back toward approaching traffic. Another truck approached from the rear and was attempting to pass when it met

another vehicle approaching in the opposite direction and seeing it would be impossible to pass he ran into the defendant's truck and injured the plaintiff. The court held that there was no liability quoting with approval these words:

" 'Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause.' "

The accident happened in open daylight and the court stated that the driver of the second truck became aware of the potential danger created by the parked truck within ample time to have avoided the accident. The court also used language which is highly significant in the case under consideration.

"This likewise disposes of the contention that Revetta failed to take reasonable precautions to warn customers in the vicinity of the truck of approaching traffic. Even if the duty existed, Pendleton's conscious conduct was a superseding cause."

The ruling in the above cited case was based on a similar Pennsylvania case, *Kline, et al.*, v. *Moyer, et al.*, 325 Pa. 357, 191 A. 43, 111 A. L. R. 406. In this case one Albert was forced to park his truck on the highway because of a broken axle. The highway where the truck was parked was straight and the view was unobstructed. While Albert was gone for repairs a car driven by the plaintiff from the opposite direction started to pass the truck when it met another car driven by Moyer which was going in the same direction the truck was headed and there was a headon collision. The question to be decided was stated by the court this way: Assuming that Albert was negligent in parking the truck "the important question presented on the appeal was whether such negligence was in whole or in part a proximate cause of the accident, or whether on the contrary it was legally insulated by in-

tervening negligence on the part of Moyer, reducing Albert's negligence to the status of a remote cause, and thereby absolving him from liability." In holding that the negligence of Albert was not actionable the court said:

" 'It is well settled that where there has been negligence in the doing of an act, the result of which is the creation of a dangerous condition, no liability will attach to the one responsible for the condition if an injury results which was not caused directly by this act, but rather by the intervening negligent conduct of a third party.' "

It was also said, in referring to Albert's negligence, that "the original negligence of the truck owner [Albert] became a non-causal factor divested of legal significance."

The Supreme Court of Minnesota in the case of *Goede* v. *Rondorf, et al.,* 231 Minn. 322, 43 N. W. 2d 770, reached the same conclusion by the same process of reasoning as in the two Pennsylvania cases mentioned above. The essential facts in this case were: When Goede attempted to turn to his right on Excelsior Avenue which was 40 feet wide and covered with ice the defendant, driving out of a filling station, onto the same street hooked his rear bumper onto the front bumper of Goede's car and dragged him approximately a half block down Excelsior Street. When Goede got out of his car and walked up to the locked bumpers a third car coming from an opposite direction hit Goede and killed him. His widow recovered $5,000.00 in an action against the defendant and the Supreme Court reversed the trial court holding that the defendant's negligence was not the proximate cause of the accident. The court stated the question this way: "The only question presented here is whether defendant's negligence, *which is conceded by defendant,* proximately caused or contributed to the death of plaintiff's decedent." (Emphasis ours.) Among other things the court had this to say: "If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all." Again the court said: "Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was

liable to result in injury to others then he is liable for any injury proximately resulting from it. . . . Consequences which flow in unbroken sequence without an intervening efficient cause, from the original negligent act are natural and proximate." Then the court in an effort to define an intervening cause such as would relieve from liability of the first act of negligence stated that it always depended on whether or not the original negligent party could have reasonably foreseen or anticipated the happening of the intervening cause. In this particular case the court said: "We think that the negligence of the hit-run driver was such an intervening force." In speaking of the negligence of the defendant the court said: "If it only became injurious through some distinct wrongful act or negligence of another, the last wrong is the proximate cause, and the injury will be imputed to it and not to that which is more remote."

The majority, in an apparent effort to bolster an otherwise weak opinion, mention that appellant placed appellee in an unsafe place. Appellee's own view of this matter was:

"Q. You knew there was danger, two cars tied together, you knew that?

"A. No, sir. Not both cars standing.

"Q. What caused you to fall?

"A. By the car hitting the car caused me to fall off.

"Q. The thing that actually hurt you, Henry, was when this car came across the street?

"A. Yes."

Thus this anomaly to the law of negligence: M. recovers from L. because of L's negligence in putting him in an unsafe place to work when M. says it was a safe place.

Justices Robinson and George Rose Smtih join in this dissent.

4762 265 S. W. 2d 542

Opinion delivered March 8, 1954.

George F. Edwardes, for appellant.

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

J. SEABORN HOLT, J. By information, appellants were charged jointly under § 41-1811, Ark. Stats., 1947, with the "crime of possessing forged and counterfeited instrument committed as follows, to-wit: The said defendants on the 10th day of July, 1953, in Miller County, Arkansas, did unlawfully, wilfully and feloniously, falsely and fraudulently have and keep in their possession divers false, forged and counterfeited checks and drafts and fictitious instruments purporting to be checks, etc."

Trial resulted in a verdict finding both guilty and leaving the punishment to be assessed by the Court. Pilgreen was adjudged to serve three years in the Boys' Industrial School, and Keese, three years in the State Penitentiary. From the judgment is this appeal.

Appellants first question the sufficiency of the evidence and their conviction under the above section of the statute, which provides in material part. "Whoever shall fraudulently keep in his possession or conceal the counterfeit resemblance or imitation of any bank bill, note, check, or draft, or any instrument which circulates as currency, of any corporation, company or person that exists, or may exist, whether such bill, note, check, draft or instrument be complete and filled up, or otherwise, or shall fraudulently keep in possession or conceal any fictitious instrument, purporting to be a bank bill, note, check or draft of any corporation, company or person, whether the same be filled up and complete or not, . . . or shall fraudulently . . . offer to pass, or assist, or be concerned in fraudulently buying, paying, or tendering in payment, altering or passing any such bill, note, draft, check . . ., shall be imprisoned in the penitentiary not less than three (3) nor more than ten (10) years."

After reviewing all the testimony, we have concluded that it was substantial and sufficient to support the jury's finding that appellants were guilty of the crime charged.

The record reflects that on July 10, 1953, appellant, Keese, entered the Belk-Jones Store in Texarkana and presented to the cashier a check for payment in the amount of approximately $71, drawn on the State National Bank, and signed "Willie Ray Smith" and payable to "George F. Norris." The cashier referred Keese to Mr. Jester, an employee whose duty was to approve checks. When Keese asked Jester to approve the check, Jester then telephoned the bank and was informed that the amount of the check was all right. Thereupon, Keese tore up the check and left the store. Jester, at once, notified the police, and together with another employe, Heflin, went out on the street to search for the pieces of the check, but none was found. Thurman Conley, an acquaintance of Pilgreen, at the time was sitting in a car in the same block in which the store was located. Pilgreen entered Conley's car, removed a check from his billfold and placed it "under the dash of my car." Conley overheard Jester say he was looking for a check, so he, Conley, removed the check that Pilgreen had placed under the dashboard, followed Jester and Heflin, and gave the check to Heflin. The check was as follows: "Texarkana, Arkansas, July 10th, 1953—THE STATE NATIONAL BANK of Texarkana—Pay to George F. Norris or bearer $71.50—Seventy-one and fifty cents—Dollars—Willie Ray Smith."

Heflin testified, in effect, that after he and Jester returned to the store and Conley delivered to him the check, copied above, he turned it over to the Police Department.

Deputy Sheriff Johnson testified that while Keese was in jail July, 1953, he obtained specimens of his handwriting, "I had him write Willie Ray Smith, Bill Keese, and the name, George F. Norris and also some dates, and the figures seventy-one fifty cents. . . . Did you advise him at the time that he did not have to do that? A. I don't believe I did. Q. In what manner did you obtain that specimen of his handwriting, did you ask him to do it? A. I had these names that were on this check and I asked him if he would write those names on this paper

for me and he did. Q. He agreed to do so? A. Yes, he raised no objections to it." These specimens were introduced in evidence.

Mr. Jones, head bookkeeper of the State National Bank, testified that he had had eight years of examining handwriting for the bank, that he was familiar with the handwriting of Willie Ray Smith, and that the signature of the above check (which check was introduced in evidence) was not Smith's signature and that the handwriting on the above check and the specimens procured by Officer Johnson were, in his opinion, written by the same person.

Willie Ray Smith testified that the signature on the above check was not his, and that he did not authorize any one to sign his name to it.

At the time the torn up check was presented by Keese at the store, he, Smith, had an account in the State National Bank.

We think the above testimony shows a definite plan and chain of events and acts connecting appellants with the crime charged and sufficient to establish their guilt.

The above statute makes it a crime for one to have in possession, with intent to defraud the "counterfeit resemblance or imitation of any . . . check, . . . that exists, or may exist," or to pass or to offer to pass such check, "or be concerned in . . . tendering in payment . . . or passing any such . . . check."

We think it obvious that under the plain terms of the above section, it was designed to apply not only to bank notes and currency, but also to the ordinary bank check, which is "a written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money." *Bouvier's Law Dictionary,* Vol. 1, page 475.

The evidence shows that appellants had in their possession two forged, fictitious and fraudulent checks, the

one that Keese tore to pieces in the store and the one left by Pilgreen in Conley's car, which was introduced in evidence. These two checks were practically identical in all essential parts.

We do not agree with appellants' contention that the above section, "was designed only 'to protect banks and to prevent people from possessing anything that was designed to circulate as currency, and a check drawn by an individual upon a bank is not such an instrument as included in the original statute.' " Had the Legislature intended such a narrow and strained construction, it could easily have said so.

A directed verdict for appellants was properly refused since the evidence was sufficient to show a violation of the above statute. "The trial judge may direct a verdict only where the evidence raises no material question of fact for the jury's determination." *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80, and *Ruffin* v. *State,* 207 Ark. 672, 182 S. W. 2d 673.

Appellants also say that the court erred in refusing their request for a severance. This contention is untenable for the reason that our statute, § 43-1802, Ark. Stats., 1947, provides: "When two (2) 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."

"The granting of a severance is within the sound discretion of the trial court." *Nolan and Guthrie* v. *State,* 205 Ark. 103, 167 S. W. 2d 503. Its action will not be disturbed, absent evidence indicating abuse of discretion.

We find no abuse of discretion here.

Appellants next argue "that the court erred in refusing to discharge the jury panel and in ordering the defendant, Doyle Pilgreen, into a trial during the same week that he had already been previously tried and committed, and this error was aggravated by the fact that it was known to the jury that tried him in the instant case,"

and that they were denied a fair and impartial trial. We do not agree.

The record reflects that Pilgreen had been tried for some offense during the same week in which both appellants were jointly tried in the present case and that jurors, Roberts and Crank, (of the regular panel) knew of such trial. Whether Pilgreen was found guilty or acquitted, or on what charge, is not disclosed. While the jurors were being questioned on *voir dire,* the record shows: "By MR. EDWARDES: (Questioning the panel as a whole) Gentlemen, have any of you heard of any case in this court at this term involving these defendants or either of them? (Thereupon, two jurors indicated that they had, said jurors being Buron Roberts and G. W. Crank, Jr.) Q. Did either of you hear the trial of that case? A. No, sir. (Both jurors answered in the negative). Q. Mr. Buron Roberts, I believe you were present when the jury was selected in the other case against Doyle Pilgreen? A. Yes, sir. . . . Now, all you members standing know that there was another case here against the defendant, Doyle Pilgreen—is there any one of you that doesn't know it? A. I have heard the name mentioned is all I know about it. Q. You are Mr. Buron Roberts? A. Yes, sir. Q. Is there any one still standing that was on the other jury that tried Doyle Pilgreen? (There was none indicated). Q. It has come to your attention during the court's examination of the jury that there was another case here; all of you understand that now? BY THE COURT: . . . In the court's qualifying this jury to serve on this case, no mention was made of any other case. . . . This jury panel has been examined fully, and they were asked that all who had served on any case in which either of these boys were involved would please be seated and they did, and so far as information being conveyed to these jurors, it could have been either of these defendants."

At this point, appellants moved that the court discharge the entire panel for the reason that it had come to the jurors' attention that there was another criminal charge against Pilgreen. The court overruled this mo-

tion with this statement: "The motion will be overruled for the reason that the jury has been fully interrogated about their knowledge of this case which is being tried now, and as to whether or not they could give the defendant a fair and impartial trial, based upon the law and the evidence in this case, and all have answered that they can and will do that."

Section 43-1911, Ark. Stats., 1947, provides: "A challenge to the panel shall only be for substantial irregularity in selecting or summoning the jury, or in drawing the panel by the clerk." *Shockiey* v. *State,* 199 Ark. 159, 133 S. W. 2d 630.

It appears that the jurors that tried appellants all answered, when examined, that they could, and would, give them a fair and impartial trial. Appellants did not exhaust their statutory rights of peremptory challenges. In fact, it does not appear that they made any such challenges at all.

The rule announced in *Wiley* v. *State,* 191 Ark. 274, 86 S. W. 2d 13, is applicable here. We there said: "Section 3152 of Crawford & Moses' Digest (now § 43-1911, Ark. Stats., 1947) provides: 'A challenge to the panel shall only be for substantial irregularity in selecting or summoning the jury, or in drawing the panel by the clerk.' The plain language of this section of the statutes is such as to exclude prejudice of the panel as cause for challenge thereto. This section of the statutes prescribes the only causes for which a jury panel may be excused, and therefore excludes all other causes not within its terms. Moreover, the record does not reflect that appellant exhausted or even exercised any of his statutory rights of peremptory challenges to relieve against the condition complained of; therefore, under repeated opinions of this court, he is in no position to urge this contention. *Hooper* v. *State,* 187 Ark. 88, 58 S. W. 2d 434."

We hold, therefore, that this assignment is without merit.

Appellants say that "the court erred in overruling the defendants' motion to require the prosecution to elect upon the specific charge that they would proceed, and in ruling that the information was not duplicitious."

The answer to this contention is that the record is silent as to any motion or ruling of the court referred to by appellants or whether any objections were made and exceptions saved. This assignment, therefore, comes too late and cannot be considered.

" '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.' " *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702.

Appellants next argue that the court erred in admitting the check introduced herein (and set out above) for the reason that it was not identified and traced to appellants, and permitting the introduction of evidence of other checks.

We hold this contention untenable.

As we have indicated, the check introduced in evidence above was sufficiently identified and traced to appellants. It was similar in every material respect to the one that was destroyed by Keese and the evidence showed that both checks were written by the same person, Keese. As to the alleged admission in evidence of a check other than the evidence relating to the two checks above, the record shows in the direct examination of Willie Ray Smith, the following: "By Mr. Lookadoo: Q. I hand you here another check in the sum of eighteen fifty ($18.50), and I want to ask you if that is your

signature? A. No, sir. By Mr. Edwardes: I want to object. They are referring to a check that is not referred to in the information, and has not been referred to at any time. I don't know what they are talking about and it is improper. * * * By the Court: The court has no way of knowing whether it is or not. I don't know what it is. You may proceed. * * * By Mr. Lookadoo: Q. What is the date of that check? A. July 9th. Q. That was drawn on the State National Bank? A. Yes, sir. Q. And that is not your signature? A. It is not. By Mr. Edwardes: Are you seeking to offer it in evidence? By Mr. Lookadoo: I will be glad to introduce it. By Mr. Edwardes: I am not asking you to and I object. By the Court: Is there anything further? By Mr. Lookadoo: No, sir. By the Court: He says he is through with the witness and it hasn't been offered in evidence. By Mr. Edwardes: I have no questions."

The information here charged appellants with falsely and fraudulently keeping in their possession divers false, forged and counterfeited checks, etc. and this evidence was properly offered by the State to show criminal intent, design, or part of a common scheme or plan of appellants.

" 'The evidence of the commission of other crimes of a similar nature about the same time, however, tends to show the guilt of the defendant of the crime charged when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other.' " *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d 468.

Next appellants say that the court erred "in charging the jury, * * * that in the event they could not agree upon the punishment herein that if they returned a verdict of merely finding the defendants guilty that the court would fix the punishment."

There is no merit to this assignment. In its instruction No. 7, the court told the jury "if you find

the defendants guilty beyond a reasonable doubt and cannot agree as to the amount of punishment, then you may, if you desire to do so, return into court a verdict of guilty and the court will fix the amount of punishment. However, if it is possible to do so, should you find them guilty, you should also fix the amount of punishment. A finding of guilty, however, must be beyond a reasonable doubt as the court has instructed you."

This was a correct instruction under § 43-2306, Ark. Stats. 1947.

"There was no error in instructing the jury before it retired that if they found the defendant guilty and could not agree on the punishment to be imposed they might, under § 4070, Pope's Digest, (now § 43-2306 Ark. Stats. 1947) leave fixing the punishment to the court." *Knighten* v. *State,* 210 Ark. 248, 195 S. W. 2d 47, (Headnote 3).

Finally, appellants argue that "taking specimens of handwriting from the accused, Bill R. Keese, by the officer, Tillman Johnson, violated the constitutional rights of the appellant, Bill R. Keese."

This alleged error is without merit for the reason that it was not incorporated in appellants' motion for a new trial and under our long established rule, we must regard it as having been waived.

"It is a well established rule of practice that, where there is a motion for a new trial, such previous exceptions as are not incorporated in the motion, must be regarded as having been waived." *Collier* v. *State,* 20 Ark. 36, (Headnote). *Havens* v. *State,* 217 Ark. 153, 228 S. W. 2d 1003.

We point out, however, that had this alleged error been properly brought forward, it would have availed appellants nothing for the reason that Keese voluntarily gave specimens of his handwriting, freely and without coercion or threat, and this evidence was properly admitted. *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77.

Affirmed.

TEAGUE *v.* SCURLOCK, COMMISSIONER OF REVENUES.

5-321 265 S. W. 2d 528

Opinion delivered March 8, 1954.

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

O. T. Ward and *Russell Reinmiller*, for appellee.

ED. F. MCFADDIN, Justice. This suit is an effort to obtain a tax exemption on commercial poultry feed.

The appellant is engaged in the business of raising chickens and turkeys for the commercial market: he buys day-old chickens and turkeys, feeds them only commercial poultry feed, and then sells them when they reach the size and weight for marketing. We refer to this as the "broiler business".[1] The commercial poultry feed which appellant buys from outside of Arkansas has been held by the appellee, Revenue Commissioner, to be subject to the 2% use tax under Act 487 of 1949 (now found in § 84-3101 *et seq.* Ark. Stats. Cumulative Pocket

[1] Webster's Dictionary defines broiler as: "A chicken or other bird fit for broiling, especially a young chicken weighing up to two and one-half pounds dressed."

Supplement). Under protest, appellant paid such use tax; and then filed this suit for refund, pursuant to § 20 of Act 487 of 1949 (now found in § 84-3120 Ark. Stats. Cumulative Pocket Supplement). The Trial Court ruled against appellant; and on this appeal he states the question to be: "Does the use tax (Act 487 of 1949) apply to the purchase of commercially produced poultry feed when sold to persons engaged in the production of poultry for consumption on the general market, those poultry products being fed nothing but said feeds in the process of their production?"

Appellant argues the posed question under three headings, which we now quote and discuss:

I. *Appellant Says: "These Poultry Feeds Are Specifically Excluded from This Tax by § 6 of Act 487 of 1949."*

The germane language of exemption upon which appellant relies is in § 6 of the Act, and reads:

"There are hereby specifically exempted from the taxes levied in this Act: . . . (d) Tangible personal property used by manufacturers or processors or distributors for further processing, compounding or manufacturing; . . ."

In his effort to bring the purchase of the commercial poultry feed within the foregoing quoted statutory exemption, appellant argues that he is in effect a "manufacturer" or "processor" of poultry for the commercial market; that he purchases the commercial feed and feeds it to the chickens and thereby, in effect, processes the commercial feed into the broiler; and that in reality, the broiler is the commercial feed in another form. This is a very ingenious argument, but one which has been denied in other cases. One such case is *Colbert Mill* v. *Okla. Tax Comm.*, 188 Okla. 366, 109 Pac. 2d 504. In that case, the Colbert Company was engaged in the business of feeding cattle for the market, and claimed that the feed purchased and fed to such cattle was exempt from the Oklahoma Consumers and Users Tax. The Court denied the claimed exemption, saying that the

feed was not sold to the owner of the cattle for use in "processing" or "preparing for sale" so that the same (feed) becomes "a recognizable integral part" of any finished product "for the purpose of resale," or "the subject matter of resale" so as to exempt the sale from the tax.

Without lengthening this opinion to state in detail appellant's arguments and our reasons for holding against them, it is sufficient to say that we hold that the statutory language of exemption, as hereinbefore copied, does not afford the appellant any relief, because his business is not such "processing, compounding or manufacturing" of commercial feed into broilers as is contemplated by the language used in the Statute.

II. *The Appellant Says: "The Legislature INTENDED to exempt all of the Ingredients or Component Parts Necessary to Make a Finished Product for Subsequent Re-sale, and this Without Exception or Exclusion."* Under this topic, appellant argues: (a) that the use tax here involved (Act 487 of 1949) is the complement of the sales tax (Act 386 of 1941, as amended); (b) that the taxes are "consumer taxes"; (c) that the spirit of these laws of consumer taxes is that the consumption shall only be taxed once; (d) that when the baker buys flour for bread for commercial sale the baker pays no tax on the flour purchased because the tax is on the loaf of bread; and (e) that by the same token the appellant should pay no tax on the purchase of the commercial poultry feed because the tax should be on the grown chicken, i. e., the broiler. Thus appellant is saying, in effect, that the intention of the Legislature was and is that there shall be one, and only one, consumer tax.

Conceding without deciding that the foregoing statements are correct as to the nature and purpose of the use tax here involved, we then examine to see where the Legislature placed the exemption in the case at bar. There is no tax on the flour purchased by the baker, because that flour is manufactured into a loaf of bread that is taxed. But there is a tax on the gas or elec-

tricity used by the baker in baking the bread. It is the flour that becomes the bread—not the heat used in baking the bread. So also with the broiler industry in which appellant is engaged: the Legislature, by Act 15 of 1949, has exempted the sale of baby chickens from the gross receipts tax,[2] just as it has exempted the flour of the baker. And just as the Legislature has levied the tax on the fuel used in the baking of the bread from the flour, so the Legislature has levied the tax on the commercial feed used by the appellant in growing his baby chickens into broilers. So the Legislative intent exempts the baby chickens and not the commercial feed.

Furthermore, on this matter of Legislative intent, we think it proper to point out that the 1953 Legislature passed a bill which, among other things, specifically exempted chicken feed; and such bill was vetoed by the Governor.[3] If the Legislative intent of Act 487 of 1949 had been to exempt chicken feed, then there was certainly no occasion for the 1953 Legislature—in advance of judicial determination contrary to that Legislative intention—to pass a bill that granted a specific exemption to chicken feed. So we deny appellant's claim that the Legislative intent—carried into law—was to exempt chicken feed from the use tax.

III. *The Appellant Says: "This Law as Attempted to be Enforced by Appellee Would Be Unconstitutional."* In the argument under this section, the appellant says, in effect, that unless we hold the purchase of commercial poultry feed to be exempt, then the classification of exemptions in § 6 of the Act is arbitrary and unreasonable, and therefore, the law is unconstitutional. We are unable to tell whether the appellant means that the entire Act 487 of 1949 should be held unconstitu-

[2] Section 2 of Act 15 of 1949 is specific in this regard. It says: "It being the intention of this Act to exempt the sale of baby chickens from the provisions of Act 386 of 1941."

[3] This was H. B. 395 of 1953. It was vetoed by the Governor. We take judicial notice of such bill and veto because each is a part of the record of the General Assembly and a part of the record in the Office of the Secretary of State. See *Grant* v. *Hardage*, 106 Ark. 506, 153 S. W. 826, and other cases collected in West's Ark. Digest, "Evidence," § 33.

tional, or merely that § 6 of the Act (being the section which allows exemptions) should be held unconstitutional; but he is not entitled to prevail on either argument. Section 29 of Act 487, which is the severability clause, says:

"If any section . . . of this act . . . or the application thereof in any particular case . . . is held to be unconstitutional, such decision shall not affect the remaining portions of this Act or their application in other cases or to other persons not similarly situated. The Legislature hereby declares that it would have passed the remaining portions of this Act irrespective of the fact that such section . . . be declared unconstitutional."

The striking of § 6 of the Act would leave all the other sections to stand, and the tax would remain, as the Act is constitutional. In this connection, however, we think it well to state, unmistakably, that the power to grant exemptions has not been arbitrarily exercised, and that Section 6 of the Act is valid as against the attack here made.

The decree is affirmed.

Mr. Justice ROBINSON not participating.

WILLIAMS *v.* PURDY, EXECUTRIX.

5-322 - 5-323 265 S. W. 2d 534

Opinion delivered March 8, 1954.

J. R. Wilson and *Paul K. Roberts,* for appellant.

Thomas E. Sparks, for appellee.

MINOR W. MILLWEE, Justice. Sometime in 1918, Joseph A. Williams, while serving as a soldier in the U. S. Army, bought a Service Life Insurance policy and named his half-sister, Amelia Williams, as beneficiary. Joseph died intestate on October 18, 1918, and Amelia received installment payments on the insurance until her death in 1924. The federal law at that time, 43 Stats. at Large, 1310, Chapter 553, § 14, provided that if the beneficiary ". . . dies prior to receiving all the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured, the present value of the monthy installments thereafter payable . . ."

After Amelia's death, her mother, Myra E. Williams, brought suit against L. E. Purdy as administrator of Joseph's estate, in which action she claimed to be the sole heir of Amelia Williams, who was the sole heir of Joseph Williams. The parties to that action stipulated that Myra was the wife of George J. Williams; that Joseph was the son of George Williams by a former wife; that Joseph died intestate leaving as his sole heir

a half-sister, Amelia, born in lawful wedlock, the daughter of Myra and George Williams; and that Myra is the sole heir of Amelia.

At the November, 1929, term of the Dallas Circuit Court, a judgment was entered in favor of Myra, and in satisfaction thereof, the administrator paid her $8,069.66, Joseph's entire estate.

On July 3, 1948, appellants herein, the collateral heirs of George Williams, sought to vacate the judgment obtained in 1929 against L. E. Purdy, administrator, on the ground of fraud in obtaining the judgment under the fourth subdivision of Ark. Stats. § 29-506. They filed an intervention in the 1929 action alleging that Myra was never married to George Williams; that Amelia was therefore illegitimate; and that both Myra and L. E. Purdy knew these facts to be true at the time they entered into the stipulation to the contrary. Appellants also alleged they were non-residents of Arkansas, that they had no notice of their right to said insurance, and that their cause of action was first revealed to them in the course of other litigation in July, 1945. It was further alleged that after the death of George J. Williams the non-resident families of the appellants tried to keep up correspondence with the family of George J. Williams in Arkansas but that such correspondence "failed at all times to show the status of Joseph A. Williams or Amelia Williams on account of the character of the correspondence which was either due to the illiteracy of Myra E. Williams or her desire to conceal the status of the lands belonging to George J. Williams at the time of his death." There are other allegations in the form of conclusions that appellants had been defrauded of the insurance money by the fraudulent concealment of Myra E. Williams or certain unnamed persons acting in her behalf.

Appellants filed with their petition in intervention a cross-complaint in which they asked for judgment against: the executrix of the estate of L. E. Purdy, deceased, and the sureties on his administrator's bond; the

administrator of the estate of Myra Williams, deceased, and his sureties; the distributees of Myra Williams' estate, their administrators and their guardians; and the bondsmen on the refunding bonds required in the estate of Myra Williams.

On the same day the intervention was filed, an almost identical complaint was filed by the same parties, the only difference being that the parties were designated "intervenors and cross-complainants" in one action and "plaintiffs" in the other. With the filing of every amendment to the intervention there was also filed an almost identical amendment to the complaint. In both cases, the trial judge sustained a demurrer on the ground that the action was barred by the statute of limitations. The cases have been consolidated for purposes of this appeal.

In the absence of any circumstances tolling the running of the statute of limitations, appellants' cause of action is clearly barred either by the 5-year limitation imposed in Ark. Stats. § 37-213 or the 8-year limitation applicable to actions on the bonds of administrators and executors under Ark. Stats. § 37-211. It has repeatedly been held by this court that the statute of limitations may be raised by demurrer. *Herpin* v. *Webb*, 221 Ark. 798, 256 S. W. 2d 44. However, this rule has certain qualifications, for in *State, use Glover* v. *McIlroy,* 196 Ark. 63, 116 S. W. 2d 601, it is said: "It is urged, and we think correctly so, that the plea of the statute of limitations cannot be raised by demurrer, unless the complaint shows not only that the time had elapsed so as to bar the action, but in addition thereto, it must appear also, from the complaint, the non-existence of any ground for the avoidance of the statute of limitations. *St. L., I. M. & S. Ry. Co.* v. *Brown,* 49 Ark. 253, 4 S. W. 781; *Collins* v. *Mack,* 31 Ark. 684; *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S. W. 867; *McCollum* v. *Neimeyer,* 142 Ark. 471, 219 S. W. 746."

Mere ignorance of one's rights does not prevent the operation of the statute of limitations, but where the ignorance is produced by affirmative and fraudulent

acts of concealment, the statute of limitations does not begin to run until the fraud is discovered. *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 2d 521; *Kurry* v. *Frost,* 204 Ark. 386, 162 S. W. 2d 48; *State of Tennessee* v. *Barton,* 210 Ark. 816, 198 S. W. 2d 512. Some affirmative act of concealment must be done; mere failure to reveal is not enough, unless there is a duty to speak. *Arkansas Power and Light Co.* v. *Decker,* 181 Ark. 1079, 28 S. W. 2d 701. As the court said in *McKneely* v. *Terry,* 61 Ark. 527, 33 S. W. 953: "No mere ignorance on the part of plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it." It has also been held that blood kinship alone does not constitute such relationship as requires revelation of the facts. *Stephens* v. *Walker,* 193 Ga. 330, 18 S. E. 2d 537. Nor does the mere fact that the appellants were non-residents entitle them to preferred consideration, for Ark. Stats. § 37-230 provides: "This act and all other acts of limitation now in force, shall apply to non-residents as well as residents of this state." This is also the general rule in the absence of a statute. 54 C. J. S., Limitation of Actions, § 208.

The applicable rule is stated in 34 Am. Jur., Limitation of Actions, § 166, as follows: "Unless the fraud was of such a character as necessarily to imply concealment, it is necessary, in order to postpone the running of the statute of limitations until the discovery of the fraud, that ignorance thereof shall have been produced by affirmative acts of the guilty party. In other words, the fact that the complainant was ignorant of the fraud until after the right to recover was barred is not *per se* sufficient to entitle him to the benefit of the exception under consideration, in the absence of any act or conduct on the part of his adversary calculated to mislead, de-

ceive, or lull inquiry." And in § 167, it is said: "To prevent the barring of an action, it must appear that the fraud not only was not discovered, but could not have been discovered with reasonable diligence, until within the statutory period before the action was begun. A plaintiff cannot excuse his delay in instituting suit if his failure to discover the fraud was attributable to his own neglect."

When tested by these rules, it is our conclusion that the trial court correctly held appellants' action barred by the statute of limitations. Insufficient facts are alleged in appellants' complaint to sustain the assertion or conclusion that Myra E. Williams and L. E. Purdy fraudulently concealed a cause of action from the appellants. There are no allegations of such affirmative and positive acts of fraudulent concealment on their part as to toll the running of the statute of limitations nor is the fraud alleged of such character as necessarily implies concealment. Indeed it is alleged that Myra E. Williams' failure to notify appellants might just as well have resulted from her illiteracy as from anything else. By the exercise of reasonable diligence appellants could have ascertained the death of their kinsman, Joseph A. Williams, and the status of his estate. These and other facts pertinent to the 1929 judgment had been matters of public record for more than 18 years before the institution of the instant proceedings.

There is also another reason why the demurrer of appellees should have been sustained. In *Parker* v. *Sims*, 185 Ark. 1111, 51 S. W. 2d 517, the court said: "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." The rule is stated in *Hendrickson* v. *Farmer's Bank and Trust Co.*, 189 Ark. 423, 73 S. W. 2d 725, as follows: "The fraud for which a decree will be canceled

must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed." See also, *Manning* v. *Manning,* 206 Ark. 425; 175 S. W. 2d 982; *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234; *Blankenship* v. *Montgomery,* 218 Ark. 854, 239 S. W. 2d 272.

The fraud complained of in this case, i. e. the alleged false stipulation of facts showing Amelia Williams to be the sole heir of Joseph A. Williams, was not extrinsic of the issue actually tried and decided, for the determination of heirship was primary in the rendering of the judgment sought to be set aside. Hence, the action of Myra E. Williams and L. E. Purdy in entering into a false stipulation in the original action would have amounted to intrinsic fraud and not the type of fraud required to vacate the judgment. It follows that the complaint failed to state a cause of action on the ground of fraud in the procurement of the judgment.

Affirmed.

PARSONS *v.* MASON.

5-332 265 S. W. 2d 526

Opinion delivered March 8, 1954.

Fietz & McAdams, for appellant.

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

George Rose Smith, J. This is an election contest involving the position of school director. On March 21, 1953, the Knobel school district held an election at which the appellee, C. R. Mason, was the only candidate whose name appeared on the printed ballot. Mason received 125 votes, but 140 persons voted for the appellant, Ruel Parsons, by writing in his name. The election judges declared 23 of the write-in votes to be void, with the result that Mason was certified as the winner by a count of 125 to 117. On March 31 the county court canvassed the returns and entered an order declaring Mason to be the winner and granting an appeal to Parsons. Parsons later filed an original action in the circuit court contesting the election, but summons was not issued until April 13, which was more than twenty days after the election. The circuit court held, first, that the appellant's remedy was by original action rather than by appeal from the county court's order, and, second, that the contest in the circuit court was filed too late.

The case involves the construction of two 1951 statutes, Act 366 and Act 403. Ark. Stats. 1947, §§ 80-318, 80-321, and 80-322. In construing earlier statutes we held in *McLeod* v. *Richardson,* 204 Ark. 558, 163 S. W. 2d 166, that with respect to school elections the county courts

were vested with but two powers: canvassing returns and certifying results. It was there decided that § 80-213 transferred to the county board of education jurisdiction of election contests involving the office of school director. Act 366 of 1951 is explicit in divesting the county boards of education of that jurisdiction and in providing that such contests shall be brought in the circuit court. Since the Act requires that contest to be commenced within twenty days after the election the trial court was correct in holding that the present contest was begun too late.

The appellant insists that Act 403 of 1951 either repealed Act 366 or provided an alternative method of contest, by appeal from the county court order. We do not agree. Act 403, after outlining the procedure by which the election judges file a certified return of the votes, provides: "Within ten days after the election the county court shall canvass the returns and declare the result of the election by an order entered of record. This order shall be final unless an appeal is taken from it to the circuit court within fifteen days after it has been entered."

It is our duty to give effect to both statutes if possible, and we find no difficulty in doing so. Under Act 403 the county court's duties remain substantially unchanged. That court merely canvasses the returns and declares the result, its order constituting a permanent record of the outcome of the election. An appeal from that order would merely test the correctness of the court's tabulation of the returns.

An election contest, on the other hand, involves the matter of going behind the returns and inquiring into the qualifications of the electors and other matters affecting the validity of the ballots. Jurisdiction of such a contest was conferred upon the circuit court by Act 366, and we have no reason to think that the Legislature did not intend for that jurisdiction to be exclusive.

Affirmed.

McFaddin, J., concurs.

BOSWELL *v.* CITY OF RUSSELLVILLE.

5-325 265 S. W. 2d 533

Opinion delivered March 8, 1954.

J. H. A. Baker, for appellant.

James K. Young, for appellee.

GEORGE ROSE SMITH, J. In 1951 the city of Russellville, pursuant to Act 132 of 1933 (Ark. Stats. 1947, §§ 19-4101 *et seq.*), issued revenue bonds for the purpose of improving its sewer system. This is a suit brought by the city to collect delinquent sewer assessments. The appellants, defendants below, filed an answer and cross-complaint, to which a demurrer was sustained. The only question before us is whether the chancellor's ruling upon the demurrer was correct.

We think the chancellor was right. The appellants' principal defense is that the city's revenue bonds were not issued in compliance with the procedural requirements of Amendment 13 to the Constitution. The answer is that the 1951 ordinance was not adopted under the authority of that amendment, which permits the levy of a property tax for the payment of various municipal bonds. Here the city proceeded under Act 132 of 1933, which authorizes the issuance of bonds secured not by a property tax but by revenues derived from the sewer system. The constitutionality of Act 132 was upheld in *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5. It is

immaterial that the ordinance was not passed in compliance with Amendment 13, since the city was not exercising the power conferred by that amendment.

The appellants also assert in their answer and cross-complaint that the promoters of the 1951 sewer ordinance misled the voters by false newspaper advertising concerning the way in which the proceeds of the bond issue would be spent. Even if we assume that this contention would have merit in a direct contest of the election, it is plainly not a jurisdictional matter and therefore cannot form the basis for a collateral attack, as this one is.

Affirmed.

HANCOCK *v.* SIMMONS.

5-345 265 S. W. 2d 537

Opinion delivered March 8, 1954.

T. O. Abbott, for appellant.

Silas W. Rogers, for appellee.

GEORGE ROSE SMITH, J. This was originally a suit filed by the appellee to cancel a deed upon the ground that it was a forgery. By answer the appellants, husband and wife, denied the charge of forgery and asked that the husband's title be quieted. When the case came on for trial the plaintiff elected to take a nonsuit. The defendants then insisted that their answer was in fact a cross-complaint, entitling them to a trial in spite of the plaintiff's decision to dismiss her complaint. Ark. Stats. 1947,

§ 27-1407. The trial court held that the answer did not constitute a cross-complaint; so there was no issue before the court for trial. That is the only question presented by this appeal.

In her complaint the plaintiff alleged that in 1937 there was filed for record a forged deed which purported to be a conveyance by the plaintiff to J. A. Hancock's first wife. It was further stated that after the death of the first Mrs. Hancock the couple's surviving daughter deeded the property to her father, the defendant J. A. Hancock. The plaintiff asked that the forged deed be cancelled.

To this complaint Hancock and his present wife filed an answer which denies that the 1937 conveyance was a forgery. This pleading asserts that the deed in question was genuine, admits the later conveyance by the Hancocks' daughter, and prays that the complaint be dismissed for want of equity and that the title be quieted and confirmed in J. A. Hancock.

Inasmuch as the plaintiff's complaint has been withdrawn, the question is really whether the defendants' answer states an affirmative cause of action that would be good against demurrer. In determining this question we must be governed by the *facts* that the pleading alleges. *Phillips* v. *Southwestern Tel. & Tel. Co.*, 72 Ark. 478, 81 S. W. 605. "We have held that the statement of facts in a complaint or cross-complaint, and not the prayer for relief, constitutes the cause of action." *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S. W. 2d 633.

Taken alone, the appellants' answer alleges no facts entitling J. A. Hancock to a decree quieting his title. This pleading, even when construed liberally, states merely that the first Mrs. Hancock purchased the land from the plaintiff, that the deed was genuine, and that the title has now passed to J. A. Hancock. In short, the answer avers in substance that J. A. Hancock has a perfect title to the property, and if this be true he certainly

has no basis for bringing suit against the appellee. *Cf. Lawrence* v. *Zimpleman,* 37 Ark. 643; *Beardsley* v. *Hill,* 85 Ark. 4, 106 S. W. 1169; Covington, Bills to Remove Cloud on Title and Quieting Title in Arkansas, 6 Ark. L. Rev. 83.

Affirmed.

LYKES *v.* CITY OF TEXARKANA.

5-344 265 S. W. 2d 539

Opinion delivered March 8, 1954.

George F. Edwardes, for appellant.

Charles Conway, Van Johnson, Boyd Tackett and *A. G. Sanderson, Jr.,* for appellee.

WARD, J. This appeal by a taxpayer of Texarkana challenges the ruling of the chancellor in denying his petition to enjoin the City from paying for the materials and labor in connection with the construction of rest-

rooms in the basement of the City Hall where the contract for such construction was not let pursuant to law.

On July 7, 1953, the Mayor and six of the Councilmen in Texarkana met and let a contract for Claughton to install two restrooms. This was not a regular meeting of the council and bids were not asked for. The contract price was $2,204. On July 9, 1953, appellants filed a petition in chancery court before the regular chancellor asking to restrain the City from proceeding under the alleged contract. The regular chancellor stated that he was disqualified to hear the case or to issue a temporary order but that he would call in a judge on exchange for that purpose. Judge James A. Rowles was selected to preside in the case and a hearing was set for July 15th. On the last mentioned date it was shown by appellees that the entire installation had been made and the job completed and accepted by the City. Thereupon appellants amended their pleading and asked to enjoin the City from paying out any money under the purported contract either to the contractor or to the materialmen. Upon the issue thus joined evidence was introduced and the special chancellor dismissed appellants' petition finding that the City had approved the contract and had accepted and was enjoying the benefits of the newly installed restrooms. For a reversal appellants urge several grounds of error.

First. It is insisted by appellants that they had a right to maintain this kind of an action but this need not be discussed as will appear later.

Second. Appellants contend that they did everything in their power to prevent the construction and completion of the project. They insist that they had no right, upon the disqualification of the regular chancellor, to present their petition to the county or circuit judge, relying on Ark. Stats., § 32-214.

We do not agree with appellants in this contention. The statute referred to above "provides that no injunction shall be granted by a circuit or probate judge after a motion therefor has been overruled by the court. Nor

shall any be granted by a judge of a probate court where it has been refused by the judge of the court in which the action is brought or by any circuit judge." The provision of this statute did not prevent appellants from presenting their petition to another judge because, as noted above, the regular chancellor did not pass on or refuse their petition, but merely disqualified himself as a judge in this particular case.

Third. It is the contention of appellants that the City of Texarkana had no statutory power to let a contract such as was done here, but that such a power rests solely in the Board of Public Affairs under the provisions of Ark. Stats., § 19-1022. In brief this statute provides:

"Said board shall have the exclusive power to make purchases of all supplies, apparatus, materials, and other things requisite for public purposes in such city, and to make all necessary contracts for work or labor to be done, or materials or other necessary things to be furnished for the benefit of such city, or in carrying out any work or undertaking of a public nature therein; but where the amount of expenditure involved therein may exceed three hundred dollars ($300), said board shall transmit to the city council an estimate thereof, and an ordinance authorizing such expenditure, with their recommendations in relation thereto, and, upon the passage of such ordinance, it shall be the duty of said board to advertise and let the work or contract to the lowest responsible bidder."

Replying to the above and to sustain the ruling of the lower court appellees, admitting that appellants have the right to maintain this kind of an action, take the position that even though the contract was improperly let in this case still the City Council having approved the contract by ordinance and the City having accepted the job and the benefits deriving therefrom is liable to pay the fair value of all labor used and materials employed. In support of this contention they rely on, among other cases, *Texarkana* v. *Friedell,* 82 Ark. 531, 102 S. W. 374;

City of Little Rock v. *White Company,* 193 Ark. 837, 103 S. W. 2d 58; *Yaffee Iron & Metal Company* v. *Pulaski County,* 188 Ark. 808, 67 S. W. 2d 1017; and *Fort Smith* v. *U. S. Rubber Company,* 184 Ark. 588, 42 S. W. 2d 1004.

Appellants of course contend the contract was void because the Board of Public Affairs was by-passed and also because there was no regular meeting of the City Council where the purported contract was authorized, but, conceding appellants' contention, this does not relieve the City from all obligation to pay.

In the *Yaffee* case, *supra,* the Court said:

" 'It is immaterial that the contract was void. Appellee cannot accept and hold appellant's money, also retaining the bridges, and at the same time plead the invalidity of the contract in bar of recovery. This contention has been definitely and certainly determined by this Court in a number of cases.' "

It was also shown at the hearing on the 15th that the City held a regular meeting on the 14th and passed an ordinance approving and ratifying the project. In the *Friedell* case, *supra,* the Court approved the following from Dillon's work on Municipal Corporations:

" '. . . a municipal corporation may ratify the unauthorized acts of its agents or officers which are within the scope of the corporate powers but not authority. The next is, that where work done for a corporation without legal authorization is for a corporate purpose, and is beneficial to it, and the price reasonable, strong evidence of the assent of the corporation is not required; but such assent must be shown. The third principal is that the ratification, whatever its form must be by the principal or by its authorized agents.' "

The rule, which seems to be conceded by appellees, under the circumstances here is that the contractor, Claughton, is not necessarily entitled to receive the full contract price of $2,204 but is only entitled to receive the fair value of his work and the labor and materials furnished. The trial court decided the case in accordance

with this rule, and found that appellants failed to show "the City did not receive full value" or "that the City was not getting its money's worth," and so dismissed appellants' complaint.

We have examined the testimony introduced on both sides and we cannot say the decision of the Special Chancellor was against the weight of the evidence on the question of fair value

The testimony is conflicting and unreconcilable and it would serve no useful purpose to set it out in full. Lykes stated the work could have been done for much less, but he admitted the workmanship and materials used were good, and apparently admits that Claughton's claim for supervisory services was fair. He was asked if he knew "The quantity of rough plumbing, labor and materials that went into the job, excluding the fixtures that you [he] already named?" His answer was: "I couldn't itemize it, no."

"Q. You do not know?

"A. I couldn't itemize it, no.

"Q. And the reason you cannot itemize it is because you do not know?

"A. Because some of it is covered up. The quality that I saw there was a standard quality, the material I saw laying there."

There was testimony by Claughton and Paul Hardy, Jr., a disinterested contractor, that the contract price was fair.

Appellants' brief contains no argument on the question of the value of the improvements, but they contend that the fair value rule does not apply where there is a lack of good faith. We are not convinced by this argument. If any lack of good faith is shown it is on the part of the City. If we should hold the City is not obligated to pay for these improvements, it would not be punished but rewarded for its exercise of bad faith.

It is our opinion that the decree of the Special Chancellor should be and it is hereby affirmed.

Justice McFaddin not participating.

5-342 265 S. W. 2d 531

Opinion delivered March 8, 1954.

[redacted]

Rose, Meek, House, Barron & Nash, for appellant.

Wootton, Land & Matthews, for appellee.

ROBINSON, J. Appellant Helen Sims Reed and appellee Kirby E. Reed married in 1935. In July, 1952, Helen filed suit for divorce. Kirby is a plumber and practiced that trade as an employee of others and also by working for himself from a shop at his home until the year 1944. At that time he had been out of work for about three months, and at Helen's suggestion a plumbing shop was opened. Helen says that she is a partner in such business. Kirby maintains that Helen is not a partner but merely helped to the extent that wives usually assist their husbands. In 1946 Kirby's brother Mike came into the business as a partner.

Upon a trial Helen was granted a divorce which is not questioned on appeal; however the Chancellor made a finding that she is not a partner in the plumbing business, but that Kirby owes her for money borrowed the sum of $2,000 with 6% interest thereon from February 16, 1945. The decree also provides for $35 per week alimony and for the disposal of some property held as an estate by the entirety which was acquired in 1947.

There is a sharp conflict in the testimony as to whether Helen is a partner in the plumbing business, and although there is substantial evidence to sustain the contention of such a partnership, there is also convincing evidence to the contrary; and we cannot say the Chancellor's finding in that respect is against the preponderance of the evidence.

Although appellant was granted a divorce, the trial court did not make a personal property division as provided by Ark. Stats., § 34-1214. There is no showing that appellee owned any real estate other than his interest in the property held as an estate by the entirety; and Mrs. Reed would not be entitled to more than that vested in her by reason of such an estate. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690; *Woodall* v. *Woodall,* 144 Ark. 159, 221 S. W. 463. But she is entitled to "⅓ of the husband's personal property absolutely." *Crosser* v. *Crosser,* 121 Ark. 64, 180 S. W. 337; *Dowell* v. *Dowell,* 207 Ark. 578, 182 S. W. 2d 344. This would include ⅓ of any interest the husband may own in a partnership with his brother or anyone else. Such interest may be reached by a charge order. Ark. Stats., § 65-128.

According to the record, $35 per week alimony appears to be rather small; but whether alimony should be continued, and the amount thereof, depends on the financial condition of the parties after appellant receives ⅓ of appellee's personal property in addition to the $2,000 and interest.

Reversed.

Mr. Justice George Rose Smith not participating.

Ward, J. This dissent to the majority opinion is based on two grounds.

1. While I agree with the majority that the Chancellor's finding that no partnership existed is not against the weight of the evidence, still, in my opinion, appellant, the wife, should have been given one-half of the plumbing business [or the value thereof after all debts were paid] because the evidence [which the majority did not see fit

to discuss in detail] shows she put as much money and effort into the business as her husband did. This is what the court did in the case of *Williams* v. *Williams,* 186 Ark. 160, 52 S. W. 2d 971. There the court, after discussing the evidence, no more favorable to the wife than here, said:

"It is clear from the evidence that both appellant and appellee worked and conducted the business which resulted in the accumulation of the property in controversy. It is immaterial whether there was a partnership. If appellee and appellant, by their joint work, labor and management, acquired the property, a court of equity would, even before the recent statutes, protect the wife's interest in the property."

Added force is given to the applicability of the above language to the present case because there the divorce was given to the husband while here the wife secured the divorce.

2. The majority opinion invades the province of the trial court by expressing its view as to the sufficiency of the amount of alimony, even though this court has no way of knowing the facts (amount of property) upon which the amount of alimony depends. We have consistently held that the amount of alimony rests in the discretion of the trial court. *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369; *Johnson* v. *Johnson,* 165 Ark. 195, 263 S. W. 379; *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S. W. 2d 339; *Guier* v. *Guier,* 200 Ark. 552, 139 S. W. 2d 694; *Laird* v. *Laird,* 201 Ark. 483, 145 S. W. 2d 27; *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998; *Angellitti* v. *Angellitti,* 209 Ark. 991, 193 S. W. 2d 330; *Foster* v. *Foster,* 216 Ark. 76, 224 S. W. 2d 47; *Bridwell* v. *Bridwell,* 217 Ark. 514, 231 S. W. 2d 117; and *Birnstill* v. *Birnstill,* 218 Ark. 130, 234 S. W. 2d 757.

Referring to the allowance of alimony by the trial court, we said in the first cited case at page 184 of the Arkansas Reports:

"The amount of such allowance is within the sound discretion of the court, and all the circumstances of the particular case should be considered in fixing it."

In the last cited case we said at page 132 of the Arkansas Reports:

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

MONTGOMERY *v.* STROUD.

5-257 265 S. W. 2d 723

Opinion delivered March 15, 1954.

E. H. Tharp, for appellant.

D. Leonard Lingo and *Harry L. Ponder,* for appellee.

GRIFFIN SMITH, Chief Justice. Stroud and Watkins sought to enforce a lien for $332 representing the amount claimed to be due them by Montgomery for drilling a well, completed Nov. 11, 1950. The notice was filed with the clerk of the circuit court February 5, 1951. This was followed by a suit in equity to foreclose.

The defendant first demurred, then answered, but finally elected to stand on his demurrer. Reliance is placed upon §§ 51-613, 614, and 615, Ark. Stat's. Specifically it is contended that jurisdiction to foreclose the lien is confined to circuit court.

The language of § 51-615 is that all liens created by virtue of the Act of 1895 [§ 17], Ark. Stat's, § 51-615, shall be enforced in the circuit court of the county wherein the property on which the lien is attached is situated.

Wording of the Act lends substance to appellant's contentions, but our decisions are in harmony with Rockel on Mechanics' Liens, § 198, where it is said the Act usually provided by statute is not regarded as an exclusive remedy. Mr. Justice Hart, in *Martin* v. *Blytheville Water Co.,* 115 Ark. 230, 170 S. W. 1019, wrote the court's opinion approving the statement that legislation of this nature is merely cumulative, "and the debtor may pursue whatever other remedy he may have to secure payment." Judge Hart's opinion was written in 1914, nearly twenty years after the Act of 1895 went into effect, and it cited *Murray* v. *Rapley,* 30 Ark. 568, and *Kizer Lumber Co.* v. *Mosely,* 56 Ark. 544, 20 S. W. 409.[1]

The decision in *Carr* v. *Hahn & Carter,* 126 Ark. 609, 191 S. W. 232, goes directly to the point and is unaffected by collateral considerations. "The controlling issue", said Mr. Justice Humphreys, "is whether the chancery court had jurisdiction and whether, having jurisdiction, personal service outside of Lincoln County, where the suit was instituted, was sufficient. Our court has held that the chancery courts of this state have concurrent jurisdiction in the enforcement of our mechanics' lien law".

An illustration of concurrent jurisdiction where by statute circuit court alone is named is to be found in Judge Hart's opinion (*Adams* v. *State,* 153 Ark. 202, 240 S. W. 5). It was there said that "there are many instances of the circuit court and other courts having concurrent jurisdiction. [An example is] that chancery courts have concurrent jurisdiction with that given by statute to the circuit courts in the enforcement of the mechanics' lien laws of the state".

The precise question was expressly decided in *Sims* v. *Hammons,* 152 Ark. 616, 239 S. W. 19, where it was said that equity has jurisdiction under its general powers to enforce liens. Attention was called to the annotated section relied upon by appellant. There is this state-

[1] In the Blytheville Water Co. case equity had acquired jurisdiction through appointment of a receiver, but Judge HART'S opinion made no distinction on that account.

ment: ". . . We have frequently held that [mechanics'] liens are enforceable in equity, notwithstanding the remedy given at law".

Affirmed.

MESERVE *v.* EDMONDS.

5-361 265 S. W. 2d 704

Opinion delivered March 15, 1954.

Shaver & Shaver, for appellant.

Lloyd Henry and *W. J. Dungan,* for appellee.

J. Seaborn Holt, J. The three suits here involved were consolidated for trial.

Fencing District No. 6 of Woodruff County was created in 1925 under Act 158 of the 1891 General Assembly,—Ark. Stats. 1947, 78-1301—78-1329, inclusive, Section 78-1336, and Sections 78-1347—78-1353, inclusive. Subsequent to its formation, additional territory was annexed until practically all of Woodruff County was embraced within the District, the last two additions being made in 1945.

By proper County Court Order, on May 6, 1946, all lands (except lands of the Hunter Annexation and certain railroad lands) within the District, including the lands here involved, were assessed at the rate of one per cent per annum, on assessed valuation, to be paid before October 1, 1946. No other assessment was ever made.

Appellants, Meserve, *et al.,* Della Holcombe, W. W. Shaver, Jr., J. L. Shaver, and R. E. Robinson, failed to pay their assessments and suit was filed in 1948 (as Case No. 6130) to foreclose the District's lien on the lands here involved.

Decree was entered May 10, 1948, the lands sold, and sales were duly confirmed July 15, 1948, and one year allowed in which to redeem. There was no appeal from this decree.

The lands owned by Meserve, *et al.* were assessed and sold to Edmonds (appellee) for $27.99, under the following description:

"Name of Owner	Description	Sec.	Twp.	Range	Tax
A. G. Mesero	W½	24	8N	1W	$6.40
R. J. Mesero	W½	25	8N	1W	6.40
A. G. Mesero	E½	26	8N	1W	6.40"

The Holcombe lands were assessed and sold as follows:

"Name of Owner	Description	Sec.	Twp.	Range	Tax
E. F. Hunsinker	NW¼ SE¼	21	8	1	$1.00
E. F. Hunsinker	S ½ SE¼	21	8	1	2.00
E. F. Hunsinker	NW¼ SW ¼	22	8	1	1.00
E. F. Hunsinker	SW ¼ NW¼	22	8	1	1.00"

"Orbin Ball purchased the South Half (S½) Southeast Quarter (SE¼) of 21 and the Southwest Quarter (SW¼) Northwest Quarter (NW¼) of 22 for the sum of $6.90; Fencing District No. 6 purchased the Southwest Quarter (SW¼) of Northwest Quarter (NW¼) Sec. 22 for $2.85; and Jack Childress purchased the Northwest Quarter (NW¼) Southeast Quarter (SE¼) Sec. 21 and the Northwest Quarter (NW¼) Southwest Quarter (SW¼) Sec. 22 for a total of $55.70."

The Shaver-Robinson lands were assessed and sold to Orbin Ball for $8.10, under the following description:

"Name of Owner	Description	Sec.	Twp.	Range	Tax
Henry Wrape Co.	E½ NE¼	23	8	1	$2.00
Henry Wrape Co.	E½ SE¼	23	8	1	2.00"

As indicated, these sales were confirmed.

The three present consolidated suits were filed on the following dates: Meserve, *et al.,* April 12, 1950; Holcombe, June 4, 1950; and the Shaver-Robinson, October 21, 1950. In each of these suits, appellants (plaintiffs in the trial court) alleged, in effect, that all proceedings in Case No. 6130, Woodruff Chancery Court, to foreclose the 1946 delinquent fencing tax are void because defendants in that cause were not served with notice as provided by law.

All defendants (appellees), except the Commissioners of the Fencing District, answered with a general denial and plead *res adjudicata.*

Trial resulted in a decree, which contained these recitals: "The court found that plaintiffs in the Meserve and Holcombe cases were entitled to redeem their property, their suits having been filed within two (2) years, from July 9, 1948, the date of sale of their property; the

defendants, Orbin Ball and Arnie Ball should prevail in the Shaver case because suit was not filed to redeem within two years from the date of sale.

"The court further found that all contentions raised by the plaintiffs in all three (3) cases, attacking the decree in Cause No. 6130, rendered by the Woodruff Chancery Court on May 10, 1948, and all proceedings had thereon, and all contentions attacking the tax levy made by the County Court of Woodruff County, levying the tax upon the lands involved in this case by Fencing District No. 6, should be dismissed."

The cause is here on direct appeal of Meserve, *et al.*, Holcombe, and Shaver, *et al.*, and the cross-appeal of Edmonds and Ball.

We have concluded, after a review of the record presented, that proper notice to appellants, delinquent property owners, in the foreclosure sale in Case No. 6130 in 1948, had not been given, as appellants contend, under the Fencing Act, *supra,* and that the sale was, therefore, void and subject to direct attack.

In *Morgan* v. *Leon,* 178 Ark. 768, 12 S. W. 2d 404, (Headnote 1), the court held: "Judgment—Direct Attack.—A proceeding to have a decree declared void upon the ground that it was entered without notice, is a direct and not a collateral attack on the decree."

It is undisputed, in this case, that the only notice attempted to be given the delinquent land owners (appellants) in the foreclosure suit (No. 6130) of 1948 was by publication in a local newspaper,—in other words, constructive service, and no personal service was attempted, or had..

The Fencing Act No. 158 of 1891, above, in Section 20, provides: "In such suits the same service shall be had on defendants, and the case shall proceed in the same manner *as is now provided by law* in cases of suits for the collection of assessments for local improvements in cities of the first class, so far as the same proceeding can be made applicable, and in case of sale the owner

shall have the same right of redemption by paying the amount of the purchase money and all assessments to the purchaser and twenty percentum thereon, within one year from the date of sale."

It will be observed that this section plainly and unmistakably directs that "service shall be had on defendants (delinquent landowners), and the case shall proceed in the same manner *as is now provided by law,*" etc.

The law, on the effective date of this Act 158, was embodied in Act 84 of the General Assembly of 1881, which was "AN ACT to Regulate the Manner of Assessing Real Property for Local Improvements in Cities of the First Class," and provided in Section 10 specifically the manner in which delinquent property should be foreclosed and the kind of service necessary on delinquent property owners. Section 10 of Act 84 provides: "* * * The owner of the property assessed shall be made a defendant if known, if he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding *in rem* against the property assessed. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost, and an attorney's fee. If the sheriff, or other officer, to whom the writ may be directed, shall return that defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in case of actual service."

It appears that Section 20 of Act 158, above, has never been amended, and, as indicated, this section required that delinquent property, as here, would have

to be foreclosed, *as provided by law,* at the time of the effective date of that Act. In other words, we hold that the plain terms of Act 84, § 10 (1881), above, required that the foreclosing authorities exercise good faith in endeavoring to ascertain the name of the owner of any property offered for sale, and, when so ascertained, that personal service be had. *Laflin* v. *Drake,* 218 Ark. 218, 237 S. W. 2d 32. Section 20 of the Fencing Act, we hold, was not amended when the General Assembly, in 1937 and 1939, amended § 10 of Act 84 of 1881 to provide for constructive service in Municipal Improvement Districts instead of personal service. We think the Legislature, in Act 158, § 20, in dealing with Fencing Districts, clearly intended that before a delinquent property owner could have his property taken away from him for failure to pay an assessment, direct and literal compliance with § 20 of Act 158, and § 10 of Act 84, containing the requisites of notice, must be followed, and that personal service was intended and required under § 10, and none was had in the present three cases.

In the 1948 foreclosure suit (No. 6130), it was not alleged in the complaint that the owners of the property, here involved, were unknown, but the proceedings were against named defendants, alleged to be the supposed owners of the property. This was not notice to the true and record owners of the lands, who had paid the taxes on the lands for many years. No effort appears to have been made to determine the true owners of the lands, as § 10, above, requires. This section also requires that the owners of the delinquent lands shall be made defendants, if known, summons issued against such owners, and that they appear and answer within five days after service. In case the owners are not known, then that fact shall be stated in the complaint, which, as indicated, was not done in the foreclosure suit.

"If doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch,* 303 U. S. 303, 58 S. Ct. 559, 88 L. Ed. 858.

"If it be thought that, at most, the legislative purpose as expressed by the words employed is ambiguous, still the holding must be adverse to appellant because doubt in such cases is invariably resolved in favor of the taxpayer." *McLeod, Commissioner of Revenues* v. *The Commercial National Bank of Little Rock,* 206 Ark. 1086, 178 S. W. 2d 496.

But, say appellees (Holcombe and Ball), in any event, the 1948 foreclosure (No. 6130) is *res adjudicata* and a complete defense to the present suits. They contend that Suit No. 6130 was a class suit and the doctrine of "virtual representation" applies and appellants are bound by that decree. We do not agree.

In the 1948 foreclosure suit, it appears that an attorney filed an answer for his clients, the following land owners, "L. A. Stuckey, John Ancil, Joe Hess, Joe Ancil, Ben Starman, W. A. Smith and Walter McDonald," and alleged that said answer was for these seven parties, or landowners, "and for the benefit of all other owners of lands in said territory." Appellants,—as we have concluded,—had no notice of the foreclosure suit and had not authorized appellees' attorney to represent them in any capacity. It appears that one of the appellants is a prominent practicing attorney. Such attempted representation was not "*bona fide* for the entire class and with all diligence" and in their interest, such as would bind the entire class. *Holthoff* v. *State Bank & Trust Company of Wellston, Mo., et al.,* 208 Ark. 307, 186 S. W. 2d 162.

As we have pointed out, it was necessary under the Arkansas Fencing Law, above, that the owners be made parties to the foreclosure suit. Where the owner is unknown, then the suit can proceed *in rem.* The statute was not complied with. The foreclosure proceedings in No. 6130 were void and appellants' lands could not be foreclosed in that case under the notice given. Certainly, then appellants' lands could not be foreclosed in such a void proceeding (and appellants bound by such proceeding) just because appellees' attorney attempted

to appear for them and stated that he answered for all other landowners in the District. To permit this to be done, in the circumstances, would deny appellants their constitutional rights.

"5. The constitutional requirement of due process gives each party a right to be heard. (See Am. Jur. 'Constitutional Law,' § 607). * * *

"6. In order that a valid judgment may be rendered in a proceeding *in rem* or *quasi in rem,* every person who has an interest in the *res* must have legal notice of the proceeding and an opportunity to be heard. (See Am. Jur. 'Judgments,' § 446)." *O'Hara, et al.,* v. *Pittston Company, Appt.,* 186 Va. 325, 42 S. E. 2d 269, 174 A. L. R. 945.

Accordingly, the decree is reversed and the cause remanded on direct appeal with directions to declare void, and cancel, the proceedings in the foreclosure suit of 1948, No. 6130, and for further proceedings consistent with this option.

Affirmed on cross-appeal.

Justice McFaddin concurs.

BELL *v.* STATE.

4763 265 S. W. 2d 709

Opinion delivered March 15, 1954.

Harold Sharpe, for appellant.

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

ED. F. MCFADDIN, Justice. The appellant, Leodis Bell, was convicted of the crime of murder in the first degree and sentenced to life imprisonment; and he prosecutes this appeal.

We have carefully studied the record and find no error except the one unfortunate incident involving a communication between the Trial Judge and the Jury; and that incident necessitates a reversal. After the evidence had been concluded, the instructions given, and the arguments made, the Jury retired to consider its verdict; and while the Jury was thus deliberating, on September 14th, there occurred the incident which is referred to in Assignment No. 5 in the Motion for New Trial, which reads as follows:

"(5) That during the course of the jury's deliberation the Judge of the Court went into the jury room to ask the jurors if they were going to reach a

verdict before the noon hour and while there the Judge was asked by the jury if they gave the defendant life imprisonment would he be able to get out, and the judge of the Court replied that he could not tell them definitely but that normally speaking, through various processes of the Parole Board—commutations of sentences, etc., that life termers usually don't serve over seven or eight years, but that there are instances in which they served the full life term; that this indicates that the jury was trying to determine how long a term it would take to be sure the defendant served seven or eight years in the penitentiary, and that they did not arrive at their verdict on the basis of the fact that the defendant was guilty of first degree murder; that statements of His Honor, the Judge, although not intended to be, were highly prejudicial to the defendant."

The Motion for New Trial was overruled on September 16th, and when the appellant's counsel was before the Court to have the Bill of Exceptions settled on October 5th, the Trial Court dictated a statement which became a part of the Bill of Exceptions, and which statement we now copy in full:

"At the request of counsel for the defendant who will be the appellant in the Supreme Court and who was not counsel at the trial of the case the Court makes the following statement for the record in open court on this, the 5th day of October, in the presence of counsel for the defendant and the prosecuting attorney: "The jury in this case retired to the jury room to consider their verdict between 10:30 and 11:00 o'clock. The Court was recessed while this jury was out and at 12:00 o'clock noon, or a little bit thereafter, I wanted to determine whether the jury would want me to stay over during the noon hour or whether they were going to adjourn their deliberations for lunch. I looked around for the sheriff and he was not in the court room so I walked to the jury room door, which is just off the court room, knocked on the door and opened it. When I opened the door all discussion in the jury room stopped. I did not enter the jury room, but stood at the door with the

door open and asked the foreman of the jury if they wanted me to keep myself available during the noon hour to receive their verdict or did they want to go to lunch themselves. The foreman informed me that they would let me know in a few minutes. I started to leave and one of the jurors asked me if he could ask me a question. I said, 'You may ask a question but I doubt if I can answer it.' He then asked if there was any way a man could get out of serving a life sentence who had been sentenced for life. On the spur of the moment, I answered his question by saying: 'Yes, it does happen that they get out under our present system after having served from seven to ten years.' The same juror then asked 'How do they do it?'; and I said, 'It happens often that they commute the life sentence to twenty-one years after the defendant has served seven years or more and then let him out on parole. As a matter of fact it is my information that the average time served by life termers in Arkansas for the last several years has been seven years, however, it does not always happen and there are those who serve the rest of their lives under this type of sentence.' That was all of the discussion as nearly word for word as I can remember it. I never did go into the jury room and I never did hear any of the jury's discussion, either about adjournment for lunch or about the case. I then returned to the court room and informed counsel for the defendant fully as to what had just occurred.

"No motion for a mistrial was made at the time but this matter was included in the motion for new trial as one of the grounds therefor, was argued and the Court being of the opinion that it was not prejudicial overruled the motion for new trial."

We admire the candor and integrity of character of the Trial Judge, who unhesitatingly made the above and foregoing statement; but we cannot affirm this case and thereby put the stamp of our judicial approval on such communications between the Judge and the Jury, lest in the future such communications should be considered a wise course for other judges to follow. Our

position here is very much like that which confronted us in *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748. In that case it was discovered after the trial—and unknown by the Judge and all parties before the trial—that the Trial Judge was related to the deceased within the fourth degree of affinity. Solely because of such relationship, we reversed the conviction. The late and beloved Mr. Justice Frank G. Smith, speaking for the Court, said:

"It may be asked therefore, what difference it makes that this relationship existed between the presiding judge and the sheriff? The answer is, 'It will be recorded for a precedent and many an error by the same example will rush into the state. It cannot be.' . . .

"It may be unfortunate that the case will have to be retried, but we think it better that a single case should be retried than to approve an improper precedent for the trial of future cases."[1]

Likewise, we know it is better for this one case to be retried than for this Court to approve an improper precedent that may be used in the trial of future cases. We are convinced that the Trial Judge committed error, which was not waived; and that the error was prejudicial.

I. *Error.* § 43-2139 Ark. Stats. is § 248 of the Code of Criminal Procedure, and says:

"After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties."

In *Wacaster* v. *State,* 172 Ark. 983, 291 S. W. 85, while the Jury was still considering its verdict, the Trial Judge and the foreman of the Jury had a conversation in the hall outside of the jury room, in the absence of the defendant and his attorney, in which conversation

[1] In *Stroope* v. *State,* 72 Ark. 379, 80 S. W. 749, Chief Justice BUNN expressed the same thought as that contained in the quotation.

the Court discussed with the foreman of the Jury the likelihood of a parole. We held that the Statute quoted above was mandatory, and that the conversation between the Trial Judge and the foreman of the Jury was error; and we reversed the conviction. We quoted from *Wawak* v. *State,* 170 Ark. 329, 279 S. W. 997, as follows:

" 'It is, of course, not only improper, but is error calling for the reversal of the judgment, for the Court to communicate with the Jury, in the absence of the defendant, any directions in regard to their verdict.' "

In addition to the cases cited in *Wacaster* v. *State, (supra),* there are many other cases decided by this Court, all discussing this matter of communications between the Court and the Jury, either in the absence of the accused or in any manner except in accordance with § 43-2139 Ark. Stats. Some of these cases are: *Kinnemer* v. *State,* 66 Ark. 206, 49 S. W. 815; *Stroope* v. *State,* 72 Ark. 379, 80 S. W. 749; *Pearson* v. *State,* 119 Ark. 152, 178 S. W. 914; *Scruggs* v. *State,* 131 Ark. 320, 198 S. W. 694; *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811; *Hopkins* v. *State,* 174 Ark. 391, 295 S. W. 361; *Durham* v. *State,* 179 Ark. 507, 16 S. W. 2d 991; *Day* v. *State,* 185 Ark. 710, 49 S. W. 2d 380; and *Smith* v. *State,* 194 Ark. 264, 106 S. W. 2d 1019. See also Annotations in 22 A. L. R. 261; 34 A. L. R. 104; and 62 A. L. R. 1466. We conclude that the Trial Judge committed error in having the conversation with the Jury as detailed in his statement previously copied herein.

II. *Waiver.* But it is insisted by the Attorney General that any error that might have been committed by the Trial Judge was waived by the defendant and his counsel because the Trial Judge immediately returned to the Court room and informed counsel for the defendant fully as to what had just occurred; and that record contains no objection or exception; and the Trial Judge has dictated into the record that no Motion for Mistrial was made. From these facts, the Attorney General argues that in the absence of an objection or exception, the error cannot be considered; that it was too late to raise the

question for the first time in the Motion for New Trial; and the Attorney General cites in this connection, *Durham* v. *State,* 179 Ark. 507, 16 S. W. 2d 991, and *Davidson* v. *State,* 108 Ark. 191, 158 S. W. 1103. It is true that we have said many times in appeals in criminal cases that error assigned in the Motion for New Trial must be predicated on an objection or exception made at the time the error was committed. This is the rule: but we have recognized an exception [2] to it, particularly in the matter of improper argument. In *Wilson* v. *State,* 126 Ark. 354, 190 S. W. 441, in discussing the absence of any objection to an improper argument, we said:

"Appellant cannot predicate error upon failure of the Court to make a ruling that he did not at the time ask the Court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same."

In the case at bar, we hold that the conversation between the Trial Judge and the Juror falls within the purview of the quoted language above: the Judge, having committed the error, should have corrected it on his own motion, and the accused was not obligated to make a formal objection because the error had already been committed, and an objection could not have erased the damage that had been done. The remarks that the Trial Judge made to the Jury were the same as ink upon snow,[3] and no amount of admonitions or cautions could have erased from the minds of the Jury what the Trial Judge had said.

In some cases the Trial Judge has told the Jury the *law* as to paroles; and that course of procedure has been approved. See *Glover* v. *State,* 211 Ark. 1002, 204 S. W.

[2] In *Wells* v. *State,* 193 Ark. 1092, 104 S. W. 2d 451, we held that although there were no objections or exceptions, nevertheless this Court was not precluded from an examination of the record for error. In *Wacaster* v. *State,* (*supra*), the objection was not made until the Motion for New Trial, but in that case the Court did not inform counsel of the conversation, as was done here.

[3] We used this expression in regard to statements of the Prosecuting Attorney to the Jury in *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 248.

2d 373; and *Pendleton* v. *State,* 211 Ark. 1054, 204 S. W. 2d 559.[4] But in the case at bar, the answers made by the Trial Judge to the Juror's questions—admittedly made on the "spur of the moment"—were not declarations of law that a Judge could make from the bench; rather the answers were testimony as to the Judge's personal observations and hearsay evidence as to the length of time some convicts stay incarcerated. The answers would not have been legally admissible into evidence. At best they fall into the same category as improper arguments of counsel to the Jury,[5] and for that reason the quoted language from *Wilson* v. *State, (supra),* is apropos to the situation here. The defendant did not waive the error because the Trial Judge should, on his own motion, have declared a mistrial because of the answers that he made to the Jury. We are all human, and we know the Trial Judge in this case did "on the spur of the moment" what many of us might have done; but calm reflection convinces us that he should have set the verdict aside when the error was called to his attention in the Motion for New Trial, because it was error that, under the circumstances, was not waived.

III. *Prejudicial.* In the statement which the Trial Court dictated into the record, as previously copied herein, the Trial Judge stated that he denied the new trial because "the Court being of the opinion that it (the error) was not prejudicial." We conclude that the error here involved was prejudicial.[6] The Court had instructed the Jury, not only as to first degree murder, but as to second degree murder, voluntary manslaughter, and self-defense. The defendant had stoutly maintained that if he did not act in self-defense, he certainly acted in the heat of passion. The Jury was still deliberating, when the Court told the Jury that a person sentenced to life im-

[4] Other cases that might be cited to point out the difference between the Court telling the Jury the law and telling the Jury the facts on suspended sentence and parole, are: *Pittman* v. *State,* 84 Ark. 292, 105 S. W. 874; *Bird* v. *State,* 154 Ark. 297, 242 S. W. 71; and *Jones* v. *State,* 161 Ark. 242, 255 S. W. 876.

[5] See *Hyde* v. *State,* 212 Ark. 612, 206 S. W. 2d 739.

[6] See 24 C. J. S. 849 for general discussion as to when remarks of trial judge constitute prejudicial error.

prisonment sometimes got out in seven years. That conversation could have caused the Jury to change the grade of the offense from second degree murder and a seven-year sentence to first degree murder with a life sentence. Certainly the communication made by the Trial Judge to the Jury while the deliberations were still in progress did not benefit the defendant; and, on the other hand, prejudiced his rights.

What this Court said about another Trial Judge in *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811, applies with equal force to the Trial Judge here: "The high character of the Trial Judge is so well known that it cannot be assumed that he was undertaking to exercise any undue influence over the Jury.'" But, for the error indicated, the judgment is reversed and the cause remanded.

The Chief Justice dissents.

MINOR W. MILLWEE, Justice (concurring). It is a little difficult to determine from the majority opinion whether the circuit judge or the defendant was on trial below. But it is clear that error was committed by the judge in going to the jury room in the manner indicated, and the attorney general has so conceded in his brief. The difficult question is whether the error was waived by appellant's failure to object after the matter was called to his counsel's attention. In reciting what transpired the court stated that counsel for the defendant made no "motion for a mistrial" at the time he was informed of the objectionable matters, but the court did not state whether counsel for the defendant objected to the procedure. In these circumstances, I would resolve the doubt in favor of the defendant and indulge the presumption that he did, in fact, object although he did not move for a mistrial. I cannot agree with the majority's conclusion that no objection was necessary. In reaching this conclusion the majority are overruling the case of *Durham* v. *State,* 179 Ark. 507, 16 S. W. 2d 991, without saying so. That case involved the same error committed here and this court in a unanimous opinion written by Chief Justice HART held that the error was waived by failure to

object. We have followed the same rule in numerous other cases, many of them involving the death penalty, in connection with errors which are not objected to. In my opinion the majority do violence to this well-settled rule. I, therefore, concur in the result only.

GRIFFIN SMITH, Chief Justice, dissenting. The material facts are undisputed. Judge Taylor did not enter the jury room, but stood at the door and answered certain questions that every informed person in Arkansas knows to be true. These questions and the responses made by the judge are a composite of constitutional and statutory law: the Governor's power, upon the one hand, to commute sentences, and the parole system upon the other.

Then the judge immediately informed counsel for the defendant regarding the conversation, and there was seeming acquiescence. Certainly a motion for mistrial at this stage of the procedure would have been proper. Instead, the defendant preferred to speculate on what the jury would do. If the verdict proved satisfactory, nothing would be said about the so-called judicial indiscretion; if unsatisfactory, the matter would be urged as error. I do not think that counsel for the defendant had this alternative in mind. They are not the type of lawyers who would conceal such a purpose. It is more than a circumstance that these attorneys do not appear as counsel on appeal. Neither should unethical practice be ascribed to the attorney who now represents the defendant. The record does not show that he participated in the trial. I think the error was waived by conduct and that the judgment should be affirmed.

NOBLIT *v.* NOBLIT.

5-330 265 S. W. 2d 725

Opinion delivered March 15, 1954.

Herrn Northcutt, for appellant.

Oscar E. Ellis, for appellee.

MINOR W. MILLWEE, Justice. This is a companion case to *Noblit* v. *Noblit, ante* p. 220, 265 S. W. 2d 520, decided March 1, 1954. In that case we sustained an order of the Fulton Probate Court admitting to probate the will of G. Howard Noblit, deceased, in which he devised all of his real estate to appellee, Mrs. Howard Noblit, his widow. Appellant, Maude Noblit, brought the instant suit in equity to partition certain lands devised to appellee in said will claiming that decedent died intestate and that appellant, as his sole heir-at-law, owned an interest in said lands which should be sold and the proceeds divided between appellee and appellant.

The effect of our holding in the former case was that appellant had no interest in the lands which she seeks to partition. It necessarily follows that the chancellor correctly dismissed the instant partition suit.

Affirmed.

REYNOLDS *v.* MANLEY.

5-176 265 S. W. 2d 714

Opinion delivered March 15, 1954.

Mehaffy, Smith & Williams, Pat Mehaffy, John T. Williams and *R. Ben Allen,* for appellant.

Bates, Poe & Bates, for appellee.

WARD, J. This is an appeal from a judgment against appellants based on injuries received in an automobile collision and in favor of John Manley, John Manley as guardian of his three children, and John Manley as administrator of the estate of his wife. The principal ground urged by appellants for a reversal is that there is no substantial evidence to support the verdict of the jury and the judgment of the trial court.

On October 27, 1951, John Manley, accompanied by his wife, Lucy, and their three minor children, was driving south on Highway No. 71 toward Texarkana. As he was approaching the south end of Index bridge a large trailer truck going north came to a halt supposedly for the purpose of allowing Manley's car to clear the bridge.

At this time a pickup truck driven by J. P. Harrison, one of the defendants in the trial court, had come up behind the trailer truck. Because of this situation, it is alleged, Manley was forced to pull his car to the right off the 18-foot concrete highway and onto a concrete extension slab which extended from the bridge south along the west side of the main highway for a distance of approximately 200 feet, and when he came to the end of the extension slab, it is contended, the right wheel of his car went off the end of the extension slab and into a hole or rut. This, it is contended, caused him to lose control of his car and caused his car to swerve to the left into the direct path of a car being driven north at the time by one Perry Lay. As a result of the collision Manley and his three children were injured and his wife, Lucy, died a few days later. The extent of the injuries and the amount of recovery are matters that need not be discussed in this opinion.

The concrete extension slab mentioned above is approximately 3 feet wide at the bridge and the south end is approximately 14 inches wide. This extension slab was constructed by appellants pursuant to a contract with the State Highway Department. The U. S. Bureau of Public Roads participated with the State in the construction project. Incidental to the contract it was a part of appellants' job to backfill on the west side and at the south end of the extension slab and also repair or build the shoulder on the west side of the concrete road and immediately south of the end of the extension slab for a distance of approximately 34 feet. The material to be used in backfilling and in building the shoulder is one of the questions to be discussed later.

Appellees' action is based on the alleged negligence of appellants in the construction of the extension slab and the shoulder. Hereafter we will refer to the shoulder as the extension shoulder. In their original complaint appellees alleged that appellants were negligent in that they "dug an excavation and opening several feet in length extending along the west side of the slab approximately one foot in width and approximately one foot in depth and left there without guards and it was [left]

open without giving warning, which created a hidden or indiscernible hazard dangerous to the public." Appellees have apparently abandoned this specific allegation of negligence except insofar as it relates to the allegations contained in their amendment to the complaint where appellants' negligence is stated thus: Appellants left "the hole opening an excavation described in the original complaint in a careless and negligent manner, making a hole and opening apparent and imminently dangerous in the public highway where motorists were likely to drive their cars, and after so doing then refilled, and left, the hole and opening with improper materials and dirt without tamping the fill, as should have been done, which acts were carelessness and negligence, and by not so tamping and packing the sand with the proper dirt and materials went and left a hole apparent and imminently dangerous. . . ." The undisputed proof shows [and appellees do not contend otherwise] that when the contractors finished the job there was no hole left in the extension shoulder and therefore, as we see it, appellees predicate negligence on the allegation that appellants, in backfilling the extension slab and in constructing the extension shoulder used (a) improper materials and (b) did not properly tamp and pack the materials used.

The record shows without contradiction that appellants completed their contract on May 5, 1951; that the job was inspected on May 9, 1951, by appellants' superintendent and by the resident engineer and the assistant construction engineer in charge of bridge work for the Highway Department; that the job was formally inspected on May 22, 1951, by the State Highway Department engineer and by the officer in charge of construction and maintenance for the U. S. Bureau of Public Roads; that on May 22, 1951, the State Highway Department finally and fully accepted the job from appellants; that on August 7, 1951, the engineer of the U. S. Bureau of Public Roads, who could not be present at the final inspection on May 22, 1951, inspected the entire job and approved the same, and; that the wreck which caused appellees' injuries occurred on October 27, 1951.

Appellants make the contention that, under the above undisputed facts, they cannot be held liable for damages, and, in support cite *Memphis Asphalt and Paving Company* v. *Fleming,* 96 Ark. 442, 132 S. W. 222. In that case appellant under contract with a city improvement district constructed a sidewalk along the side of a street and across a branch but did not construct any guard rail or barrier where it extended over the branch, nor was any required by the contract. Appellee was injured by falling from the sidewalk into the branch and the negligence alleged was the failure to construct a guard rail. Appellant's contention was that "it had paved the street and constructed the sidewalk in accordance with the contract and that the work was completed and accepted before the injury occurred." The court said:

"The proof shows that the street had been paved and the sidewalk constructed in accordance with the contract plans and specifications, and that it had been in fact and formally accepted by the engineer in charge of the district on September 2, and thrown open to the use of the public, and that plaintiff's injury occurred three days thereafter, and that later the city accepted the improvement of the entire district on October 6 or 7, without any change in the work on this sidewalk. The asphalt company's contract was with the improvement district, not the city.

"The general rule is that after the contractor has turned the work over and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work, but the responsibility, if any, for maintaining or using it in its *defective* condition is shifted to the proprietor." (Emphasis supplied.)

The contract which appellants here had with the State Highway Department was not introduced in the record, but there is no contention on the part of appellees that appellants did not construct the extension slab and extension shoulder in accordance with the provisions of the contract, except in one instance which we discuss later, recognizing, of course, appellees contend the con-

struction was done in a negligent manner. It was stated by one of appellants' witnesses that the contract called for dirt to be used in making the fills, whereas the evidence shows the fills were made with a sand and gravel mixture known as s-5. However, the undisputed proof shows that this change was first discussed with and sanctioned by representatives of the State Highway Department, and, as so changed, was finally accepted. The unescapable conclusion therefore is that the contract between the appellants and the State Highway Department was changed in this regard by mutual consent. So it must be said here as was said in the *Memphis Asphalt* case, *supra,* that the extension slab and extension shoulder were "constructed in accordance with the contract plans and specifications, and that it had been in fact and formally accepted. . . ." Although the opinion in the cited case mentions no evidence of negligence on the part of the contractor the general rule stated by the court as copied above leads us to conclude that the same result would have been reached if evidence of negligence had been introduced, unless such negligence had come within the classifications later mentioned.

Appellees strongly insist that appellants were negligent in this instance in using s-5 gravel instead of dirt and in not properly tamping the material used in backfilling and in building the extension shoulder. However, even if it be conceded that the record shows substantial evidence of such negligence, appellants cannot be held liable under the holding announced in the case of *Canal Construction Company* v. *Clem,* 163 Ark. 416, 260 S. W. 442, 41 A. L. R. 4. In that case Clem, in the trial court, recovered damages against the construction company on account of an injury received while crossing a bridge over a public highway, which injury it was alleged was caused by appellant's negligence in the construction of the bridge. Notwithstanding the proof was ample to show negligence on the part of the construction company in leaving the flooring of the bridge un-nailed, this court reversed the trial court and dismissed the cause of action announcing this rule:

"The general rule is well established that an independent contractor is not liable for injuries to a third person occurring after the contractor has completed the work and turned it over to the owner and the same has been accepted by him, though the injury resulted from the contractor's failure to properly carry out his contract."

It is our best judgment that the facts in the case under consideration place it squarely within the general rule announced in the above-mentioned decisions.

There are, however, some exceptions to this general rule, under which exceptions a contractor may be held liable even though there has been an approval and acceptance of the completed job. One of the exceptions noted in the *Memphis Asphalt* case, *supra,* is where the job is "turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons." An exception to the general rule is also noted in the *Canal Construction Company* case, *supra.* The courts and authorities in general recognize at least two exceptions to the general rule upon which appellees here rely, namely: (a) Where a defect in construction caused by the negligence of the contractor is so concealed that it could not reasonably be detected on inspection by the proprietor, and; (b) Where the job is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons. We shall now discuss these exceptions as they relate to the evidence introduced in this case.

(a) Were the defects, if any, concealed from the State? Appellees contend that dirt should have been used instead of sand and gravel, that appellants should have used an air hammer instead of using heavy trucks or vehicles with pneumatic tires for compaction, and that appellants were negligent in not doing so. Again conceding for the present that appellees are right in this contention, yet it cannot reasonably be said that this situation was in any way concealed from the State Highway Department. The undisputed facts are that officials of the State Highway Department were present when all

this work was being done, that they not only knew how it was being done but actually directed what materials to use, and that they approved and accepted the work with full knowledge.

Mr. M. O. Thornton, the resident engineer with the State Highway Department in charge of this job, testified: "Q. Did they perform that and every phase of that work under your direct supervision? A. Yes sir, that's right." When Thornton was asked about the last work done on shoulder he stated: "A. On May 5, Saturday morning, the trenches were filled or what we refer to as backfilling, the edges of the pavement with gravel on both sides of the road, both sides of the pavement. Q. Were you present when that was done? A. I was."

(b) We cannot agree with appellee's contention that the contractors here turned over the job to the State and Federal authorities in such a condition that it was imminently dangerous to persons who might later use the highway.

The job here was completed on May 5, 1951, and the accident occurred on October 27, 1951. In the meantime approximately 200,000 cars had used the highway. Of course, not all but many of the cars must have gone over this slab and shoulder, because there were ruts in the shoulder when the accident happened and there must have been ruts before that because the shoulder had been reconditioned practically every week by the maintenance department of the State. There is, of course, no contention that any hole or rut was left when the job was completed. If the best possible judgment was not used in the selection of material and method of compaction it was not the misjudgment of appellants but of the State Highway Department. Again, in speaking of the final phases of the work, Thornton testified:

"Q. Who selected and passed on the material that went into that hole or trench there at the end of the bridge?

"A. I did.

"Q. What kind of material was used there with reference to whether it was sand or gravel?

"A. It was sandy gravel.

"Q. Why did you require the contractor to put gravel there, if you did?

"A. I consulted with my superior, the assistant construction engineer, Mr. E. E. Hurley, as to which would possibly be more advisable and the best construction and he concurred with me that it would be better to backfill that widening strip with gravel than with the sandy loam soil, that it possibly wouldn't scour quite as much and that we could get equal compaction which in the event that traffic should go off, it would be a little better to be on a gravel surface than on soil, and we did that."

When Thornton was asked about the method of compaction he stated:

"A. Placing and rolling of backfill material in a close place with a motor patrol pneumatic tire operation is considered better than with the steel rollers or steel equipment."

Black's Law Dictionary, Fourth Edition, describes "Imminent" as: "Near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; perilous." The case of *Jaroniec* v. *Hasselbarth,* (N. Y.) 228 N. Y. S. 302, in discussing a manufactured article which was alleged to be "imminently dangerous," quoted with approval the following language:

"There must be knowledge of a danger, not merely possible but probable. It is possible to use most anything in a way that will make it dangerous. That is not enough to charge the manufacturer with a duty independent with his contract."

Under the facts and circumstances disclosed by the entire record here it would be, in our judgment, most un-

reasonable to hold that appellants, as contractors, by their negligence created an imminently dangerous situation which caused appellees' injuries and the death of Mrs. Manley. The effects of such a holding are so obvious and so far-reaching as to compel caution. Road construction contractors, under such holding, would be subjected to potential liabilities so great as to deter them from undertaking such work, or it would force them to demand such exorbitant prices as to make further road construction impossible, and it is not apparent at what point of time such liability would cease. When appellants here undertook and performed this contract job they could reasonably expect that the shoulder would have to be repaired from time to time and that this would be done by the maintenance division of the State Highway Department. This was in fact done. Not only did the State recondition this shoulder practically every week during the five months previous to the accident but it actually did a major repair job only a few days before the accident. It is obvious therefore that the condition which caused the accident was not the condition which existed when appellants finished the job or when the job was approved and accepted.

It is in regard to some of the features of this case mentioned above that distinguishes it from many of the cases relied on by appellees for a reversal, and in particular the case of *Southern Express Company* v. *Texarkana Water Company,* 54 Ark. 131, 15 S. W. 361, which case was recognized as an exception to the general rule in the *Canal Construction* case, *supra.* In the *Southern Express* case, *supra,* the water company dug a trench in the public street and improperly refilled it in such a way that rains caused the filling material to wash or settle. As a result appellant's horse fell or stepped into the sunken portion and was injured. The effect of the opinion appears to be that the water company's negligence was the proximate cause of the injury, though the court said such "negligence was the proximate cause of the defect in the street. . . ." It was further stated by the court that it was the duty of the water company to anticipate and provide for the material effect of rains

upon earth excavated and repaired. The court also said: "If guilty of no negligence in the performance of its duty to replace the street in the condition in which it found it, the defendant would not be liable for a dangerous condition subsequently occasioned by natural causes."

The opinion in the *Southern Express* case, *supra,* is short and does not discuss the question from the standpoint of imminent danger as an exception to the general rule, yet it apparently rests on that basis as was recognized in the *Canal Construction* case, *supra.* As we view the opinion it does not apply to and is distinguishable from the case under consideration. First, there was no contract between the water company and the city, and so there was no inspection and acceptance by the city. Second, it was not unreasonable for the water company to anticipate that rain would cause the dirt to sink if it was not properly packed and there appears to be no contention that it was. Here it is admitted by appellants that a road shoulder, whether constructed with dirt or s-5 gravel, will be affected by rain and traffic, but they also had a right to expect, as before stated, the State would keep it in a safe condition for use by the traveling public notwithstanding rain and traffic. There is also a third and vital distinction between the two cases. As before noted, the court in the *Southern Express* case, *supra,* stated that the company's negligence was the proximate cause of the defect. Although the court's opinion does not so state, it apparently based its conclusion as to proximate cause on the absence of proof that the ditch had been refilled by the city, but that it was in the same condition as it was left by the water company. Such of course is not the situation here. We, therefore, cannot agree that the opinion in the *Southern Express* case, *supra,* is authority for holding here that the alleged negligence of appellants, even if any is shown, was the proximate cause of the rut in the extension shoulder which, it is conceded, was made by heavy traffic months after they had finished the job and after the State Highway Department had inspected and accepted the work and had assumed full responsibility for keeping it in repair.

Appellees cite many other cases but none of them are relied on to the extent that the *Southern Express* case, *supra,* is relied on, and it would serve no useful purpose to discuss them. We have carefully examined each cited case and find that they either do not apply to the facts here or can be distinguished on facts or principles of law from the *Memphis Asphalt* case, *supra,* and the *Canal Construction* case, *supra.*

For the reasons stated above the judgment of the trial court is reversed and the cause of action, appearing to have been fully developed, is dismissed.

Justices McFaddin and Millwee dissent.

Southeast Construction Company, Inc. *v.* Wood, Judge.

5-353 265 S. W. 2d 720

Opinion delivered March 15, 1954.

Howard L. Wilkinson and *Daily & Woods,* for petitioner.

Bates, Poe & Bates, for respondent.

Ward, J. This Petition for Writ of Prohibition raises the question of proper venue in an action brought by Cecil N. Elliott and wife against petitioners. The answer to this question depends on whether Elliotts' complaint states a cause of action in damages to real estate or a

cause of action on contract. If the former, the action is local and the Writ must be denied, but if the latter, the Writ should be granted.

The first complaint filed by Elliotts makes many references to a contract between the State and petitioners, but later Elliotts filed an amended complaint which we will consider in this opinion.

In substance the amended complaint states. Elliotts are the owners of certain lands; The State Highway Department, in order to widen Highway No. 28, took a portion of their land upon which was situated their residence, several other structures (naming them), and a well; Payne Brothers, as sub-contractors under the Southeast Construction Company, tore down said buildings and destroyed their value, and; by this taking they were damaged in the sum of $14,000. The complaint, of course, does not use the language set out above, but it can reasonably be interpreted to convey the same meaning. As so interpreted the complaint states a cause of action for damages to real estate and the venue was thereby fixed in Scott County where the complaint was filed, under Ark. Stats., § 27-601.

In addition to the allegations above set out, however, the complaint contained many other statements, and petitioners contend that these other statements show the complaint to state a cause of action solely in contract. If this contention is correct it may be conceded that Scott County is not the proper venue, since neither of the petitioners lived or was served in that county, and that the Writ should issue in this case. We do not agree with this contention.

The complaint, among other things, states that: Petitioner, Southeast Construction Company, is a corporation of Arkansas with its principal place of business at Pine Bluff, and prior to December 7, 1951, it entered into a contract with the State to widen Highway No. 28; said construction company "entered into some kind of a contractual arrangement with" petitioners, A. G. Payne and C. L. Payne, as sub-contractors to move the buildings

located on Elliotts' land, and the contractor was liable for all the sub-contractor's acts; petitioners, acting jointly and in concert, moved the said buildings and, in doing so, negligently destroyed and demolished the buildings and the well, although they were "supposed to move each of the above buildings as a whole and restore them to the condition they were off the right-of-way," and; "the value of the buildings and structures immediately preceding the building of this road had a value of $15,000; that today the buildings and structures are so situated and left in such a condition that it has very little value not to exceed over $1,000; that, as a result of the acts of the defendant, Southeast Construction Company, Incorporated, in this contract, the plaintiffs have been damaged in the sum of $14,000."

It is apparent, of course, from the above mentioned allegations that many references are made in the amended complaint to the contract between the State and the Southeast Construction Company, but we do not think they are necessarily controlling.

There is nothing in the amended complaint to show by what authority, if any, the State took the Elliott land, or just what rights, if any, they had under the contract between the State and petitioners. The references in the amended complaint to the duty of petitioners to move and restore the buildings, and the negligent manner in which they attempted to do so, may be treated as surplusage or as showing elements of mitigation in damages for which petitioners might be liable. Even if it is correct to say Elliotts could have sued for a breach of contract, the fact remains that they had a choice of remedies. It is evident from the fact they abandoned the original complaint and filed an amendment that they chose an action for damages to real estate. That Elliotts could have two remedies based on the same fact situation, and that they had a choice, was held in *Ferrill* v. *Collins,* 222 Ark. 840, 262 S. W. 2d 885, where, in an analogous situation, we said:

"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."

In accordance with the views above expressed, the Writ of Prohibition must be, and the same is, hereby denied.

The Chief Justice dissents.

SOUTHEAST CONSTRUCTION COMPANY, INC. *v.* WOOD, JUDGE.

5-354 265 S. W. 2d 722

Opinion delivered March 15, 1954.

Daily & Woods, for petitioner.

Bates, Poe & Bates, for respondent.

ROBINSON, J. Southeast Construction Company seeks a writ of prohibition, contending that the Scott Circuit Court is without jurisdiction in the case of J. S. Sanders and Lillie Sanders, his wife, and Earl Sanders and Bettie Sanders, his wife, v. Petitioner herein, Southeast Con-

struction Company. The complaint filed by the Sanders alleges that Southeast Construction Company contracted with the Highway Department to do certain work on the Needmore-Forester Road. Plaintiffs further allege that defendant, Southeast Construction Company, carelessly and negligently constructed and built a culvert in and through State Highway 28 at a place where the highway runs through plaintiffs' farms, that such construction was done in a negligent and careless manner, thereby changing the natural flow of water and causing it to run over plaintiffs' lands.

Subsequently the Sanders filed an amended complaint alleging that the carelessness and negligence of the defendant, Southeast Construction Company, resulting in the damages complained of by the plaintiffs, consisted of building and constructing the culvert where one had not been, which changed the natural flow of water, without providing the proper and necessary inlet and outlet; and by carelessly and negligently closing and damming up the ditch on the south side of the highway just below and to the east of the culvert, thereby causing all the water to flow out of its natural course, and onto the lands of the plaintiffs, without providing and building the necessary and proper outlet, spillway, and ditch to carry off the water.

Petitioner, Southeast Construction Company, alleges that the suit is on the contract between it and the Highway Department and that the venue is in the county where service of summons can be obtained on the defendant, and that defendant was not served in Scott County. In support of its contention petitioner cites Ark. Stat., 76-232, which provides, *inter alia,* "that where any suit may be filed against any contractor, or persons engaged in the construction of state highways, or on account of any claim growing out of any contract, express or implied, or on account of any damages to person or property, said suits may be filed in any county in this State where service can be obtained upon the defendant by summons or publication of a warning order. . . ."

The above-quoted statute is not applicable because this action sounds *in tort* and is for damages to lands. Ark. Stat., 27-601, provides. "Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: . . . for an injury to real property."

In *Missouri Pacific Railroad Co.* v. *Henry,* 188 Ark. 530, 66 S. W. 2d 636, it is said: "Do the complaints state actions for injuries to real property? If so, they are local and must be brought in the county where the lands lie. [Ark. Stat., § 27-601] § 1164, Crawford & Moses' Digest, 4th subdiv.; *Jacks* v. *Moore,* 33 Ark. 31; *Cox* v. *Little Rock & M. R. Co.,* 55 Ark. 454, 18 S. W. 630. Even consent cannot confer jurisdiction of the subject-matter. *King* v. *Harris,* 134 Ark. 337, 203 S. W. 847. See *Kory* v. *Dodge,* 174 Ark. 1156, 298 S. W. 505."

Writ denied.

ALFORD *v.* STATE.

4760 266 S. W. 2d 804

Opinion delivered March 15, 1954.

[Opinion on rehearing delivered April 26, 1954.]

Wiley A. Branton, for appellant.

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

George Rose Smith, J. The appellant was convicted of rape and was sentenced to death. In our opinion there are two errors in the record which entitle the appellant to a new trial.

Although it is contended that the evidence is insufficient to support the verdict we find this contention to be without merit. The prosecutrix, Mrs. Morman, testified that shortly after midnight on May 26, 1953, Alford entered the isolated railroad building in which she was working as a telegrapher. When he revealed his purpose Mrs. Morman gave him her watch and money

in the hope of dissuading him, but Alford threatened her with a hunting knife, dragged her from the building, and raped her. Two residents in the vicinity heard Mrs. Morman's screams. A physician who examined her later in the night found bruises on many parts of her body and semen within the vaginal tract. The watch was later found in Alford's home. The defendant did not testify. We regard the testimony as ample to support the conviction.

We think, however, that the court was in error in failing to inform the jury of its option to impose either the death sentence or life imprisonment. Since this option lies entirely with the jury the court is under the affirmative duty of bringing the matter to the jury's attention, even though that action is not requested by the accused. *Webb* v. *State,* 154 Ark. 67, 242 S. W. 380; *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 249.

In the case at bar the penalty for rape was not mentioned in the court's instructions. Nor is it shown that, when the forms of verdict were given to the jury by the court, any oral explanation of the forms was made. Two of these forms provided for a finding of guilty on the charge of rape, one fixing the punishment at death and the other at life imprisonment. It is, of course, possible —it is perhaps quite probable—that the members of the jury so thoroughly discussed these forms that each juror understood his choice in the matter. But it is also possible that the alternative punishments were not discussed and that all the jurors did not examine the forms. In the latter case it might be impossible to discover the error, for jurors cannot impeach their verdict. In a matter of such grave importance we think that even the possibility of misunderstanding should be avoided. The court should explain the penalties to the jury as a whole, so that the record will disclose with certainty that the information was received by all the jurors.

Second, a Mrs. Austin was permitted to testify that on a night during the first half of May the defendant, by the use of a gun, forced her husband and her from their car, took her to a vacant house nearby, and attempted

to rape her, although he at last yielded to her entreaties and desisted without having accomplished his purpose. The court instructed the jury, in substance, that Alford could not be convicted upon Mrs. Austin's testimony, that evidence having been admitted only to show design, particular intention, knowledge, or good or bad faith. The appellant insists that the admission of this testimony was prejudicial error. The State contends that proof of a recent offense of a similar nature is competent.

This question of introducing proof of other offenses in criminal cases has been considered by us on more than a hundred occasions. In reviewing these opinions one notices that the results reached in the various cases have been harmonious to a high degree. There have occasionally been dicta that went beyond the requirements of the case under consideration, and with so many decisions to choose from it is, of course, possible to pluck sentences from their factual background and in that way to advance a plausible argument supporting either the reception or the exclusion of evidence concerning almost any prior offense. But when each statement of law is weighed in its own setting of fact the opinions may be readily reconciled with one another.

No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.

The rule itself has been announced in some fifty decisions of this court and is so familiar that we need not discuss at length the reasons for its acceptance by every English and American court. Basically, the rule rests upon that spirit of fair play which, perhaps more than anything else, distinguishes Anglo-American law

from the jurisprudence of other nations. Our theory is simply that a finding of guilty should rest upon proof, beyond a reasonable doubt, that the accused committed the exact offense for which he is being tried. We do not permit the State to bolster its appeal to the jury by proof of prior *convictions,* with their conclusive presumption of verity, and still less is there reason to allow the jury to be prejudiced by mere accusations of earlier misconduct on the part of the defendant. If the accused has committed other crimes, each may be examined separately in a court of law, and punishment may be imposed for those established with the required certainty. In this way alone can we avoid the elements of unfair surprise and undue prejudice that necessarily attend trial by accusation in place of trial upon facts demonstrated beyond a reasonable doubt.

The rule is designed to protect the innocent, but it is often invoked as a basis for excluding *any* evidence that tends to show the commission of another offense. We have repeatedly rejected unfounded appeals to the protection of the basic rule of exclusion. If other conduct on the part of the accused is independently relevant to the main issue—relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal—then evidence of that conduct may be admissible, with a proper cautionary instruction by the court. "While the principle is usually spoken of as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts which are from their nature competent as showing knowledge, intent or design, although they may be crimes, which is admitted. In other words, the fact that evidence shows that the defendant was guilty of another crime does not prevent it being admissible when otherwise it would be competent on the issue under trial." *State* v. *DuLaney,* 87 Ark. 17, 112 S. W. 158.

Although, as stated in the above quotation, the instances of admissibility are not really exceptions to the exclusionary principle, most courts, including this one,

have often found it convenient to catalogue examples of competent testimony as exceptions to the general rule of inadmissibility. The only disadvantage in this approach is the possibility that incompetent evidence may be admitted under the guise of an exception or that competent proof may be ruled out for want of an exception that seems to fit the case. Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988.

The State contends that evidence of recent similar offenses is admissible in criminal cases. While that broad statement has appeared in a few opinions, it must on each occasion be read in context. Taken as a whole, our decisions do not support the view that the sole test of competency is the recency of the other offense and the similarity of its nature. Indeed, if that test were applied woodenly in each case the result would be to deprive the accused of much of the protection that the rule is intended to afford.

Superficially similar to the case at bar are those decisions holding that in trials for incest or carnal abuse the State may show other acts of intercourse *between the same parties*. *Adams* v. *State,* 78 Ark. 16, 92 S. W. 1123; *Williams* v. *State,* 156 Ark. 205, 246 S. W. 503. But obviously such testimony is directly relevant to the question at issue. As stated in the *Williams* case, such prior acts of intercourse show "the relation and intimacy of the parties, their disposition and antecedent conduct toward each other," and for that reason the evidence aids the jury in determining whether the offense was committed on the particular occasion charged in the indictment.

Again, where the charge involves unnatural sexual acts proof of prior similar offenses has been received: *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594; *Roach* v. *State,* 222 Ark. 738, 262 S. W. 2d 647. Such evidence shows not that the accused is a criminal but that he has "a depraved sexual instinct," to quote Judge Parker's phrase in *Lovely* v. *United States,* 4th Cir., 169 F. 2d 386.

Perhaps the most frequent resort to evidence of recent similar offenses occurs in the cases involving guilty

knowledge. In such cases good faith would be a defense to the charge; the vital issue is whether the defendant knew his conduct to be wrongful. For example, it is not a crime to pass a forged check in the belief that it is genuine, but the same conduct is criminal when done with knowledge that the instrument is bogus. Since it is highly improbable that an innocent man would repeatedly come into possession of forged checks, proof of recent similar offenses bears directly on the issue of guilty knowledge. In this category fall cases involving forgery, counterfeiting, false pretenses, knowledge that an establishment is a gambling house, and many other situations. *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779; *Holden* v. *State,* 156 Ark. 521, 247 S. W. 768; *McCoy* v. *State,* 161 Ark. 568, 257 S. W. 386; *Norris* v. *State,* 170 Ark. 484, 280 S. W. 398; *Wilson* v. *State,* 184 Ark. 119, 41 S. W. 2d 764; *Sibeck* v. *State,* 186 Ark. 194, 53 S. W. 2d 5.

We need not take the time to review in detail the cases in which proof of other recent similar offenses is competent under other so-called exceptions to the general rule, as to show motive, *Shuffield* v. *State,* 120 Ark. 458, 179 S. W. 650, to rebut the plea of an alibi, *Nash* v. *State,* 120 Ark. 157, 179 S. W. 159, to prove the transaction as a whole, *Autrey* v. *State,* 113 Ark. 347, 168 S. W. 556, and so forth. The present case centers upon proof offered to show intent; so we turn to representative decisions on that point.

The issue of intent is *theoretically* present in every criminal case, and for that reason it is here that we are most apt to overlook the basic requirement of independent relevancy. Professor Stone, in the article cited above, has cogently demonstrated how easy it is to reason in this manner: Evidence to prove intent is admissible, and since the present case involves intent the proof should be received. 51 Harv. L. Rev. 988, 1007. What has happened is that the emphasis has shifted from evidence *relevant* to prove intent to evidence *offered for the purpose* of proving intent, by showing that the defendant is a bad man. If this transfer of emphasis is permitted the exclusionary rule has lost its meaning.

Many of the cases involving intent are similar to those involving guilty knowledge, in that guilt involves a specific mental attitude on the part of the defendant. For example, burglary is more than the mere breaking and entering of the premises; the defendant must have intended to commit a felony therein. We have therefore held that, when the accused contended that his wrongful entry was a mere trespass without felonious purpose, the State could show that the defendant had on other occasions broken into the same store and committed larceny. *Camp* v. *State,* 144 Ark. 641 (mem.), 215 S. W. 170. The recent similar offense was directly pertinent to the issue of intent.

Similarly, upon a charge of unlawful possession of morphine the defendant contended that she had the drug lawfully for her own use, upon a doctor's prescription. We held that the State could show that she also had in her possession a quantity of cocaine, as bearing upon the question of whether the morphine was being kept for her own use or for sale or administration to others. *Starr* v. *State,* 165 Ark. 511, 265 S. W. 54. Again, where the issue was whether the accused had burned a car to collect insurance, proof that he had burned other insured vehicles was competent. *Casteel* v. *State,* 205 Ark. 82, 167 S. W. 2d 634. The same reasoning was followed in *Jenkins* v. *State,* 191 Ark. 625, 87 S. W. 2d 78.

A specific intent was involved in *Davis* v. *State,* 109 Ark. 341, 159 S. W. 1129. The statutory definition of a vagrant included a person going from place to place for the purpose of gaming. The State was rightly allowed to prove that the defendant had gambled in other counties. "We think such testimony was competent, *not for the purpose of proving the commission of the same offense in another county,* but to show the purpose of his wanderings, whether to pursue a lawful avocation. or to habitually engage in the pursuit of gambling." The clause we have italicized states plainly enough that a recent similar offense is not for that reason alone competent.

Quite evidently this category includes the many charges of assault with intent to commit a specified crime,

for here the State must prove not merely the assault but also that it was made with a certain intent. Hence, since the accused's purpose is at issue, proof of other similar offenses is independently relevant. *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116; *Hearn* v. *State,* 206 Ark. 206, 174 S. W. 2d 452; *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37; Wigmore on Evidence (3rd Ed.), § 357.

On the other hand, the reception of proof of recent similar offenses is prejudicial error when the evidence has no true relation to the issue of intent. In two of our cases the charge was theft of horses, and the State was allowed to prove closely contemporaneous thefts of saddles or bridles. Both convictions were reversed and sent back for a new trial. *Dove* v. *State,* 37 Ark. 261; *Endaily* v. *State,* 39 Ark. 278. See also *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398; *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701. In *Morris* v. *State,* 165 Ark. 452, 264 S. W. 970, a conviction for assault with intent to kill was reversed because the State had been allowed to prove prior offenses by the accused, the State's theory being that these offenses tended to show the accused's motive in shooting at police officers. Judge FRANK SMITH put his finger on the point when he said: "There was no question about the motive of appellant in shooting at the officers."

Thus our cases very plainly support the commonsense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded. In the case at bar it seems to us idle to contend that there was any real question about Alford's intent, concerning which the jury needed further enlightenment. See Wigmore, § 357. If Alford overpowered his victim and ravished her, it is a quibble to contend that perhaps he intended something other than rape. The jury's problem was to determine whether the acts described by the prosecutrix took place; if so, their motivation is not open to doubt. The earlier attack upon Mrs. Austin could have no conceivable pertinence except to brand Alford as a criminal, which is just what the State is not allowed to do. *Williams* v.

State, 183 Ark. 870, 39 S. W. 2d 295. Nor could this deadly prejudice be removed by the instruction confining Mrs. Austin's testimony to the issue of intent. If her evidence had no permissible relevancy to that issue, and we think it had none, then the jury could obey the instruction only by disregarding the evidence altogether—a result that is more surely accomplished by excluding the testimony in the first place. It is not without regret that we send this cause back for a new trial. But the issue goes to the very heart of fairness and justice in criminal trials; we cannot conscientiously sustain a verdict that may have been influenced by such prejudicial testimony.

Reversed.

GRIFFIN SMITH, C. J., and MILLWEE, J., dissent.

McFADDIN, J., dissents in part.

OPINION ON REHEARING

GEORGE ROSE SMITH, J., on rehearing. In connection with a petition for rehearing the State asks leave to amend the record by showing that the trial court in fact instructed the jury with respect to the alternative penalties for the crime of rape, this instruction having been omitted from the record by error. If this were the only reason for remanding the case for a new trial a ruling upon this motion would be necessary, as in *Morton* v. *State,* 208 Ark. 492, 187 S. W. 2d 335; but since a new trial is necessary in any event we find it unnecessary to pass upon the State's motion. See *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 248.

Rehearing denied.

ED. F. McFADDIN, Justice (dissenting).

I.

Failure to Instruct on Life Imprisonment

I agree that the record in this case fails to show that the Jury was *instructed* regarding life imprisonment; and this case, on that point, is ruled by the case of *Webb* v.

State, 154 Ark. 67, 242 S. W. 380, and *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 249. Therefore, I am convinced we should do here as we did in the cited cases; and this should be our direction, as quoted from *Webb* v. *State, supra:*

"The sentence of death . . . will be set aside, and the sentence reduced to imprisonment for life in the State Penitentiary at hard labor, unless the Attorney General elects, within two weeks, to have the judgment reversed and the cause remanded for a new trial."

II.

Proof of Other Acts of a Similar Nature

But I most earnestly dissent from all that part of the majority opinion which holds that the Trial Court committed error in admitting evidence of Alford's attempt to rape Mrs. Austin. Such evidence was entirely competent under the Instruction given by the Trial Court, as hereinafter quoted.

The majority opinion correctly states that the prosecution in any criminal case cannot prove the commission of the crime in question by the proof of the commission of other offenses of a similar nature; but such was not attempted to be done in the case at bar. That the evidence of the attack on Mrs. Austin was not admitted for such purpose is clearly shown by the Instruction which the Trial Court gave to the Jury, and which reads:

"The Court has admitted testimony of another offense similar to the one charged in the information. You will not be permitted to convict the defendant upon such testimony. Evidence of another similar offense, if you believe another has been proven, is admitted solely for the purpose of showing design, particular intention, knowledge, good or bad faith, and you should consider such evidence for this purpose and for this purpose alone. The defendant is not on trial for any offense except the alleged offense against Mrs. Morman and the defendant

cannot be convicted on Mrs. Austin's testimony of another possible offense."

The majority opinion says: "If other conduct on the part of the accused is independently relevant to the main issue—relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal—then evidence of that conduct may be admissible, with a proper cautionary instruction by the Court." The Instruction copied above shows that a "proper cautionary Instruction" was given in the case at bar.

The majority opinion admits that in *some cases,* proof of other acts of a similar nature is admissible as bearing on the "knowledge, intent or design"; and the majority opinion cites at least eight situations in which other acts of a similar nature have been held to be admissible by our cases. I take these eight situations and cases from quotations in the majority opinion:

1. ". . . in trials for incest or carnal abuse the State may show other acts of intercourse *between the same parties. Adams* v. *State,* 78 Ark. 16, 92 S. W. 1123; *Williams* v. *State,* 156 Ark. 205, 246 S. W. 503."

2. "Again, where the charge involves unnatural sexual acts proof of prior similar offenses has been received. *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594; *Roach* v. *State,* 222 Ark. 738, 262 S. W. 2d 647."

3. ". . . in the cases involving guilty knowledge . . . cases involving forgery, counterfeiting, false pretenses, knowledge that an establishment is a gambling house, and many other situations. *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779; *Holden* v. *State,* 156 Ark. 521, 247 S. W. 768; *McCoy* v. *State,* 161 Ark. 568, 257 S. W. 386; *Norris* v. *State,* 170 Ark. 484, 280 S. W. 398; *Wilson* v. *State,* 184 Ark. 119, 41 S. W. 2d 764; *Sibeck* v. *State,* 186 Ark. 194, 53 S. W. 2d 5."

4. In those cases ". . . in that guilt involves a specific mental attitude on the part of the defendant . . . *Camp* v. *State,* 144 Ark. 641, 215 S. W. 170. The

recent similar offense was directly pertinent to the issue of intent."

5. ". . . possession of a quantity of cocaine, as bearing upon the question of whether the morphine was being kept for her own use or for sale or administration to others. *Starr* v. *State,* 165 Ark. 511, 265 S. W. 54."

6. "Again, where the issue was whether the accused had burned a car to collect insurance, proof that he had burned other insured vehicles was competent. *Casteel* v. *State,* 205 Ark. 82, 167 S. W. 2d 634."

7. "The State was rightly allowed to prove that the defendant had gambled in other counties . . . to show the purpose of his wanderings, . . ." *Davis* v. *State,* 109 Ark. 341, 159 S. W. 1129.

8. ". . . the many charges of assault with intent to commit a specified crime . . . since the accused's purpose is at issue, proof of other similar offenses is independently relevant. *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116; *Hearn* v. *State,* 206 Ark. 206, 174 S. W. 2d 452; *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37."

Now, in the above eight numbered categories, I have quoted directly from the majority opinion to show cases in which the majority opinion admits that evidence of other similar offenses was admissible in each instance. I submit that when the majority admits—as it has—that in the eight categories above, the evidence of other similar acts was admissible, then the majority cannot be heard to say—with any degree of consistency—that the evidence of a similar attempted rape was not admissible in the case at bar.

In category 2 above, the majority admits that "where the charge involves unnatural sexual acts, proof of prior similar offenses has been received." I submit that rape falls in the same category as that quoted, because rape is *forced* sexual intercourse. In *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785, in discussing rape and unnatural sexual intercourse, this Court (speaking through the writer of the majority opinion in the present case), said:

"The argument now is that the accused may be a sexual pervert (he was so characterized by one witness for the defense) who did not either intend or accomplish an act of intercourse. The patent answer to this suggestion is that the proof still does not show the possibility of an assault with intent to rape; for one can intend to commit rape only if he intends to have sexual intercourse with his victim."

Thus, in the Needham case, the words were "for one can *intend* to commit rape only if he *intends* to have sexual intercourse with his victim." (Italics our own.) The quoted language from the Needham case constitutes judicial recognition that intent has been recognized as being involved in the offense of rape. So, if "other acts of a similar nature" are admissible where *intent* is involved, then I fail to see why the attack on Mrs. Austin was not admissible in the case at bar: it was certainly another act of a similar nature to show the *intent* with which the appellant attacked Mrs. Morman, for which act he was being tried.

Further, I point out that when the defendant was being tried for rape in the case at bar, he was also being tried for assault with intent to rape. At *defendant's request,* the Court gave Instruction No. 4, which reads:

"The crime of assault with intent to rape is embraced in the information charging the crime of rape; whoever shall feloniously, wilfully, and with malice aforethought assault any person with intent to commit a rape shall on conviction thereof be imprisoned in the penitentiary not less than three nor more than twenty-one years."

Now the majority opinion says in its category 8, (*supra*), that in cases of *assault with intent* to commit a specific crime ". . . proof of similar offenses is independently relevant." Appellant asked the Court to instruct the Jury on the crime of assault *with intent* to rape. How can the majority say, in the face of appellant's requested Instruction which was given, that evidence of other similar offenses was not admissible on the issue of *intent?* I submit that the majority opinion shows that

the testimony about the attack on Mrs. Austin was correctly admitted by the Trial Court.

Because I entertain the views herein expressed, I respectfully dissent.

STATE, EX REL. BERRY ASPHALT COMPANY, ET AL. *v.* WESTERN SURETY COMPANY, ET AL.

5-350 266 S. W. 2d 835

Opinion delivered March 22, 1954.

[Rehearing denied May 3, 1954.]

Tompkins, McKenzie & McRae, for appellant.

H. B. Stubblefield, for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by the appellant, Berry Asphalt Company, (*a*) to recover judgment for $5,023 for asphalt sold to the North Little Rock Asphalt Company, a corporation that is now insolvent, (*b*) to recover $1,910 of this account from Western Surety Company, as surety upon a contractor's bond executed by the insolvent company, and (*c*) to reach by equitable garnishment the sum of $300 which Street Im-

provement District No. 567 of Little Rock is said to owe the insolvent concern. On these issues the chancellor (*a*) entered judgment by default for the amount sued for, (*b*) held that the suit upon the contractor's bond was filed too late, and (*c*) ruled that the $300 held by the district was not reached by this proceeding. This appeal brings issues (*b*) and (*c*) to us.

In 1950 District 567 and a companion district employed the North Little Rock Asphalt Company to do certain paving work for the districts. The agreement required the contractor to furnish two bonds, both of which were executed by the contractor as principal and by Western as surety. The work was substantially completed in October of 1951, but this suit was not filed by Berry, which had furnished $1,910 worth of asphalt for the job, until February 24, 1953. The chancellor was of the opinion that the suit should have been brought within six months after October, 1951, the month in which he found the work to have been completed and the final estimate to have been made.

Except for a contention that we do not reach, relating to the date of the final estimate, Berry concedes that its suit was delayed too long as far as one of the two contractor's bonds is concerned. This bond is entitled Statutory Performance Bond, secures only indebtedness for labor and materials, and by its terms was executed pursuant to Act 446 of 1911. Ark. Stats., 1947, §§ 51-628 and 51-629.

The dispute upon issue (*b*) centers upon the other bond, which is entitled Performance Bond. The undertaking of this bond is twofold: First, that the contractor will perform and complete the job in a good and workmanlike manner, and, second, that he will save the districts harmless against claims for labor, materials, and certain other items that we need not enumerate, except to say that these items are substantially the same as those listed in § 1 of Act 368 of 1929. Ark. Stats., § 14-604. Berry contends that this second bond is a common law bond upon which the period of limitations is five years.

Western contends that it is a statutory bond, upon which § 3 of Act 368 requires suit to be brought within six months after the date of the final estimate to the contractor. That is the narrow issue to be decided.

We think Berry's position to be well-taken. Act 446 of 1911 required certain public officers, upon entering into construction contracts, to obtain a bond securing liability for labor and materials. Since those who furnish labor and materials for public works are not protected by the general mechanic's lien laws (*Holcomb* v. *American Surety Co.,* 184 Ark. 449, 42 S. W. 2d 765), the purpose of Act 446 was to provide that protection with respect to those public contracts to which the Act applies.

Under the 1911 law questions arose as to the extent of the surety's liability upon the bond for labor and materials, and Act 368 of 1929 was enacted for the purpose of including "all items which had been previously questioned or would likely be used or employed subsequently in the performance of the construction contracts there enumerated." *Consolidated Indemnity & Ins. Co.* v. *Fischer, Etc., Co.,* 187 Ark. 131, 58 S. W. 2d 928.

It is clear that the 1929 statute did not, as Western now contends, require a second statutory bond in addition to the one exacted by the 1911 law. Instead, the 1929 Act is purely interpretational in character. Section 1 (§ 14-604) provides that all bonds required by designated public officers shall be liable for claims for labor, materials, camp equipment fuel, food for men and animals, lumber used in making forms, and several other items that are specifically described. It is true that § 3 (§ 14-606) begins by saying that public officers shall require a bond specifically enumerating the items listed in § 1; but this statement is merely introductory, for the rest of the sentence provides that even though the bond does not so enumerate the items it shall nevertheless be security therefor.

Thus Act 446 of 1911 and Act 368 of 1929, when construed together, do not contemplate the execution of two separate bonds having the same provisions. It is Act 446

alone that requires the bond; Act 368 merely sets out certain claims that are declared to be within the coverage of the bond, whether or not they are explicitly named in the instrument. The question, then, is whether this contractor's Performance Bond is a mere duplication of the Statutory Performance Bond or is instead a common law bond going beyond the statutes.

We think it to be the latter. Although the Performance Bond does secure the payment of claims for labor and materials, it goes farther and assures the obligees that the contractor will perform and complete the job in a workmanlike manner. This protection against the contractor's poor workmanship or default is not even touched upon by Act 446 or Act 368. It follows that the bond is a common law obligation to which the ordinary statute of limitations applies. Upon issue (*b*) the decree must be reversed.

We may dispose quickly of the garnishment question. It is familiar law that a garnishee cannot enter his appearance; he must be brought into court by process. *Schiele* v. *Dillard,* 94 Ark. 277, 126 S. W. 835. The reason for the rule is given in the two cases there cited. "The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense of and injury to another, and creating actually a privilege with priority in favor of one creditor to the injury of another." *Schindler* v. *Smith, Bullins & Co.,* 18 La. Ann. 476. In the case before us District 567 was not served with process; instead it agreed to enter its appearance and attempted to do so. That appearance being ineffective, the chancellor was correct in holding that the retained $300 was not reached by this proceeding. Upon issue (*c*) the decree is affirmed.

Mr. Justice McFaddin concurs.

ED. F. MCFADDIN, Justice (concurring). On issues A and C, I agree with the majority. On issue B, I reach the same result, but by an entirely different process of reasoning.

The majority holds that one bond is a statutory performance bond and the other bond is a contract bond. I find it unnecessary to make such a decision, because the evidence in this case clearly establishes that there has never been a final estimate so as to allow the six-months limitation period to commence under either bond. The only estimate ever made was entitled: "Estimate No. 7 and Semi-final." This was an estimate made by the Engineer for the District on October 11, 1951, and indicated certain defects. The Engineer has never made his final inspection or released the retained money, so the six-months limitation period provided by Statute has never commenced to run. I think it better to put the opinion on that basis, rather than to decide a statutory question.

KIMBERLING *v.* ROGERS.

5-365 265 S. W. 2d 952

Opinion delivered March 22, 1954.

M. P. Watkins, for appellants.

Maddox, Greer & Maddox, for appellee.

GRIFFIN SMITH, Chief Justice. Larry Junior Kimberling, five years of age, is the son of Wanda Sue Rogers and Mark Kimberling, Jr. When Mark and Wanda were divorced Sept. 26, 1949, the infant was given to its mother by decretal order. The father was directed to pay $15 per month toward maintenance. The former Mrs. Kimberling has remarried and is in a position to care for the child.

The appeal is from action of Poinsett Circuit Court in restoring to the mother, through *habeas corpus* proceedings, the custody of her son against claims of the paternal grandparents that Wanda Sue had given the child to her former husband, and that under mutual arrangements these grandparents were entitled to custody.

In addition to the three formal assignments in the motion for a new trial, appellants contend that the court erred in not granting their motion for a continuance. The writ directed them to bring Larry to court Oct. 5, 1953. The motion asked that consideration be deferred until the December term. After asserting that Wanda Sue voluntarily surrendered the child's custody to its father, and that this act occurred approximately four years ago, it was stated that the father was in the U. S. army, stationed in Texas. Facts attending the amicable arrangements relating to custody were alleged to have been peculiarly within the father's knowledge. In a response to the primary peition Rosie and Mark Kimberling—the paternal grandparents—stated that the custody they contended for was agreed to by the child's mother.

The suit is not, of course, a petition to change legal custody of the boy because conditions have been altered. The decree of the Jackson county chancery court, where the divorce was granted, has not been modified.

Our decisions are specific in holding that minors are wards of chancery courts. *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879. It is the duty of such courts to make

orders properly safeguarding the rights of infants. Where such custody has been awarded and the order is appealed from, we try the case *de novo.* *Venegas* v. *Mascorro,* 216 Ark. 173, 224 S. W. 2d 532. Here the appeal comes from a court of law where the rules for dealing with factual matters differ from those applicable to equitable transactions.

Waller v. *Waller,* 220 Ark. 19, 245 S. W. 2d 814, is a case where through writ of *habeas corpus* custody was an issue. In addition to custody the court's right to award support money was upheld. But the appeal came from a court of chancery.

Two theories, referred to as the Virginia Rule, and the Oregon Rule, were discussed, with approval of the latter. The accepted rule, as enunciated in *Bartlett* v. *Bartlett,* 175 Ore. 215, 152 Pac. 2d 402, was set out in an appeal from the Clakamas county circuit court, but both the statement of facts and the opinion by Mr. Justice BRAND show that the proceedings were "as a suit in equity." There is nothing in the Waller opinion indicating that a court of law has power to do more than determine, under the writ of *habeas corpus,* the respondent's authority for holding the child.

It has long been the rule at law that on *habeas corpus* the inquiry is confined to jurisdictional matters. *Ex Parte Foote,* 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63; and, if the process [or judicial order] be valid, the court cannot go behind it to determine whether there was error in the proceedings. *Ex Parte Jackson,* 45 Ark. 158. Nor may a mother, by contract, deprive herself of the permanent custody of her child. *Clark* v. *White,* 102 Ark. 93, 143 S. W. 587.

Somewhat analogous is *Haller* v. *Ratcliffe,* 215 Ark. 628, 221 S. W. 2d 886. The holding was that where, under statute, the petitioner had a right to ask the probate court to set aside an order appointing a guardian of the petitioner's child—pursuant to pleadings in which the petitioner had agreed to the appointment of a guardian, but which, it was contended, had been revoked before the

appointment was made—*habeas corpus* would not lie, although the petitioner could not get immediate custody in probate.

We have also held that a *habeas corpus* petition by parents to obtain custody of an adopted child was a collateral attack on the adoption judgment, and the only proper inquiry was whether the probate court had jurisdiction. *Hughes* v. *Cain,* 210 Ark. 476, 196 S. W. 2d 758.

In the circumstances we do not think the court was arbitrary in refusing to continue the case. Nor was the judgment improper.

Affirmed.

SEABOARD FINANCE COMPANY, ET AL. *v.* WRIGHT, ADMX.

5-348 266 S. W. 2d 70

Opinion delivered March 22, 1954.

[Rehearing denied April 19, 1954.]

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

U. A. Gentry, for appellee and cross-appellant.

Ed. F. McFaddin, Justice. This is a suit brought by appellee, as Administratrix of the Estate of John Watson, deceased, against Seaboard Finance Company (hereinafter called "Seaboard") and Old Republic Credit Life Insurance Company (hereinafter called "Old Republic") to recover the proceeds of a life insurance policy issued by Old Republic to Seaboard on the life of John Watson. Old Republic pleaded payment; and Seaboard pleaded *res judicata.* From a decree against Seaboard, it has appealed; and from a decree in favor of Old Republic, the Watson Estate has appealed. We reverse as to Seaboard, and affirm as to Old Republic.

Seaboard is a corporation engaged in making loans, and Old Republic is a corporation engaged in issuing credit life insurance policies. In November, 1951, John Watson, in borrowing money from Seaboard, executed his note for $1,242, payable $69 per month for eighteen months, and secured the note by a mortgage on his Packard automobile. In order to obtain the loan, Watson was obligated to allow Seaboard to retain from the $1,242, not only large sums for interest and service charges, but also $37.26 as the premium on a credit life insurance policy for $1,242 issued by Old Republic and delivered to Seaboard. The policy provided, among other things, that upon due proof of death of John Watson during the time of the Seaboard loan, Old Republic would "pay to said creditor, as irrevocable creditor beneficiary, the amount of insurance shown above, as its in-

terest may appear. Any balance remaining after payment of the debtor's indebtedness to the creditor beneficiary shall be paid to the estate of the debtor, as second beneficiary."

Watson paid Seaboard a total of $60 on the note, and then on February 11, 1952, filed suit No. 93751 in the Pulaski Chancery Court[1] against Seaboard, seeking to cancel the note and mortgage on the claim of usury. Watson alleged that the retained interest, service charges and insurance premium made the entire transaction usurious. As regards the $37.26 premium on the credit life insurance policy, Watson alleged that Seaboard "required the plaintiff to take a life insurance policy, the sole purpose of which was to increase defendant's receipts for the loan or forbearance of money. The defendant has some connection with the life insurance company in which the plaintiff was required to take out life insurance, by virtue of which the defendant receives a certain portion of the premiums, which is in addition to the interest and service charges included in said loan. The combined acts of the defendant, as heretofore stated, were for the purpose of charging and securing for itself more than 10% interest for the loan of money. The note and mortgage are, therefore, void, and defendant should be required to surrender the same for cancellation."

Seaboard in its answer denied the usury charge, and claimed the transaction was legal and valid, and prayed for judgment and foreclosure of its mortgage. Then on July 7, 1952, while the suit was still pending, John Watson killed himself. Thereafter on July 21, 1952, the suit of John Watson against Seaboard was revived in the name of Mercer Burnside, as Special Administratrix. She was the sister of John Watson and no issue is here raised questioning the validity of the revivor action and the subsequent acts of the Special Administratrix. In fact, in the present suit it is stipulated: "On the 21st

[1] This complaint was filed on February 11, 1952. It was not until May 19, 1952, that we decided the case of *Strickler* v. *State Auto Finance*, 220 Ark. 565, 249 S. W. 2d 307, and *Winston* v. *Personal Finance Co.*, 220 Ark. 580, 249 S. W. 2d 315, involving companies which, like Seaboard, were operating under Act 203 of 1951.

of July, 1952, the Pulaski Chancery Court by order appointed the said Mercer Burnside special administratrix and revived that cause in her name. Thereafter, counsel for Seaboard advised counsel for the said Mercer Burnside, *et al.,* that the deceased, John Watson, had sufficient credit life insurance to pay off his indebtedness to Seaboard, owing at the time of his death, the entire premium for which Seaboard had remitted or paid to Old Republic out of the proceeds of this loan, and that the insurance company (Old Republic) had paid off Seaboard in full; and that because it had received full payment, Seaboard was ready and willing to deliver to the said Mercer Burnside the note and mortgage of John Watson, deceased, marked cancelled and satisfied, as well as any and all other documents pertaining to this loan. Thereafter by consent of the parties, Seaboard delivered said note and mortgage to the said Mercer Burnside, whereupon the Pulaski Chancery Court on the 25th day of August, 1952, entered an order dismissing with prejudice cause No. 93751."

The said order of dismissal with prejudice of said case No. 93751 in the Pulaski Chancery Court was made on August 25, 1952, and recites that the "defendant delivered into the hands of the court the original note and mortgage herein involved, marked cancelled and satisfied, paid in full, and all other allied papers pertaining to this loan, which the Court delivered to the plaintiff as the proper party to receive same; and it now appearing that this cause has been satisfied in full, and no controversy remains to be determined between the parties: it is therefore considered, ordered, adjudged and decreed that this cause be and the same is hereby dismissed with prejudice."

Thus Chancery Case No. 93751 was dismissed with prejudice; and we come now to the present suit. On April 30, 1953, Gertie Wright (mother of John Watson, deceased), filed this action in the Pulaski Circuit Court against Seaboard and Old Republic for $1,242, alleging: (a) that she was the Administratrix of the Estate of John Watson; (b) that when John Watson borrowed the

$1,242 from Seaboard, Old Republic issued a credit life insurance policy on Watson's life for $1,242; and (c) that Seaboard had collected the $1,242 from Old Republic but should not be allowed to keep the money because "the note and mortgage as aforesaid were usurious, void and unenforceable and by reason thereof Seaboard Finance Company had no interest as beneficiary under said insurance policy, the fact of such invalidity being well known to both the loan company and the insurance company." To this action (transferred to the Pulaski Chancery Court as Case No. 98049) Seaboard pleaded, *inter alia,* that the dismissal with prejudice of Case No. 93751 rendered the present suit *res judicata;* and Old Republic pleaded payment based on the delivery of $1,182 to Seaboard and the delivery of a check to Gertie Wright for $60 as the second beneficiary under the policy, since Watson had paid $60 on the $1,242 loan.

The present suit was tried in the Pulaski Chancery Court on stipulated facts as detailed herein, and resulted in a decree in favor of the Watson Estate and against Seaboard for $1,182, and against the Watson Estate in its claim against Old Republic. Seaboard appeals from the decree adverse to it, and the Watson Estate prosecutes an appeal against Old Republic.

I. *Seaboard's Appeal.* As heretofore stated, we hold that Seaboard's plea of *res judicata* should have been sustained. The Latin words *"res judicata" literally* translated into English mean "a thing adjudged"; and *freely* translated into English mean "the matter has already been decided." In *Mo. Pac.* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872, we quoted from 30 Am. Jur. 908:

"Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

A dismissal of a cause of action *with prejudice* is a final adjudication on the merits within the rule of *res judicata.* See *Union Indemnity Co.* v. *Benton County Lbr. Co.,* 179 Ark. 752, 18 S. W. 2d 327; and *Shorten* v. *Brotherhood, etc.,* 182 Ark. 646, 32 S. W. 2d 304. In *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610, we cited earlier cases to support this statement:

"The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit."

Weighed by the holdings in the foregoing cases, it is clear that the usury suit of Watson against Seaboard (Chancery Case No. 93751) presented the issue of the insurance policy being a part of the transaction there claimed to be usurious, and that the settlement in that suit was after the Watson Estate had been fully advised that Seaboard had collected the insurance money and was therefore delivering the note and mortgage to the Watson Estate. We have previously copied the stipulation on this point. If the Watson Estate had intended to claim the insurance money from Seaboard, such a claim should have been made in the Chancery Case No. 93751. Instead, the Watson Estate dismissed that suit against Seaboard *with prejudice;* and that act prevents the Watson Estate from now claiming the insurance money from Seaboard, because there is no evidence here of any fraud practiced by Seaboard or its attorneys on the Watson Estate or its attorney in obtaining the said dismissal *with prejudice.* Therefore the decree of the Chancery Court in favor of the Watson Estate and against Seaboard is reversed and that cause of action is dismissed.

II. *The Appeal of the Watson Estate Against Old Republic.* At the time that Old Republic paid the $1,182 to Seaboard, there had been no adjudication that Seaboard's note and mortgage were void. Usury is a defense that must be pleaded and established. *Butts* v.

Crumb, 182 Ark. 286, 31 S. W. 2d 307; and *Bell* v. *Fergus,* 55 Ark. 536, 18 S. W. 931. So Old Republic paid the $1,182 to Seaboard in accordance with the policy. The Watson Estate knew of such payment when it agreed to the order of dismissal with prejudice and made no claim to such insurance money. The holding in cases like *Dunn* v. *Second National Bank,* 131 Tex. 198, 113 S. W. 2d 165, 115 A. L. R. 730, cannot apply here: because the Watson note to Seaboard has never been—in itself—judicially declared void because of usury, nor had it been *paid* by Watson's Estate at the time Old Republic delivered the $1,182 to Seaboard.

Before the filing of the present action, Old Republic had delivered to the Watson Estate a check for $60 as the balance due on the insurance policy, and it is stipulated that such check is still in the hands of Gertie Wright, Administratrix of the Estate. The check may still be cashed; and it is all that Old Republic owes to the Watson Estate. Therefore, the decree in favor of Old Republic is affirmed.

BRUCE *v.* STATE.

4766 265 S. W. 2d 956

Opinion delivered March 22, 1954.

M. M. Martin, for appellant.

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

George Rose Smith, J. Elva E. Bruce was found guilty of obtaining money and property under false pretenses and was sentenced to a year's imprisonment. The only issue is whether the verdict is supported by substantial evidence.

On November 29, 1951, for a consideration of $4,800 in cash and a truck worth $1,200, W. C. Watkins purchased from Bruce the pine timber upon 320 acres of Oklahoma land. Bruce represented that he owned the land and timber, but in fact he did not. At the time of the timber sale Bruce was apparently negotiating for the property and had made a payment of $500 as earnest money. The land was owned by the heirs of Ira Dew, one of whom had written Bruce that he thought he could "manage" the other heirs and deliver title to the property. The jury were warranted in finding that Bruce's unqualified assertion of ownership was false and that he knew it to be false. In other cases involving a vendor's false representation of title convictions for obtaining money under false pretenses have been upheld. *Shelton* v. *State,* 96 Ark. 237, 131 S. W. 871; *Holden* v. *State,* 156 Ark. 521, 247 S. W. 768.

It is argued that Bruce settled Watkins' claim by repaying $1,083.33 and by later obtaining an undivided 31/90ths interest in the land and conveying it to Watkins. But if the original transaction was criminal, as the jury found, the fact that restitution was made is not a defense to the charge. *Donohoe* v. *State,* 59 Ark. 375, 27 S. W. 226; *Moss and Clark* v. *State,* 194 Ark. 524, 108 S. W. 2d 782. It would at most have a bearing upon the issue of Bruce's good faith in the first instance, and that question was for the jury.

Affirmed.

STURGIS *v.* MEADORS.

5-355 266 S. W. 2d 81

Opinion delivered March 22, 1954.

[Rehearing denied April 19, 1954.]

James R. Hale, for appellant.

Jameson & Jameson, for appellees.

WARD, J. Appellees obtained a judgment, by a jury trial in the circuit court, against appellant for $1,000, based on the general allegation that appellant had given them a check for $1,000 as earnest money for the purchase of a farm and that later payment was stopped on the check. The principal issue involved is whether appellees can maintain such action even though they could not have maintained an action for specific performance of the contract because of the statute of fraud.

On September 25, 1952, appellant went with a real estate agent named Van Tries to look at appellees' 229-acre farm with the view to buying the same. Part of the farm was the homestead of appellees, C. F. Meadors and his wife, Myrtle Meadors. After looking the farm over it was verbally agreed between appellant and the appellees that appellees would sell and that appellant would

buy the farm for the price of $26,000, and that appellant would put up $1,000 to the agent, it being understood that if appellant bought the farm the $1,000 would apply on the purchase price and that if he refused it would belong to appellees. Following this verbal agreement a memorandum contract was entered into on a regular form furnished by the agent containing the terms mentioned above but in which the land was not accurately described. This contract was signed by appellant and C. F. Meadors, but Mrs. Meadors did not sign. Within two or three days after the contract was entered into appellant, according to appellees' testimony, stopped payment on the $1,000 check. Also within a short time after the contract was signed appellant bought another farm for $36,000.

The original complaint filed by appellees on November 12, 1952, was based on the written contract referred to above, but after a motion was filed by appellant the complaint was amended to allege the oral agreement. Attached to the amended complaint was the deed executed by appellees conveying the land to appellant, showing that as to part of the lands appellees owned only a one-half interest in the mineral rights and also showing that some of the land was described indefinitely. Appellant filed a demurrer to the amended complaint and it was overruled by the court. The court also overruled a motion for an instructed verdict made by appellant at the close of appellees' testimony and the same motion made at the close of all the testimony.

In his brief appellant makes no argument based on the court's instructions but relies for a reversal here on two principal grounds: 1. The court erred in failing to sustain the defendant's demurrer to the complaint, because the alleged contract was void and unforceable for any purpose, and; 2. The court erred in failing to direct a verdict.

1. It is true that appellant would have been precluded from an action to force appellees to sell him the farm under the oral contract because of the statute of

fraud, but this same statute is not a bar to appellees' action to recover the $1,000 which appellant paid to appellees, or rather to their agent, as part of the purchase price for their farm. Authority for this conclusion is not readily established by the decisions of this court. However, the underlying principal was announced in the case of *Venable* v. *Brown,* 31 Ark. 564, and it has not been abrogated by any later decision. In that case the person who was attempting to buy the land delivered to the seller a mule of the value of $125, and the buyer brought an action to recover the mule when the sale fell through. The trial court allowed the plaintiff to recover the mule upon the finding of fact that the parties had not entered into a contract for the sale of the land but that the dealings amounted only to negotiations for a contract. This court affirmed the trial court on the same theory but said in effect that the decision would have been otherwise if it had been a contract of sale. In this case the court said:

"For the current of authorities sustains the proposition that where a person has paid money, or delivered property, upon a parol contract for the purchase of land, which is void by the Statute of Frauds, he cannot maintain an action to recover back the money or property so paid, or delivered, so long as the other party, to whom the money has been paid or property delivered, is willing to perform on his part, and has the ability to perform."

Other jurisdictions have passed upon substantially the same issue which we are considering here and have sustained the conclusion reached by us. In the case of *Keystone Hardware Corporation* v. *Patrick Tague,* 246 N. Y. 79, 158 N. E. 27, 53 A. L. R. 610, the vendee sued the vendor to recover earnest money which had been paid as part of the purchase price of land under an oral contract. The court said that although the statute of fraud would preclude an action for specific performance yet the vendee could not recover the money which had been given in part payment, using this language:

"It is not defendant who pleads the statute of frauds. He is satisfied with the contract. The fact that it was incomplete in the sense that something was left

for future negotiation does not concern plaintiff as far as his alleged cause of action is concerned. The agreement was not illegal. There was no objection in law to complete performance by both parties. Money paid in performance in part even of an oral contract for the purchase of land cannot be recovered if the vendor is willing to convey on the performance of the conditions by plaintiff. . . . If a jury should accept defendant's evidence, a necessary conclusion would follow that plaintiff is attempting, by its plea of the statute of frauds, to take advantage of its own wrong. No court will tolerate such a thing."

An annotation in 169 American Law Reports 187, discussing this same issue, says this at page 188:

"According to the great weight of authority, the vendee in a contract which does not satisfy the requirements of the statute of frauds cannot recover payments made by him pursuant to the contract so long as the vendor is both willing and able to perform his part of the agreement, even though it would not be possible to enforce the contract against the vendor either at law or in equity."

At page 192 in the same annotation we find this:

"Courts both in jurisdictions where the statute of frauds prevents maintenance of an action and those where the statute provides that the contract is void or invalid, have adhered to the concept that the vendor is the party for whose protection the statute is designed, and that, if he elects not to avail himself of its protection, the contract may be enforced against him, and, inversely, the vendee should not be permitted to take advantage of the statute."

The conclusion which we reach is in no way contradictory to the holding in such cases as *Bowden* v. *Wilson,* 214 Ark. 828, 218 S. W. 2d 374, where this court refused to enforce a contract for the sale of land where the wife had not signed the contract and where the land being sold was her homestead. The court did say in the *Bowden*

case, *supra,* that the contract, being under the provisions of Ark. Stats., § 50-415, was unenforceable for any purpose, but it did not say, and we have never said, that money paid by the vendee under such a contract could be recovered. Here, appellees are not attempting to enforce performance of a contract.

2. The trial court's refusal to direct a verdict in favor of appellant was not error. The reasons assigned by appellant for a directed verdict have already been disposed of and need not be repeated, except that it is contended the undisputed proof showed appellees were unable to furnish a marketable title. We do not agree with this contention because, under the facts and circumstances of this case, this was a question for the jury. The jury answered the question in favor of appellees under the court's first instruction which covered this issue. The only remaining question is whether there was substantial evidence to support the jury's verdict on this point. We think there was such evidence. The fact that, at the time of the trial, the evidence showed part of appellees' land was not definitely described and they did not have record title to all the mineral rights in part of the land, must be weighed against other facts and circumstances revealed by the record. Appellant looked over the land and therefore knew what he was buying. Appellant stopped payment on the check before appellees had time to perfect their title and thereby rendered further efforts useless on appellees' part. Appellees were entitled to a reasonable time to perfect their title. In dealing with a similar situation in *Mays* v. *Blair,* 120 Ark. 69, 179 S. W. 331, we said:

"If the other defects in regard to the description in the other deeds had been insisted upon, appellant would have been in the attitude to demand that those defects be cured, but instead of doing that, he arbitrarily broke off the negotiations and declined to go further with the trade. Appellees still had the right, and have now the right, under the contract, to perfect the title so as to make it marketable."

The matter of certain misrepresentations alleged to have been made by appellees relative to grazing rights on

other lands was raised, but this was also submitted to the jury by instructions which are not challenged by appellant.

No error appearing, the judgment of the lower court is affirmed.

Justices McFaddin and George Rose Smith dissent.

George Rose Smith, J., dissenting. I think this case readily distinguishable from the authorities cited in the majority opinion. In those cases the vendee had actually made a payment of earnest money under an oral contract for the purchase of land. Later on the vendee sought to withdraw from the contract and *as plaintiff* brought suit to recover his payment. It being shown that the vendor was able and willing to carry out the agreement, the court in each case refused to allow the vendee to rely upon the statute of frauds as an offensive weapon enabling him to recover his down payment.

Those cases would be in point here if the appellees had cashed the vendee's check and had its proceeds in their possession. But that is not the situation. Payment of the check was stopped before it was cashed. Even though the check is negotiable it is of course subject to defenses as between the original parties to the instrument. Hence, in this case, the fact that the vendee's promise is evidenced by an uncashed check rather than by the invalid agreement itself adds no strength to the vendor's position. Narrowed down to its essentials, this is an attempt by the vendor to enforce a single clause—the promise to pay earnest money—contained in an invalid contract for the sale of land. The vendee relies, not offensively but defensively, upon the statute of frauds, as he has a perfect right to do. Thus the cases cited by the majority are in fact authorities favoring the appellant, since their holding is that the statute of frauds is a shield, not a sword. Here the vendees seek to use the invalid contract as an offensive weapon to enforce a promise for the payment of earnest money. If this can be done, there is no reason why they might not have recovered the entire purchase

price as well. In my opinion the judgment should be reversed and the cause dismissed.

Justice McFaddin joins in this dissent.

Pate *v.* Fears.

5-349 265 S. W. 2d 954

Opinion delivered March 22, 1954.

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

M. V. Moody, for appellee.

Minor W. Millwee, Justice. Appellee, Emma Fears, brought this action against the appellant, James Pate, seeking damages for personal injuries sustained when she was hit by appellant's car. Appellee alleged that she was walking north at the intersection of Eighth and Hays streets in Little Rock, Arkansas, at about 8:30 p.m. on November 5, 1952, when she was struck, and that appellant was negligent in operating his car in a fast and reckless manner and in failing to keep a proper look-out. Appellant denied that he was negligent and pleaded contributory negligence on the part of appellee.

The trial court, sitting as a jury, rendered judgment for appellee in the sum of $2,500. The only contention

for reversal is that the judgment is unsupported by any substantial evidence.

Where a jury is waived and the case is tried before a judge sitting as a jury, his finding on a question of fact is as conclusive on appeal as a jury verdict and will not be disturbed if supported by any substantial evidence. *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322. In determining the sufficiency of the evidence, it must be considered in the light most favorable to appellee. *United Van Lines* v. *Haley,* 214 Ark. 938, 218 S. W. 2d 715.

On the night in question appellant was driving north on Hayes street which is paved and level for several blocks from the intersection with Eighth street. According to appellee's testimony she was walking north on the right-hand gravel shoulder of Hayes street where it intersects with Eighth street when she was struck by appellant's speeding car. Charlotte Robinson, who lives about 50 feet from the scene of the accident, testified that she heard "the brakes race" or "skidding" of a car and reached her front door just as appellee was struck. When she asked appellant why he hit appellee, he replied, "My lights was dim and I didn't see her. I wouldn't have hit her for nothing." She also corroborated appellee's statement that there were no other vehicles passing at or near the time that appellee was struck.

Appellant testified that as he approached the intersection he was blinded by the headlights of two automobiles going in the opposite direction. He was driving about 25 miles per hour and as he passed the second car he saw appellee in the middle of Hayes street and immediately applied his brakes. He also turned his car to the right shoulder of the street but appellee ran in front of the car and was struck by the left front headlight and fender. It was dark and appellee was dressed in black clothing. He measured the skid marks of his car which were 41 feet long.

There are many decisions of this court defining the relative rights and duties of pedestrians and drivers of automobiles using the public streets and highways. Both

have a right to the use of the streets and are required to exercise ordinary care for their own safety and the prevention of injury to others. In sustaining a jury finding that the driver of an automobile failed to exercise ordinary care under facts similar to those in the instant case, this court said in *Northwestern Casualty and Surety Co.* v. *Rose,* 185 Ark. 263, 46 S. W. 2d 796: "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." In *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. 2d 1110, the court said: "Ordinary care, however, is a relative term, its interpretation depending upon the facts and circumstances of each particular case; and, although drivers of automobiles and pedestrians both have the right to the use of the streets, the former must anticipate the presence of the latter and exercise reasonable care to avoid injuring them, care commensurate with the danger reasonably to be anticipated." And in *Smith Ark. Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. 2d 1052, it is said: "Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he cannot be regarded or treated as exercising ordinary care." See, also, *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. 2d 391, and *Yocum* v. *Holmes,* 222 Ark. 251, 258 S. W. 2d 535, and cases there cited.

When the conflicting evidence in the case at bar is considered in the light most favorable to appellee under the foregoing principles, it is substantial and sufficient to support the court's finding that appellee's injuries were proximately caused by appellant's failure to exercise ordinary care under all the circumstances.

The judgment is, therefore, affirmed.

5-369 265 S. W. 2d 956

Opinion delivered March 22, 1954.

L. A. Hardin and *Carl Langston,* for petitioner.

Mehaffy, Smith & Williams, Shaver, Tackett & Jones, House, Moses & Holmes and *E. B. Dillon, Jr.,* for respondent.

J. SEABORN HOLT, J. Petitioners, in an original proceeding here, ask for Writ of Prohibition to prohibit the Pulaski Probate Court from proceeding further in connection with an Order made November 9, 1953, appointing a Special Administrator in the matter of the Estate of Merwin I. Moore, who died testate August 5, 1953.

Under the provisions of the purported will, J. A. Breshears was named executor, and also trustee of the entire estate. On August 10, 1953, the alleged will was admitted to probate and Breshears was duly appointed executor and trustee. The above instrument was probated in common form, without notice, and was attacked by certain heirs at law of the decedent September 3, 1953, and petitions were filed asking for the removal of Breshears as executor on the grounds that he had failed and refused to include in his inventory of the property

belonging to the estate a bank deposit of $12,000 in a local bank and a number of pieces of improved real estate of the approximate value of $60,000, all of which property he claimed as his own, and that the contest and petitions are now pending in the Pulaski Probate Court.

Pending hearing and action of the Probate Court on the above contest and petitions, certain heirs at law of the decedent on November 9, 1953, filed petition for the appointment of a Special Administrator, under authority of § 62-2210, Ark. Stats., 1947, which provides:

"SPECIAL ADMINISTRATORS—For good cause shown a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or general administrator. A special administrator may be appointed without notice or upon such notice as the court may direct. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appointment. The special administrator shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority. Otherwise, and except where the provisions of this Code by their terms apply only to general personal representatives, and except as ordered by the court, the law and procedure relating to personal representatives shall apply to special administrators. The order appointing a special administrator shall not be appealable. (Acts 1949, No. 140, § 79, p. 304)."

No request for Breshears' immediate removal as administrator was made. The Probate Court on November 9, 1953, granted this petition of the heirs, and appointed Phillip Carroll, a local attorney, as such special administrator. The court's Order contains the following recitals: "Phillip Carroll, . . . is appointed special administrator of the Estate of Merwin I. Moore, deceased, for the purpose of filing and prosecuting such actions, petitions, suits or causes against James A. Breshears, Ruby Breshears, Frank Ballard, Susie Ballard, Buell Slaughter and Mattie Slaughter, in such form and manner as he may

deem necessary or proper for the protection and benefit of said estate, and those persons interested therein to recover possession, custody and title to the real estate described in certain instruments filed in Pulaski County . . . ., and in Sebastian County, . . . and to collect rents and to require an accounting for rents already collected.

"The said Phillip Carroll is further appointed for the purpose of filing and prosecuting such suits, actions, petitions or causes against James A. Breshears as he may deem necessary and proper to recover custody, possession, control and title to the funds in that certain checking account in Union National Bank of Little Rock which belonged to the decedent, Merwin I. Moore, prior to his death for the benefit of said estate.

"Said Phillip Carroll shall have all such powers to act for the purposes herein set forth as may be necessary or convenient to carry out this order and he shall serve until such time as he has completed his duties or is removed by further order of this court."

Petitioners contend here that "the (above) Order of the Probate Court was in excess of its jurisdiction and prohibition should issue."

It appears that the sole issue is whether the Pulaski Probate Court, in the circumstances, had jurisdiction to appoint a special administrator. We hold that it had jurisdiction and that such jurisdiction is exclusive and original, *Gocio* v. *Seamster, Judge,* 203 Ark. 937, 160 S. W. 2d 194.

The Pulaski Probate Court has not as yet passed upon the merits of the claims of either the petitioners or the estate. Since the Probate Court had jurisdiction, its Order appointing a special administrator was not, in the circumstances, appealable. "There shall be no appeal . . . from an order appointing a special administrator," § 62-2016, b., Ark. Stats., 1947. Section 62-2210, Ark. Stats., 1947, also provides: "The order appointing a special administrator shall not be appealable."

The scope of the Writ of Prohibition has been announced in numerous cases by this court. Such Writ comes into use only when the lower court is without jurisdiction.

"The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. (Citing Cases). . . the writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by an inferior court over a subject-matter when it has none and over parties where it can acquire none.

"Where the court has jurisdiction over the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy," *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. 2d 448. See also, *Pacific Mutual Life Insurance Company* v. *Toler,* 187 Ark. 1073, 63 S. W. 2d 839; and *Gordon* v. *Smith, Chancellor,* 196 Ark. 926, 120 S. W. 2d 325.

Accordingly, since it appears that the Pulaski Probate Court had jurisdiction of the subject-matter and the parties, the Writ of Prohibition must be and is denied.

SHIVERS, ET AL. *v.* MOON DISTRIBUTORS, INC., ET AL.

5-359 265 S. W. 2d 947

Opinion delivered March 22, 1954.

[redacted]

E. M. Arnold, for appellants.

House, Moses & Holmes, William M. Clark and *Frank O. Bass, Jr.,* for appellees.

Warner & Warner, Amici Curiae.

ROBINSON, J. The issue here is whether taxes paid to the State in the sum of $2.50 per gallon on liquor may be considered as part of the basis for computing the 13% wholesaler's mark-up allowed by law. Appellant, who was plaintiff in the Chancery Court, contends that the tax is not a part of the invoice price and should not be considered in determining the total mark-up; and that he had been compelled to pay $.066 additional for a fifth of whiskey by reason of the wholesaler's figuring as part of the cost price 13% on the $2.50 per gallon paid in taxes. Plaintiff seeks a judgment for the alleged overcharge and an injunction to prevent such charges in the future. The Chancellor sustained a demurrer to the complaint, and plaintiff has appealed.

Is the $2.50 per gallon tax paid to the State part of the invoice price of the liquor within the meaning of the statute? If it is, then the tax may be considered as a part of the basis for computing the 13% mark-up. On the other hand, if it is illegal for the wholesaler to include 13% on the tax paid as part of the mark-up, then appellant should prevail.

Act 282 of the General Assembly of 1949 regulates the price of liquor and § 3 provides: "The wholesaler's selling price to the retailer shall be his cost (as defined in this Act) and determined by the Commissioner of Revenues, plus a mark-up of fifteen (15) per cent of cost on liquor. . . ." Sec. 6 provides: "The cost to the wholesaler is the actual invoice price which he pays for the merchandise, and as determined by the Commissioner of Revenues, plus actual freight and cartage costs incurred in delivery to him." Act 252 of 1951 reduces the allowable mark-up to 13%. Act 285 of 1953 makes a fur-

ther reduction in the mark-up to 10%. (However, this Act has been suspended by the filing of a referendum petition.) Neither the 1951 Act nor the 1953 Act makes any change in the method of computing the wholesaler's cost price.

In August, 1949, the Commissioner of Revenues, as authorized by Act 282 of 1949, promulgated certain regulations to determine the wholesaler's cost price; the price thus determined included the tax. This regulation was formally adopted February 2, 1950. Subsequently by Act 159 of 1951 the Commissioner of Revenues' duties in connection with fixing the price of liquor were transferred to the Alcoholic Beverage Control Board. This Board adopted its own regulations, and No. 125 thereof also includes the tax as part of the cost of the liquor to the wholesaler on which is allowed a 13% mark-up. The Revenue Commissioner's construction of the Act had been given effect at the time of the adoption of Act 159 of 1951; and the Alcoholic Beverage Control Board's interpretation of the Act, being the same as that of the Revenue Commissioner, was in force at the time of the adoption of Act 285 of 1953. The 1949 Act specifically provides "The wholesaler's selling price to the retailer shall be his cost (as defined in this Act) and determined by the Commissioner of Revenues, plus a mark-up of fifteen (15) per cent of cost on liquor." The 1951 Act deals directly with the question of the amount of money the wholesaler shall be allowed to keep from the sales of liquor. The 1951 Act reduces the mark-up from 15% to 13%, and in 1953 the legislature again dealing with the subject of the wholesaler's mark-up reduced it to 10%.

Although there may be instances where the legislature re-enacts legislation without knowing all administrative interpretations placed on the former Act, it is inconceivable that here the legislature in 1951 and 1953 did not know of the construction which had been given the original 1949 Act and the 1951 Act, by first the Commissioner of Revenues and next the Alcoholic Beverage Control Board; and the legislature did not see fit to adopt

an amendment in the 1951 Act or the 1953 Act that would bring about a change in the construction of the Acts which permitted the mark-up on the amount paid as taxes. Hence it appears that the legislature acquiesced in the construction adopted by the administrative officials.

In *Hendricks* v. *Hodges, Sec'y of State,* 122 Ark. 82, 182 S. W. 538, it is said: "In interpreting the amendatory statute, we ought to follow the well established rules of statutory construction, and one of those rules is that where a statute is re-enacted in substantially the same form as the old one, the presumption should be indulged that the lawmakers intended no changes other than those clearly expressed in the language of the new statute."

"When a known statute has been re-enacted in terms, its known interpretation will be presumed to have been also adopted by the legislature." *McKenzie* v. *State,* 11 Ark. 594.

"While the interpretation of the above provisions of the Revised Statutes of the United States by the Land Department is not controlling on the courts, it is at least highly persuasive." *Moore* v. *Tillman,* 170 Ark. 895, 282 S. W. 9.

Official conduct long pursued in elections will be given great weight in determining intent of the legislature. *Adams* v. *Hale,* 213 Ark. 589, 212 S. W. 2d 330.

"Ordinarily, when the Legislature adopts certain language, or expressions, or terminology in an enactment, it adopts prior constructions or interpretations thereof." *American Workmen Insurance Company* v. *Irvin,* 194 Ark. 1149, 110 S. W. 2d 487.

In *Helvering* v. *Reynolds Co.,* 306 U. S. 110, 83 L. Ed. 536, 59 S. Ct. 423, it is said: "The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the revenue acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and de-

cisions of the Board of Tax Appeals. In the meantime successive revenue acts have re-enacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918. Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."

In *Walnut Grove School Dist. No. 6* v. *County Board of Education,* 204 Ark. 354, 162 S. W. 2d 64, Mr. Justice Frank Smith said: "This administrative interpretation of the legislation is not, of course, conclusive; but it is not to be disregarded. At § 219 of Crawford's Interpretation of Laws it is said that 'As a general rule executive and administrative officers will be called upon to interpret certain statutes long before the courts may have an occasion to construe them. Inasmuch as the interpretation of statutes is a judicial function, naturally the construction placed upon a statute by an executive or administrative official will not be binding upon the court. Yet where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long period of time, and generally or uniformly acquiesced in, it will not be disregarded by the courts, except for the most satisfactory, cogent or impelling reasons. In other words, the administrative construction generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight. It is highly persuasive.' "

Moreover § 3 of Act 252 of 1951, which is the Act in effect at present, provides: "The wholesaler's selling price to the retailer shall be his cost (as defined in this Act) and determined by the Commissioner of Revenues, plus a mark-up of thirteen (13) per cent of cost on liquor." Not one word is specifically said about the tax being a part of the cost, or about permitting the wholesaler to pass on to the retailer as part of the selling

price the amount of the tax; but the administrative officials have construed the Act as permitting this to be done; and it is clear from the allegations in the amended complaint as to the price paid to the distillery by the wholesaler, and the price paid to the wholesaler by the retailer, that the wholesaler could not stay in business for any time at all unless the tax could be added to the selling price of the liquor. Hence the administrative board is undoubtedly correct in construing the tax as part of the invoice price to the wholesaler and permitting the wholesaler to treat it as such, mark it up accordingly, and pass such marked-up price on to the retailer.

We are urged to over-rule *Gipson* v. *Morley,* 217 Ark. 560, 233 S. W. 2d 79, upholding the constitutionality of Act 282 of 1949, but we adhere to the decision in that case.

Affirmed.

HART *v.* HART.

5-351 265 S. W. 2d 950

Opinion delivered March 22, 1954.

Cole & Epperson, for appellant.

W. H. McClellan, for appellee.

WARD, J. The question presented on this appeal is whether the evidence shows appellant to be such a resi-

dent of Arkansas as will enable him to maintain an action for divorce.

Appellant and appellee were married in 1939 and on March 18, 1953, appellant filed a suit in Hot Spring County for a divorce from appellee. Appellee, a resident of Oklahoma, appeared specially and filed a motion to dismiss appellant's complaint on the ground that he was not a *bona fide* resident of Arkansas. After hearing the testimony the chancellor sustained appellee's motion and dismissed appellant's complaint, hence this appeal.

Testimony introduced by appellee to sustain the motion is to this effect: Prior to November, 1951, appellant was employed in Louisville, Kentucky, by Motors Insurance Corporation and was earning approximately $700 a month. While so employed appellant lived in Louisville in their own home with his wife and four children, during which time his residence was in Kentucky. After resigning his job in Louisville in November, 1951, appellant obtained the same type of employment in Cincinnati, Ohio, but appellee and the children continued to live in Louisville. In May, 1952, appellant's employment in Cincinnati was terminated. Appellant, who had served in the Navy during the second World War, as a Naval Reserve Officer was due to report to Norfolk, Virginia, on June 14, 1952, for a two weeks' training period. So on June 1, 1952, appellant and his family went to the home of appellant's parents near Donaldson, Hot Spring County, Arkansas, leaving their furniture and household effects in storage at Louisville. When appellant left for training on or about June 14th appellee and the children went to Duncan, Oklahoma, to reside with her parents. Upon finishing the training period about July 1st appellant learned that he was to undergo two more weeks of training beginning on or about July 25th. When appellant left for the second training period appellee and the children went back to Duncan to reside with her parents. After this training period was over appellant again returned to Duncan and stayed a short time there then took his family to his parents in Arkansas where they stayed until about September 12, 1952, when they all returned

to Duncan, Oklahoma, and again appellant was ordered to report for active duty in Chicago on or about September 25, 1952. On the last trip to Oklahoma appellant and appellee looked for a house in which to live and finally it was arranged to rent a house from appellee's brother and appellant spent three or four days in helping repair the house. At this time appellant directed the storage company in Louisville, Kentucky, to ship his furniture and household goods to Duncan, Oklahoma, and he was advised that the shipment could not be made until about the first of October, 1952. During the 1952 Christmas holidays appellant went to Duncan, Oklahoma, and stayed a few days and then spent a few days with his parents in Arkansas before returning to duty. The first intimation that appellant was preparing to secure a divorce was when he so advised appellee's brother on February 13, 1953. On March 5, 1953, appellee filed an action in Oklahoma for maintenance and custody of the children. Appellant arrived in Duncan on March 15th and was served with summons on March 16th when he immediately returned to Arkansas and filed this divorce action on March 18th. Several letters were introduced in evidence as having some bearing on appellant's intentions regarding residence. On February 13, 1953, appellant wrote that he expected orders for overseas duty for the next 18 months or two years. On February 24, 1953, appellant wrote appellee that he had a ride to Social Hill and after a day or two would come on to Duncan, Oklahoma. On July 22, 1952, a life insurance company wrote appellant at Duncan, Oklahoma: "We have noted your new address and have changed our records accordingly." On September 26, 1952, the storage company in Louisville, Kentucky, wrote appellant a letter addressed to Duncan, Oklahoma, in regard to his furniture. On March 5, 1953, a friend of appellant wrote him a letter addressed to Duncan, Oklahoma.

On behalf of appellant testimony was introduced in substance as follows: Appellant states that he intended to make his home with his parents at Donaldson, Arkansas, and that he never established a residence in Okla-

homa. In 1952 appellant purchased Arkansas license for his car to replace Kentucky license which had expired about the first of July and this license was renewed in January, 1953. Appellee who had subscribed to numerous magazines directed the publishers in August, 1952, to change the address to Donaldson, Arkansas. Appellant said he intended to purchase a farm near Donaldson, Arkansas, and had made arrangements with his father to help him buy it, but the deal never was consummated. He states that he never lived in the home which they rented in Duncan, Oklahoma, but stayed with his wife at her parents home at 1005 Ash Street in Duncan. Appellant's mother states that appellee did not want to stay on the farm with her husband but wanted to make their home in Duncan; that when appellant was home from service he always stayed at her home.

From the above and other similar testimony we are unable to say that the finding of the chancellor in this instance is not supported by the weight of the testimony.

The rule regarding *bona fide* residence in divorce cases which obtained theretofore was changed by this court in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, where it was stated that one must, in truth and in fact be a *bona fide* resident in this state before he can maintain an action for divorce. Before the decision in the *Cassen* case, *supra,* we stated in *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502, that "there must be overt acts sufficient to demonstrate a real and *bona fide* intent to acquire residence before the State of Arkansas—as a silent third party to every divorce suit here—will allow its courts to be used as a haven of the transient and dissatisfied spouse."

Appellant contends that the burden of proof was on appellee to show that he was not a *bona fide* resident of Arkansas and that the proof in this case should be viewed in that light, but we do not entirely agree with this contention. In *Gilmore* v. *Gilmore,* 204 Ark. 643, 164 S. W. 2d 446, it was stated that "*prima facie,* residence was established for the requisite period of ninety days" and

that this fact justified the chancellor in rendering the decree. But following this the court also stated that "proof in support of appellant's motion, however, shows that appellee misconstrued the statute" and the case was reversed. Conceding that appellant's petition for divorce filed in Arkansas raised a presumption that he was a *bona fide* resident, this presumption was overcome by proof on appellee's motion and the burden of establishing a *bona fide* residence thereupon shifted to appellant. The question before the chancellor here was: Did the evidence show appellant to be a *bona fide* resident of Arkansas? He held it did not. As held in *May* v. *May*, 221 Ark. 585, 254 S. W. 2d 957, the decree of the chancellor will be affirmed if it is supported, as we hold it is, by the weight of the evidence.

Affirmed.

LEWIS *v.* PHILLIPS.

5-378 266 S. W. 2d 68

Opinion delivered March 29, 1954.

Opie Rogers, for appellant.

Koone & Stephens, for appellee.

J. Seaborn Holt, J. August 12, 1953, appellees sued appellants for the unlawful, willful cutting and taking of timber from their lands without their knowledge and consent, for treble damages in the amount of $196.20, and for additional damages of $500 for trespassing, cutting ruts and destroying two culverts on appellees' property, or a total of $696.20.

Appellants answered with a general denial and in a cross complaint sought damages from appellees for the alleged unlawful taking of timber from appellants' lands in the amount of $123.68.

A jury trial resulted in a verdict for appellees for $100. This appeal followed.

For reversal, appellants first question the sufficiency of the evidence to support the verdict.

After a review of the testimony, we hold that it was substantial and ample.

In this connection, appellants argue that the undisputed proof shows that if any timber were cut and taken from appellees' lands and any damages resulted, as alleged, that it was caused solely by two individual contractors, Lester and Joe Lewis. There was testimony that Lester and Joe were working for and under the direction of appellants and cut and removed the timber in question from appellees' lands and that it was their trucks that caused any alleged damages to appellees' culverts and lands.

It appears that the court gave appellants' instruction No. 4, as follows: "You are instructed that if the defendants contracted with Lester Lewis and Joe Lewis to cut their timber and process same and paid them a contract price and that the defendant, Lewis Lumber

Company, had no control over the said Lester Lewis and Joe Lewis, in the cutting, hauling and processing of said timber, other than to receive the processed lumber and pay the said Lester Lewis and Joe Lewis according to their contract, the said Lester Lewis and Joe Lewis would be independent contractors and the defendants would not be liable for the acts of the said Lester Lewis and Joe Lewis."

Under our holding in *Lewis* v. *Mays,* 208 Ark. 382, 186 S. W. 2d 178, this instruction was more favorable to appellants than they were entitled under the law and certainly they are in no position now to complain. In the above case, under a similar situation where the same defense, as here, was pleaded, we held in effect: (186 S. W. 2d 178; Headnote 5) "Generally, where a trespass is committed by defendant's advice or direction, the contractual or other relation, including that of an independent contractor, between the immediate agent of the wrong and defendant, is immaterial in determining defendant's liability."

The record reflects that during the examination of appellee, T. M. Phillips, the following occurred: "Q. Toy, what do you estimate that it would take to put the road back in condition so that it would be passable; or in the condition you had it when you lived there in November? MR. ROGERS: We object. That is not the proper measure of damage. THE COURT: The court will let the testimony go in as to the measure of damage, that can be taken care of in the instruction. MR. ROGERS: Exceptions saved. A. My estimation is that it would be better than $400.00."

Appellants argue that the admission of this evidence was error for the reason that "the measure of damage could not properly be proven by a mere estimate. The theory of the plaintiff (appellees) was that the lands had been ditched and washed and in this view (that is, if this be the correct view then appellants say) the measure of damage would be the difference in the value of the land before and after the alleged injury and

no effort was made to show the difference in value before and after the alleged damage."

We hold that the action of the court, before all the evidence was complete, was correct, in the circumstances. In *Benton Gravel Co.* v. *Wright,* 206 Ark. 930, 175 S. W. 2d 208, we said: " 'It is often difficult for a court to determine the true measure until all the evidence is in. * * * If there be different modes of measuring the damages, depending on the circumstances, the proper way is to hear the evidence, and to instruct the jury afterwards according to the nature of the case.' "

Appellees tried the case on the theory that the damages alleged were of a temporary nature remediable and produced evidence to show the cost of restoring their property to its former state.

The court, over appellants' objection, gave the following instruction at appellees' request on the measure of damages: "You are instructed that if you find, from a preponderance of the evidence, that the defendants damaged and destroyed two bridges belonging to and on the property of the plaintiffs, said plaintiffs are entitled to damages in the amount sufficient to restore the bridges damaged and destroyed by the said defendants to their previous condition. And if you further find from a preponderance of the evidence that the defendants damaged the land and property of the plaintiffs by driving upon and over the lands of the plaintiffs, said plaintiffs are entitled to damage in the amount sufficient to restore the property to its former condition, unless said bridges were a part of the public road."

This was a proper instruction and justified on the facts in this case.

Appellants also allege that the court erred in discharging juror, Williams, for cause at appellees' request. We find no merit to this contention for the reason that appellants have not shown that a biased or incompetent juror was forced upon him. "Since a party is not entitled to have any particular juror, the erroneous re-

jection of a competent talesman is not prejudicial, in the absence of a showing that some biased or incompetent juror was thrust upon him." *Decker* v. *Laws,* 74 Ark. 286, (Headnote 2), 85 S. W. 425.

Other alleged errors have been considered and found to be untenable.

Affirmed.

KENNEMORE *v.* ROBBINS.

5-316 266 S. W. 2d 64

Opinion delivered March 29, 1954.

Claude F. Cooper and *Mitchell Moore,* for appellant.

Bruce Ivy, for appellee.

ED. F. MCFADDIN, Justice. Appellant sought a lien (under § 51-601 *et seq.* Ark. Stats.) on certain property belonging to appellees. From a decree denying the lien, there is this appeal.

In September, 1950, the appellees, Robbins, *et al.,* made a contract in writing with Lowell Dickson, whereby Dickson was to furnish the labor and materials and to construct and paint some houses for the appellees. In October, 1950, Dickson employed the appellant, Kennemore, to paint the houses at a total price of $1,170.00.

Kennemore performed his contract and received $400.00 from Dickson, and then filed the lien claim, here involved, for the balance of $770.00. Among other defenses, the appellees pleaded and offered evidence of estoppel; and their testimony on that issue—the determinative one—is substantially as follows:

That before Kennemore began the painting work, he was in the store of the appellees, and they directly inquired of him as to whether they should withhold any money from their contract with Dickson and pay same to Kennemore for the paint job; that Kennemore then told appellees that Dickson was constructing a house for Kennemore, or one of his employees; that Kennemore and Dickson were going to "swap-out"; that Dickson would get his pay for the Robbins painting job by crediting the same on the Kennemore house job; that the appellees need not hold back any money on their contract with Dickson in order to pay Kennemore for the paint job; that at the time Kennemore made these statements, the appellees had several thousand dollars still due Dickson on their contract; and that because of Kennemore's statements, the appellees paid Dickson the full contract price long before Kennemore attempted to assert the lien here involved.

As aforesaid, the Chancery Court rendered a decree adverse to Kennemore; and on this appeal he questions (a) the correctness of the evidence of the appellees, and (b) the sufficiency of such evidence on which to base an estoppel.

I. *The Preponderance of the Evidence.* The burden was on the appellees to prove the facts constituting their claims of estoppel, since it is conceded that the materials had been furnished and the lien notice filed within the statutory time. *Davidson* v. *Reiff,*[1] 123 Ark. 620, 186 S. W. 818. Four witnesses—the three appellees and one of their employees—testified to the statements made by Kennemore in the conversation as heretofore detailed. Kennemore admitted that he was in the ap-

[1] This opinion is not reported in full in the Arkansas Reports, but may be found in the Southwestern Reporter.

pellees' place of business and that they had some kind of conversation; but he claims that it was different from that testified to by the appellees and their witnesses. Dickson testified that he knew nothing of the Kennemore-Robbins conversations; and that Kennemore never told him of any such conversations.

With the testimony in such irreconcilable conflict on the factual issue, we cannot say that the Chancellor's decision is against the preponderance of the evidence. Therefore we cannot reverse on the facts.

II. *Estoppel.* In 57 C. J. S. 803 *et seq.,* Mechanic's Liens, § 229-230, the general rules on estoppel against the assertion of a mechanic's lien are stated as follows:

"As a general rule a person entitled to a mechanic's lien may be estopped to assert or enforce it by any act which would render it inequitable for him to do so . . . A sub-contractor, materialman, or laborer, is estopped to assert a mechanic's lien where the owner has settled with the contractor, or made payments to the contractor or subcontractors, in reliance on a representation, statement or direction by the sub-contractor, materialman, or laborer, that he has been paid."

See also Annotation in 155 A. L. R. 350 on "Estoppel of Mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or sub-contractor." See also note in Ann. Cas. 1916D 1068: "Representations of sub-contractor inducing payment to contractor as estopping former from claiming mechanic's lien."

We have several cases in this jurisdiction which recognize that a potential lienor may estop himself by making statements which are relied on by the owner. In *Davidson* v. *Reiff,* 123 Ark. 620, 186 S. W. 818, the Court found the facts to be against the alleged estoppel but recognized that an estoppel could exist under such a situation. In *Hot Springs Golf & Country Club Assn.* v. *Community Bank & Trust Co.,* 182 Ark. 715, 32 S. W. 2d 427, the Court recognized the possibility of estoppel but denied its application because there was no evidence

that the alleged statements had been relied on to the prejudice of the party pleading the estoppel.

In the case at bar, however, the appellees testified —and the Court by the decree inferentially found—that the statements were made by Kennemore and were relied on by the appellees, who paid the full price of the Dickson contract long before they learned that Kennemore was denying his alleged statements to them. Thus a promissory estoppel was established in the case at bar, just as in *Peoples Nat'l Bank of Little Rock* v. *Limebarger,* 219 Ark. 11, 240 S. W. 2d 12.

The decree is affirmed.

LONG *v.* STATE.

4765 266 S. W. 2d 66

Opinion delivered March 29, 1954.

Jay W. Dickey and *Sam M. Levine,* for appellant.

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

MINOR W. MILLWEE, Justice. Appellant, Clarence Long, was charged with and convicted of murder in the

first degree for the killing of Henry Allen; the jury fixed his punishment at life imprisonment. At the conclusion of all the testimony, appellant by proper motions challenged the sufficiency of the evidence to sustain a verdict of guilty of murder in either the first or second degree or manslaughter. It is now insisted that the state failed to prove the malice and premeditation on the part of appellant requisite to a conviction of first degree murder.

The evidence disclosed that on Sunday morning, August 9, 1953, appellant drove his two-door sedan automobile from Altheimer, Arkansas, to Pastoria, Arkansas, carrying five other passengers. After remaining in Pastoria a few hours, the group started back. Deceased, who had come to Pastoria in another car, wanted to ride back with them, and though there were protestations that the car would be too crowded, he did get into the back seat. After driving a short way, appellant complained that he would be arrested by the police for overloading the car. Appellant stopped the car; deceased got out, walked around to the driver's side, opened the door, and attempted to pull appellant from the car. The defense witnesses testified that deceased had a knife out and tried to use it on appellant, while the State's witnesses insist that there was no knife involved in the fracas. The deceased was restrained by the other passengers, and appellant drove off leaving deceased and two others in the road.

The shooting occurred later that day in the Busy Bee Cafe in Altheimer, and the testimony as to what happened there is in sharp conflict. Defense witnesses testified that appellant was in the cafe inquiring about his watch, which had apparently been lost in the earlier scuffle, and that deceased came in afterwards. They stated that appellant started backing from him toward the door, and that deceased advanced on him with his hands in his pockets, a position which suggested to appellant that deceased was preparing to pull a knife.

Opposed to this testimony, Lee Withers, a witness for the State, testified that deceased was already in

the cafe when appellant entered, and that the shooting occurred immediately upon appellant's entrance. Neither defense nor State witnesses testified to hearing any argument preceding the shooting, and no one saw a knife either in deceased's hand or about his body, though no one searched his pockets.

Appellant argues that even when considered in the light most favorable to the verdict the foregoing evidence is insufficient to show the malice, premeditation and deliberation required by Ark. Stats. § 41-2205 for a conviction of first degree murder.

It is a rule of long standing and repeated application in this state that when the homicide is without provocation and done with a deadly weapon, the law will imply malice. *McAdams* v. *State,* 25 Ark. 405; *Wooten* v. *State,* 220 Ark. 755, 249 S. W. 2d 968. Here, the lethal character of the weapon is unquestioned. When this fact is considered with the evidence that no argument or threats preceded the shooting, and that appellant began shooting immediately upon entering the cafe, the jury's finding of malice on the part of appellant was amply sustained.

The requirement of premeditation and deliberation presents a more difficult problem, for this court has held that these two elements of first degree murder 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. However, recognizing the difficulty of establishing by proof the existence of a mental process and a state of mind, this court has approved the rule that premeditation and deliberation 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. According to the evidence adduced by the State in the case at bar, appellant had had trouble with deceased earlier in the day and had lost a watch which he prized very

highly in the struggle. He then procured a loaded .32 calibre pistol and proceeded to a crowded cafe on Sunday afternoon in search of the deceased. Immediately upon entering the cafe he began shooting and killed the deceased. This testimony was sufficient to warrant the court in submitting to the jury the question of whether or not the appellant acted with premeditation and deliberation when he killed Henry Allen and the jury's finding on this issue is conclusive.

Appellant also argues that his plea of self-defense was fully established and that deceased was the aggressor at the time of the shooting. In this connection it is contended that certain witnesses for appellant were in a better position than Lee Withers to observe what occurred at the time of the shooting. Under our system of jurisprudence these were matters within the exclusive province of the jury. Since there was a sharp dispute in the testimony as to what occurred immediately preceding the shooting, it was for the jury as the sole judges of the credibility of the witnesses to determine the verity and weight to be given the testimony. The law of self-defense and other issues were presented to the jury under instructions which have been repeatedly approved by this court.

The record presents no reversible error, and the judgment is affirmed.

HUGGINS *v.* WACASTER.

5-363 266 S. W. 2d 58

Opinion delivered March 29, 1954.

Mark E. Woolsey and *Yates & Yates,* for appellant.

G. C. Carter and *John J. Cravens,* for appellee.

George Rose Smith, J. This is a dispute among three claimants to the office of county clerk of Franklin County. Huggins, one of the appellants, asserts title to the office by virtue of his election thereto at the general election held on November 4, 1952. Wacaster, the plaintiff below, bases his claim to the office upon his appointment thereto by the governor, under Act 256 of 1953. Anderson, the other appellant, is the circuit clerk of the county and contends that he is thereby *ex officio* county clerk.

The controversy is occasioned by the fact that, according to the 1950 federal census, the population of Franklin County fell below 15,000. Until the adoption of Amendment 41 our constitution provided that the circuit clerk should be *ex officio* county clerk, except that "in any county having a population exceeding fifteen thousand inhabitants, as shown by the last Federal census, there shall be elected a county clerk, in like manner as the clerk of the circuit court . . ." Art. 7, § 19.

In 1890 Franklin County's population first exceeded 15,000, and for the next sixty years the county had a separate county clerk. But when the 1950 census results were announced in April, 1951, it was disclosed that the county's population had dropped to 12,358. Nevertheless Huggins was nominated for the county clerkship in the summer of 1952 and was ostensibly elected to the office at the general election in November. He assumed the office on January 1, 1953, and served until his removal by the court below.

Huggins makes two contentions to support his claim to the position. First, it is insisted that even though a county's population must exceed 15,000 before the county clerkship becomes an office in itself, a later decline in population does not return the duties of the office to the circuit clerk. Upon this theory the separate office continued in spite of the 1950 census results, so that Huggins' election was valid.

The language of the constitution does not sustain this argument. The constitutional convention, having in mind economy in government, evidently believed that the need for a separate clerk is not sufficiently great in the less populous counties to justify the extra expense to the taxpayers. Hence a separate county clerk was provided only for those counties having more than 15,000 inhabitants "as shown by the last Federal census." As we reasoned in *Childers* v. *Duvall,* 69 Ark. 336, 63 S. W. 802: "This is the condition upon which the county is allowed two clerks. It (the convention) did not intend that the federal census of 1870, which was the last census at the time the constitution of 1874 was adopted, should for all time determine when the condition for which it provided existed. It provided for counties having a population in excess of 15,000 inhabitants. This is a condition, present and future, for which it provided. There was and is no reason for discrimination in favor of one county against another of the same population." Yet such discrimination would result if Huggins' position were now approved. One of two equally populous counties might have an extra clerk

merely because its population had exceeded 15,000 in some past decade. It was to prevent such inequalities that the convention chose the *last* census as the controlling factor. We must give effect to the plain words of the constitution.

Second, Huggins contends that Amendment 41 created a separate county clerkship for every county in the State. This amendment was adopted at the general election held on November 4, 1952—the day of Huggins' ostensible election to the office in dispute. The amendment reads in part: "The provisions for the election of a County Clerk upon a population basis are hereby abolished and there may be elected a County Clerk in like manner as a Circuit Clerk."

We do not think this amendment had the effect that Huggins seeks to attribute to it. The original constitution had provided that in counties having more than 15,000 people there *shall* be elected a county clerk. (It may be noted parenthetically that as first drafted Amendment 41 also contained the word "shall," which was later changed to "may." Senate Journal, 1951, Vol. 2, p. 1512. We do not regard this fact as controlling, for the question is what the public intended when the amendment was voted upon.) But Amendment 41, after abolishing the population requirement, provides that there *may* be elected a county clerk. Thus the original provision was mandatory, but the amendment is merely permissive. It was not intended that the amendment should force an additional public office upon even the least populous county, where there might be no need for it. We must conclude that the amendment is not self-executing. Hence enabling legislation is needed for the creation of a new clerkship in those counties not having a separate clerk when Amendment 41 took effect. Since there was no enabling act for Franklin County at the time of Huggins' asserted election, his claim fails, for he was a candidate for a nonexistent office. *Childers* v. *Duvall, supra.*

Wacaster, the appellee, contends that Act 256 of 1953, under which he was appointed to the office, con-

stitutes the enabling legislation that is lacking in Huggins' case. This Act, approved March 10, 1953, undertook to create the separate office of county clerk in Franklin County, under the authority of Amendment 41. By its terms Act 256 is a local act, applicable only to Franklin County. The question is whether it violates Amendment 14, which prohibits local or special legislation.

It has long been settled that an act which applies to only one county contravenes Amendment 14. Wacaster insists, however, that Act 256 falls within the rule which permits the enactment of special legislation dealing with the administration of justice. The rule does not go far enough to reach the present case. Acts affecting purely judicial officers, such as a court reporter or the Pulaski chancery clerk, have been upheld. *McLellan* v. *Pledger,* 209 Ark. 159, 189 S. W. 2d 789; *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S. W. 2d 647. But many, if not most, of a county clerk's duties are administrative in character. It has already been held that local legislation dealing with the office of county clerk is unconstitutional. *Cannon* v. *May,* 183 Ark. 107, 35 S. W. 2d 70. Act 256 cannot be upheld upon the theory that it affects the administration of justice.

We must also consider the possibility that Amendment 41 impliedly amended Amendment 14, putting the office of county clerk in the unique position of being immune to the ban against local legislation. It is true, as we have seen, that Amendment 41 requires enabling legislation for its operation; but the question is, may these enabling laws be framed without regard to the basic prohibition against local acts?

Our cases shed much light on this issue. For some years after the adoption of Amendment 14 it was contended that the prohibition against local and special laws should not apply in any field as to which the General Assembly was given express legislative authority by some other provision of the constitution. Anderson, Special and Local Acts in Arkansas, 3 Ark. L. Rev. 113,

116. But this view, which would have stripped Amendment 14 of much of its force, did not gain acceptance by a majority of the court. It was finally laid at rest in *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. 2d 55, where we said: "In our opinion it is immaterial whether or not local legislation is induced by constitutional mandate or is passed because not prohibited by the Constitution . . . It is the duty of this court to harmonize all provisions of the Constitution and amendments thereto and to construe them with the view of a harmonious whole."

It was with this background of interpretation that Amendment 41 was written and approved. Had there been any intention of putting the office of county clerk in a class all by itself, subject to local legislation as no other county administrative office is, we should expect to find in its language some intimation of that purpose. But that intimation is not to be found. The amendment declares simply that county clerks may be elected in like manner as circuit clerks. Of course legislation affecting circuit clerks must be general rather than special. In the case of county clerks we are not authorized to read into the constitution an exception that is not there. We conclude that, apart from the possibility that a separate county clerkship may be created by the county electorate acting under Amendment 7, the enabling legislation contemplated by Amendment 41 must conform to the constitutional requirement that it be general. Act 256 is a local law that is prohibited by Amendment 14.

The result is that in Franklin County the office of county clerk does not have a separate existence. Its duties therefore fall upon the circuit clerk, acting *ex officio.*

Reversed.

5-356 266 S. W. 2d 74

Opinion delivered March 29, 1954.

Davis & Allen, for appellant.

Keith & Clegg, for appellee.

WARD, J. This appeal raises this general question: What acts on the part of a lessee constitute a compliance with the provision to "commence drilling operations" before the expiration of an oil and gas lease?

On February 23, 1943 appellees, L. A. McClendon and Susie McClendon, executed a standard oil and gas "Commencement Form Lease," form No. 88, on certain lands to appellants, Fred T. Haddock and W. S. Bellows. The principal term of the lease was 10 years from the date of execution and was to be kept in force by the payment of yearly rentals, which in this instance were all paid, thereby extending the term of the lease to February 23, 1953. The lease also contained this paragraph:

"Notwithstanding anything in this lease contained to the contrary, it is expressly agreed and covenanted that if the lessee, his heirs, successors or assigns, shall *commence drilling operations* at any time while this lease is in force, this lease shall remain in force and effect, and the term and life shall continue as to the entire acreage described herein, *so long as such operations are prosecuted,* and if production results from such operations, then as long thereafter as such production continues." (Emphasis supplied.)

Apparently due to the fact that appellants were waiting on the outcome of nearby oil developments, or at least it is a fact, they did not see fit and did not attempt to drill an oil well on said lands until the attempt, as hereafter discussed, was made shortly before the expiration date of the lease. While appellants were engaged in an attempt, begun February 18, 1953, to proceed with drilling operations they were notified by appellees, on March 4, 1953, that the lease had terminated, and on March 14th following appellants filed this suit against appellees asking to have their title to the oil and gas lease quieted in them. Appellees filed a general denial and also specifically denied that Haddock and Bellows, as lessees, had "commenced or caused to be commenced drilling operations on the above described land which would operate to continue said lease in force and effect beyond the expiration of the primary term," and they ask that the said oil and gas lease be canceled, set aside and held for naught. On final hearing the chancellor dismissed the complaint and canceled the lease, giving, in part, the following reasons: Nothing was done by appellants until the closing days of the lease; appellants did not do what was necessary under the terms of the lease to protect their interest and prolong the life of the lease; and, apparently the purpose of appellants in starting the operations was to see what the result of a nearby well would be. It was further noted by the chancellor that had appellants "in good faith, gone in on the last day and entered upon this property and commenced to drill for gas or oil they would have had

their protection." From this decree appellants prosecute this appeal.

Although the testimony is in most part not in conflict we deem it necessary to set out portions of it hereafter in some detail.

Appellant Haddock is an oil producer who lives in Oklahoma and appellant Bellows is a general contractor who lives in Houston, Texas. Knowing that their lease from appellees would expire on February 23, 1953, and apparently being aware of the oil production near the leased land, they employed Mr. George Belt, a practical oil man in Oklahoma, early in January 1953, to come to Arkansas and drill a well 9,400 feet deep on the leased premises. Under instructions Belt offered to pay appellees a substantial sum of money if they would extend the expiration date of the lease for something like sixty days, but appellees refused to do this. Then Belt made inquiry with the view to obtaining a drilling rig which would be capable of drilling to a depth of 9,400 feet, which depth, it is conceded, will be necessary to drill in this instance with any hopes of striking oil or gas. Not being able to obtain such a rig readily Belt made arrangements with Warren and Hollyfield for a smaller drilling rig known as a "Cardwell Rig," which uses a cable. It is conceded by appellants that this rig is not capable of drilling the desired depth, but Belt says that he secured it only for the purpose of putting down about 200 feet of soil pipe in preparation for a larger drilling operation. Before the expiration date Belt made application to and secured a permit from the Arkansas Gas Commission to drill the well to a depth of 9,400 feet, and a few days before drilling operations started on February 18th Belt built a road up to the drilling site. This road would take care of ordinary heavy traffic but was not in shape to take care of a heavy drilling rig such as would eventually have to be used. The Cardwell rig was moved on location on February 18th and after encountering many difficulties, including quicksand, they were able to drill about 30 feet by February 23rd and had drilled to the depth of 52 feet by March 12, 1953, but were not able to install all of the surface pipe.

For a reversal, the principal contention of appellants is stated in this way:

"The employment of a cable tool drilling rig for the purpose of setting surface casing on the lease, and the actual making of a hole with that equipment constituted drilling operations while this lease was in force."

In support of this contention they cite the following authorities: *Jackson* v. *Gilbert,* 216 Ark. 501, 226 S. W. 2d 59; *Winn* v. *Collins,* 207 Ark. 946, 183 S. W. 2d 593; *Allen* v. *Palmer, et al.,* 201 Okla. 673, 209 Pac. 2d 502; and *McCallister, et al.* v. *Texas Company,* (Tex. Civ. A.) 223 S. W. 859.

The *Jackson* case, *supra,* dealt with a coal mining lease where it was alleged that the lessee had violated a provision of the lease requiring him "to begin the establishment of a plant within the first year." The expiration date was January 1st and it was shown that appellee began stripping overburden with a bulldozer on the previous December 21st and removed 4 tons of coal on December 23rd; then, deciding the bulldozer was not suitable, he brought in a dragline on December 30th; and appellee had installed two boxes, dragline cover and shed. In denying cancellation of the lease we said:

"We think the requirement is met by the installation of such machinery and equipment as are appropriate to the development of the leasehold. The lease itself permits the lessee to remove the top vein of coal 'by the steam shovel process or other equally good processes.' "

The *Winn* case, *supra,* deals with the expiration clause in a bauxite mining lease. The lessee there had until April 29, 1943 to begin active mining operations. The proof showed that on February 7th test mining began and that in the early part of April a shaft was being sunk to see if bauxite could be mined in that way and it was discovered that they could only mine by open pits. On April 28th a scraper and tractor were in use removing the overburden. Although no bauxite had been mined we held the above facts showed "that active mining operations began in due time."

The *Allen* case, *supra,* involving an oil and gas lease, deals with a question similar to the one presented here. Apparently this case is cited by appellants to show that it is not necessary to have a complete drilling outfit on the ground before the expiration date. There the court posed the question this way:

"The decisive question presented is whether Allen commenced the actual drilling of an oil and gas well upon the property covered by the lease on or before April 26, 1947."

The proof showed that Allen set up a rig one day before the expiration date and drilled 6 feet in rock; that he was unable to get a connection made for fuel gas until April 29th but supplied gas by small containers; that they were unable to connect up a water line until May 5th; and that they did not have surface casing. In refusing to declare a forfeiture of the lease the court said:

"We are cited to no case by plaintiffs, and we know of none, holding that actual drilling of an oil and gas well is not in fact commenced until, as contended by plaintiffs, all the equipment, machinery and materials necessary to drill and complete the well have been placed upon the leased property. In fact from the testimony of witnesses produced by both parties, it appears that it is not customary, prior to commencing drilling operations, to have upon the land everything necessary to complete the well."

In the *McCallister* case, *supra,* the forfeiture clause in the oil and gas lease stated that "operations for the drilling of well for oil or gas shall be begun within 2 years . . ." The lease would have expired on August 19, 1918, the lessee began operations to drill on July 13, 1918, but actual drilling started on September 14, 1918. The preparations to drill consisted of selecting and locating a place, hauling derrick timbers to the site, and providing a water supply for drilling purposes. The court there held that such preparations satisfied the provision in the lease requiring that operations for drilling should begin, and refused to cancel the lease. It is true that in the cited case the court found that operations continued with diligence

until May 13, 1919, at which time oil was found. In the *McCallister* case, *supra,* the court also stated that "forfeitures are not favored by law and if the language is fairly susceptible of an interpretation which will prevent a forfeiture it will be so construed," citing *Brown* v. *Insurance Company,* 89 Texas 590, 35 S. W. 1060.

To sustain the decree of the trial court appellees state that the provisions of oil and gas leases should be construed more strongly against the lessee and in favor of the lessor, citing *Anderson* v. *Talley,* 199 Okla. 491, 187 P. 2d 206. In this same connection appellees point out that formerly a "Completion Form Lease" was in common use, which in general provided that leases would forfeit unless there was actual production before the end of the primary term fixed in the lease, but that the lease under consideration is one of those which has later become known as a "Commencement Form Lease" which permits a lessee to continue with due diligence the drilling of a well commenced before the expiration of the primary term.

However, appellees' principal contention for an affirmance is set forth in their own language, to-wit: "Good faith drilling operations as contemplated by the parties to the lease were not performed by the lessee." To support this contention they cite *Wickham, et al.* v. *Skelly Oil Company,* 106 Fed. Supp. 61, affirmed by the United States Court of Appeals, 10th Circuit, on February 9, 1953, 202 Fed. 2d 442; 12 Am. Jur. 667; Vol. 2, Summers Oil and Gas, at page 260; *Mansfield Gas Company* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; and *Huggins* v. *Daley,* 99 Fed. 606.

In our opinion the decree of the trial court in this case cannot be affirmed on the basis of "good faith," or rather the lack of good faith. As we view this case the question of diligence or lack of diligence is also related to the question of good faith or lack of good faith.

A full discussion of appellees' authorities would serve no useful purpose. It suffices to say: The *Wickham* case, *supra,* is to the effect that the lease here would expire on

February 23rd, but if before that date drilling was begun and continued until production was obtained the lease would be revived; the *Am. Jur.* citation says it is implied that *good faith* must be used in performing written obligations; and the *Huggins* opinion, *supra,* says there is an implied obligation on the lessee to use *diligence* in search and operation.

It appears decisive therefore to apply the tests of *good faith* and *diligence* to the facts and circumstances of this case.

Good Faith. We are not convinced that the evidence shows a lack of good faith on the part of appellants. They had a right, as held in the *Allen* case, *supra,* if they wanted to do so, to wait until one day before February 23rd to start drilling, and the fact that they may have been waiting on the outcome of nearby operations is immaterial. The lease imposed upon appellants not only the duty to commence drilling operations before February 23rd but also the duty to discover oil or gas, otherwise the lease would be void. Good faith in this instance therefore must mean, or at least include, their intention to drill a well to the production sand which it is agreed was 9,400 feet deep. Good faith relates to intent, and if appellants didn't intend to drill 9,400 feet then they must have intended to throw away over $5,000 which they spent on what they did do. We are loath to believe they had the latter intent, and it is not deducible from the testimony.

Diligence. We agree with appellees that appellants would have been obligated to use diligence [though not specifically required in the lease] in their attempt to drill an oil well to completion. They would have had no right to delay operations for the purpose of waiting on the outcome of other oil developments, but that situation did not develop here because appellants were, in effect, stopped by appellees' letter of March 4th. We have no way of knowing what diligence appellants might have used after that date, or after this suit was filed on March 14th. So the question: Should the lease be canceled because of appellants' lack of diligence in doing what they did here?

We do not think so. Appellants had a right, as we have mentioned, to wait until practically the last day to begin drilling, and cannot therefore be penalized for lack of diligence on that account, and since they were stopped by appellees on March 4th, the question of diligence thereafter never arose.

Appellees' witnesses stated that they visited the drilling location several times when the men didn't seem to be working, and it is evident the drill crew did not work 24 hours a day, but it would be a dangerous precedent to say these facts justify cancellation of a lease on the ground of lack of diligence. It is true the evidence reflects that ordinarily more progress would have been made in the same time than was made here by appellants, but Belt explains the difficulties they had with quicksand and in lowering the surface pipe, and it is not shown that the same difficulties might not have occurred with a larger drilling rig.

Appellees attach importance to the fact, admitted by appellants, that the cable rig used in this instance was not suitable to drill 9,400 feet. Appellants' explanation of course is that they only intended to use the cable rig to set 200 feet of surface pipe and then proceed with a proper rig. We have no way of knowing what appellants would have done had they been permitted to set the surface pipe, but their apparent experience and financial standing preclude an assumption they would not have proceeded properly. The testimony indicates that setting soil pipe is a necessary step in the drilling of an oil well.

In our opinion, the decision of the trial court that appellants' activities did not comply with the lease provision to "commence drilling operations," is not supported by the weight of the evidence.

Reversed.

Justice George Rose Smith dissents.

CLARK COUNTY *v.* MITCHELL.

5-352 266 S. W. 2d 831

Opinion delivered March 29, 1954.

[Rehearing denied May 3, 1954.]

G. W. Lookadoo, W. R. Thrasher and *W. L. Terry,* for appellant.

John E. Lookadoo, for appellee.

ROBINSON, J. The issue here is the amount of damages suffered by landowners by reason of the loss of a strip of ground taken by eminent domain proceedings for a highway right-of-way, and because of the lowering of the grade of the highway about 5 feet in front of appellees' place of business. A jury was waived and the circuit court, sitting as a jury, awarded damages in the sum of $20,000. Clark County has appealed contending the judgment is excessive.

Appellees own approximately 6½ acres of land in Clark County adjoining the west side of Highway 67, which at this point runs north and south. Located on the land is a store building and dwelling house under one roof, also several tourist cabins. The appellant took from appellees a strip of land 10 feet in width extending across the 6½ acres.

There is substantial evidence to the effect that appellees have spent between $30,000 and $40,000 on the improvements, and now the property is practically worthless for commercial purposes and has no considerable value for any other purpose. The right-of-way now is within 1½ feet of the front door of the store; when the screen door is opened, it comes out over the right-of-way.

The 10-foot strip was taken for the purpose of increasing the width of the right-of-way of Highway 67 to 200 feet. The Highway Department has constructed within the boundaries of the 200-foot right-of-way a new concrete strip 24 feet wide just east of the old strip. Appellees' land and improvements are at or near the apex of a rise in the highway; in order to build the new concrete strip in accordance with modern practices, this rise was cut down to the extent that the new concrete strip is now approximately 5 feet lower than the old strip and appellees' improvements, and when the old strip is rebuilt it will also be lowered to the level of the new strip. However there is no showing as to just when the west portion of Highway 67 will be rebuilt.

Appellant contends that in assessing damages the trial court took into consideration the anticipated change in grade of that portion of Highway 67 adjoining appellees' property, and allowed damages therefor. Undoubtedly there is very substantial evidence to the effect that appellees have been damaged to the extent of the amount awarded by the court, but appellant contends that if appellees have been damaged in any amount other than the value of the land actually taken, it is by rerouting the highway rather than changing the grade. It is contended that although a new concrete strip has been laid

on the 200-foot right-of-way and the grade therefor has been lowered 5 feet in front of appellees' place of business, appellees are not entitled to damages by reason of the change in grade because that portion of the highway which actually adjoins the property still owned by appellees has not been lowered at this time.

Highway 67 has not been rerouted; it still passes directly in front of appellees' place of business, and the right-of-way which now includes the 10-foot strip of ground taken from them comes within 1½ feet of the front door of their place of business. It is true that only a portion of the right-of-way had been lowered as of the date of the trial, but it is equally true that there is substantial evidence to the effect that the west portion of the highway will be rebuilt, and when this is done it will be lowered to the level of the new strip.

If appellees have not been damaged because only the eastern portion of the right-of-way has been reduced in grade at this time, just how far west could the Highway Department go in lowering the grade before it would get to the point where appellees would be damaged?

It is true that the route of Highway 67 could be changed without giving rise to a cause of action in favor of a landowner on the present highway. But here Highway 67 has not been rerouted; in fact, instead of being rerouted it has been extended in width at its present location, taking a 10-foot strip of the landowner's property in order to widen it. The evidence is convincing that all of Highway 67 will be lowered in front of appellees' place of business; 10 feet of their land has been taken to facilitate the construction of the new highway, obviously at a lower grade. Also there is substantial evidence to the effect that the change of grade in the highway will practically destroy the value of appellees' property for commercial purposes, for which it is now being used.

Our Constitution, Article 2, § 22, provides: "Private property shall not be taken, appropriated, or damaged for public use without just compensation." In *Dick-*

erson v. *Okolona,* 98 Ark. 206, 135 S. W. 863, 36 L. R. A., N. S. 1194, Chief Justice McCulloch in referring to the above section of the Constitution said: "We are of the opinion that the authorities thoroughly establish the doctrine that under a constitutional provision guaranteeing compensation to the owner of private property damaged for public use, a municipality is liable for damage done by raising or lowering the grade of a street; otherwise the language of the Constitution would be meaningless." See also *Fayetteville* v. *Stone,* 104 Ark. 136, 148 S. W. 524.

In *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. 2d 300, this court said the measure of damages is the value of the land taken plus the damage to the land not taken, less any accruing benefits. In the case at bar appellees are entitled to compensation for the land taken, plus the damage to the land not taken. In arriving at the amount of the damages it is proper to take into consideration the difference in the market value of the property before and after the taking. *St. Louis, Arkansas & Texas Railroad* v. *Anderson,* 39 Ark. 167; *City of Harrison* v. *Moss,* 213 Ark. 721, 212 S. W. 2d 334.

There is substantial evidence to sustain the damages awarded by the court; and in our opinion the court was correct in finding that in addition to the value of the land taken, damage was caused by changing the grade and not by rerouting the highway.

Affirmed.

George Rose Smith, J., dissenting. In this case the appellee's home, store, and tourist court lie on the west side of the old highway. In the main his buildings are as yet undisturbed and have the same physical value as before. It is true that the market value of his property has been reduced by the relocation of the highway, but I do not regard that damage as compensable in this action.

What the State has done is to relocate the highway by constructing a new thoroughfare a short distance east of the old road. The old highway is still in existence and

provides a means of access to the appellee's place of business. The proof is that the appellee's volume of business has declined, as it is now difficult for the traveling public to reach his store and tourist court. It happens that this difficulty is due in part to the fact that the new road is several feet lower in grade than the old one; to reach the appellee's property the public must leave the new road at a short distance in either direction from the appellee's place of business, instead of immediately in front of it. But the point is that this inconvenience, with its adverse effect upon market values, is simply due to the fact that the road has been relocated.

In *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. 2d 300, we held that damage resulting from the relocation of a highway is not compensable. "No person has a vested right in the maintenance of a public highway in any particular place, as the power is in the State to relocate the road at any time in the public interest. Therefore, the change in the road so as to leave appellee's residence off the new road did not constitute an element of damage in this case." Had the new road in the case at bar been located a mile east of the old one the damage to the appellee would have been far greater than it is now, since it would have been still more inconvenient for the public to do business with him. Yet in that situation the loss would not have been compensable. I do not see that the situation is changed by the fact that here the relocated highway is a few feet away horizontally and about five feet vertically, while in the supposed case the new road might be a mile away horizontally. In either case the harm results from the fact that the appellee's property no longer abuts the main thoroughfare, but that is not an element of recoverable damage.

The other factor relied upon by the appellee's witnesses is the possibility that the old highway may someday be regraded to the elevation of the new one, leaving the appellee's property perched from a bank five feet above the road. That however, is only a possibility that may or may not occur. I think it unsound to bottom the landowner's claim to damages upon a uncertainty such as

this, for there is no limit to the vague threats of future damage that landowners may conjure up in condemnation cases. Damage that is purely speculative should not be paid for until it becomes a fact.

If the State should, at some future date, take steps to lower the grade of the old highway, that will be a separate damage for which the appellee will have a separate cause of action. In *Arkansas State Highway Com'n* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968, Partain's situation was exactly like the appellee's will be if the State decides in the future to lower the old roadway. There the State did not propose to take any of Partain's land; its purpose was to construct a viaduct upon an existing street that ran directly in front of Partain's residence. Even though Partain could not sue the State, we held that he could enjoin the work until compensation had been made for the damage. In like manner, if the State should eventually decide to reduce the elevation of the old highway the appellee will have his remedy by injunction.

It is my conclusion that this cause should be remanded for a new trial, the proof to be limited to those damages that are now recoverable.

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

NOBLE *v.* CITY OF LITTLE ROCK.

5-377 266 S. W. 2d 78

Opinion delivered March 29, 1954.

John F. Park, for appellant.

O. D. Longstreth, Jr., Joseph Brooks and *Dave E. Witt,* for appellee.

Griffin Smith, Chief Justice. The appeal is from the Chancellor's determination that the administrative authorities of Little Rock did not act arbitrarily in rejecting an application of O. W. Noble to rezone a designated area in a manner converting it from B-Residential to I-Light Industrial. This change would have permitted the applicant to operate a commercial garage in the residential district over objections of homeowners.

Noble is the owner of Lots 7, 8, 9, and 10, Boulevard Terrace Annex No. 1 to Little Rock. The lots face West Twenty-Ninth street and Noble's home occupies parts of Lots 7 and 8. It was completed in March, 1946, and occupied that month. Three and a half years later Noble applied for authority to construct a 20 x 30-ft. frame garage on part of Lot 7 contiguous to Monroe street, and to the rear.

Noble testified that he started operating his present business in a small building April 11, 1949. Seemingly, under the permit issued October 26th of that year, he constructed a 30 x 30 garage, using concrete blocks, steel casement windows, and composition roof. He insists that for all practical purposes the building is fireproof and that inflammable commodities in appreciable quantities are not kept on the premises. He also insists that he uses modern tools designed to muffle noise, including rubber hammers, etc.

Several of the neighbors testified—and it was stipulated that others would express the same views—that the methods employed by Noble in operating the garage did not bother them, although it was conceded that he

sometimes works at night. Others thought differently. Charles C. Moore, whose home is within twenty feet of the garage, testified that when he came home during the late afternoon Noble would be operating a spray gun in a noisy manner. Then, said the witness, the worker would "open up" with his air hammer and drop his tools, "and it is a nuisance to try to rest after you get home."

It is argued inferentially that Moore bought his home knowing that the garage had been a fixture for several years, therefore he is in no position to complain of distractions consciously incurred. But the record discloses that in July, 1952, Noble was granted authority by the city council to operate the business as a non-conforming activity until January 1, 1953. At a regular meeting of the council March 9, 1953, protests signed by "a number of residents in the vicinity of the garage" were considered, with the result that the permit was revoked. It should be noted, however, that the authority expired by its own terms more than two months earlier.

When arrested for violating the zoning ordinance Noble procured a temporary injunction, the effect being to restrain officers from interfering with operation of the garage. While this suit was pending Noble applied to the city planning commission, asking that the area be rezoned. The commission's refusal was sustained by the city council July 27, 1953, and this suit followed.

The chancellor's interpretation of the effect to be given zoning ordinances was correct. The particular building—said to have cost more than $1,500—was not initially authorized. The frame structure mentioned in Noble's building application of October 26, 1949, was estimated to cost $200. While appellant may have felt morally sustained by conduct of his neighbors who gave him their automobile repair work and in saying that they were not bothered by the noise, that is not the test. The justiciable issues are whether (a) the building conformed to the zoning ordinance applicable to the area in question; and, (b) whether refusal to change existing regulations to make them harmonize with appellant's convenience or necessity was arbitrary.

The ordinance filed as an exhibit became effective March 17, 1937. Its salutary provisions were intended as much for appellant's benefit as for the benefit of anyone else. The right to reasonably regulate has long been recognized.

Our early case upholding an Act of the general assembly authorizing cities to enact zoning ordinances—*Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321—forecloses some of the contentions made by appellant here. The ordinance as applied in the instant case is not void because, as counsel argues, police power is given precedence over constitutional property rights.

Mr. Justice FRANK G. SMITH, who wrote the Herring-Stannus opinion, quoted from *Bacon* v. *Walker,* 204 U. S. 318, 51 L. Ed. 499, 27 Sup. Ct. Rep. 289, where Mr. Justice McKENNA said that an Idaho statute [prohibiting the herding or grazing of sheep on, or within two miles of, land or processory claims of persons other than the owners of the sheep] did not wrongly deprive sheepowners of their property without due process of law. Effect of the Idaho law was to prevent grazing, in some instances, on the public domain. The state's police power, said Judge McKENNA, is not confined to what is offensive, disorderly, or unsanitary; rather, it reaches legislative dealing with conditions existing in the state "so as to bring out of them the greatest welfare of its people."

In the Herring-Stannus case reference is made to *City of Des Moines* v. *Manhattan Oil Co.,* 184 N. W. 823, 23 A. L. R. 1322, where Mr. Justice WEAVER quotes from the opinion of Chief Justice SHAW (*Commonwealth of Massachusetts* v. *Alger,* 7 Cush. 53). In speaking for the court Judge SHAW said: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . ."

In *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890, Judge FRANK SMITH said that when a business district has been appropriately established, the rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property. This was a reiteration of expressions in the Pfeifer case. The same principle would apply to residential property within the latitude for changes contemplated by the Little Rock ordinance and decisions construing it and delineating the legislative power.

The Tennessee Supreme Court, speaking through Mr. Justice GAILOR (*Brooks* v. *City of Memphis,* 241 S. W. 2d 432) said that the complexities of modern life have made the principle of municipal zoning necessary, hence it has been established by all courts that fixing the lines of the various districts making up the zoning plan is a legislative exercise of the police power, and not a judicial function.

As to borderline cases Mr. Justice OLIVER WENDEL HOLMES (*Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 48 S. Ct. 423, 426, 72 L. Ed. 770, 775) made this comment: "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or a point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of the reasonable mark."

While as in the case resulting in this appeal hardships are bound to occur, we are not able to say that the municipal authorities have acted capriciously or arbitrarily in refusing to rezone the district; hence the decree must be affirmed.

5-360 267 S. W. 2d 6

Opinion delivered April 5, 1954.

[Rehearing denied May 10, 1954.]

[redacted]

Frank C. Douglas, for appellant.

Marcus Evrard, for appellee.

ED. F. MCFADDIN, Justice. In February, 1953, appellee, J. H. Seaman, for himself and the other heirs of F. G. Seaman, deceased, filed this suit against W. T. Ingram and Jiedel's, Inc., alleging: (a) that Frank G. Seaman died intestate in 1927, the owner of the Lot 9 here involved, survived by his wife, Paralee Seaman, and the plaintiffs, as his descendants and heirs at law; (b) that the Lot No. 9 was the homestead, occupied by the widow; (c) that Paralee Seaman married W. T. Ingram, in January, 1940, and she and Mr. Ingram con-

tinued to occupy the Lot 9; (d) that Paralee Seaman had suffered the Lot to become delinquent for general taxes and improvement assessments, although it was her duty as life tenant to pay the same; (e) that on March 11, 1940, Paralee Seaman (then Ingram) executed a deed to her husband, W. T. Ingram, involving said Lot 9, without the knowledge or consent of said plaintiff remaindermen, and Mr. Ingram then paid all delinquent taxes and improvement assessments; (f) that such payments were in effect a redemption by Paralee Seaman Ingram, the life tenant, and created no title adverse to the plaintiff remaindermen; (g) that immediately prior to the filing of this suit, the plaintiff learned that Mr. Ingram was claiming to be the owner of the fee simple title and had executed mortgages to his co-defendant, Jiedel's, Inc., and unless restrained, Mr. Ingram would further convey and cloud the plaintiffs' title, as remaindermen. The prayer of the complaint was that Mr. Ingram be adjudicated to hold title only for the life of Paralee Seaman Ingram, his wife; that the plaintiff and other heirs of F. G. Seaman be decreed to be remaindermen; that the mortgages to Jiedel's, Inc. be limited to the life estate title of Paralee Seaman Ingram; and that Mr. Ingram be enjoined from further clouding the title of the remaindermen.

The defendant, W. T. Ingram, in his pleading admitted that F. G. Seaman purchased the Lot 9, and that Paralee Seaman (now Ingram) was his widow; but Mr. Ingram claimed "that after this defendant married Paralee Seaman she was unable to pay up the delinquent taxes and assessments against said property and in order to save some interest therein she deeded the property to this defendant by deed . . . in which she reserved the right to dower in case of the death of this defendant . . ." Mr. Ingram asserted that he acquired the title from the State and also received deeds from the several Improvement Districts that had completed foreclosure proceedings, and held title to the Lot. He asserted that he held title by adverse possession against the plaintiffs. In the alternate, Mr. Ingram pleaded that if his title by adverse possession should

not be sustained then under the Betterment Statutes (§ 84-1121 Ark. Stats. and § 34-1423 Ark. Stats.) he was entitled to recover improvements to the amount of $7,000.00 which he had placed on the Lot. Jiedel's, Inc. claimed that the mortgages executed to it by Mr. Ingram were valid in every respect and superior to any claim of plaintiffs.

So much for the pleadings. The testimony established the death of F. G. Seaman; the homestead rights of his widow and heirs; the delinquency of the property; the widow's marriage to Mr. Ingram; her deed to him; and his acquisition of the outstanding tax titles. The main questions related to abandonment of the homestead, adverse possession, and the Betterment Statutes. On all of these questions, the Chancery Court found against W. T. Ingram and Jiedel's, Inc.; and they have appealed.

I. *Abandonment of the Homestead Estate.*[1] Mr. Ingram argues that Mrs. Paralee Seaman Ingram abandoned her homestead by actually moving away from the homestead and then executing the deed to him. We hold that there was no abandonment. Mrs. Paralee Seaman, along with her son, the appellee, J. H. Seaman, lived on the Lot 9 continuously from the death of Mr. Seaman until her marriage to Mr. Ingram. On January 15, 1940, Mrs. Seaman married Mr. Ingram, and for six or eight weeks the newly married pair lived away from Lot 9. Then Mrs. Ingram insisted that Mr. Ingram return with her to Lot 9. Accordingly, J. H. Seaman and his family moved elsewhere, and Mrs. Paralee Seaman Ingram and Mr. Ingram returned to Lot 9 and have continued to live there. Under the circumstances here involved, her short absence of six or eight weeks would not in itself constitute an abandonment of her homestead. She never acquired another one. See *Van Pelt* v. *Johnson,* 222 Ark. 398, 259 S. W. 2d 519.

The only right of Mrs. Paralee Seaman Ingram to return to the Lot 9 after her marriage to Mr. Ingram

[1] In Jones' volume, "Arkansas Titles," § 893 *et seq.*, there may be found a discussion on the nature of the homestead estate. In the case at bar, we have no question of homestead rights of *minor children.*

was her right of homestead, and Mr. Ingram recognized that fact when he returned with her. Immediately thereafter,[2] and under date of March 11, 1940, Mrs. Ingram executed to Mr. Ingram a Warranty Deed covering Lot 9, regular in every respect except that from the beginning of the deed through the consideration clause, the deed recited:

"KNOW ALL MEN BY THESE PRESENTS: That I, Paralee Seaman Ingram, wife to W. T. Ingram—husband, for and in consideration of the sum of One and no/100 Dollars, cash in hand paid by W. T. Ingram, and love and affection. Subject to dower rights of grantor; so *land* as *grantor* lives on property and pays taxes, upon death of *grantor,* title reverts to estate of *grantee,* do hereby grant, bargain, sell and convey unto the said W. T. Ingram, and unto his heirs and assigns forever, . . ." (Italics our own.)

It was shown that the aforementioned deed was prepared by a layman, now deceased, and it is apparent that he used the word "land" for "long", and probably interchanged "grantor" and "grantee"; but the point is that Mrs. Paralee Seaman Ingram was living on the Lot 9 as her homestead when she executed the deed to Mr. Ingram and that they continued to live on the property, even to the time of the trial of this cause. Therefore, there was no actual abandonment of the homestead in any way, nor any overt claim of adverse possession so as to make applicable such cases as *Graves* v. *Simms Oil Co.,* 189 Ark. 910, 75 S. W. 2d 809; *Barnett* v. *Meacham,* 62 Ark. 313, 35 S. W. 533; *Brinkley* v. *Taylor,* 111 Ark. 305, 163 S. W. 521; *Fletcher* v. *Josephs,* 105 Ark. 646, 152 S. W. 293; and *Griffin* v. *Dunn,* 79 Ark. 408, 96 S. W. 190.

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[2] That the Ingrams had returned to the said Lot 9 when the deed was executed is shown by Mr. Ingram's testimony:

"Q. At any event, this deed she gave you was executed shortly after you and she moved back into this property?

"A. Shortly after we moved into this home there.

"Q. And it was shortly after that that you got the other deeds and paid the taxes?

"A. Yes, sir."

Furthermore, the testimony here clearly shows that no notice of disavowal of the homestead—so as to set in operation the Statute of Limitations — was ever brought home to the plaintiff, J. H. Seaman, or any of the other heirs of F. G. Seaman. See *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002; and *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835. We therefore hold that there was no abandonment of the homestead by Mrs. Paralee Seaman Ingram.

II. *Adverse Possession.* But Mr. Ingram claims that the deeds he received from the State and the Improvement Districts set in motion the Statute of Limitations against the remaindermen. A widow, having what is similar to a *life estate* in the homestead, has the duty to pay the taxes, and *she* cannot remain in possession and acquire a tax title adverse to the remaindermen. See *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858. Thus Mrs. Paralee Seaman Ingram could not have acquired a tax title adverse to the plaintiffs. We have also held that when the husband acquires a tax title from the State, it inures to the benefit of the wife. See *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809. And for other cases looking in the same direction, see *Dedmon* v. *Hawkins,* 211 Ark. 840, 203 S. W. 2d 183; *Smith* v. *Davis,* 200 Ark. 547, 140 S. W. 2d 126; and *Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718. In 41 C. J. S. 765 the rule is stated:

"The purchase by a husband of an adverse claim to his wife's land inures primarily to the benefit of her title, and to his benefit only so far as his marital interests are concerned. Thus a husband cannot acquire a tax title to his wife's lands, . . ."

In one place in Mr. Ingram's testimony, this question and answer occur:

"Q. Why did you pay these taxes and secure these deeds?

"A. At the old lady's request for me to redeem the place. She had lived there so many years, and she still thought she would be better satisfied there."

The reference to the "old lady" was an affectionate reference to his wife, Mrs. Paralee Seaman Ingram, and shows that Mr. Ingram redeemed the property for her. So we hold that while remaining in possession, Mrs. Paralee Seaman Ingram could not execute a deed to her husband, Mr. Ingram, and thereby empower him to acquire a title adverse to the remaindermen without any notice to them: whatever title Mr. Ingram acquired from the State and Improvement Districts was, in effect a redemption by his wife and was neither adverse to her as life tenant nor adverse to the Seaman heirs as remaindermen. Thus adverse possession has never commenced.

III. *Betterments.* Mr. Ingram claimed that he had spent several thousand dollars improving the house in which he and Mrs. Paralee Seaman Ingram lived on Lot 9, and also in building a rent house on the same lot; and because of such expenditures, Mr. Ingram claimed Betterments under either of our two Betterment Statutes—that is § 84-1121 Ark. Stats. and § 34-1423 Ark. Stats. The Trial Court held against Mr. Ingram on both statutes, and he has appealed.

Sec. 84-1121 Ark. Stats. relates to the improvements made by the *purchaser* of a tax title. We have held in Topic II, *supra,* that Mr. Ingram did not in fact purchase the tax title, but in effect redeemed for his wife. Therefore, it necessarily follows that Mr. Ingram has not brought himself within the purview of § 84-1121 Ark. Stats. See *Dedmon* v. *Hawkins,* 211 Ark. 840, 203 S. W. 2d 183, where we held that this Betterment Statute could not be claimed when the tax deed was in effect a redemption.

Sec. 34-1423 Ark. Stats. is the general Betterment Statute. Its language germane to this case reads:

"If any person, *believing himself to be the owner,* either in law or in equity, under color of title, has peaceably improved . . . any land . . ."

Under this Statute, Mr. Ingram is also met by the fact that one redeeming property from a tax sale is not in a position to claim that he *honestly believes* himself to be

the owner. All the deeds that Mr. Ingram acquired to the Lot 9—whether from the State or the Improvement Districts [3] — were, in effect, a redemption for the benefit of his wife, who was the life tenant. He was asked why he paid the taxes, and obtained the deeds, and he said it was his wife's request for him to *"redeem"* the place. Under our holding in *Graves* v. *Bean,* 200 Ark. 863, 141 S. W. 2d 50, the life tenant cannot recover for betterments where he has improved the property knowing that he had only a life estate, and that is the situation in the case at bar.

By building the rent house on the lot and dividing the main house into apartments, Mr. Ingram collected substantial rents, the exact amount of which he did not disclose. The Trial Court also found that Mr. Ingram's evidence of the amount of the improvements was too indefinite to entitle him to any relief; but we need not discuss that angle of the case, since Mr. Ingram was not entitled to relief under the Betterment Statutes. Furthermore, when Mr. Ingram's title fails to the fee, then necessarily the mortgages of Jiedel's, Inc. likewise fail to the fee.

The decree is affirmed.

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[3] There is no need for us to discuss the relative rights of the State and the Improvement Districts as were involved in the case of *Terry* v. *Drainage Dist.,* 206 Ark. 940, 178 S. W. 2d 857, because we have held in Topic II, *supra,* that Ingram redeemed by these deeds, regardless of whether the State or the Improvement Districts had the superior title.

McLAIN *v.* JOHNSON.

5-374 266 S. W. 2d 829

Opinion delivered April 5, 1954.

[Rehearing denied May 3, 1954.]

J. B. Reed, for appellant.

John R. Thompson, for appellee.

MINOR W. MILLWEE, Justice. The sole issue presented by this appeal is the correctness of the trial court's refusal to change the permanent custody of a three-year-old girl from the maternal grandmother to a paternal aunt.

Aleta Ann Gordon's parents were killed in an automobile accident in October, 1951. Appellee, Mrs. Aileen Johnson, is the child's maternal grandmother and resides at Griffithville, Arkansas. Appellant, Mrs. Lorene G. McLain, is the child's paternal aunt and lives at Ft. Smith, Arkansas. They filed rival petitions in the probate court seeking appointment as guardian of the person and for permanent custody of Aleta Ann. Pending a final hearing on these petitions, temporary custody was awarded first to appellee for six months and then to appellant for a shorter period. After an extensive hearing on March 20, 1953, an order was entered dismissing appellant's petition and fixing permanent custody in the appellee, with the right of appellant to have the child for a two weeks visit in the summer. There was a further provision that Mr. and Mrs. J. L. Gordon of Lonoke, Arkansas, paternal grandparents of said child, should have certain rights of visitation every two weeks. On February 15, 1954, we sustained appellee's motion to dismiss the appeal from the order of March 20, 1953, because it was filed too late.

On June 19, 1953, appellant petitioned the probate court to divest appellee of permanent custody of the child and invest same in appellant. As grounds therefor, she alleged that appellee had disobeyed the order of March 20, 1953, in two respects: (1) appellee had failed to place and keep the child under the care of an eye specialist; and (2) she had refused to permit the child to visit in the home of the paternal grandparents, Mr. and Mrs. J. L. Gordon. Following a brief hearing on August 14, 1953, an order was entered dismissing appellant's petition but awarding custody of the child to the paternal grandparents for 10 days and fixing their right of visitation as in the original order of March 20, 1953. Mr. and Mrs. Gordon are not parties to this appeal from the order of August 14, 1953.

Counsel for appellant filed his brief herein prior to dismissal of the appeal from the first order of March 20, 1953, and his contentions for reversal are based largely on testimony adduced at the first hearing. We may not consider this evidence in determining whether the trial court erred in refusing to change custody in the order of August 14, 1953, but are necessarily confined to the record of the latter hearing. In this connection it is argued that appellee has shown a callous disregard of the child's eye condition and the court's order that she be kept under the care of a specialist. It was in evidence that the child had been taken to a specialist in Fort Smith twice by the appellant and to a specialist in Little Rock twice by the appellee. Letters from both doctors were introduced at the August hearing in which each advised the necessity for surgery in cooler weather, but advised against it prior to October, 1953. Both letters indicated that no present treatment was needed. On the question whether appellee had denied visitation privileges to Mr. and Mrs. Gordon, Mr. Gordon testified that visits were refused. This conclusion was predicated on two post cards written to the Gordons by appellee on May 25 and June 4, 1953, which were introduced. While the contents of these cards indicate appellee's displeasure with the week-end visits, they did not amount to an outright re-

fusal of such visits. It was stated in the first card that the child had "to have her shot like she takes every month of May each year", and in the second that, "Aleta Ann and I still have a little cold." Mr. Gordon frankly admitted on cross-examination that no effort had been made to obtain the child which was refused by appellee, and Mrs. Johnson stoutly disclaimed any such intent to defy the court's order. Appellant admitted that she obtained the child from appellee for the two weeks summer visit without any trouble. With commendable frankness, it is also conceded that the good character of appellee and her genuine affection for the child are in no manner questioned by appellant. There is nothing to indicate any ill feeling between any of the parties involved in this controversy.

A universal rule in these cases is that the trial court, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the interest of the child. *Phelps* v. *Phelps*, 209 Ark. 44, 189 S. W. 2d 617. But it is also well settled that a decree fixing the custody of a child is final on the conditions then existing and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child. *Weatherton* v. *Taylor*, 124 Ark. 579, 187 S. W. 450.

After hearing the evidence adduced on August 14, 1953, the trial court concluded that it was insufficient to show such a material change in conditions affecting the child's welfare as would warrant an order changing the permanent custody from appellee to appellant. We cannot say this finding is against the weight of the evidence.

Affirmed.

HOLT and ROBINSON, JJ., dissent.

DIERKS LUMBER & COAL COMPANY *v.* CARROLL.

5-311 266 S. W. 2d 294

Opinion delivered April 5, 1954.

[redacted]

Collins, Core & Collins, for appellant.

Winfred Lake, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a decree that Mike B. Carroll and other heirs of John W. Carroll were owners by adverse possession of 19.95 acres in section 23, township nine south, range thirty west, Sevier county. The adjudication was the result of a suit by Dierks Lumber & Coal Company to remove clouds created by Carroll claims.

December 9, 1901, John W. Carroll conveyed *part* of the east half of the northeast quarter of section twenty-three to A. C. Steel, trustee for DeQueen & Eastern Railroad Company, but in addition to the "part" description the land is shown to be in range 39 west. Seventy acres were mentioned, the consideration being that the railroad company, not later than six months after completing its line, should lay off and plat the tract into lots or blocks "to the number and value of one-half of the area of said tract". Failure of the railroad company to plat the area worked a forfeiture of the conveyance.

October 9, 1902, Carroll conveyed a 100-ft. right-of-way to the railroad company. January 13, 1903, the same grantor, by what is termed a correction deed, conveyed to Steel, trustee, lands designated by metes and bounds. There was reference to the railroad company's agreement of November 27, 1901, with A. C. Steel, J. S. Steel, T. W. McCown and others to construct, maintain, and operate the railroad through Lockesburg. By deed of January 10, 1913, Steel, as trustee, conveyed the land in controversy and other property to the railroad company. December 15, 1949, the railroad company conveyed to Dierks.

A chart shows 14.35 acres to be north of the railroad right-of-way, while 5.60 acres lie south 890-ft. along the boundary of sections 23 and 24, extending to Highway No. 24. The remainder is south of the highway.

It is quite clear that Carroll and officials of the railroad company contemplated extensive townsite development and anticipated that profits would accrue to each. A plat, not recorded, shows that all of the area constituting the 19.95 acres contended for was within the project, (also land in section 24) and twelve acres west of the two tracts comprising 14.35 acres in section 23. There was objection to the introduction of the plat —an objection that would be tenable if the purpose were to identify a particular lot or block. We are cited to *Clark* v. *Gridiron,* 222 Ark. 151, 257 S. W. 2d 561. It will be noted that in that case the appellant himself stated that

he did not know where the lot was. It was also stated that the appellee held a deed to the land embracing block twenty-four, and that the description was by metes and bounds.

On March 5th, 1903, the railroad company conveyed to John W. Carroll, and to his heirs and assigns, sixty lots designated by numbers, and seven blocks. Some of the blocks in the area north of the railroad are irregular, and the deed of 1903 appears to have been an attempt to equalize values by alternate selection. This, of course, left Carroll with the record title to land described by blocks and lots referable to a plat not on file. Seemingly the uncertainty was of mutual recognition, for in 1921 Carroll conveyed to the railroad company all of the lots and blocks that were mentioned in the deed of March 5th, 1903. In exchange the railroad company quit-claimed to Carroll other lands embraced within the original 70 acres dealt with when the promotion plans were undertaken. Effect of this deed was to convey to the railroad company the exact acreage contended for by Dierks under its 1949 deed.

Since the Chancellor found in favor of the defendants on the grounds of adverse possession alone, this opinion will be confined to that issue.

That some of the witnesses were uninformed regarding the land in controversy cannot be doubted. Even one or two of the defendants did not know where the boundaries were, or how many acres were involved. This is easily understood when consideration is given the fact that John W. Carroll owned 120 acres east of Lockesburg. Some of it adjoined the R. A. Gilliam home place and the Ed Williamson lands.

The contention of appellees that they used the area in controversy for pasturage, that they had cut wood and timber from it, and that some of it had been leased should be weighed in the light of actualities.

The plat, claimed by appellant to have been used for purposes of illustration while examining witnesses, but

not introduced as an exhibit, was referred to by each side while the cause was being argued orally here, and for all practical purposes it is before us. It shows that the north and south lines are 1320 feet, with two charted 10-acre tracts, each 660-ft. x 660-ft. Tract A is east of tract I. Admittedly tract I is part of the retained Carroll estate, as is that portion of tract II immediately south of tract I and north of the railroad. Tract A (10 acres), and tract B, containing 4.35 acres each north of the railroad and east of tracts I and II, were conveyed by Carroll to the railroad company in 1921, as were also tracts C and D to the south.

There is a creek approximately 327 feet east of the railroad right-of-way. The railroad separates tracts B and C. The creek is spanned by a trestle. From each side of this structure a fence connects to a north-south fence that delineates sections 23 and 24. Southward from the railroad where it crosses this line and beginning at a point 890-ft. from the railroad, the fence runs northwesterly along Highway 24 to a point approximately 300 feet from the western side of what appears to be the 60-acre parent tract. The fence then veers north by east, describing a gradual curve northwest to a cattle guard on the railroad. This guard separates tract II (owned by appellees) from land to the south.

West of tracts I and II there is the Gilliam fence, and north, extending across tracts I and A there is the Frank Steel fence. The McWhorter field is east of tract A.

As to acts of dominion, such as cutting wood, taking timber, and like transactions, J. B. Williamson was perhaps the most positive witness used by appellees. He had married a daughter of J. W. Carroll. The heirs of Carroll, said Williamson, had sold timber from the land in controversy on four occasions. He didn't remember the initial invasion—it was "away back". The timber was sold to "somebody"—a man named Friday, he thought. His best recollection was that this occurred in 1933 or

1934. J. T. Vaught and others testified that the disputed area was generally referred to as the Carroll lands. The railroad company's roadmaster crossed the lands frequently; and, say appellees, there was nothing to prevent him from noticing that the timber had been cut.

Vaught's timber-cutting had been at the suggestion of Williamson and sale had been made to Dierks. The first transaction occurred in 1940. All told, the witness thought the value of the timber was between $200 and $300. No doubt the acreage had been used for pasturage and the Carrolls had profited from these isolated occurrences, but there was no fence between the disputed tract and some of the property admittedly owned by the Carrolls; nor is there any evidence that taxes had been paid by the Carrolls. Tax receipts showing payments by Southern Land & Townsite Company beginning with assessments for 1935 and continuing through 1945 are in evidence. Dierks began paying in 1946, but one description is "part" of the northeast southeast, etc. Earlier assessments were against lots. None of the receipts is of major significance.

A contention that title has ripened through adverse possession usually involves facts pertinent to the particular claim. General rules are well known. Where an act, standing alone, is conclusive of intent when viewed by the so-called reasonable man, the determination is not difficult; nor is the problem vexatious where concurring operations are of a character that should impress upon the local public or the record title claimant the reasonable conclusion that the things being done were in derogation of the owner's rights. In these cases an adjudication is much easier than it is where reliance is placed upon sporadic conduct, incidental entry, and tactics difficult to distinguish from trespass infrequently committed and remotely spaced in point of time.

Mr. Justice Butler, speaking for an undivided court in *Sanderson* v. *Thomas,* 192 Ark. 302, 90 S. W. 2d 965, mentioned our holdings that adverse possession could not be predicated upon irregular unauthorized acts of one

who enters another's land for the purpose of cutting firewood, making rails, posts, and boards; and this is true even though the trespasses recurred "through a considerable period of time".

In order to acquire title to woodland under claim of adverse possession there must be actual use of the land of such unequivocal character as to reasonably indicate to the owner visiting the premises during the statutory period that such use and occupation indicate an appropriation of ownership in another. This statement of the law was declared by the Supreme Court of Maine in *Adams* v. *Clapp,* 87 Me. 316, and was quoted approvingly in *Earle Improvement Company* v. *Chatfield,* 81 Ark. 296, 99 S. W. 84. See also *Norwood* v. *Mayo,* 153 Ark. 620, 241 S. W. 7.

We think the chancellor was in error in finding that the disconnected acts of the Carrolls were sufficient to put the railroad company on notice that the land was being appropriated under a claim of right; and, of course, Dierks stands in the railroad's title position. Appellees are descendants of John W. Carroll whose purpose to have the property divided and to clarify uncertainties incidental to the original deeds—deeds executed at a time when the townsite promotion appeared promising—stand out too prominently to admit of serious controversy. It follows that the decree must be reversed and the cause remanded with directions that title be quieted in the plaintiff below.

Justice WARD dissents.

WARD, J., dissenting. I am firmly convinced this court should not reverse the Chancellor who had a better opportunity than we have to weigh the testimony in a fact situation which the majority opinion admits is not easy to adjudge.

Equities.. The equities involved in this case are such that if there is any doubt about the weight of the evidence it should be resolved in favor of appellees. A quick glance at the overall picture brings these equities into striking relief.

John W. Carroll [through whom appellees claim as heirs] owned 70 acres of land near Lockesburg in 1900. In 1901 he deeded it to A. C. Steele, Trustee. [We know from the record that he was trustee for the railroad company.] The sole consideration to be received by Carroll was: The Railroad Company was to plot the tract of land into lots and blocks [and we can picture the sales talk the Railroad gave Carroll on the rapid growth of Lockesburg as a result of the Railroad] and deed one-half of them back to Carroll, otherwise the deed was to be void. The Railroad Company never did plot the land.

The record casts a suspicion that the Railroad Company never intended in good faith to plot this parcel of land because in 1903 Steele as trustee conveyed the land [or a large portion thereof] to the DeQueen and Eastern Railroad Company for a consideration of $2,456. It is easy to imagine that John W. Carroll was not satisfied with the conduct of Steele or the DeQueen and Eastern Railroad Company. Apparently in an effort of appeasement the said Railroad Company reconveyed to Carroll 12 acres of land. Thus, as I see it, John W. Carroll gave the Railroad Company 58 acres of land and got nothing in return.

Payment of Taxes. Although we have uniformly held that payment of taxes is not a necessary element of adverse possession the majority opinion lays stress on the fact that appellant did and appellee did not pay taxes on the land in dispute. This is only partially true. An examination of the tax receipts reveals that the Railroad Company never paid taxes on the south portion of the land in dispute which amounted to 5.60 acres and perhaps more. The parcels not paid on by the Railroad Company are marked "C" and "D" on the plat referred to in the majority opinion.

Acts of Adverse Possession. It is a fact, though not clearly set forth in the majority opinion, that all of the land in dispute (together with the 12 acres above referred to) was entirely enclosed by fence and had been for some 40 years. The majority opinion correctly recognizes that

acts of adverse possession must be of such a nature as would reasonably be calculated to give notice of their nature to the record owner or to the world. As I read the record the weight of the testimony is to the effect that appellant did know that appellees were claiming this land adversely. They are bound to have known the land was enclosed with other land to which appellees undisputedly had record title. Several witnesses for appellees testified they cut and removed timber from the land on different occasions, and that the logs were piled up in plain view for every one to see. One witness testified that officials of the Railroad Company passed over the land practically every day for years. Another witness testified that he leased the land from appellees for a period of 9 years and used it as a pasture. Appellees testified that agents of the Railroad Company talked to them about timber having been cut and removed from the land and that they [appellees] informed them it was their land. In other ways appellees exercised unmistakable control over this land claiming to be the owners and this knowledge was unquestionably brought home to the Railroad Company. J. B. Williamson, the husband of one of the appellees, testified:

"Q. Does the Southern Gas and Electric Company have a high line transmission line across there?

"A. Yes.

"Q. From whom did they buy that right-of-way?

"A. From the Carroll estate.

"Q. Then they bought it from the heirs of John W. Carroll?

"A. That is right."

Testimony of the same witness shows conclusively that appellant and the Railroad Company knew of appellees' claim to the land.

"Q. Do you know whether or not the D. & E. Railroad and the Dierks Lumber & Coal Company once talked

with you about building a right-of-way to put a tram road across this land going south?

"A. Mr. Campbell talked to me.

"Q. Jim Campbell?

"A. Yes.

"Q. Was he connected with the DeQueen & Eastern Railroad?

"A. He was with Dierks, and I think he was vice-president of the DeQueen & Eastern. I wouldn't say for sure.

"Q. After talking with some of the heirs, did you report to him that they would sell him a right-of-way?

"A. Yes."

In my humble judgment the decree of the trial court is abundantly supported by the record in this case.

SOUTHWESTERN BELL TELEPHONE CO. *v.* BATEMAN.

5-346 266 S. W. 2d 289

Opinion delivered April 5, 1954.

Blake Downie, for appellant.

Coleman & Mayes, for appellee.

J. Seaborn Holt, J. This is a suit filed February 12, 1951, by appellee, Geraldine Bateman, under the provisions of § 73-1816, Ark. Stats. 1947, in which she seeks by mandamus to "enforce the furnishing" of telephone facilities in the residence in which she and her husband reside. Thereafter, on September 8, 1951, she filed an amended petition, alleging that appellant had unfairly discriminated against her and prayed for the penalties provided for under the above statute.

Appellant answered, denying all material allegations except admissions shown in an agreed statement of facts, presently set out, and affirmatively pleaded the Statute of Limitation.

The cause was submitted to the trial court on an agreed statement of facts, a jury having been waived, and judgment was rendered in favor of appellee for $2,935 against appellant as statutory penalties for 587 days, — the period from September 8, 1949, to April 19, 1951, at $5.00 per day.

This appeal followed.

For reversal, appellant first earnestly contends that "appellant's requirement that appellee post a $25.00 deposit before receiving telephone service did not constitute discrimination against appellee in violation of § 73-1816 of the Arkansas Statutes," in short, that appellee has failed, on the undisputed facts, to show any right to recover under this section, which requires that she and all applicants for service "first comply or offer to comply with the reasonable regulations of the company."

Since we have concluded that appellant is correct in this contention, we do not consider other assignments.

The stipulated facts were: "Defendant is a corporation doing a general telephone business in the city of Paragould, Arkansas, and plaintiff resides at 507 South Fourth Street, Paragould, Arkansas.

"Plaintiff applied for telephone service and an employee of defendant (which employee had authority to fix the amount of required deposit) originally asked a deposit of $5.00. Upon checking the defendant's records, however, and finding the balance owed by plaintiff's husband, which is explained hereinafter, a deposit of $25.00 was asked.

"Plaintiff thereafter and on February 8, 1949, demanded by registered letter that she be provided with a telephone at her residence, and offered to make a deposit of $5.00 as security for payment of bills, and a copy of this letter is attached hereto and made a part hereof as Exhibit 'A'. Defendant refused said request unless a cash deposit of $25.00 was made by plaintiff, for the reason that plaintiff's husband, with whom she was and still is living, was and still is obligated to defendant for an unpaid telephone bill that had been incurred by him as a co-partner in a business enterprise. Plaintiff had no legal or financial connection with this enterprise, but was married to her husband at the time the obligation was incurred. Plaintiff continued her efforts to secure telephone service, and at all times was ready and willing to make a $5.00 deposit. Defendant continued to refuse to connect service except upon the making of a cash deposit of $25.00, but offered to consider reduction or complete refund of the deposit in the event plaintiff's bills are handled in a satisfactory manner. Plaintiff owes defendant no money and is employed and pays her own obligations from her income.

"On April 19, 1951, an employee of defendant who failed to check the defendant's records as to plaintiff's credit, accepted a deposit of $10.00 and connected residence party line service for plaintiff. This service was changed to one-party residence service on September 25, 1951, at plaintiff's request and no additional deposit was required.

"Defendant's General Exchange Tariff, Advance Payments and Deposits Section, 4th Revised Sheet 1, had been in effect and on file with and approved by the Arkansas Public Service Commission and its predecessors since July 10, 1938, and provides as follows:

"A. If it is deemed necessary by the Telephone Company in safeguarding its interests, applicants for service or present customers may be required to make a deposit of an amount not to exceed two months' exchange service charges plus two months' estimated toll usage, to be applied in payment of any unpaid charges for exchange or toll service which may be rendered. Simple interest at the rate of six per cent per annum will be paid on such deposit, if held thirty days or more. * * *

"D. Any balance of the amounts deposited, credited to the customer's account is returned to the customer at the termination of the contract, or it may be returned at any time previous thereto at the option of the Telephone Company when it is deemed that the customer has established satisfactory credit.

"Defendant has many subscribers to the class of service for which plaintiff applied in the city of Paragould and elsewhere who have no deposit with defendant for the reason that their credit is established with defendant. Defendant has other customers in the city of Paragould and elsewhere who have a $5.00 deposit with defendant. Other deposits in the city of Paragould and elsewhere exceed the amount of $25.00, and in some cases run into hundreds of dollars as there is no arbitrary and fixed limitation as to the amount of deposit." (Here is listed the names of some twenty-five subscribers in Paragould, who have made deposits from $10.00 to $50.00).

"It is further stipulated that the telephone bills of subscribers of the class in which plaintiff's phone would be are handled and collected by defendant company in accordance with the terms stated in their regular monthly statements, a copy of which is set out below. * * * (The copy of appellant's bill shows

charges for local or exchange service are billed in advance.)

"All other requirements of defendant company have been met by plaintiff. * * *

"The foregoing stipulation is approved as the bill of exceptions herein, this 27 day of July, 1953."

Section 73-1816, above, provides: "Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten (10) days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars ($100.00), and five dollars ($5.00) per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimination, after compliance or offer to comply with the reasonable regulations of such company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. Any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same," etc.

We are not without long established rules in considering cases of this nature.

From the outset, the burden was on appellee to show that she had been unfairly discriminated against, within the meaning of § 73-1816. This statute is highly penal and a strict compliance with its terms is required. "Noth-

ing can be taken by intendment to show compliance with statutes of this kind." *Rousseau* v. *Ed White Junior Shoe Company,* 222 Ark. 240, 250 S. W. 2d 240.

Material sections of the above statute were construed by this court in what may be termed our landmark case, *Yancey* v. *Batesville Telephone Company,* 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135, where it was said: "Every company is entitled to compensation for telephone facilities furnished by it. It may require the charges for such services to be paid in advance. * * * This power is given for its own protection. In the exercise of it, it may extend credit for such charges to persons it may deem deserving. This is a reasonable exercise of the power, and is essential to its success. No rule can be laid down by which the credit to which each person is entitled can be determined. This is dependent upon various circumstances, such as the amount of property he may have over and above his exemptions and liabilities, his promptness in paying his debts, his being contentious, a wrangler, a fault-finder, his honesty, integrity, and other qualities. The credit due each individual depends upon himself. It can not be fixed by any rule, but must be and is left to the company to determine. The statute forbidding discriminations does not deny the right. It does not come within the evils the statute was intended to suppress. All are required to pay the same rates for the same service in like situations, but the time when it should be paid is within the peculiar province of the company to determine. This is a right of creditors, and there is no reason why it should be denied to telephone companies."

Bearing in mind the above rules of construction, we find no evidence presented here that even tends to show discrimination against appellee, or that the company's deposit demand of $25.00 was unreasonable. It is undisputed that many patrons in Paragould are required to deposit from five to fifty dollars (or more, depending on the credit risk in each case). Clearly, under § 73-1816, and the tariff provisions, above, appellant, company, had the right to require such a deposit as it

"deemed necessary * * * in safeguarding its interest," so long as these requirements were reasonable and non-discriminatory.

This credit extended depends on each individual. "In its exercise, it (the company) may extend credit for such charges to persons it may deem deserving," and "no rule can be laid down by which the credit to which each person is entitled can be determined. * * * It can not be fixed by any rule, but must be and is left to the company."

We find no evidence that a $25.00 deposit requirement was unreasonable and discriminatory, on the evidence presented. We agree that service could not be denied appellee for the sole reason that her husband owed the company for a phone rental, which he refused to pay, but this fact may be considered by the company in connection with other "circumstances" and "qualities," which the company might take into account in determining each person's credit rating.

It is not disputed that appellee and her husband were living together in the residence in which the telephone was installed and both could use it at will and tolls could be charged against it by either. In fact, appellee, subscriber, under the "General Exchange Tariff Rules and Regulations, 7th Div., Revised Sheet 2," on file with our Public Service Commission, was required to pay all long distance messages originating from her phone, whether O.K.'d by her or not. *Southwestern Telegraph & Telephone Company* v. *Sharp & White,* 118 Ark. 541, 117 S. W. 25, L. R. A. 1915 E., 323. We take judicial notice of these rules and regulations, *State, ex rel. Attorney General* v. *State Board of Education,* 195 Ark. 222, 112 S. W. 2d 18. *Seubold* v. *Fort Smith Special School* District, 218 Ark. 560, 237 S. W. 2d 884, and *Koonce* v. *Woods,* 211 Ark. 440, 201 S. W. 2d 748.

There is no evidence that appellee had ever had a telephone installed in her name before and no evidence that the company had ever had an opportunity to establish her credit rating. Appellee conceded that the com

pany had the right to require sufficient deposit to cover two months' exchange service charges, plus two months' estimated tolls. She offered no proof that these charges would not be sufficient to justify a $25.00 deposit, although the burden was on her to make strict proof. She was "employed and pays her own obligations from her income," but the nature of her work, the kind of employment in which she was engaged, or the extent of her earnings, were not disclosed by this record.

Of significance, is the fact that later, appellee did make a deposit of $10.00 and was provided with telephone service. It would be a fair inference that she did not consider a $10.00 deposit to be discriminatory, although it would be double the customary $5.00 deposit.

We conclude, therefore, as indicated, that there is no substantial evidence in this case to warrant a recovery on behalf of appellee and accordingly, the judgment is reversed, and since the cause appears to be fully developed, it is dismissed.

MINOR W. MILLWEE, Justice (dissenting). In reaching the conclusion that there was no evidence which "even tends to show" discrimination or unreasonableness in appellant's demand for a $25.00 deposit of appellee, the majority have arbitrarily substituted their own findings on a factual issue for those of the trial court, sitting as a jury. In reaching the opposite conclusion, the able trial court rendered an exhaustive and learned opinion in which he explored every phase of the present controversy, factual and legal. After citing and examining the leading authorities on the question of whether appellant's action was discriminatory under our statute, the opinion recites: "The net result of the defendant's actions under the facts of this case is that it has completely departed from its own Commission approved rule, and on the statement of facts as to the plaintiff alone, promulgated a new one. To express it otherwise, they have said to the public generally, 'If you apply for service, we do not have to but may require a two months' deposit on service charges and estimated toll usages and we will calculate that amount as

best we can taking into consideration our best estimate of what we think your long distance calls will amount to in two months time.' To this plaintiff they have said, in effect, 'Regardless of the amount two months service and estimated toll usage in your case comes to, we are going to require you to deposit $25.00 because your husband's company owes us an unpaid debt.' This to my mind, in the words of the statute (Ark. Stat., § 73-1816) is a failure to 'supply all applicants for telephone connections and facilities without discrimination or partiality,' and a violation of that clause which reads, 'no such company shall impose any conditions or restrictions upon any applicant that are not imposed impartially upon all persons in like situations.' The plaintiff is entitled to recover.

"Even if the company could be permitted to ignore the rule which it has proclaimed, the common law rule of the Yancey case should not give them relief. It was there said, 'The credit due each individual depends upon himself.' Here, according to the stipulation of facts, the defendant's employee made a determination of the credit allowable to the plaintiff, an employed and self-supporting person, and a deposit of $5.00 required as a result thereof. Quoting from the stipulation of facts, we find the amount of deposit raised to $25.00 'for the reason that plaintiff's husband, with whom she was and still is living, was and still is obligated to defendant for an unpaid telephone bill that had been incurred by him as a copartner in a business enterprise.' So, in this case, the defendant company used a credit criteria not depending 'upon herself,' but rather upon that of one (even though it be her husband) not a party to the proposed contract. The company requires its monthly service charge to be paid in advance, and if not paid, the telephone can be readily and summarily removed. It would be strange indeed if the company did not also make cumulative records as they occur of charges involved in the long distance calls placed from the phones of its subscribers, and if that be true, at any time it appeared that the user's credit was being overextended they could require a deposit to pro-

tect them, or remove the instrument. This is mentioned merely to indicate that the defendant company could have protected itself and was being overly concerned (if they were) of the plaintiff's credit standing because of her relationship to a past debtor. It would obviously be unfair that one's credit standing should be determined not from his personal abilities and record, but solely from the credit standing of one's relations. For these reasons, the court in the Yancey case wisely limited the rule there announced to a consideration of the individual's personal credit standing.

"In passing, it may be noted that according to the statement of facts varying deposits are required of different individuals in the area concerned. However, this does not enlighten the situation, for insofar as the record is concerned, these may well have been determined within the confines and limitations of the company's rules hereinbefore set out. So far as this record is concerned, the plaintiff is the only applicant for service (or customer) whose amount of deposit has been determined, not by her own credit rating, but by that of a non-contracting party.

"The plaintiff is therefore entitled to recover from the defendant the statutory penalty of $5.00 per day to be reckoned as set out in this opinion previously."

When the trial court's findings are considered along with the stipulation of facts, it should be apparent to anyone that they are based on substantial evidence. In my humble judgment, they constitute a complete and irrefutable answer to the unsupported action of the majority in substituting their own views for those of the trial court.

The judgment should be affirmed, and I respectfully dissent.

Justice McFaddin joins in this dissent.

5-375 266 S. W. 2d 281

Opinion delivered April 5, 1954.

[redacted]

McKay, McKay & Anderson, for appellant.

W. H. Kitchens, Jr., for appellee.

WARD, J. This appeal challenges the decision of the trial court which held that appellee had acquired by prescription a road over lands belonging to appellants. Appellants and appellee are adjoining landowners, with appellee's land located south and east of appellants' land. Appellants bought their land in 1946 from W. C. Dean who owned the land for many years previous thereto. Appellants do not live on their land which is mostly woodland, a small portion of which has at times been in cultivation. Appellee's land is what is known as the old "Polk Place" and was the home of William Polk for many years. For some 35 years the occupants of appellee's land have used a road which runs north from the dwelling approximately 248 feet, thence west approximately 130 feet, and thence northwesterly approximately 524 feet (across appellants' land) to intersect with a public road which runs in a northeasterly direction, and

is designated as road "A." The road just described as used by appellee and her predecessors is designated as road "B."

In the latter part of 1948 appellants built a fence along the east side of public road "A" across road "B." After some conversation with appellee in which no definite agreement was reached appellants in 1951 placed a gate where the fence crossed road "B." Later appellants again obstructed road "B" and this suit was instituted by appellee to remove said obstructions and to reopen the road.

Upon final hearing, after both sides had introduced their testimony, the chancellor found "that the plaintiff (appellee) proved that road 'B' . . . has been established by prescription for many years." The chancellor also stated that "it would be equitable to allow the defendants (appellants) to furnish an alternate route, no more inconvenient to the plaintiff, and the defendants would be allowed 60 days in which to furnish such alternate route if they so desire . . ." Appellants did not choose to furnish the alternate route, and have prosecuted this appeal.

Appellants' principal contention for a reversal is based upon the principle of law announced in the case of *Boulliouu* v. *Constantine, et al.,* 186 Ark. 625, 54 S. W. 2d 896, to the effect that the use of a passageway over uninclosed lands is presumed to be permissive and not adverse to the owners of the land over which the passageway is used. As stated by appellants, this same principle was announced in the case of *Birdwell* v. *Arkansas Power & Light Company,* 191 Ark. 227, 85 S. W. 2d 712, and in *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461. In the case under consideration the testimony shows that road "B" ran through the timber land, and there is no contention that this land was fully inclosed. The evidence does show that many years ago there was a fence on the southern portion of the land and there is evidence to the effect that people at different times went onto the land to work. On the whole however we agree that the facts

and circumstances in this case make applicable the rule of law heretofore stated.

This court, however, in dealing many times with the acquisition of passageways over land, has recognized what might be deemed a variation or exception to the rule before mentioned. One such case is *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, where the general rule was recognized and an exception thereto was stated in this language:

"It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to establish an adverse use, so as to ripen into title by a limitation." (Citing other cases.)

In this same case the court further said:

"We give full recognition to principle of law to the effect that a permissive use cannot ripen into a legal right merely by lapse of time, but we think the evidence is sufficient to show that this use was made of the alley as a matter of right, and in hostility to the right of the original owner to close the strip and prevent its use."

In the case of *Kimmer* v. *Nelson,* 218 Ark. 332, 236 S. W. 2d 427, where a question similar to the one here involved was under consideration this court recognized that permissive usage of a passageway may become adverse usage, or that the permissive usage may be considered abandoned, by lapse of time. This court after noting the passageway was across wooded and undeveloped land but had been used for a period of 40 years without question or objection, stated:

"In these circumstances the original restriction in the nature of a permissive use in favor of particular persons was abandoned through the long lapse of time."

The reason for the rule that a passageway over uninclosed and unimproved land is deemed to be permissive is sound and also easily understandable, as was explained in the *Boulliou*n case, *supra.* It assumes that the owner of such land in many instances will not be in position to readily detect or prevent others from crossing over his land, and, even if he did, he might not enter any objection because of a desire to accommodate others and because such usage resulted in no immediate damage to him. Also in such instances the landowner would probably have no reason to think the users of the passageway were attempting to acquire any adverse rights. On the other hand there would be no reason or basis for such inference of permission on the part of the landowner if someone tore down his fence or destroyed his crops by reason of such usage. These acts alone would be calculated to put the landowner on notice that others were using his land adversely to his own interest and right of occupation. The right of a person to acquire a passageway over the land of another is somewhat analogous to the right to acquire land by 7 years adverse possession. The headnote in the case of *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705, reads:

"Private Way—Adverse Use. A private way over the land of another may be acquired by open, continuous and adverse use for seven years under a claim of right." The opinion, written by Judge RIDDICK, states:

"It is clear from the evidence that this strip has been continually used by plaintiffs as an alley or passageway for ten or twelve years at least before it was obstructed by the defendant."

The headnote in *Scott* v. *Dishough,* 83 Ark. 369, 103 S. W. 1153, reads:

"Adverse Possession—Alley.—Where the owners of adjacent property have used an alley openly, continually, peacefully and adversely for seven years they acquire an easement therein."

After commenting on the evidence in the short opinion Judge BATTLE, speaking for the court, said:

"This is sufficient to vest them with an easement therein; seven years adverse possession being sufficient for that purpose." (Citing other cases.)

A consideration of the many opinions of this court regarding the acquisition of a right-of-way over lands makes it clear, in our opinion, that no real conflict exists. All our opinions are in harmony on one point, *viz.*: Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowedge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right.

In our opinion, in the case under consideration, the weight of the testimony supports the finding of the chancellor that appellee and her predecessors in title used road "B" for more than seven years after appellants and their predecessors in title knew or should have known that the road was being used adversely. The great weight of the testimony shows that road "B" has been in use as a well defined roadway since 1917 or 1918 and there is testimony that it was in use prior to said dates. Appellants' predecessors in title had knowledge of this usage without any objection on their part and they also knew that this was the only outlet appellee and her predecessors had to the county highway. The evidence shows that work was done on this road from time to time and that it was used as a passageway not only by appellee and her predecessors but by the general public. Alva Cloud, 59 years old, said that road "B" has been in existence ever since he could remember, that he traveled the road all that time and that it was open for wagon travel as a common road. R. E. Polk, 73 years old, said road "B" had been open at least 35 years and that others used the road regularly. L. E. Cloud, age 62, gave testimony to the same effect. Ben Watkins, age 73, knows that the road has been open for more than 20 years. S. L. Black,

age 85, knows the road has been in existence over 45 years—that he traveled the road before his daughter was born 48 years ago. W. C. Dean, who owned appellants' land from 1917 to 1946, said road "B" was in existence in 1917 and that he went over the road in a buggy in 1912.

From the above testimony it clearly appears that the owners of appellants' land have known of the existence and continuous usage of road "B" at least since 1917 or a period of over 30 years. Thus the weight of the testimony supports the chancellor's finding that the road has been used by appellee and the public openly and adversely for more than 7 years and that the constant usage of said road for some 40 years under the circumstances of this case overcomes the presumption that said usage was permissive.

The contention is also made by appellants that appellee has abandoned any rights she may have acquired to road "B" because of non-use, but this contention is not supported by the evidence. Appellants call attention to the fact that they closed road "B" some four or five years before this suit was filed by appellee, and cite *Clinton Chamber of Commerce* v. *Jacobs,* 212 Ark. 776, 207 S. W. 2d 616. In the cited case we held that where a fence had been maintained for seven years by the landowner across a roadway acquired by prescription the easement would be terminated. It is undisputed that here appellants had not maintained an obstruction for seven years prior to the filing of this suit by appellee.

No error appearing, the decree of the trial court is affirmed.

CLOUD OAK FLOORING COMPANY *v.* J. A. RIGGS TRACTOR CO.

5-255 266 S. W. 2d 284

Opinion delivered April 5, 1954.

Ben B. Williamson, for appellant.

Stanley E. Price and *Rose, Meek, House, Barron & Nash,* for appellee.

J. S. Daily, Special Justice. The appellant argues only two questions in its brief. These are the only points properly presented here. *Connell* v. *Robinson,* 217 Ark. 1 at 4, 228 S. W. 2d 475; *Bowling* v. *Stough,* 101 Ark. 398 at 404, 142 S. W. 512; *Purifoy* v. *Lester Mill Co.,* 99 Ark. 490 at 494, 138 S. W. 995.

Stated in inverse order these are: (1) Conversion is not a proper remedy of a conditional seller against one holding under his conditional buyer; and (2) A provision in a conditional sales contract conditioning the passage of title upon the payment by the buyer of open account indebtedness due the seller for repairs to the machine sold. and in addition to the deferred installments of the purchase price, is not enforceable, after the full payment of the purchase price, against one holding under the buyer.

For the first proposition stated appellant relies on *Loden* v. *Paris Auto Co.,* 174 Ark. 720, 296 S. W. 78. But the point of that case, on the question of conversion, was that a conditional buyer has an interest which he can sell or mortgage without the consent of the conditional seller, *Fairbanks, Morse & Co.* v. *Parker,* 167 Ark. 654, 269 S. W. 42, and, therefore, a purchase from the buyer, alone and of itself, does not constitute a conversion. Appellant quotes from *Olson* v. *Moody, et al.,* 156 Ark. 319, 246 S. W. 3, as follows:

"* * * This court is committed to the doctrine that a vendor who has retained purchase money has only

two remedies for a breach of the contract. He may either treat the sale as canceled and bring suit in replevin for the property, or may treat the sale as absolute and sue for the unpaid purchase money, and, in aid thereof, attach the property * * *. There is no suggestion in any of the Arkansas cases that a third remedy is open to a vendor who has conditionally sold personal property. * * *"

But there the seller sued in the Chancery Court for the debt representing the unpaid purchase price and sought to have a lien declared and foreclosed upon the subject of the sale. The question before the Court was the jurisdiction of equity to create a lien in favor of the conditional seller upon the subject of the sale in an action for the balance of the purchase price. The Court held not, and added to the language above quoted:

"* * * As stated before, a vendor has an adequate remedy at law, and no necessity exists for equity to mold a remedy to preserve his rights. * * *"

Subsequently this Court has recognized and enforced the remedy of conversion in favor of conditional sellers against purchasers from the buyer under a proper showing. *Wright Motor Co.* v. *Shaw,* 171 Ark. 935, 287 S. W. 177; *General Contract Purchase Corporation* v. *Row,* 208 Ark. 951, 188 S. W. 2d 507; *Schwartz* v. *Fulmer,* 214 Ark. 572, 217 S. W. 2d 254; *Bailey* v. *Tolleson,* 219 Ark. 307, 241 S. W. 2d 110; *Strickland* v. *Quality Building and Security Co.,* 220 Ark. 708, 249 S. W. 2d 557. These lay down the rule that conversion is a proper remedy of the conditional seller against one holding under the conditional buyer if such holder disposes of the subject of the sale, or withholds its possession, after notice of the seller's claim and demand for possession by the seller following the conditional buyer's default.

The appellant has brought into the transcript the testimony of its own general superintendent, in the form of his oral deposition taken by stipulation and filed with the trial Court. It conclusively shows that appellant retained and withheld possession of the tractor in con-

troversy, having removed it out of the state, after the filing of the complaint and service of summons on appellant. The latter was full notice to the appellant of appellee's claim of title under its conditional sales contract and of the conditional buyer's default and constituted demand for possession. Therefore, all of the elements of conversion are present.

The second question presented by the appellant—validity of use of conditional sales contract to secure a subsequently incurred debt in addition to the purchase price—has not been clearly answered in Arkansas decisions. In this case it arises under the following contract provisions:

* * * *

"Title to the property aforesaid shall remain in the seller until the full purchase price thereof and all interest thereon and all reimbursable expenses incurred by seller shall have been paid in full."

* * * *

"Buyer agrees, during the continuance of this contract, * * * to make any and all repairs thereon which may be necessary to keep said property and its equipment in as good condition as it is now, reasonable use and wear thereof excepted; * * *"

* * * *

"Should buyer fail to do or perform any of the acts or things required to be done by him under any of the terms hereof, seller may, at its option, do and perform any of such acts or things on the buyer's behalf, and all moneys advanced or paid by seller in so doing shall be added to and be deemed a part of the balance due hereunder and bear interest at a like rate."

Pending payment of the deferred purchase price installments the conditional seller, appellee, made repairs to the tractor in controversy, charging the costs of the parts and labor to the conditional buyer on open account. This open account indebtedness for repairs has never been paid and is the basis of the appellee's claim of re-

tained title as against appellant, mortgagee of the conditional buyer.

This question is the subject of an annotation found at 148 A. L. R. page 346 following *Re Halferty,* 136 F. 2d 640, 148 A. L. R. 342. In *Re Halferty* the Court of Appeals for the Seventh Circuit had before it this precise question and lists the earlier decisions pro and con, including the three from Arkansas pertinent to the point and which are hereafter referred to separately. The decision in *Re Halferty,* upholding the validity of such contract provision as against the conditional buyer's trustee in bankruptcy, is bottomed, however, upon § 29 of the Uniform Sales Act then in force in Illinois, locus of the sale (Ark. Stats. 1947, § 68-1420 is the same). But when our Legislature adopted the Uniform Sales Act (Act 428 of 1941) it appended a § 76 (c) (§ 68-1479), not a part of the original uniform act, and this added section expressly excepted conditional sales from the Uniform Sales Act's operation and terms in our state. Therefore, *Re Halferty* is not of value in determining the issue in Arkansas.

In *Faisst* v. *Waldo,* 57 Ark. 270, 21 S. W. 436, the question was mooted and avoided by employment of the principle of application of payments to effectuate the evident intent of the parties. In *Augusta Cooperage Company* v. *Parham,* 139 Ark. 605, 213 S. W. 737, the Court *assumed* valid, as against a mortgagee of the conditional buyer without notice, a condition obligating payment of sums other than the purchase price, if incorporated in a title retention sale contract. But the lower court had found, on disputed testimony, that the contract *was not so conditioned.* The decision was merely an affirmance of this fact finding, on the ground that it was supported by substantial evidence. In *Hammans Lumber Co.* v. *Fricker,* 184 Ark. 1193, 42 S. W. 2d 1001, an action of conversion by the conditional buyer against his conditional seller who had repossessed the subject of the sale, the Court approved an instruction to the effect that the conditional buyer "could not recover if he had purchased the truck at a given price * * * with the agreement

that the truck with its equipment was to remain the property of [the seller] until the purchase price and *repairs* were paid, and that the [conditional buyer] had failed to pay such purchase money and *cost of repairs.*" (Emphasis added). The last two of these three Arkansas decisions are not reported in the official Arkansas reports, the Court concluding they were of no value as precedents.

A majority of the decisions of other jurisdictions have approved such provisions as a valid condition to be imposed by a title retention contract of sale, although some of these, like in *Re Halferty,* are predicated upon the Uniform Sales Act or the Uniform Conditional Sales Act, neither of which is of support here.

It is not necessary that we decide the enforceability of such a provision as against innocent third parties without notice, and thereby extend the inherent vice of secret liens, resulting from our lack of statutory require- m ıt that title retention sale contracts be in writing and r(orded or filed (motor vehicles excepted—Ark. Stats. 1! 7, 1953 Cum. Supp., §§ 75-160 and 75-161). Here the a· ellant had full notice of the existence of appellee's c(ditional sale contract and assumed and agreed to pay tl installments of the purchase price due under it. The t(imony of the appellant's general superintendent, re- f(red to hereinabove, is unequivocally to this effect. In f: t appellant paid or furnished the funds to pay all of tl installments of the purchase price. If it never saw tl contract and the provisions in it copied above, it was n ertheless charged with notice of them. One who has n ice or knowledge of an instrument is charged with n ice of all recitals and provisions in it, if reasonably o ainable on inquiry. *Kellogg-Fontaine Lumber Co.* v. C *nnic,* 219 Ark. 170, 240 S. W. 2d 872; 39 Am. Jur., N tice and Notices, § 22, page 246. Appellant had only t(request inspection of the buyer's or the appellee's c(y of their contract. The former was an employee of tl appellant.

We hold the provisions of the contract herein quoted e ective to condition passage of title upon payment of

the repair bills incurred for the maintenance of the subject matter of the sale, and valid and enforceable against appellant, holding under the buyer, and charged, as appellant is, with notice of these provisions of the contract at the time it acquired its interest.

Affirmed.

Justice GEORGE ROSE SMITH not participating.

WARD, J. In disagreeing with the majority opinion in this case I am not concerned with the first question discussed in the opinion relative to conversion being the proper remedy. My dissent goes to the second question discussed which relates to the effect of the provision in the conditional sale contract whereby appellee attempted to retain what amounts to a lien on the tractor to secure it for repairs. I want to note at this time that the "repairs" with which we are concerned here had not been made at the time of the sale but that they refer to repairs which appellee contemplated it might make sometime in the future.

It is noted also that the majority opinion recognizes that the question here involved "has not been clearly answered in Arkansas decisions." This is one of the reasons why I think "the inherent vice of secret liens," as recognized in the majority opinion, should not be extended, and there are other reasons. Our statutory law provided appellee a method whereby it could perfect a lien on the tractor for the repairs which it had furnished. Ark. Stats., § 51-404 and § 51-405 allow appellee to retain possession of the tractor after the repairs have been made, in which event it would have had a lien to protect its credit. Appellee could also have perfected a lien under Sections, § 51-409 and § 51-412, but in this event it would have been necessary to file a claim with the clerk within 90 days after the repairs were made. Of course appellee could also have taken a chattel mortgage on the tractor for repairs, but the mortgage would have had to be placed of record. Appellee, however, did not choose to follow any of these remedies but chose to rely on the provision in the conditional sale contract.

It seems obvious to me that if the said provision about repairs was valid it would have to be on the same basis as the provision for purchase price. The majority opinion does not choose to put both provisions on the same basis. If not on the same basis then the questioned provision in the sale contract can only be likened to a mortgage. But an unrecorded mortgage is not notice to third parties. In *Leonhard* v. *Flood,* 68 Ark. 162, 56 S. W. 781, the court said: "An unrecorded mortgage, in this state, constitutes no lien as to third parties." This rule has been consistently upheld by many subsequent decisions. We also uniformly hold that an unrecorded mortgage is not good against a third party even though he has actual notice. *Polster* v. *Langley,* 201 Ark. 396, 144 S. W. 2d 1063. Therefore it is my conclusion that the provision in the conditional sale contract concerning payment for repairs amounted to no more than an unrecorded mortgage.

Assuming my position thus far is not sound, there is another reason why I think the majority opinion is wrong. It is based on the proposition that appellant, in this case, had actual notice of the provision in the conditional sale contract. The opinion states: "Here the appellant had full notice of the existence of appellee's conditional sale contract. . . ." Just what does this mean? This case comes to us from an order of the trial court overruling a demurrer to appellee's complaint. It must be conceded that the demurrer will be tested here by, and only by, the allegations contained in the complaint. The only allegation in the complaint relative to notice is the following: "On or about August 1, 1952, and with knowledge of the existence of the aforesaid contract of sale defendant took possession. . . ." I submit that this statement contained in the complaint is not equivalent to a statement that appellant had knowledge of the existence of the peculiar provision in the contract. The majority opinion, apparently in an effort to substantiate its assertion that appellant had actual knowledge, refers to a certain deposition or stipulation which was filed in this case, but this deposition was not a part of the complaint and therefore should not be considered.

PARKER, COUNTY JUDGE *v.* ADKINS.

5-376 266 S. W. 2d 799

Opinion delivered April 5, 1954.

R. T. Boulware and *J. W. Patton, Jr.,* for appellant.

Pat Robinson and *Shaver, Tackett* and *Jones,* for appellee.

ROBINSON, J. Act 53 of the General Assembly of 1951 provides for the employment of a deputy sheriff in the several counties "whose primary duties will be to work with and assist the Junior Deputy Sheriffs League". A salary not exceeding $300 per month is authorized. The Quorum Court of Lafayette County appropriated $3,000 to pay an annual salary for such a deputy. The Sheriff of the county appointed appellee John E. Adkins as a deputy in connection with the Junior Deputy work; the county court refused to allow the claims for his salary, and Adkins appealed to Circuit Court. There the claims were allowed and the county court directed to approve them. A. B. Parker, the County Judge, has appealed from the order of the Circuit Court.

Act 53 of 1951, Ark. Stats., § 12-1116, provides: "Hereafter, the Quorum Courts of the several counties of this State are authorized to employ and pay the salary of,

and purchase necessary equipment for an additional Deputy Sheriff, whose primary duties will be to work with and assist the Junior Deputy Sheriffs League. Said Deputy Sheriff may be paid any sum not to exceed Three Hundred Dollars ($300.00) per month."

It is the contention of appellant that only the County Court is authorized to employ a deputy sheriff in pursuance to Act 53. As a basis for this contention it is alleged that § 28 of Article 7 of the Constitution of Arkansas vests in the County Court the exclusive jurisdiction to make contracts for the county and that the employment of a deputy sheriff in the circumstances necessarily embodies a contract of employment. It is thus reasoned that the County Court has exclusive jurisdiction to enter into the contractual relation on the part of the County, and in this case since that court did not make such an agreement, appellee Adkins can not recover for the work he has done as an appointee to the position of deputy sheriff.

We believe a proper construction of Act 53, one which would give effect to the Act, is that the sheriff may appoint a deputy for certain purposes when the Quorum Court makes an appropriation to pay the salary of such deputy. This construction is compelling when all the ramifications and possible consequences of the employment of a deputy sheriff are considered.

The office of sheriff is constitutional; Arkansas Constitution, Article 7, § 46. Ark. Stats., § 12-1105 provides: "Each sheriff in the state may appoint one or more deputies, for whose official conduct he shall be responsible." It is hard to believe that by Act 53 of 1951 the legislature intended that someone other than the sheriff would have authority to appoint a deputy sheriff for whose official conduct the sheriff would be responsible. If this were true, conceivably the sheriff's worst enemy could be appointed as his deputy. Further, Ark. Stat. § 12-1106 provides: "Such appointment shall be in writing under the hand of the sheriff, and shall be filed and recorded in the Recorder's Office in the county."

It being determined that the legislature by Act 53 authorized the sheriff to appoint a deputy for the purpose stated in the Act and authorized the Quorum Court to make an appropriation to pay the salary of such deputy, the question arises: Is it necessary for the County Court to enter into a contract of employment on behalf of the County with the deputy sheriff before the County must pay the deputy sheriff's salary?

Appellant cites *Watson and Smith* v. *Union County,* 193 Ark. 559, 101 S. W. 2d 791, holding that the approval of the County Court is necessary to give validity to the contract of employment of county demonstration agents. It was held that such contracts of employment were exclusively within the jurisdiction of the county court, but because the county court has exclusive jurisdiction to employ county demonstration agents it does not necessarily follow that such court has exclusive jurisdiction to employ deputy sheriffs.

In *Cain* v. *Woodruff County,* 89 Ark. 456, 117 S. W. 768, it is said: "By § 46 Article 7 of the Constitution it is provided that: 'The qualified electors of each county shall elect a sheriff, who shall be *ex-officio* collector of taxes, unless otherwise provided by law.' . . . Now, the Constitution does not define the duties of the office of sheriff. That is left entirely to the Legislature to fix and determine; and it is also left to the Legislature to fix the amount of the compensation that shall be paid for services required of such officer . . . There is no provision in our Constitution that inhibits the Legislature from adding to or varying the duties of the office of sheriff."

In the case at bar the legislature added to the duties of the sheriff by authorizing him to employ a deputy to work with the Junior Deputy Sheriffs League at a salary not exceeding $300 per month, and authorized the Quorum Court to make an appropriation to pay such a salary. In the *Cain* case the legislature authorized the sheriff to feed the prisoners of the county and fixed the compensation therefor to be paid by the county; and there

it was held that the legislative act authorizing the sheriff to feed the prisoners and fixing the compensation therefor was not contrary to the Constitution.

In *Jeffery, County Judge* v. *Trevathan,* 215 Ark. 311, 220 S. W. 2d 412, this court in speaking of *Cain* v. *Woodruff County, supra,* said: "It was claimed that a legislative enactment, requiring the county to pay the sheriff seventy-five cents per day for feeding each prisoner, was void as violative of the county court's power under said Art. VII, § 28 of the Constitution" and then the Court quoted with approval from the *Cain* case as follows: "The Legislature, unless restricted by the Constitution, has full and plenary powers to adopt such policies and prescribe the duties which it deems best for the peace and welfare of the People . . . The Constitution regards the county courts as political and corporate bodies that are to be controlled and regulated in their discretion by the acts of the General Assembly, and not as independent of or superior to it. As political and corporate bodies, they are required to conform their action to the rule of the Legislature, and in the exercise of their jurisdiction to proceed in the mode and manner prescribed by law. *County of Pulaski* v. *Irvin,* 4 Ark. 473; *Hudson* v. *Jefferson County Court,* 28 Ark. 359."

In *Crawford County* v. *City of Van Buren,* 201 Ark. 798, 146 S. W. 2d 914, the city filed a claim against the county for a portion of the expense of the municipal court. The county court disallowed the claim on the theory that the attempt to impose upon the county a portion of the expenses of the municipal court was in violation of §§ 28 and 30 of Article 7 of the Constitution. In that case, Mr. Justice Frank Smith said: "We do not think, however, that these sections of the constitution operate to deprive the general assembly of the power to impose duties upon counties and to require counties to pay therefor. Our cases are to the contrary. For instance, in the case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002, there is an enumeration of various items of expenses imposed upon counties by legislative enactment. In the case of *Burrow, County Judge*

v. *Batchelor,* 193 Ark. 229, 98 S. W. 2d 946, there was involved an act of the general assembly requiring all counties to pay salaries of circuit court and grand jury stenographers. This act was upheld, it being there said that these salaries must be paid as long as there is money in the county general fund to pay them, and that it was not discretionary with the county court to allow them, and that if it failed to do so the circuit court might compel the county court to perform this ministerial duty."

In the case at bar the legislature authorized the sheriff to appoint a deputy for certain purposes, and authorized the Quorum Court to appropriate a salary to pay such deputy. In view of what has been said, we do not believe this was in violation of the constitutional provision prescribing the jurisdiction of the county court.

The circuit court's action in directing that the salary of the deputy sheriff be paid is correct, and the judgment is therefore affirmed.

HADFIELD *v.* KITZMANN.

5-292 266 S. W. 2d 801

Opinion delivered April 5, 1954.

Wood & Smith and *John W. Newman,* for appellant.

McMillen, Teague & Coates, for appellee.

George Rose Smith, J. This is a proceeding brought by the appellants, H. P. Hadfield and wife, to obtain partition of certain property that is owned in equal thirds by the appellants, by the appellees Gus Kitzmann and wife, and by the appellee Ruth McMillen. The property consists of five apartment buildings in Little Rock, the buildings being designated as Units 1 to 5. The complaint asked that Units 1, 2, and 3 be divided in kind among the co-owners and that Units 4 and 5 be sold. The chancellor denied this request and ordered instead that all five buildings be sold in bulk. This appeal questions the correctness of that decree and also attacks the order confirming the sale.

In 1949 the Hadfields, the Kitzmanns, and Verne McMillen formed a corporation for the purpose of constructing these buildings, which are known as the Yorkshire Apartments. The venture was largely financed by a loan from the federal government. Each of the three participating interests contributed $10,000 to the project, and a federal loan of $335,000 supplied the remaining funds. At the time of trial this loan had been reduced to about $311,000, so that the owners' equity in the property was still relatively small. In the interim Verne McMillen had transferred his stock to his wife Ruth, and the corporation had conveyed the property to the stockholders and had been dissolved.

Most of the testimony at the trial was directed to the issue of whether Units 1, 2, and 3 are of so nearly equal value that a division in kind would be fair. On this issue the weight of the evidence supports the chancellor's conclusion. The five buildings are situated in a semicircle and are numbered from left to right. The first three buildings contain eight apartments each, while Units 4 and 5 have ten apartments each.

The testimony indicates pretty clearly that Unit 3 is substantially more valuable than Units 1 and 2. It sits

in the center of the semicircle and is architecturally more attractive than the other four structures. It cost about $5,000 more to build than did the other two eight-apartment units. The federal loan was divided into five separate loans, and as of April 30, 1953, the owners' equity in Unit 3 was $13,725.34, while it was only $8,961.76 in Unit 2 and $10,728.19 in Unit 1. Again, during the first four years Unit 2 returned a net profit of $5,130.65, compared to a profit of only $2,558.34 for Unit 1 and $3,955.30 for Unit 3.

Apart from these figures, the various expert opinions offered at the trial are about evenly balanced. There is also much evidence to show that the value of all five buildings would be materially diminished if three were divided in kind and the other two sold. The resulting separate ownerships would entail a loss of economy in management and would leave each proprietor exposed to the threat of rent reductions on the part of someone else. Without reviewing the testimony in greater detail, we think it sufficient to say that the chancellor's decision on the main issue is not contrary to the preponderance of the evidence.

At the commissioner's sale the properties were jointly purchased for $60,000, one third by the Kitzmanns, one third by Ruth McMillen, and one third by J. B. Murphy. Since the Kitzmanns and Mrs. McMillen already owned a two-thirds interest, the actual result of the sale was that Murphy bought the appellants' equity for $20,000. It is now insisted that this price is so grossly inadequate that the sale should not have been confirmed.

We hardly think the price even to be inadequate, much less grossly so. As of April 30, 1953—a few months before the sale—the owners' bookkeeping equity in the five buildings was $61,578.84. The chancellor was scrupulously fair in giving the parties ample opportunity to obtain bids for the property. In taking the case under submission he gave the litigants several months in which to find a buyer. The only offer that was obtained for the entire property was a $65,000 offer made by Murphy.

This offer, however, was for an immediate delivery of title, free from further litigation in the trial or appellate court.

After Murphy's offer was made the Hadfields offered in substance to pay one-fifth thereof, or $13,000, for either Unit 4 or 5. But these are the ten-apartment units and are undoubtedly worth more than the smaller units. Construction costs for Unit 5 were more than $17,000 greater than those for Unit 2. Thus if the Hadfields consider $13,000 to be a fair price for the most valuable of the five buildings, we do not think it can be said that a bid of $60,000 for the whole is grossly inadequate. On this question, too, the opinions of expert witnesses are directly conflicting.

The remaining issue is whether the court erred in directing that the property be offered for sale in bulk rather than first in bulk and then separately, with the better bid to be accepted. The appellants insist that the statute requires distinct buildings to be sold separately. Ark. Stats. 1947, § 34-1829. No request for this procedure was made by anyone before the sale, but the point was relied upon by the Hadfields as an objection to confirmation.

Although it is certainly the better practice for property to be offered alternatively as a whole and in parcels, the objection is not now available to the appellants. The error of offering separate tracts *en masse* is a mere irregularity which does not avoid the sale. *Glasscock* v. *Glasscock,* 98 Ark. 151, 135 S. W. 835. We there held that since the error is not jurisdictional a stranger who purchases under the decree will be protected, even though the decree be subsequently set aside.

As we have seen, all that was actually sold in the case at bar was the Hadfields' one-third interest. The purchaser was Murphy, who is not a party and is therefore entitled to protection. Nor is it material that Murphy was to some extent familiar with the litigation and was aware that an appeal had been taken from the original decree. The appellants failed to supersede that de-

cree and thereby permitted the sale to be held. With reference to this situation we said in *Rankin* v. *Schofield,* 81 Ark. 440, 98 S. W. 674: "It is well settled, when lands are sold under a valid decree and purchased by one not a party to the proceedings who pays the purchase price and receives a deed to the lands, that the purchaser will be protected in his purchase, even though the decree under which the lands were sold be reversed and set aside on appeal. The mere fact that there were errors in the proceedings leading up to the decree is a matter of no moment, so far as the purchaser is concerned, if the court had jurisdiction of the parties and the subject-matter and power to make the decree. Nor would the case be different if the purchaser had notice of such errors, for otherwise it would not be safe for anyone to purchase at a judicial sale that was liable to be reversed on appeal. For on a reversal it could always be said that by an examination of the record the purchaser could have ascertained the errors. . . . It is sufficient for the purchaser at such a sale to know that the court had jurisdiction and power to order the sale. If the court has power under a decree to order the sale, and a purchaser buys at a sale made under the decree, then, if the sale is confirmed by the court, and the purchaser pays the price and receives a deed, it is immaterial, so far as he is concerned, whether there were errors or not, for his title will not be affected by them. *Moore* v. *Woodall,* 40 Ark. 42; *Boyd* v. *Roane,* 49 Ark. 397 [5 S. W. 704]."

In this case, as in that one, the purchaser has paid the purchase price and the sale has been confirmed, the order reciting that title is divested from the Hadfields and vested in Murphy. The only difference is that here it does not appear that Murphy has yet received a commissioner's deed. This makes no difference, however, for it is the order of confirmation that vests the title, the deed being merely evidence of what was done. *Person* v. *Johnson,* 218 Ark. 117, 235 S. W. 2d 876.

Affirmed.

GRIFFIN SMITH, C. J., not participating.

CARL F. PARKER, COMMISSIONER OF REVENUES *v.* KERN-LIMERICK, INC.

4-9924 266 S. W. 2d 298

Per Curiam opinion delivered April 5, 1954.

[redacted]

O. T. Ward, for appellant.

Rose, Meek, House, Barron & Nash and *Berryman Green,* for appellee.

PER CURIAM. Our opinion of January 12, 1953, held that the commissioner of revenues was not liable to Kern-Limerick for gross receipts taxes the corporation had paid under protest when two diesel tractors were purchased. The actual amount involved is $342.93. See *Parker, Commissioner,* v. *Kern-Limerick, Inc.,* 221 Ark. 439, 254 S. W. 2d 454. In concluding that the tax was payable we reversed a decree of Pulaski Chancery Court, Second Division. On appeal to the United States Supreme Court it was held, in effect, that the Armed Service Procurement Act mentioned in our opinion was broad enough to permit the contractors to rely upon the Navy Department's authorization to purchase the machinery without incurring liability under our Use Tax Act, the Federal government being exempt from such payments.

Accordingly our opinion is recalled as to that part not in harmony with the holding of the U. S. Supreme Court, February 8, 1954, *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 313, and that court's mandate of March 25, 1954. The Chancery Court order is therefore reinstated.

5-249 266 S. W. 2d 818

Opinion delivered April 12, 1954.

W. H. Roth, G. P. Houston and *Sam Rorex,* for appellant.

John D. Eldridge, Jr., for appellee.

GRIFFIN SMITH, Chief Justice. We are asked to reverse the trial court's judgment that appellant—sometimes referred to as the respondent — should be permanently disbarred because of unprofessional conduct extending over a protracted period. Rules for the procedure were adopted April 24, 1939, under authority of Amendment No. 28 to the Constitution.

The motion for a new trial lists twenty-eight matters it is contended were erroneously disposed of by the trial judge.

The respondent's motion to make the complaint more definite and certain was granted, but a defense demurrer was overruled. Other preliminary phases were acted on

in a manner unsatisfactory to appellant, over his objections and exceptions. The general demurrer asserted that the complaint did not state facts sufficient to constitute a cause of action. By separate motion Armitage asked that factual issues be determined by a jury, Revised Statutes, Ch. 15; Ark. Stat's, § 25-407. The judge properly held that the old enactment had been superseded by Supreme Court Rules authorized by Amendment 28.

The amended complaint listed nine acts of misconduct — or, rather conduct in connection with cases in which Armitage, as an officer of the court, had transgressed professional propriety to such an extent that his reliability as an attorney had become impaired. Four of the counts were dismissed. The final judgment rests on the remaining five charges.

First, there is involved appellant's representation of Mrs. Irene Christy whose trip from Chicago to Searcy was admittedly for the purpose of procuring a quick divorce from George Christy. Directly related to the Christy case is appellant's conduct during hearings before the Bar Rules Committee. The record discloses affirmative acts of deception in an effort to discredit handwriting experts and sustain his contention that an unknown person who said he was Christy came to appellant's office and signed the appearance entry.

The second allegation is based upon the respondent's conduct in withholding money from a client, Mrs. Susan Hamilton.

Charge No. 3 involves attorney-client relations with L. L. Morris for whom Armitage collected a substantial sum of money and dealt with it in gross disregard of his professional obligations. See *Armitage* v. *Morris, Administrator,* 215 Ark. 383, 221 S. W. 2d 9.

Charge No. 4 relates to a divorce procured by Armitage for Alma Jean Farrar Topper in circumstances indicating that she was excused from coming to Arkansas. It also involved the attorney's behavior in handling money and settling an obligation on his own terms and in his own time, with a final substantial loss to the client.

In agreeing with appellants assignments 13, 14, and 15 in the motion for a new trial relative to the inadmissibility of the affidavit and deposition of George Christy and the decree and depositions in *Christy* v. *Christy,* the result reached by the trial judge is not affected. There was other evidence showing that Christy did not enter his appearance. It is sought to sustain the non-culpability of Armitage on the ground that he was imposed upon when a spurious document came into the record.

We are also of the view that proceedings before the Bar Rules Committee in which appellant and his witnesses participated are admissible; and this is true irrespective of the administration of an oath. This is not a criminal action. In holding that at trial proceedings before the Bar Rules Committee in which the appellant participated are admissible, much of the matter objected to reaches us in pertinent form free from convincing contentions that the defendant was not fairly treated. The Committee's creation and existence is this Court's determination that an impartial tribunal should consider complaints of professional misconduct, sift substantial accusations from charges based upon personal pique, disappointment, or prejudice, and then, in respect of serious implication, permit the attorney to explain the transaction and, when he so desires, bring witnesses before the committee to substantiate his position.

By this process minor professional deviations are disposed of justly without public embarrassment. But where, as here, the investigation resolves itself into a consideration of unethical deportment extending over a long period of time, and where every convenience available to the Committee is animated by a desire to establish probable facts and then to consider the respondent's explanations and the measure of justification they afford, the legal status of this record is much like proceedings before administrative agencies where factual issues are sifted by a body composed of experienced men selected because of professional fitness. In the case at issue the Committee members were chosen to inquire into the very things contemplated by this Court. To say that

essentials constituting these preliminary hearings are hearsay would in some instances defeat the broad purposes of Amendment 28 and our implementing rules.

Ordinarily we confine our review to things abstracted by the appellant—sometimes supplemented by the appellee. But where the litigating parties do not agree regarding the construction to be placed upon language of a witness, the effect of a document, or meaning that should attach to what the witnesses have said, the transcript is referred to. It sometimes happens that words are taken from their context and a meaning is imposed at variance from reasonable understanding if the entire sentence, paragraph, deposition, or the oral examination and cross-examination were considered.

Judge Audrey Strait, who heard the cause on exchange, made findings of facts and announced conclusions of law. The factual fabric as summarized by Judge Strait has been compared with the testimony, exhibits, pleadings, etc. We find a painstaking, thorough, and conservative review of the testimony. Little of value could be added by an independent presentation, hence the facts as recapitulated for the information of the respondent and the Committee are adopted as our own.

JUDGE STRAIT'S FACTUAL FINDINGS.

Christy v. Christy.—The Court finds as a fact that on March 18, 1950, Irene Christy brought a suit for divorce in the White Chancery Court against her husband, George Christy. Irene Christy at the time of the filing of the action was living in Chicago, Ill. The record discloses that she went to the office of the defendant, Gordon Armitage, in Searcy, and that he was employed to represent her. Leon Brewer, whom she later married, was with her.

Irene Christy was visiting in Sidon [White county] on the trip resulting in a divorce decree, and she asserted that the defendant advised her to state that she had been a resident of Arkansas for 90 days. Both Irene Christy and Leon Brewer testified in the divorce case, but denied

certain statements therein contained. An entry of appearance purportedly signed by George Christy appeared in the record and a divorce decree obtained in favor of Irene Christy resulted, [in the procurement of which] a trip was made to Little Rock for the presentation of the case before Judge Frank Dodge. Subsequently George Christy, who lived in Chicago, was advised of the divorce proceeding by his wife in Arkansas, and upon receipt of this information . . . the Bar Rules Committee . . . started its investigation, which eventually resulted in the filing of the complaint with its charges of . . . unprofessional conduct upon the part of defendant, Gordon Armitage.

Mr. Howard Cockrill, [Secretary] of the Bar Rules Committee stated that when the defendant was asked to explain the purported forgery of the signature of George Christy to the entry of appearance, [Armitage's story was] that when Irene Christy employed him as her attorney, a man was introduced to him as George Christy, and that he [later] knew he had been imposed upon. Specimens of handwriting of Gordon Armitage and his wife were submitted the Bar Rules Committee, to determine, if possible, who had signed the name of George Christy to the entry of appearance. The specimens . . . were shown to handwriting experts, Feron and Walters, who, from the information and data before them, gave opinions to the effect that the signature of George Christy upon the entry of appearance was in the handwriting of Mrs. Gordon Armitage. Later, these opinions were repudiated by each of the two witnesses and error admitted, largely because of the . . . family characteristic in the handwritings of Mrs. Armitage and her son, Robert Armitage. Feron and Walters did not have specimens or samples of Bobby Armitage's handwriting when their first opinions were given.

When the conclusions of the handwriting experts were disclosed to defendant, in a second appearance before the Bar Rules Committee, he stated that he had an opinion as to who had written the signature of George Christy on the entry of appearance. He produced an

anonymous letter, purported to have been written to Armitage [and mailed from] Trumann, Arkansas. The envelope shows that it was dated April 23, 1951. He furnished to the Bar Rules Committee a photostatic copy of the purported anonymous letter. Later, defendant admitted authorship in that he dictated the form to his son, Bobby Armitage, who wrote the letter as introduced in his own handwriting. The record shows that when defendant was questioned by the Bar Rules Committee as to the authorship of the latter, he denied knowing who had written same. Later, when the true authorship was disclosed, defendant stated that in admitting knowledge of authorship he wanted to mislead or confuse the experts and to justify such action and conduct in the investigation being made by the Bar Rules Committee. He stated that he knew he was not under oath when he appeared and talked before the Bar Rules Committee about not knowing who wrote the anonymous letter, and that he wanted to test experts.

Subsequently, with the additional specimens of handwritings by Bobby Armitage and that contained in the anonymous letter, the matter was again submitted to Feron and Walters, who concluded and gave their opinion that in the light of this new evidence, the signature of George Christy on the entry of appearance was in the handwriting of Bobby Armitage, the son of defendant. The two expert witnesses were present and testified in person in the trial. Their testimony, while long, was impressive and the Court had an opportunity to observe the seriousness and sense of responsibility resting upon them in the testimony given. They frankly admitted erroneous opinions upon the exhibits and specimens originally before them to the effect that the signature of George Christy was in the handwriting of Mrs. Armitage. With enlarged pictures and charts of her handwriting, that of Gordon Armitage and of the signature on the entry of appearance, it was understandable that because of strong family resemblance in the handwritings, a mistake could have occurred. Both witnesses stated that subsequent to their original opinions, with all the speci-

mens of handwriting before them and with an enlarged record, by comparison in handwriting, which they explained at length, without doubt Bobby Armitage wrote and signed the name of George Christy to the entry of appearance. There is no contention upon the part of any person that George Christy actually signed the entry. The record shows he was not in Arkansas at the time.

The whole history surrounding this allegation showed falsehoods being incorporated in the depositions of Irene Christy and Leon Brewer—that the signature of George Christy was forged to the entry of appearance with the knowledge and connivance of defendant. The action and conduct of defendant after the investigations were instituted by the Bar Rules Committee, to determine the true facts, were intentionally misleading, as he himself stated. The explanation he made—that in appearing before the Bar Rules Committee he knew he was not under oath and sought because of such alleged fact to mistake the true circumstances surrounding the matter investigated—could not redound to his credit.

The Court finds and holds that the defendant was guilty of gross unprofessional conduct as an attorney in handling the Christy case, both in the procurement of the divorce as well as his attitude and conduct with reference to the investigation by the Bar Rules Committee.

Mrs. Susan Hamilton.—Plaintiff's testimony in this allegation consisted of two letters, or carbon copies thereof, referred to in the trial as Exhibits 38 and 39. The charge of unprofessional conduct upon the part of defendant is that having funds in his hands belonging to Mrs. Hamilton, he (without legal justification) withheld the payment of such money to her for an unreasonable length of time. The facts are brief and to the effect that defendant sold property which Mrs. Hamilton had acquired as a surviving tenant by entirety.

Mrs. Hamilton moved to California, and was apparently indebted to Armitage in the sum of $175.00 for prior legal services. When a purchaser of the lands was found, defendant prepared and forwarded to Mrs. Ham-

ilton a deed for execution, and advised her that he would account for all funds and expenses. The deed was executed and returned to defendant in November, 1948. Not having heard from the defendant about remitting the purchase money, a Mr. Scheller, an attorney for Mrs. Hamilton, wrote defendant, asking for remittance. He was told by Armitage that he had been ill, but was surprised that no acknowledgment had been made by Mrs. Hamilton of a check alleged to have been mailed to her. There was nothing adduced in the trial to indicate such a check had ever been sent.

Subsequently, Armitage mailed Mrs. Hamilton his check for $700.00 and promised to pay the balance within a short time. There was no further word from defendant for almost an eight-months period. Mr. Scheller then contacted the Bar Rules Committee, through Paul Gutensohn, an attorney of Ft. Smith. Defendant, resenting such inquiry by the Bar Rules Committee, consented to and did remit the balance to Mrs. Hamilton. His explanation for the delay in making remittance was based upon two reasons, (quoting from the notes made by the Court): First: Mrs. Hamilton "failed to coöperate with me in handling the place." Second: "Because I knew that the money would be spent as soon as she got it". Defendant took the position that the relationship of attorney and client did not exist between Mrs. Hamilton and himself, and that no legal charge of misconduct could be predicated upon the facts and circumstances of the allegations.

The conduct of defendant in withholding funds from Mrs. Hamilton until forced to make remittance by reason of employment of attorneys by Mrs. Hamilton, and the inquiry of the Bar Rules Committee, is not justified upon the grounds he relied upon as a defense. He was guilty of unprofessional conduct as an attorney without reference to the actual relationship as to attorney and client between himself and Mrs. Hamilton.

Armitage v. Morris.—The defendant in the complaint is charged with gross unprofessional conduct with

reference to his employment as an attorney for L. L. Morris.

The record discloses that Walter Morris, a brother of L. L. Morris and Ann Dye Morris, died intestate in 1943. Ann Dye Morris died in 1944. Lewis, or L. L. Morris [the same person] was appointed as administrator of the Ann Dye Morris Estate. Information subsequently came to L. L. Morris of his brother's death through W. C. Cox Company, an organization employed in investigating beneficiaries or claimants of interests in estates of deceased persons.

L. L. Morris contacted defendant, who approved the employment of W. C. Cox Company to help establish the claim of Morris. A representative of Cox came to Searcy and after some discussions, a contract was entered into with Cox and compensation for services agreed to. The evidence, not seriously disputed in any respect, shows that subsequent to the contract with Cox Company and the employment of defendant to advise and represent L. L. Morris, certain remittances were made of funds collected in California from the Walter Morris Estate.

On March 8, 1947, there was remitted to defendant a check from the Walter Morris Estate in the amount of $4,742.04. Armitage prepared a receipt which Louis Lexton Morris signed, dated March 9, 1947, in the sum of $4,742.04. Actually, (and it is not disputed) Morris received in cash the sum of $2,371.02. On or about March 25, following, U. S. Savings Bonds, Series E, were purchased in the name of Lewis Lexton Morris without his knowledge or consent. The bonds were apparently bought with funds which properly belonged to Lewis Lexton Morris as Administrator. They were placed in the safety deposit box of Armitage, so he said. Apparently Morris had no knowledge of the purchase of the bonds at that time. Later, when information came to him, demand was made for delivery of the bonds to Morris or Mr. Levitt as his agent. The demand was refused by defendant. Thereupon, suit was instituted to recover bonds, which was resisted. Also, involved was matter of compensation to be paid to the attorney for services.

The claim of Armitage was, by the Court, reduced and restitution of difference between the amount claimed and that found due ordered made. The evidence disclosed that as to the check dated February 13, 1947, payable in the sum of $4,742.03 to Lewis Lexton Morris, as Administrator of the Estate of Ann Dye Morris, such check was cashed by the defendant who affixing an "X" to the check, (admittedly by Armitage) without the knowledge or consent of L. L. Morris. As a result of the litigation by Morris against Armitage, the bonds were deposited into the registry of the Court.

It would be a matter of speculation to assume to state what was in the mind of defendant during the period of the handling of the collection of the funds from the Walter Morris Estate. He predicated his action and conduct upon the over-all theory that L. L. Morris was mentally incompetent and incapable of directly handling the funds due him or the estate of Ann Dye Morris.

As an attorney, he knew the proceedings that should have been pursued to properly and ethically follow the legal provisions of the law. His action in the drawing of the receipt for $4,742.03 from Morris when actually one-half only was paid Morris, cannot be excused or justified. The presumptious act of Armitage in affixing the signature of L. L. Morris to the check with an "X" was without authority and not justified. If, as defendant contended, Morris was incapable of handling his funds, and for such reason Armitage saw fit to invest one-half of the money in bonds, then why not the whole of the collection of $4,742.03? The idea that Court action had to be resorted to in adjusting the matter of collections and attorneys' fees is not such evidence of good faith as should be exhibited by an attorney toward his client. Under the facts, not seriously disputed, the Court finds that the defendant was guilty of unprofessional conduct toward L. L. Morris, as his client, not warranted nor justified under the facts and circumstances surrounding the whole case.

Alma Jean Farrar Topper.—Alma Jean Farrar obtained a divorce from Charles E. Farrar. The decree recited that Farrar was indebted to his wife in the sum of $927.50 and that this indebtedness would be paid within a reasonable time, the amount to be paid upon the refinancing of the farm or its sale. About two years later, in August, 1949, Armitage obtained a deed to this property—property dealt with in that divorce decree. On inquiry, Mrs. Farrar later learned of the sale and sought to collect her debt, which took about a year.

Defendant paid her $50.00 on this trip and offered to pay her $50.00 per month until he could refinance the debt. Later Mrs. Farrar employed an attorney to collect the indebtedness due her. In October, 1950, she received a net of $585.00. The evidence and record disclose that the deed from Charles Farrar was withheld from the record for a long period of time—until April 20, 1950, when Mrs. Gordon Armitage was permitted to record it as being a true copy of the original, filed for record November 22, 1949. Without enlarging on this phase of the case, suffice it to say that Mrs. Farrar was required to employ an attorney to collect the indebtedness due her under the divorce decree. As the Court views the evidence and record covering this controversy, it was incumbent upon defendant, in view of the relationship of attorney and client, and in his capacity as a fiduciary, (in that he purchased the lands originally referred to in a foreclosure proceeding) to diligently and without delay, see that Mrs. Farrar was paid.

So often truth creeps into the picture when least contemplated. Defendant introduced a letter in evidence, as Exhibit "T" addressed to Mrs. Farrar at Kennett, Missouri, dated November 4, 1947, in which he stated it would not be necessary for her to come down "here" (Searcy). He wrote: "P. S. It will not be necessary for you to come down. I will get the decree [divorce] in a few days and will forward same to you. This decree will be final from date it is granted." The caption to the depositions in the divorce proceedings shows that they were taken in Searcy on November 4, 1947. The certifi-

cate stated "That there was present at the examination Alma Jean Farrar, Gus Sims—and Gordon Armitage, who conducted the examination." On November 19, following, Mrs. Farrar wrote Armitage thanking him for handling the divorce. The discrepancy just referred to is not, of course, an allegation of professional misconduct, but it came into the picture unsought and is somewhat revealing in its aspects.

The Court finds as a fact from the evidence on the Farrar allegation, that the defendant was guilty of unprofessional conduct in the manner in which he handled the interest and debt due Mrs. Farrar.

PER CURIAM. It has long been the rule that a lawyer's unprofessional conduct subjects the practitioner to disciplinary action in some instances, and in others to permanent exclusion from the practice. In the case here the trial court found—from evidence of a convincing nature—that after inquiry had been undertaken by the Bar Rules Committee a planned policy of deception was pursued. It was not until ascertainment of the facts became inevitable that the respondent admitted the circuitous course he had adopted to mislead those who were judicially obligated to determine essential issues.

Our conclusions are that the judgment of permanent disbarment is justified, that the appellant was not prejudiced by procedural rulings, and that an affirmance is necessary. It is so ordered.

GENERAL CONTRACT CORPORATION *v.* WILLIAM H. DODGE.

5-380 266 S. W. 2d 816

Opinion delivered April 12, 1954.

Rector, Cockrill, Limerick & Laser, for appellant.

John K. Shamburger, for appellee.

J. Seaborn Holt, J. This is a case of alleged usury and arises out of a Conditional Sales Contract for the purchase of a Pontiac automobile by appellee, Dodge, on May 9, 1952, from the Dutch O'Neal Motors, Inc.,—not a party here. The transaction occurred prior to the effective date of the *caveat* (June 30, 1952) in the case of *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973.

Appellee alleged in his complaint, in effect, that on May 9, 1952, he purchased the car in question from Dutch O'Neal Motors, Inc. for $2,200, on which he made a down payment of $767, leaving an unpaid balance of $1,433, that at the time he signed a Conditional Sales Contract under which he was supposed to pay 5% on the unpaid balance, that later, after receiving a copy of the contract, he learned that a purchase price of $2,400 with an interest charge of $395 was stated therein, and an insurance premium charge of $162 on which appellant received a commission as agent and that the transaction was usurious and fraudulent. He asked that the sales contract and note be cancelled and title to the automobile vested in him.

O'Neal Motors answered separately with a general denial, specifically pleaded that the contract was a true time sales transaction and pleaded *stare decisis* as a complete defense. A nonsuit was taken as to it. General Contract Corporation answered with a general denial and also alleged it was a true time sales contract and *stare decisis* as a complete bar. In a cross complaint, appellant, General Contract Corporation, alleged default in making monthly payments by appellee, that it was the

owner of the car of the value of $2,000, and prayed for judgment for its possession or value.

Trial resulted in a decree for appellee, Dodge. The decree recited: "The court further finds as a matter of fact that $2,200 was the selling price of the Pontiac automobile. That there was credited on the $2,200, $767, as a down payment, leaving a balance of $1,433; that an insurance policy was issued protecting plaintiff and defendants for collision or upset; the cost of insurance being $162, leaving a balance to be financed of $1,595; that plaintiff was charged on such balance of $1,595, interest far in excess of 10% per annum.

"That actually this transaction was a loan of money from General Contract Corporation to plaintiff and a sale of personal property by Dutch O'Neal Motors, Inc. to plaintiff and that the contract showing a total price of $2,795 was a device to cover usury, and a fraud as to plaintiff. That there was no *bona fide* credit price or time sale and that the whole scheme was one to evade and avoid the constitutional mandate against usury.

"That the note and contract should be declared void and that the lien securing same should be invalidated and the cloud on plaintiff's title to the Pontiac automobile be removed."

On the record presented, we hold that this case is governed by our opinions in *Crisco* v. *Murdock Acceptance Corp.*, 222 Ark. 127, 258 S. W. 2d 551, and *Aunspaugh* v. *Murdock Acceptance Corp.*, 222 Ark. 141, 258 S. W. 2d 559, wherein the facts were substantially similar.

It is undisputed that the transaction here was consummated on May 9, 1952, prior to the finality of our decision in the Hare case, above. The sales contract shows purchase by appellee of the car in question from Dutch O'Neal Motors, Inc. "Time differential price (credit purchase price)—$2,795.—Down payment, cash—$767," payable $84.50 on or before June 24, 1952, and $84.50 on the 24th of each month thereafter. The bottom portion of the face of the instrument is a note signed by

appellee, dated May 9, 1952, for $2,028, payable to the dealer in twenty-four consecutive monthly installments of $84.50 beginning June 24, 1952, with provision for acceleration of balance upon default of any installment. The reverse of the sales contract shows assignment by the dealer with warranty of validity of the instrument, that it was read by appellee and that all statements were true, etc.

A Retail Buyers Order dated May 9, 1952, signed by appellee contains the following recital: "Cash delivered price in North Little Rock—$2,421.—Cash on delivery—$767.—Bal. 24 notes of $84.50 each starting 45 days—$1,633."

Appellee, a licensed attorney, admitted signing the sales contract here in question. He intended to purchase on a time, or credit, basis and was credited with a down payment of $767 and agreed to pay twenty-four monthly payments of $84.50 each. He testified: "A. That was my agreement to pay twenty-four notes at $84.50, and I just told you that $767, that is $600 plus $167, I knew I was getting credit for that, that is right. * * * It was my understanding I was to pay twenty-four notes at $84.50. That would total up to $2,200 plus insurance, plus 5% interest. That was it. As far as those additional figures in there, I had no understanding of that at all."

The transaction here appears to have been consummated under the accepted practice in this State prior to the *Hare* case, above, and in accordance with our holdings in the *Crisco* v. *Murdock Acceptance Corp.* and *Aumspaugh* v. *Murdock Acceptance Corp.* cases, above, the decree must be reversed.

It could serve no useful purpose to reiterate what we said in those cases. Accordingly, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

5-293 266 S. W. 2d 815

Opinion delivered April 12, 1954.

W. Tillar Adamson and *Guy B. Reeves,* for appellant.

L. A. Hardin, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal from a default judgment.

On October 10, 1952, Bond (appellee here) filed suit in the Chancery Court against Manhattan Credit Company (appellant here) and James Hampton. Both defendants were duly and personally served with summons.

The allegations of the complaint will be subsequently stated. Both defendants wholly made default; and on April 1, 1953, the Chancery Court rendered a decree granting the plaintiff the prayed relief. Then on September 12, 1953, the Manhattan Credit Company prayed an appeal out of this Court by filing a transcript containing (a) the complaint; (b) the statement as to serv-

ice of summons; and (c) the decree. Hampton has not appealed, but in view of the result to be reached here, we need not consider the effect—if any—of such failure on the rights of Manhattan Credit Company.

We have several cases which state the extent of review in this Court when the appeal is from a default judgment. Some of these cases are: *Benton* v. *Holliday,* 44 Ark. 56; *Sproull* v. *Miles,* 82 Ark. 455, 102 S. W. 204; *Euper* v. *State,* 85 Ark. 223, 107 S. W. 179; *Neimeyer* v. *Claiborne,* 87 Ark. 72, 112 S. W. 387; *Koons* v. *Markle,* 94 Ark. 572, 127 S. W. 959; *Thompson* v. *Hickman,* 164 Ark. 469, 262 S. W. 20.

In *Neimeyer* v. *Claiborne, supra,* we said:

" 'When a judgment is entered by default, it will be presumed that whatever proofs were necessary to support it were duly presented and taken.' 23 Cyc. 763. The only question here is, were the allegations of the complaint sufficient to authorize the judgment? *Benton* v. *Holliday,* 44 Ark. 56; *Euper* v. *State,* 85 Ark. 223."

Under the above stated rule as to review, we examine the complaint in the case at bar to see if its allegations were sufficient to authorize the decree rendered. The complaint alleged: that in February, 1952, the plaintiff purchased an automobile *from both defendants* for a total of $1,595; that $400 was paid by delivery of another car, and $135 was paid in cash, leaving an unpaid balance of $1,060; "that the defendants fraudulently and without knowledge of the plaintiff changed the selling price of the car to $1,957"; "that the difference between $1,595 and $1,957 was added on and charged by the defendants as interest"; and that the said unlawful interest made the contract usurious and null and void. The prayer of the complaint was that the contract be declared void because of the "fraudulent and usurious interest charges."

The decree recites the default of the defendants and also that "said cause was submitted to the Court upon the complaint of the plaintiff, together with documentary exhibits showing the amount paid by the plaintiff on said conditional sales contract and also invoice statement

from the defendant." Then, after making factual findings, the decree granted the plaintiff the prayed relief. Thus, it is clear that the complaint alleged a cause of action that authorized the decree rendered.

Manhattan urges in this Court that the transaction occurred in February, 1952, which was before our decision in *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973; and that Manhattan is entitled to prevail because of our decisions in *Crisco* v. *Murdock*, 222 Ark. 127, 258 S. W. 2d 551; and *Pacific Finance Corp.* v. *Tinsley*, 222 Ark. 723, 262 S. W. 2d 282; the effect of the two last cited cases being that conditional sales contracts entered into and valid under existing authorities before *Hare* v. *General Contract Purchase Corp.* would not be declared void by the Hare opinion. But the burden in the case at bar was on Manhattan Credit Company to appear and defend in the Trial Court and offer facts that would bring the case at bar within the purview of the *Crisco* and *Pacific* cases. Such was not done. Bond's complaint alleged fraudulent conduct as well as resulting usury. For aught that here appears, the evidence offered in the Trial Court might have established facts entirely at variance from those in the *Crisco* and *Pacific* cases. Furthermore, the allegation of fraud, when coupled with the resulting usury, did not require that Bond offer restitution, as a prerequisite to relief under our usury laws.

We conclude that the allegations in Bond's complaint authorized the decree rendered in his favor. That is the test in an appeal from a decree rendered on default after due service.

Affirmed.

THOMPSON *v.* MURDOCK ACCEPTANCE CORPORATION.

5-386 267 S. W. 2d 11

Opinion delivered April 12, 1954.

[Rehearing denied May 10, 1954.]

S. L. White, for appellant.

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

ROBINSON, J. Appellant Gladys M. Thompson filed suit against James Hampton, doing business as Public Auto Company, and Murdock Acceptance Corporation, alleging she was charged a usurious rate of interest on the unpaid balance of the purchase price of an automobile. Upon completion of the introduction of evidence by the plaintiff, the defendant Murdock Acceptance Corporation moved that the cause be dismissed due to insufficiency of the evidence to prove usury. The motion was sustained, and plaintiff has appealed.

On the 11th day of October, 1952, which was subsequent to the decision in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, James Hampton sold an automobile to appellant, and as part of the purchase price of $1,460.00 Mrs. Thompson delivered to him a used truck, paid $53.00 in cash, and signed a title-retaining contract for the unpaid balance. Hampton

transferred this contract to appellee Murdock Acceptance Corporation. It shows an unpaid balance at the time of transfer of $1,244.04. Mrs. Thompson contends on appeal that the correct balance owed after the down payment, including interest at 10 per cent per annum, was $1,083.06; and that the difference of $160.98 is a usurious charge.

Appellant contends that in preparing the written contract, Hampton showed a balance due of $1,244.04 when in truth and fact the balance should have been $1,083.06. Appellant arrives at the total of $1,083.06 in this manner; she states that it was agreed she was to receive credit in the sum of $600.00 for the old truck traded in; that $53 was paid in cash which was to reduce an existing mortgage in the sum of $203 down to $150; and that in addition to allowing her $600 on the old truck, Hampton assumed the burden of paying off the $150 balance on the mortgage. She also says that she agreed to buy certain insurance for which the premium was $174.40 and that the interest at 10 per cent per annum is $101.66, and all of this considered together leaves a total of $1,083.06. She makes no contention in this court that the sale of the insurance was a device or scheme to evade the usury laws. The motion to dismiss was not in writing, but she did not object to the motion for that reason at the time it was made. Although Act 470 of 1949, Ark. Stats., § 27-1729 as amended, provides for a written motion challenging the sufficiency of the evidence, the party resisting the motion in the trial court would be in no position to complain here of the motion being oral when no objection had been made on that ground in the trial court.

Mrs. Thompson testified that she did not receive a copy of the contract which she signed at the time of the consummation of the transaction. Also she says it was in blank. However, she testified that she did receive an invoice and that it shows she was not allowed a credit of $600 on the old truck, but was allowed $490 thereon; and that the invoice further shows she owed a balance of

$1,244.04 instead of $1,083.06 which she claims is the correct amount.

According to Mrs. Thompson's version of the transaction, it was agreed she was to receive a total allowance of $750.00 on the old truck, $600.00 to be credited on the purchase price of the automobile, and payment by Hampton of a mortgage on the truck in the sum of $150.00—total $750.00. Actually she was allowed a credit of $490.00. The sale contract shows a total time price of $1,734.04, with $490.00 paid thereon at time of delivery, leaving a balance of $1,244.04 payable in 21 monthly installments of $59.24 each.

If Mrs. Thompson's conception of the transaction is correct that she was to receive a total credit of $750.00 on the truck traded in, and Hampton for the purpose of exacting interest greater than 10 per cent per annum prepared the contract in a manner calculated to deceive the purchaser and thereby charge more than the legal rate of interest, it would be usury. In *Strickler* v. *State Auto Finance Company,* 220 Ark. 565, 249 S. W. 2d 307, this court quoted with approval from *Wilson* v. *Whitworth,* 197 Ark. 675, 125 S. W. 2d 112, as follows: "This constitutional inhibition cannot be avoided by any trick or device, and the courts will closely scrutinize every suspicious transaction in order to ascertain its real nature; and if it appears that the contract is merely one for the loan of money with the intention on the part of the lender to exact more than the lawful rate of interest, the contract will be declared usurious and void."

Counsel for appellee makes a reasonable and plausible explanation of the transaction going to show that no usurious rate of interest was charged; but the weakness in the argument is that it is assumed Hampton's understanding of the transaction was that a net credit of $450.00 instead of $750.00 was to be allowed on the truck traded in. However, there is no evidence of what Hampton understood, and Mrs. Thompson's evidence is sufficient to make out a *prima facie* case of usury. In *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, this court said:

"What, then, is the effect of a demurrer to the evidence or a similar pleading in jurisdictions recognizing that practice? The question may arise either in equity cases, where the chancellor is the arbiter of the facts, or in cases tried at law without a jury, where also the trial judge decides all issues of fact. By the overwhelming weight of authority it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case."

Appellee's motion to dismiss at the conclusion of the introduction of appellant's evidence should have been overruled. Therefore the cause is reversed.

Mr. Justice WARD dissents.

WARD, J. My dissent to the majority opinion in this case is based upon the following.

First. Apparently it is admitted that appellant's contention of usury is based on the charge that Hampton allowed her as a credit on the truck which she traded in only the sum of $490 whereas she understood and he agreed to allow her a credit of $653. If appellant takes the position that Hampton tricked or deceived her in the matter mentioned then I agree that, if true, this would constitute the basis for the charge of usury. We will discuss this eventuality later. However if appellant takes the position that there was an honest mistake made then she only had the right to sue Hampton for the difference. The record makes it clear that she is not pursuing that remedy. The transcript shows:

"THE COURT: This action is not founded on anything but usury.

Mr. White (attorney for appellant): That is right."

Moreover, if the discrepancy in the amount of credit claimed was a result of a mistake an action in usury

would not lie. In *Perry* v. *Shelby,* 196 Ark. 541 (at page 546), 118 S. W. 2d 849, the court said:

"While it is not necessary that both parties be cognizant of the fact or facts constituting usury, it is necessary that the lender have an intention to charge a usurious rate of interest or be cognizant of the fact or facts which constitute usury."

This court has many times held that a mistake can not be the basis for a suit in usury. *Baxter* v. *Jackson,* 193 Ark. 996, 104 S. W. 2d 202; *Simpson* v. *Smith Savings Society,* 178 Ark. 921, 12 S. W. 2d 890; *Temple* v. *Hamilton,* 178 Ark. 355, 11 S. W. 2d 465; *Gilliam* v. *Peebles,* 144 Ark. 573, 223 S. W. 14; *Aldrich* v. *McClay,* 75 Ark. 387, 87 S. W. 813; *Jarvis* v. *Southern Grocery Company,* 63 Ark. 225, 38 S. W. 148; *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430 and 37 S. W. 569; *German Bank* v. *DeShon,* 41 Ark. 331.

Second. If then no question of a honest mistake is involved appellant must take the position that Hampton in some way induced her to make the trade by deceiving her into thinking she was getting more than $490 credit. Appellant's own testimony conclusively refutes any idea that she was deceived or that she did not know when she made the trade that she was getting credit for only $490. Although appellant and her husband signed an affidavit, shown in the record, stating that Hampton never delivered to either of them "any so called car invoice in connection with the sale of the automobile" and although she repeated this contention in parts of her testimony, when pressed for a more specific answer as to what happened at the time the sale was made she said: "That was Saturday night. He [Hampton] gave me a little white sheet of paper, which was an invoice, had a lot of figures on it, but I didn't pay much attention to the figures. Actually I was so excited about getting the car . . . and I guess I was careless in not going over the figures, but we did go over the invoice after we went for a ride to try out the car and after I went over the figures on the invoice he didn't give me $600 trade in."

Again after being further pressed for details regarding "the little white paper" appellant testified:

"Q. What did the invoice that you received show . . .?

A. It did not show any trade in allowance.

Q. I understood you stated it showed you were allowed a less amount on the trade in than you thought you were entitled to receive?

A. $490 I believe it showed."

It appears from the next to the last paragraph in the majority opinion that this case is being reversed because appellee introduced no evidence to show what credit Hampton meant to give. It is there stated: "but the weakness in the argument is that it is assumed Hampton's understanding of the transaction was that a net credit of $450 instead of $600 was to be allowed on the truck traded in. However there is no evidence of what Hampton understood and Mrs. Thompson's evidence is sufficient to make a *prima facie* case of usury." I cannot understand why the evidence leaves anything to be *assumed* in regard to the credit Hampton meant to give. It is true that he did not testify in this case but that was not necessary since appellant, as shown above, admitted that Hampton gave her a written statement showing the credit which he, Hampton, was allowing her. Since the testimony as to the $490 credit is in the record it makes no difference whether it was produced by Hampton or appellant, except I would say that an admission by appellant has stronger probative value than a statement made by Hampton.

The trial court heard all of appellant's testimony and ruled that she had not made out a *prima facie* case, and I submit that he was absolutely correct.

YARBROUGH *v.* MOSES, EXECUTOR.

5-334 267 S. W. 2d 289

Opinion delivered April 12, 1954.

[Rehearing denied May 17, 1954.]

Snowden, Davis, McCoy, Donelson & Myer and *Wright, Harrison, Lindsey & Upton,* for appellant.

Fred MacDonald and *Sharp & Sharp,* for appellee.

WARD, J. This appeal presents only one issue: Does the evidence support the trial court's finding that William B. Folsom had the mental capacity to execute his will on November 21, 1949. There is no disagreement as to the applicable law, hence the issue is essentially one of fact.

Folsom died May 20, 1953, at the age of 85, seized of an estate of $108,735.75, approximately all of which was in cash. Previously, and about the same time he executed his will, he had deeded his home in Brinkley to that City for a public library. With the exceptions of a few small bequests to individuals Folsom, by his will, provided for

his estate to be used for the maintenance of the library to be established in his former home. The library was to be named after him and his wife, to be known as the "Harriet M. and William B. Folsom Library." The deceased and his wife had lived in Brinkley over 40 years until her death in 1948. During a large portion of this time he was engaged in running a newspaper and was active in civic affairs. He and his wife never had any children, and his closest heirs were the appellants, a nephew and niece. Before setting out the bequest for the library the will provides for the following bequests:

1. Jack W. Yarbrough, Memphis, Tenn. (appellant) $2,000;
2. Miss Ellen Jones Yarbrough, Wynne (appellant) $1,500;
3. Miss Jennie Folsom, McCrory (an aunt) ..... $ 800;
4. Mrs. Maggie Folsom, Memphis ..... $ 500;
5. Reverend O. C. Harvey $2,000;
6. (Certain items of furniture to Hamilton Moses, executor, which were declined).

The will was witnessed by John F. Cole, vice president of the Bank of Brinkley where the deceased did most of his banking business and by Robert Moore, now vice president of the First National Bank of Springdale, Arkansas, but cashier of the Bank of Brinkley in 1949. Both of these witnesses testified that the testator had the mental capacity to execute his will on November 21, 1949, and that there was nothing strange or unusual in his demeanor on that occasion. Both witnesses stated they had known the deceased for something like thirty years, that they had observed his business dealings, and that they observed no impairment of his mind or business ability until he became ill two or three years after the will was executed. These two witnesses were corroborated by several other citizens of Brinkley and business acquaintances of the deceased, including Hamilton Moses who wrote the will, each one detailing their conversations and

dealings with the deceased before and after the date the will was executed.

It would serve no useful purpose to set out the testimony of all of the witnesses on behalf of appellee tending to show William B. Folsom had sufficient mental capacity to execute his will on November 21, 1949. In view of the fact that appellants were unable to produce any substantial testimony bearing on the deceased's testamentary capacity as of that date it suffices to say here that the record discloses ample testimony to support the conclusion that the deceased did have testamentary capacity when he executed the will. The only question remaining is: Is the testimony produced by appellants' witnesses to the effect that the deceased lacked testamentary capacity at certain times some months before and after November 21, 1949 sufficient to overcome appellee's testimony, or, in other words is it sufficient to justify us in holding that the decision of the trial court in favor of appellee is not supported by the weight of the evidence? After a careful review of the voluminous testimony on the part of appellants we have concluded that the question posed above must be answered in the negative.

During the latter part of January 1949 the testator became ill and was sent to the Baptist Hospital in Little Rock where he remained for treatment until about the middle of February of the same year. The doctor's diagnosis showed he was suffering from a bronchial condition and also from arteriosclerosis, that he had fever as high as 103 degrees and was at times confused and disoriented. It is not clear whether his state of confusion was caused by his temperature or other conditions mentioned above. At that time he was 79 or 80 years old and there were circumstances indicating that he was affected by senile dementia. However when he was discharged the doctor stated that he was "perfectly clear mentally."

Beginning during the latter part of 1951 there were definite signs that the testator was in poor health and that he was in need of someone to take care of him, partially because of his mental incapacity and partially be-

cause he was living by himself and had no one to look after him. This condition appeared to grow worse and on October 27, 1952 he was adjudged incompetent and a guardian was appointed. He remained in this condition until he died on May 20, 1953. There is much testimony by appellants, in sharp conflict with testimony offered by appellee, indicating that the testator was far from normal at certain periods of time before and after the will was executed. Appellant Yarbrough testified: I am 48 years old, live at Memphis, am a nephew of the deceased, and have kept in close touch with him through the years; after the deceased was released from the Baptist Hospital in February of 1949 I had occasion to pass through Brinkley and would stop off to see him, he visited me and my family in Memphis during that year and often expressed love and admiration for my wife, our little girl and myself; prior to the death of testator's wife he was well dressed and quite a neat man but his condition changed after her death in March of 1948 when he wore old clothes that needed mending and pressing; his physical and mental decline began approximately at the death of his wife and became progressively worse; when he came to see us in Memphis he would generally ride the bus and come by himself, he wouldn't always come when he said he would, and on most of these occasions he was quite confused and didn't know what was going on; he was an individualist, a strong willed man and very determined in what he wanted to do; he drove a car during 1949 and part of the time he lived by himself; and, in my opinion at no time during the year 1949 was he mentally competent to make a will because he never seemed to be able to grasp anything and keep it in his mind long enough to make a decision. Introduced in evidence, as exhibits to witness' testimony are nine letters written by deceased to witness or his wife, two of which were written in April 1949, two in May 1949, and five in November 1949. The last three letters were dated November 19, November 23 and November 25, and all of the letters are written in the testator's handwriting. The letters appear to be sensibly composed and almost uniformly they expressed love and affection. From these

letters and other testimony it appears that they had under consideration a plan whereby the testator would advance something like five or six thousand dollars to help Jack Yarbrough and his wife provide a suitable home in Memphis in which they would all live.

The testimony of Mrs. Jack Yarbrough did not go into as much detail as that of her husband but was substantially to the same effect.

A number of other witnesses, friends and neighbors who lived in Brinkley, testified to numerous conversations and incidents which tended to indicate that the deceased was not normal during 1949 and 1950. One who had almost daily contact with the deceased noticed a mental and physical change in him after the death of his wife in 1948 and didn't think he was competent to make a will. One lady who lived next door to the deceased for eight years and had almost daily contact with him says that in 1949 he would often lose the keys to his house or would leave them inside the house; she stayed with the deceased and was supposed to receive $175 a month but only got $30; and the deceased did not buy groceries because he said he didn't have the money, and he could not at all times retain in his memory without prompting the nature and extent of his possessions, sometimes he could and sometimes he couldn't. Mr. Malham who operated a hotel at Brinkley just one block from Folsom's home had casual contact with him; Folsom often bought sandwiches and drinks at his place and was never out of order; he had no reason to believe Folsom was incompetent in 1949. Mr. Clifton began working for Folsom in 1921 as a "printer's devil," purchased an interest in the paper in 1943 and continued as a joint owner with Folsom until March 21, 1948 when he purchased Folsom's interest after the death of Mrs. Folsom. Witness saw Folsom frequently from January 1949 to November 21, 1949 and thinks he did not have a good mental condition; he observed a marked change in his physical and mental condition after the death of his wife; prior to his wife's death Folsom was neat and clean but afterwards he was ragged; Folsom never smoked or drank prior to the

death of his wife, he operated on a cash basis and took all discounts. Witness knows that when Folsom deeded his home place to the city he got the description wrong and attempted to convey a portion which he did not own and which he had formerly deeded to him (the witness). Mrs. Stone lives in Memphis and was a cousin of Folsom; she discussed investments with Folsom prior to his wife's death; on one occasion she came to Brinkley at his suggestion to help him make a list of his holdings so he could get his business straightened out; he didn't seem to be able to give her any accurate information; she saw him two or three times in Brinkley in 1949 and had conversations with him and does not think his mental condition was very clear on Christmas day of 1949. Mrs. Mary Thompson lives in Memphis and was a cousin of Folsom; she saw him at Christmas time in 1949 when he came to Memphis; she and Folsom carried on considerable correspondence but when she told him something he would answer as if he did not understand; she called him on November 24, 1949 to ask him to come and eat Christmas dinner but he was not at all well and didn't seem to understand; and in her opinion he did not have mental capacity to transact business or to execute the will. H. L. Cooper, 31 years old, has lived at Brinkley for 27 years, has been engaged in grocery business for eleven years and knew Folsom who traded at his store; he thinks Folsom was a little bit eccentric and unusual all the time he knew him; he was stingy although everybody knew he had lots of money and he was always saying he couldn't afford things; on one occasion in 1950 Folsom gave him a check for $85 when he only owed 85 cents but had never had any similar difficulty before that time. Marie Graves, a practical nurse employed by Dr. Dalton, has lived in Brinkley 25 or 30 years; she nursed Mrs. Folsom for two or three weeks before she died and has never been paid for her services although she tried to collect from Folsom. There is other testimony of a like tenor. John B. Thurman, an attorney of Little Rock, as a representative of an insurance company, represented Folsom in a lawsuit which involved a car wreck; the wreck occurred in 1948 and the suit was tried in June

1949; before trial he went to Brinkley to talk with Folsom about the wreck and to contact an eye-witness which Folsom was to furnish; he talked about two hours with Folsom and had great difficulty in securing satisfactory information; finally Folsom produced a negro who was supposed to be an eye-witness but actually was not and knew nothing about the wreck. When pressed for an answer to what he thought of Folsom's mental capacity to execute a will Thurman stated: "At the end of two hours talking to him [Folsom] in his home I was still unable to get him to talk about the accident and I reached the definite conclusion right then his mental condition was such that I doubted the advisability of putting him on the stand."

Appellants introduced the testimony of two doctors. Dr. Smith who has practiced in Little Rock about 25 years treated Folsom at the Baptist Hospital in Little Rock from January 30th through February 15, 1949. His hospital record shows a diagnosis of acute upper respiratory infection and acute thrombosed hemorrhoids. He found the patient to be 80 years old, disoriented and history not reliable, fairly cooperative and mentally confused. Another diagnosis was bronchial pneumonia, generalized arteriosclerosis and thrombotic hemorrhoids. The patient's chart showed temperatures ranging from 96 degrees to 103.40 degrees. The last notation made on February 15, 1949 reads "condition satisfactory, perfectly clear mentally. General physical condition is excellent. To go home today or when ready." In the doctor's opinion Folsom's confusion and disorientation was precipitated by respiratory infection and that the background would be his age and the general cycle of his becoming mentally aged. The doctor stated that sloppiness in dress, disregard of traffic hazards, anxiety about finances are indications of mental deterioration, and all of these symptoms are typical of arteriosclerotic changes; and that loss of memory and interest in surroundings is also a symptom of senile psychosis and arteriosclerosis. The doctor stated further that X-ray is important in a diagnosis of this kind and that Folsom's X-ray report

showed: "The most marked change however is seen in the aorta as there is quite a marked aneurysmal dilatation of same." When Folsom left the hospital he was, according to the doctor, normal for a man 80 years of age.

Dr. Howard A. Boone, a graduate of the University of Tennessee medical school in 1944, treated Folsom at the Wallace Hospital in Memphis between the dates of October 28, 1952 and March 24, 1953 and saw him daily. His diagnosis was cerebral arteriosclerosis, arteriosclerotic heart disease, and benign prostatic hypertrophy. In his opinion Folsom was a senile individual who was disoriented and incompetent; that his mental condition might have come about recently after a complete occlusion of one of the larger vessels of the brain but was of the opinion that it came about over a considerable period of time as a gradually advancing process.

In rebuttal to the above testimony on the part of the appellants, appellee introduced approximately a dozen witnesses who had known Folsom intimately for years, and particularly during the years 1948 to 1953. Many of these witnesses had numerous conversations along business lines with him shortly before and after the will was executed. They were all of the opinion that during 1949 and part of 1951, excepting the time he was in the Baptist Hospital at Little Rock, Folsom was fully competent mentally to execute the will and that he actually looked after business affairs and took care of himself as any normal man of his age. According to these witnesses Folsom and his wife had for years planned to give their home and their property to the city of Brinkley for the purpose of establishing a memorial library.

As previously stated, the only issue before us is whether William B. Folsom had mental capacity to execute his will on November 21, 1949. While this issue presents primarily a question of fact or a weighing of the evidence, there are certain well defined applicable rules of law, a consideration of which will assist in a proper determination of that issue.

This court has many times defined the *quantum* of mental capacity necessary for a testator to have in order to make a valid will. Briefly stated it is generally said that a testator must have a sound mind and disposing memory.

This definition is generally broken down into three subdivisions and testamentary capacity is more fully defined as the ability on the part of the testator (a) to retain in memory without prompting the extent and condition of the property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he includes in or excludes from his will. *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433; *Scott* v. *Dodson, Executor,* 214 Ark. 1, 214 S. W. 2d 357; and *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405. We have many times held that it is not necessary to show that the testator actually had in mind all the details concerning his property at the time he makes a will but that he had the capacity to know and comprehend the nature and extent. In *Emerich* v. *Arendt,* 179 Ark. 186, (at page 188) 14 S. W. 2d 547, it was stated: "The question is not whether the testator did actually appreciate the deserts of and relation to him of the one excluded but whether he had, at the time, the capacity to do so."

In *Shippen* v. *Shippen, supra,* we said: "The burden of proof in cases of this kind is on the contestant, who asserts the mental incapacity of the testator," and this rule had been announced many times previously.

While old age and physical fitness are proper matters to be considered in an effort to determine one's testamentary capacity yet this court has said many times as was said in *Griffin* v. *Union Trust Company,* 166 Ark. 347, (at page 356) 266 S. W. 289, that:

"Old age, physical incapacity and partial eclipse of the mind will not invalidate a will if the testator has sufficient capacity to remember the extent and condition of his property without prompting, to comprehend to whom he is giving it, and be capable of appreciating the

deserts and relation to him of others whom he excluded from participating in his estate. He is not required to do all these things, but should have capacity to do them."

It has also been consistently held by this court, as was stated in the case of *Scott* v. *Dodson, supra,* that the testator's mental capacity must be adjudged as of the time when his will is executed. It is true of course that testimony of the testator's mental capacity for a reasonable time before and after the execution of the will is ordinarily, as in this case, competent evidence to show what his mental capacity was at the time the will was executed.

When we consider the testimony in behalf of appellants and the appellee, as outlined above, we are driven to the conclusion that the weight of the evidence sustains the trial court's finding to the effect that William B. Folsom had sufficient mental capacity to execute his will on November 21, 1949.

The weight of the evidence shows that the testator in this instance had many times expressed the intention of giving the bulk of his property to establish a library for the town of Brinkley, that he fully comprehended the extent and condition of the property which he owned; that he knew to whom he was giving it; and that he fully realized the relation which he bore to appellants and their natural claim to his bounty. We cannot say that the devises contained in William B. Folsom's will are indicative that he did not act as a normal and reasonable person. We recognize that many of the testator's statements and actions before and after November 21, 1949, particularly when standing alone without any explanation which he might have been able to make if alive, appear strange and eccentric but we are unable to say that they overcome the direct testimony that he was mentally competent to execute his will at the time he did so.

Affirmed.

THE STATE OF ARKANSAS *v.* BOWERS.

4770 266 S. W. 2d 824

Opinion delivered April 12, 1954.

Thos. J. Gentry, Attorney General, and *John R. Thompson,* Chief Assistant Attorney General, for appellant.

S. M. Bone, for appellee.

WARD, J. This appeal challenges the jurisdiction of a municipal court to try a misdemeanor committed under the laws regulating Motor Carriers. It is the contention of appellant that municipal courts have concurrent jurisdiction with the circuit courts, and it is the contention of appellee that circuit courts have exclusive jurisdiction.

Appellee, W. D. Bowers, was convicted and fined $500 in the Municipal Court of Searcy, Arkansas, for violating §§ 8 and 11 of Act 367 of 1941, being respectively Ark. Stats., §§ 73-1709 and 73-1712. Penalty for violation of the Act is fixed by § 22 of said Act 367, being Ark. Stats., § 73-1723. It was charged that appellee, on May 8, 1953, "did unlawfully and wrongfully haul manufactured feed which is a finished product upon the highways of the State of Arkansas, and more specifically in White County, Arkansas, without having a permit from the Arkansas Public Service Commission to haul as a common carrier."

Appellee filed a motion in the Municipal Court to dismiss the charge against him on the ground that said court did not have jurisdiction, and said motion was overruled. An appeal was taken to the Circuit Court of White County, again the same motion to dismiss was made by appellee, and the motion was sustained by the trial judge, and the charge against appellee was dismissed. The State of Arkansas prosecutes this appeal for a determination of the question of jurisdiction as above stated.

No question of fact is involved and the only question for us to decide is the question of law.

The basis upon which appellee rests his argument to sustain the trial court is the last sentence in said § 22 of said Act 367 (Ark. Stats., § 73-1723) which reads as follows:

"(h) The several Circuit Courts of this State shall have jurisdiction of prosecutions arising from alleged violations of this act."

To sustain his position appellee quotes from 50 Am. Jur., §§ 244, 246, 357, 358, 429; *Continental Casualty Co.* v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426, 62 S. Ct. 393; and headnotes from *Ledbetter* v. *Hall*, 191 Ark. 791, 87 S. W. 2d 996, and *LaFargue* v. *Waggoner*, 189 Ark. 757, 75 S. W. 2d 235. The general tenor of the cited authorities is to the effect that in construing statutes the courts will give efficient operation and effect to all parts so as to render no word or phrase useless or meaningless, and that the courts should arrive at the real intent of the lawmakers. From one authority appellee quotes: "Generally speaking a legislative affirmative description implies denial of the non-descriptive or non-described powers." From this line of reasoning appellee concludes that the latter portion of § 22 of Act 367 as quoted above would be rendered useless and non-operative if it is interpreted as appellant contends it should be interpreted. In other words, as contended by appellee, it was a vain thing for the Legislature to enact the sentence mentioned above unless we interpret it to mean that the Circuit

Courts have exclusive jurisdiction. Appellee also would distinguish the case under consideration from the cases which we will later refer to on the ground that the Arkansas Motor Vehicle Act deals with civil matters and not primarily with criminal matters.

We are unable to agree with appellee's contentions, and in our opinion the court erred in sustaining appellee's motion to dismiss.

First. We think there was a special reason for the Legislature to enact Subsection (h) of § 22 of Act 367 to the effect that "the several Circuit Courts of this State shall have jurisdiction of prosecutions . . ." In Subsection (b) of the same section it is provided that the Chancery Court of Pulaski County shall have statewide jurisdiction in certain matters. In view of this provision it can be reasonably assumed that the Legislature enacted Subsection (h) to make clear that *all* the circuit courts of the state would have jurisdiction. The use of the word *several* in Subsection (h) supports this view, otherwise the word *several* would be surplusage.

Second. It will of course be conceded that, aside from any consideration of the language in said Subsection (h), the law places jurisdiction to try misdemeanor cases in Justice of the Peace Courts, Municipal Courts, and Circuit Courts. Since there is nothing in said Act 367 (or amendments thereto) expressly abrogating the jurisdiction of Municipal Courts, such abrogation, if it exists, must be by implication. But, as stated in *Martels* v. *Wyss,* 123 Ark. 184, 184 S. W. 845, and *Gans* v. *State,* 132 Ark. 481, 201 S. W. 823, statutory repeal by implication is not favored. In the *Martels* case, at page 187 of the Arkansas Reports, the court said:

"Repeals by implication are not favored, and when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible to both. It is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced, that the last one

enacted will supersede the former and repeal it by implication."

Third. This court has previously considered substantially the same question presented here and has resolved it against the contention of appellee.

In the *Gans* case, *supra,* appellant was fined $100 in the Municipal Court of Little Rock for a violation of Act 13 of 1917, known as the "Bone Dry" law. The sole question presented to this court was [as stated by the court] "whether or not the municipal court has jurisdiction of causes arising, under § 15 of the above act." Said § 15, in all parts material here, reads: "The circuit court held in the county from which, through which, or to which such shipments are made, shall have jurisdiction for the trial of such violations of this act . . ." It was there urged, as here, that by conferring jurisdiction on circuit courts the Legislature intended to confer exclusive jurisdiction to the exclusion of municipal courts. In rejecting this contention, we said:

"The act under which appellant was convicted, while conferring upon the circuit court jurisdiction, did not in express terms say that it was an exclusive jurisdiction. This the Legislature would have done if it had intended to make such jurisdiction exclusive. The two acts conferring jurisdiction are not repugnant to each other, and unless they were so it is our duty to so construe them as to allow them to stand together. Repeals by implication are not favored."

The issue in the *Gans* case was substantially the same as the one considered, with the same results, in *McCracken* v. *State,* 146 Ark. 300, 227 S. W. 8 (on rehearing). In approving the holding in the *Gans* case, the court stated the question and its conclusion, at page 309 of the Arkansas Reports, this way:

"It is also urged that the justice of the peace had no jurisdiction of the offense charged in the information. Counsel rely on the language of the statute which provides that when any person obstructs a public road 'he

shall be guilty of a misdemeanor and liable to indictment in the circuit court of the proper county,' etc. That part of the statute which reads that the person 'is liable to indictment in the circuit' was not intended to confer exclusive jurisdiction on that court, for the other language of the statute in express terms declares the offense to be a misdemeanor."

Subsection (h), § 22 of Act 367 of 1941, conferring jurisdiction on circuit courts is not repugnant to existing jurisdiction in municipal courts. As stated in *Adams* v. *State,* 153 Ark. 202 (at page 205), 240 S. W. 5: "There are many instances of the circuit court and other courts having concurrent jurisdiction"; and ". . . jurisdiction conferred upon one court does not operate to oust other courts otherwise possessing it."

Fourth. Any possible doubt that the Legislature, by the enactment of said Subsection (h), meant to leave undisturbed the jurisdiction of inferior courts over misdemeanors, seems to have been resolved against appellee's contention by the Legislature itself by the passage of Act 368 of 1953, which Act amends said Act 367 in certain particulars. In Subsection (j), § 7 of Act 368, the jurisdiction of justice of the peace courts is specifically recognized. The language there used clearly indicates a recognition of existing jurisdiction and cannot reasonably be interpreted as conferring jurisdiction where none existed. With some exceptions not material here the law confers the same jurisdiction in misdemeanor cases on justice of the peace courts and municipal courts.

In view of what has been said the judgment of the trial court must be and it is accordingly reversed.

MEEKS *v.* ZIMMERMAN.

5-367 266 S. W. 2d 827

Opinion delivered April 12, 1954.

Wright, Harrison, Lindsey & Upton, for appellant.

Henry & Long, for appellee.

ROBINSON, J. Frank R. and Edith B. Zimmerman, husband and wife, recovered judgments against the appellant, Ben G. Meeks, for damages sustained in an automobile collision on March 2, 1953. There was a judgment for Mr. Zimmerman in the sum of $2,000.00 and one for Mrs. Zimmerman in the sum of $8,500.00. On appeal appellant relies on one point, and that is the contention that the judgments are excessive.

The Zimmermans live in East St. Louis, and they both work in a chemical plant. They have three children, and at the time of the collision Mrs. Zimmerman was 3 months pregnant. They had been to Mardi Gras at New Orleans, and were returning to their home when the collision occurred.

As to the $2,000.00 judgment in favor of Mr. Zimmerman, viewing the evidence in the light most favorable to him, it appears that his special damages, consisting of loss of time, property damage, etc., amounts to $1,022.26. This leaves $977.74 awarded to him for pain and suffering. It does not appear that he suffered personal injuries of any consequence. He was not confined to the hospital for any time at all, nor does it appear that the injury, which involved his knee, was exceptionally painful. There were no broken bones nor dislocations; in fact, there is no substantial evidence that would justify an award for pain and suffering for more than $200.00.

When this amount is added to the $1,022.26 for special damages, it makes a total of $1,222.26 and the judgment in his favor should be reduced to that sum.

In regard to Mrs. Zimmerman, she was knocked unconscious by the collision and was taken to the hospital in an unconscious condition; she was in a state of shock. Her body was swollen and sore. Her wedding ring was mashed on her finger. Her lip was torn open; her chin was cut open. She was bruised about the body and there was danger of a miscarriage as she was 3 months pregnant at the time. Her lip and chin had to be sewed up; she was confined to the hospital for 4 days and 2 additional days in the hotel before she could be removed to her home in St. Louis, where the stitches in her lip and chin were removed. She had a blood test in an effort to determine if her unborn child was injured. While in the hospital she suffered what appeared to be labor pains, and there appeared to be great danger of a miscarriage. In addition to physical pain she suffered mental anguish by reason of this condition. She has scars on her lip and chin which will be permanent unless plastic surgery is resorted to. The lip was cut all the way through. Lipstick irritates the damaged condition of the lip; therefore she cannot use cosmetics of that kind. She has difficulty in eating, especially soup. She was nauseated for weeks and on vomiting tore open her lip. She has difficulty in pronouncing certain words and has a hard knot in the scar on her chin. She was confined to her bed continuously for 3 weeks, and at the time of the trial, which was held on July 24, 1953, had been in bed off and on since the date of the injury.

For these injuries she was awarded $8,500.00. Twelve jurors arrived at the verdict for that sum in a trial that appears to have been absolutely fair in every respect. In *Norris* v. *Johnson,* 214 Ark. 947, 218 S. W. 2d 720, this court said: "We have often said the amount of damage to be awarded for personal injuries rests largely in the discretion of the trial jury. . . . It is only when the amount awarded is, under the testimony, so excessive as to raise a presumption that the jury fixed

it as a result of prejudice, rather than from a deliberate consideration of the evidence, that we may require reduction thereof."

In *Coca-Cola Bottling Co. of Arkansas* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771, it is said: "The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability as he had sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained."

In *Missouri Pacific Railroad Co.* v. *Hendrix,* 169 Ark. 825, 277 S. W. 337, it is said: "The element of pain and suffering is one which must be left largely to the sound judgment of a trial jury, and the conclusion reached by the jury as to the proper amount should not be disturbed unless the award is clearly excessive."

Considering the testimony as a whole, we are unable to say that the award to Mrs. Zimmerman is excessive, and the judgment in her favor is affirmed. The majority of the court is of the opinion that the judgment in favor of Mr. Zimmerman should be reduced to $1,222.26. Mr. Justice MILLWEE is of the opinion that neither judgment is excessive and Mr. Justice WARD is of the opinion that

the judgment in favor of Mrs. Zimmerman as well as the judgment in favor of Mr. Zimmerman is excessive.

If within 15 judicial days, a remittitur of $777.74 is entered by Mr. Zimmerman, his case is affirmed. Otherwise his cause is reversed and remanded for a new trial.

SCURLOCK, COMMISSIONER OF REVENUES *v.* GREENE COUNTY.

5-384 266 S. W. 2d 811

Opinion delivered April 12, 1954.

O. T. Ward, for appellant.

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

GEORGE ROSE SMITH, J. This is a claim filed by the appellant, as Commissioner of Revenues, to recover severance taxes in the sum of $192.56, assertedly owed to the State by Greene County. The agreed facts are that the county, having purchased gravel from various landowners, removed the gravel itself and used it solely for the construction and maintenance of county roads. The county court's denial of the claim was affirmed by the circuit court.

We regard as controlling the decision in *McLeod* v. *Kansas City So. Ry. Co.,* 206 Ark. 281, 175 S. W. 2d 391. There the railroad employed others to sever gravel from the railroad's own lands, and the stone was used by the railroad as ballast. The statute then in force imposed the severance tax, as an occupation tax, upon persons engaged in the business of severing natural resources for commercial purposes. Pope's Digest, §§ 13371 *et seq.*

We concluded that the railroad, in having its own gravel severed for its own use, was not engaged in business of a kind falling within the purview of the statute.

Some three years after that decision the General Assembly reënacted the severance tax law in its present form. Ark. Stats. 1947, Title 84, Ch. 21. The nature and the incidence of the tax have not been changed. It is still levied upon those who are engaged in the business of severing natural resources for commercial purposes. Section 84-2101 (c) and (f). As before, one who desires to engage in that business must apply to the Commissioner for a permit. Section 84-2103. If, as we held in the *McLeod* case, a private corporation mining gravel for use in its own business is not subject to the tax, still less is there reason to think that the State meant to tax one of its political subdivisions, a county, which severs gravel not for sale or other commercial purpose but only for use upon the public highways. Had the Legislature intended to broaden this field of taxation it would not have resorted again to substantially the same language that was construed in the earlier case.

Affirmed.

PROVINCE *v.* DEAN.

5-373 266 S. W. 2d 812

Opinion delivered April 12, 1954.

Percy A. Wright, for appellant.

Claude F. Cooper, for appellee.

MINOR W. MILLWEE, Justice. Appellants listed their five-room brick home with appellee, T. F. Dean, a real estate broker, on January 16, 1952. The listing was exclusive, of 90 days duration, and provided for the usual 5% commission to the broker in the event of a sale within that period. The property was sold to a Mrs. Chism on April 12, 1952, for $11,000 in cash and certain property valued at $7,000. Dean and appellee, Kemp Whisenhunt, another real estate broker, who allegedly found the purchaser for the property, brought this action against appellants, seeking to recover the 5% commission provided for in the contract. The verdict and judgment were in favor of appellees for $850.

The testimony of the opposing parties is sharply conflicting. Viewing the testimony, as we must, in the light most favorable to appellee, the facts are these:

Whisenhunt had recently found a buyer for a brick house similar to appellants', so appellant, J. W. Province, called him and told him about the property appellants had listed with Dean. Whisenhunt told them he might have some prospective buyers and that if he sold the house before Dean's listing expired, he and Dean would split the commission; appellants were to give Whisenhunt an exclusive listing after Dean's listing expired.

Whisenhunt found a prospective buyer, Mrs. Chism, and showed her the property, quoting a price of $18,000. Mrs. Province helped show the house to Mrs. Chism and Mr. Jones, who was to finance the transaction for her. Mrs. Chism made a contract of sale with appellants on

April 5, 1952, and the deed transferring the property was executed April 12, 1952.

After the contract of sale was made, and before the deed was executed, Mr. Jones went to Mr. Dean and gave him $100, saying that Dean was "getting the run-around." It is at this point that the parties' testimony most widely differs. Dean testified that he accepted the money, but stated positively to Mr. Jones that he still expected his commission. Jones testified, by deposition, that the $100 was paid for the relinquishment of Dean's listing contract.

Appellants contend that the trial court should have declared a mistrial because of misjoinder of parties plaintiff. They argue that any contractual rights of the appellees are several and not joint. Appellants at no time prior to judgment called this objection to the attention of the court, and misjoinder of parties is first urged in their motion for new trial. It is unnecessary to determine whether appellees were properly joined as plaintiffs in this action under Ark. Stats., 27-806 which recites: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. . . ." As stated in 39 Am. Jur., Parties, § 119: "It appears to be quite generally held that objection to a misjoinder of parties plaintiff should be interposed before judgment, otherwise, it is deemed to be waived, especially where no prejudice could arise to the defendant from the alleged misjoinder. After a judgment has been entered in favor of several plaintiffs, an objection that one of the plaintiffs had no interest in the action and was therefore improperly joined cannot be successfully urged. Such an objection cannot be taken advantage of in a reviewing court." See also, 67 C. J. S., Parties, § 133. If there was a misjoinder of parties plaintiff in the case at bar, it was clearly waived by a failure to raise it in the proper time and manner.

Next appellants contend that the court erred in submitting to the jury an improper form of verdict in which they were to find, if they found for the plaintiffs, in an amount equal to 5% of $18,000.00. It is argued that there was conflicting evidence as to what the property sold for and that this was a question for the jury. It should be noted that the verdict of the jury was apparently for 5% of $17,000.00 and not 5% of $18,000.00 as contended by appellants; and we are unable to ascertain from the record whether the amount of $850.00 was written in by the court or the jury. There was no objection to any instruction given. Nor was there any objection to the form of the verdict until the motion for a new trial. We have held that such an objection must be made when the jury is directed to return a verdict, and that an objection made for the first time in the motion for new trial comes too late. *Garst* v. *General Contract Purchase Corp.,* 211 Ark. 526, 201 S. W. 2d 757.

Appellants also insist that the court abused its discretion in refusing to grant them a new trial on the grounds of newly discovered evidence. In this connection appellants alleged in the motion for new trial, "that since the trial of this cause they have discovered new evidence which was not known to them at or prior to the trial of this cause and which evidence is invaluable to them in the proper defense of this case." There is no statement in the motion for new trial, or anywhere else in this record, as to the nature of the alleged newly discovered evidence, and nothing to indicate whether it meets the requirements laid down by this court. Nor is the allegation of appellants' motion sustained by "affidavits or other competent testimony" as required by Ark. Stats., § 27-1905. The failure to meet this statutory requirement justified the overruling of the motion for new trial on the ground of newly discovered evidence. *Jones* v. *Gaines,* 92 Ark. 519, 123 S. W. 667; *Mangrum* v. *Benton,* 194 Ark. 1007, 109 S. W. 2d 1250.

It is also argued that there is no substantial evidence to support the verdict. In our opinion the evidence offered by appellees was sufficient to sustain a finding by

the jury that there existed a valid contract, never released, under which the appellants were obligated to pay appellees the amount recovered.

The judgment is affirmed.

BAKER *v.* WOOD.

5-368 267 S. W. 2d 765

Opinion delivered April 19, 1954.

[Rehearing denied May 31, 1954.]

Reece Caudle and *Richard Mobley,* for appellant.

Shaw & Spencer, for appellee.

GRIFFIN SMITH, Chief Justice. Two issues are present: (1) Did the probate court err in refusing to remove Olen R. Wood as executor of the estate of Irvin V. Tenison? (2) Was the court's determination that Wood did not use improper influence to induce execution of the will against the weight of evidence?

Separate appeals were taken. By administrative order the first was withheld from submission until the second could be considered with it, although the two were not consolidated.

Tenison died November 6, 1952, in his 69th year. His will was executed June 13, 1951. Shortly thereafter a codicil corrected the spelling of certain names that had been erroneously typed. The codicil also mentioned that the testator had instructed his friend, Olen R. Wood, to place his body in a double-strength steel casket and vault, "and lay me to rest by the side of my beloved wife in Memorial Park Cemetery". Mrs. Tenison had died in 1949.

The will, as distinguished from the codicil, contained a similar expression. In addition it asked that the First Christian and First Presbyterian Churches of Mena permit joint funeral services at the Christian Church, the last rites to be supervised by Dallas [Masonic] Lodge No. 128. This sentence appears: "I request that Olen R. Wood acquire from Beasley-Wood Funeral Home a vault for the remains of my body, similar to the one in which the remains of my deceased wife were laid to rest".

The testator bequeathed to each of the churches heretofore identified $500. Two hundred dollars went to the Mena Park Commission, $500 to the Masonic Lodge, $600 to one sister, $700 to another, $1,500 to a third, and to a niece of Mrs. Tenison $2,500 and a half interest in a lot in Mena. Each of two nephews was given one dollar. As stated by the appellants, Olen R. Wood is to receive as a tenant in common half of real

estate valued at $2,500 and $700 in cash. Wood was also to receive a diamond ring. He was to serve as executor without bond. During one of the trials it was stipulated that validity of personal bequests to the executor would be the only challenged items, reserving, of course, the contention that Wood's personal interests were antagonistic to his trust status.

A procedural controversy arose during the second trial (appeal number 368) when on direct examination Wood was asked what arrangements, if any, Tenison had made for his own funeral. Counsel for appellants insisted that our decisions construing § 2 of the schedule to the constitution were infringed when Wood, over appellants' objection and exceptions, was permitted to testify that Tenison, in purchasing a burial policy for $300 from the Beasley-Wood Funeral Home, asked whether he could have the same kind of a funeral that Beasley-Wood had provided for Mrs. Tenison. The complete question was: "What arrangements, if any, did Mr. Tenison make with reference to his own funeral?"

There was no dispute that the burial policy had been purchased. During the first and second trials testimony almost identical in many respects was given. On cross-examination by appellants Wood was asked regarding transactions with Tenison. Stress was placed upon testimony of other witnesses who said they had heard Tenison say he had paid Wood $1,200 to cover funeral expenses. We are asked to consider the two appeals in parity. To do this it is impossible to exclude parts of the testimony that appellants themselves developed and to say that as to it the Dead Man's Statute, so-called, is applicable.

It is not disputed that after Mrs. Tenison's death Wood and the surviving husband became close friends. Witnesses testified they had heard Tenison say that Mr. and Mrs. Wood were the best friends he had. He frequently expressed appreciation of their acts of kindness. At odd times Tenison would stay at the funeral home or sit for hours talking with acquaintances. He

had undoubtedly selected the kind of casket he wished to be buried in and had shown it to several persons. But the evidence that he had prepaid his funeral is partly hearsay and partly dependent upon statements that Wood admitted such an arrangement had been made. The trial court was not impressed with this testimony, and we do not think its rejection was arbitrary or that when all of the evidence is considered it can be said to preponderate in favor of the claim of prepayment.

In 1951 Tenison placed $500 with Wood in anticipation of expenses that might accrue during an illness. It was shown that with the exception of $33.26 the money had been appropriately spent for Tenison's benefit. Wood testified that he undertook to return the difference and that Tenison told him to keep it for his trouble. This explanation is not inconsistent with the relationship that was shown to have existed at that time.

G. W. Liles, a minister of the United Pentecostal Church at Mena, testified that Tenison had been a roomer and boarder in his home after Mrs. Tenison's death, and that Tenison had offered to leave some if not all of his estate to him on condition that certain ecclesiastical services would be performed. The minister says he refused the offer because Tenison smoked—a violation of the church rules. Tenison had also told him that he would remember the minister's son in his will to an extent sufficient to aid with the young man's education.

Liles said that on one occasion he looked through a window of Tenison's room and saw him counting money. There were several large envelopes. Liles did not know what the unopened envelopes contained, but assumed that they were used by Tenison in connection with his supposed habit of hoarding money. The envelopes were taken from a box ordinarily kept in Tenison's trunk. This box, according to Liles, was taken to the Beasley-Wood Undertaking Parlors for safekeeping.

Liles also testified that Mr. and Mrs. Wood had visited Tenison in his room, that on one occasion he over-

heard conversations regarding a will, and that seemingly Wood objected to certain bequests Tenison had in mind, believing them to be too liberal. He thought Tenison was drinking on this occasion, and knew that after Mrs. Tenison's death his boarder occasionally took a "bracer" —usually early in the morning. A bottle of brandy was found by Wood in Tenison's trunk while a search was being made for burial clothes, and there were indications that other containers had been utilized by Tenison. Wood offered to give the liquor to a third party.

Liles and other witnesses called by the plaintiffs thought that Tenison, although ordinarily strong-willed, could be easily influenced through friendship and whiskey. They admitted, however, that he was not mentally impaired and that he usually had definite views not easily changed. Witnesses called by the defendant regarded Tenison as a man of high character, calm reasoning, definite purposes, and mentally alert.

We agree with the probate judge that the evidence was not sufficient to justify removal of Wood as executor or to establish undue influence in the procurement of bequests. Neither do we think prepayment of the funeral costs was shown by convincing testimony. In naming Wood executor Tenison selected Lowrey Embry as executor in succession to serve in the event of Wood's death. The court felt that the designation of Embry as co-executor would be advantageous. There is no appeal from this action.

Evidence sufficiently shows that Tenison's will was his voluntary act. Wood was not present when it was written or executed. The drafting attorney followed the testator's instructions in all essentials and it is difficult to see how the trial court could have reached a different conclusion. Wood's good character was avouched by a number of witnesses who had known him for years as an upright, honorable business man.

We are not able to say that the trial court incorrectly appraised the testimony, hence the judgments must be affirmed.

KNAUS *v.* KNAUS.

5-302 267 S. W. 2d 16

Opinion delivered April 19, 1954.

Martin K. Fulk, for appellant.

Townsend & Townsend, for appellee.

GEORGE ROSE SMITH, J. In the court below the appellee, William A. Knaus, obtained a divorce upon the ground of three years separation. The only contention now made is that Knaus had not been a *bona fide* resident of Arkansas for two months before the suit was filed.

The parties were married in 1941 and lived together for a few months in Library, Pennsylvania. The appellee then entered the military service and remained in the army until his discharge in 1948. It is conceded that the couple have not lived together since the year 1945.

In 1949 the appellee brought suit for divorce in Pennsylvania, and while that case was pending the appellant sued in the same court for a limited divorce. The cases were tried together, resulting in a decree, entered on July 22, 1952, by which relief was denied to both parties.

On June 24, 1952—about a month before the decision in the Pennsylvania cases — the appellee had moved to Little Rock, Arkansas. The present suit was

filed on August 28, 1952. On the jurisdictional question the appellee offered testimony to show that he had resigned his job in Pennsylvania, that he had moved his belongings to Arkansas, that he had obtained employment here, opened a bank account, rented an apartment, paid taxes, and done other things tending to show that he had become a permanent resident of this State. This testimony is substantially undisputed. There is no reason for us to extend this opinion by a detailed review of the evidence. As in most cases of this kind, turning upon a question of subjective intent, the issue is not free from doubt and might with some plausibility be decided either way. The chancellor concluded that the appellee is acting in good faith, and we cannot say that his conclusion is contrary to the weight of the testimony. In several respects the case is similar to *Kirk* v. *Kirk,* 218 Ark. 880, 239 S. W. 2d 6, where we upheld the chancellor's finding that the plaintiff had established his domicile in Arkansas.

The appellant contends that, in determining the length of the appellee's residence in Arkansas, we should exclude the twenty-eight days between his arrival in this State and the dismissal of his Pennsylvania suit. We do not think that an inflexible rule to that effect would be sound law. A change of domicile occurs when physical presence in the new jurisdiction is accompanied by the intention of remaining there. That one who migrates to another state leaves behind him a pending divorce suit may have a very significant bearing upon the issue of intention, as we pointed out in *Walters* v. *Walters,* 213 Ark. 497, 211 S. W. 2d 110; but this one fact cannot be regarded as conclusive. Here the appellee cites decisions of inferior Pennsylvania courts to show that there a plaintiff's suit for divorce does not abate upon his removal to another state during the pendency of the case. If that is the law of Pennsylvania the appellee was at liberty to come to Arkansas when he did, and even if the law were otherwise the appellee by his exodus merely risked the abatement of his Pennsylvania suit. For us the question is whether Knaus

came to Little Rock with the intention of remaining here, and we are not convinced that the pendency of the earlier case outweighs the many facts supporting the chancellor's decision.

Affirmed.

McFaddin, J., dissents.

Hawkins *v.* State.

4768 267 S. W. 2d 1

Opinion delivered April 19, 1954.

Bates & Bates and *John E. Harris,* for appellant.

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

J. Seaborn Holt, J. A jury convicted appellant of the crime of carnal abuse under § 41-3406, Ark. Stats. 1947, which 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." His punishment was fixed at a term of three (3) years in the State Penitentiary, and from the judgment is this appeal.

—(1)—

For reversal, appellant first contends that the evidence was not sufficient to convict. We do not agree. The prosecuting witness, appellant's daughter, became sixteen years of age April 3, 1953. The present charge was filed April 6, 1953. She testified positively that her father had been having intercourse with her since she was nine years of age, and for the past seven years. A physician testified that he examined this little girl, and, in his opinion, she had had sexual intercourse. It was not necessary for a conviction that her testimony be corroborated, since appellant could be convicted on her testimony alone. *Clack* v. *State,* 213 Ark. 652, 212 S. W. 2d 20 and *Willis* v. *State,* 221 Ark. 162, 252 S. W. 2d 618. Appellant stoutly denied the truth of her statements and thus was made a question of fact for the jury. *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813.

—(2)—

Appellant next argues that the State failed to prove that the act (or acts) had been committed within the three years next before the information was filed. The prosecuting witness testified: "How long had this been

going on? A. Ever since I was nine years old. Q. How many years had that been? A. About seven years." She further testified: "Q. Just tell this jury now what happened on or about January 18, 1953, where you all had been, your mother, and sisters, where you wanted to go, what preparation you made, and what took place, if anything, between you and your father. A. I don't know if I remember that exact date or not, but I think it was the night I and my brothers and sisters went to my cousin's house to stay all night. My father was drunk that night and he came there to get us to go to the show and I went back by the house to change my blouse and he came back in there and had sexual intercourse with me." This evidence was sufficient to warrant the jury in finding that the act of intercourse occurred within the three-year period prior to filing the information.

—(3)—

Appellant also questions the jurisdiction of the court to try the case on the charge of carnal abuse, contending that it is undisputed that appellant is the father of the prosecuting witness and that the alleged crime was that of incest (§ 41-811, Ark. Stats. 1947) and not carnal abuse. We do not agree. In a fact situation, in effect, the same as here, we recently held in *Willis* v. *State,* above, that a father might be convicted of carnal abuse where the victim of his lust was his own daughter. The above § 41-3406 makes no distinction as to consanguinity, but makes it a crime to carnally know or abuse "any female person" under the age of sixteen years.

—(4)—

Next appellant says that the court erred in excluding the testimony of Preston Hawkins, appellant's twelve-year-old son, to the effect that his mother's sister, Mrs. Miller, had told him and appellant's other children to " 'swear anything even to lies, against their daddy to send him to the penitentiary, and if they did not do so, he and the other children would be sent to the Reform

School,' for the reason that said testimony was a part of a scheme and plan to get rid of the defendant so that their mother and entire family of children could get on the welfare, * * *'' and that ''this conspiracy was relevant to the ultimate question of whether the jury would believe prosecuting witness, or not.''

The record reflects that the prosecuting witness was never asked directly or, in effect, the above question propounded to Preston, — that is, — whether Mrs. Miller had told appellant's children to ''swear anything even to lies,'' against their father. No foundation was laid for this testimony which was intended to impeach the prosecuting witness. The fact that Mrs. Miller, a third party, might have been prejudiced against appellant could not be shown for the purpose of impeaching the prosecuting witness. ''A witness cannot be impeached by evidence tending to show that a third person was prejudiced against the accused,'' *Benton* v. *State,* 30 Ark. 328, (Headnote 4). We therefore find no merit to this contention.

—(5)—

Error was also alleged in the court's refusal, upon objection by the State, to allow the appellant to answer the following question: ''Thurman, I will ask you, do you know or have you knowledge of any threats being made to you or members of your family by the Welfare Department or by Mrs. Miller?'' The record shows exceptions saved by appellant to the court's ruling, but appellant made no offer to show what appellant would have said had he been permitted to answer. We have nothing on which to base error on the ruling of the court. *Baldwin* v. *State,* 119 Ark. 518, 178 S. W. 409 and *Wooten* v. *State,* 220 Ark. 755, 249 S. W. 2d 968.

—(6)—

Appellant says error was committed by the court in refusing to allow John Hawkins to answer the following question: ''Has any of the Hawkins' family ever been charged with a felony?'' The record shows the

following testimony for appellant by witness, Hawkins, on direct examination: "Q. Mr. Hawkins, has Thurman ever been arrested to your knowledge, charged with a felony before this case? A. No, sir. Q. Has any of the Hawkins' family ever been charged with a felony? MR. GUTENSOHN: I object. THE COURT: Objection sustained." Again appellant made no offer to show what witness would have said had he been allowed to answer. What we said in paragraph —(5)—, above, applies with equal force here.

—(7)—

Finally, it is argued that: "The court erred in sustaining an objection by the State to the testimony of Mr. Charles Evans to the effect that about three years ago, while he lived near the defendant's home, he saw Johnnie Lou Hawkins and Wanda Faye Hawkins, daughters of the defendant and prosecuting witnesses, slip away from their home after dark, come by his house, enter cars with boys in them, and leave, as this was an impeachment of the witnesses, the foundation having first been laid by asking said witnesses if such were true, to which they replied 'no'."

It appears that on cross examination by appellant's counsel, the prosecuting witness and a younger sister both denied having slipped away from home at night to go out with boys and appellant sought to contradict this testimony by Evans' evidence. The court properly refused Evans' testimony, in the circumstances. While a witness may be questioned as to certain specific acts for impeachment purposes, however, if such matters are collateral to the issue, as here, such witness may not subsequently be contradicted by a witness of the party (appellant here) putting the question. The examiner is bound by the answer given. *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684, and *Bevis* v. *State,* 209 Ark. 624, 192 S. W. 2d 113.

In the McAlister case, we held: "While it is proper to permit a witness to be asked as to specific acts affecting his credibility, yet if such matters are collateral

to the issue, he can not, as to his answer, be subsequently contradicted by the party putting the question." (Headnote 2).

Finding no error, the judgment is affirmed.

BLACKBURN *v.* FORD.

5-372 267 S. W. 2d 519

Opinion delivered April 19, 1954.

[Rehearing denied May 24, 1954.]

Wiley W. Bean and *O. S. Blackburn,* for appellant.

W. J. Morrow and *Mark E. Woolsey,* for appellee.

ED. F. MCFADDIN, Justice. This suit involves claims of rival litigants for the minerals under 120 acres of land in Johnson County; but we do not reach the main issues because of procedural defects. The appellee has moved to strike the Bill of Exceptions and affirm the case; and that motion must be granted.

The cause was heard by the Chancery Court on evidence *ore tenus* on June 9, 1953; and at the conclusion of the testimony, the Court took the cause under submission for later decision. The decree was rendered after due notice to all parties, and filed with the Chancery Clerk on October 13, 1953.[1] In the decree there was no time given for filing the Bill of Exceptions. The transcript, containing the purported Bill of Exceptions, was filed in this Court on December 3, 1953, and an appeal prayed on

[1] In *Meadows* v. *Costoff,* 221 Ark. 273, 252 S. W. 2d 825, we cited cases to the effect that under such circumstances as these, the decree dates from its filing.

the transcript: the appellant electing to pursue the old procedure rather than that contained in Act 555 of 1953.[2]

There is nothing in the transcript to show that the Bill of Exceptions was ever submitted to or approved by opposing counsel or the Trial Court, as is required by Act 139 of 1951. In *Bolls* v. *Craig,* 220 Ark. 880, 251 S. W. 2d 482, and in *Meadows* v. *Costoff,* 221 Ark. 273, 252 S. W. 2d 825, we held that Act 139 of 1951 was ruling as to all Chancery cases. In the case at bar, the time for obtaining such approval of the Bill of Exceptions has now expired, so the Motion to Strike the Bill of Exceptions is granted. There is no error apparent on the face of the record, so the decree is affirmed.

[2] Such election was permissible as to judgments or decrees rendered before January 10, 1954.

CULLUM *v.* VAN BUREN COUNTY.

5-381 267 S. W. 2d 14

Opinion delivered April 19, 1954.

C. V. Jones and *Opie Rogers,* for appellant.

Alton Bittle, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal by a landowner from a judgment, based on a Jury Verdict, that refused to award the landowner any damages for his property taken for highway purposes.

The County Court of Van Buren County made an order [1] for the relocation of State Highway No. 9 which resulted in taking approximately one acre of Cullum's land. His claim for $5,000 damages was entirely disallowed by the County Court. On appeal to the Circuit Court, the case was tried to a Jury, and from a judgment adverse to Cullum, he brings this appeal.

I. *Sufficiency of the Evidence to Sustain the Verdict.* The evidence showed—*inter alia*—that State Highway No. 9, as relocated, went *through* Cullum's land instead of *along side* it, as theretofore; that as a result of the relocation, Cullum's store was left some distance from the new road; that his lands were cut into small and irregular parcels and subject to overflow; that his well was taken because it was in the right-of-way; and that some of his fences and trees were destroyed. Against all these matters of damage, the County claimed that Cullum had received special benefits to his land by reason of the new road; and that the special benefits far exceeded all of his damages. The County Judge; John H. Johnson, in testifying that Cullum's benefits to his remaining lands exceeded all of his damages, said: ". . . in fact, I think his property is worth more." Likewise, the witness, Joe Hall, testified: "I would say the benefits would outweigh the damages he has sustained. . . ." By consent, the Jury viewed the premises before returning its verdict. In the light of the foregoing, we conclude that the evidence was sufficient to sustain the verdict.

Art. 2, § 22, of the Constitution of Arkansas states: ". . . private property shall not be taken, appropriated or damaged for public use, without just compen-

[1] See § 76-510, Ark. Stats.

sation therefor." But our cases hold that when the benefits to the remaining property exceed the damages resulting because of the property taken, then the landowner has received "just compensation." See *Cate* v. *Crawford County,* 176 Ark. 873, 4 S. W. 2d 516; *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S. W. 62; and *City of Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78.

II. *Instructions.* Among other Instructions, the Court gave these three:

I.

"In this case the claimant, Jack Cullum, seeks to recover damage for the taking of his property and the construction of a highway through his property. Private property cannot be taken for public use without just compensation, and if you find from the evidence and by a preponderance thereof that the County of Van Buren took and damaged the property of the claimant you should find for the claimant, in such a sum as will fairly compensate him for the said damage and as hereinafter instructed."

II.

"You are instructed that if you find for the claimant, Jack Cullum, you will fix his damage at the difference in the fair market value of the property before and after the construction of the highway. You are further instructed that if you find that the highway as constructed created a special benefit to the other lands of the claimant, Jack Cullum, you may set whatever benefits it is to his other property off against whatever damage you find he has suffered."

No. "C"

"You are further instructed that no person has a vested right in a highway; that is, no person has a right to demand that a highway be left in the same position where it is now located. So you are instructed that any damage that the claimant may have suffered solely and directly due to and caused by the relocation of the highway would not be an element of damages in this case,

except as to any bearing that such relocation might have upon the value of the real estate."

Cullum offered no objection to Instruction No. I. The record is a little uncertain as to whether his only objection to the Instructions was to Instruction No. II or Instruction No. "C," as above copied.[2] But in either event, the only objection reads:

"The claimant, Jack Cullum, objects to the giving of Instruction No. 2 for the defendant and for such reason says that said instruction is in conflict with Instruction No. 1 given for the claimant and does not state the correct rule of the law covering the damages."

Assuming that the objection went to Instruction No. II, we consider the objection without merit. While the thought expressed in Instruction No. II might be worded differently, nevertheless, it contains in plain, every-day, understandable language the test of benefits offsetting damages; and it was correct when considered with Instruction No. I that was given without objection. If we consider Cullum's objection as going to Instruction No. "C," we likewise find that the objection is without merit. The first part of Instruction No. "C" was possibly based on the case of *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. 2d 300.

If the concluding language of Instruction No. "C"—*i.e.,* ". . . except as to any bearing that such relocation might have upon the value of the real estate"—means that the relocation of the road *depreciated* the value of the real estate, then the Instruction was too favorable to Cullum, and was in violation of our holding in *Hempstead County* v. *Huddleston, supra.* But, of course, Cullum could not complain of an Instruction too favorable to him. On the other hand, if the concluding language of Instruction No. "C"—as above quoted—means that the relocation of the road *enhanced* the value of the

[2] As we read the transcript, the objection offered by Cullum's attorney was to Instruction No. II. But in appellant's brief, he argues the objection as urged against Instruction No. "C"; and the appellee's brief raises no objection. Therefore, we think it better to discuss both Instructions.

remaining real estate, then the Instruction was correct. The Instruction should have been worded so as to be susceptible only to this latter interpretation, because with such meaning, the Instruction was correct, when considered along with the other Instructions in the case. The relocation of the road took property of the claimant; and for damages resulting from such taking, he was entitled to recover, unless the relocation itself gave him benefits in excess of his damages. At all events, Cullum's objection was without merit.

Affirmed.

KOELSCH *v.* ARKANSAS STATE HIGHWAY COMMISSION.

5-382 267 S. W. 2d 4

Opinion delivered April 19, 1954.

C. V. Jones and *Opie Rogers,* for appellant.

W. R. Thrasher and *William L. Terry,* for appellee.

MINOR W. MILLWEE, Justice. On June 23, 1952, the county court of Van Buren County, on petition of appellee, Arkansas State Highway Commission, entered its order prescribing the route and dimensions of a new road which would run through lands owned by Phil Koelsch, appellant, and condemning 2.2 acres of said land for use as right-of-way for the road. When appellant refused to allow entry upon his condemned property, appellee filed an injunction suit to restrain him from interfering with the contractor's work, and on August 22, 1952, the chancery court made such an order, after requiring that appellee deposit $1,000 to guarantee payment of any damages suffered by appellant due to the entry onto the property. After a hearing on June 23, 1953, the chancellor found that appellant was entitled to no damages for the taking of his lands, and ordered the $1,000 deposit returned to appellee after costs were deducted. This conclusion was apparently based on the court's determination that the benefits resulting to appellant's remaining lands equaled or exceeded the value of the lands taken and any damages to the remaining lands.

Appellant first argues, for reversal, that the benefits which will offset the loss of his 2.2 acres must be local, special, and peculiar to his land and not such benefits as accrue to the public generally. The proposition of law argued is true, but we have held that a benefit does not cease to be special even though other property along the new road receives benefits from the road. In *Ball* v. *Independence County,* 214 Ark. 694, 217 S. W. 2d 913, this court approved an instruction which stated that special benefits include both neighborhood and peculiar benefits, and that a benefit does not cease to be special because it is participated in by every lot or farm fronting on the highway or improvement. See also, *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051.

At the conclusion of the evidence offered by the parties, the chancellor on his own motion called three witnesses appointed by him on the day of trial to view the lands and testify as to comparable values before and after the taking of the right-of-way. None of these witnesses qualified as experts on land values. Appellant now contends that this procedure was wholly unauthorized and that error was committed in admitting the testimony of these witnesses. This contention would present a serious question if appellant had made any objection to such procedure or the testimony of said witnesses at the trial. We are committed to the rule that all objections to evidence and witnesses in chancery cases must be made in a timely manner in the trial court and, if not so made, such objections will be considered as waived when the case reaches us on appeal. *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495. Hence appellant has waived the objections he now urges for the first time.

The remaining issue is whether the findings of the chancellor are supported by the preponderance of the evidence. The lands involved are a part of appellant's 75-acre farm which he purchased in 1946 for $3,500.00. The greater portion of said lands are rough, hilly, timbered lands of little value. There are about 20 acres of fertile creek bottom lands near appellant's home and the highway with about 5 or 6 acres cleared and in cultivation. The 2.2 acres were taken out of the tillable bottom lands upon which appellant raised feed for his livestock. The old gravel highway ran conveniently near appellant's home. The road was rerouted to make a long sweeping curve dividing appellant's tillable lands and leaving approximately 2 acres across the new road from the rest of his property. The curve also resulted in the road in front of appellant's home being relocated north of the old road so that there is a small strip belonging to a third party between the old and new roads. It was also necessary to construct a new bridge on the creek nearby about 20 feet downstream from the old bridge.

Appellant and four other witnesses in his behalf testified that his damages exceeded any benefits from the construction of the new road by amounts varying from $1,000 to $1,900.00. At the court's insistence, these witnesses itemized the various elements of damage about which they testified. They estimated the value of the 2.2 acres taken at $175 to $225 per acre. L. M. Conner, a real estate dealer, roughly estimated that appellant's damages amounted to $2,000 offset by $1,000 in benefits by reason of the construction of the new road. When asked to itemize the damages, he stated that the lands taken were worth $500; that the remaining lands were damaged to the extent of $500 from washing and overflow occasioned by relocation of the bridge and $400 because of inaccessibility of his cultivated lands northwest of the new highway which were severed from the rest of his lands; and $50 to $75.00 for a fence torn down by overflow. He also stated that appellant's farm had a market value of $4,000 before, and $2,800 after, construction of the new road. Three farmers living in the vicinity corroborated the testimony of Conner as to the damages sustained and were of the opinion that little, if any, benefits accrued by construction of the new road.

Appellee's first witness was its right-of-way engineer who examined the lands for about 45 minutes on the morning of the trial and described the general physical situation as altered by the new construction. He gave no testimony relative to monetary damages that appellant might have sustained by the taking of his land. The next witness for appellee was the county judge who, after stating that he was "not too familiar" with the lands in question or land values generally, replied when asked about appellant's damage: "I guess he is damaged, but still on the other hand of course I am pretty strong for good roads." It was at this point that appellee rested and the chancellor called the three witnesses appointed by him. The first witness was a former farmer, county treasurer and deputy sheriff. The second was a postmaster and former county assessor and

sheriff. The third witness formerly farmed and stated that he had "considerable road experience" and was reasonably well acquainted with real estate values. In response to rather leading questions by the court these witnesses stated they had observed the various physical aspects of the property and that, in their opinions, the farm was worth as much after the land taking as it had been before. They were not asked to specify or itemize any damages or benefits and did not assign any reasons for the opinions given.

We have held that where witnesses give their opinions as to damages to the lands taken in cases of this kind, such testimony must be considered in connection with related facts upon which the opinions are based. *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738. We agree with the chancellor's observation that neither the trial court nor this court can determine these cases to a mathematical certainty. However, after careful consideration of all the testimony, we have concluded that a preponderance thereof supports the conclusion that the value of the lands taken and the damages to the remaining lands exceeded the benefits thereto by the sum of $500. The decree is accordingly reversed and the cause remanded with directions to enter judgment in favor of appellant for that sum.

RILEY *v.* EIGHT MILE DRAINAGE DISTRICT NO. 5.

5-410 267 S. W. 2d 302

Opinion delivered April 19, 1954.

[Rehearing denied May 17, 1954.]

Lee Ward, for appellant.

Rhine & Rhine and *Carl Hunter,* for appellee.

WARD, J. The only issue raised by this appeal is the sufficiency of the published Notice to property owners in a proposed drainage district. Certain landowners, hereafter referred to as "petitioners", requested the County Court of Greene County to create Eight Mile Drainage District No. 5 pursuant to the provisions in Ark. Stats. § 21-501, which section is a part of Act 279 of 1909 pertaining to the creation of drainage districts in this state. Objections were entered by certain other landowners, hereafter referred to as "protestants", and the County Court rejected the petition. Petitioners appealed to the Circuit Court which, over the objections of protestants, granted the petition and ordered the district formed. Protestants now prosecute this appeal.

Although the issue here raised by protestants was not urged in either court below, they have a right to

urge it now because, in such a proceeding, proper notice is jurisdictional. *Paschal* v. *Swepston,* 120 Ark. 230, 179 S. W. 339.

Said § 21-501 contains the following provisions with reference to notice and descriptions: (a) The petition must describe generally the region to be embraced in the district; (b) The engineer's report must "ascertain the limits of the region which will be benefited" and show the "territory which will be benefited", and; (c) The clerk shall publish a notice to "all persons owning property within said district." It is not disputed that all these preliminary steps were properly taken, except as hereinafter noted, and it is conceded that the description contained in the Notice was the same as contained in the engineer's report.

The objection now urged by protestants, appellants, is, as they say, that "the land descriptions appearing in the Published Notice of Hearing are not sufficiently accurate and definite to give reasonable notice to all landowners" within the district. Appellants then divide the alleged indefinite descriptions into several classifications, and we will discuss them separately.

First. Under this classification several separate descriptions are set out but, for the purpose of discussion, one will suffice. It reads:

> "Lands in Township 16 North, Range 5 East, to-wit: All of Section 1 now within the City Limits of Paragould, Ark."

The objection is that the affected landowners "would not know the exact location of the Paragould city limits." In our opinion this objection is not sound for these reasons:

(a) The record contains a plat made by the engineer and filed, as a part of his report, with the clerk which shows that all of the City of Paragould lies within the proposed district. The engineer's report was on file before the hearing for any interested person to examine, and the Notice states that it was on file in

the clerk's office. Therefore every landowner in Paragould knew, or could have easily ascertained from the plat, that his property was being embraced in the district.

(b) Protestants having land within the City of Paragould are presumed to know that fact. In Vol. 62 C. J. S. page 118, under the heading of "Municipal Corporations" it is stated:

"A person owning land included within the corporate boundaries of a municipality is charged with knowledge that it is so included, regardless of whether he owned it at the time of the incorporation of the municipality or subsequently acquired it."

The same citation, at page 116, says: "It has been said that municipal corporations must have boundaries or they have no existence."

(c) We take judicial notice that the boundaries of cities and towns and all subdivisions must be made a matter of record, and ordinarily they are tied in with the sections, townships, and ranges of the U. S. Government Survey. Therefore, even if all of the City had not been included in the District, persons owning land in Paragould and in Section 1, Township 16 North, Range 5 East could have determined from the record whether it was included in the District.

Second. The objection is here made that Paragould has many subdivisions, that some of the protestants' lands lie in such subdivisions, and that the landowner holds and knows his title by such reference only. We see no merit in this objection particularly in view of what we said in the preceding paragraphs (a), (b), and (c).

Third. One portion of the land included was in Section 12, Township 16 North, Range 5 East and is described in the Notice as: "All lying East of Mo. Pac. R. R." Apparently no objection is made to the use of the abbreviation "Mo. Pac." for Missouri Pacific, but it is contended that the letters "R. R." are meaning-

less. We do not think such a conclusion is reasonable or justified. In the connection used there is room for little, if any, doubt that "R. R." refers to railroad. The case of *Simms* v. *Rolfe,* 177 Ark. 52, 5 S. W. 2d 718, cited by appellants is easily distinguishable from the situation here. There a sale of land based on a tax forfeiture was held bad where the land was described as: "W of R NE ¼, Sec. 8, Tp. 5 north, range 4 east." Of course the context which we have here was not present there and the court, recognizing this, said: "The letter 'R' or 'r' is the proper abbreviation for range within the meaning of government surveys when used with reference thereto. When used otherwise in an attempted land description, it means nothing."

Fourth. The final objection is that "the Notice identifies certain lands solely by reference to the type of improvements thereon", but we do not think the description contained in the Notice is open to that objection or that it is defective. The second paragraph of the Notice states "the following lands, railroads and tramroads" will be benefited and should be included in the proposed drainage district. At the end of a long list of land descriptions there appears:

"Railroads: (here trackage is described as to length, and also names section, township and range through which it runs).

The objection here raised by appellants was decided against their contention in the case of *Burns* v. *Fisher,* 171 Ark. 1012, 287 S. W. 205.

Our conclusion that the Notice was sufficient disposes of appellants' only other contention which challenged the trial court's jurisdiction.

Affirmed.

ATKINSON *v.* STATE.

4769 267 S. W. 2d 304

Opinion delivered April 19, 1954.

[Rehearing denied May 17, 1954.]

[redacted]

Reinberger & Eilbott, for appellant.

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

ROBINSON, J. Appellant Luther Atkinson was charged with murder in the first degree by shooting and killing A. B. Martin on the 28th day of June, 1953, and convicted of voluntary manslaughter. On appeal he contends the evidence is not sufficient to sustain the verdict; that the court erred in over-ruling a motion for a continuance; and that there was error in permitting the clothes worn by the deceased at the time he was shot to be introduced in evidence.

The cause came on for trial November 18, 1953. On that day defendant filed a motion for a continuance alleging his power of reasoning had been impaired and he was therefore in no condition to stand trial or properly defend himself. In support of his motion he filed a letter from a Memphis physician who specializes in neuropsychiatry expressing his opinion that the defendant was

in no condition to go on trial. The defendant had been given a mental examination by doctors at the Arkansas State Hospital, and the report from that institution filed September 10, 1953, is to the effect that the defendant was mentally competent at the time of the killing and at the time of the examination.

A motion for a continuance rests to a large extent in the sound discretion of the trial court. *Burford* v. *State,* 184 Ark. 193, 41 S. W. 2d 751; *Perkins* v. *State,* 217 Ark. 252, 230 S. W. 2d 1. Here we can not say the trial court abused its discretion in over-ruling the motion for a continuance.

The evidence is sufficient to sustain the conviction. Appellant Atkinson had gone with Ilena Stanley for several years, but a few weeks prior to the homicide they had quit going together. On the night of the tragedy, Mrs. Stanley was entertaining in her home a lady friend and two men, Fred Mayberry and A. B. Martin. Mr. Atkinson, the appellant, called Mrs. Stanley on the phone; there is a conflict in the testimony as to what was said, but in any event Mrs. Stanley locked the kitchen door leading out to the back yard. It appears that at this point she then went into a bedroom and lay down across the bed. Martin made the remark that it was hot; that he was not afraid of anyone; and unlocked the back door and opened it. A little later the guests heard dogs barking, and Mayberry went out the front door to see about his car and to answer a call of nature, so he testified. Martin went out the back door to see what caused the dogs to bark; apparently at that time he was armed with a .32 caliber pistol belonging to Mayberry. Atkinson had driven his car to an alley behind the Stanley home, and arming himself with a revolver, climbed over the back fence of the Stanley property and approached the house. When near the house, he met Martin and the shooting started. Martin was struck several times; two of the bullets were recovered from his body and identified by a ballistics expert as having been fired from a .38 caliber revolver belonging to Atkinson and found on the ground at the scene of the shooting.

Although Atkinson says he fired only a couple of shots from a .45 caliber revolver and that he knows neither of them struck Martin, the evidence is sufficient to support a finding that he was shooting his .38 caliber revolver. Evidently Martin fired several shots from the .32 caliber pistol at Atkinson, wounding him in the hand; but when arrested some time later in his hotel room, Atkinson was suffering not only from a hand wound but from a gunshot wound in the head. However, 3 pistol shots were fired by Atkinson while the officers were seeking to gain admission to his room; the evidence is overwhelming that the head wound was self-inflicted at that time.

When all is said and done, the facts remain that Atkinson armed himself with a deadly weapon and went out to Mrs. Stanley's home at a time she was entertaining guests, but instead of going to the front door he went up the alley; and notwithstanding he is a man 62 years of age, climbed over the back fence and approached the house. When Martin came out the back door to see what was making the dogs bark, Atkinson shot him 5 or 6 times, Martin dying from the effects of the wounds a short time later. The evidence would sustain a conviction for a much higher degree of homicide than voluntary manslaughter.

As to the introduction in evidence of the clothes worn by Martin at the time he was shot, they were properly identified and introduced for the purpose of showing the location of the bullet holes. However, they had been washed since being removed from the body. *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27, is directly in point and it was there held: "Washing did not change the character of the garments, and they were admissible to show the location of the wounds." And in *Cross* v. *State,* 200 Ark. 1165, 143 S. W. 2d 530, it is said: "Where the changed condition of clothing worn by deceased when killed does not prevent them from tending to prove or disprove an issue in the case, then it is proper to permit the clothes to be introduced in evidence."

Finding no error, the judgment is affirmed.

ASHDOWN HARDWARE COMPANY *v.* HUGHES.

5-288 267 S. W. 2d 294

Opinion delivered April 19, 1954.

[Rehearing denied May 17, 1954.]

Shaver, Tackett & Jones and *M. C. Lewis, Jr.,* for appellant.

Johnson & Johnson, for appellee.

J. SEABORN HOLT, J. This suit is a mortgage foreclosure, involving certain alleged liens for materials, claimed by appellants.

J. C. Stewart and wife (not parties here) were the owners of a tract of land of approximately six acres on which was their residence, subject to an outstanding mortgage of $4,500. On February 2, 1952, in order to secure money to pay off the mortgage indebtedness and build four tourist cabins on this tract, they executed a mortgage to appellee, Hughes, for $10,000, covering this property. This mortgage was recorded February 7, 1952, and contained these pertinent recitals:

"The sale is on the condition that whereas the grantors are justly indebted unto W. R. Hughes separate estate in the sum of Four Thousand Five Hundred Dollars as evidenced by our joint and several note of even date drawing interest from date until paid at the rate of seven per cent per annum and due as hereinafter stated; and this mortgage likewise secures an additional advance to be made by the mortgagee in the total sum of Five Thousand Five Hundred Dollars, said advances to be made as follows: The first advance to be made on completion by mortgagor of No. One Tourist Cabin and same fully insured on this property in the amount of not more than One Thousand Three Hundred and Seventy-Five Dollars; the second advance to be made on completion of second tourist cabin and same insured on this property not to exceed however the sum of One Thousand Three Hundred * * * and likewise for the third and fourth advance. Each advance as aforesaid to be evidenced by the notes of the mortgagors and drawing interest from date of advance until paid at the rate of seven per cent per annum. The principal sum of Four Thousand Five Hundred Dollars, plus all advances made under this mortgage, and the contemplation is that Five Thousand Five Hundred Dollars in advances will be made, shall be due and payable as follows: One payable one year after date of this mortgage; Two Thousand Dollars and all accrued annual interest payable two years from date of this mortgage * * *," and so on for other payments.

"The mortgagee covenants for himself, his heirs, executors, administrators or assigns to make the advances herein provided without delay and as provided herein and acceptance of this mortgage makes this covenant irrevocable. Mortgagors understand and agree that all advances made under this mortgage shall be used exclusively for building of cabins on this property and improving same and failure to so use said money or any part thereof the original note and all installments become immediately due and payable at the option of the Mortgagee or holder of said notes. * * *"

The mortgage also contained an acceleration clause and coverage for taxes and insurance advances by the mortgagee. On February 4, 1952, appellee advanced $4,500 to the Stewarts and the indebtedness on the property was discharged. The four cabins were completed on the mortgaged premises, insured, and inspected by the mortgagee, Hughes, on the following dates: April 30, 1952, May 23, 1952, July 11, 1952, August 15, 1952. Checks in the amount of $1,375 each were issued to Stewart on these respective dates. He, joined by his wife, executed notes for like amounts with 7% interest.

The record reflects that appellant, Ashdown Hardware Company, (a partnership) had filed a lien on said property for $1,192.02, on November 6, 1952, for materials furnished from February 20 through October 3, 1952, and appellant, Wilson Lumber Company, (a partnership composed of Richard L. Craigo and Lelia F. Craigo), had filed on October 24, 1952, lien for materials in the amount of $792.22 furnished from April 25 through July 28, 1952. It also appears that a second mortgage on this property in the amount of $922.06 in favor of R. L. Craigo, was executed October 14, 1952, and recorded on October 21, 1952.

Appellee (Hughes) in effect alleged in his complaint that he had advanced $10,000 to Stewart, the owner of the six-acre tract, under the terms of the above mortgage, for the purpose of making improvements on the property, that this money was so used and that his mortgage claim was superior to appellants' liens for materials, in the circumstances.

Appellants asserted that their claims for materials furnished were superior to appellee's mortgage, denied that any part of the money advanced by appellee was for improvements, asserted that appellee's mortgage constituted, in effect, five different mortgages and that all were inferior to their claims.

Appellant, Wilson Lumber Company, denied accepting the second mortgage, above, (in the amount of $922.06) "in release of their materialman's lien pre-

viously filed and never intended to release * * * said lien in favor of said mortgage."

Trial resulted in a decree directing foreclosure, the sale of the property, and declared appellee's mortgage superior to appellants' liens and all other claims. The court declared that appellee had a superior claim under his mortgage, in the amount of $10,836.89, on the proceeds of the sale, that appellant, Ashdown Hardware Company, had a valid materialman's lien on the property, but that it was inferior to appellee's mortgage. The court further decreed that appellant, Wilson Lumber Company, was entitled only to a judgment against the owners of the property, that its lien claim was inferior to that of appellee and also inferior to that of appellant, Ashdown Hardware Company, and other materialmen. This appeal followed.

Both appellants have joined on this appeal, but each has filed a separate brief.

Appellants say that "the issue before this court is a determination of the rights of priority between appellants' liens and claims, and appellee's mortgage, and their rights in and to the proceeds from the sale of the property," and further assert that this case is one of first impression here.

A determination of the issues requires, primarily, construction of § 51-605, Ark. Stats. 1947, which provides: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements, for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, improvements or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements

or buildings, then said lien shall be prior to the lien given by this act."

There was testimony on behalf of appellee, Hughes, that he advanced the $10,000 to the owner, Stewart, for the purpose of making improvements on the property and that this money was so used. It is undisputed that this $10,000 mortgage was executed February 2, 1952, duly recorded February 7th, that $4,500 was advanced February 4, 1952, to the owner, Stewart, and was used by Stewart to liquidate the existing mortgage on the property. It is further undisputed that all materials for the four cabins were furnished the owner subsequent to the recording date of the mortgage, February 7, 1952. This recorded mortgage was, therefore, notice to these appellants and the world, from and after its recording date, that appellee, Hughes, had a lien on the property here involved. This was the only mortgage executed by Hughes to the owner, Stewart. It is fair to assume that had appellants inspected the mortgage record and the provisions of this mortgage, it is not likely that they would have furnished materials for the cabins without first making arrangements with appellee, Hughes, for payment.

In construing the above statute, we said in *Sebastian Building & Loan Association* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011: "Under the test prescribed by the statute, laborers and materialmen can learn the purpose for which the money was raised by examining the clerk's records, and if they do not believe the borrower will use it for that purpose, they may refuse to perform labor or furnish material towards the construction of the contemplated improvement. In any event, the statute should be construed as it was enacted by the Legislature, with its plain declaration that the sole test of the superiority of liens upon lands before improvements are made is the purpose for which the money is raised or borrowed, and not the use made of it. . . .

"The lien in favor of mechanics and materialmen is wholly statutory and the lien claimant must bring him-

self within the provisions of the statute in order to be entitled to a lien. If the Legislature had intended the *use* to which the money borrowed was the test of the superiority of the liens, it doubtless would have so declared, instead of making the *purpose* for which the money was borrowed the test. After a review of the authorities on statutory interpretation, Judge SANBORN, said: 'Apply the rule which these authorities announce to the statute in hand. It declares without uncertainty or doubt that the liens of prior mortgages whose proceeds were raised for the purpose of making improvements upon the mortgaged property are superior to subsequent mechanics' liens.' It says: 'that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act.' . . . The test of their validity is the *purpose* for which the proceeds were obtained, not the *use* to which they were applied. . . .

"In *Shaw* v. *Rackensack Apartment Corp.*, 174 Ark. 492, 295 S. W. 966, it was held that a mortgage for the purpose of raising money to erect a building which was filed prior to the commencement of work by a lien claimant, was superior to a lien for labor and material furnished, notwithstanding that some of the loan, for which the mortgage was given, was used for clearing the title."

Under the terms of the mortgage, here involved, as we construe them, Hughes, the mortgagee was obligated and irrevocably bound to make the advances to construct the cabins when each was completed and insured, and this he did. He had no option in the matter.

We said in *Superior Lumber Company* v. *National Bank of Commerce,* 176 Ark. 300, 2 S. W. 2d 1093: "Mortgages to secure future advances are valid; but, where it is entirely optional with the mortgagee whether to make future advances or not, advances made after notice of a subsequent incumbrance, such as a lien for materials furnished, are inferior to the materialman's lien.

In other words, the general rule is that, if the amount for which the mortgage shall stand is wholly optional with the mortgagee, he cannot, after notice that a subsequent lien has attached, deplete the value of the equity to the disparagement of its lienors by advances which, if refused, would not have been in force."

The general rule is stated in 5 A. L. R., 399, in this language: "By the weight of authority, a mortgage for future advances becomes an effective lien from the time of its execution, or as to subsequent purchasers and encumbrancers, from the time of its recordation, rather than from the time when each advance is made, where the making of the advances is obligatory upon and not merely optional with the mortgagee. (Citing many authorities). . . . Or where such advances are made without actual notice of the claim forming the basis of the mechanics' lien."

In 41 C. J., page 525, § 465, the textwriter says: "A mortgage may legally be given to secure future advances to be made to the mortgagor, and may become a prior lien for the amount actually loaned or paid, although the advancements are not made until after subsequent mortgages or other liens have come into force. . . . The law requires mortgages to be recorded and a recorded mortgage for future advances is notice to all parties subsequently dealing with the property as to the amount advanced pursuant to the mortgage, although the latter does not specify any particular sum which it is to secure. . . .

"(§ 466, page 526). While it has been said that there is a decided contrariety of judicial views on the subject, many of the decisions make the effectiveness of such a mortgage depend upon the character of the liability assumed by the mortgagee with reference to making the advances, holding that, if it is optional with him to make or refuse such advances, he will be protected by the security of his mortgage only as to advances made before the attaching of a junior lien, while if he is under a binding obligation to make the advances in any event, the mort-

gage will cover advances made after, as well as before, the junior lien."

Both appellants say that, in any event, their liens should be held superior to appellee to the $4,500 advanced by Hughes to the owner to pay off the indebtedness against Stewart's property, since it did not go into his (owner's) improvements. We do not agree.

This money was used by the owner to clear the property, which included Stewart's residence, of a pre-existing debt. While literally this $4,500 was not used to construct a new residence for the owner, it was used to lift a debt burden on both the land and the existing residence. Hughes' security would thus be enhanced and he was given an added inducement to make his loan more secure. Certainly, indirectly, if not directly, the purpose was to improve the owner's property.

Finally, appellant, Wilson Lumber Company, argues that the court erred in denying its claim to a lien, in holding that its claim was inferior to appellee's mortgage, and appellant's, Ashdown Hardware Company's, lien and in decreeing that it should have judgment only against the owner's property. The answer to this contention is that the record showed that appellant, Wilson Lumber Company, failed to give the ten days' statutory notice of its intention to file a lien for materials as required by § 51-608, Ark. Stats. 1947. In fact, it appears that no effort was made to comply with this section, which provides:

"Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this act . . ., shall give ten (10) days' notice before the filing of the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due."

In construing this statute, we held in *Doke, Administrator,* v. *Benton County Lumber Company,* 114 Ark. 1 (Headnotes 1 and 2) 169 S. W. 327, 52 L. R. A., N. S. 870:

"Liens of mechanics and materialmen for work done or material furnished in the construction of an improvement are creatures of the statute creating them, and must be perfected and enforced according to its provisions. 2. MECHANIC'S LIENS—NOTICE—Ten days' notice before filing the lien must be given by any one seeking the benefit of the act establishing mechanic's liens."

We conclude, therefore, that the decree, on all issues, is correct and should be and is affirmed.

Justices MILLWEE, GEORGE ROSE SMITH and WARD dissent in part. Justices MCFADDIN and ROBINSON concur.

ED. F. MCFADDIN, Justice (concurring). To the majority opinion and the dissenting opinion, I desire to add this concurring opinion, to explain why I think the majority has reached the correct conclusion on the issue discussed in the dissenting opinion.

On February 4, 1952, Mr. Stewart executed a mortgage to Mr. Hughes for $10,000.00. Of this amount, the sum of $4,500.00 was used to retire indebtedness then owed by Stewart; and the sum of $5,500.00 was agreed to be paid by Hughes to Stewart when, as, and if Stewart built certain cabins on the mortgaged lands. The Hughes mortgage was recorded on February 7, 1952. Payment of the $5,500.00 was made in installments in April, May, July, and August, 1952. Beginning on February 20, 1952, Ashdown Hardware Company (hereinafter called "Ashdown") furnished materials to Stewart for use in the construction of the four cabins; and, primarily, this is a suit to determine the superiority of the mortgage lien of Hughes over the materialman's lien of Ashdown.

As to the $5,500.00 advanced in the course of the construction, the majority holds that the Hughes mortgage is superior. I agree with that holding; and I understand the dissenting opinion does not disagree with such result.

It is as to the $4,500.00 which Hughes paid to Stewart on February 4, 1952, that the dissent arises. The majority holds that the Hughes mortgage for the $4,500.00 is superior to Ashdown's lien; and the dissenting opinion

is of the opposite view, relying largely on the case of *Peoples B. & L. Ass'n* v. *Leslie,* 183 Ark. 800, 38 S. W. 2d 759, a case not discussed in the majority opinion.

Independent of the principle of subrogation, I think the majority is correct in holding the Hughes mortgage lien to be superior to Ashdown on the $4,500.00 item, because the case of *Peoples B. & L. Ass'n* v. *Leslie Lbr. Co., supra*—relied on in the dissenting opinion—has facts which clearly distinguish it from the case at bar. In the cited case, Peoples B. & L. Ass'n had sold property to Ish for $500.00 cash and a vendor's lien for $19,500.00, *and in addition had required Ish to make certain improvements* which resulted in the lien of Leslie Lumber Company. This Court held that Peoples B. & L. Ass'n *required that the improvements be made, and that such requirement was the point that differentiated the Peoples-Leslie* case from the general rule stated in *Gunter* v. *Ludlam,* 155 Ark. 201, 244 S. W. 348. Here is the language of this Court on this point, as found in the *Peoples-Leslie* case:

" 'The statute (C. & M. Dig., § 6911) gives priority to liens for labor or material only against other incumbrances created after the commencement of the improvement, and in effect subordinates the lien to prior incumbrances by way of mortgage or otherwise.' [1]

"The contract for sale in the instant case expressly provided that the improvements should be made, and this was a part of the consideration. The appellant authorized the improvements itself, required them to be made, and according to its own testimony, knew that the improvements were being made and knew that Parker was doing the work. . . .

"If a sale of the place had been made by appellant to Ish and no improvements authorized by the appellant, and the purchaser had thereafter made improvements without any authority from the vendor to do so, under the principle announced in *Gunter* v. *Ludlam, supra,* the ven-

[1] C. & M. Dig. § 6911 is now § 51-607 Ark. Stats.

dor's lien would have been prior to the mechanic's liens; but when the owner contracts to sell the place and expressly requires the improvements to be made for its own benefit, it cannot then claim that its lien is superior to the lien of persons furnishing labor or material."

In the case at bar, *Hughes did not require Stewart to build any of the four cabins that resulted in the lien claim of Ashdown*: rather Hughes merely obligated himself to furnish the $5,500.00 to Stewart when, as, and if the cabins were built. The mere fact that Hughes agreed to make further advances—as Stewart might require—should not defeat the superiority of Hughes' mortgage for the $4,500.00 that he advanced to Stewart *before* any materials were furnished by Ashdown. I do not understand that the case of *Peoples B. & L. Ass'n* v. *Leslie Lbr. Co.* goes to such an extreme.

Of course, under § 51-605 Ark. Stats., Ashdown might have enforced a prior lien on the cabins—if they were removable from the land. *Imboden* v. *Citizens Bank,* 163 Ark. 615, 260 S. W. 734; *Fine* v. *Dyke,* 175 Ark. 672, 300 S. W. 375, 58 A. L. R. 907; *Morrilton Lbr. Co.* v. *Groom,* 176 Ark. 520, 3 S. W. 2d 293. But the issue of removing the cabins from the land is not involved in this case.

For the reasons herein stated, I agree with the result reached in the majority opinion; and I am authorized to state that Mr. Justice ROBINSON joins in this concurrence.

GEORGE ROSE SMITH, J., dissenting. It does not seem to me that the appellee's initial advancement of $4,500 is entitled to priority. The statute relied upon by the majority awards priority to a mortgage given for the purpose of making improvements. Ark. Stats. 1947, § 51-605. This $4,500 was advanced for the purpose of paying off preëxisting mortgage liens. Had the transaction stopped at that point I do not suppose anyone would contend that the loan was made for the purpose of making improvements. It happens that additional advances provided for by the same mortgage were in fact used for the purpose contemplated by the statute, but I fail to see how this

circumstance converts the refinancing of prior mortgages into a loan made for improvement purposes.

We must lay aside the possibility that the appellee, as to this $4,500, may be entitled to subrogation to the liens of the mortgages that were paid off with this money. Subrogation has not been sought by the appellee, either in the trial court or here. Furthermore, the majority reach their conclusion by charging laborers and materialmen with the information that an examination of the public records would have disclosed. Such an inspection would not have alerted the appellants to the possibility of subrogation, for the appellee's mortgage contains no warning that the original $4,500 advancement was to be applied to existing mortgages. If the public record is to govern, a claim to subrogation should be buttressed by language in the mortgage indicating it to be a renewal of an earlier lien.

On the main issue I cannot reconcile today's decision with our holding in *People's Bldg. & L. Ass'n* v. *Leslie Lbr. Co.,* 183 Ark. 800, 38 S. W. 2d 759. There the seller of a hotel asserted a claim for unpaid purchase money in the amount of $19,500. But the contract of sale provided that the buyer should make certain repairs and improvements, and the seller knew that the work was being done. Even though the contract of sale purported to protect the seller against liens for labor or material, we held that the seller, by authorizing and requiring the work in question, thereby subordinated its purchase-money claim to the liens of laborers and materialmen.

In the case at bar the appellee certainly authorized the work and knew that it was in progress. Indeed, if he was unconditionally required to make the subsequent advances—and the majority so hold—then it is equally true that Stewart was unconditionally required to make the improvements. In that situation the *Leslie* case, *supra,* holds that the mortgage lien is subordinate to claims arising from the improvements that were contemplated by both parties to the mortgage. That conclusion seems to me to be entirely just. A mortgagee can protect himself

by withholding his advances until the mortgagor submits satisfactory proof that all labor and material have been paid for. This appellee admits in his testimony that he exercised no real diligence in this respect. But, as a practical matter, the mechanic's lien claimant lacks this opportunity for self-protection. An uneducated laborer, applying for work on a construction job, should not be required to travel to the county seat to attempt what is for him the impossible task of analyzing the public record of deeds and mortgage. In some cases, it is true, the statute does impose that burden upon the laborer; but in the *Leslie* case we held that it did not exist in the circumstances now before us. I would accordingly hold that the appellee's mortgage is not entitled to priority to the extent of the first advancement of $4,500.

WARD, J., joins in this dissent.

CITY OF MOUNTAIN HOME *v.* RAY.

5-371 267 S. W. 2d 503

Opinion delivered April 26, 1954.

Emery D. Curlee, for appellant.

H. J. Denton and *Ivan Williamson* and *Ben B. Williamson,* for appellee.

GRIFFIN SMITH, Chief Justice. O. H. Ray owns land adjoining College street in the City of Mountain Home. The area was formerly a 40-acre tract, but in 1940 and 1941 Ray constructed thirty-one buildings, including a store. Following Norfork Dam developments and an influx of domestic and out-of-state tourists and vacationers the city's growth was accelerated to such an extent that a sewage system was required. It was installed under Act 132 of 1933.

Appellee was directed to connect his occupied property with this system—a system financed through issuance of revenue bonds. At the time notice was given (March, 1953) twenty-eight of Ray's houses were vacant. The proprietor's contention was that he had septic tanks, that water was supplied from wells, and in other respects the premises were in a sanitary condition.

Ordinance No. 107 directs the owners of all improved property within the district susceptible of service to make sewer connections if this can be done without running pipes more than 200 feet. Section 27 of the ordinance authorizes issuance of written notice commanding compliance within two weeks. Disobedience is a misdemeanor punishable by fine of not less than two nor more than ten

dollars, each day's failure or refusal constituting a separate offense.

The construction, operation and maintenance of the system shall be supervised by a sewer committee, but this committee acts under control of the city council "to such extent as may be provided in the ordinance or resolution appointing the committee". Only §§ 26 and 27 of Ordinance No. 107 are in the record.

Ray refused to connect his property with the sewer system and was fined $88 and cost amounting to $17.50. While the appeal bond states that the trial proceedings were in the court of J. C. Watson, a justice of the peace for Whiteville Township, the judgment is signed by J. C. Watson as acting mayor. The defendant was informed that the fine and cost would be set aside if compliance with the order to connect occurred within two weeks. An appeal was taken before this period expired.

Circuit court found §§ 26 and 27 "to be invalid and unenforcible *in this case*". There is an express disclaimer by the city of any purpose to procure enforcement of the fine and cost. The municipality's fear is that with the two ordinance sections deleted its remedies under Act 132 are neutralized, hence a decision on the city's power to compel sewer connections is imperative.

An initial contention by the appellee is that J. C. Watson, being a justice of the peace, could not be designated to sit as mayor because Act 284 of 1941, from which the claimed authority derives, became local legislation when five counties were exempted from its provisions. The Act was construed in *Harris* v. *City of Harrison,* 211 Ark. 889, 204 S. W. 2d 167, but the point here pressed was not raised.

By reference to Act 284 it will be seen that two sections of Pope's Digest are dealt with. Section 9798 containing the proviso exempting the five counties mentioned in § 1 of Act 284 was Act 368 of 1921. Section 2 of Act 284 — the legislation containing the language thought by appellee to be void for constitutional reasons

—amended § 9809 of Pope's Digest, and 9809 is § 48 of an Act of March 9, 1875. The exemption of the five counties is a part of the Act of 1921, brought forward into § 1 of Act 284 as originally written; hence it is no part of § 2 amending Pope's Digest section No. 2.

Appellee's next contention is that the right of appeal from circuit court has not been conferred by statute, hence there is nothing before the court. By § 4 of Art. 7 of the constitution this court's appellate jurisdiction is coextensive with the state. We are expressly given a general superintending control over all inferior courts of law and equity. In aid of this appellate jurisdiction power is conferred to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs, "and to hear and determine the same". It is true that the Supreme Court's appellate jurisdiction is to be exercised under such restrictions as may from time to time be prescribed by law. Here it is argued that there is no express right of appeal to this court.

Pretermitting a discussion of the effect of Ark. Stat's, § 27-2101, it is abundantly clear that we have held that in civil matters all final orders or judgments of circuit or chancery courts are appealable. In *St. Louis & North Arkansas Railroad Company* v. *Mathis,* 76 Ark. 184, 91 S. W. 763, (opinion on rehearing) Mr. Justice McCulloch said: "It is contended on behalf of appellee that it was meant, by the use in the constitution of the words, 'under such restrictions as may from time to time be prescribed by law', to confer upon the law-making body the power to limit the right of appeal. Placing this construction upon the language used, the effect of the constitutional provision would be to give to the court only such appellate jurisdiction as the law-making body should see fit to leave to it. . . . The manifest intention of the framers of the constitution was, primarily, to give a right of appeal to the Supreme Court from all final judgments of circuit and chancery courts, but to vest in the legislature the power to prescribe regulations as to the manner of taking appeals

and time within which the same may be taken and prosecuted. This is, we think, what is meant by the words, 'under such restrictions as may from time to time be prescribed by law'. To construe it otherwise would be to make it read that the Supreme Court shall have only such appellate jurisdiction as may from time to time be prescribed by law''.[1]

In *Missouri Pacific Railroad Company* v. *Bridge District,* 134 Ark. 292, 204 S. W. 630, Chief Justice McCulloch discussed a special statute creating an improvement district and the right of an aggrieved property owner to appeal. From this opinion the following is copied: ''At the threshold of the hearing in this court we are confronted with the contention of counsel for appellee that as the special statute under which the proceedings are conducted does not provide for an appeal, none will lie. The circuit court acts in a judicial, and not in an administrative, capacity, and under the constitution an appeal to this court will lie from all final judgments and orders of the circuit court. . . . The right of appeal extends to special proceedings though the right be not expressly granted in the statute authorizing such proceedings''.

Appellant's argument is that § 27 of the ordinance is constitutional, but irrespective of the ordinance, or of Act 132, cities have inherent power to compel obedience to sanitary and health regulations. In *Branch* v. *Gerlach,* 94 Ark. 378, 127 S. W. 451, it was held that an ordinance requiring a separate sewer connection for each

[1] Section 44-503, Ark. Stat's, denies the state a right of appeal from judgments of the justices' courts. [But in the case now considered the appeal was taken from a judgment by a justice of the peace sitting on behalf of the mayor, and Ray was the appellant]. See § 44-116 where, in a mayor's court, the right of trial by jury is denied, but the defendant may require a jury on the appeal to circuit court. Section 43-2720 permits an appeal by the state in criminal cases upon certification by the attorney general, but (§ 43-2722) a judgment of acquittal is a bar to further prosecution. Section 43-2730 expressly invests the Supreme Court with appellate jurisdiction in misdemeanor cases, and (by § 43-2733) the state may appeal through the prosecuting attorney. But (§ 43-2736) the judgment shall only be reversed for errors of law apparent on the face of the record to the prejudice of the appellant. Where the prosecution is by a penal action, "the appeal shall be similar in all respects to appeals in civil actions". Section 43-2738.

lot was reasonable and that the city's right came from its police power—control of sewer connections having been conferred by Kirby's Digest, § 5722 et seq. (now Ark. Stat's, § 19-4125). It was said in *Freeman* v. *Jones,* 189 Ark. 815, 75 S. W. 2d 226, that reasonable charges may be imposed upon owners of property connected with a city sewer system.

Issues raised in *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5, were discussed by Judge Frank G. Smith. In holding Act 132 constitutional as against enumerated points of attack, it was said that the power of cities and towns to install sewage systems and waterworks is universally recognized. "The health, as well as the comfort and convenience of persons living together in close relation and in large numbers, require the existence of such powers, and a sewage system would be valueless unless the power inhered to require all property owners to make physical connections with the sewers".

The rule deducible from the Jernigan-Harris case, however, seems to be that either a city board of health or some constituted health authority must ascertain that existing facilities are inadequate and that the public health is impaired before criminal proceedings may be prosecuted. It follows that punishment must rest upon a factual background upon which prosecution for an act tending to imperil public health is shown.

This does not mean that § 27 is unconstitutional; rather, the result is that the city's interpretation of its remedy is not sufficiently identified with the municipality's general police power to make § 27 applicable in the case at bar, although undoubtedly civil action may be resorted to, and criminal prosecution if the public health and safety are shown to have been impaired.

While § 27 is penal, punishment does not include imprisonment. We see no reason why the city attorney may not prosecute the appeal for the sole purpose of procuring a ruling respecting validity of the ordinance.

Reversed.

Mr. Justice McFaddin and Mr. Justice George Rose Smith dissent.

5-393 267 S. W. 2d 314

Opinion delivered April 26, 1954.

John L. Sullivan, for appellant.

Hobbs & Ridgeway and *Campbell & Campbell,* for appellee.

MINOR W. MILLWEE, Justice. On August 1, 1953, the members of the Arkansas Board of Massage, appellants herein, filed a petition in Garland Circuit court seeking a declaratory judgment construing Act 180 of the Acts of 1951, the "Massage Registration Act." The petition alleged that appellees are engaged in the practice of massage in various bathhouses in Hot Springs, Arkansas, which are located on property ceded to the United States Government and now leased from said government; and that appellees have failed and refused to register under said Act 180 and to otherwise abide by its provisions.

On August 15, 1953, appellees filed a demurrer to the complaint on the ground, among others, that the court lacked jurisdiction of the persons of appellees and of the subject of the action. On August 26, 1953, part of the original defendants, the presidents and managers of various bathhouses, moved to dismiss on the grounds that none of them are masseurs or employ masseurs and

the motion was granted. On October 6, 1953, the appellees' demurrer was sustained on the ground that the court had no jurisdiction of the persons of appellees or of the subject matter of the action. Upon appellants' refusal to plead further, their complaint was dismissed.

The sole question presented is whether or not the courts of the State of Arkansas have jurisdiction to enforce Act 180, *supra,* as against appellees, who are residents of Arkansas but are employed on property owned by the United States of America and leased from that government by bathhouses in the city of Hot Springs, Arkansas. Ark. Stats. §§ 10-1123 through 10-1126 cede the property involved to the United States with the reservation that this grant of jurisdiction shall not prevent the execution of any process of the state, civil or criminal, on any person who may be on the reservation or premises, and further reserving the right to tax all structures and other property of private ownership in the Hot Springs Reservation. This cession of jurisdiction by the State was duly accepted by Congress and various statutes have been enacted by that body authorizing the Secretary of the Interior to lease and make all needful rules and regulations regarding the operation of bathhouses in the Hot Springs National Park. 16 U. S. C. A., §§ 362-374. By § 369 the Secretary of the Interior is authorized to assess and collect certain fees or charges from masseurs and bath attendants operating on the Reservation.

In *Fant* v. *Arlington Hotel Company,* 170 Ark. 440, 280 S. W. 20, the Arlington Hotel in Hot Springs had burned, and the question was whether an Arkansas statute restricting the liability of hotel keepers, which was enacted subsequent to the cession of jurisdiction to the Federal Government, applied. This court held the statute inapplicable, saying: "We think it is equally clear that the statute was inoperative. The cession of jurisdiction was necessarily one of political power, and it took away the authority of the State Government to legislate over the territory ceded to the general government. This point is expressly decided by the Supreme Court of the

United States in the Lowe case, *supra,* [referring to *Ft. Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 29 L. Ed. 264, 5 S. Ct. 995] where the court said: 'These authorities are sufficient to support the proposition, which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent, under the Constitution, operates to exclude all other legislative authority.' " See, also, *Arlington Hotel Company* v. *Fant,* 176 Ark. 613, 4 S. W. 2d 7, affd. 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447; *Young, Administrator* v. *G. L. Tarlton, Contractor, Inc.,* 204 Ark. 283, 162 S. W. 2d 477.

In *Lynch* v. *Hammock,* 204 Ark. 911, 165 S. W. 2d 369, we held that a physician licensed by another state, whose practice in this state was confined to workmen engaged in constructing buildings upon property owned by the United States, is not subject to the laws of Arkansas relating to the practice of medicine and surgery. So here, it appears that Arkansas has relinquished jurisdiction to the United States over the Hot Springs National Park except as reserved in the above mentioned statutes. The regulation of the practice of massage and the conduct of massage establishments does not fall within the reservations specified and the authority to regulate such matters has been conferred upon the Secretary of the Interior by Congress. Since the trial court was without jurisdiction, it was powerless to render judgment against appellees, declaratory or otherwise.

Affirmed.

CASH, COMMISSIONER OF LABOR *v.* ROCKET MANUFACTURING COMPANY.

5-399 267 S. W. 2d 318

Opinion delivered April 26, 1954.

Luke Arnett, for appellant.

J. Gayle Windsor, Jr., and *Eichenbaum, Walther, Scott & Miller,* for appellee.

George Rose Smith, J. Four employers, the appellees, brought suit to enjoin the Commissioner of Labor from charging to their respective accounts certain unemployment compensation benefits that had been paid to various former employees. The cases were consolidated for trial and resulted in a decree for the plaintiffs.

We find no substantial difference between the facts in this case and those considered in *Call* v. *Luten,* 219 Ark. 640, 244 S. W. 2d 130. There Luten was notified that a former employee had applied for unemployment compensation. Upon Luten's protest the employee was disqualified for a period of five weeks. Luten was notified of this disqualification (a fact reflected by the record in that case, although not mentioned in the opinion). Later on the Commissioner determined that the five weeks of disqualification had been satisfied, and, without further notice to Luten, benefit payments were begun. We held that the statute required that the employer be given notice of the Commissioner's determination that the period of disqualification had been satisfied and that the claimant had become eligible for benefit payments.

The present case involves claims arising in 1950 and the first few months of 1951, all prior to the decision in the *Luten* case. In each instance now before us the employer was notified that a claim had been filed.

Upon the employer's protest the claimant was held disqualified, usually for a period of ten weeks. In each instance the employer was notified of this disqualification. But, just as in the *Luten* case, the Commissioner later determined that the disqualification had been satisfied, and benefits were paid without further notice to the employer.

We see no reason for retreating from the position taken in the earlier case. It is important to realize that a disqualification for a given period, as for ten weeks, is not automatically satisfied by the mere passage of time. For any particular week to satisfy a week of disqualification it is necessary that the claimant either be employed or, if unemployed, be registered with the employment service and available for work. Ark. Stats. 1947, § 81-1106 (i) (2). Thus the Commissioner's determination that a period of disqualification has been satisfied involves the decision of a question of fact. The *Luten* case holds that the employer, from whose pocket the benefits are paid, is entitled to notice of the Commissioner's determination, so that he may resort to the administrative remedies provided by the law.

It is insisted that these appellees were not prejudiced by the want of notice, as they have not shown a meritorious defense to the claims. This is immaterial. It is true that proof of a defense is required by statute as a condition to obtaining relief from the judgment of a court. Ark. Stats., § 29-508. But the procedure followed by governmental agencies does not ordinarily involve the same safeguards that are observed by courts of law. The Employment Security Act does not require proof of a defense as a prerequisite to relief from a Commissioner's decision made without notice, and we do not feel called upon to supply a provision that the legislature deemed unnecessary.

Affirmed.

MARTIN *v.* MARTIN.

5-341 267 S. W. 2d 320

Opinion delivered April 26, 1954.

[redacted]

S. L. Richardson, for appellant.

Frierson, Walker & Snellgrove, for appellee.

J. SEABORN HOLT, J. Appellee, Vivian Martin, brought suit against her brother, Harry Martin, and in her complaint alleged, in effect, and prayed, that Harry Martin be declared to be holding legal title to certain property (six lots), appellee's residence in the town of Trumann, as a trustee of a resulting trust, and further prayed that an alleged partnership between them, involving business property in the town of Trumann and farm land in Poinsett County, be dissolved and the partnership property partitioned.

Appellant answered with a general denial and affirmatively pleaded the defense of laches, estoppel and statute of frauds. In a cross complaint, appellant alleged that he "has an absolute interest in all of said property as the sole owner thereof," etc. Thereafter, appellee answered appellant's cross complaint and denied "each and every allegation" therein.

Voluminous testimony was taken in this case before the trial court. There were findings and a decree in favor of appellee. The case is here on direct appeal of appellant and cross-appeal of appellee.

At the outset, we are met with an order of this court, (on appellee's motion) entered on March 8, 1954, striking the Bill of Exceptions in this case. This being true, we are limited to a consideration of what appears on the face of the record. We find no error apparent on the face of the record presented.

Our rule is well established that evidence at the trial cannot be considered by this court on appeal without a proper bill of exceptions and in such circumstances, we must presume that the absent evidence was sufficient to support the trial court's findings and decree. *McKinney* v. *Caldwell, Executor,* 220 Ark. 775, 250 S. W. 2d 117 and the decree of April 19, 1954 of *Oather S. Blackburn, et al.* v. *Abraham Ford, ante,* page 524.

On her cross-appeal, appellee "questions that part of the decree which found appellant to have an equal interest in the original capital of the partnership," * * *. "She does not question the findings of fact, but contends that the Chancellor improperly applied the law to these facts." We find no merit to this contention for the reason that the court's decree here, —which was a part of the record proper,—determined this issue along with all others, based on conflicting facts on matters joined by the pleadings above. These conflicting facts were contained in the absent bill of exceptions and must be presumed to support the findings and decree, therefore, appellee is in the same position on her cross-appeal as appellant on his direct appeal.

Accordingly, the decree is affirmed on both direct and cross-appeal.

CUPP *v.* LIGHT GIN ASSOCIATION.

5-396 267 S. W. 2d 516

Opinion delivered April 26, 1954.

[Rehearing denied May 24, 1954.]

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

Cecil Grooms, for appellee.

WARD, J. This appeal involves the acquisition of a passageway over occupied land by public usage for more than seven years.

On May 15, 1952, appellee, Light Gin Association, filed a petition in the Chancery Court alleging that appellant, Vance Cupp, without right blocked the road in dispute by placing an obstruction of four steel posts therein on or about May 7, 1952. The prayer was that Cupp be ordered to remove the obstruction and that he be permanently enjoined from further obstructing the road. There was also an allegation of and a prayer for damages, but none was allowed by the trial court and this issue is not raised here. An answer was filed denying that the road in question was a public road, that appellee had suffered any damages, and that he had any right to maintain the action. After hearing testimony introduced by both sides the chancellor found the issues in favor of appellee, ordering appellant to remove the obstructions and enjoining him from interfering with the use of the passageway. From this ruling of the chancellor appellant has appealed.

In order to facilitate an understanding of the issues and the relevancy of the testimony we will attempt to create a mental picture of the physical surroundings as disclosed by the record.

Highway No. 25 runs east and west and the property here involved lies along the south side of said highway and is a part of the East half of the NW¼ of the NE¼ Section 34, Township 17 North, Range 3 East. Beginning at a point on the said highway near the northeast corner of the property a WPA road runs southwest at an angle of 45 degrees and forms the east and principally the south boundary of the property here involved. Appellant owns a strip of the said land along the south side of Highway No. 25 approximately 200 feet wide from north to south, and appellee owns the rest of the land south of appellant's land. On a plat introduced in evidence there are certain buildings, roads and lines indicated which we will attempt to describe. There is a blue line running east and west dividing the two pieces of property. The road in dispute, approximately 25 feet wide, leaves Highway No. 25 and runs south across appellant's property on down to the blue line and, as appellee contends, thence due south to connect with the WPA road, but, as appellant contends, after the road in dispute leaves the blue line going south there are other ways that can be and are used to get to the WPA road. On appellant's property there is a house just east of the disputed road, another house just west of the road, and still another house further west. Appellant also has a chicken house on the south side of his property near the WPA road. On appellee's property the plat shows the following buildings: Just south of the blue line and near the WPA road is a store building, some 200 or 300 feet south of the blue line and slightly to the west is a gin, near the gin on the west side is a cotton house, and just to the south of the gin is a seed house. From the plat it appears that the distance from Highway No. 25 south to the WPA road is some 500 to 600 feet.

All of the East half of the NW¼ of the NE¼ described above was owned by D. S. Robinson for some

years prior to his death in 1938. In 1943 Robinson's heirs deeded to Gramling, et al. by an indefinite metes and bounds description all of the land south of the blue line; a few years later Gramling, et al. deeded the same land to Kennemore; and on April 14, 1952, Kennemore deeded to appellee. Appellant received a deed to his land January 6, 1947, from Robinson's heirs.

As stated by appellant, "There is little conflict in the testimony of the witnesses in this case." There has been a gin on the present location since before Robinson died in 1938 and before that time there was a stave mill located at the same place. As early as 1930 and perhaps before that the disputed road was used by people leaving Highway No. 25 to get to the mill and the gin, and there is testimony by several witnesses that the road has been used more than seven years by people in general to travel from Highway No. 25 to the WPA road and vice versa. At first there was a tram road on the location of the present disputed road for the benefit of the mill but it was later abandoned and then the public began using the same passageway. Kennemore who has managed the gin since 1943 says that he graveled the disputed road several times and paid for the gravel; that the county grader graded the road a few times—sometimes when he requested it and at least one time when he didn't. Others testified that the road had been graded by the county machinery. Appellant admits putting gravel on this road and also on other passageways leading from his property to the WPA road. All the witnesses agreed that the road had been used frequently and without any objections being raised and all agreed they had not gotten permission from anyone to use the road. Appellant himself testified the public has been using this passageway day and night for a period of 25 or 30 years, and he didn't know of anybody questioning their right. The pictures introduced in evidence show clearly that the road is well defined particularly from Highway 25 to the blue line but south of the blue line it appears that traffic could reach the WPA road by at least one other route. We think the weight of the testi-

mony shows that most of the traffic particularly from Highway No. 25 to the WPA road was in a direct south line and the pictures show that this passageway was open and of course the shortest route. There is some testimony on the part of appellant indicating that the disputed road was originally established and maintained by Robinson and his successors in title solely for the purpose of accommodating people who desired to reach the gin and the mill by way of Highway No. 25. While the evidence does show such customers did use the road there was other testimony that the people in general also used the road.

Appellant ably contends that under the above fact situation the use of the disputed road by the public should at law be considered permissive. If this rule is to be followed it also follows, according to many decisions of this court, that seven years of such permissive usage would not create a road by prescription or adverse usage. In support of this contention appellant calls attention to the rule many times announced by this court as stated in the case of *Boulliouu* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986, to this effect:

". . . where the easement received is against property that is *uninclosed* it will be deemed to be by permission of the owner and not to be adverse to his title." (emphasis supplied).

The record discloses that the land across which the disputed road runs is not and has not been inclosed.

In answer to the above contention appellee points out another rule also many times announced by this court, as also stated in the above cited case, which is as follows:

". . . where the claimant has openly made continuous use of the way over *occupied* lands unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right." (emphasis supplied).

In the case under consideration the record discloses that the land in question was *occupied* and that the usage of the road was unmolested by the owners.

Thus arises the difficulty of applying both rules to the facts of this case.

This same difficulty was noted in the case of *Martin* v. *Bond, Trustee,* 215 Ark. 146, 219 S. W. 2d 618. In an apparent effort to harmonize the two rules the court there interpreted language in the *Boullioun* case as meaning that "uninclosed" lands referred to lands that were open or "unoccupied." Following this reasoning the court then held, in effect, that a question of fact was presented regarding the nature of the usage. The last sentence in the opinion reads:

"While the testimony is conflicting as to whether use of the road since 1938 has been adverse and under claim of right, or permissive, we cannot say that finding of the trial court is against the weight of the evidence as a whole."

The holding in the above case is in harmony with the announcement in the recent case of *Fullenwider* v. *Kitchens,* 223 Ark. ....., 266 S. W. 2d 281, which involved the same difficult question here presented, and where we said:

"Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right."

Applying here the same reasoning used in the last two cited cases, we cannot say the finding of the trial court as to the character of the usage was against the weight of the evidence.

Finally, appellant argues that appellee, individually, has no right to maintain this action because it suffered

no damage different from that suffered by the general public, but the answer to this argument is found in *Langford* v. *Griffin,* 179 Ark. 574, 17 S. W. 2d 296. It was there held that special damages accrued to one whose property abutted the closed road or alley way.

Affirmed.

Justice ROBINSON dissents.

ANDERSON *v.* ANDERSON.

5-398 267 S. W. 2d 316

Opinion delivered April 26, 1954.

Sam Rorex, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

ROBINSON, J. This is an appeal from an order denying a petition to set aside a decree of divorce. On the 27th day of June, 1952, appellee Hallam H. Anderson filed suit in the Pulaski Chancery Court, First Division, alleging that he and appellant herein, Florence P. Anderson, were husband and wife but had lived separate and apart for about 10 years, and asked for a divorce on the

grounds of 3 years separation. He alleged that he was a citizen and resident of Pulaski County, Arkansas. On the 10th day of July appellant filed an entry of appearance and waiver in which she acknowledged receipt of a copy of the complaint, waived service of process, entered her appearance in the cause, and agreed that the plaintiff could take certain depositions without further notice to her. On the same day she filed an answer which was a general denial.

Upon a trial of the cause, appellee introduced evidence to the effect that he resided at 1615 West 12th Street, Apt. No. 2, Little Rock, and had lived there for a sufficient time to establish residence within the requirements of our divorce laws. The trial resulted in a decree granting Mr. Anderson a divorce, and requiring him to pay to Mrs. Anderson a sum exceeding $60,000. No appeal was taken from this decree.

About 6 months later, after the term of court had expired and after Anderson had paid Mrs. Anderson the full amount provided by the decree, she filed a petition to set aside the decree, alleging that Anderson was not a resident as required by the laws of this state. Appellee Anderson filed a motion to dismiss the petition, alleging that the term of court at which the decree was entered had expired; that the petitioner had personally entered her appearance and was represented by an attorney who was present in the courtroom and participated in the original trial; that no appeal was taken from the Chancellor's decree; that all of the issues were before the court at the original hearing including the issue of plaintiff's domicile; that the cause was *res adjudicata;* that the petitioner had accepted all of the benefits provided for her by the decree; and that she was estopped to now plead the lack of jurisdiction of the court which granted the decree. Appellant filed an amended petition in which she alleged that at the time she entered her appearance in the divorce suit, she did not know that plaintiff was a non-resident of Pulaski County. The trial court granted the motion to dismiss

the petition to set aside the decree, and petitioner has appealed.

The court's action in dismissing the petition to set aside the decree must be sustained for two reasons. In the first place, the issue of whether appellee was a *bona fide* resident of Pulaski County, Arkansas, at the time of the rendition of the decree is *res adjudicata.* Assuming now that Anderson was not a *bona fide* resident of Pulaski County at the time he was granted a divorce, the issue of his residence was before the court at that time and the burden was on him to prove such residence. Ark. Stat. § 34-1208.

We are not overlooking cases in which we have held that a divorce may be set aside where the plaintiff fraudulently claimed to be a *bona fide* resident, such as *Murphy* v. *Murphy,* 200 Ark. 458, 140 S. W. 2d 416; *Corney* v. *Corney,* 79 Ark. 289, 95 S. W. 135, 116 Am. St. Rep. 80; *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295; *Stewart* v. *Stewart,* 101 Ark. 86, 141 S. W. 193.

Kennedy v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876, is another case relied on by appellant; but that case as well as *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49, was a direct appeal from the decree granting the divorce, and for that reason they are not in point with the situation presented here. Also in *Porter* v. *Porter,* 209 Ark. 371, 195 S. W. 2d 53, there was a direct appeal from the decree but the first decree had been set aside on a showing that the wife had been prevented by unavoidable casualty from making a defense. In all the other cases cited above, for various reasons the defendant did not appear and was not represented by counsel of her choice. But here, not only was the defendant notified of the filing of the suit, but she actually filed a waiver she had personally signed, engaged an attorney to appear in her behalf, and was ably represented. The decree provides benefits to her of a sum in excess of $60,000.

Furthermore in the case at bar there is no evidence of collusion such as existed in *Oberstein* v. *Oberstein,*

217 Ark. 80, 228 S. W. 2d 615. Therefore that case is not in point with the issue presented here.

In *Williams, et al.* v. *North Carolina,* 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, 157 A. L. R. 1366, it was held that the State of North Carolina was not compelled to give full faith and credit to a decree of divorce rendered by a Nevada court, where a jury in a North Carolina court found as a matter of fact that the defendant, who was on trial in North Carolina for illegal cohabitation, had never been a resident of Nevada. The effect of this finding resulted in a holding that the courts of Nevada had no jurisdiction over the person of Williams to render a divorce decree. But in that case service in the Nevada court had been obtained by warning order and the spouse did not appear to defend. It was specifically stated in the Williams case that the defendant spouse had not appeared nor had she been served with process in Nevada.

Later, in *Sherrer* v. *Sherrer,* 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A. L. R. 2d 1355, where the State of Massachusetts had failed to accord full faith and credit to a decree of divorce rendered by the State of Florida, the U. S. Supreme Court held the Florida divorce was valid and the doctrine of *res adjudicata* was applicable. The court quoted from *Stoll* v. *Gottlieb,* 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, as follows: "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." The court further said: "She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile."

In *Coe* v. *Coe,* 334 U. S. 378, 92 L. Ed. 1451, 68 S. Ct. 1094, 1 A. L. R. 2d 1376, the court said: "Thus, here,

as in the *Sherrer* case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues. It is a decree not susceptible to collateral attack in the courts of the State in which it was rendered."

Likewise in the case at bar Mrs. Anderson entered her appearance and filed an answer putting in issue the question of residence of the plaintiff. She was represented by counsel of her choice and obtained a substantial amount of money in the suit. She had her day in court. No appeal was taken from the decree rendered. The cause is *res adjudicata.*

On the question of estoppel, Mrs. Anderson accepted more than $60,000 under the provisions of the decree. She considered the decree valid insofar as it provided benefits for herself; and therefore she is not now in a position to say that although she did not appeal from the finding that Mr. Anderson was a resident of the county and state, and although she accepted the benefits awarded to her by the decree, she would now have the decree declared null and void. In pursuance to the provisions of the decree, Mr. Anderson paid to Mrs. Anderson the large sum of money mentioned. In *Baker-Matthews Lumber Co.* v. *Bank of Lepanto,* 170 Ark. 1146, 282 S. W. 995, it is said: "The whole principle of equitable estoppel is that when a man has deliberately done an act or said a thing, and another person who had a right to do so has relied on that act or words and shaped his conduct accordingly, and will be injured if the former can repudiate the act or recall the words, it shall not be done." Even if Mrs. Anderson had taken a direct appeal from the decree and had, pending the appeal, accepted the benefits of the decree, she would be estopped to continue the litigation. In *Jones, et al.* v. *Rogers, et al.,* 222 Ark. 523, 261 S. W. 2d 649, it is said: "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."

Our conclusion is that the cause is *res adjudicata;* and further, that the appellant, by the acceptance of the benefits of the decree, is estopped to say that the decree is invalid. The order of the Chancellor in dismissing the petition to set aside the decree is therefore affirmed.

SEQUOYAH FEED & SUPPLY CO., INC. *v.* FIRST NATIONAL BANK OF HUNTSVILLE.

5-390 267 S. W. 2d 310

Opinion delivered April 26, 1954.

Greenhaw & Greenhaw and *Pearson & Pearson,* for appellant.

E. M. Fowler, Suzanne C. Lighton and *Lee Seamster,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, First National Bank of Huntsville, Arkansas, herinafter called "Bank," was the garnishee in two separate writs issued in litigation in the Madison Circuit Court involving numerous parties and issues. One of the garnishments was issued at the instance of appellant, Sequoyah Feed and Supply Company, Inc., hereinafter called "Sequo-

yah," and the other was issued in favor of Norris Counts, an intervenor in the action. Both garnishments were for the amount of $1,890.21 which the Bank held to the credit of Cotton Produce Company, a partnership composed of J. A. Robinson, V. A. Ashworth and Tommy Weir, hereinafter called "Cotton" and a defendant and cross-complainant in the action. The present appeal is from the circuit court's judgment holding that the Bank acted lawfully in paying the garnished funds to the Sheriff of Madison County under an execution issued pursuant to a judgment rendered in the action in favor of Intervenor Counts against Cotton.

A brief history of the litigation is necessary to an understanding of the present issue. Sequoyah brought the original action against Cotton on an open account on April 24, 1951, and a writ of garnishment was issued and served on the Bank on the same day. Cotton answered and filed a cross-complaint against Sequoyah for damages in the sum of $25,000.00. On May 5, 1951, Norris Counts filed an intervention in the action seeking judgment against Sequoyah and Cotton and on the same date had a garnishment issued and served on the Bank covering the Cotton account. Counts also alleged there was collusion between Cotton and Sequoyah in the issuance of the first garnishment. Sequoyah answered the Counts intervention denying collusion and generally denying other allegations. Other parties and issues were involved in the action which it is unnecessary to mention here.

On March 10, 1952, proceedings were begun which resulted in a judgment, reading in part, as follows:

"*Comes on this the 10th day of March, 1952,* for trial, the above styled cause, the plaintiff, Sequoyah Feed and Supply Co., Inc., appearing by its attorneys Greenhaw and Greenhaw, and Pearson and Pearson, the defendants, J. A. Robinson and V. A. Ashworth appearing in person and by their attorneys Jeff Duty, Rex Perkins, and Price Dickson; the defendant Tommy Weir being in default and not appearing, the Cross Defendant Pillsbury Mills, Inc., appearing by its attorneys Greenhaw and

Greenhaw, and Pearson and Pearson; and all parties and their respective attorneys announcing ready for trial, it was thereupon stipulated and so ordered by the court that said cause would be tried on the complaint of the plaintiff and the answer and cross-complaint of the defendants J. A. Robinson, and V. A. Ashworth, *and that the interventions filed herein and the garnishment proceedings herein would be passed for hearing at a later date.* . . .

"*Thereupon, on 11th day of March, 1952,* at the conclusion of all evidence and all parties having rested and closed, the court upon the motion of the defendant J. A. Robinson, then and there directed the jury to return a verdict for the defendant J. A. Robinson in the sum of $4,433.87 for commissions due the said J. A. Robinson by Pillsbury Mills, Inc. . . .

"It is therefore the order and judgment of this court, that judgment be, and the same is hereby rendered, in favor of the plaintiff Sequoyah Feed and Supply Co., Inc., and against the defendants V. A. Ashworth, J. A. Robinson, and Tommy Weir, individually and as partners doing business as Cotton's Produce Co., in the sum of $5,062.24.

"It is also the order and judgment of this court, that judgment be, and the same is hereby rendered in favor of V. A. Ashworth and J. A. Robinson, and against Sequoyah Feed and Supply Co., Inc., in the amount of $6,336.00.

"It is the further order and judgment of this court that judgment be, and the same is hereby rendered in favor of J. A. Robinson and against Pillsbury Mills, Inc., in the sum of $4,433.87.

"*It is the further order and judgment of this court that the garnishment issued by the plaintiff, Sequoyah Feed and Supply Co., Inc., whereby the sum of $1,890.21 on deposit at the First National Bank, Huntsville, Arkansas, was impounded be, and the same is, hereby released, conditioned however that said funds shall not be paid by*

said bank to any of the parties herein or that said funds shall be released until further order of this court."[1]

On March 11, 1952, proceedings were had on the Counts' intervention resulting in the following judgment:

"Now on this 11th day of March, 1952, this cause comes on to be heard the above styled action, and the Intervenor appearing in person and by his attorney, Clifton Wade, and the defendants, J. A. Robinson, V. A. Ashworth, and Tommy Weir, d/b/a Cotton Produce Company, appearing in person and by their attorneys, Rex Perkins, Price Dickson, and Jeff Duty; thereupon the said Intervenor, Norris Counts, demanded a trial, and the cause was submitted to the Court upon the Complaint filed herein by the Intervenor, with exhibits attached thereto, including the check herein sued upon, the Writ of garnishment and Allegations and Interrogatories and Summons issued herein against the defendant and garnishees, and the returns thereof, showing proper service for the time and in the manner required by law, the parties waiving a trial by jury and consenting and agreeing in open court that the cause might be submitted to the Court and judgment rendered herein, and from the evidence introduced by said Intervenor and other matters, proof, and things before the Court, the Court finds:

"That the defendants herein have failed to plead, and though present in open court, make no defense to complaint of intervenor;

"That defendants, V. A. Ashworth, J. A. Robinson, (one and the same person as James A. Robinson), and Tommy Weir, d/b/a Cotton's Produce, a partnership, are indebted to plaintiff, Norris Counts, in the amount of $2,166.64, on account of check dated April 17, 1951 drawn on First National Bank of Huntsville, Arkansas, payable to Intervenor, which check, though presented in due course, was returned unpaid;

"That said principal amount is due and unpaid to Intervenor, together with protest charges in the amount

[1] All italics supplied.

of $2.50 for all of which the said Intervenor should have judgment.

"That a Writ of Garnishment was issued by the Circuit Clerk of Madison County, Arkansas, on the 21st day of May, 1951, and that said writ was thereupon on said day duly served by the Sheriff of Madison County upon said bank in the form and manner provided by law, that more than six (6) months has elapsed since said service, but that no answer or response thereto has been filed by said bank as provided by law, and that Norris Counts, as Intervenor should have judgment against the First National Bank of Huntsville, Arkansas, the garnishee herein, in the amount of $2,169.14.

"It Is Therefore, by the Court, Ordered, Considered, and Adjudged, that Norris Counts, Intervenor herein do have and recover judgment from the defendants, V. A. Ashworth, J. A. Robinson, and Tommy Weir, d/b/a Cotton's Produce Company, both jointly and severally, as partners, and the First National Bank of Huntsville, Arkansas, in the amount of $2,169.14, together with interest from this date until paid at the rate of six (6) per cent per annum, and the costs herein laid out, paid and expended, for which execution may issue."

On March 20, 1952, Sequoyah filed a motion for new trial in its appeal from the first judgment above mentioned and one of the alleged errors was the action of the court in releasing the impounded funds held by the Bank from the Sequoyah garnishment. The motion was overruled March 25, 1952, and on March 28th Sequoyah filed bond to supersede the Cotton judgment. There was no mention of the garnishment or the bank in either the bond or the supersedeas issued by the clerk. On September 8, 1952, Sequoyah prayed and was granted an appeal out of this court from the first judgment and had a summons issued and served on Cotton. The Bank was not made a party to the appeal and no summons was issued for or served on it.

There was no appeal from the judgment in favor of Counts against Cotton and the Bank rendered on March

11, 1952. On March 22, 1952, an execution was issued by the clerk pursuant to said judgment and levied against the Bank by the sheriff of Madison County. Acting on the advice of counsel, the Bank paid the garnished funds of $1,890.21 to the sheriff in satisfaction of said execution on the same date.

On February 23, 1953, we decided the appeal taken by Sequoyah from the judgment of Cotton against it in *Sequoyah Feed and Supply Company, Inc.* v. *Robinson,* 221 Ark. 660, 255 S. W. 2d 425. In reversing the judgment, we said: "The trial Court ordered that certain funds that had been garnished in the hands of the Bank, would be held until further orders. There were several interventions in the case which, as previously mentioned, were left for further consideration. As between Sequoyah and Cotton, the garnishment of the Bank was good; but we forego any discussion of the garnishment because there may be some rights of the intervenors yet to be adjudicated."

On March 19, 1953, Sequoyah filed the mandate of this court in the circuit court and on the same date filed a motion for judgment against the Bank in the sum of $1,890.21. In its response the Bank denied liability on the grounds: (1) that it had already paid the garnished funds to the sheriff for Counts' benefit under the execution issued and levied pursuant to the unappealed judgment for Counts against Cotton; (2) that the order releasing the Sequoyah garnishment was never appealed from; (3) that when the Bank paid the funds out under the execution, no appeal had been taken; (4) and that when the appeal was taken from the Cotton Sequoyah judgment on September 8, 1952, the Bank was not made a party nor notified of said appeal. Sequoyah filed a motion to strike the response. After a hearing, the trial court denied Sequoyah's motion for judgment, holding that the Bank lawfully paid the garnished funds on the execution issued pursuant to the garnishment and judgment in favor of Counts.

In seeking a reversal Sequoyah argues that it was unnecessary to make the Bank a party appellee or notify it on the first appeal; that the Counts judgment and execution issued thereon against the Bank were void; and that the Bank failed to use due diligence to protect its interest either by pleading the Sequoyah garnishment in answer to the Counts' garnishment, or by appealing from the Counts' judgment, or by paying the garnished funds into court. In support of the trial court's judgment, the Bank insists that it was unaffected by the Sequoyah-Cotton appeal because it was never made a party thereto; and that it in good faith performed its duty as garnishee by paying over the garnished funds in obedience to the execution issued pursuant to the Counts' judgment and garnishment. In connection with these contentions, Sequoyah insists that the Counts' judgment was rendered prior to the Sequoyah judgment while the Bank contends that the Counts' judgment was rendered the day after the Sequoyah judgment. Oral testimony adduced on this issue adds little to the record recitals which show the Sequoyah judgment entered first followed immediately by the Counts' judgment. The judgment record indicates quite clearly that the first paragraph of the Sequoyah judgment which passed the interventions and garnishment proceedings for a later hearing was made and rendered on March 10, 1952, while that part of said judgment which ordered the release of the impounded funds from the Sequoyah garnishment on certain conditions was rendered March 11, 1952, the same date on which the Counts' judgment was rendered. So, strictly speaking, the Counts' intervention and both garnishment proceedings were in fact heard "at a later date" as directed by the court in the Sequoyah judgment.

In support of its contentions, the Bank relies on the cases of *American Nat. Bank of Ft. Smith* v. *Douglas,* 126 Ark. 7, 189 S. W. 161, and *Hot Springs Concrete Co.* v. *Rosamond,* 180 Ark. 690, 22 S. W. 2d 368. Sequoyah relies on *Citizens Bank* v. *Commercial National Bank,* 107 Ark. 142, 155 S. W. 102; *Hughes-Speith Pipe Line Company* v. *McWilliams Hdwe. and Furniture Co.,* 172

Ark. 79, 287 S. W. 580; and cases from other jurisdictions on the general proposition that a garnishee has a duty to perform to protect its interests as well as the interests of others. In none of these cases is a factual situation presented parallel to that in the instant case. We have considered the principles of these cases along with the general rule that, where funds of the principal debtor in the hands of the garnishee are taken from him by legal process after service of the writ, he is not chargeable in garnishment proceedings therefor. See: 38 C. J. S., Garnishment, § 186e; 5 Am. Jur., Attachment and Garnishment, § 678.

All parties to this involved litigation apparently had full knowledge of all the proceedings had on March 10 and 11, 1952, which culminated in the two judgments. A representative of the Bank appeared in the Sequoyah-Cotton proceedings and admitted that the Bank held certain funds to Cotton's credit. Sequoyah was a party to the Counts' intervention in which the validity of the two garnishments was put in issue and answered said intervention. Under the Sequoyah-Cotton judgment the Sequoyah garnishment was ordered released on conditions that were couched in ambiguous language. The Counts' judgment ordered that execution issue on the judgment against the Bank as garnishee. Ten days after these proceedings the Bank was served with the execution by the sheriff of Madison County. It is true that the writ of execution was not an "order of court" in the strict sense but it did constitute "legal process" issued on the court's order in the Counts' judgment, which the Bank, with some justification, construed as a "further order" of the court. Subsequent to these proceedings there was no appeal from the Counts' judgment and the Bank was not made a party to nor given notice of the Sequoyah appeal or the supersedeas issued thereunder which only superseded the judgment in favor of Cotton and did not mention the Bank. We concur in the trial court's conclusion that it would work an injustice to require the Bank to twice pay over the garnished funds

under all the circumstances, and the judgment is affirmed.

LAWRENCE *v.* FRANCIS.

5-389 267 S. W. 2d 306

Opinion delivered April 26, 1954.

Joe W. McCoy, for appellant.

Ben M. McCray and *W. H. McClellan,* for appellee.

ED. F. MCFADDIN, Justice. This is an action for damages brought by the property owner, Francis, against the Insurance Broker, Lawrence, for failure to obtain insurance on property in accordance with an agreement. From a verdict and judgment for the plaintiff, Francis, for $4,000.00, the defendant, Lawrence, prosecutes this

appeal; and the main insistence for reversal is that no *definite* contract was ever made by the parties.

FACTS

Mr. Francis had lived in the State of Minnesota for many years, but decided to move to Arkansas. In July, 1951, he went to Malvern, Arkansas, to see Mr. Craft, a real estate agent, who showed him several places, but none was satisfactory. Then Mr. Craft took Mr. Francis to Mr. Lawrence, also a real estate agent, to look at his listings. Mr. Lawrence showed Mr. Francis the property of Mr. and Mrs. Holiman, which consisted of 2½ acres, with a modern 5-room house, garage, barn, and chicken-house. Mr. Francis agreed to buy the Holiman property for a total price of $5,000.00. He deposited $400.00 with Mr. Lawrence, and signed an agreement to pay the balance of $4,600.00 within 90 days. This contract was signed by Mr. Francis and the Holimans on July 17, 1951, and on that date occurred the agreement here involved. Mr. Francis was to return to Minnesota to liquidate his holdings there, in order to obtain the balance of $4,600.00. Mr. Lawrence was an insurance agent, as well as a real estate agent. Here is Mr. Francis' pertinent testimony:

"A. I gave Mr. Lawrence a check for the Four Hundred Dollars.

"Q. All right, then what happened after the contract was signed there?

"A. Well, we—I asked at that time about insurance, I asked him whether he knew Mr. Holiman had any insurance on that property, and he said he didn't know. He said if he has, he hasn't got it with me; and I said, will you see Mr. Holiman and find out if he has insurance and how much and if you can settle at sufficient coverage will you see if he can transfer it to me and I will pay the premium. If you don't consider it sufficient premium, I want insurance, because I want full coverage. And I asked him what company he represented, and he explained a mutual company to me, and I said that suited

me all right, I had my property in Minnesota listed in a mutual and was satisfied with it, and just about that time the telephone rang. I was sitting right by the telephone.

"Q. Where were you now? I don't believe you made that clear to the jury where you were at this time.

"A. We were at the United Farm Agency's place of business, and Mr. Lawrence was sitting on the daveno there, and I was sitting on a chair close to the phone . . . And well, Mr. Craft came and answered the phone. We stopped talking, of course, and as soon as he hung up I turned to Mr. Lawrence and I said, 'And you will take care of the insurance?' and he said, 'Yes, yes', so I considered the insurance would be taken care of, being as he was an insurance agent—in that business —and I had told him that I wanted full coverage."

Mr. Francis returned to Minnesota and in August sent to Mr. Craft a cashier's check for $4,600.00, who delivered it to Mr. Lawrence on August 21st; and on the same day, he paid the money to Mr. and Mrs. Holiman. As Notary Public, Mr. Lawrence took the acknowledgment of the deed transferring the property that day to Mr. Francis. The Holimans had a $4,000.00 fire insurance policy on the house and buildings; and on August 21st they cancelled their insurance. Mr. Lawrence does not claim that he mentioned anything to the Holimans about transferring the insurance policy to Mr. Francis; and Mr. Lawrence did not insure the property for Mr. Francis with any company.

On August 31st, all of the buildings were destroyed by fire. Mr. Francis, still in Minnesota, learned of the fire on September 7th, and immediately went to Malvern and contacted Mr. Lawrence; and here is Mr. Francis' testimony about that conversation:

"Q. Did you contact Mr. Lawrence relative to making claims for your insurance?

"A. I did.

"Q. What were you then advised?

"A. Well, he didn't deny—the only defense that he offered then was that I didn't tell him how much insurance I wanted. He didn't deny our conversation, he didn't deny that I asked him if he would take care of it, and he said full coverage, all that meant was coverage against hail, wind, fire, etc., he said that don't mean anything to the amount.

"Q. That was the only excuse he gave you then for not having insured your property, was that you didn't say what specific amount to insure it?

"A. Yes, sir.

"Q. Did you remind him at that time that you had left it up to him as to what was sufficient?

"A. Yes, sir. And I understood that full coverage was the full amount that an insurance company would allow their agents to put on a property."

That Mr. Lawrence did agree to look after the insurance for Mr. Francis is substantiated by Mr. Craft, who testified:

"Q. During the negotiations between Mr. Francis and Mr. Lawrence, did you hear a conversation between them relative to insurance on the improvements on the lands purchased by Mr. Francis?

"A. Yes.

"Q. If your answer to the preceding question is yes, please state whether or not Mr. Lawrence agreed to see that said property was fully insured? And state the conversation relative to the insuring of the property.

"A. Yes. As they closed the deal, Mr. Francis asked Mr. Lawrence, 'Then you will take care of the insurance?' Mr. Lawrence answered the way he does when he is excited. 'Yes, sir, yes, sir. I sure will.' "

OPINION

The foregoing facts are detailed from the viewpoint of Mr. Francis, since the Jury verdict was in his favor; and in testing the sufficiency of the evidence, we always view the facts in the light most favorable to support the Jury verdict. *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287; *Potashnick Truck System* v. *Archer,* 207 Ark. 220, 179 S. W. 2d 696; and see other cases collected in West's Arkansas Digest, "Appeal & Error", § 930.

Mr. Lawrence urges, here, that the foregoing facts are insufficient to support the verdict; and he insists that he was entitled to an instructed verdict in his favor, because he claims the agreement alleged by Mr. Francis shows these defects: (1) there was no consideration; (2) there was no mutuality of assent; (3) there was no agreement as to the price of the policy; (4) there was no agreement as to payment of premium; (5) there was no amount of insurance specified; and (6) there was no duration of the policy stated.

We hold that the Trial Court ruled correctly in refusing Mr. Lawrence's request for an instructed verdict, and also in refusing Mr. Lawrence's other requested Instructions, amplifying on the six matters as above stated. It was shown by another Insurance Agent in Malvern that such a request as Mr. Francis made of Mr. Lawrence, in regard to insurance, was a sufficient instruction to any Insurance Agent to *bind* the risk and extend credit for the coverage. Mr. Lawrence, as a real estate agent, had a commission coming from completing the Holiman sale; and his interest in completing the sale, as well as his profit from writing insurance, constituted a sufficient consideration to support his promise to Mr. Francis to "see about the insurance". In 29 Am. Jur. 130, the holding of the cases is summarized in this language:

"It may be laid down as a general rule that a broker or agent who, with a view to compensation for his services, undertakes to procure insurance on the property of another, and, unjustifiably and through his fault or

neglect, fails to do so, will be held liable for any damage resulting therefrom. Although there is some authority to the effect that one who gratuitously undertakes to procure insurance for another is not liable for his omission to do so, it is generally accepted that the undertaking in itself imposes a duty to procure such insurance, and according to some authorities, the trust and confidence imposed in a broker employed to secure insurance on property afford a sufficient consideration for his undertaking to carry out the instructions given. The general rule in such respect is that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy, he may be held liable for the loss properly attributable to his negligent default. The promise by a property owner to take a policy of insurance, for the securing of which he employs a broker, has been declared to be a sufficient consideration for the broker's undertaking to carry out his instructions with respect to the policy."

As to what kind of insurance—i. e., fire, windstorm, etc.—there is no need to argue: Holiman had fire insurance, and the buildings were destroyed by fire. As to the amount of the insurance coverage, it was shown that Holiman had $4,000.00 fire insurance on the buildings. Lawrence made no effort to have the Holiman fire insurance policies transferred to Francis: Lawrence could and should have obtained the same kind and amount of insurance for Francis that Holiman had. When the deed was delivered to Lawrence on August 21st, Holiman told Lawrence that he (Holiman) was cancelling his insurance on the property. Certainly on that day Lawrence could and should have either taken over Holiman's fire insurance policy for Francis, or should have obtained other insurance of like amount. Such was his promise to Francis. Lawrence failed entirely to exercise reasonable care to perform his agreement with Francis as to insurance.

In our recent case of *Derby* v. *Blankenship,* 217 Ark. 272, 230 S. W. 2d 481, we had occasion to discuss the liability of an insurance agent, —i. e., a broker—for failure to obtain insurance in accordance with his agreement; and we there approved an Instruction which declared the law to be: that where an insurance agent undertakes to procure a policy of insurance for another, the law imposes upon the agent the duty, in the exercise of reasonable care, to perform the obligation that he has assumed, and the agent may be held liable for any loss—within the amount of the proposed policy—suffered by the applicant attributable to the agent's failure to provide such insurance. We then said:

"The great weight of judicial authority in America permits recoveries against insurance brokers under such circumstances. *Burroughs* v. *Bunch* (Tex. Civ. App.), 210 S. W. 2d 211; *Rezac* v. *Zima,* 96 Kans. 752, 153 Pac. 500, Ann. Cas. 1918B 1035; *Gay* v. *Lavina State Bank,* 61 Mont. 449, 202 Pac. 753, 18 A. L. R. 1204; *Elam* v. *Smithdeal Realty & Ins. Co.,* 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210; 2 Couch, Insurance § 468 (p. 1329); 16 Appleman, Insurance, § 8841 (p. 300)."

The case of *Derby* v. *Blankenship* is ruling in the case at bar.

Affirmed.

HAGAN *v.* KNOWLES.

5-383 267 S. W. 2d 514

Opinion delivered May 3, 1954.

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

H. B. Means, Jr., for appellee.

GRIFFIN SMITH, Chief Justice. A truck owned by Paul Hagan and driven by Ewell Gray was struck by an automobile owned and operated by Grady A. Knowles, who sued for $496.93 to compensate property loss. Hagan's denial that his driver was negligent was coupled with a cross-complaint for $490.76 covering loss sustained by reason of the damage to his truck. From a judgment in favor of Knowles for the full amount of his claim Hagan has appealed.

Appellant's contention is that the undisputed evidence shows contributory negligence when Knowles undertook to pass the truck.

Highway 270 passes through Malvern and intersects some of its streets. Gray, as Hagan's servant, was driving westward on the highway and undertook to enter Railroad street by turning to the left. Knowles, traveling in the same direction, attempted to pass the truck at a point where the highway is intersected by railroad lines and where Railroad street enters the highway. Appellant concedes that Gray did not give a manual signal of his intention to turn, but thinks it is not seriously disputed that stop lights on the truck were activated when the driver maneuvered control mechanism preparatory to the actual turn. If, as appellant contends, Knowles was guilty of contributory negligence, recovery is barred. It is not insisted that the jury's failure to return a verdict for Hagan on his cross-complaint should work a reversal and remand of the cause.

Knowles testified that while driving on the highway he first observed appellant's truck when it was slightly less than half a block from him. He estimated the truck's speed (which was not diminished) at from 15 to 20 miles an hour and his own at 30 or perhaps 35 miles. The fact that Gray was traveling slowly did not suggest to Knowles that a turn was to be made, "because he was making the same speed when I first saw him".

There was no other visible traffic on the highway; and, said Knowles, the truck was virtually overtaken between the tracks and the street intersection. Gray testified that before or at the time of making the turn he did not lower the window; nor did he put out his hand "or do anything of that sort". The collision occurred on the left side of the center line of the highway in respect of driver direction. Knowles' reconstruction of essentials is that he attempted to pass the truck "just beyond the railroad tracks"; that the street intersection was approximately 75 feet from the tracks, and that he applied his brakes and sounded his horn in an attempt to inform the truck driver of an intention to pass.

Appellant's contentions, as summarized, are: (1) Appellee failed to give an audible signal of his purpose to pass the truck; (2) he was attempting to pass where the highway is intersected by railroad tracks, and (3) the attempt was made at the intersection of the highway with a street.

The collision occurred in November, shortly after dark. It had been raining and a slight mist was still falling. Darkness and weather conditions, it is urged, required that appropriate precautions be observed. We are cited to the provisions of Acts embraced within §§ 75-609 and 75-611, Ark. Stat's, prescribing a driver's duty in passing a vehicle when the two are going in the same direction. Primarily, however, appellant relies upon our decisions in *Madison Cadillac Company* v. *Lloyd,* 184 Ark. 542, 43 S. W. 2d 729, and *Ward* v. *Haralson,* 196 Ark. 785, 120 S. W. 2d 322.

In the Cadillac Company case the opinion states that when the appellees (who there stood in Knowles' posi-

tion here in most respects) were within 100 yards of the Cadillac Company's automobile (a Hudson) it was discovered by those in the rear car that the Hudson was slowing to a speed of 25 or 30 miles per hour. Following a summation of facts the opinion, in regard to the law, said that the automobile in front has a superior right to use of the highway for the purpose of leaving it to enter an intersecting road, and the traveler who is following must handle his car "in recognition of the superior right of the traveler in front". This broad statement does not, of course, mean that the so-called front car may be driven without regard to trailing traffic. We have often said that the violation of a traffic safety measure is not negligence *per se,* but only evidence of such.

The Ward-Haralson case can hardly be said to have factual application here. There the truck driver was on his right side of the highway. He was driving slowly in circumstances indicating the exercise of unusual care, and the car in the rear was being driven rapidly as it topped a hill, in disregard of obvious danger.

In view of the testimony of appellant's driver that he did not manually signal an intention to turn, and in the absence of conduct from which appellee, as a reasonably prudent person, should have inferred that Gray's purpose was to leave the highway, we are not able to say that appellee's act in undertaking to pass the truck was of a character imputing negligence as a matter of law and that an instructed verdict should have been given. The jury could have made a finding that appellee was negligent, and the evidence would have sustained that finding.

Affirmed.

5-392 267 S. W. 2d 507

Opinion delivered May 3, 1954.

P. E. Dobbs, for appellant.

Clayton Farrar, for appellee.

ED. F. MCFADDIN, Justice. This is a suit instituted by the appellee to recover a tract of land in the City of Hot Springs. From a decree in favor of the plaintiff for the land and for $1,076.67 damages, the defendant prosecutes this appeal. We will refer to the parties as they were styled in the Trial Court.

I. *Title of Plaintiff.* The cause was filed as an action in ejectment, and transferred to equity on motion of the defendant. The plaintiff both alleged and proved the following:

(a) that the Lot 8 here involved was owned by Sam Rye, who died in 1921;

(b) that this Lot 8 was devised in the residuary clause of the will to Sam Rye's four children, of whom plaintiff was one;

(c) that Elsie Rye, widow of Sam Rye, not being named in the will, took dower in his estate as provided by Statute;

(d) that this Lot 8 was assigned to the widow, Elsie Rye, for her life[1] by proper order of the Probate Court in 1923;

(e) that on September 3, 1926, Elsie Rye executed a Special Warranty Deed to J. H. Floyd, describing the property: ". . . all my right, title and interest in and to Lot 8" (further described by block and addition, etc.), "said property having been assigned and set apart to me as dower by order of the Garland County Probate Court";

(f) that the Executor of the Estate of J. H. Floyd executed a Special Warranty Deed to the defendant, Rutha Perry, in 1941, describing the property conveyed as ". . . all the right, title and interest of J. H. Floyd, as conveyed by Elsie Rye on September 3, 1926," (and giving the book and page number of the deed where recorded) "as follows: 'All my right, title and interest in and to Lot 8' (and giving block and addition, etc.), 'said property having been assigned and set apart to me as dower by order of the Garland County Probate Court' ";

(g) that Elsie Rye died on July 22, 1951; and

(h) this action was filed on September 5, 1951.

With the above facts alleged and proved, we think the plaintiff proved a sufficient title. It is true that the plaintiff did not deraign his title from the sovereignty

[1] The Probate Court order setting apart the said Lot 8 to the widow said: "She is hereby endowed of . . . Lot 8 . . . and is entit'ed during the term of her natural life to the use, rents, and profits thereof, free from the interference or claim of . . . heirs at law of said Sam Rye, deceased."

of the soil, but he did deraign it from Sam Rye, who is the common source of title of both plaintiff and defendant: since defendant claimed by limitations and by tax forfeitures occurring during the life estate of Elsie Rye. Allegation and proof of title from the common source was therefore sufficient in this situation. See *Spencer* v. *Pierce,* 172 Ark. 108, 287 S. W. 1019; and *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735.

The defendant apparently recognized the general rule of law that *limitations does not commence to run against the remainderman until the death of the life tenant.* *Ogden* v. *Ogden,* 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; *Kennedy* v. *Burns,* 140 Ark. 367, 215 S. W. 618; and *Frazier* v. *Hanes,* 220 Ark. 765, 249 S. W. 2d 842.

II. *Betterments.* After receiving the aforementioned deed from the Executor of the J. H. Floyd Estate in 1941, defendant placed portions of four houses on the Lot 8 here involved; and defendant claims that he is entitled to the protection of our Betterment Statutes.

In an effort to bring himself within the purview of § 84-1121, Ark. Stats., as to betterments by the purchaser of a tax title, the defendant showed that the Lot 8 sold for the taxes of 1923; and that the Clerk's Tax Deed was made to Sam Smith on July 3, 1926; that Sam Smith conveyed the Lot 8 by Quitclaim Deed to Elsie Rye on August 16, 1926; and that Elsie Rye conveyed to J. H. Floyd on September 3, 1926. But it will be observed that at the time of the tax forfeiture in 1923, Elsie Rye was the life tenant; and it was her duty to pay the taxes. So when she received the Quitclaim Deed from Sam Smith, she, in effect, redeemed from the tax sale. A life tenant cannot acquire a tax title adverse to the remainderman. *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858; and *Ingram* v. *Seaman,* 223 Ark. 414, 267 S. W. 2d 6.

In an effort to bring himself within the purview of § 34-1423, Ark. Stats., which is our General Betterment Statute, the defendant claimed that he honestly believed that the deed from the Executor of Floyd's Estate conveyed the fee, because of defendant's own ignorance and

other extraneous matters. But all of defendant's effort in this regard fall short of complying with the Statute, which provides that the person improving the property must not only believe himself to be the owner, but must be holding "under color of title." The Deed under which the plaintiff claimed from the Estate of Floyd recited on its face that it conveyed only the life estate of Elsie Rye which she had conveyed to J. H. Floyd. A deed conveying only life estate is not sufficient "color of title" to bring the grantee under the benefit of the Betterment Statute: see *Graves* v. *Bean,* 200 Ark. 863, 141 S. W. 2d 50. Without considering the question of "honestly believing," we hold that the defendant failed to show that he held under color of title; and for that reason is prevented from claiming under the General Betterment Statute.

III. *Defect of Parties.* It was shown that the descendant of another beneficiary under the Sam Rye will owned one-half of the remainder title, along with the plaintiff, Joe Rye. In other words, such person was a co-tenant with the plaintiff. The defendant moved that such absent co-tenant should be brought into the cause.[2] The Court overruled this motion, and the defendant claims error; but our cases hold contrary to the defendant's claims. One co-tenant can maintain an action in ejectment for the benefit of himself and his absent co-tenant. *Spencer* v. *Pierce,* 172 Ark. 108, 287 S. W. 1019. The statement there contained, supported by many cited cases, is:

"One tenant in common may maintain an action for the recovery of real property against a third person and trespasser, which will inure to the benefit of all his co-tenants."

So plaintiff had a right to maintain this case. It is always the better practice when the name of the absent

[2] The said Motion read in part: "That evidence adduced heretofore in proceedings in this matter reveal that there are two legal heirs of Sam Rye, Deceased, the plaintiff herein and Ada Rye Frizby; that in order to adjudicate this matter as to all parties it is necessary that the said Ada Rye Frizby, heir at law of Sam Rye, Deceased, be made a party plaintiff to this cause of action."

co-tenant has been shown—as here—that such absent co-tenant be made a party, particularly in view of the distribution of the damages;[3] but making the absent co-tenant a party is not judicially essential to maintaining the action of ejectment. In the case at bar, the absent co-tenant may yet be made a party, in view of the directive hereinafter contained.

IV. *Damages.* The Chancery Court allowed the plaintiff (for himself and his absent co-tenant) damages in the sum of $1,076.67; and we find this to be excessive. The sum was evidently reached from the testimony of a real estate man, who testified that there were four houses on or partially on the Lot 8; and he gave the rental value of the houses as follows: $15.00 per month for each of two houses partially on Lot 8, $5.00 per month for one house entirely on Lot 8, and $7.50 per month for that portion of another house that was partially on Lot 8. Defendant, Rutha Rye, owned adjacent Lot 7, and his title to that Lot is not in controversy; and in building the four houses, he had constructed them without regard to the boundary line between Lots 7 and 8. That circumstance accounts for the fact that three of the houses were only partially on Lot 8. The witness who fixed the said rental values of the houses did not testify as to what portion of the rental of the first two houses was allocated to Lot 8. At all events, it was shown that the house that rented for $5.00 per month was vacant, through no fault of defendant. The death of Elsie Rye was July 22, 1951, and the date of the decree in this case was September 24, 1953; so the Trial Court evidently took the total of the rental of all four houses and calculated it for twenty-six months. Because only a portion of two of the houses was on Lot 8, and because one of the houses was vacant without fault of the defendant, it follows that the damages assessed against the defendant were excessive. But in view of the next section of this opinion, we are remanding for re-trial all questions of damages.

V. *Location of the Houses.* A most unusual situation was shown to exist regarding the location of the

[3] For a discussion on this point, see *Young* v. *Garrett*, 149 F. 2d 223.

houses on Lots 7 and 8, as mentioned in the previous Topic. The plat, which was introduced by stipulation, would *prima facie* indicate that two of the houses encroached from Lot 8 onto Lot 7, and that one of the houses encroached from Lot 7 onto Lot 8. The parties made no serious effort to present to the Trial Court the law or facts as to the disposition of the houses.[4] We think it the better practice for all the issues in an equity case to be settled in one suit. Whether justice should be accomplished by partition of the houses, by destruction of the encroaching parts, by some application of the doctrine of encroachments, or some other theory, are matters that the parties should first present at the trial level.

CONCLUSION

Therefore, we affirm so much of the decree as awarded the plaintiff and his absent co-tenant the title to Lot 8 and denied the defendant's plea of betterments; but we remand the cause for new trial as to damages, and for a decision as to the said disposition of the buildings that are over the boundary line; and on remand, the absent co-tenant should be made a party.

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[4] The appellant says in his brief in this Court:

"We feel that it is apparent that this matter has not been fully adjudicated since the court in reaching its decision did not make any disposition or vest title to the houses located on and partially on this property and call the attention of this Court to the stipulation and the plat. If this judgment should be allowed to stand, it appears that this matter would have to be litigated further by the institution of additional suit. We, therefore, submit that this Court or the court below should make a decision on this point."

In answer to the above argument, the appellee says:

"Appellee can find no case where a similar situation existed and was adjudicated. Appellants informed appellee just prior to the entry of judgment that the case would be appealed if an adverse ruling was made. Thereupon appellee concluded the appellate court would direct the proper procedure to be followed in partitioning the improvements."

FARISH *v.* BEN M. HOGAN & COMPANY.

5-411 267 S. W. 2d 503

Opinion delivered May 3, 1954.

[redacted]

Charles L. Farish and *John G. Moore,* for appellant.

Mehaffy, Smith & Williams and *S. Hubert Mayes,* for appellee.

ROBINSON, J. Appellant J. D. Farish was injured while riding as a guest in a truck owned by Ben M. Hogan and Company and being operated by Hogan's employee, Fiezel. The court directed a verdict for the defendant on the theory there was no evidence of willful and wanton misconduct on the part of Hogan's driver which would sustain a verdict in favor of the appellant Farish.

Before a guest in an automobile can recover against the owner or operator, he must show that the automobile was being driven in a willful or wanton manner. Ark. Stats., § 75-915 and § 75-913. Here there is no evidence whatever of willfulness or wantonness on the part of the driver of the truck. For a full discussion of the terms "willful" and "wanton" see *Steward, Adm.* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901.

The truck involved had an A-frame mounted on the rear extending upward for several feet. The mishap occurred when the driver, Fiezel, attempted to cross a bridge and the A-frame came in contact with the superstructure of the bridge. Undoubtedly there is evidence that Fiezel was negligent; he was either negligent in estimating the height of the A-frame in relation to the upper portion of the bridge, or he simply forgot about

the A-frame being on the truck; but there is no evidence that such negligence amounted to willful and wanton misconduct. In fact, the appellant Farish testified: "Q. There was nothing said, no warning given you by Mr. Fiezel? A. No, he thought it would go under there himself, I am satisfied, or he wouldn't have pulled under there." There is no evidence that the accident occurred from any other cause than that explained by the appellant, and his testimony does not make out a case of willful and wanton misconduct on the part of the driver of the truck.

The court was correct in directing the verdict, and the judgment is therefore affirmed.

LITTLE *v.* SMITH.

5-401 267 S. W. 2d 511

Opinion delivered May 3, 1954.

Mahony & Yocum, for appellant.

DuVal L. Purkins and *Clifton Bond,* for appellee.

J. SEABORN HOLT, J. Appellees brought this suit under our Workmen's Compensation Law (§ 81-1301—1349, Ark. Stats. 1947) to recover compensation as a result of the injury and death of their son, A. G. Smith.

Smith's death occurred September 29, 1950, while he was employed by appellant, Little, and in the course of his employment. Appellees sought compensation award on claim of partial dependency.

A hearing, first before Commissioner Holmes, and later before the full Commission, resulted in findings that appellees had not filed their alleged claim within the statutory requirement of one year from the death of their son, and compensation was denied for this reason.

On appeal to the Bradley Circuit Court, the order of the Commission was reversed and judgment entered granting an award and attorney's fee. This appeal followed.

The primary and decisive question here is whether there was a valid claim filed in accordance with the provisions of the Compensation Law. We have concluded that no such claim was filed and that the Circuit Court erred in holding otherwise.

§ 81-1318, Ark. Stats. 1947 (a) of the Compensation Law provides: "(3) A claim for compensation on account of death shall be barred unless filed with the Commission within (1) year of the date of such death. * * * (c) Failure to file. Failure to file a claim within the period prescribed in subsection (a) or (b) shall not be a bar to such right unless objection to such failure is made at the first hearing on such claim in which all parties in interest have been given a reasonable notice and opportunity to be heard."

It is not disputed that appellants (respondents) at the first hearing before Commissioner Holmes (February 8, 1952, at Warren, Ark.) duly made objection to the claim because of appellees' failure to file within one year from the death of their son.

Appellees say: "It is the contention of the claimants (appellees) that a claim was filed and processed in their behalf within the meaning of the Workmen's Compensation Law and the facts and circumstances contained in the record support this contention."

The record reflects the following events: After Smith's (the employee) death September 29, 1950, the Secretary of the Commission wrote the following letter November 13, 1950: "Mr. A. G. Smith, Hermitage, Arkansas—RE: *W. L. Little* v. *A. G. Smith*—WCC No. A 023189—Carrier's No. C-105989 Ark. Dear Mr. Smith: We have received a report from the insurance carrier that Mr. Little was killed in the course of his employment but that he left no dependents. We always like to check this matter and will appreciate it if you will advise us whether or not he was supporting a mother, father, brothers or sisters. As we understand it, he was a single man. Kindly advise us at your earliest convenience."

Little (Smith's employer) replied November 20, 1950, to this letter as follows: "In regard to your letter of November 13-50, you have the wrong man dead. A. G. Smith is deceased, I am the contractor. Smith was single, but he was helping to support his father and mother, that is he turned them in on his Form W-4 Withholding Exemption Certificate. He was injured on Sept. 22, 1950. His father is Homer Smith, Address Winnfield, La. This boy was colored. Your friend, W. L. Little."

Following receipt of this letter, the Commission on November 22, 1950, wrote the Chambers Claims Service, which was making an investigation for the insurance carrier, as follows: "RE: *A. G. Smith (Dec'd.)* v. *W. L. Little,* WCC No. A 023189—Carrier's No. C-105989—Ark. Dear Mr. Chambers: We have been advised by Mr. W. L. Little that the deceased in this case was helping to support his father and mother. The father's name is Homer Smith, and his address is Winnfield, La. Kindly take notice. Very truly yours, John T. Jernigan, Secretary."

December 1, 1950, Chambers Claims Service wrote the Commission: "This will acknowledge receipt of your letter of November 22, 1950. We are making an investigation of this case and the Company's representatives in Louisiana have been attempting to contact Homer

Smith, father and alleged dependent of the deceased; however, they have learned that he has moved to some place near Monroe, Louisiana and we respectively ask for sufficient time to make the necessary investigation and determine if there were any dependents."

December 5, 1950, the Commission wrote Chambers: "Your letter of December 1, 1950, received. It will be satisfactory for you to take some additional time to locate the dependents, if any, in the above case."

January 16, 1951, the Chambers Claims Service wrote the Commission that its investigation had been completed and "we must stand on our Intention to Controvert Claim as filed with you on November 8, 1950."

The Circuit Court, in its consideration of this case, found that the above correspondence constituted a valid claim. The Court said: "The only question before this court is whether or not, as a matter of law, the foregoing letters between Mr. Little, the Workmen's Compensation Commission and the insurance carrier constituted a claim under the Act."

In the circumstances, the above communications from Little, the Commission, and the Chambers Claims Service, related to investigations following report of the employer, Little, to the Commission of Smith's injury and death, and fell far short of constituting a valid claim. The employer's letter to the Commission reporting Smith's death was required of him under the Compensation Law. Sections 81-1333 and 81-1334, Ark. Stats. 1947 provide: "81-1333. Record of injury or death.—Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disability or death in respect of such injury as the Commission may by rules or regulations require, and shall be available for inspection by the Commission or by any State authority at such time and under such conditions as the Commission may by rule or regulation prescribe.

"81-1334. Reports.—(a) Within ten (10) days after the date of receipt of notice or of knowledge of injury

or death the employer shall send to the Commission a report setting forth (1) the name, address, and business of the employer, (2) the name, address and occupation of the employee, (3) the cause and nature of the injury or death, (4) the year, month, day and hour when, and the particular locality where, the injury or death occurred, and (5) such other information as the Commission may require. (b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Commission at such times and in such manner as the Commission may prescribe. (c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."

These reports could not be used as evidence by appellees on a claim for compensation under the plain terms of the above sections. Notice clearly is for the purpose of affording an investigation.

The text writer in 71 C. J., § 779, p. 1000, says: "C. Claim for Compensation—1. Necessity for Making or Filing. Although in some jurisdictions there is no such requirement, the statutes ordinarily provide that, in addition to the giving of notice of injury, a claim for compensation shall be made or filed within a specified time. The requirement for the making or filing of a claim is held to be jurisdictional and mandatory, the making or filing of a claim in accordance with the act being a matter going to the maintenance of the right of action and essential to the recovery of compensation, and a failure to make or file a timely claim is a bar to the recovery of compensation. * * * (§ 782) 4. a. Ordinarily no particular form of claim or demand is required, particularly where substantial compliance with the statutory provisions as to the claim or demand is all that is required. The claim for compensation is not a formal pleading, the same particularity of pleading not being required as to a claim in a compensation proceeding as is required in an action at law. Hence great liberality as to the form and substance of an application

for compensation is to be indulged, especially where applicant is not represented by counsel. The claim must nevertheless be direct and unequivocal, and show that a claim for compensation is being made; be understandable, where filed with the commission it must call for some immediate action by the commission. It must apprise the employer that the employee has sustained injuries of such character as to entitle him to compensation and that the benefits of the act are being claimed."

In *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S. W. 2d 796, we said: "The Workmen's Compensation Law (§ 18 [a]) imposes an absolute limitation on the time for filing a claim. In the Williams-Walker case we held that knowledge rendered notice unnecessary; but here we are presented with a case where no claim was filed within the statutory period. Thus, a jurisdictional matter is presented, and not a mere defensive provision of notice as in the Williams-Walker case.

"Appellee's lack of knowledge of the law is no defense. He was in full possession of his mental faculties. However meritorious the claim may be, nevertheless, § 18 (a) of the Workmen's Compensation is a bar, since the 'latent injury' cases do not apply. While our Compensation Law is liberally construed to effectuate its purposes, still the plain wording of that law is a mandate which we cannot evade." See also, *Kimpel, Guardian,* v. *Gariand Anthony Lumber Co.,* 216 Ark. 788, 227 S. W. 2d 932.

From the above authorities, a claim for compensation must be clear, direct and definite, and call for immediate action by the Commission. It is undisputed that neither of the appellees signed a claim or authorized the signing of a claim for them by any one, which was filed with the Commission within the statutory limits of one year. We find nothing in the above correspondence or communications that requested or demanded payment of compensation or that would constitute a claim under the Compensation Law.

Under § 81-1325, it is provided: "The Court shall review only questions of law and may modify, reverse,

remand for rehearing, or set aside the order or award upon any of the following grounds and no other:* * * 4. That there was not sufficient competent evidence in the record to warrant the making of the award."

We cannot say, as a matter of law, that there was no substantial evidence to support the finding and order of the Commission. Accordingly, the judgment of the Circuit Court is reversed and the cause remanded to the Circuit Court, with directions to affirm the order of the Workmen's Compensation Commission.

COFFEY *v.* COFFEY.

5-388 267 S. W. 2d 499

Opinion delivered May 3, 1954.

Earl J. Lane, Leo P. McLaughlin and *Richard M. Ryan,* for appellant.

Rose, Meek, House, Barron & Nash, for appellee.

MINOR W. MILLWEE, Justice. Dr. George C. Coffey, appellant, and Cora Coffey, appellee, were married in 1922 and lived together in Hot Springs, Arkansas, for about 30 years, until December 4, 1952. On January 6, 1953, appellee filed a complaint against appellant seeking a divorce from bed and board and asking separate maintenance. Later, she amended her complaint and asked for an absolute divorce on the statutory ground that appellant had offered such indignities to her person as to render her condition in life intolerable. In his answer, appellant denied any indignities on his part and asserted that since their marriage appellee had constantly nagged, bemeaned and denounced him and humiliated and embarrassed him in the presence of his friends; and that such indignities had made his life unbearable. He prayed that she be denied a divorce. On October 31, 1953, the court granted appellee an absolute divorce on the ground of indignities, awarded her ⅓ of appellant's real and personal property, and $200.00 per month permanent alimony, and an attorney's fee of $150.00.

Appellee testified to numerous indignities extending over a period of time which evidenced a general lack of harmony and compatibility in the home. She related that appellant has repeatedly told her she was old and he was tired of her; that her inquiry concerning trips that he made or his whereabouts met with profanity and anger; that appellant had slapped her on several occasions, once during a heated discussion about appellant's office girl and again when a letter came from the F. B. I. which both parties desired to see; that the parties had political differences and appellant yelled, screamed, and cursed at her concerning one of her political favorites; that on one occasion appellant slapped her so hard she had pressure behind the eyes for six months; that appellant is hypercritical of the home and the things she has done

in it; that in recent years appellant has refused to associate with their old friends and that any mention of them elicited profanity from him; that he has adopted a new, younger, set of associates, likes to dance and party all the time, and has substantially increased his drinking.

Appellee also related several incidents occurring in recent years leading her to believe that appellant was having improper relations with his secretary. These incidents together with the continuous violent cursing and quarreling in the home apparently reached a climax in November 1953, when appellant made a trip to New Orleans and refused to allow appellee to go along although it was customary for her to do so, if she desired. On cross-examination she testified: "Q. I want to ask about your final separation on November on or about November 25th; what happened then, when Dr. Coffey told you he was going to New Orleans? A. Well, about two or three days before I had asked him, I said, 'Let's go to New Orleans.' I knew all the earmarks of a trip, which he takes every year to New Orleans, so I decided I would ask him to take me. I said, 'I hear you are going to New Orleans,' and he said, 'I haven't made up my mind.' So, he was still getting ready to go and, the night before, he came home for dinner late and in a bad mood, as usual; he said, 'I am going to New Orleans tomorrow,' and I said, 'Yes, I know, take me along, I haven't had a vacation.' He said, 'I don't want you and if you want a vacation, take it by yourself; I am not ever taking you on another vacation, this one or any other.' . . . Q. Did you tell him not to come back to the house when he returned to Hot Springs? A. I said, 'Who are you taking to New Orleans,' and he said, 'Not any of your Goddam business,' and I said, 'You had better not take your office girl'; and he said, 'I can if I want to; we can go anywhere we please; do anything we please; she is twenty-two years old and it is nobody's business. We do not have to stay in Hot Springs; we can go anywhere; we don't have to live here.' And I said, 'All right, if

that is the way you feel, you had just better pack everything.' And he said, 'Furthermore, I don't ever intend to take you.' And that is the way he talked to me.'' Later appellee frankly admitted that she probably would not have instituted suit if appellant had taken her on the trip to New Orleans.

In his testimony appellant admitted many of the incidents to which appellee testified including his striking her, ordering her out of the office in the presence of his secretary and refusing to take her to New Orleans. He also testified to the constant and violent quarreling and nagging for many years but placed the whole blame on appellee.

The only corroborating witness offered by appellee was Mrs. Alice Wilson, a practical nurse who for five years lived in the home of the parties and cared for appellee's invalid mother. She testified that appellant constantly precipitated arguments, and that nothing seemed to please him; that he was very critical of appellee and her friends, often using violent profanity in discussing and referring to the latter; and that this dissension occurred daily at every meal and grew progressively worse. On cross-examination she admitted that both parties were nervous and that appellee would argue at times but observed that under the circumstances, ''she couldn't do anything else.''

For reversal appellant first contends the testimony is insufficient to sustain the decree which is against the preponderance of the evidence. In this connection it is argued that the indignities about which appellee testified were imaginary and fancied grievances brought on by groundless suspicion and jealousy on her part. Ark. Stats. § 34-1202 enumerates, as a ground for the granting of a divorce, the offering of such indignities to the person of a spouse as shall render his or her condition intolerable. Interpreting this statute in *Griffin* v. *Griffin,* 166 Ark. 85, 265 S. W. 352, this court said: ''It is obvious that the court cannot grant a divorce because the parties have become dissatisfied with the marriage

yoke. In such cases the parties must, by mutual concession, make the yoke lighter.

"On the other hand, constant abuse, studied neglect, and humiliating insults and annoyances which indicate contempt and hatred by the offending party, amount to such indignities to the person as to render his or her condition in life intolerable within the meaning of the statute." Nor is it necessary that the person to whom the divorce is granted on the ground of indignities be wholly blameless. *Haley* v. *Haley,* 44 Ark. 429.

We have also held that the determination of whether the conduct and acts of a spouse have been pursued so habitually and to such an extent as to render the condition in life of the complaining party intolerable, must be based upon facts testified to by witnesses and not upon their beliefs or conclusions. See *Bell* v. *Bell,* 105 Ark. 194, 150 S. W. 1031, where, in affirming the chancellor's finding that the evidence was insufficient the court noted the lack of proof of specific acts of misconduct or corroboration thereof. Here, as in the Bell case, we consider the chancellor's findings as persuasive. The chancellor and the parties reside in the same community and he had the advantage of seeing and hearing the witnesses testify and was in a preferred position in determining the credibility of the witnesses and the weight to be accorded their testimony. *Hill* v. *Barnard,* 216 Ark. 29, 224 S. W. 2d 31. We have also held that while chancery cases are tried *de novo,* the established rule of practice is that his findings are of such persuasive force upon evenly balanced testimony that a decree will not be reversed. *Dyer* v. *Dyer,* 116 Ark. 487, 173 S. W. 394. Applying these rules here, we cannot say the chancellor's findings are against the preponderance of the evidence or that the testimony is insufficient to support the decree.

It is next argued that there is no corroboration of the testimony of appellee concerning the indignities. It is a rigid rule of continuous application in this state that in an action of divorce a decree will not be granted upon

the uncorroborated testimony of one of the parties. *Smith* v. *Smith,* 215 Ark. 839, 223 S. W. 2d 776. But the purpose of the rule requiring corroboration is to prevent the procuring of divorces through collusion, and when it is plain that there is no collusion, the corroboration may be comparatively slight. *Kirk* v. *Kirk,* 218 Ark. 880, 239 S. W. 2d 6. It is not necessary that the testimony of the complaining spouse be corroborated on every element or essential in a divorce suit. *Morgan* v. *Morgan,* 202 Ark. 76, 148 S. W. 2d 1078. This was a hotly contested divorce suit, with no intimation of collusion, and it clearly falls within the rules stated. It is true that Mrs. Wilson did not go into detail in corroboration of every element of the indignities which appellee related, but, as the Court said in *Franks* v. *Franks,* 211 Ark. 919, 204 S. W. 2d 90: ". . . we think some of the incidents related by her were corroborated sufficiently to justify the court in treating the whole of her testimony as to such mistreatment as being fully corroborated."

Finally, counsel argue that appellee is barred by the rule of condonation, that by continuing to live with appellant appellee condoned the indignities which had transpired earlier. In *Bridwell* v. *Bridwell,* 217 Ark. 514, 231 S. W. 2d 117, we said: "The general rule is stated in 17 Am. Jur., p. 249, § 197. The text recites: 'Condonation is a conditional, rather than an absolute, remission of the offense, the implied condition being that the offense will not be repeated and that the guilty party shall not in the future commit any other matrimonial offense or, as it is frequently expressed, that the offender will treat the injured party with conjugal kindness.' " Also, in *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41, the Court said: "The law is well settled that either spouse may condone conduct of the other which, but for the condonation, would entitle the innocent spouse to a divorce. But it is equally as well settled that condonation does not deprive the aggrieved spouse of the right to a divorce on account of the subsequent misconduct of the offending spouse. On the contrary, subsequent misconduct will generally operate to revive the right to a divorce for the

condoned offense.'' We have also said that one indignity might not—and usually would not—afford ground for divorce. *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055. Here, there was testimony that the indignities continued until the separation. Hence, earlier indignities, even if condoned, were revived and competent to serve as a ground for divorce.

The decree is affirmed, and appellee is allowed an additional attorney's fee of $150.

Justice ROBINSON dissents.

Justice GEORGE ROSE SMITH not participating.

BARRY, EXECUTOR *v.* BRITTAIN.

5-413 268 S. W. 2d 12

Opinion delivered May 10, 1954.

[Rehearing June 14, 1954.]

Clinton R. Barry, Pro Se, for appellant.

Warner & Warner, for appellee.

GRIFFIN SMITH, Chief Justice. Sarah Devlin Brittain, an octogenarian whose mental capacity to execute

a will is not questioned, died in June, 1953, leaving an estate estimated to be worth a little more than $42,000. Her husband, E. F. Brittain, to whom she had been married for almost a quarter of a century, was provided for to the extent of from $11,000 to $16,000. Brittain filed with the executor—Clinton R. Barry—a claim for $5,-145.94 for reimbursement of payments personally made covering doctor bills, medicines, nurses, hospitalization and items of a similar nature beginning with April 16, 1952. The claim was disallowed by the executor, but approved by the probate court with an order directing payment.

Determination of the appeal requires a construction of the words "just debts which I may owe" and their relation to Brittain's contention that it was the purpose of the testatrix to charge her estate with all expenditures relating to the prolonged illness. The pertinent paragraph is: "I direct that all just debts which I may owe, including the expenses of my last illness and of my burial, be paid".

Appellant's position is that it was the husband's primary duty to pay the charges incurred on account of Mrs. Brittain's illness, that he recognized this obligation from time to time, and that in the absence of appropriate language in the will from which an intention to charge the estate with these items should be drawn, there was no indebtedness within Mrs. Brittain's contemplation and no right of repayment.

It is conceded that a court's function is to construe and enforce a will—not to make for the testator another which might appear to be more equitable "or more in accordance with what the court might believe to have been the testator's unexpressed intentions". *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546. We are cited to *Morris* v. *Dosch,* 194 Ark. 153, 106 S. W. 2d 159 as authority for appellee's belief that Mrs. Brittain intended that her husband should be reimbursed for what he had spent; but in the Morris-Dorsch case the language of the will was: "After all expenses, burial, inheritance

tax, etc., are paid, I want [the property to go as directed]". We held that inheritance taxes and certain other items were charges against the estate made so by express language.

We are also asked to apply a rule stated in *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. 2d 36. An item of $1,522.65 was allowed in favor of the administratrix, covering last illness and burial expenses. But there the intestate decedent was responsible for his own bills. The administratrix was his widow and the obligations were of a fixed character. Excerpts from the opinion are: "Except for funeral expenses, no debts can be created against an estate after death. The debts must be existing at the time of death or arise out of obligations incurred by decedent. Only such claims can be presented for allowance, classification, and payment out of the assets found in the hands of the representative after settlement". In *Burns* v. *Wegman,* 200 Ark. 225, 138 S. W. 389, we held that a widow had a right to pay the medical and funeral expenses of her husband and claim reimbursement as a creditor of the first class.

In *Beverly* v. *Nance,* 145 Ark. 589, 224 S. W. 956 it was said that "incident to the duty of a husband to maintain his wife is the corresponding duty of paying for her reasonable burial expenses".

Two cases decided in 1949—*Simpson* v. *Thayer,* 214 Ark. 566, 217 S. W. 2d 354, and *James* v. *James,* 215 Ark. 509, 221 S. W. 2d 766, reaffirm what Judge Kirby said for an undivided court in *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867: ". . . Where the husband purchased and paid for land, taking the deed therefor in the name of his wife, the presumption is that his money, thus used, was intended as a gift to her, and the law does not imply a promise or obligation on her part to refund the money or to divide the property purchased or to hold the same in trust for him. His conduct is referable to his affection for her and his duty to protect her against want . . ."

In the case before us Mrs. Brittain directed that "all just debts *which I may owe*" be paid, including the expenses of my last illness and of my burial". Burial expenses are not included in the account.

Appellee testified that he had been employed gainfully for many years, that during the 24 years of his marriage to Mrs. Brittain he earned $80,000 or more, and that his savings from such receipts had been about $5,000.

We think the case here is much stronger in favor of the executor than the court's language in *Harbour* v. *Harbour*, where the husband's money paid for the land and the deed was made to his wife. There was no legal obligation that this be done, and it is entirely possible that the purchaser expected a reconveyance. This, of course, is speculative; but the fact remains that his purchase was held to have been an outright gift.

Brittain was legally obligated to make the payments he did, and when his wife died the estate was not under any duty to repay him. Mrs. Brittain had the financial ability to do so and the mental capacity to express the intent, but the language relied upon by appellee did not accomplish that purpose, hence the judgment must be reversed.

Justices Holt, Millwee, and Robinson dissent.

J. Seaborn Holt, J., dissenting. The decisive question presented is primarily not whether Mrs. Brittain's husband owed her the duty to support her, but whether, under the following plain and unambiguous provision of her will,—"I direct that all just debts which I may owe, *including the expenses of my last illness* and of my burial, be paid,"—created a charge upon Mrs. Brittain's separate property that imposed ultimate liability on her estate. It seems obvious to me that it did.

The uniform rule is that courts must construe and enforce wills as written. Mrs. Brittain, whatever her motive, had a right to dispose of her property as she

saw fit. "'* * * Hence, courts have, with great uniformity, in this class of cases, required the proof that should destroy the recitals in a solemn instrument to be clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt,' " *McDaniel* v. *McDaniel,* 220 Ark. 614, 249 S. W. 2d 125.

"The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. 'The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will.' *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417.

"Before the necessity for judicial interpretation of a will may arise there must be found in the language of the will an ambiguity or uncertainty; and where no such ambiguity or uncertainty is found, there is no need for the application by the court of any of the rules for construction. In *Quattlebaum* v. *Simmons National Bank of Pine Bluff,* 208 Ark. 66, 184 S. W. 2d 911, we quoted from Thompson on Wills, 2d Ed., § 210, as follows: 'The purpose of construction and interpretation being the ascertainment of the testator's intention, it follows that where such intention is expressed in the will in clear and unequivocal language, there is no occasion for judicial construction and interpretation, and it should not be resorted to or allowed.'

"The polestar of the court, in construing a will, should always be the intention of the testator; and the will itself is ordinarily the only place to which the court should resort to find such intention. If it be in the will expressed in language that is clear and unmistakable the court should go no further, but should

put in effect the intention of the testator, as thus clearly set forth in his will. *Hoyle* v. *Baddour,* 193 Ark. 233, 98 S. W. 2d 959.

"* * * We have no right to alter, under the guise of construction, the definite and unequivocal disposition of his property as made by him," *Park* v. *Holloman,* 218 Ark. 288, 195 S. W. 2d 546.

"The cases all agree that the testator's intention can be gathered only from the will itself and that extrinsic evidence is not admissible to prove an intention in regard to the disposition of the property not expressed in the will." *Duensing* v. *Duensing,* 112 Ark. 362, 165 S. W. 956.

In *Morris* v. *Dosch,* 194 Ark. 153, 106, S. W. 2d 159, the will provided: "After all expenses, burial, inheritance tax, etc., are paid, I want the balance of my Estate to be given to" certain charities. The trial court directed the trustees to pay inheritance taxes out of the corpus of the estate. Affirming, we said: "In this we think the court was correct. It is in exact compliance with the will. It says: 'After all expenses, burial, inheritance tax, etc., are paid, I want,' etc., as copied above. The obligation to pay these taxes and expenses was not placed on appellees further than it might reduce the income from the estate. The direction comes in a sentence referring to expenses that came shortly following the death of the testator, such as burial, court costs, etc. The payment of the inheritance taxes could not be postponed until after the death of appellees and he had the right to direct its payment from the body of his estate.

"'* * * the general rule is that the paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or of some rule of law, shall control; and such intention is to be ascertained from the language used as it appears from a consideration of the entire instrument. Words and sentences used are to be con-

strued in their ordinary sense so as to arrive at the real intention of the testator. (Citing cases).' "

It appears to be the uniform rule that a married woman may bind her separate property for medical expenses for herself, either by express provision, conduct, or words from which a promise may be inferred.

In 41 C. J. S. (Husband & Wife), § 340, p. 827, this rule is stated: "A married woman may, however, as a general rule, bind her property for medical services for herself or the family, either by express provision or by conduct or words from which a promise may be inferred." 30 C. J., § 627, p. 923 states the same rule.

In *Security Bank & Trust Company* v. *Costen,* 169 Ark. 173, 273 S. W. 705, the wife was allowed to recover her husband's burial expenses. The will did not require her to pay such debt and for this reason it was held that it was not her obligation and could not be charged against the property she took under her husband's will. We there said: "If the person who incurs the expense or advances the money to pay it is not a mere volunteer who acts officiously and without interest in the estate of the decedent, the charge against the estate inures to his or her benefit. (Citing cases). Under the circumstances of this case, it cannot be rightly said that the widow was a mere volunteer and acted officiously and without interest in paying the funeral expenses of her deceased husband. The payment was in settlement of the claim of the undertaker, which would have been a legal claim against the estate, and the act of the widow in making the payment was not a discharge of the obligation of the estate, but was a mere transfer of the obligation by way of subrogation to the widow. The last will and testament of the deceased husband did not cast upon the widow the burden of paying the debts of the estate, and she was therefore under no obligation to pay the debts out of her own estate or out of the interest which she took under the will of her husband, for no such condition or burden was imposed upon her by the terms of the will."

The implication, it seems to me, to be clear that where, as here, the wife's will expressly directs payment of "expenses of my last illness" from her estate, the husband would be entitled to reimbursement upon payment by him.

In 27 Am. Jur. (Husband and Wife), § 458, p. 57, in stating that the Married Women's Acts do not relieve the husband's primary liability to pay funeral expenses of his wife, it is said: "The husband may be relieved from such primary liability, however, by the will of his wife; a provision in a will to such effect is construed as a legacy."

13 R. C. L., § 248, p. 1214, states the same rule as follows: "Where a married woman by her will expressly charges her separate estate with the payment of her funeral expenses, the husband is entitled to reimbursement from such estate in case he has paid such charges."

"A married woman may, by providing in her will that her funeral expenses shall be paid out of her own estate, relieve her husband from liability; * * *," 41 C. J. S., (Husband and Wife), § 61 at p. 529.

In *Picketts' Est.* v. *Pickett* (Md.), 158 Atl. 29, the wife's will directed her estate to pay funeral expenses. The court held that the husband as administrator was entitled to allowance of such expenses, although but for such direction the husband would be primarily liable therefor. The court said: "Apart from the direction in the will on that subject, the husband's primary responsibility for such an expense would debar him from charging it against his deceased wife's estate. (Citing cases). But it was legally permissible for the wife to impose that obligation upon her estate, and thus relieve her husband of it, by suitable provision in her will. When a testamentary purpose to that end has been definitely expressed, it should be given its due effect."

In *Jackson as Executor* (N. Y.) 61 Howard's Pr. Rep. 402, the court held that the duty of burying a wife rests on the husband, but the wife may charge

by her will her own separate estate with funeral expenses and said: "* * * But the will of the testatrix itself puts the subject at rest, for she orders and directs in the first paragraph thereof, that all her debts and 'funeral expenses' shall be paid. The duty, therefore, is cast upon the executors to pay these charges. Although it may be true that the duty of burying the body of his deceased wife rests upon her husband, yet a wife may charge, through her last will and testament, her own separate estate with the expenses of her funeral."

"But where, as in the present case, the wife by will directs the payment of her funeral expenses out of her estate, the ultimate liability will fall upon her estate rather than upon the husband, and the husband is entitled to reimbursement from her estate in case he has paid such charges," *Watt* v. *Atlantic Safe D & T Co.* (N. J.), 112 Atl. 186.

I think the great preponderance, if not the undisputed, testimony supports the chancellor's finding in appellee's favor that the claim was for expenses expended by him for Mrs. Brittain's last illness for the period March 17, 1952 up to her death, and that no credit should be allowed thereon and that the claim should be allowed in full.

C. R. I. & P. Rd. Co. *v.* Cohen.

5-400 267 S. W. 2d 774

Opinion delivered May 10, 1954.

Wright, Harrison, Lindsey & Upton, for appellant.

Harold Sharpe, for appellee.

ROBINSON, J. This is an appeal from an order of the St. Francis Circuit Court dismissing an appeal from the municipal court of Forrest City because appellant failed to make or file with the municipal court an affidavit stating "that the appeal is not taken for the purpose of delay, but that justice may be done," as required by Ark. Stat. § 26-1302. It is the contention of appellant, Chicago, Rock Island & Pacific Railroad Company, that Ark. Stat. § 22-707 is controlling and that this section does not require the filing of the affidavit mentioned in § 26-1302.

Section 22-707 is § 7 of Act 60 of 1927 as amended by Act 280 of 1941; it does not provide for the making of the affidavit mentioned. However § 22-708, which is § 8 of the 1927 Act, provides: "All provisions of the general laws applying to Police Courts in cities of the first class, and to the judges thereof, not inconsistent with the provisions of this Act, and all provisions of the general laws applying to Justices of the Peace not inconsistent with the provisions of this Act, or with the provisions of the general laws to Police Courts in cities of the first class and the judges thereof, shall apply with like force and effect to Municipal Courts and the Judges thereof."

In *Arkansas Brick & Tile Co.* v. *Crabtree,* 172 Ark. 752, 290 S. W. 361, the court said: "The law requires an affidavit for an appeal from a justice court to the circuit court as a prerequisite to the circuit court's jurisdiction to entertain an appeal, and, unless waived, is ground for dismissal . . . This is likewise the law as to appeals from municipal courts. Act 87 of the Acts of 1915, § 9, page 342-347." It is the contention of appellant that the

Crabtree decision, rendered January 31, 1927, was prior to the adoption of the 1927 Act as amended by Act 280 of 1941, and that the opinion only deals with the 1915 Act; thus appellant says the decision in the *Crabtree* case is not controlling. However, that part of the 1915 Act on which the *Crabtree* case is based is identical with the 1927 Act, nor did the 1941 Act amend this section of the 1927 Act, there being no change with reference to requiring an affidavit as a prerequisite to an appeal from the municipal court to the circuit court. Neither Act specifically mentions the necessity of making such an affidavit; however, § 9 of Act 87 of 1915, § 8 of Act 60 of 1927, and Ark. Stat. § 22-708, quoted above, are identical; and as construed in the *Crabtree* case, require the affidavit as provided by Ark. Stat. § 26-1302. None of these sections are mentioned in the 1941 Act, but appellant contends they were repealed by implication insofar as requiring an affidavit for appeal.

Act 280 of 1941 amends Act 60 of 1927, Ark. Stat. § 22-707, by making it clear that the Act only applies to civil cases, and further that before the appeal can be lodged in circuit court certain costs must be paid, and that within five days after the payment of such costs the clerk of the municipal court shall lodge a transcript in circuit court. The appellant maintains that this amendment does away with the requirement of the affidavit as provided in § 26-1302; that § 22-707 sets out all the steps necessary to perfect an appeal; and that hence § 26-1302 is repealed by implication.

We have held that where an act of the legislature deals with an entire subject anew, and it is apparent from the mere reading of the new act that it was the intention of the general assembly to cover the entire subject, plainly showing that the new act was intended as a substitute for the old act, there is a repeal by implication; but repeals of this kind are looked on with disfavor. In *Forby* v. *Fulk,* 214 Ark. 175, 214 S. W. 2d 920, this court quoted with approval from *Coates* v. *Hill,* 41 Ark. 149, as follows: "Repeals by implication are not favored. To produce this result, the two acts must be upon the

same subject and there must be a plain repugnancy between their provisions; in which case the latter act, without the repealing clause, operates to the extent of repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then this latter act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first. *United States* v. *Tynen,* 11 Wall 88, 20 L. Ed. 153."

In addition to § 22-707-8, § 26-1301-24 deal with appeals from Justice of the Peace courts, and therefore in accordance with § 22-708 may be applicable in appeals from municipal courts. § 26-1302 also provides for a supersedeas bond and it could hardly be said a bond is no longer necessary to supersede the judgment. Hence it can not be said that Act 280 of 1941 covers anew the entire subject of appeals from municipal court to circuit court, thereby repealing by implication § 26-1302 requiring the affidavit.

The court was correct in dismissing the appeal because of the failure to file the affidavit. The judgment is therefore affirmed.

The Chief Justice and Justices HOLT and WARD dissent.

J. SEABORN HOLT, J., dissenting. The General Assembly in 1941 passed Act 280 (now Section 22-707, Ark. Stats. 1947) and digested under the heading "appeals—Costs—Time of Trial," which provides (in its entirety: "ACT 280. AN ACT To Amend the Municipal Court Act, § (7) of Act 60 of the General Assembly of 1927, Approved February 28, 1927, § 9903 of Pope's Digest. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS: SECTION 1. That Section Seven (7) of Act 60 of the General Assembly of 1927, Section 9903 of Pope's Digest, be amended as follows: 'All appeals (of civil cases) from Municipal Courts must be taken and the transcripts of appeal lodged in the office of the Clerk of the Circuit Court within thirty days after judgment

is rendered, and not thereafter, (only after the party appealing has paid to the Clerk of the Municipal Court the costs now allowed for the preparation of the transcript, and also the filing costs due the circuit clerk. The Clerk of the Municipal Court shall within five days after such payment lodge such transcript with the circuit clerk and pay to him the amounts due as filing costs.) The Circuit Court shall advance on its docket such causes on appeal and the same shall stand for trial *de novo* in the Circuit Court ten days after being docketed.'

"SECTION 2. That all laws and parts of laws in conflict herewith are hereby repealed and this act being necessary for the immediate preservation of property, public health and safety, an emergency is hereby declared to exist and the same shall be in full force and effect from and after its passage. APPROVED: March 26, 1941."

It will be noted that the above Act (#280) amends § 9903, Pope's Digest (Act 87 of the laws of 1915) by adding the following language: "of civil cases," "only after the party appealing has paid to the Clerk of the Municipal Court the costs now allowed for the preparation of the transcript, and also the filing costs due the circuit clerk. The Clerk of the Municipal Court shall within five days after such payment lodge such transcript with the circuit clerk and pay to him the amounts due as filing costs."

Prior to this 1941 amendment, this court had decided in 1927 (*Acme Brick and Tile Company* v. *Crabtree*, 172 Ark. 752, 290 S. W. 361) that the filing of an affidavit that the appeal was not taken for delay, was a prerequisite for an appeal from the Municipal Court to the Circuit Court.

The present 1941 Act is a comprehensive act, applying only to *civil cases* from the Municipal Court and clearly sets out the necessary steps to follow in taking such appeal, which are "(1) Payment to the Clerk of the Municipal Court of costs for preparing the transcript; (2) Payment to the Municipal Clerk of fil-

ing costs due the Circuit Clerk; (3) Taking the appeal and lodging the transcript of appeal in the office of the Circuit Clerk within 30 days after judgment is rendered."

It is undisputed that appellant took all these steps and having done so, the following duties become mandatory on the Municipal Court Clerk: He *shall* lodge the appeal with the Circuit Clerk and pay to the Circuit Clerk all filing costs due. After this is done, the Circuit Clerk *shall* advance the case on the docket for appeal and same *shall* stand for trial *de novo* in the Circuit Court ten days after so docketed. The word *shall* used in this act is clearly mandatory.

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory." *State* v. *Wymore,* 343 Mo. 98, 119 S. W. 2d 941.

"The word 'shall' in its ordinary sense is imperative. When the word 'shall' is used in a statute, and a right or benefit to anyone depends upon giving it an imperative construction, then that is to be regarded as peremptory." *Ballou* v. *Kemp,* 92 F. 2d 556.

The prerequisites for appeal under Act 280 seem to me to be inconsistent with the former statute (in effect prior to this 1941 act) requiring the filing of an affidavit as a prerequisite to appeal.

I think this 1941 act was intended by the lawmakers to embrace all the mandatory and necessary requirements for appeal in *civil cases* only, to simplify and facilitate such appeals, and was enacted to cover the entire appellate prerequisites in civil cases, and to remove and by implication repeal the requirement for the affidavit prior to its enactment.

"The right of appeal is given in all cases by our Constitution, and the majority of the court is of the opinion that statutes regulating it should be construed so as to facilitate rather than impede its exercise." *McNutt* v. *State,* 163 Ark. 122, 259 S. W. 1.

Act 280 is couched in such plain and unambiguous language that no judicial construction seems necessary.

I would reverse.

The Chief Justice and Justice WARD join in this dissent.

SMITH *v.* SMITH.

5-347 267 S. W. 2d 771

Opinion delivered May 10, 1954.

Clifton Wade, Beloit Taylor and *Robert A. Leflar,* for appellant.

Phillip S. Moyer, Rex W. Perkins, Martin K. Fulk and *William H. Donham,* for appellee.

ED. F. MCFADDIN, Justice. A constitutional question —relating to Act 348 of 1953—is posed for our decision; but we are of the opinion that any decision on the constitutional question would be premature in the present state of the record in this case. We abstract the pleadings in due order:

I.

COMPLAINT

On July 10, 1953, Luther B. Smith filed a complaint in the Washington Chancery Court against Bernice G. Smith,[1] which, omitting *only* caption and signature, reads:

"The plaintiff for his cause of action against defendant states:

"That he and the defendant were married at Hagerstown, Maryland, on the 26th day of December, 1916, and lived together as husband and wife until, on, to-wit, the 24th day of May, 1945, on which date they were separated and that they have lived separate and apart and have not cohabited since the last mentioned date—a period of more than three (3) years.

"WHEREFORE, PREMISES SEEN, plaintiff prays that the bonds of matrimony now existing between plaintiff and defendant be cancelled, set aside and held for naught, and for such other and further relief to which he may be entitled."

II.

SPECIAL APPEARANCE AND ANSWER

Mrs. Smith—a non-resident—entered her special appearance, and, *inter alia,* said:

"The plaintiff is not now and was not at the time for the filing of the complaint herein a bona fide resident of the State of Arkansas and this Court therefore has no jurisdiction to try and determine this cause or to grant the plaintiff a divorce as prayed for in his complaint."

In the alternative, and without waiving her special appearance, Mrs. Smith alleged that she was the injured party in this divorce action, and prayed that if Mr. Smith

[1] It was conceded in the oral argument in this Court that these are the same parties as those in the case of *Smith* v. *Smith,* 219 Ark. 278, 242 S. W. 2d 350.

should be awarded an absolute divorce, then the Washington Chancery Court should award Mrs. Smith permanent alimony and also dower rights in the property of Mr. Smith. The prayer of the answer was in part:

"WHEREFORE, defendant prays:

"(1). That the complaint of the plaintiff be dismissed for want of jurisdiction and by reason of the fact that the plaintiff is not now and was not at the time of the commencement of this action a bona fide resident of the State of Arkansas, as required by the laws thereof;

"(2). Defendant, without waiving her plea to the jurisdiction of the court, and still insisting that the plaintiff is not and was not a bona fide resident of Arkansas, prays alternatively, in the event an absolute decree of divorce is granted to the plaintiff, that she be awarded such property rights in the property of the plaintiff as are fixed by the Statutes of Arkansas in favor of the wife where she is the injured party by reason of the separation complained of in the complaint, together with a reasonable allowance in favor of the defendant by way of permanent alimony."

III.

MOTION TO STRIKE

Mr. Smith filed a motion to strike the alternative prayer contained in the pleading above; and alleged: (a) that the last matrimonial domicile of the parties was in the State of Pennsylvania; (b) that under the law of Pennsylvania, permanent alimony could not be awarded; and (c) that under the law of Pennsylvania, Mrs. Smith was not entitled to an interest in Mr. Smith's property.[2]

[2] In regard to property rights, the allegation in Mr. Smith's Motion to Strike was in the following language: "That under the Statute and the case law of the State of Pennsylvania a wife granted an absolute decree of divorce by a court of that state is not entitled to receive a division of, or any portion of, her husband's property, provided, however, that the property acquired as tenants by the entireties is to be held, after an absolute decree of divorce, as tenants in common of equal one-half shares in value, and either the husband or the wife may bring a suit to have the property sold and the proceeds divided between them; . . ."

Mr. Smith claimed that under Act 348 of 1953 of the Arkansas Legislature, Mrs. Smith—even if the injured party—could receive only such alimony and property rights as were allowed her by the law of the last matrimonial domicile of the parties; and that under the law of Pennsylvania, Mrs. Smith was not entitled to any permanent alimony or property rights.

IV.

RESPONSE

Mrs. Smith resisted the Motion to Strike and claimed that said Act 348 of the Arkansas Legislature of 1953 was unconstitutional for several reasons,[3] among others being the claim that Section 3 of said Act violated the Equal Protection Clause of the 14th Amendment to the United States Constitution.

THE CHANCERY ORDER

With the pleadings in the status listed, the Chancery Court heard the arguments on the Motion to Strike (no evidence was heard), and in refusing the Motion, delivered a written opinion showing much study and erudition, and held that Section 3 of said Act 348 of 1953 was unconstitutional. Thereupon, Mr. Smith gave notice of appeal to this Court, pursuant to Act 555 of 1953 and the concluding paragraph of § 27-2101 Ark. Stats. Excellent briefs have been filed by both sides in this Court on the constitutional question. The trial of the divorce action in the Chancery Court is awaiting the outcome of this appeal.

OUR OPINION

We reach the conclusion that the Trial Court should not have proceeded to decide either questions of property rights or constitutional issues until the case had been first tried as to (a) jurisdiction of the parties; (b) cause of action; and (c) which spouse was the injured party.

[3] Mrs. Smith does not appear to have challenged the Act as violative of Art. 5, § 23 of the Arkansas Constitution. See *Farris* v. *Wright*, 158 Ark. 519, 250 S. W. 889.

A divorce action is one affecting the status of the parties,[4] and the State is a silent third party in every divorce action. Every court should be firmly sure of its jurisdiction before undertaking to determine the status of the parties. Under our American system, in which each of 48 states has divorce power, the decisions of the United States Supreme Court show instances in which all too frequently a divorce decree rendered in one State has been successfully attacked in another State because of lack of jurisdiction of the first State.[5] *Bona fide* residence of the plaintiff is an essential to the jurisdiction of an Arkansas court to entertain a suit for divorce; and *bona fide* residence means domicile. *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585; *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, 27 A. L. R. 2d 861.

In the case at bar, the complaint—previously copied in full except for caption and signature—did not allege that the plaintiff, Mr. Smith, was a resident of this State. Sec. 34-1208 Ark. Stats. says that residence need not be alleged, *but must be proved.* Certainly, in the light of this Statute, the plaintiff in this instance should have proved *bona fide* residence before expecting the Trial Court to determine other questions.

Our Statute on property rights in divorce actions is § 34-1214 Ark. Stats. Prior to Act 348 of 1953 and also in the 1953 Act, the Statute provides that "In every final judgment for divorce, . . .", the Court shall adjudicate the property rights. Those prefatory words—"In every final judgment for divorce"—mean something: they mean that it is not until the Court makes the final judgment in the divorce action that property rights are to be adjudicated. Those prefatory words mean that it is not until questions have been settled in regard to jurisdiction of the parties, the cause of action, and the determination of which is the injured party—it is not until that stage of the proceedings—that the Court de-

[4] Section 133 of Leflar on Conflict of Laws contains a discussion on the matter of "Jurisdiction to Grant Divorces".

[5] One such comparatively recent case is *Williams* v. *North Carolina,* 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, 157 A. L. R. 1366.

termines property rights and decides for or against permanent alimony. Yet in the case at bar, the parties persuaded the Trial Court to hurdle all these essentials of (a) jurisdiction, (b) cause of action, and (c) determination as to injured party, and pass on a constitutional question involving property rights and alimony, entirely outside of the orderly course of procedure. To use a well understood and homely expression, the parties persuaded the Trial Court to "put the cart before the horse".

Why is it important that jurisdiction, cause of action, and determination of which spouse is the injured party, should first be made? The answer is simple. Suppose we should decide the constitutional question presented and the plaintiff should be displeased with the decision. Then he could dismiss his cause of action and go elsewhere, and we would have decided a case that one party could render moot. Suppose on trial the plaintiff failed to prove a cause of action, or that the defendant, Mrs. Smith, should be found to be the guilty party: then in either such event, a decision on the constitutional question of property rights would become dictum and the adjudication would be moot. It has long been the rule in this jurisdiction that we do not pass on constitutional questions except where such decision is necessary to the determination of the case. *Holt* v. *Howard,* 206 Ark. 337, 175 S. W. 2d 384; *Rowland* v. *Rogers* 199 Ark. 1041, 137 S. W. 2d 246; and other cases collected in West's Arkansas Digest, "Constitutional Law" § 46. Certainly no such necessity exists in the case at bar: on the contrary, orderly procedure demonstrates that the constitutional question has not yet been reached. In the oral argument it was conceded by appellant that this is not a proceeding brought under the declaratory judgment law—Act 274 of 1953.

Appellant claims that the Motion to Strike is appealable under the concluding paragraph of § 27-2101 Ark. Stats., the germane portion of which reads:

"Whenever the decision of any motion . . . in any of the inferior courts of this State, involves the

constitutionality of any law of this State . . . then an appeal shall lie . . . from such decision . . . to the Supreme Court."[6]

In claiming that the above Statute is not governing, the appellee cites us to the case of *State* v. *Greenville Stone & Gravel Co.*, 122 Ark. 151, 182 S. W. 555; but we do not reach the question of appealability for the same reason that we do not reach the question involving the constitutionality of Act 348 of 1953.

Our decision in this case is, that the Trial Court should not have decided questions of alimony and property rights and constitutional issues until those questions had been reached in the orderly procedure, as hereinbefore indicated. Therefore we dismiss the appeal without prejudice, and remand the cause to the Chancery Court with directions that further procedure, if any be desired by the parties, be in accord with the views herein expressed. The costs are taxed against the appellant.

Justice ROBINSON concurs.

Justices HOLT, MILLWEE and WARD dissent.

SAM ROBINSON, Associate Justice, concurring.

In my opinion it is a matter of discretion with the trial court as to when motions, petitions, etc., will be considered. However I concur in the result reached here for the reason that the order of the court holding § 3 of Act 348 of 1953 unconstitutional is not a final order from which an appeal will lie.

In *Wicker* v. *Wicker, ante* page 219, 265 S. W. 2d 6, we said: "The order overruling the motion to dismiss was not a final judgment from which an appeal will lie. If this court should at this time sustain the Chancellor's order overruling the motion to dismiss, the case would still stand for trial on its merits. Meantime the defendant may file some other motion. An appeal cannot be taken from an order of a chancery court which is not a final order."

[6] A typographical error appears in this Section in Ark. Stats.: the last word of the Section is "*hereby*" instead of "thereby".

State v. *Greenville Stone & Gravel Co.*, 122 Ark. 151, 182 S. W. 555, is directly in point, and it is there said: "We have reached the conclusion that, under the fourth subdivision, no appeal will lie from a decision of the lower court on any motion, even though it involves the constitutionality of any law of this State, unless the decision is a final order or judgment of the court . . . To hold otherwise would lead to interminable confusion in our decisions and to innumerable appeals from interlocutory orders not decisive of the final rights of the parties, and would thus thwart the very purpose of the law."

HOWARD *v.* STATE, EX REL. STUCKEY.

5-403 267 S. W. 2d 763

Opinion delivered May 10, 1954.

Carl Langston, for appellant.

Tom Downie and *John T. Jernigan,* for appellee.

MINOR W. MILLWEE, Justice. This is a bastardy proceeding instituted in the Pulaski County Court

against appellant by appellee, State of Arkansas, for the use and benefit of the mother of the alleged bastard child. A hearing was held on February 21, 1952, and a judgment was entered March 27, 1952, finding appellant to be the father and ordering him to pay $295.00 for lying-in expenses, $300.00 for past maintenance of said child and $30.00 per month for future care and maintenance. The judgment recites: "This judgment having been rendered on February 21, 1952, but omitted from record on that date is hereby ordered entered *nunc pro tunc.*"

On April 23, 1952, appellant filed affidavit and bond for appeal in the county court. On the same date the county court entered an order granting an appeal to circuit court. On May 2, 1952, a transcript of appeal was lodged with the clerk of the circuit court. On July 31, 1953, appellee filed a motion to dismiss the appeal on the ground that it was not timely filed. On October 5, 1953, appellant filed a response stating that if the statutory requirements for appeal had not been satisfied, it was because the county clerk would not permit him to have the papers and transcript; that appellee was estopped from claiming that the appeal was not filed within the time required by law; and that justice required a *de novo* hearing and a disregard of the delay in filing the appeal.

This appeal is from an order of the circuit court entered on October 20, 1952, sustaining the motion to dismiss.

The matter of appeal in bastardy proceedings is controlled by Ark. Stats. 34-709, which recites: "An appeal will lie from a judgment of the county court to the circuit court in all cases of bastardy, as in cases of appeal from judgments of justices of the peace to circuit courts . . ." Referring to the statutes controlling appeals from judgments of justices of the peace to circuit courts, we find two statutes, Ark. Stats. §§ 26-1306 and 26-1307, which relate to the time allowed for filing the transcript of the judgment in the office of the circuit

clerk. § 26-1306 provides: "On or before the first day of the circuit court next after the appeal shall have been allowed, the justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the cause, together with all the process and all the papers relating to such suit . . ." This statute was a part of Act 135 of 1873 and was in effect at the time Ark. Stats. 34-709 was adopted in 1875. *Carr* v. *State, for use of Smith,* 164 Ark. 503, 262 S. W. 337. In 1939, the legislature adopted Ark. Stats. 26-1307, which recites: "A party who appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment must file the transcript of the judgment in the office of the circuit court clerk within 30 days after the rendition of the judgment. If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond."

Appellant argues that, even though § 26-1307 has superseded § 26-1306, still the statute in effect at the time § 34-709 was adopted should be the controlling one, because § 34-709 specifically adopted it. He relies on the general rule of statutory construction followed in *McLeod, Commissioner of Revenues* v. *The Commercial National Bank, Executor,* 206 Ark. 1086, 178 S. W. 2d 496, to the effect that when a statute adopts a part or all of another statute by a specific and descriptive reference thereto, such adoption takes the statute as it exists at that time, unaffected by any subsequent modification of the statute adopted, unless a contrary intention is clearly manifested. While this general rule is well recognized, there is also a well-established exception to, or qualification of, the rule to the effect that where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, the reference in such case includes not only the law in force at the date of the adopting act but also all subsequent amendments or laws in force on the subject at the time it is invoked. 82 C. J. S., Statutes, § 370a; 50 Am. Jur., Statutes, § 39.

The rule is stated by the annotator in 168 A. L. R. 628, as follows: "In the absence of anything in the adopting statute and the circumstances surrounding its enactment to indicate a different legislative intent, the general rule of construction to be drawn from the cases is that a statute adopting or referring to another statute or to some of its provisions adopts and incorporates the provisions of the earlier statute as they existed at the time of the adoption, but not subsequent additions or modifications of the statute adopted, with the result that the operation of the adopting statute will not be enlarged, limited, or otherwise affected by the subsequent modification or repeal of the adopted statute, but if reference in the adopting statute is to the general law regulating the subject, the incorporation is of that general law as it exists from time to time or at the time the exigency arises to which the law is to be applied."

In *Davison* v. *Heinrich,* 340 Ill. 349, 172 N. E. 770, in construing a provision that appeals in probate matters may be taken "in the same time and manner as appeals may be taken from justices of the peace" the court said: "It is a well-settled rule of statutory construction that, where the reference in an adopting statute is to the law generally which governs the particular subject and not to a particular act, by title or otherwise, the reference will be regarded as signifying and including the law in force on the subject at the time it is invoked." The court held that modifications of the appeal procedure from justices of the peace subsequent to the enactment of the adopting statute were also adopted by that statute.

Here, Ark. Stats. § 34-709 did not specifically or descriptively refer to Ark. Stats. § 26-1306 or any other statute. Its reference was to the general law controlling appeals from justices of the peace. § 26-1306 was modified by § 26-1307, and the latter became a part of the applicable appellate procedure in bastardy cases.

In discussing § 26-1307, in *Lytle* v. *Hill,* 205 Ark. 789, 170 S. W. 2d 684, we said: "This section gives finality to the judgments of inferior courts where the

transcript of the judgment is not filed in the office of the clerk of the circuit court within thirty days after the rendition of the judgment, and authorizes the issuance of an execution against the signers of the appeal bond as upon a final judgment."

"This act is not only mandatory, but is jurisdictional. The transcript must be filed with the clerk of the circuit court within 30 days to confer jurisdiction upon the circuit court."

Since the instant appeal was not perfected by filing the transcript in the circuit court within 30 days after the rendition of the county court judgment, it was properly dismissed.

The judgment is affirmed.

LETAW *v.* SMITH, CHANCELLOR.

5-391 268 S. W. 2d 3

Opinion delivered May 10, 1954.

[Rehearing denied June 7, 1954.]

Abe L. Roberts and *Marvin Brooks Norfleet,* for petitioner.

Everard Weisburd, Jake Brick, John A. Fogleman and *Elton A. Rieves, Jr.,* for respondent.

WARD, J. On August 6, 1953 petitioner, Letaw, filed a complaint in the Chancery Court of Crittenden County against Doyne Dodd. On August 10, 1953 the clerk of the chancery court wrote one of the petitioners, Roberts, who was Letaw's attorney and lived in Memphis, Tennessee, that he had not complied with a rule of the Chancery Court of Crittenden County [which will be set out and discussed later] to the effect that it would be necessary to associate with him in the case local Arkansas counsel. Associated with Roberts as one of Letaw's attorneys in the case was petitioner Norfleet who was also a resident of Memphis, Tennessee.

On August 11, 1953 Roberts and Norfleet, for themselves and as attorneys for Letaw, filed a motion in the Crittenden County Chancery Court stating: That Roberts is now and has been at all material times a resident citizen of Memphis, a practicing lawyer licensed to practice in the Supreme Court of Tennessee and all the courts of Tennessee; that Norfleet is and has been a practicing lawyer at Memphis, Tennessee licensed to practice in the Supreme Court and all other courts of that state, that he is and has been licensed to practice in the Supreme Court and all other courts in Arkansas, and that Norfleet had been a resident of Forrest City, Arkansas

up until July 1952 when he became a resident of Memphis, Tennessee; and, that the rule which the chancery court seeks to enforce is void as being arbitrary, unreasonable and violative of comity between Arkansas and Tennessee with reference to the practice of law within the United States of America, etc. The prayer in the motion was that the court relax the said rule insofar as this particular case is concerned and for all other proper relief. The trial court, after hearing testimony on the motion, refused by order dated August 31, 1953 to modify its rule and refused to allow Letaw and his attorneys to proceed further in the case. From this ruling of the trial court petitioners here seek relief by Writ of *Certiorari.*

The rule adopted by the Chancery Court of Crittenden County and here questioned is as follows:

"Non-resident attorneys at law, who have been admitted to practice by the Supreme Court of this State or by the court of last resort in the state of their residence, will be permitted by courtesy to appear in all causes in the Crittenden Chancery Court representing any party thereto, but the pleadings in all such causes filed by a non-resident attorney shall be signed also by a duly licensed resident attorney of this county upon whom service of notices may be had and who shall be responsible to the court for the conduct of the interest represented by the non-resident attorney in such cause. The Clerk of this court is charged with the enforcement of this rule."

"This order to be effective Oct. 16, 1933."

In rendering its decision the trial court stated "that the making of said rule was a valid exercise of the court's power, and that said rule is reasonable, proper and valid."

Before we consider the issue here raised it becomes necessary to set out certain material and undisputed facts and to call attention to an agreement reached by the attorneys for both parties during the oral argument in this court.

It is undisputed that: Roberts is an attorney residing in Memphis, Tennessee; he is a member of the bar of Tennessee, admitted to practice in all the courts of that state, and has paid his fee of $1.00 to and been enrolled to practice by the Chancery Court of Crittenden County; and, Norfleet has exactly the same status as Roberts, except that he was formerly a resident of Arkansas, he was admitted to practice in all the courts of this state in 1919, and has ever since paid his annual dues to the bar of Arkansas.

The Agreement on Oral Argument. The petitioners filed their motion in the trial court, filed this petition here, and briefed their case on the theory and assumption that the disputed rule meant one thing, and respondent briefed its cause on the theory, not too clearly defined however, that the rule had a different meaning. Petitioners' interpretation of the rule, as applied to the facts of this case, is: Because Attorney Roberts [and Norfleet] is a resident of Tennessee he is not allowed to prosecute a suit for Letaw in Crittenden County unless he employs, as co-counsel, an attorney residing in Crittenden County. Respondent contends the rule means: Roberts, an attorney of Tennessee, can proceed with his suit if he employs, as co-counsel, an attorney who lives anywhere in Arkansas. During oral argument respondent's attorneys made it plain that their interpretation of the rule was as stated above and that they were insisting on no other interpretation, and petitioners agreed that the rule, so interpreted, was satisfactory to them.

The above status of the case leaves two principal matters for further consideration.

1. Since the attorneys in this case have no authority to fix, by agreement, the rules of practice in the Crittenden County Chancery Court, or to say what is or is not a reasonable rule in such matters, it remains the duty and responsibility of this Court to decide the issue presented by this writ.

In our opinion the questioned rule, taken in the plain ordinary meaning of the language heretofore copied, is

susceptible only of the interpretation given it by petitioners, and, as such, does not conform to our statute, is unreasonable and cannot be sustained. Ark. Stats., § 25-108, reads as follows:

"Non-resident attorneys at law of record shall be allowed to practice law in all the courts of this State of equal jurisdiction of the court or courts to which they have been admitted to practice and are members of the bar in good standing in the State of their residence."

It is generally conceded that courts have the inherent right to make local rules of practice and procedure subject to certain limitations. Two of these limitations are that such local rules must not contravene a valid statute or be unreasonable. In the case of *Meyer, et al.* v. *Brinsky, et al.,* 129 Ohio St. 371, 195 N. E. 702, cited by both parties here, the Court, in discussing the power of trial courts to make rules, said:

"However, it is equally fundamental that such rules must not contravene either the organic law or a valid statute; and likewise they must be reasonable in their operation."

The limitations we are speaking of are expressed in 21 C. J. S. § 170 (b), page 261, this way:

". . . subject to limitations based on reasonableness and conformity to constitutional and statutory provisions."

Not only does the Crittenden County Rule, requiring a local attorney in the circumstances mentioned, not conform to the reciprocity statute quoted above, but it appears to us to be unreasonable. A rule which requires an attorney residing in Memphis, Tennessee to employ co-counsel living in Crittenden County as a prerequisite to prosecuting a suit filed in that court is manifestly unnecessary. Those seeking to sustain the rule do so on the ground that it is necessary for the Court to have, in each case, an attorney upon whom notices may be served and who would be responsible to the court. This same justification is found in the rule itself. However,

as now conceded by respondent, the Chancery Court of Crittenden County could exercise the same control over an attorney of Pulaski County [or any other county] that it could over an attorney of Crittenden County. So, if the restriction imposed on non-resident attorney is unnecessary, it is to that extent unreasonable.

2. It has been urged that the Petition here should be dismissed or denied because (a) there is no justiciable issue and (b) the issue is moot, but we do not agree.

(a) If at the hearing before the Chancellor it had been made clear to petitioners that they could proceed by employing any attorney in Arkansas and that such was the interpretation of the rule, then petitioners might not have instituted this proceeding, but this was not done. It appears to us that petitioners had reasonable grounds to believe they were being required to employ an attorney in Crittenden County. The plain wording of the rule conveys this impression; the letter from the clerk of the Chancery Court of Crittenden County to Roberts stated that the rule required him to associate "local Arkansas counsel"; and the record fails to disclose that the respondent or the attorneys made clear to petitioners the interpretation of the rule which they now claim although ample opportunity was afforded them during the hearing. Though it might be argued that the words "local Arkansas counsel" along with other language in the letter should not be interpreted as restricting the location to Crittenden County, yet it must be remembered that the clerk has no authority to interpret the rule and in many instances it is possible that non-resident attorneys might ask for and receive a copy of the rule itself.

(b) On December 14, 1953, at an adjourned day of court after the August order denying petitioners the right to proceed in the original case and after petitioners had taken an appeal [later changed to this writ] from that order, the trial court made another order, stating and finding: "Norfleet is now a resident of St. Francis County, Arkansas and has been since September 11,

1953, and that said Marvin Brooks Norfleet is now a regularly licensed attorney at law in the State of Arkansas and is not an attorney at law, non-resident of the State within the meaning of the rule of this Court dated August 31, 1933 . . .''; and it is therefore ordered that Letaw's attorneys, Norfleet and Roberts, may now proceed with the trial of this cause.

In our opinion the December order does not render moot the issue presented to us by petitioners' writ for several reasons. First, we think the December order should be treated as an addendum to the August order and it is not the order which is challenged by this writ. Second, the December order, by its own interpretation, does not affect, modify or repeal the rule here challenged. Third, when this court allowed petitioners to change their procedure from ''appeal'' to ''certiorari'' it was, we think, an implied commitment to hear this petition on its merits. Fourth, petitioner, Roberts, being a non-resident attorney, had an interest in this matter which the December order does not dispose of. Moreover, it appears that the interest of practitioners and litigants in general would be best served to have the status of this questioned rule definitely settled.

We point out that no one connected with this litigation had anything to do with the adoption of the rule in question and certainly we do not mean to imply any criticism of those who have merely conformed to a procedure which had been followed by others for twenty years.

Writ granted.

Justice MILLWEE concurs.

ED. F. MCFADDIN, Justice (dissenting). The majority has decided a case that is *moot*. Such procedure is contrary to our established precedents in which we have refused in all instances—except election controversies[1] to decide a case that does not present a justiciable issue.

[1] For election controversies, see *Cain* v. *Carl Lee*, 171 Ark. 155, 283 S. W. 365; and *Brown* v. *Anderson*, 210 Ark. 970, 198 S. W. 2d 188.

In *Quellmalz* v. *Day,* 132 Ark. 469, 201 S. W. 125, we said:

"It is not the policy of our law with respect to litigated cases to decide questions which have ceased to be an issue by reason of facts having intervened rendering their decision of no practical application to the controversy between the litigants. *Pearson* v. *Quinn,* 113 Ark. 24; *Tabor* v. *Hipp,* 136 Ga. 123, Ann. Cas. 1912C 246."

In *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617, we 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 cannot affect the matter in issue in the case at bar."

In *Kirk* v. *North Little Rock School Dist.,* 174 Ark. 943, 298 S. W. 212, we said:

"It has never been the policy of this court with respect to litigated cases to decide cases which, by reason of intervening facts, seemed to be of no practical application to the controversy between the parties. It is the duty of the courts to decide actual controversies by a judgment or decree which can be carried into effect, but not to give opinions upon controversies or declare principles of law which cannot be executed or which cannot have any practical effect in settling the rights of the litigants under the judgment or decree rendered. *Mabry* v. *Kettering,* 92 Ark. 81, 122 S. W. 115, *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617; *Blakely* v. *Newton,* 157 Ark. 351, 248 S. W. 907; *Mills* v. *Green,* 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; *Jones* v. *Montague,* 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913; *Wilson* v. *Shaw,* 204 U. S. 24, 27 S. Ct. 233, 51 L. Ed. 351; and *So. Pac. Terminal Co.* v. *Int. Commerce Com.,* 219 U. S. 498, 31 S. Ct. 297, 55 L. Ed. 310."

Thus it has long been the policy of this Court—and it is the policy of other Courts throughout the

nation—to refuse to decide questions not essential to settle the rights of the litigants. The question that the majority has decided in the case at bar—that the Crittenden Court rule of 1933 is void—does not and cannot affect the rights of Letaw in the case at bar. Therefore, it is a moot question, and the time of this Court should not have been consumed in deciding it.

To clearly demonstrate that the question decided is moot, I review briefly the facts in this matter:

1. On August 6, 1953, Letaw filed suit against Dodd's Drug Store in the Crittenden Chancery Court, seeking to recover judgment against Dodd and to foreclose an alleged lien on personal property. That was the case of *Letaw* v. *Dodd,* in which attorneys Roberts and Norfleet represented Letaw.

2. The Clerk of the Crittenden Chancery Court notified these attorneys of the Crittenden Court rule of 1933, saying in part: "These rules require that all out-of-state attorneys associate with local counsel residing in the State of Arkansas."[2] On August 11, 1953, Letaw and his attorneys filed a motion—in the case of *Letaw* v. *Dodd*—asking the Court to relax the said rule.

3. On August 31, 1953,—in the case of *Letaw* v. *Dodd*—the Court refused to relax the rule because each of the said attorneys was then a *non-resident of the State of Arkansas.*[2] So far as we know, the merits of the case of *Letaw* v. *Dodd* are still pending in the Crittenden Chancery Court.

4. On November 17, 1953, Letaw filed a transcript in this Court—in Case numbered 362 herein—attempting to appeal from the order of the Crittenden Chancery Court which refused to relax the rule against non-resident attorneys. Of course, there was no final order

[2] The majority opinion says: "Respondent briefed his cause on the theory, not too clearly defined, however, that the rule had a different meaning". But it is evident that the Clerk of the Court, and the Court itself, all the time declared the rule as meaning *State,* instead of *County.* There was never a time—in the record in this case—when the rule was understood as meaning only attorneys *resident of Crittenden County.* It was all the time understood as meaning attorneys *resident of the State of Arkansas.*

on which to base an appeal; and on February 8, 1954, this Court dismissed the appeal of Letaw ". . . for want of a final, appealable order"; and that ended the appeal to this Court of the case of *Letaw* v. *Dodd,* and left the controversy pending in the Crittenden Chancery Court, where it had always been pending.

5. On December 14, 1953, the Chancery Court of Crittenden County entered another order in the case of *Letaw* v. *Dodd,* which order recited that Attorney Norfleet was then a resident of St. Francis County, Arkansas, and had been since September 11, 1953, and that since Attorney Norfleet was a resident of the State of Arkansas,[2] there was full compliance with the rule of the Court, and that Letaw could proceed with a lawsuit against Dodd. The order concluded: "It is, therefore, by the Court, considered, ordered and decreed that the plaintiff and his attorneys, Marvin Brooks Norfleet, and A. Bell Roberts, may now proceed with the trial of this cause, to all of which Marvin Brooks Norfleet and A. Bell Roberts excepted, said exceptions being duly noted herein."

6. At the time the aforesaid order was made on December 14, 1953, the learned Chancellor delivered an opinion, which shows much study and thought. A copy of the Chancellor's opinion is attached to this dissenting opinion. From this opinion of the Chancellor, it is clear that ever since December 14, 1953, Letaw and his attorneys have been at perfect liberty to proceed with their case against Dodd: yet—as above quoted—the attorneys excepted to the very order that allowed them to proceed. When the Court allowed Letaw to proceed with his case against Dodd, then the question here presented became moot.

7. But notwithstanding the order of December 14, 1953, we find that on December 29, 1953, Letaw filed the present case in this Court. It is Case No. 391, and is the one that the majority is now deciding. In this case, Letaw and his attorneys, Roberts and Norfleet, ask this Court to enjoin Chancellor Smith from enforcing the Crittenden County Court rule against them.

It is worthy of note (a) that his present case was a Petition for Writ of Prohibition, seeking to prohibit Chancellor Smith from enforcing the Crittenden County Court rule against them; and (b) that the case was filed here fifteen days after Chancellor Smith had made an order that permitted Letaw and his attorneys to proceed in Letaw's case. In order to decide the controversy, this Court has treated the Petition for Prohibition as a Petition for Certiorari. We have a right to do that; but still the whole controversy is moot, and has been moot since December 14, 1953, when Letaw and his attorneys were notified by the Crittenden Chancery Court that they had a full right to proceed with the case of *Letaw* v. *Dodd.*

From the foregoing seven numbered paragraphs, I emphasize that the facts demonstrate that the present case does not present a justiciable controversy affecting Letaw's rights: rather they show that Letaw and his attorneys have undertaken to reform the Court rules of Crittenden County in a situation that does not now affect Letaw's rights. I am surprised that this Court has let itself be used for such a result. Why should we consider the rules of the Crittenden Chancery Court, when such consideration cannot possibly affect the right of Letaw to proceed in his case against Dodd? I cannot understand it.

Now this dissent might well stop at this place: but since the majority has seen fit to test the Crittenden County Court rule by § 25-108 Ark. Stats., I think it not amiss to give my views on that Statute. That section of the Digest is a part of Act 222 of 1911. In 1938, the People of Arkansas adopted Amendment 28 to the Constitution, which Amendment reads:

"The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

Since 1939 it has been the duty of this Court to make rules regulating the practice of law; and I submit that this Court should now make a rule, effective imme-

diately, which rule should provide that any non-resident attorney must associate with him an attorney resident in Arkansas in any case that may be filed in any Court of this State. As pointed out in the opinion of the Chancellor of December 14, 1953, other States and other jurisdictions have such a rule; and we should have one, which would be just like the Crittenden County rule, as interpreted by its Chancellor.

Because the majority has decided a case that is moot, I respectfully dissent.

APPENDIX

Opinion of Chancellor Smith, Delivered December 14, 1953,

In the Case of *Letaw* v. *Dodd.*

Gentlemen, in order that there not be any confusion or misunderstanding or any reason for any mis-statements, I am going to undertake to make my position clear in regard to this matter. On August 6, 1953, the plaintiff filed in this court, his petition against the defendant in which he alleged that the defendant was indebted to him in certain sums. The plaintiff prayed judgment for the amount of that indebtedness and asked that that judgment be declared a lien upon certain personal property belonging to the defendant; that if the judgment was not paid within a certain time to be fixed by the court, that the lien be ordered foreclosed and a commissioner appointed to sell the property to satisfy the judgment. Summons was duly issued and served on the defendant and on the 7th day of September, 1953, the defendant filed in this court, his answer, denying the allegations contained in the complaint. Prior to that time a motion was filed attacking the validity of a rule of court that was promulgated on August 31, 1933, recorded in the permanent records of this court and by that order or rule it was to become effective on October 16, 1933. That rule of court in effect, provided that a non-resident attorney who was licensed to practice law in the State of Arkansas or in the State

of his residence, that is, by the highest court in the state of his residence, would be permitted to practice in this court provided that all pleadings be signed by a resident attorney upon whom process might be had and who might be responsible to the court for the conduct of the litigation. It is significant to note that rule was not questioned for twenty years. Many, many, many attorneys from other states have complied with the rule and practiced in this court. Many of them during my three years tenure on the bench. I assume, and must assume that there was reason for the promulgation of that rule. Rules of similar nature are enforced in many other courts. A rule almost identical in language is in effect in the Federal Courts of the State of Arkansas and rules in many other states are similar. There is a rule, according to the record in this case, in the Probate Court of Shelby County, Tennessee to the effect that no one except a licensed attorney in Tennessee and a resident of Shelby County shall be permitted to practice in that court. That is a record before this court in this case. When a rule, promulgated by a court, is duly recorded in the permanent records of that court, it becomes just as effective as if it were a law passed by the Legislature of the State and should be given the same effect in the same manner as a rule or law passed by the Legislature. On August 31, 1953, a hearing was had on that motion and testimony was taken in open court. The testimony consisted of the evidence of the two attorneys representing the plaintiff and certain documentary evidence. There was no testimony, at least competent testimony, to the effect that the enforcement of this rule would deprive the plaintiff of an opportunity to try this law suit upon compliance with the rule. The parties simply introduced their license, one of them exhibiting his license granted by the Arkansas Supreme Court in 1919 and his license to practice in the courts of Tennessee, the other his license in the State of Tennessee, each stating under oath that he was, at that time, a resident of Tennessee. There was no testimony to the effect that plaintiff could not comply with the rule. They simply

relied upon the Statute of 1911, the laws of the State of Arkansas which provided and which does provide that an attorney who has been licensed to practice before the highest court in his state shall be permitted to practice law in the courts of this state. The license issued to every member of the Bar of Arkansas, over eleven hundred in number, contains the same provision, that the holder of that license is permitted to practice in the Supreme Court of this State and all inferior courts of the State. It is the opinion of the court that does not give the holder of that license the privilege to ignore the rules promulgated by courts in the exercise of their inherent power, so a statute conferring upon non-resident attorneys the right to practice in this state could certainly confer upon them no greater right than the licensed attorneys of this state. The laws of the State of Arkansas provide that before attorneys can be licensed in the first place in the State of Arkansas, that he must be a resident of this state and must have resided in this state for a specified length of time. We have no cases in this court, but the great weight of the decisions of other states is to the effect that where residence is a prerequisite to practice in the first place, that upon the removal of a person, it acts not as a revocation of his license, but as a suspension.

Upon the testimony before the court on August 31st, the court was unwilling to declare as a matter of law, that the rule was invalid. There is not now, and there never has been for one single minute since that time, any effort, any intention, any desire upon the part of the court to alter the ruling of August 31, 1953. There has never been any indication, any intention or desire to have any re-hearing in connection with the order made on August 31, 1953. It has come to the attention of the court and admitted in open court this morning that since the 11th of September, 1953, or about the 11th of September, 1953, one of the attorneys, the attorney who was licensed to practice law in Arkansas, has returned or removed to his former home in St. Francis County, Arkansas, and is now a bona fide resident of the State of Arkansas. The court takes the

position without, as I say, undertaking to alter, revise or amend the order of August 31, 1953, to any extent, good or bad, whether valid or invalid, no longer applies to that attorney and that he has a perfect right to proceed in the trial of his client's cause in this court.

It is immaterial, a matter of no consequence, whether Mr. Roberts intended to take the lead in the case, or whether Mr. Norfleet intends to take the lead in the case. Insofar as Mr. Norfleet is concerned, he is not a non-resident of the State of Arkansas, and therefore, the rule has no application to him whatsoever. There is an attorney of record in this case upon whom process of service can be had and who can be responsible for the conduct of the law suit, who could be punished, if need be, and I am satisfied there won't, by process of this court.

I am not unmindful of the fact that there has been an attempted appeal from the order of August 31, 1953. I did not think then and I do not think now that the order of August 31, 1953, was an appealable order and, therefore, I am of the opinion that the jurisdiction of that case is still in this court. There has been a complaint filed and an answer filed. There has been no proof taken by either side on the merits of that case; they are simply, insofar as the parties are concerned, a complaint alleging certain facts to be true, and an answer denying those facts to be true. It is, therefore, incumbent upon the plaintiff, who has the burden of proving his case, to act.

I am not unmindful of the rule of court and the decision of the Supreme Court to the effect that when there is an appeal to the Supreme Court from a former order or judgment, that the lower court loses all jurisdiction. The jurisdiction is there and not here because the case is transferred; and by a very early case of *Gates* v. *Solomon,* 73 Ark. 6. That was a case where the Circuit Court had either sustained or overruled a demurrer to the complaint. The court sustained the demurrer to the complaint and no further action was taken except the circuit court rendered judgment against

the plaintiff for the costs of the case and our Supreme Court said that the Circuit Court was in error in rendering costs against the plaintiff for the action while it was still pending, there being no dismissal and there was no dismissal in this case and that thought unquestionably ran through the minds of the attorneys when the court announced the ruling, that he assumed that the complaint was being dismissed and he was told by the court then there was no reason to dismiss the complaint, that the attorneys could proceed with the trial of their cause as soon as the rule was complied with and it was not a final judgment and no appeal lies from it. The appeal was prematurely taken, the case is still pending in the Chancery Court. In the case of *McCarroll, Commissioner of Revenue v. Gregory-Robinson-Speas, Inc.*, the appellant admitted in the Supreme Court that the only order rendered by the trial court was an order overruling his demurrer to the complaint and granting an appeal from such order to the Supreme Court. Certainly it cannot be denied that the order made in the instant case was the one holding that the rule of the court was valid. The Supreme Court continued by saying:

"The order overruling his demurrer to the complaint and granting an appeal from such order was an interlocutory order and not being a final judgment was not appealable to this court. The appeal was, therefore, prematurely taken. The case is still pending in the chancery court, notwithstanding the attempted appeal from the order overruling the demurrer to the complaint."

Citing the case of *Gates* v. *Solomon* in 73 Ark. 8, which I just mentioned, goes further in saying that: "This court decided in the case of *Davis* v. *Biddle,* **117 Ark.** 393, that no appeal lies where there is no final judgment, and an order sustaining a demurrer being only an interlocutory judgment, an appeal therefrom would be dismissed for want of jurisdiction and also decided in *State* v. *Greenville Stone & Gravel Co.,* 122 Ark. 151, that orders overruling demurrers were not appeal-

able since they were not final orders and that the mere fact that a constitutional question was involved was not sufficent to make the order final."

In a more recent case of *Piercy* v. *Baldwin,* 205 Ark. 413, the plaintiff in that case brought suit in ejectment against Luther Baldwin and Lois Baldwin, his wife, as well as against other defendants. In apt time, Lois Baldwin, on behalf of herself and the other defendants, filed a motion to stay the proceedings. In short, her motion was based upon the fact that her husband, Luther Baldwin, was a member of the armed forces of the United States and, therefore, was entitled to the benefit of the Soldiers and Sailors Civil Relief Act. Her prayer was that the proceedings in the cause be stayed during the period of military service of her husband and for three months thereafter. A response was filed to that motion and upon a hearing the court sustained the motion to stay the proceedings as to the defendants, Lois Baldwin and Luther Baldwin, whereupon, the plaintiff then moved the court to permit him to proceed with the trial as to the other defendants. That motion was denied by the court and the plaintiff prayed and was granted an appeal to the Supreme Court. In the Supreme Court, the plaintiff contended first that the trial court abused its discretion in granting the defendant's motion for a stay of proceedings and second, that in any event, there was an abuse of discretion in granting the defendant's motion for a stay of proceedings and second, that in any event, there was an abuse of discretion, an error in denying the plaintiff's motion to permit him to proceed against the other defendants. In passing on those motions, our Supreme Court said:

"We cannot decide these questions for the reason that the appeal has been prematurely brought and we are without jurisdiction. The order from which this appeal comes is in no sense a final order, from which an appeal may be prosecuted. In effect, the order continues the cause during the military service of appellee, Luther Baldwin, and for three months thereafter. The cause has not been tried on its merits, but is still pend-

ing. In *Harlow* v. *Mason*, 117 Ark. 360, this court, quoting from an earlier case, said: 'A judgment to be final must dismiss the parties from the court, discharge them from the action or conclude their rights to the subject-matter in controversy.' "

Therefore, this court is of the opinion that the cause has not been removed to the Supreme Court, notwithstanding the fact that there has been lodged there a transcript of the pleadings and the testimony that was taken here in August. The order, upon its face, shows that it did not conclude the rgihts of the parties, that they were not dismissed from the action; that they were not precluded from proceeding in this cause. I am of the opinion that if the Supreme Court considers the matter now pending before it at all, that it will consider it as an original petition for a writ of mandamus. If that is true, there will be an original action in the Supreme Court and this action is still pending in this court.

As I say, without any regard to the validity of the rule, without any regard to the correctness of the August 31, 1953 order, that under the facts as they now exist, and without any modification of the previous order or any attempt to do so, the court simply makes an order at this time finding that one of the attorneys for the petitioner is a *bona fide* resident of the State of Arkansas, with license to practice in the Supreme Court of this State and all inferior courts, that the rule, valid or invalid, promulgated in 1933, no longer applies to that attorney.

The order is that the plaintiff be and he is hereby granted permission at this time to proceed with the trial of his cause with his present solicitors, Mr. Roberts and Mr. Norfleet.

5-405 267 S. W. 2d 778

Opinion delivered May 10, 1954.

[redacted]

Claude E. Love, for appellant.

Mahony & Yocum, for appellee.

J. SEABORN HOLT, J. September 9, 1953, appellant, Adams, filed the present suit seeking to set aside, or materially reduce, an award to appellee, Mrs. Adams, of $170.00 per month alimony, in a prior divorce decree, on the alleged ground of changed conditions since the granting of the divorce decree. Trial resulted in a decree (October 9, 1953) denying to Adams the relief prayed and this appeal followed.

The parties were married January 10, 1946, separated July 8, 1950, and a decree of divorce was given Mrs. Adams April 5, 1951, awarding her care and custody of their little girl (then sixteen months old), $30.00 monthly for her support, and in addition alimony of $170.00 monthly, or a total of $200.00 per month. Appellant filed a waiver and entry of appearance in the divorce suit. This waiver signed only by appellant and prepared by him, contained the following provision: "I further agree to pay to the plaintiff the sum of Two Hundred Dollars ($200.00) per month, the same to be Thirty Dollars ($30.00) a month for support of my minor child and One Hundred Seventy Dollars ($170.00) per month

for alimony for the plaintiff. Said amounts will be paid as long as conditions remain as they are; any change of her conditions in her being able to rehabilitate herself and go to work or any demotion in the armed services or discharge therefrom, said payments shall be reduced into such amount as agreed upon between us, or as the Court may decree. The court is to keep jurisdiction of this cause and make such changes as should be made when conditions change."

As indicated, Mrs. Adams did not sign the waiver. She testified: "Q. Now, at the time the decree was granted, you knew about this waiver, did you not? A. Yes, sir. Q. And you knew the provisions in the waiver about paying the $170.00 a month alimony until such time—A. When the waiver was signed it was Capt. Adams' idea. He signed the waiver. I didn't even see it. He set the terms up for the agreement. Q. Was that agreeable to you? A. Well, he threatened to cut all of it off if I didn't get the divorce. I had no choice."

Adams has remarried and now has a child by his present wife.

Mrs. Adams secured temporary employment in 1950 and in January 1951 permanent employment with the Lion Oil Company at $44.00 per week. She had been drawing this salary for a period of about nine months prior to the divorce decree. Thereafter her salary has been increased to $60.00 per week. She was receiving $240.00 per month salary, $170.00 alimony and $30.00 for child support, or a total of $440.00 when the present suit was filed. There was evidence that Mrs. Adams' monthly expenses totaled approximately $470.00. She testified that more than half of her expenses was spent for the child: "Out of the money that Mr. Adams gives me I pay $60 a month for rent and $60 a month for food, which consists of, I would say, breakfast and dinner at night. I am not there much at noon, maybe twice a week for lunch, sometimes three times. I pay $5.56 for a telephone, $13.80 for utilities. Water is approximately $3.11, gas $4.69, and electricity is about $6.00. It

varies in the summer and winter. Well, I pay, I would say easily $10 for a doctor bill per month for the baby and myself. That is averaging so much a year. $10 a month for drug bill, which includes cosmetics and necessities for a working girl. I spend about $8.00 a month for gasoline, which is for pleasure and transportation. The maid costs $5.00 a month for cleaning, which increases as a child grows. $2.00 a month or $24.00 a year for emergencies, such as automobile repair, odds and ends, repairing the refrigerator or washing machine. $2.28 per month for my baby's insurance, an endowment, $2.49 for mine on life. * * * I pay a maid $60.00 per month."

Appellant, Adams, at the time the divorce decree was awarded to appellee held the rank of Captain in the U. S. Army Air Corp. Shortly thereafter, he was promoted in rank to that of Major with increased total pay amounting to $755.00 per month. After paying appellee $200.00 per month (alimony and child support) and his expenses (estimated at about $460.00 per month) he had a surplus of approximately $93.00.

Without attempting to detail all the testimony, after a careful review of it all, we have concluded that, while the alimony allowance appears to be somewhat liberal, the decree denying modification at this time is, in the circumstances, correct and should be affirmed. In other words, we find no such changed conditions that would warrant modification.

In a case of this nature, our statute § 34-1213, Ark. Stats. 1947, provides: "Modification of allowance for alimony and maintenance.—The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance, as may be proper, (and may order any reasonable sum to be paid for the support of the wife, during the pending of her bill for a divorce). See *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931, 33 L. R. A., N. S. 1074.

We do not agree with appellant's contention that the above waiver is a binding agreement on appellee. In the first place, she never signed it and it is unilateral, in effect. Even if it could be said that appellee did make such an agreement with appellant on the amount to be fixed by the court as alimony, still under our decisions, the trial court, in the circumstances, would not be bound thereby.

In *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954, we said: "The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree upon 'the amount the court by its decree should fix as alimony.' *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102, which construed an agreement of the first type, and *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the Holmes case we held that the second type of contract does not prevent the court from later modifying its decree."

In *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409, we said: "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."

Taking into account the cost of living, which has substantially increased, since the alimony award was made to appellee, the necessary and reasonable expenses for the proper care and rearing of this little girl, with

the fact that a substantial part of these expenses for the child are being supplied and must be supplied by appellee out of her alimony allowance over and above the $30.00 support money, and further the ability of Adams to pay, the duty resting on him to support his child properly, all in all, although, as indicated, while it may appear that the alimony allowance was liberal, it also may be said from the testimony that the support award for the child was not liberal enough.

We conclude that the Chancellor's findings were not against the preponderance of the testimony, and accordingly, the decree is affirmed.

BARBEE *v.* CARPENTER.

5-394 267 S. W. 2d 768

Opinion delivered May 10, 1954.

Vol T. Lindsey, for appellant.

Eugene Coffelt, for appellee.

George Rose Smith, J. This dispute involves the appellees' right to close part of Second Street in the city of Siloam Springs. The appellees' home is situated at the northwest corner of the intersection of Second and College Streets and fronts on College to the east. The appellants' home, also facing College, is just across Second Street, at the southwest corner of the intersection. This suit results from the action of the appellees in placing a fence across Second Street along the line of its intersection with College. The appellants' complaint asks that the appellees be required to remove the fence. The defense is that neither the public nor the plaintiffs have an easement in this part of Second Street. The chancellor sustained this defense, holding that the appellees now own this part of Second Street in fee.

We agree that the public easement in Second Street, in the block between College and Maple to the west, has been extinguished. This addition to the city was platted in 1881, and of course the subsequent sale of lots by reference to the plat confirmed the dedication of Second Street and other thoroughfares. *Butler* v. *Emerson,* 211 Ark. 707, 202 S. W. 2d 599. But there is a bluff across what would be Second Street between College and Maple, and for that reason Second has never been sufficiently improved to permit vehicles to travel along this entire block. Instead, Second has been a cul-de-sac that extends west from College to a point only slightly past the houses now owned by these litigants.

In 1911 E. J. Hewitt, who then owned the property on both sides of this segment of Second Street, filed a

petition with the city council, asking that the street be closed. As consideration for this action Hewitt offered to construct certain concrete steps at the north end of College, for public use. By resolution the council accepted this offer, and in the same year the city conveyed this part of Second Street to Hewitt. His title has since passed by mesne conveyances to the appellees.

It appears that both Hewitt's petition and the council's resolution have been lost or destroyed. There is, however, a familiar presumption in favor of the validity of the acts of public officers, and upon that basis the chancellor may reasonably have assumed the city's transaction with Hewitt to have been valid. Since 1897 cities of the second class have been authorized to vacate such portions of public streets as may not for the time being be required for corporate purposes. Ark. Stats. 1947, § 19-2305. We have held that a similar statute (§ 19-2304), applicable to cities of the first class, empowers a city to find and to enact that a portion of a street is no longer required for public purposes. *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S. W. 2d 1004.

In 1911 the city council of Siloam Springs could well have concluded that, owing to the bluff between College and Maple Streets, that particular segment of Second Street was not needed for corporate purposes. Upon such a determination the council was justified in authorizing the conveyance to Hewitt. Of course the power to vacate a street does not ordinarily include the power to convey it to one person; but in 1911 Hewitt owned all the land abutting this part of Second Street, and for that reason the direct conveyance to Hewitt achieved the same result that would have been accomplished by a declaration that the street had been vacated, with title to vest in the abutting owners. We think it fair to presume that the council's action, taken more than forty years ago, operated to extinguish the public easement in that part of Second Street that lies between College and Maple.

On the other hand, a decided preponderance of the testimony supports the appellants' assertion of a private

easement which enables them to use a portion of the vacated street as a means of access from College Street to their back yard. The appellees insist that the traveled part of what was originally Second Street has for many years been in fact a mere driveway leading to the back door of the appellees' house. But the proof shows pretty clearly that this driveway has been used for twenty years or more as a means of ingress to the appellants' property as well. The appellants themselves have not owned a car and have therefore used the driveway only occasionally, as when loading an automobile for fishing trips and the like. But for at least two decades tradesmen have used the driveway regularly — almost daily—for deliveries of ice, coal, and groceries to the appellants' back door. This proof is not seriously disputed; indeed, it was the constant traffic along the driveway that led the appellees to erect the fence now complained of.

Thus the situation is that for some twenty years the driveway along the south edge of the appellees' property has been utilized by business visitors for ingress to the appellants' back yard. It is plain enough that this continual travel over the appellees' property—travel that led only to the appellants' back door—did not create a public easement such as a street or an alley. But it is equally plain that this long continued use of the driveway, even though exercised mainly by third persons, inured to the benefit of the appellants and resulted after seven years in the creation of a private easement. In these circumstances the user is referable to the premises being visited and eventually creates an easement appurtenant to that property. *Jean* v. *Arseneault,* 85 N. H. 72, 153 A. 819; *Wilson* v. *Waters,* 192 Md. 221, 64 A. 2d 135.

The most difficult question in the case is whether the use of the way in dispute was permissive or adverse. It would evidently not be correct to say that a private easement invariably results whenever a person, in a spirit of neighborliness, permits others to use his driveway for seven years or more. A mere user, even though continued for the statutory period, does not ripen

into a prescriptive right unless the circumstances are such as to put the owner of the servient estate on notice that the way is being used adversely under a claim of right. *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705; *Bridwell* v. *Ark. P. & L. Co.,* 191 Ark. 227, 85 S. W. 2d 712. In the case at bar, however, there are several reasons for concluding that the travel across the appellees' land was not merely permissive.

To begin with, the appellees' property was occupied. We have recently stressed this fact as one of the factors tending to put the landowner on notice that the user is under a claim of right. *Cupp* v. *Light Gin Ass'n, ante* page 565, 267 S. W. 2d 516. Second, this was the only means of ingress to the appellants' back yard, for there is a hedge along the sidewalk in front of their home. Hence the driveway served not simply as an alternative route of convenience, as is the case when pedestrians cut across a vacant corner lot; instead, it was the only available path to the appellants' back door.

Third, the metes and bounds description in the city's 1911 deed to Hewitt was defective, the defect having eventually been remedied by a correction deed executed by the city in 1940. Therefore it was not until 1940 that the owner of what is now the appellees' property was legally in a position to protest the use of his driveway. When that owner sought and obtained a correction deed he necessarily recognized the flaw in his title, and he must be charged with the knowledge that the preceding use of his property could properly have been under a claim of right. By arming himself with the correction deed the owner undertook to convert into private property what had been a public street since 1881. It is fair to cast upon him the duty of taking some action to warn his neighbors that in the future no one was to have the right to cross the property. No such action is shown to have been taken; on the contrary, the adverse use of the driveway was allowed to continue until shortly before this suit was filed in 1951. This delay of more than ten years precludes the appellees from obstructing

the right-of-way which the appellants have acquired by prescription.

Reversed.

BOCKMAN *v.* WORLD INSURANCE COMPANY.

5-250 268 S. W. 2d 1

Opinion delivered May 17, 1954

Cracraft & Cracraft, for appellant.

Gannaway & Gannaway, Peter A. Deisch and *Burke, Moore & Burke,* for appellee.

J. SEABORN HOLT, J. These consolidated cases were before us on a former appeal (*Bockman* v. *World Ins. Co. and Mutual Benefit Health & Accident Ins. Co.,* 222 Ark. 877, 263 S. W. 2d 486, opinion delivered January 11, 1954), wherein two issues were presented: (1) Whether the evidence was sufficient to support the jury's verdict in favor of appellees (Insurance Companies), and (2) Alleged error of the trial court in failing to make a definite and proper ruling on Dr. Bockman's motion for a new trial. On that appeal, we sustained appellant's latter contention and did not decide the first. We remanded the case "to permit the court to rule on the motion (for a new trial), in accordance with this opinion, which on certification will become a part of the record here."

The trial court, promptly and properly, complied with our directive. The motion for a new trial was overruled and the present appeal presents the one remaining question of the sufficiency of the evidence to support the jury's verdict in favor of appellees (Insurance Companies).

There is no contention that any improper instructions were given to the jury.

Under the terms of the two insurance policies (similar in effect) issued to Dr. Bockman, it was provided that if appellant should, by accidental means, be wholly and continuously disabled for one day or more, as long as he lives, and suffers total loss of time, the respective appellees would each pay a monthly indemnity at the rate of $100.00 per month for the first fifteen days, and at the rate of $200.00 per month thereafter.

Appellant says "that he sustained X-ray burns from the use of a fluoroscope during the month of April, 1951, which caused him to suffer from radio dermatitis of the second, third, fourth and fifth fingers of both hands, resulting in a continuous and permanent disability from the date of the alleged accident, and that due to his injuries the appellant has been and will continue to be hereafter disabled from performing the substantial duties of his profession in the usual and customary way."

Appellees say "that the evidence clearly discloses that the appellant was not and is not permanently disabled to such an extent as would prevent him from performing all the substantial duties as a medical practitioner in the usual and customary manner."

So, the sole question is: Was there any substantial evidence to support the jury's verdict? We hold that there was.

In determining this issue, this Court, on appeal here, has long been committed to the following rules of law, so well established that citation of authorities is unnecessary: We are required to view the evidence in the light most favorable to the jury's verdict, and affirm if there

be any substantial evidence to support it. The weight of the evidence and credibility of witnesses are solely within the jury's province. We are not concerned with where the preponderance of the evidence may be. This prerogative rests with the jury and the trial court.

The testimony shows that during the time Dr. Bockman claimed to be disabled, within the meaning of the policies, from May 1, 1951 through April, 1953 (the case was tried April 30, 1953), he treated a total of 13,576 patients and collected for services $43,485.09, or an average of approximately $1,812.00 monthly. He was a general practitioner, and did no surgery. He testified: "Would you explain to the jury what the nature and the duties of a general practitioner are? A. Everything but surgery, home deliveries and do general practice and complete physicals. Q. Most of it is diagnosis? A. Yes, sir. Q. And prescribing medicine? A. Yes, sir. Q. Is there anything to prevent you from doing that? A. No, sir, I can still do that, I can still do a blood pressure. Q. How many hours a day do you put in? A. Plenty of them. Q. From six o'clock in the morning? A. Yes, sir, and sometimes all night, Mr. Burke, I am a practicing physician and a country doctor. Q. Everything that is done there is done under your supervision? A. Yes, sir. Q. Then you are still practicing medicine? A. Yes, sir, I never denied that. Q. You devote practically all your time to your practice? A. That is all I have done for the last 17 years. Q. That is all you have done? A. Yes, sir, especially since May 1st or 2nd of 1951, and I am still devoting it. Q. Doctor, do you have a very large practice? A. Yes, sir, I have more than I can look after."

Two prominent and qualified practicing physicians in Helena testified on behalf of the insurance companies. Dr. Storm, in effect, testified that he examined Dr. Bockman in October, 1952, and found dermatitis on four fingers of each hand, that the thumb was not involved, and no malignancy. "Q. What was your opinion, after that examination in October, 1952, as to whether Dr. Bockman was able or unable to perform all, or substantially all, of the acts of his profession? A. I think he was, yes,

sir." That he examined Dr. Bockman yesterday with Dr. McCarty and found no change in his condition since October, 1952; no ulceration or malignancy. "Q. What is your opinion as to whether he can perform all, or substantially all, of the acts of his profession? A. I see no reason why he couldn't." Dr. McCarty, in effect, corroborated Dr. Storm's testimony.

Without detailing more of the evidence, we think it ample to support the verdict and affirm the judgment.

GREGORY *v.* OKLAHOMA MISSISSIPPI RIVER PRODUCTS LINES, INC.

5-404 267 S. W. 2d 953

Opinion delivered May 17, 1954.

W. J. Dungan, Augusta, for appellant.

John F. Curran, Shaw, Jones & Shaw and *John D. Eldridge, Jr.,* for appellee.

GRIFFIN SMITH, Chief Justice. Oklahoma Mississippi River Products Line, Inc., filed two suits in Woodruff

Circuit Court against various defendants, seeking to condemn easements. The causes were consolidated.

Plaintiff is a Delaware corporation claiming rights as a pipe-line company operating in this state. Ark. Stat's, §§ 73-1901 and 73-1902. See, also, § 35-601 and §§ 35-201 to 35-207, inclusive.

The defendants demurred in Circuit Court. They alleged that the petitioning company was not a public utility within the meaning of eminent domain laws. Circuit Court declined to pass on the demurrers, but transferred the litigation to Chancery Court, where a motion to remand was overruled. The landowners then filed demurrers that were overruled, whereupon it was again alleged that the pipe-line company was not entitled to exercise eminent domain rights.

In appellants' Circuit Court motion this language appears: "Wherefore, respondents move the court to transfer this cause to the Chancery Court of Woodruff County, to the end that a complete remedy may be obtained, and [they] state that such a complete remedy cannot be obtained in a court of law".

When the matter was before the Chancellor appellants made a final effort to have the cause sent back to Circuit Court to have their demurrers determined.

It is our view that equity was definitely selected as an appropriate forum and the appellants are not now entitled to lift the cause from the court they asserted to be the only one with sufficient jurisdiction to afford complete relief.

At the October 23d hearing testimony relating to the plaintiff's status as a corporation authorized to build a pipe-line was heard. Findings in the appellee's favor were coupled with an order that $1,900 be deposited: $900 to indemnify one set of defendants and $1,000 for the benefit of the others.

The appeal presents two problems: (a) Was the Chancery Court's order permitting entry appealable?

(b) Did equity have jurisdiction to decree complete relief?

We have consistently held that where private property is to be taken, any public agency seeking to exercise the high prerogative of eminent domain must bring itself clearly within the law's contemplation. A corollary is that no more land may be taken than the public need requires.

Another rule equally definite is that where equity jurisdiction exists in respect of an essential element of litigation and such jurisdiction is invoked, the process draws full power to determine all of the rights that are involved. *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58.

In the Selle case it was said that when transfer [in a condemnation suit] is asked and jurisdiction attends for any purpose, the value of the land can be adjudged. To the same effect is *Burton* v. *Ward, Chancellor,* 218 Ark. 253, 236 S. W. 2d 65. In the Burton case a dissenting opinion expressed the view that language in the Selle decision was dictum, "although as an abstract proposition of law [it is correct]".

Since Chancery had the jurisdiction claimed for it by appellants, its order permitting entry when deposits were made was correct if the petitioning corporation brought itself within the statute pertaining to it. The construction has been that with compliance attending domestication the corporation is no longer foreign in respect of its right to take land for public use.

The evidence convincingly shows that the company's purpose is to operate as a public service agency. It has no production of its own, but must transport commodities without discrimination. This being true, the Chancellor's finding that the easements were necessary will not be disturbed.

But inasmuch as there has been no judgment fixing the damages (a judgment Chancery has a right to render) the appeals are premature. The consolidated causes will

therefore be remanded with directions to proceed in a manner not inconsistent with this opinion, the sole question being the amount of damages.

BROWN *v.* FRAZIER.

5-409 267 S. W. 2d 951

Opinion delivered May 17, 1954.

J. B. Gillison, for appellant.

Carneal Warfield, for appellee.

WARD, J. This appeal involves the construction of Ark. Stats., § 34-1421, which is to the general effect that the trial court must, in the absence of an affidavit of tender of payment of taxes, improvements, interests, etc., dismiss the complaint in certain instances.

Appellees, H. W. Wells and H. L. Cooper, filed an ejectment suit against appellant, W. G. Brown, in the Chicot Circuit Court, making certain allegations. Those material to this decision are, in substance, as follows: Wells is the owner and entitled to the immediate possession of the land in question; title in Wells is deraigned through twenty-three separate conveyances or transactions, among which are deeds from the State and also

the Cypress Creek Drainage District [based on tax forfeitures] to Wells or his predecessors; Brown "claims some interest in said property, the exact nature of which is unknown" but without foundation; and, Brown "forcibly entered on said lands, took possession thereof" and refuses to allow plaintiffs to enter thereon. The prayer was for possession of the lands.

Brown's response to the above complaint was a Motion to Dismiss, in which the following allegations, material here, were made: He is the owner and in possession of said lands; he bought the land from the Southeast Arkansas Levee District which District had previously received a deed from the Chicot County Clerk, all based on tax forfeitures; all sales mentioned above were pointed out as being matters of public record and, as such, were notice to Wells; and, Wells has "failed, refused or neglected to tender to this defendant any of said taxes or improvements made on said lands by him" and has failed to file the affidavit required by Ark. Stats., § 34-1420 and § 34-1421, and because thereof the complaint should be dismissed.

After argument on appellant's motion by counsel on both sides and after some remarks by the trial judge, but before any decision was rendered, the court granted Wells' request to take a non-suit at his costs and an order was entered to the above effect over the objections of appellant.

Appellant apparently assumes, and we think correctly, that appellee's non-suit was taken, with the approval of the trial court, without prejudice, and we shall consider it from this viewpoint.

The only question presented here, according to appellant's view, is: Does Ark. Stats., § 34-1421 make it mandatory on the trial judge, in a case of this nature, to dismiss the complaint with prejudice? If so, this cause must be reversed, otherwise it must be affirmed. The section mentioned reads as follows:

"If any suit or action shall be brought in any court of record in this State against any such purchaser or purchasers, his, her, or their heirs, or assigns, holding any lands, as specified in the first section [§ 34-1419] of this act, and it shall appear to the satisfaction of such court, that no affidavit, as required in the preceding section of this act, was filed previous to the commencement thereof, it shall be the duty of such court to dismiss said suit or action, at the cost of the plaintiff or plaintiffs."

Statute Not Mandatory. In our opinion the statute is not mandatory in either of two respects: (a) The trial court is not compelled to dismiss with prejudice, and (b) The trial court can permit the plaintiff to take a nonsuit without prejudice in lieu of a dismissal by the court, plaintiff to pay the cost in either event.

(a) Appellants' construction of § 34-1421 is harsh and could easily result in a denial of justice on an oversight or technicality. This situation could more easily arise, as here, where the necessity of an affidavit of tender first becomes apparent and its omission noted for the first time in a motion to dismiss. That the question can be raised on a motion was decided in *Pope, et al.* v. *Macon, et al.,* 23 Ark. 644. So, if appellees in this instance do own the land in question and are in fact entitled to possession, justice dictates they should have a chance to be heard on the merits of their claim.

Although this court has not had occasions to pass directly on the question here raised by appellant, we think the implications in the opinion in *Wolf & Bailey* v. *Phillips,* 116 Ark. 115, 172 S. W. 894, fully sustain the conclusion we reach here.

In the above cited case the opinion dealt with two situations. The first, and the one pertinent here, was where an affidavit required by Kirby's Digest, § 2760, which is the same as Ark. Stats., § 34-1421, was insufficient. In this connection the Court there said:

"(1) *First.* It is the duty of the circuit court, where the above statute is not complied with, 'to dismiss

said action at the cost of the plaintiff.' Kirby's Digest, § 2760. This statute contemplates that the court shall dismiss the action where the affidavit is insufficient, without submitting the issue raised by the pleadings in the case to the jury. It is a matter that must be disposed of *in limine*. It is erroneous procedure to have the cause submitted on the merits to the jury and then direct the jury to return a verdict in favor of the defendant in the action because the plaintiff has failed to file a sufficient affidavit. The judgment of the court based on the jury's verdict was not one dismissing the action, but was tantamount to a judgment in favor of the defendant on the merits.''

If this Court did not consider a dismissal for lack of the affidavit to be without prejudice, we can see no occasion for it to stress the ''merits'' of the case as it did in the last two sentences above quoted.

(b) In view of what has been said above little need be said to justify the trial court in allowing appellees to take a non-suit at their own expense. Regardless of whether the court dismissed appellees' complaint at their cost or allowed them to take a non-suit at their cost, the same result was reached and the purpose of the statute was fulfilled in either event. The right of a litigant, recognized by practice and statute, to take a non-suit is too well established to require comment or citations.

In reaching the above conclusions we have done so on the basis there is no contention that appellant's motion amounted to a cross-complaint or that there was such a final submission to the court as would prevent appellees from taking a non-suit.

Affirmed.

CROSS *v.* MCLAREN, EXECUTRIX.

5-407 267 S. W. 2d 956

Opinion delivered May 17, 1954.

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

A. S. Hays and *Henry W. Gregory, Jr.*, for appellee.

MINOR W. MILLWEE, Justice. On August 7, 1952, G. A. McLaren died testate in Pope County, leaving a will modified by three codicils. On August 28, 1952, the original will and the codicils were presented for probate and were admitted without objection. The will is composed of twenty-five items, some of which are modified by the three codicils. Item I appointed appellees Carrie Lee McLaren and Pearl Barlow the joint executrices of the will, and Item II directed them to pay just debts and funeral expenses and make settlement of taxes or assessments against his property. Item III bequeathed the home to testator's wife for life, then Item IV bequeathed all the residue of the estate to the appellees to hold as trustees for the term, conditions and purposes set out in the will. Item V established the term of the trusteeship as the lives of his wife and daughter, or in any event twenty years after his death; this was amended by codicil to thirty years after his death. Then follows a number of specific instructions to the trustees pertaining to their management of the trust estate. Item X directs the trustee to file an inventory of the trust estate in the chancery court while Item XIII directs them to make annual reports to the chancery court showing all income and expenditures in their administration of the trust. Chancery court is also given the right to fix the compensation of the trustees as well as the right to remove them for violation of cer-

tain provisions of the will, and to name their successors. Item XXIII directs that the trustees shall consult J. A. Willey and Zada Cross, appellant herein, in the management of the real estate, and further provides that they shall have the right to rent estate lands. By codicil, the right bestowed by this item is conditioned on the cultivation of the rented land in a first class husbandman-like manner.

Item XXIV of the will originally read as follows: "After the full expiration of twenty years from my death and the death of both my wife Florence and my daughter, Alta, either before or after the full twenty-year period and whichever is latest to occur, then I declare the trust herein created to terminate and my Trustees shall thereupon execute their Trustees deed to my granddaughter, Sandra Lee McLaren, and to the issue of her body, but if the said Sandra Lee McLaren be dead, then said conveyances shall be made to her bodily heirs and if there be no bodily heirs of the said Sandra Lee McLaren living at the termination of this Trust as herein provided, then all property held by my said Trustee shall revert to my estate; in the event of such reversion by reason of the death of Sandra Lee McLaren and failure of bodily issue of her, then it is my will, and I give and bequeath to my cousin, Arnie McLaren, the sum of FIVE THOUSAND and no/100 ($5,000) DOLLARS; to my cousin Tabitha McLaren Fronabarger, or in the case of her death to her descendants, according to the laws of descent and distribution of this State, FIVE THOUSAND and no/100 ($5,000.00) DOLLARS: to Zada Cross, I give, bequeath and devise FIVE THOUSAND and no/100 ($5,000.00) DOLLARS, in money, absolutely, and the East Half (E½) of the Southeast Quarter (SE¼), of Section 32, Township 7 North, Range 18 West, in Pope County, Arkansas, for and during her life and under the same terms and conditions as her present lease."

Item XXIV was modified by the codicils to read: "After the full expiration of thirty years from my death and the death of both my wife Florence and my daugh-

ter, Alta, either before or after the full thirty-year period and whichever is latest to occur, then I declare the trust herein created to terminate and my Trustees shall thereupon execute their Trustee deed to my granddaughter, Sandra Lee McLaren, and to the issue of her body, but if the said Sandra Lee McLaren be dead, then said conveyances shall be made to her bodily heirs and if there be no bodily heirs of the said Sandra Lee McLaren living at the termination of this Trust as herein provided, then all property held by my said Trustees shall revert to my estate; to Zada Cross, I give, bequeath and devise FIVE THOUSAND and no/100 ($5,000) DOLLARS, in money, absolutely, and the East Half (E½) of the Southeast Quarter (SE¼), of Section 32, Township 7 North, Range 18 West, in Pope County, Arkansas, for and during her life and under the same terms and conditions as her present lease. Provided, said Zada Cross complies with the terms and conditions in her lease; then neither my trustees or beneficiaries of my will, may dispossess her of the lands under her lease or disturb her in the peaceable possession of the lands so leased or willed to her."

On August 28, 1952, letters testamentary were issued to appellees herein. Attorneys were employed, inventories filed, and the administration of the estate proceeded in a regular manner. On December 16, 1952, appellees obtained an order of the chancery court declaring the trust under the testator's will and confirming appellees as trustees. On March 12, 1953, appellees, as executrices of the estate, petitioned the probate court for authority to pay to themselves, as trustees, certain accumulated estate income that they might distribute said income to the trust beneficiaries, and the authority was granted that day. On the same day, the chancery court issued an order on the ex parte petition of the trustees construing Item XVI of the will as requiring said trustees to distribute a portion of the income of the estate to the beneficiaries of the trust.

On May 23, 1953, appellant petitioned the probate court for a construction of the will and codicils, alleging

that she was entitled to a bequest of $5,000 under Item XXIV of the will and that her demand for payment of same had been refused and ignored. She further alleged that she was entitled to lifetime possession of an 80-acre tract together with certain accumulated rents, the privilege to rent other lands of the estate, and the right to be consulted in the leasing and renting of said lands under the will, all of which had been refused her. She prayed that the court construe the will to determine her rights in the premises and, by amendment to the petition, she also asked for a construction of her rights under a certain lease executed by testator on August 22, 1949, and referred to in the will.

On September 23, 1953, appellees filed a motion to dismiss appellant's petition for construction of the will, for want of jurisdiction. They alleged that the chancery court had already assumed jurisdiction over the trust provided for in the will and that the exercise by the probate court of any jurisdiction over the trust provisions of the will or of the administration of the trust would be an encroachment on the jurisdiction of the chancery court. On October 1, 1953, the probate court entered an order sustaining appellees' motion and dismissing appellant's petition and the amendment thereto for want of jurisdiction. This appeal follows.

Prior to adoption of the Probate Code [Act 140 of 1949] the probate court was without jurisdiction of a proceeding to construe a will. *Skeif* v. *Bohall,* 99 Ark. 339, 138 S. W. 461. Our earlier cases supported the rule that courts of equity had exclusive jurisdiction of suits involving the construction of a will creating a trust. *Williamson* v. *Grider,* 97 Ark. 588, 135 S. W. 361. See also, *Jesseph* v. *Leveridge,* 205 Ark. 665, 170 S. W. 2d 71.

Section 4b of the Probate Code [Ark. Stats. § 62-2004b] reads: "JURISDICTION. The Probate Court shall have jurisdiction of the administration, settlement and distribution of estates of decedents, the probate of wills, the persons and estates of minors, persons of un-

sound mind and their estates, the determination of heirship, adoption, and (concurrent with jurisdiction of other courts) jurisdiction to restore lost wills and for the construction of wills when incident to the administration of an estate; and all such other matters as are now or may hereafter be by law provided. The judge of the Probate Court shall try all issues of law and of fact arising in causes or proceedings within the jurisdiction of said court and therein pending. The court shall have the same powers to execute its jurisdiction and to carry out its orders and judgments, including the award of costs, as now exist in courts of general jurisdiction; and the same presumptions shall exist as to the validity of its orders and judgments as of the orders and judgments of courts of general jurisdiction."

Section 32 of the Probate Code [Ark. Stats. § 60-416] provides: "The court in which a will is probated, or to which the administration proceeding may have been transferred, shall have jurisdiction to construe it at any time during the administration. Such construction may be made on the petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to persons interested in the construction of the will."

We proceed to examine the petition of appellant in the light of the foregoing statutes. Section 62-2004b, *supra,* follows the enumeration of jurisdictional functions granted in Amendment No. 24 to the Constitution of Arkansas and, pursuant to the authority granted in said amendment, enlarges such jurisdiction by adding thereto the determination of heirship, adoption, and concurrent jurisdiction to establish lost wills and for construction of wills "when incident to the administration of an estate."[1] Now the question whether appellant is present-

[1] See Committee Comment, § 62-2004.

ly entitled to a bequest of $5,000 under Item XXIV of the will is certainly a matter that is incident to the administration of the estate in the probate court. This is a matter pertaining to the administration, settlement and distribution of the estate over which the probate court has final and exclusive jurisdiction. According to a stipulation of the parties, appellant's claim for payment of the alleged bequest has been filed in the probate court after being disallowed by the executrices. The issue is, therefore, properly before the probate court and a construction of the will is necessary to the determination of that issue. It is unnecessary to determine here whether the chancery court might have concurrent jurisdiction to construe the will on this issue since there has been no request for such construction in that court insofar as this record discloses. We do hold that the probate court has jurisdiction to construe the will to determine whether appellant is presently entitled to a bequest of $5,000; and that the trial court erred in holding to the contrary.

However, we are of the further opinion that the trial court correctly determined that it was without jurisdiction to construe the will and lease on the question relating to appellant's rights to possess and rent certain lands, and to be consulted in the leasing and renting of other lands of the estate. Under the terms of the will the residuary estate, including the real property, passed immediately to the trustees to be held, managed and disposed of by them in the administration of the trust under supervision of the chancery court. The chancery court has already assumed jurisdiction over the trust. The jurisdiction of the probate court is confined to the administration of assets which come under its control, and said court ordinarily has no jurisdiction of a contest between an executor and others over property rights. *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140.

That part of the judgment holding that the probate court lacked jurisdiction to construe the will to determine whether appellant is entitled to a bequest of $5,000 is accordingly reversed and the cause remanded for fur-

ther proceedings not inconsistent with this opinion. In other respects the judgment is affirmed.

ELLIS, TRUSTEE *v.* JONES.

5-412 267 S. W. 2d 955

Opinion delivered May 17, 1954.

Giles Dearing, for appellant.

Killough & Killough, for appellee.

ROBINSON, J. D. V. and Blanche Dodd operate a garage and filling station. On November 4, 1944, they sold to Joe and Florence Jones an automobile for the sum of $850. The Joneses gave their note for the purchase price, secured by a deed of trust to real estate. T. M. Ellis, Trustee, filed this suit to foreclose the deed of trust alleging the note, though long past due, remains unpaid. The Joneses defended on the theory the note had been paid by returning the automobile to the Dodds, the sellers, as payment in full. The Chancellor made a finding of fact that the note had been paid, and from a decree to that effect comes this appeal.

The note given for the automobile by the Joneses was dated November 4, 1944, and was due one year from date. The following June or July Jones returned the car to Dodd who in turn sold it to James Winfrey for $900. Dodd claims that the car, while Jones had it, was wrecked, and that he took it back from Jones under an agreement that he, Dodd, would furnish the necessary repairs to put the automobile in condition, then sell it and give Jones credit for the net amount the car brought after payment of the repairs; that it cost from

$250 to $300 to repair the car, and this sum added to the $850 made a total of about "$1050" that Joneses owed Dodd when the car was sold; that he gave Florence Jones $450 of the money that he got from the sale of the automobile because she was sick and needed the money, and in addition he had a mortgage on the property to secure the indebtedness.

D. V. Dodd is corroborated in his testimony by his wife, Blanche Dodd, and by evidence of repairs to the car. On the other hand Joe Jones (Florence Jones died after suit was filed but before the trial) is corroborated in his evidence of the transaction by the circumstantial evidence. Some of these circumstances are that Jones worked for Dodd for several years subsequent to the transaction and after the note was due, and Dodd made no effort to collect it or hold anything out of Jones' pay to be applied on the note; and further that no demand was made on Jones for the payment of the note until suit was filed some four years after the note was due; and moreover, the fact that $450 was paid to Florence Jones at the time of the sale of the car to Winfrey. All of these circumstances corroborate Jones in his testimony to the effect that he turned the car back at Dodd's suggestion as payment in full of the indebtedness, Dodd stating that he could sell it for more than was owed on it. The state of the testimony is not such that we can say the Chancellor's finding in favor of Jones is contrary to a preponderance of the evidence.

The decree is therefore affirmed.

CLARK *v.* PORTER.

5-406 268 S. W. 2d 383

Opinion delivered May 17, 1954.

[Rehearing denied June 21, 1954.]

John C. Sheffield, for appellant.

James P. Baker, Jr., for appellee.

ED. F. MCFADDIN, Justice. This is an effort by the appellant (a) to have the appellee, Porter, ousted from the Office of Mayor of West Helena, and (b) to require the other appellees (members of the Phillips County Board of Election Commissioners) to issue a Certificate of Election to the appellant. The Circuit Court sustained demurrers to the complaint, and appellant prosecutes this appeal. On the authority of *Swepston* v. *Barton,* 39 Ark. 549, and the cases following it, we affirm the judgment of the Circuit Court dismissing the appellant's complaint.

The complaint alleged: (a) that Clark, Porter and White were rival candidates for the Office of Mayor of West Helena at the General Election held on November 4, 1953; (b) that a total of 1294 votes were cast, of which Porter received 956, Clark 316, and White 22; (c) that Porter was ineligible to hold the office since he did not possess a poll tax receipt; (d) that Porter's ineligibility was advertised several days before the election, but he nevertheless received the number of votes stated; and (e) that notwithstanding Porter's ineligibility, the Election Commissioners issued a Certificate of Election to him. The prayer of the complaint was that the votes for Porter be discarded as void, and that Clark be certified as elected. The Election Commissioners and Porter filed separate demurrers to the effect that Clark's complaint did not state a cause of

action; and, as aforesaid, these demurrers were sustained.

The complaint alleged that there were a total of 1294 votes cast in the election, and that Clark received only 316 of these. Even if Porter should be ineligible, still Clark's complaint would not show him entitled to the office until he alleged that he received a majority of the legal votes cast. Therefore the complaint showed on its face that Clark did not receive a majority of the votes cast, unless every vote cast for Porter be declared an *illegal or void* vote. Our cases uniformly hold that votes cast for an ineligible candidate are not illegal or void votes. *Swepston* v. *Barton,* 39 Ark. 549, is our landmark case on the question here involved. In that case, Swepston had received a majority of the votes cast and he was commissioned. Barton instituted a contest, claiming that Swepston was ineligible to hold the office because he was a defaulter. The question presented to the Court was the legal effect of votes cast for an ineligible candidate, and Justice William W. Smith, speaking for the Court, stated the law in this language:

"But the weight of American authority is, that when a vote for an ineligible candidate is not declared void by statute, the votes he receives, if they are a majority or plurality, will be effectual to prevent the opposing candidate being chosen, and the election must be considered as having failed . . .

"The real issue in this cause was, which candidate received a majority of the legal votes cast. If Barton did not obtain such a majority, but his competitor was ineligible, it by no means follows that he, as the next in the poll, should receive the office. 'The votes are not less legal votes because given to a person in whose behalf they cannot be counted.' *Saunders* v. *Haynes,* 13 Cal. 145."

Thus in 1882, this Court definitely decided the question here at issue; and that decision was adverse to the appellant in the present case. Clark's complaint shows on its face that he did not receive a majority of the

votes cast in the election, unless all the votes for Porter be held illegal votes; and they are not illegal votes merely because they were cast for an ineligible candidate. The case of *Swepston* v. *Barton* has been followed in a number of subsequent cases. We mention a few: *Collins* v. *McClendon,* 177 Ark. 44, 5 S. W. 2d 734; *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. 2d 230; *Winton* v. *Irby,* 189 Ark. 906, 75 S. W. 2d 656; *Tompkins* v. *Cross,* 194 Ark. 75, 105 S. W. 2d 540; and *State* v. *Jones,* 194 Ark. 445, 108 S. W. 2d 901.

Appellant concedes the holding of *Swepston* v. *Barton, supra,* as adverse to him; but insists that Act 105 of the Arkansas Legislature of 1935 (as now found in § 19-1001 Ark. Stats.) changed the rule as announced in *Swepston* v. *Barton.* We do not agree with appellant's contention in that regard. The said Act 105 was to prevent votes for "write-in" candidates in municipal elections. The Act reads:

"In all general elections held in cities of the first class for the election of officials of said cities of the first class no ballots shall be counted for any person whose name is written in thereon, and only votes cast for the regularly nominated and/or otherwise qualified candidates and whose names are printed on the ballot as candidates in such election in cities of the first class shall by the judges and clerks be counted."

In *Davidson* v. *Rhea,* 221 Ark. 885, 256 S. W. 2d 744, we construed this Act to show that its effect was to prohibit the counting of votes for "write-in" candidates. In the case at bar, neither Clark, Porter, nor White was a "write-in" candidate, so the Act 105 of 1935 has no application; and this case is ruled by *Swepston* v. *Barton, supra,* and the cases following it.

The judgment is affirmed.

BAILEY *v.* COMMERCE UNION BANK.

5-408 269 S. W. 2d 314

Opinion delivered May 17, 1954.

[Opinion on rehearing delivered June 28, 1954.]

Talley & Owen and *Dale Price,* for appellant.

Owens, Ehrman & McHaney and *James M. McHaney,* for appellee.

GEORGE ROSE SMITH, J. This is an action in replevin brought by the appellee to recover possession of a house trailer. The trailer was originally sold by the Wiley Trailer Market to Paul C. Thompson, the seller retaining title to the vehicle. By subsequent assignments the seller's contract has passed to the appellee and the purchaser's interest has passed to the appellant. The complaint alleges that the unpaid balance of the purchase price amounts to $4,736.06.

The defendant first filed a motion to transfer the cause to equity, upon the ground that usury would be pleaded as a defense. Before the court acted upon that motion the defendant filed an answer which asserts that the contract is usurious and void upon its face. The plaintiff then moved that this defense be stricken, for the reason that the defendant was not a party to the original contract and therefore cannot plead usury. Upon these pleadings, without hearing any testimony, the court denied the motion to transfer and sustained the motion to strike the plea of usury. The case then proceeded to a final judgment for the plaintiff. Upon this appeal the appellant attacks the court's rulings on the two motions.

The court was right in denying the request for a transfer to chancery. A plea of usury raises no issue that cannot be effectively determined by a court of law. The debtor, it is true, by acting promptly may bring suit in equity to obtain cancellation of the contract. But this appellant failed to take that step, and instead it was the creditor who first put the debt in issue by seeking to replevy the property. The plea of usury thus became a defense available to the debtor. This defense is no more complicated than, for example, a plea of payment, and in no way does it require the exercise of powers peculiar to a court of equity. Under the doctrine of *res judicata* a judgment for the defendant in a court of law would settle the controversy with the same finality that would attend an equitable decree of cancellation. There was no occasion for the circuit court to surrender control of the case.

The serious question is presented by the plaintiff's motion to strike the defense of usury: May one who purchases property already subject to a title retaining contract attack that contract as usurious?

At common law the plea was not allowed. The courts reasoned that the purchaser had presumably received credit on the purchase price for the amount of the encumbrance and would be unjustly enriched if the

debt were cancelled. (It could of course be argued with equal force that, if the contract was void from the beginning, it is the creditor who is unjustly enriched by denying to the purchaser a valid defense. There is simply a choice of who shall bear the loss.) In 1877 we adopted the common law rule by declaring that a plea of usury is personal to the borrower. *Pickett* v. *Merchants' Nat. Bank,* 32 Ark. 346. We later held, in 1885 and again in 1886, that one who challenges a usurious contract must tender the debt plus lawful interest. *Grider* v. *Driver,* 46 Ark. 50; *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516.

These two rules—that the plea is personal to the borrower and that even the borrower must tender the debt with legal interest—are mere common law pronouncements which the Legislature is free to abrogate if it likes. The General Assembly, at its next session after the decision in the *Tillar* case, undertook to abolish both rules, by the enactment of Act 39 of 1887. Ark. Stats. 1947, §§ 68-609—68-611. Sections 1 and 3 of the Act are pertinent to the present case:

"Section 1. 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 percentum 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 prop-

erty. And 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 anyone 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."

"Section 3. 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 said 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."

It is difficult to see how the Legislature could have expressed itself more clearly. In 1875 the General Assembly, pursuant to the mandate contained in the Constitution of 1874, Art. 19, § 13, had declared all usurious contracts whatever to be void. Ark. Stats., § 68-608. During the next eleven years this court laid down the two rules that we have mentioned. By § 1 of Act 39 of 1887, quoted above, it is declared that "The maker of a usurious contract may by suit in equity against all parties asserting rights under the same, have such contract . . . annulled and cancelled." The same right is then extended to "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." By

§ 3 it is declared that neither the maker nor his vendees, assigns or creditors shall be required to tender or pay any part of the usurious debt or interest as a condition to cancellation of the contract. In an abundance of caution the Legislature pointedly added that "any rule of law, equity or practice to the contrary is hereby abrogated."

This statute, with reference to the particular point now under discussion, has been considered in only one case, *Hiner* v. *Whitlow,* 66 Ark. 121, 49 S. W. 353, 74 Am. St. Rep. 74. There Hiner had bought mortgaged property and caused it to be conveyed to his wife. It is not clear whether she assumed the debt or took subject to it, as the court regarded that question as immaterial. In a suit brought by Whitlow to foreclose the mortgage Mrs. Hiner attempted to rely upon usury as a defense. We first referred to the common law rule which precludes one not a party to the original contract from pleading usury "unless allowed to do so by a statute." We then examined §§ 1 and 2 of Act 39 and concluded that the common law rule had not been changed thereby. The opinion stresses the concluding clause of § 1, to the effect that the plaintiff may have the usurious contract cancelled "in so far as the same is in conflict" with his rights. The court's reasoning was that since the purchaser of mortgaged property acquires not the property itself but only the equity of redemption—"that part of the estate or interest in the property not covered by the mortgage"—there is no conflict between the purchaser's rights and the usurious lien.

We have studied the statute and the *Hiner* opinion long and carefully, and we are wholly unable to reconcile the two. The final clause in § 1 of the statute, which was emphasized in the *Hiner* opinion, can easily be harmonized with the rest of the Act. If, for instance, a usurious mortgage embraces three tracts of land and the plaintiff has purchased only one tract, this clause limits his right of cancellation to the extent that the mortgage conflicts with his interest.

If, however, this one clause is to be given the force attributed to it by the *Hiner* case, then it completely nullifies the rest of § 1 and all of § 3, as far as an assignee of the contract is concerned. This is so for the reason that in every situation, without exception, it could be said that the purchaser of encumbered property acquires only the equity over and above the encumbrance. The result is not only to deny to the purchaser of "an interest" in the property the right of cancellation, a right plainly given by § 1, but also to require the purchaser to pay the entire debt and usurious interest thereon, in the teeth of § 3.

The *Hiner* case has not been followed, nor even cited, in the fifty-five years since it was decided. It did not establish a rule of property in the sense that anyone has patterned his conduct in reliance upon the case. That is, it is pretty certain that no creditor, owning a usurious contract, has persuaded his debtor to transfer the property to a third person for the sole purpose of immunizing the contract from attack. Yet, if the decision is allowed to stand, it could readily be utilized by an unscrupulous lender as a means of protecting usurious contracts; for the loan could ostensibly be made to a straw man, and the real borrower could then be required to assume the obligation. The *Hiner* case, to the extent that it construed Act 39 of 1887, is overruled.

We do not intimate that this appellee's conditional sales contract is in fact void for usury. That issue has not been investigated, since the defense of usury was stricken from the defendant's answer and was therefore not explored at the trial. The statute, however, expressly gives the borrower the right to litigate the matter in a court of equity, and, as we have seen, this is a substantive right that can equally well be asserted in a court of law.

Reversed and remanded for a new trial.

McFaddin and Ward, JJ., dissent.

Griffin Smith, Chief Justice, dissenting. My objection goes to the majority's action in overruling the

Hiner case. A decision that has landmarked a particular statute for more than half a century should not be cast aside with conclusions that in the composite amount to a declaration that "We don't like it!" We have frequently said that judicial construction of a statute will be presumed to have come to the attention of the general assembly, and acquiescence by that body for a long period of time where the subject-matter was of legislative address carries with it the implication of assent.

ON REHEARING

George Rose Smith, J., on rehearing. In its brief on rehearing the appellee does not question the correctness of our interpretation of Act 39 of 1887. Instead, it is now contended that the appellant's right to plead usury should be determined by the law of Tennessee, where the original contract of sale was made, and that by Tennessee law the plea is not available to an assignee of encumbered property.

This conflict of laws question was not seriously argued in the original briefs. There the appellant somewhat indirectly suggested that the Tennessee law was favorable to him, while the appellee insisted that the law of Arkansas should govern and that the case of *Hiner* v. *Whitlow* was controlling. Since we have overruled the *Hiner* case—a step that the appellee could not reasonably have been expected to anticipate—simple fairness requires that the appellee now be permitted to raise an issue that was not essential to its argument as long as the doctrine of the *Hiner* case remained unimpaired.

This contract of sale was made in Chattanooga, Tennessee, and it is not intimated that there was any effort on the part of the contracting parties to evade the law of Arkansas. (See Williston on Contracts [Rev. Ed.], § 1792.) Rather, this was apparently a *bona fide* Tennessee sale, pursuant to which the purchaser's interest was later assigned to the appellant. The present question is whether his right to attack the contract for usury should be determined by Tennessee law or by Arkansas law.

We think the Tennessee law governs. It has been pointed out that the assignment of a contractual right "may give the transferee, as between the parties to the transfer, the benefit of the right and authority to enforce it without necessarily in any other way putting him into the transferor's position with regard to the other contracting parties." Whether the assignment in fact has that effect is to be determined by the law of the place of contracting. Rest., Conflict of Laws, § 348. Again, "whether any rights, and if so what rights, of the assignor are transferable are determined by the law of the place where the contract is made." *Ibid.*, § 350. In Tennessee it has long been the rule that the defense of usury is personal to the debtor and cannot be asserted by one who purchases property encumbered by a usurious debt. *Nance* v. *Gregory,* 6 Lea 343, 40 Am. Rep. 41; *Parker* v. *Bethel Hotel Co.,* 96 Tenn. 289, 34 S. W. 209, 31 L. R. A. 706; *Deitch* v. *Staub,* 6th Cir., 115 F. 309. This being true, the circuit court was right in striking the plea of usury.

The petition for rehearing is granted, and the judgment is affirmed.

Ed. F. McFaddin, Justice (concurring on rehearing). I dissented from the Majority's original opinion, because I did not favor overruling Justice Battle's holding in *Hiner* v. *Whitlow.*

Now, I concur with the result reached by the Majority on rehearing; and I write this concurring opinion to emphasize that NOW all reference to *Hiner* v. *Whitlow* in the majority's original opinion is dicta and nothing but dicta.

By the rehearing opinion the Majority is holding that the contract here involved is not usurious because the contract is governed by the law of Tennessee. Such holding leaves as dicta *all* the language in the original majority opinion in regard to the Hiner case; and such dicta is not, in my way of thinking, sufficient to overrule the holding of Justice Battle in Hiner v. Whitlow.

BELL, GUARDIAN *v.* SILAS, GUARDIAN.

5-422 268 S. W. 2d 624

Opinion delivered May 24, 1954.

[Rehearing denied June 28, 1954.]

[redacted]

Chas. F. Cole, for appellant.

W. J. Arnold and *C. T. Bennett,* for appellee.

GRIFFIN SMITH, Chief Justice. Len Harmon and his wife, Elsie, and their infant child, were killed near White Hall, Ill., May 8th, 1953. Their other two children (Gerald, a boy of six, and Shirley Ann, two years younger) were with their parents, but survived the ordeal. Harmon and his wife had formerly resided at Piggott, Ark., but had been in Indiana for approximately six years. Lorse Silas is the grandfather of Gerald and Shirley Ann, Mrs. Harmon having been his daughter. Silas and his wife now reside in Independence county at Cushman.

William E. Bell had resided near Decatur, Indiana, for almost five years, but in March, 1953, he went to

Clay county, Arkansas, to assist his father on a farm. The witness is an uncle by marriage of the two children. Bell's statements, and admissions by other interested witnesses, are that guardianship and administration matters were necessary in order to collect compensation paid by the railroad company, eighteen thousand of which appears to have been received by the administrator in addition to $3,000 in insurance.

Shortly after the tragic wreck the paternal grandmother of the two children, and the maternal grandparents, with other relatives, held conferences to determine what course ought to be pursued. It was agreed that Bell should go to Indiana to negotiate with or sue the railroad company and to collect insurance.

Appellee and his wife contend that there was no agreement regarding custody of Gerald and Shirley Ann other than the paternal grandmother's statement that she was not in a position to care for them. Appellee and his wife, however, say that it was understood that they were to have the children.

There is little doubt that appellee knew that Indiana guardianship and administration would be required as an incident to collection of the sums they hoped for.

Perhaps the maternal grandparents were not familiar with legal terminology to the extent that they understood what a guardian's duties would be; but it is certain that they acquiesced in the suggestion that Bell return to Indiana and take whatever steps might be necessary to collect for the minors.

Following the accident Shirley Ann was taken to a hospital in St. Louis. Gerald was hospitalized at Kennett, Mo., and from there he was taken to appellee's home. Bell later had the boy for a short time, but appellee then took the child to Cushman and has kept him in spite of Bell's protests. Shirley Ann is now in appellant's home.

In *Landreth* v. *Henson,* 116 Ark. 361, 173 S. W. 427, Chief Justice McCulloch, speaking for an undivided

court, said that our decisions had followed the common law rule that the last domicile of the deceased father of an infant constitutes his legal domicile, and cannot be changed or removed by his own act until he reaches his majority. See *Grimmett* v. *Witherington*, 16 Ark. 377.

Appellee cites the Restatement, Conflict of Laws, § 39: "If both parents of a minor child are dead *and no guardian of the child's person is appointed,* the child by living with its grandparent at the latter's home has the domicile of that grandparent". This summation is predicated upon a situation where there is no guardian.

In the case here presence of the minor in this state was incidental to the ill-fated trip. At the time the parents were killed Gerald, because of his tender years, was incapable of deciding whether he preferred to live in Arkansas or in Indiana; nor was this taken into consideration when the family discussions were had—discussions resulting, as appellee says, in an understanding that both children should be reared in his home.

Bell was appointed guardian in Indiana May 19, 1953. Appellee's appointment in Independence county did not occur until September 14th. On August 7th Bell executed bond for $38,000 with Capitol Indemnity Insurance Company as surety.

In consenting to Bell's appointment in Indiana appellee may have had in mind the unexpressed reservation that the foreign court's authority would be limited to the designation of a guardian impliedly restricted to financial functions, but the court had no information respecting this implication.

In these circumstances we are not willing to say that Gerald, solely by virtue of the family discussions, or because of his accidental presence in the state, was a resident of Arkansas or that for legal purposes he was domiciled here. We therefore defer to the foreign court's judgment and hold that appellant is the duly appointed guardian, and entitled to custody of the child.

Reversed.

BEN PEARSON, INC., *v.* THE JOHN RUST COMPANY.

5-340 268 S. W. 2d 893

Opinion delivered May 24, 1954.

[Rehearing denied July 15, 1954.]

Veiskell Weatherford, Jr., and *Jay W. Dickey,* for appellant.

John H. Sutherland, Bridges & Young and *Henry W. Gregory, Jr.,* for appellee.

J. SEABORN HOLT, J. This suit was brought by appellees against appellant to recover approximately $150,000 alleged due as royalties on cotton picking machines accruing under a "License Agreement," or contract, executed by the parties April 1, 1949. This action covers

the period from January 1, 1950, to June 30, 1951. The trial court, at the close of all the testimony held, in effect, that the terms and provisions of the License Agreement were plain and unambiguous, that no issue was made for the jury, that only a question of law was involved, that the construction and meaning of the contract was for the court to determine and directed a verdict for appellees. This appeal followed.

The pertinent parts of the License Agreement were: "WHEREAS, Rust an inventor and patentee, is the individual and sole owner, subject to contracts hereinafter referred to, of the inventions and patent rights to improvements in cotton picking machines for which letters patent of the United States were issued to the said Rust, with serial numbers and dates of issue as follows: (Nine patents covering period from Jan. 1, 1935, through Jan. 11, 1949) and as joint inventor and patentee is joint owner of the improvements in cotton picking machines for which letters patent of the United States were issued to the said Rust and his brother jointly, with serial numbers and dates of issue as follows: (Nine patents covering period from Jan. 10, 1933, through Jan. 17, 1939), and

"WHEREAS, Rust, as inventor, is the individual and sole owner, subject to the aforesaid contracts, of any letters patent of the United States which might be issued to the said Rust on the applications now on file in the United States Patent Office which bear serial numbers and dates as follows: (Fifteen patents covering period from Mar. 29, 1944, through Jan. 12, 1948). * * *

"WHEREAS, Pearson desires to obtain a license for manufacture and sale of Rust Cotton Pickers under the aforesaid patents, issued and pending, and any future patents that may be issued to Rust for any other inventions covering improvements in cotton picking machines. * * *

"Said Foundation grants to the said Pearson a license to manufacture and sell cotton picking machines embodying the inventions and improvements covered by

the aforesaid patents, issued or pending, and all other patents or inventions covering cotton picker improvements that have been or may be issued to the said Rust by the United States Patent Office; all rights granted herein to extend throughout the life of the said Letters Patent or any reissue of same, subject only to the terms hereinafter provided. * * *

"2. Royalty. It is stipulated and agreed that on each and every cotton picking machine and all cotton picker parts and equipment embodying the invention or inventions of said Letters Patent, manufactured in whole or in part and sold by Pearson said Pearson shall pay to said Foundation a license fee, or royalty as follows: On the first one thousand (1,000) machines, ten per cent (10%) of the retail price, and on each machine thereafter, five per cent (5%) of the retail price; and on parts and equipment, five per cent (5%) of the retail price."

The record is voluminous, comprising some 750 pages. However, the issues presented are fairly simple. Appellant, Pearson, says: "The entire controversy centers about the question—What are 'cotton picking machines embodying the invention or inventions of said Letters Patent' and what are 'cotton picker parts and equipment embodying the invention or inventions of said Letters Patent,' and the controversy therefore centers upon a determination of what devices come within the scope of the patents licensed? Thus it will be seen that the question is primarily a two part question: first, what is the scope of the patents, and second, what devices fall within the scope of those patents so as to form the basis for the computation of royalties?" and argues that the controversy involves mixed questions of law and fact which should be submitted to the jury.

Appellees say: "The simple issue before the court is this: giving the words their 'ordinary meaning,' when appellant agreed to pay a royalty on the retail price of a 'cotton picking machine,' did it agree to pay on the whole machine, or just a part of it?"

The court's directive to the jury was: "The jury is instructed to find that the term 'Cotton Picking Machine' as used in paragraph 2 of the License Agreement of April 1, 1949, between the parties hereto, and as used elsewhere in said agreement means and meant at the time of the signing of the contract the whole assembly manufactured and sold by the defendant under the name of 'Rust Cotton Picker,' " and to return a verdict for appellees.

Since the trial court directed a verdict for appellees at the close of the evidence, we must consider the testimony in the light most favorable to appellant, the party against whom the verdict was directed, in determining whether there was any substantial evidence to make a jury question.

We agree with the trial court's conclusion that the License Agreement here is couched in plain, understandable, and unambiguous language, and that it was the court's duty to discover and interpret its meaning and enforce it.

"The rules applicable to the construction of contracts generally apply to the construction of license agreements. Such contracts will be construed according to the intention of the parties as expressed in the contract as a whole * * *.

"The language used is to be given its ordinary meaning, and a license agreement should be interpreted so as to give meaning to all of its terms if possible. Particular terms used in the license must be interpreted in connection with the other words employed." 69 C. J. S., § 249, p. 770.

We said in *Dent, Adm'r.* v. *Industrial Oil & Gas Co.,* 197 Ark. 95, 122 S. W. 2d 162: "The interpretation of a contract is the determination of the meaning attached to the words * * * which make the contract. It is the duty of courts to discover the meaning of a specific contract, and to enforce it without leaning in either direction, when the parties stood on an equal footing and were free to do what they chose."

" 'The parties having made this contract in clear and unambiguous language, it is the duty of the court to construe it according to the plain meaning of the language employed, and not to enlarge or extend its terms on any theory.' " *Rains Coal Corporation* v. *Southern Coal Company, Inc.,* 202 Ark. 1077, 155 S. W. 2d 348.

" 'The first rule of interpretation is to give to the language employed by the parties to a contract the meaning they intended. It is the duty of the court to do this from the language used where it is plain and unambiguous.' " *Lee Wilson & Co.* v. *Fleming,* 203 Ark. 417, 156 S. W. 2d 893.

We think it clear that throughout the four corners of this License Agreement and in the various patents held by appellees, the words (or terms) "Cotton Picking Machine," "Rust Cotton Pickers," and "Machine" were used by the parties synonymously and meant the same thing as appellees stoutly insist. From the entire record, we are convinced that appellant was in full agreement with appellees that these terms as used in the contract were synonymous and meant the same thing and that the parties so intended.

Mr. Haun, appellant's president, who negotiated and signed the License Agreement here on behalf of appellant, in a self explanatory letter to appellees, dated March 9, 1949, less than a month before the contract was signed, clearly revealed that these terms meant the same thing to him. The letter recites: "Dear Mr. Rust: In accordance with our conversation of today, we propose the following arrangement for the manufacture of the Rust Cotton Picker. Ben Pearson, Incorporated will do as follows:

"1. We will pay you a royalty of 10% of our selling price on the first 1,000 machines manufactured. After this, the royalty will be 5%.

"2. We will pay you the sum of $6,000.00, above taxes, (figured on the basis of being your sole income) per year for your services as consultant, and the use of your knowledge and ability in future improvements

and development of the machine; also for promoting the sale of this machine. Your entire time would not be required.

"3. Providing there is not too long a delay in securing materials and dies, and completion of this agreement; and provided we are not hindered from reaching these minimums, due to conditions beyond our control, we agree to manufacture a minimum of 100 machines in 1949; a minimum of 500 machines in 1950; a minimum of 1,000 machines annually thereafter, with the understanding that if we fail to do so, you will have the right to license the manufacture of this machine to others.

"While the above are set out as minimums, we will expect to be able to, and will use every effort to produce far in excess of them, and production of these minimums is based on being able to sell and deliver the machines when they are finished.

"You agree as follows: 1. You agree to license us for the sole manufacture of this machine, with the exception of the license you now have out to Allis-Chalmers, providing we produce the minimums mentioned above. 2. You agree to work toward the improvement and future development of the machine, and to furnish us with the benefits derived therefrom.

"We are mutually agreed that the idea of marketing these machines through the co-ops is sound, and this procedure should be followed.

"Before final agreement, we are to be furnished orders for 100 machines, with cash deposit of $1,000.00 per machine, balance to be paid when ready for delivery.

"It is our understanding that you own all the patents and have the right to license us, and that you will protect us against any damage that may arise from our manufacturing the Rust Cotton Picker under this license.

"These machines are to be marketed under your name. Yours very truly, Ben Pearson, Inc. (Signed) Carl B. Haun, President."

At the trial, Mr. Haun testified: "Mr. Haun, how do you obtain your orders for a Rust Cotton Picker —what I am asking is, when a person orders it, the purchaser, don't they just order a Rust Cotton Picker at a certain price? A. Yes, ordinarily they do. Q. That is the way they order it? A. Yes. Q. Then you send the entire assembly, don't you? A. Yes. Q. Can you tell me during the entire 18 months period involved in this case, from January 1, 1950, through June 30, 1951, when you invoiced a sale of a Rust Cotton Picker, that you made an invoice setting forth separately the items, in one single instance, for a picking unit or a tractor? A. The dealer wasn't interested in that. Q. I am not asking you if the dealer was interested in that —did you? A. I don't think we did."

Appellant was simply required to pay a certain royalty on "every cotton picking machine and all cotton picker parts and equipment embodying the invention or inventions of said Letters Patent, manufactured in whole or in part and sold by Pearson, said Pearson shall pay to said Foundation a license fee, or royalty, as follows, etc." Obviously, he was not required to pay a royalty on any unpatented, separate part of the machine, or cotton picker, when sold as a separate part. The Cotton Picking Machine as a complete unit contained many unpatented parts, such as tires, bolts, nuts, springs, chains, wire, sheet metal, etc., but when sold as a complete machine, single or double unit, Pearson, appellant, must pay the royalty.

"The term 'royalties,' had its origin in the designation of the payments made to a monarch or sovereign by his subjects for privileges granted by the former and enjoyed by the latter. * * * In modern usage, * * * signifies sums paid to the owner of a patent for its use or for the right to operate under it, and may also refer to the obligation giving rise to the right to such sums." *Taylor* v. *Peck,* 160 Ohio St. 288, 116 N. E. 2d 417.

In *Volk* v. *Volk Manufacturing Co.,* 101 Conn. 594, 126 A. 847, it was said: "The use of the term 'royalty'

as applied to a patent is a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article. * * * But this is not its exclusive meaning * * * it is likewise an appropriate term as applied to improvements which are nonpatentable."

The fact that unpatented parts are sold as components of an entire machine, embodied in a picking unit, and everything necessary to pick cotton does not relieve Pearson of the royalty on the complete machine. When such parts are assembled and sold together, they, in effect, lose their identity as parts and become fractions of the entire unit or machine on which the royalty must be paid.

We adopted this definition of Webster's of "Machines" in *Blankenship* v. *W. E. Cox & Sons,* 204 Ark. 427, 162 S. W. 2d 918: "Popularly and in the wider mechanical sense, a machine is a more or less complex combination of mechanical parts, as levers, gears, sprocket wheels, pulleys, shafts and spindles, ropes, chains, and bands, cams and other turning and sliding pieces, springs, confined fluids, etc., together with the framework and fastenings supporting and connecting them, as when it is designed to operate upon material to change it in some preconceived and definite manner, to lift or transport loads, etc."

"The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." *Corning* v. *Burden,* 56 U. S. (15 How.) 252, 14 L. Ed. 683.

It was stipulated that "most of the Rust Cotton Pickers manufactured by appellant during the period in question contained the lettering and name 'Rust Cotton Picker, manufactured by Ben Pearson, Inc., Pine Bluff, Ark.' * * * Prior to the period in suit, appellant had manufactured and sold only 99 Rust Cotton Pickers, all of the single-row model."

Appellant's answer further admitted the number and retail prices of all Rust Cotton Pickers (both single-row and tandem or two-row) manufactured and sold during the period involved here.

After a review of this record, without attempting to detail the testimony, we are unable to find any disputed material fact question, or any substantial evidence whatever, tending to support appellant's theory of this case, to make a jury issue. We hold that the question presented was solely one of law for the trial court, in the circumstances, and that the instructed verdict in favor of appellees was correct.

Affirmed.

THOMPSON, COMMISSIONER OF REVENUES *v.* RHODES-JENNINGS FURNITURE CO.

5-207—5-211 consolidated 268 S. W. 2d 376

Opinion delivered May 24, 1954.

[Rehearing denied June 21, 1954.]

O. T. Ward, for appellant.

Daggett & Daggett, for appellee.

ED. F. MCFADDIN, Justice. Five separate cases were filed in the Pulaski Chancery Court against the Commissioner of Revenues of the State of Arkansas. In each case, the plaintiff was a Tennessee corporation or individual, seeking to prevent the said Commissioner from claiming a tax against such plaintiff. Two of the cases (numbered 207 and 210 in this Court) involved the Arkansas Gross Receipts Tax, being Act 386 of 1941 (§ 84-1901 *et seq.* Ark. Stats.), which is a Sales Tax. The other three cases (numbered 209, 211 and 208 in this Court) involved the Arkansas Compensation[1] Tax, being Act 487 of 1949 (§ 84-3101 Ark. Stats. Pocket Supplement), which is a Use Tax. In each case, the Commissioner of Revenues of the State of Arkansas (hereinafter called "Commissioner")[2] had assessed a tax against the Tennessee firm, which had been paid under protest as a prerequisite to the filing of the suit in the Pulaski Chancery Court to recover the amount paid. Such procedure is established by Legislative enactment.[3]

The five cases were never consolidated, but each was separately tried, on its own stipulated facts. In each case, the Chancery decree was adverse to the Commissioner, and he has appealed. For convenience, we allowed the five cases to be jointly briefed, although they were never consolidated. The cases were submitted to this Court in October, 1953; but, by agreement of all parties, we delayed our decision until the Supreme Court of the United States delivered its opinion in the case of *Miller Bros.* v. *Maryland,* which case involved the Maryland Use Tax, sustained by the Court of Appeals of Maryland in 201 Md. 535, 95 Atl. 2d 286. The decision

[1] In the Act itself, Section 1 says "Compensa*tion* Tax". In § 84-3101 Ark. Stats. says "Compensat*ing* Tax".

[2] When the cases were originally filed, Horace E. Thompson was Commissioner of Revenues, but since then, Vance Scurlock is Commissioner. However, we continue to style the cases as "Thompson, Commissioner".

[3] See § 10 of Act 386 of 1947 for Sales Tax cases; and § 20 of Act 487 of 1949 for Use Tax cases. The Use Tax Act says "Circuit Court", but no objection to forum has been made herein.

of the Supreme Court of the United States, reversing the Maryland Court, was delivered April 5, 1954. See *Miller Bros.* v. *Maryland,* 347 U. S. 340, 98 L. Ed. 744, 74 S. Ct. 535. So each of the five cases pending in this Court is now ready for our decision. We have studied most carefully the decision of the Supreme Court of the United States in *Miller Bros.* v. *Maryland*; and, as a result, we find that two of the present cases must be affirmed; and three of the cases must be reversed. It thus becomes necessary for us to give the particular facts in each of the five cases; and this will, in effect, be a separate decision on each of the cases, but all contained in this one opinion.

Case No. 207

THOMPSON, COMMISSIONER, *v.* RHODES-JENNINGS FURNITURE CO.

In this case, the Commissioner claims that Rhodes-Jennings is liable to the State for the Gross Receipts Tax, under Act 386 of 1941 (§ 84-1901 *et seq.* Ark. Stats.) because of sales of merchandise made by Rhodes-Jennings to residents of Arkansas. The facts were stipulated, as follows:

"Plaintiff is a corporation organized under the laws of the State of Tennessee. It has not qualified to do business in Arkansas, nor does it own or maintain a place of business in this state, neither does it have agents or drummers who solicit business herein.

"Plaintiff has heretofore sold merchandise to residents of Arkansas, all of such sales being made in the following manner:

"(a) Residents of Arkansas come in person to the place of business conducted by plaintiff in Memphis, Tennessee, and purchase and pay the consideration for certain items of merchandise, and

"(b) Residents of Arkansas use the Federal postal service or interstate telephone or telegraph service and

offer to purchase from plaintiff such items of merchandise, and such offers are accepted or rejected by defendant in Memphis, Tennessee.

"That in either or all of such transactions so had, the offer to buy such merchandise so made by the resident of Arkansas, and the acceptance thereof by plaintiff, was made in Tennessee, and the consideration therefor was paid in Tennessee. Thereafter, plaintiff delivered the merchandise so purchased without additional charge to the home or place of business of the Arkansas resident by its truck. Plaintiff has an established policy generally known to its customers that such delivery will be made within a radius of 100 miles of Memphis, Tennessee, at no cost to the purchaser."

It is clear from the above stipulated facts that Rhodes-Jennings' place of business is in Tennessee, that it does not have any agents or salesmen traveling in Arkansas, that in each instance the sale to the Arkansas resident was completed in Tennessee, and that the only time Rhodes-Jennings, or any of its employees, ever entered the State of Arkansas, was when the truck of Rhodes-Jennings brought the articles into Arkansas for delivery.

The Commissioner claims that Rhodes-Jennings is liable for the Gross Receipts Tax levied by Act 386 of 1941 (§ 84-1901 Ark. Stats.), which is a Sales Tax Act. In *McLeod* v. *Dilworth,* 205 Ark. 780, 171 S. W. 2d 62, we held that sales made in Tennessee under similar circumstances were not subject to the Arkansas Sales Tax; and the Supreme Court of the United States affirmed the case in *McLeod* v. *Dilworth,* 322 U. S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023. But the Commissioner now contends that the effect of the holding of the U. S. Supreme Court in *General Trading Co.* v. *State Tax Commission,* 322 U. S. 335, 88 L. Ed. 1309, 64 S. Ct. 1028, and *Norton Co.* v. *Dept. of Revenue of Ill.,* 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, was to overrule the holding in *McLeod* v. *Dilworth;* and the Commissioner also contended that the decision of the Maryland Court of Appeals in *Miller*

v. *Maryland* showed a broadening of State taxing power, even as regards sales tax cases.

All the contentions of the Commissioner are answered adversely to him by the decision of the U. S. Supreme Court in *Miller* v. *Maryland,* 347 U. S. 340, 98 L. Ed. 744, 74 S. Ct. 535 (opinion of April 5, 1954), wherein *McLeod* v. *Dilworth* is cited, and *General Trading Co.* v. *State Tax Comm.* is explained. So we see no merit in any of the aforementioned contentions of the Commissioner.

Finally, and in this one case only, the Commissioner calls attention to the following stipulated facts:

"That plaintiff holds in escrow the sum of $1,316.32, representing two per cent (2%) of the amount of said sales which is the subject of this litigation. Said purchasers made such deposits under protest, and under the express agreement between the parties that the amount so paid by each and every one of them would be held in trust by plaintiff; that plaintiff would contest the legality and validity of the Arkansas Gross Receipts Act and that the amount of such alleged tax so deposited would be returned to each and every one of them in the event it should be later determined that (1) plaintiff was not legally obligated to collect said tax, or (2) that it be held that the tax is not applicable to such sales and therefore illegal and invalid."

The Commissioner insists that the case of *Cook, Comm.* v. *Sears-Roebuck,* 212 Ark. 308, 206 S. W. 2d 20, is authority to prevent Rhodes-Jennings from recovering the money paid under protest in the case at bar. But we find no merit in this contention of the Commissioner. It is stipulated that Rhodes-Jennings holds the money subject to return to its customers. When Rhodes-Jennings prevails in this case, then the customers get the return of their money. No such facts were shown in the Sears-Roebuck case, and the absence of such facts led to the application of the doctrine of unjust enrichment in the Sears-Roebuck case. That doctrine has no application here.

We affirm the Chancery decree in favor of Rhodes-Jennings Furniture Company in the case at bar.

Case No. 210

THOMPSON, COMMISSIONER, *v.* LEO KAHN FURNITURE COMPANY.

In this case, the Commissioner claims that Leo Kahn is liable to the State for Gross Receipts Tax under Act 386 of 1941 (§ 84-1901 Ark. Stats.), because of sales of merchandise made by Leo Kahn to residents of Arkansas. The facts were stipulated as follows:

"Plaintiff is a corporation organized under the laws of the State of Tennessee, engaged in selling merchandise at its place of business in Memphis, Tennessee. It has not qualified to do business in Arkansas, nor does it own or maintain a place of business in this state, neither does it have agents or drummers who solicit business herein.

"Plaintiff has heretofore sold merchandise to residents of Arkansas, all of such sales being made in the following manner:

"(a) Residents of Arkansas come in person to place of business conducted by plaintiff in Memphis, Tennessee, and purchase and pay the consideration for certain items of merchandise, and

"(b) Residents of Arkansas use the Federal postal service or interstate telephone or telegraph service and offer to purchase from plaintiff such items of merchandise, and such offers are accepted or rejected by defendant in Memphis, Tennessee.

"That in either or all such transactions so had, the offer to buy such merchandise so made by the resident of Arkansas, and the acceptance thereof by plaintiff, was made in Tennessee, and the consideration therefor was paid in Tennessee. Thereafter, plaintiff delivered the merchandise so purchased without additional charge to the home or place of business of the Arkansas resident by its truck. Plaintiff has an established policy generally

known to its customers that such deliveries will be made within a radius of 100 miles of Memphis, Tennessee, at no cost to the purchaser . . ."

This is also a case involving the Gross Receipts Tax levied under Act 386 of 1941 (§ 84-1901 Ark. Stats.), which is a Sales Tax; and what we said in the Rhodes-Jennings case applies here.

Therefore, we affirm the decree of the Pulaski Chancery Court in favor of Leo Kahn Furniture Company.

Case No. 209

THOMPSON, COMMISSIONER, *v.* BRANYAN & PETERSON, INC.

In this case, the Commissioner claims that Branyan & Peterson, Inc., is liable to the State for the Use Tax levied by Act 487 of 1949 (§ 84-3101 Ark. Stats. Pocket Supplement), because of sales of merchandise made by Branyan & Peterson to residents of Arkansas. The facts were stipulated as follows:

"Plaintiff is a corporation organized under the laws of the State of Tennessee, engaged in the business of selling woodworking machinery at its place of business in Memphis. Plaintiff is not qualified to do business in Arkansas and does not maintain a place of business or warehouse in Arkansas. All of its sales of machinery to residents of Arkansas are made in the following manner:

"Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof of certain machinery. If said offers be obtained, they are subject to acceptance by plaintiff in Memphis, Tennessee, and if so accepted the machinery is delivered by plaintiff to common carriers, f. o. b. Memphis, Tennessee, consigned to the Arkansas resident purchaser. The offer to purchase, the acceptance and delivery of the machinery to the common carrier is consummated in Memphis, Tennessee, where the consideration for the

purchase thereof is paid. No Tennessee Sales Tax is collected on said sales."

The present case involves a Use Tax, just as was involved in *Miller* v. *Maryland,* 347 U. S. 340, 98 L. Ed. 744, 74 S. Ct. 535. We delayed our decision of this case until the Supreme Court of the United States decided the case of *Miller Bros.* v. *Maryland*; and after careful study of that opinion, we reach the conclusion that Branyan & Peterson, Inc. is liable to the State of Arkansas for the Use Tax in the case at bar, because of facts which distinguish this case from those in *Miller Bros.* v. *Maryland.*

It was stipulated in that case, as contained in Item 8 of the Appendix to the majority opinion, that Miller Bros. ". . . does not have, nor has it ever had, any representative, agent, salesman, canvasser, or solicitor, operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same". And the opening sentence of the majority opinion says: "Appellant is a Delaware merchandising corporation, which only sells directly to customers at its store in Wilmington, Delaware."

In the case at bar, the stipulated facts show that Branyan & Peterson, Inc., employs sales representatives who travel in Arkansas and solicit orders in Arkansas; and we believe this use of traveling sales representatives is a substantial fact to differentiate the case at bar from the said holding of the Supreme Court of the United States. In *Miller Bros.* v. *Maryland,* we find this language in the majority opinion: "If there is some jurisdictional fact or event to serve as a conductor, the reach of the State's taxing power may be carried to objects of taxation beyond its boundaries". And in discussing the case of *General Trading Co.* v. *State Tax Comm.,* 322 U. S. 335, 88 L. Ed. 1309, 64 S. Ct. 1028, the writer of the majority opinion for the U. S. Court, in *Miller Bros.* v. *Maryland,* made these very pertinent remarks, in comparing the facts in General Trading Co. with the facts in *Miller Bros.* v. *Maryland*:

"That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market."

Without attempting to meticulously point out other possible distinctions between the facts in *Miller Bros.* v. *Maryland* and the facts in the case at bar, we hold that the quoted language above is a recognition by the Supreme Court of the United States that the regular use of traveling salesmen in the taxing State makes the seller liable for the collection of the Use Tax of the taxing State.

We therefore reverse the decree of the Pulaski Chancery Court, and remand this cause, with directions that a decree be entered in favor of the Commissioner, in accordance with this opinion.

Case No. 211

THOMPSON, COMMISSIONER, *v.* P. H. WILLIAMS.

In this case the Commissioner claims that P. H. Williams is liable to the State for the Use Tax as levied by Act 487 of 1949 (§ 84-3101 Ark. Stats. Pocket Supp.), because of sales of merchandise made by P. H. Williams

to residents of Arkansas. The facts were stipulated as follows:

"Plaintiff is an individual citizen of Memphis, Tennessee, engaged in the business of selling explosives at his place of business in Memphis. He does not maintain a place of business or warehouse in Arkansas. All of his sales of explosives to residents of Arkansas are made in the following manner:

"Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof for dynamite and other explosives. If said offers be obtained, they are subject to acceptance by plaintiff in Memphis, Tennessee, and if so accepted the shipments are thereafter delivered by plaintiff without additional charge to the home or place of business of the Arkansas resident by his truck. No Tennessee sales tax is collected on these sales."

What we have said in the *Branyan & Peterson* case (No. 209), *supra,* applies with equal force in this case. The situations are in all respects identical.

Therefore, we reverse the decree of the Pulaski Chancery Court, and remand this cause, with directions that a decree be entered in favor of the Commissioner of Revenues, in accordance with this opinion.

Case No. 208

THOMPSON, COMMISSIONER, *v.* FRED J. VANDEMARK COMPANY.

The Commissioner claims that Vandemark is liable to the State of Arkansas for Use Tax as levied by Act 487 of 1949 (§ 84-3101 Ark. Stats. Pocket Supp.), because of sales of merchandise made by Vandemark to residents of Arkansas. The facts were stipulated as follows:

"Plaintiff is a Corporation organized under the laws of the State of Tennessee, engaged in the business of selling machinery in its place of business in Memphis.

"(a) Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof for certain machinery. If said offers be obtained they are subject to acceptance by plaintiff in Memphis, Tennessee; and if so accepted the machinery is delivered by plaintiff to common carriers, f. o. b. Memphis, Tennessee, consigned to the Arkansas resident purchaser. The offer to purchase, the acceptance, and delivery of the machinery to the common carrier is consummated in Memphis, where the consideration for the purchase thereof is also paid. . . .

"(b) In certain instances offers to purchase machinery handled by plaintiff are taken from Arkansas residents by William Bigelow Robinson, of 400 Shall Street, Little Rock, Arkansas, doing business under the firm name of Bigelow Robinson Company. The offers to purchase so taken by him are in accordance with a written contract between him and plaintiff, copy of which is attached to complaint, marked Exhibit 'A' . . ."

The said contract between Vandemark and Robinson provides in part:

"1. Vandemark hereby authorizes Robinson to sell in the Arkansas Territory hereinafter described all of the equipment, materials, and supplies handled by Vandemark, including the Clark Equipment Co. products handled by Vandemark, as well as 'Weldbilt' equipment and other materials and supplies handled and distributed by Vandemark. The dealer franchise agreement now in effect between the Clark Equipment Co., a Michigan corporation, and Fred J. Vandemark Co. is attached hereto for reference and for the purpose of acquainting Robinson with the terms thereof which are pertinent hereto . . .

"4. Robinson shall receive as compensation for the sales services rendered by him sixty (60%) per cent of the sales commission allowed to Vandemark by the manufacturer or other supplier from whom Vandemark purchases, except in the transactions dealt with in the next section hereof.

"5. Parts for any equipment handled by Vandemark shall be sold and shipped to Robinson at the manufacturer's published list price thereof, less fifteen (15%) per cent discount and f. o. b. Memphis, Tenn. Discount does not apply on parts shipped direct to customer even though ordered and invoiced by Robinson . . .

"6. Robinson agrees to maintain and operate a special truck to give on-the-spot service to users of equipment sold by him under the terms hereof to users of said equipment, and agrees to render such truck services in accordance with policies prescribed by Vandemark, designed to comply with the requirements of the Clark Equipment Co. and other suppliers . . .

"10. All orders taken by Robinson within the said territory, except for such stock as may be carried by and in the hands of Robinson, and sold by him direct to customers, shall be taken by Robinson subject to acceptance by a duly authorized officer or agent of Vandemark, at Memphis, Tennessee.

"11. Robinson agrees to install and make 45-day and 90-day inspections and servicing of each new Clark machine delivered in the said territory in accordance with the policy and instruction of the Clark Equipment Co. The said 45-day and 90-day inspections and servicings are to be made within 15 days before or after 45 days and 90 days respectively after installation. The three reports required by Clark Equipment Co. and by Vandemark upon the said installation and two inspections and servicings are to be furnished Vandemark properly made out, and upon the proper performance of said installation and inspection and servicing and the making of said reports thereon, Vandemark agrees to pay Robinson the sum of $25.00 on each machine . . ."

Vandemark not only employed traveling salesmen in Arkansas, as did Branyan & Peterson, Inc. in Case No. 209, but Vandemark also made a contract with an Arkansas resident (Bigelow Robinson); (a) that he maintain a salesroom in Arkansas; (b) that he maintain and operate a truck for "on-the-spot" service to equip-

ment purchased from Vandemark; and (c) that he make 45-day and 90-day inspections of Clark machinery sold by Vandemark. Without doubt, these activities under the Bigelow Robinson contract, brought Vandemark into the taxing jurisdiction of the State of Arkansas, under the holding of the United States Supreme Court in *Miller Bros.* v. *Maryland.*

We therefore reverse the decree of the Pulaski Chancery Court, and remand this cause, with directions to enter a decree in favor of the Commissioner, in accordance with this opinion.

The Chief Justice did not participate in any of these five cases.

DIERKS TELLER WINDOW OF HORATIO STATE BANK *v.* HUNTER.

5-379 268 S. W. 2d 16

Opinion delivered May 24, 1954.

Royal L. Coburn, John L. Cecil and *Hardin, Barton, Hardin & Garner,* for appellant.

Steel & Steel and *Shaver, Tackett & Jones,* for appellee.

George Rose Smith, J. This dispute centers upon the question of whether the appellee, W. J. Hunter, had a deposit of $1,200 in the Bank of Dierks when it was found to be insolvent. By an arrangement with the Federal Deposit Insurance Corporation (FDIC) the liabilities of the insolvent bank were assumed by the appellant, Horatio State Bank. This suit was brought by Hunter to recover the sum of $1,200 after the appellant had refused to recognize his status as a depositor. At the trial below the verdict and judgment were for the plaintiff.

It is contended that the defendant was entitled to a directed verdict, but we think a jury question was presented. Hunter testified that when he closed his account with the Bank of Dierks about a year before its failure, he was dissatisfied with the conduct of the bank officials and with their statement of the amount to his credit. He believed that he then had on deposit at least $1,200 more than the amount shown by the bank. The bank failed in August, 1952, and the FDIC undertook to make good the losses to insured accounts. It appears from the testimony that the FDIC concluded from its investigation, the details of which are not shown, that Hunter had a deposit of $1,200 at the time the bank closed its doors. Apparently the FDIC re-established a credit to Hunter in that amount. Thereafter the liabilities of the defunct institution were assumed by the appellant, which took over all sound assets and received from the FDIC cash equal to the excess of insured liabilities over these assets.

On September 2, 1952, the appellant wrote a letter to the appellee, stating that "your deposit in the sum of $1,200 in the Bank of Dierks, as appearing on the records of that bank at the close of business on August 16, 1952, has been assumed by this bank." The appel-

lant's president testified that the records which he received from the FDIC showed the balance in Hunter's account to be $1,200. In March of 1953 the FDIC apparently decided that it had been in error in setting up the $1,200 credit to Hunter. It requested the appellant to refund that sum, and, since Hunter had allowed the credit to remain on deposit, the appellant extinguished his account by paying the $1,200 to the FDIC. That action resulted in the present suit.

Thus the jury had a choice of three grounds for finding that Hunter had a $1,200 deposit in the Bank of Dierks: (a) Hunter's testimony to that effect, (b) the appellant's letter of September 2, and (c) the testimony of the appellant's president. It is now argued that Hunter's testimony is not as positive as it might be and that the FDIC re-established Hunter's account solely on the basis of information supplied by Hunter himself. One flaw in this argument is that on the evidence the jury was not required to infer that the FDIC relied only on Hunter's statements in allowing him a credit of $1,200. No one who participated in the FDIC investigation was called as a witness. The record does not disclose why the FDIC set up the credit now in dispute, nor why it later decided that it had been mistaken. Hunter's proof made a *prima facie* case, shifting to the appellant the burden of going forward with evidence to the contrary. It cannot be said that Hunter's proof was incontrovertibly overcome.

Even though a case was made for the jury the judgment must be reversed for the giving of this instruction, at the plaintiff's request: "The court instructs the jury that the statement that defendant bank furnished plaintiff on March 30, 1953, shows conclusively that plaintiff had a balance of $1,200.00 on March 21, 1953. It therefore devolves upon the defendant bank to prove by a preponderance of the evidence that the plaintiff authorized the defendant bank to pay the $1,200.00 to the FDIC and charge it to plaintiff's account, and that the defendant bank did so under and by virtue of such authority. So you are told in this connection, if you find

from a preponderance of the testimony that the defendant bank furnished plaintiff a statement showing that on or before March 21, 1953, the plaintiff had a balance of $1,200.00 in his account and that it was withdrawn without any authority from the plaintiff, or without his knowledge and consent, then you must find for the plaintiff."

The vital question in the case was whether the FDIC acted under a mistake of fact in crediting Hunter's account with the sum in dispute. This instruction in effect decided that question in the plaintiff's favor, by stating that the appellant's action in sending out a bank statement some six months later "conclusively" showed that Hunter's bank balance was correct. Since there was no proof whatever that Hunter authorized the appellant to pay the money to the FDIC, this instruction was in substance a peremptory charge for the plaintiff. It is true that a similar instruction was approved in *Bank of Hatfield* v. *Chatham,* 160 Ark. 530, 255 S. W. 31, but in that case the amount of the depositor's account was not in controversy, while here that was the main issue to be determined by the jury.

Reversed and remanded for a new trial.

Justices McFaddin and Millwee think the judgment should be affirmed. The Chief Justice and Justice Holt think the judgment should be reversed and the cause dismissed. Thus a majority vote to reverse the judgment but not to dismiss the cause.

Griffin Smith, Chief Justice, dissenting. The record conclusively shows that the credit established by FDIC was a mistake, and that appellee had withdrawn his money.

The depositor closed his account in the Bank of Dierks September 7, 1951, by writing a check for $2,146.69—the exact amount of his balance. In October two checks written by Hunter's wife were paid and Hunter took care of the overdraft. When the account was closed the depositor did not even inferentially

question correctness of the payment; nor was it ever suggested that an improper check was charged to him.

The entire case, and this court's affirmance, rest upon the proposition that one who has been a bank customer may, months later, and when the institution has failed, establish his right to an erroneous credit by testifying that he "thinks, maybe" he had put in more money than the bank had credited him with, or that he "probably" was the victim of bad bookkeeping—and he may do this without showing when the theoretical deposit was made, how he came by the money, or even naming the day or month the error or deception occurred. If third parties, charged with the duty of examining the bank's affairs, erroneously conclude that money may have been deposited (basing this assumption upon hearsay and vagrant statements) and authorize such a credit, a jury may "suppose" that the deposits were made.

I would reverse the judgment and dismiss the cause.

SULLIVANT *v.* PENNSYLVANIA FIRE INSURANCE CO.

5-456 268 S. W. 2d 372

Opinion delivered May 24, 1954.

[Rehearing denied June 21, 1954.]

Barrett, Wheatley, Smith & Deacon, for appellant.

Edward L. Westbrooke and *Terry L. Shell,* for appellee.

MINOR W. MILLWEE, Justice. On August 7, 1952, appellant, A. R. Sullivant, purchased from the agent of Pennsylvania Fire Insurance Company, appellee, a policy of insurance which insured, among other things, a 1947 Studebaker ½-ton truck against loss or damage occasioned by theft. The policy provided for a maximum coverage of $800.00 and defined theft as "loss or damage to the automobile caused by theft, larceny, robbery or pilferage."

At a hearing in the Jonesboro Municipal Court, the parties stipulated that, if called as witnesses, appellant, Hubert Rogers, his employee, and Curtis Kerr, a garage-owner, would testify as follows:

Appellant had farming interests north of Jonesboro, Arkansas, and employed Hubert Rogers of Nettleton, Arkansas, to assist him during the summer of 1953. Rogers was accorded the privilege of using the Studebaker truck for the sole purpose of traveling back and forth from work. Rogers was permitted to keep the truck at his residence at night and week-ends, but was specifically instructed that the truck was not to be used except for a means of transportation to and from work.

On the night of July 23, 1953, Rogers violated instructions by using the truck for his own personal pleasure. He became intoxicated, collided with a tree in the City of Jonesboro, and abandoned the vehicle. Damage to the vehicle was $169.63, and it is undisputed that the policy was in full force and effect at the time of the collision. It was stipulated also that Hubert Rogers would testify that it was his intention to return the truck, that he had no intention of keeping or stealing it.

Appellant filed a complaint in municipal court contending that the damage to his truck was caused by

larceny and seeking judgment therefor plus the statutory penalty and attorney's fee. On December 18, 1953, the municipal court found in favor of appellee and dismissed appellant's complaint. The instant appeal is from the same judgment rendered on appeal upon a trial before the circuit court sitting as a jury.

The principal issue is whether the acts of the employee, Hubert Rogers, constituted larceny or theft under the laws of Arkansas. In determining this question the policy must be interpreted according to the laws of the state in which it is issued. It is also well settled that insurance policies are to be construed strictly against the insurer. Appellant contends that the damage to his truck was occasioned by larceny, as defined by the 1953 Supplement to Ark. Stats. § 41-3929, and was therefore within the terms of the policy. This section recites: "Any person who shall lawfully obtain possession as bailee of any money, goods, vehicle, aircraft, chose in action, or property of any character or description including farm produce and livestock, whether or not such possession was obtained gratuitously or for a consideration, who shall thereafter knowingly receive, dispose of, conceal, convert, keep, or use said property as above described contrary to the provisions of the agreement or conditions under which the same shall have been obtained, shall be deemed guilty of larceny to the degree depending upon the value of the property involved as fixed by law, and upon conviction thereof shall be punished as in cases of larceny."[1]

The first question for decision is whether or not a bailment existed. In 6 Am. Jur., Bailments, § 4, in de-

[1] Prior to amendment by Act 323 of 1947 and Act 24 of 1953, the statute read: "If any carrier or other bailee shall embezzle, or convert to his own use, or make away with, or secrete with intent to embezzle, or convert to his own use, any money, goods, rights in action, property, effects or valuable security, which shall have come to his possession, or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them, shall be deemed guilty of larceny, and on conviction, shall be punished as in cases of larceny." The term "bailee" as used in this statute was held not confined to bailees of the generic class of carriers, but embraced all bailees. *Wallis* v. *State*, 54 Ark. 611, 16 S. W. 821; *Tally* v. *State*, 105 Ark. 28, 150 S. W. 110.

fining "bailment", the text recites: "In its ordinary legal signification, which conforms to modern authorities and is substantially accurate, the term may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it." In defining the same term, in 8 C. J. S., Bailments, § 1, it is said: "It may be comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be." On the specific issue of a master's lending a car to a servant, in Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 5, § 3050, p. 419, it is said: "Where the master has loaned the car to the servant the situation is different. Such a situation constitutes a bailment, superseding the relation of master and servant, and such relation is not restored until the driver is again acting under the master's specific direction and control. A general instruction to return the car cannot be regarded as a specific direction from the master, placing the car within his control within this rule."

In *Spellman* v. *Delano,* 177 Mo. App. 28, 163 S. W. 300, the fact situation was closely analogous to the present case. There, the master lent his servant, Cook, a horse to ride to and from work, and while Cook was going from work one day the horse was killed by a train. The master sued the railroad company for the value of the horse, and the question was presented whether the contributory negligence of the servant was imputable to the master. To decide this question, the court had to determine the relation between Cook and his employer at the time of the accident, and in discussing this the court said: "Was Cook, at the time the horse was injured, the servant of plaintiff? He was not. He worked

for plaintiff by the day, and the relation of master and servant terminated each day when the day's work ended. Plaintiff had no control over Cook after 6 o'clock. What he did from that time until he returned to work again, between 7 and 8 the next morning, was no concern of plaintiff's. Indeed, he could not legally require Cook to return to work next morning, since the hiring was by the day, and Cook was only paid for the days he worked. Plaintiff was under no obligation to transport Cook to and from his place of labor. His lending the horse to Cook was no part of the contract between them. It was done only when Cook requested it, and was then only a gratuitous favor which plaintiff could withhold or not, as he chose. But the real test as to whether Cook was a servant of plaintiff at the time of the accident is whether the former was at that time subject to the latter's orders and control. Wood on Master and Servant, § 317; *Atherton* v. *K. C. Coal Co.,* 106 Mo. App. 591, 81 S. W. 223. He was not. Consequently the relation between them was not that of master and servant, but was that of bailor and bailee."

We conclude that a bailment existed in the instant case, and that Rogers was a bailee at the time appellant's truck was damaged. Did the acts of Rogers which occasioned the damage to appellant's truck fall within the statutory definition of larceny by bailee as set out in § 41-3929, *supra?* A situation somewhat analogous to the case at bar was presented in *Central Surety Fire Corporation* v. *Williams,* 213 Ark. 600, 211 S. W. 2d 891, in which this court construed a statute which provided certain acts would be deemed larceny. In that case appellee was insured against loss of his automobile by "theft, larceny, robbery or pilferage." A swindler gave appellee a worthless check in payment for the car, and appellee delivered to him the car with a bill of sale. When the check was discovered to be worthless, appellee sued the insurance company on the policy, claiming he had lost his car through larceny; the insurance company argued that the swindler was guilty only of false pretense, not larceny. This court said: "Even if Martin [the swindler] was guilty only of false pretense, still

—under our statute [§ 3073, Pope's Digest]—such false pretense is deemed to be larceny . . .

"One guilty of the statutory crime of false pretense is deemed—or adjudged—'guilty of larceny and punished accordingly.' By the plain wording of our false pretense statute, the person guilty of its violation is adjudged guilty of *larceny.* The wording of our statute brings the act of Martin within the policy coverage of the insurance company, i. e., larceny."

Other states have enacted so-called "joy-ride" statutes similar to § 41-3929. In *Block, et al.* v. *Standard Insurance Company of New York,* 292 N. Y. 270, 54 N. E. 2d 821,[2] a car owner was driven by his chauffeur to a hotel, and, not needing the car any more that day, the owner gave the chauffeur permission to drive the car to the place where the chauffeur was spending the night, expressly forbidding him to go joy-riding in the car. The chauffeur disobeyed his instructions and wrecked the car. The car was covered by insurance which insured the owner against "Loss or damage to the Automobile caused by Larceny, Robbery or Pilferage." In holding that the owner could recover from the insurance company under a statute similar to § 41-3929, the court said: ". . . The average automobile owner knows that the taking of an automobile in manner such as was done here constitutes the crime of larceny. His legislative representative voted for that enactment. The newspaper he reads contains reports of unauthorized temporary appropriations of automobiles and both he and the newspapers now use the word joy-ride as a definition of such an act. Such act is larceny and is so considered by the average man whether or not he is the owner of an automobile." See also, *Pennsylvania Indemnity Fire Corporation* v. *Aldridge,* (D. C.) 117 F. 2d 774.

In support of the judgment, appellee relies on the case of *Export Insurance Co.* v. *Royster,* 177 Ark. 899, 8 S. W. 2d 468, where this court held that it is necessary

[2] This case is to be distinguished from *Van Vechten* v. *American Eagle Fire Insurance Company,* 239 N. Y. 303, 146 N. E. 432, where the company insured against "theft, robbery or pilferage."

to show that there was an intent to convert the property to the use of the taker to constitute larceny. This case was decided prior to the 1947 and 1953 amendments which resulted in § 41-3929, *supra*. At that time the statute provided that there exist an intent to convert to the taker's use. This provision was eliminated by the 1947 amendment. In that case the policy covered loss by "theft, robbery or pilferage" and the alleged thief was not in the employ of the assured but was employed at a garage where the car was stored.

In enacting § 41-3929, the Legislature defined larceny by bailee as including the use of a bailed vehicle contrary to the provisions of the agreement or conditions under which it was obtained. The intention to convert to the use of the taker was significantly omitted from the amended statute, and it is clear that such intent is not now necessary in this state where the taking falls within the provisions of said section. Under the undisputed testimony in the case at bar the acts of Hubert Rogers clearly fall within the definition of, and constitute, larceny as set out in the statute.

The judgment is accordingly reversed and the cause remanded with directions to enter judgment in favor of appellant for the stipulated damage plus the statutory penalty and a reasonable attorney's fee.

SCURLOCK, COMMISSIONER OF REVENUES *v.* HENDERSON.

5-339 268 S. W. 2d 619

Opinion delivered May 31, 1954.

[Rehearing denied June 28, 1954.]

O. T. Ward and *Russell Reinmiller,* for appellant.

Elsijane T. Roy and *Reid & Roy,* for appellee.

GRIFFIN SMITH, Chief Justice. The question for determination is whether tax exemptions provided by § 6(d) of Act 487 of 1949, Ark. Stat's, § 84-3106 (sup.) may be invoked in favor of one who purchases machinery for ginning cotton. The exemption extends to tangible personal property ". . . used by manufacturers or processors or distributors for further processing, compounding, or manufacturing; [also] tangible personal property used for repair, replacement, or expansion of existing manufacturing or processing facilities . . ."

In March, 1951, W. A. Henderson, Jr., purchased gin machinery from a Texas corporation to be used at Marvel, Arkansas. The Commissioner of Revenues asserted an obligation of $208.88, based on the price paid for the machinery. The Commissioner's position is that ginning cotton is not manufacturing or processing within the legislative intent.

We know as a matter of general information that when cotton is ginned, trash—including leaves and hulls—is removed, and that seeds are taken from the fiber. The hulls serve one commercial purpose, the seeds another, and the cotton as such becomes the principal commodity, ready for marketing and processing. But, says appellee, the raw material taken from the field has undergone a necessary transformation, without which its value would be impaired.

It must be conceded that "processing" is a flexible term and might with strictness be applied to any alteration of raw material, such as cutting trees for conversion into lumber, washing potatoes preliminary to placing them in sacks, husking and selling corn, thrashing wheat and similar grain, removing stems from strawberries, and the like.

Our conclusion is that cotton becomes a commercial commodity when it is ginned. Samples, taken either before or after ginning, enable buyers to grade quality and make price offerings—offerings that are controlled within narrow limits by domestic and world demand for the fiber after it has been placed on the ginner's platform, or compressed. It is then ready for processing or manufacturing.

The State relies largely upon *Georgia Warehouse Co.* v. *Jolley,* 172 Ga. 172, 157 S. E. 276, while the appellee thinks the principle enunciated in that case was traversed in *Moore* v. *Farmers Mutual Manufacturing & Ginning Company,* 51 Ariz. 378, 77 Pac. 2d 209. Another case which will be presently discussed is *Assessors of Boston* v. *Commissioners of Taxation et al.,* 323 Mass. 730, 84 N. E. 2d 129.

The Georgia case was decided in 1921. A constitutional amendment permitted the voters of a county or other political subdivision to determine at an election whether new manufactories or the enlargement of existing ones should be tax-exempt for a period of five years. Macon county adopted this policy and Jolley constructed a modern gin. The sheriff levied a tax execution for the year 1928 and Jolley sought an injunction. In affirming action of the trial court in refusing to enjoin, the Supreme Court said:

"Considering the meaning of the word 'manufacturing' in connection with our consideration of the meaning of 'processing', it must be plain that the word 'processing' has reference only to some stage or process of manufacturing. The generic meaning of the word 'cotton' as related to manufacturing has relation only to

cotton as a marketable product in the marts of commerce. The term 'cotton' is universally recognized as referring to something which can be manufactured so as to be of use to civilized man. So we are of the opinion that the word 'processing' means a process in manufacturing cotton after it has been put in a marketable form by ginning".

None of our opinions has construed "processing" as utilized in Act 487. Dictionary definitions help but little, for it must be conceded that the term may relate to a broad range of transactions, one of which might have its inception in raw material only slightly altered in form, but constituting an indispensable step in continuous or progressive conversion into an article of commerce. Such an initial operation might, in some circumstances, be a part of the manufacturing process. Defining "definition" is equally difficult, for ". . . it is so closely connected with classification that, until the nature of the latter process is in some measure understood, [definition] cannot be discussed to much purpose". J. S. Mills, Logic, I. viii, § 1.

It is not our purpose here to lay down an inflexible rule applicable to § 6(d) of Act 487. Our conclusions must necessarily be restricted to the ginning of cotton.

Appellee thinks the correct result was reached by the Supreme Court of Arizona in Moore's case. The distinction—not stressed in either brief—lies in the fact that one who claims the benefit of an exemption must clearly establish the right. Our cases have gone far in holding that tax exemptions are never presumed. In *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29, Mr. Justice Hughes cited cases, also Desty on Taxation. He quoted with approval the statement that exemptions, no matter how meritorious, are acts of grace upon the part of the sovereign, and must be restrictively treated, [for] ". . . every reasonable intendment must be made that it was not the design to surrender the power of taxation, or to exempt any property from its due proportion of the burden of taxation".

The language just copied was quoted by Mr. Justice Mehaffy in *Wiseman* v. *Madison Cadillac Company,* 191 Ark. 1021, 88 S. W. 2d 1007. See 103 A. L. R., 1208. In the Wiseman case Judge Mehaffy cited Cooley on Taxation, Vol. 2 4th Ed., § 672, p. 1403. There the textwriter said: ". . . Exemptions are never presumed, the burden [resting] on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt. In other words, since taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain".

With this positive language as a guide, let us turn to the Arizona case appellee stresses and upon which he relies for logic in contradiction of the Georgia decision.

In Judge Lockwood's opinion there is the statement that the plaintiffs and defendants admitted that the defendants were under an obligation to pay a tax. The question was whether ginning cotton fell within the provisions of the statute's gross income provision on which the rate was one-fourth of one percent, or under the privilege sales tax provision exacting one percent. Judge Lockwood then said: "The parties also agree that the rule of law which is decisive of the case is that where there is in the same statute a particular enactment, and also a general one which, in its most comprehensive sense, would include the subject matter embraced in the particular one, the particular enactment is operative, and the general one must be taken to affect only such cases within its general language as are not included in the provisions of the particular enactment".

In a paragraph devoted to a comprehensive analysis of the two statutory sections, delightfully expressed and carefully reasoned, the opinion writer concluded that under the rule of construction agreed to by the litigants.

". . . the ginning of cotton, since it is undoubtedly an agricultural product, falls within the provisions of subsection (a) 1, rather than within the general provisions of subsection (g) as being 'any tangible personal property whatsoever'' '.

Thus it will be seen that what the court actually did was to determine which of the two classifications the taxing authority intended should apply to ginning cotton, and since the particular enactment contained language thought by the court to meet the test of the rule of law agreed upon, the lower rate was approved.

In the controversy appealed by the Assessors of Boston, to which reference has been made, this distinction cannot be drawn. By the laws of Massachusetts machinery of manufacturing corporations was exempted from local taxation. Instead, there was imposed a corporation franchise tax. The board of assessors for Boston appealed twelve judgments, all having dealt with in a single opinion written by Mr. Justice RONAN for the Supreme Judicial Court. Merchants Wool Scouring Company, a Massachusetts corporation, would be exempt from local taxation if the nature of its business justified a judicial finding that it was a domestic manufacturing corporation.

The company's only business was that of processing raw and waste wool for the account of others at its plant in Boston.[1]

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[1] The opinion contains this explanation: "If the wool when received is not in good condition for scouring because it contains a slightly excessive amount of foreign matter, it is fed into a dusting machine; or if it is matted it is put into a breaker machine; or if heavily matted it is put into a machine known as the tag breaker. Wool containing burrs is treated by a burr picking machine, and if the wool is not then relatively free from burrs it is carbonized by submerging it into a solution of sulphuric acid. When the wool is ready for scouring, it is put upon a conveyor belt, studded with pine, which catches the wool and raises it upward while it is combed out and evened off by a toothed rake, and it is finally deposited in a vat in which it is submerged in hot water to which a chemical solution is added and where it is agitated by a series of rakes. The wool is removed from this vat and the water squeezed out, and it is again submerged in a second vat in a solution of water and another chemical compound. It is then removed and treated in a similar manner in a third vat. It is finally conveyed to a fourth vat known as the rinsing or bleaching vat where it is again submerged in water to which a bleaching solution is added if the customer desires the wool to have a certain color. The wool is removed from this vat,

In analyzing the case Judge RONAN said that the statute should be fairly construed "to effectuate, if reasonably possible, the legislative intent and purpose. The words 'engaged in manufacturing' are not to be given a narrow or restricted meaning."

It has been said that the construction touching manufacturing, processing, and commodities peculiar to a particular geographical district is necessarily influenced by local or area activities and necessities. The Supreme Judicial Court of Massachusetts is in a much better position than we to determine what the lawmaking authority had in mind when for the purpose of inviting manufactories into the state, or encouraging non-resident or domestic organizations to build plants, exemptions were provided.

The "feel" of legislative intent necessarily has a relation to local commerce, industry, and activities; and it inevitably blends with what courts know to be true in kinship with judicial notice.

Strictly speaking, any change or alteration in a commodity is a process; but "processing," as utilized in the exemption Act, must have been selected as a word having some direct bearing upon manufacturing.

We agree with the Georgia court that ginning is not processing or manufacturing, and that the Commissioner was correct in making the assessment. It follows that the judgment must be reversed.

Justices MCFADDIN, MILLWEE and ROBINSON dissent.

MINOR W. MILLWEE, Justice, dissenting. The majority opinion takes as its touchstone rule of construction the axiom that tax exemptions are never presumed, and that a grant of an exemption must be made out beyond a reasonable doubt. This is undoubtedly true, but, while exemption clauses are to be construed most strongly against the taxpayer, they are not to be so strictly con-

dried, bagged, and shipped to the customer, and it is ready for carding and spinning into thread, cloth, or rugs. The different processes to which the wool has been subjected are essential steps in the changing of raw wool before it can be made up into cloth."

strued as to defeat or destroy the intent and purpose of the enactment, and no strained construction will be given them that will effect that end. *State* v. *Wertheimer Bag Co.,* 253 Ala. 124, 127, 43 So. 2d 824. It has been said that "If the act expresses the intent to exempt certain property, judicial construction is not appropriate to defeat the exemption." In re Bendheim's Estate, 100 Cal. App. 2d 398, 223 P. 2d 874. The ultimate consideration in all cases of statutory interpretation is the intention of the legislature, and this intention must primarily be determined from the language of the statute itself. *McKinley, Commissioner of Labor,* v. *R. L. Payne & Son Lumber Company,* 200 Ark. 1114, 143 S. W. 2d 38.

The majority opinion relies strongly upon the much cited case of *Georgia Warehouse Co.* v. *Jolley,* 172 Ga. 172, 157 S. E. 276, in which the court said: "The term 'cotton' is universally recognized as referring to something which can be manufactured so as to be of use to a civilized man. So we are of the opinion the word 'processing' means a process in manufacturing cotton after it has been put in a marketable form by ginning, which is merely the separation of the cotton from its seed, and seed cotton is not referred to in the constitutional amendment." It is difficult to see how the Georgia court can thus arbitrarily draw a line in the chain of evolution from the boll to the bolt of cloth by saying that before a certain point the cotton is only being prepared to be processed rather than undergoing a processing. Perhaps the reasoning of the case can be explained by the court's express statement that the purpose of the Constitutional amendment under consideration in that case was to encourage manufacturing; the opinion considers the word "processing" in the light of "manufacturing" rather than ascribing to it any meaning of its own. In this case, appellee argues that the word "or" separating "manufacturing" and "processing" gives each word meaning uncolored by the connotations of the other. But even accepting the rationale of the Georgia Warehouse case, still it seems undeniable that "processing" is a far less inclusive

term and need not embrace near the scope of activity of "manufacturing", and the Georgia court's holding, in effect, that the terms are synonymous seems strained indeed.

The problem of the construction of this statute is a difficult one, for as is said in *Kennedy* v. *State Board of Assessment and Review,* 224 Ia. 405, 276 N. W. 25: "Technically speaking any change, chemical or otherwise is a process . . .", and almost certainly the legislature did not intend to exempt from taxation every facility in the steps from seed to end product. Under such a theory, ridiculous results could be reached, for water, fertilizer, farm implements, etc., all play a part in the early development of crops which are eventually used by manufacturers and processors. In the Kennedy case, supra, the court recognizes this problem, and goes on to say: " . . . but I do not believe the legislature intended so strained a construction as to call the developing of crops by means of fertilizer a processing. . . The growing of the article is not in the common use of the term a processing, but some change in the article after it is grown by means of special treatment is a processing." This would seem a much more logical place to draw the line than that set forth in the Georgia Warehouse case, supra.

In *Assessors of Boston* v. *Commissioner of Corporations and Taxation et al.,* 323 Mass. 730, 747, 84 N. E. 2d 129, cited in the majority opinion, in discussing a wool scouring company's nature as a manufactory, the court said: "If the scouring were done by a textile manufacturer in his own factory, it would be difficult to say that those employed in the scouring department were not engaged in manufacturing. If the manufacturer let the work in that department out to an independent contractor to be performed in the manufacturer's factory, the insurer of the manufacturer could not avoid the payment of workmen's compensation to an employee of the independent contractor injured while performing a part of or a process in the trade or business of the manufacturer. In other words. the

scouring of the wool is an essential and integral part of the manufacturing of textiles. The scouring does more than merely remove foreign matter from the wool. It removes a portion of the natural elements contained in the fibers. To say that manufacturing does not start until after the wool has been scoured does not seem to be a realistic view of the situation. It would be more accurate to say that scouring is the first step in transforming the wool into a new finished product. We think manufacturing begins with the scouring."

The rationale of this case might very well be applied to cotton ginning in holding that it is manufacturing, for there were experts who testified that the cotton cannot be used for manufacturing until it has been ginned, and certainly ginning "removes a portion of the natural elements contained in the fibers." But our statute would not seem to necessitate that this court go that far in order to uphold the award to appellee, for even viewing "processing" in the light of "manufacturing", still the terms are not synonymous; indeed, to hold them so would be to render "processing" a meaningless redundancy. To the contrary, our exemption would seem to be satisfied with something less than manufacturing; what this "something less" is, is the only remaining problem for consideration.

It would seem to the writer that a common sense point of distinction between "manufacturing" and "processing", viewing the latter in the light of the former, is that manufacturing is composed of various processes, but that other operations are composed of processes also, and that the legislature intended to exempt the activity which is a process in manufacture and not to exempt the processes in other forms of operation.

Under this construction, cotton ginning is clearly a process in manufacturing. In this connection it would naturally be supposed that the members of the industry would have a fair notion as to what they were engaged in. As stated previously, expert witnesses testified that cotton can only be used for manufacturing after

ginning. Appellee introduced into evidence many trade journals, bulletins and pamphlets dealing with cotton culture which show that the words "process" and "processing" are commonly used in reference to the ginning of cotton by cotton men. Indeed, it is difficult for anyone to discuss the activity under consideration without the repeated use of these words. Thus the intention of the legislature, determined from a reasonable interpretation of the words of the exempting statute, would seem to be to exempt from taxation machinery used in cotton ginning. Such was the interpretation placed on the statute by the appellant until the instant controversy arose. Of course, the wisdom of the exemption was a matter for the Legislature—and not this court.

In the final paragraph of the opinion, the majority hold that "ginning is not processing or manufacturing", leaving this writer to speculate as to just what ginning possibly could be and also what processing and manufacturing are. From this holding, I respectfully dissent.

Justices McFaddin and Robinson join in this dissent.

Karoley *v.* Reid.

5-438 269 S. W. 2d 322

Opinion delivered May 31, 1954.

[Supplemental opinion on rehearing delivered July 5, 1954.]

Richard W. Hobbs and *B. W. Thomas,* for appellant.

Glenn G. Zimmerman and *William G. Fleming,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Mary E. Karoley, instituted this suit against appellee, John D. Reid, for specific performance of a contract. Trial resulted in a dismissal of the complaint and denial of the relief sought on the ground that the alleged contract was without consideration and void. Although appellee offered no proof and the testimony was not as fully developed as it might have been, there is no controversy about the following facts which may be gleaned from the pleadings and the evidence offered by appellant.

Appellant and appellee began living together in the state of Ohio in October, 1940, at which time appellant was legally married to Jack Karoley. This illegal cohabitation continued in Ohio until 1950 when the parties moved to Little Rock, Arkansas, where a home was purchased and title thereto taken in the names of "John D. Reid and Mary E. Reid, his wife." The illicit relation-

ship continued in Little Rock until September, 1951, when the parties separated and appellant moved to Hot Springs, Arkansas, where she obtained a divorce from Jack Karoley in October, 1951. At appellee's suggestion it was agreed that the parties permanently sever their illicit relationship, and on November 13, 1951, they executed and appellee duly acknowledged the following instrument:

"AGREEMENT

"THIS AGREEMENT made and entered into this 13th day of November, 1951, by and between John D. Reid of Little Rock, Arkansas, hereinafter known as party of the first part and Mary E. Karoley of Hot Springs, Arkansas, hereinafter known as party of the second part, WITNESSETH:

"WHEREAS, party of the first part and party of the second part are now joint owners of real estate located in Little Rock, Arkansas, and personal property, also located in Little Rock, Arkansas:

"NOW IN CONSIDERATION of party of the second part relinquishing all of her right, title and interest unto said real estate and personal property and in further consideration of love and affection, party of the first part hereby agrees to pay and party of the second part hereby agrees to accept in lieu of all her interest to the above mentioned property, the sum of Two Hundred and Fifty Dollars ($250.00) payable each and every month by party of the first part to party of the second part for the rest of her natural life: and

"WHEREAS, party of the second part is now in ill health and under treatment by Dr. Ludolf Bollmeier of Hot Springs, Arkansas, party of the first part hereby agrees to pay, in addition to the $250.00 per month for life, all of the charges made by the above mentioned Ludolf Bollmeier and any other medical expense incurred during the duration of her present illness: and

"WHEREAS, party of the second part hereby agrees to execute a deed to the above described real es-

tate at any time desired by party of the first part after the signing of this instrument: and

"WHEREAS, the exact future address of the party of the second part is unknown at this time, until further notice by party of the second part to party of the first part, it is mutually agreed that the above mentioned $250.00 per month shall be payable on the first of each month, the first payment to be due on the 1st day of the month after the signing of this agreement and continue for the life of party of the second part: and

"WHEREAS, it is mutually agreed by and between the parties hereto that should party of the first part die prior to the death of party of the second part, party of the second part shall be paid a lump sum of Ten Thousand Dollars ($10,000.00), net to her, from the estate of party of the first part: and

"WHEREAS, it is mutually agreed by and between all parties hereto that should party of the second part marry prior to the termination of this agreement, her marriage shall act as an automatic termination and this agreement shall have no more force and effect.

"WITNESS our hands and seals this 13th day of November, 1951."

Following the execution of the contract, appellant executed a deed conveying her interest in the Little Rock property to appellee who made the monthly payments of $250 as provided in the contract until September, 1952, when he refused to make further payments.

Appellee filed a cross-complaint in which he alleged that the continued illicit relationship and execution of the contract were induced by the fraudulent misrepresentations and threats of appellant. There was no proof of such allegations and they were stoutly denied by the appellant, who testified that the separation of the parties and terms of the written contract were suggested and dictated by appellee. Her testimony was corroborated and it was further shown that she was mentally and physically ill at the time and that appellee paid the fees

of the attorney who drafted the contract and represented appellant in the divorce suit. Appellant also testified that the property mentioned in the contract cost $22,500, and that the parties owned an equity therein of about $10,000, and that the personal property included certain "first editions" which belonged to her personally. It is also undisputed that the parties held themselves out as husband and wife to their friends, associates and the public generally throughout the eleven-year period of cohabitation.

The controlling issue on this appeal is whether there was sufficient consideration to support the contract of the parties. The able chancellor concluded that the contract was based solely on the illicit relationship which made it without consideration. The authorities generally are in agreement on the proposition that contracts in consideration of the commencement or future continuance of illicit relations between the parties are illegal and void as being against public policy and morality. 17 C. J. S., Contracts, § 266a. However, there is considerable division of authority on the question of the validity of contracts in consideration of past illicit relations. Some courts hold such contracts void or lacking in consideration while others hold them valid and founded on a good consideration. 12 Am. Jur., Contracts, § 176; 17 C. J. S., Contracts, § 266b. We find it unnecessary to a determination of the present controversy to choose between these conflicting views. There is another well recognized rule which we do approve as applicable and decisive of the present issue. This rule is to the effect that past illicit relations between the parties to a contract will not invalidate it, if it is otherwise supported by valuable consideration. Williston on Contracts, § 1745; Corbin on Contracts, § 1476; 17 C. J. S., Contracts, § 266b.

While none of our own cases are precisely in point on the question under consideration, a somewhat analogous situation was presented in *Mitchell* v. *Fish,* 97 Ark. 444, 134 S. W. 940, 36 L. R. A., N. S., 838. In that case plaintiff left her husband and illegally cohabited with the defendant in the state of Washington for about 10 years

during which time they accumulated certain property through their joint efforts. They sold the property under an agreement to divide the proceeds, and she signed the deed as his wife. It was also agreed that plaintiff should remain in Washington for the purpose of securing a divorce from her husband while defendant proceeded south and invested the sale proceeds for them jointly in other lands. Defendant came to Arkansas where he purchased land with a part of the proceeds arising from the sale of the land in Washington. Plaintiff secured the divorce and on her way to Arkansas met another man whom she subsequently married. In her suit to recover her share of the profits under their alleged partnership agreement the trial court held that the agreement was so tainted with immorality that the court would not enforce it. In reversing the decree, this court said: ". . . it is not necessary to decide whether the relation of concubinage between the parties to this suit was incidental, and was not the motive and cause of them living together as husband and wife and forming the partnership; for we hold that, although the partnership may have been illegally formed on account of the consideration for it being the living together of the parties illegally as husband and wife, yet when the contract has been executed without the aid of the courts by the voluntary acts of the parties and a division of the profits has been agreed upon, such division of profits forms a new contract, which is collateral to and not contaminated by the original contract, and that the partner entitled to a share of such profits may enforce his right thereto in the courts." This rule is well recognized and has been applied in other jurisdictions. See Anno.: 31 A. L. R. 2d 1281.

There is still another applicable rule which we approved in the recent case of *Bodcaw Oil Co., Inc.* v. *The Atlantic Refining Co.*, 217 Ark. 50, 66, 228 S. W. 2d 626. It is set forth in Williston on Contracts, § 137, as follows: " 'Somewhat analogous to the surrender of a supposed claim as consideration for a promise is the assignment of a supposed right of another kind. Certainly if the parties confessedly bargain for the assignment of such right

as the grantee may have, be it small or great, or none at all, the assignment in fact is sufficient consideration for a promise though it turns out that there is no right transferred. The only possible exception to such a rule is that, if no reasonable person could suppose the assigned chance was of any value, it might then be insufficient consideration. But even in such a case the execution of a quitclaim deed or other desired paper would support a promise.' "

Appellee relies on the case of *In re Greene,* 45 Fed. (2) 428, Dist. Ct. S. D., N. Y., where a woman filed a claim against her bankrupt paramour's estate based upon a contract similar to the one involved here. In reversing the referee's order of allowance, the court said:

"The law is that a promise to pay a woman on account of cohabitation which has ceased is void, not for illegality, but for want of consideration. The consideration in such a case is past.

"The mere fact that past cohabitation is the motive for the promise will not of itself invalidate it, but the promise in such a case, to be valid, must be supported by some consideration other than past intercourse. Williston on Contracts, §§ 148, 1745." The court further found that there was no consideration for the contract other than the past illicit relations which, standing alone, were held insufficient to support the contract of the parties.

In the case at bar we hold that the contract was supported by valuable consideration aside from the past illicit relations of the parties. The parties had separated and agreed to permanently sever their illicit relationship. It is undisputed that a portion of the personal property to which appellant relinquished her interest under the contract was her separate property. It is also certain that both parties confidently supposed that appellant had the right to assign an interest in the real estate, and a cloud upon the title to the property was removed by her reconveyance of such supposed interest to him. In fact appellee was so strong in his belief that the parties owned the property jointly that he paid 10

monthly payments under the contract before he decided otherwise. Appellant's relinquishment of all right and title to her separate personal property and her supposed right in the real estate constituted a valid consideration for the contract, and it is unnecessary to determine whether she was a tenant in common under the deed to them jointly.

The decree is accordingly reversed and the cause remanded with directions to enter a decree not inconsistent with this opinion.

MINOR W. MILLWEE, Justice. (Supplemental Opinion on Rehearing). Our attention is now called to the applicability of Act 470 of 1949, Ark. Stats., § 27-1729 (1953 Cumulative Supplement). After appellant rested her case in the trial court, the appellee's motion for a "directed verdict" was sustained and the cause dismissed. While the motion was not in writing as required by the statute, this defect was waived by appellant's failure to object on that ground. *Thompson* v. *Murdock Acceptance Corporation,* Law Reporter, April 12, 1954. Since appellee's motion challenging the sufficiency of the evidence was erroneously sustained, § 27-1729, *supra,* requires that the cause be remanded for further development of the proof in accordance with the terms of said statute. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. The petition for rehearing is accordingly denied but the cause will be remanded for further proceedings.

FORD *v.* MARTIN.

5-419 268 S. W. 2d 391

Opinion delivered May 31, 1954.

James E. McDaniel and *Adrian Coleman,* for appellant.

Bailey & Warren, Amicus Curiae.

GEORGE ROSE SMITH, J. The appellee, W. I. Martin, who is a plumber residing in the town of Black Rock, was employed to do the plumbing work upon a construction job in the city of Paragould. Martin took an examination conducted by the Paragould Board of Plumbing Examiners, but he failed to pass. He then brought this suit to enjoin the board members from interfering with his work upon the job in question. It was Martin's contention in the trial court (he has not filed a brief in this court) that his State license as a master plumber authorizes him to pursue his trade in any city without obtaining a local license. This contention was upheld by the chancellor, who granted the requested relief.

In requiring Martin to take an examination the city was acting under the authority conferred by Ark. Stats., 1947, Title 19, Ch. 37. A city's authority to examine and license plumbers was upheld in *Carville* v. *Smith,* 211 Ark. 491, 201 S. W. 2d 33. It was contended below, however, that the municipal licensing power was impliedly withdrawn by Act 200 of 1951, Ark. Stats., §§ 71-1205, *et seq.*

We think this contention unsound. Section 2 of Act 200 (§ 71-1206) does authorize the State Board of Health to prescribe and enforce minimum plumbing standards and to license master and journeyman plumbers, but throughout the Act the emphasis is upon the Board of Health's *minimum* standards. When it is remembered that the earlier statutes provided no standards at all for incorporated towns and other small communities, it seems clear enough that Act 200 was designed to promote the

public health through the adoption of regulations applicable to all plumbing systems except those in farm buildings outside of any city or town and not connected with a public water or sewer system. Section 71-1216.

Furthermore, three different sections of Act 200 refer to the municipal regulatory authority. Section 4 (§ 71-1208) provides that a city having a waterworks or sewerage system, which Paragould has, may prescribe rules and regulations not in conflict with the Board's minimum standards. Section 5 (§ 71-1209) states that nothing in the Act shall prohibit cities and towns from providing full supervision over plumbing and plumbers. And § 12 (§ 71-1216) expressly permits cities and towns to make additional regulations not in conflict with the State code. We conclude that Paragould was acting within its authority in requiring Martin to demonstrate his skill as a plumber.

The chancellor did not find it necessary to pass upon Martin's second contention, that Paragould's examining board had not been appointed in literal compliance with the statutes. On this issue it is enough to say that the board at least had authority *de facto;* and since this suit was filed the defects complained of have been remedied, leaving Martin free to renew his application for a local license.

Reversed and dismissed.

CITY OF LITTLE ROCK *v.* CAMPBELL, COUNTY JUDGE.

5-430 268 S. W. 2d 386

Opinion delivered May 31, 1954.

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

Tom Downie, for appellee.

ROBINSON, J. Appellant, City of Little Rock, filed this suit against R. A. Campbell as County Judge of Pulaski County, to compel him to comply with Act 563 of 1953, which provides: "Of the amounts collected from the annual three-mill road tax authorized by Amendment No. 3 to the Constitution of the State of Arkansas in any county having a population in excess of 175,000 persons, the county court shall apportion to the respective cities and towns within such county for use in making and repairing public roads (streets) and bridges seventy-five per cent (75%) of said tax collected upon property within the corporate limits of the respective said cities and towns."

The trial court held the Act to be special legislation and therefore void as being in conflict with Amendment No. 14 to the Constitution, providing: "The General Assembly shall not pass any local or special Act. . . ."

Street Improvement Districts Nos. 481 and 485 v. *Hadfield,* 184 Ark. 598, 43 S. W. 2d 62, is directly in point and is controlling; there a similar Act was held to be unconstitutional. For a full discussion of the point involved, see that case.

Affirmed.

SMITH *v.* EASON.

5-434 268 S. W. 2d 389

Opinion delivered May 31, 1954.

Irving R. Kitts, for appellant.

Jameson & Jameson, for appellee.

J. Seaborn Holt, J. This appeal is from a decree of September 23, 1953, granting appellees' prayer to cancel a note, and chattel mortgage of even date (on certain cattle) securing same, on the ground of usury. The note was for the principal sum of $1,500.00, carrying the maximum interest rate of 10%, and provided: "For value received, we or either of us promise to pay to the order of Virgil G. Smith the sum of Fifteen Hundred Dollars ($1,500.00) at the rate of $62.50 per month in twenty-four (24) monthly payments to be made beginning November 15, 1952, and the fifteenth of each month thereafter.

"Interest shall also be paid with each monthly payment at the rate of ten percentum (%) per annum, on the reducing balance method, to cover interest for each preceding month on unpaid balance of principal.

"First monthly interest payment shall be $12.50 reducing each month thereafter so that last or 24th monthly interest payment shall be 52¢ in accordance with attached pencil schedule of monthly interest and principal payments in full."

When the above instruments were delivered to Smith, he gave appellees only $1,450.00. He claimed that he retained $42.00 of the principal sum for certain expenses and charges that he, as the lender, had incurred in bor-

rowing or procuring from his former wife, Floy Smith, the $1,500.00 to loan appellees, borrowers. He itemized $42.00 of the $50.00 in this manner:

"(1) Abstract expenses in bringing up abtract on Defendant's (Smith's) land which was to be mortgaged to Floy Smith to induce Floy Smith to loan the defendant the money defendant expected to loan to plaintiffs	$10.50
"(2) Examination of abstract on defendant's land by the attorney for Floy Smith	15.00
"(3) Legal expenses for legal advice, preparing note and mortgage, etc.	15.00
"(4) Recording and notary fee	1.50
	$42.00"

As to the remaining $8.00, defendant testified that he withheld $7.91 of said amount as interest, from September 27th, 1952, (the date he had the money ready) to October 14, 1952 (the latter date being the date plaintiffs signed the note and mortgage and received $1,450.00.

It will be observed that all of the above expense items were incurred in connection with the transaction that Smith had with his former wife to procure the money to loan appellees, by mortgaging certain of his real estate to Floy Smith. These expense charges were obviously not for the benefit of appellees, as borrowers, from Smith, the lender. The Easons were giving a mortgage on cattle (not real estate) for security to Smith, the lender, and they could not be charged with expense items incurred by Smith which did not benefit them, borrowers.

A contract to pay directly or indirectly a greater rate of interest than 10% for the loan of money would make the contract absolutely void as to principal and interest. "All contracts for a greater rate of interest than ten per centum per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same

by law." Article XIX, § 13, Constitution of the State of Arkansas.

Section 68-602, Ark. Stats., 1947, 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," and § 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."

We have held in many cases that the borrowers (Easons here) may properly contract to pay the lender over and above the lawful and maximum 10% interest rate for certain valid and reasonable charges, paid to a third party, and incurred for the borrowers' benefit in procuring the loan, such as for "an abstract paid to a third person, or (2) a title opinion paid a lawyer, or (3) recording fees paid an official, or (4) insurance premiums paid a third party," *Winston* v. *Personal Finance Company of Pine Bluff, Inc.*, 220 Ark. 580, 249 S. W. 2d 315, but not where such charges, as here, were for the benefit of the lender, Smith. We have held that where the borrower contracts to pay the maximum interest rate and in addition agrees to pay a commission to the lender's agent for procuring the loan, the contract thereby becomes usurious and void. We so held in *Dickey* v. *Phoenix Finance Company,* 193 Ark. 1145 (Headnote 2) 104 S. W. 2d 806: "A borrower may pay a fee or bonus to his agent who procures a loan for him; but if the agent is acting as the agent of the lender, and the bonus received, together with the interest charged, exceeds the lawful rate of interest, the contract will be void." See also *Jones* v. *Phillippe,* 135 Ark. 578, 206 S. W. 40.

The principles of law announced in the above cases by analogy apply with equal force here.

Affirmed.

Opinion delivered May 31, 1954.

Fletcher Long, for appellee.

GEORGE ROSE SMITH, J. This is a divorce case, in which the chancellor granted a divorce to the appellee. The appellant filed her notice of appeal pursuant to § 2 of Act 555 of 1953, Ark. Stats., 1947, § 27-2106.1, but she failed to docket the case in this court within the ninety days allowed by § 20 of the Act. Ark. Stats., § 27-2127.1. The appellee has brought up a partial record and has moved for a dismissal of the appeal. The question is whether this is the correct procedure under Act 555.

The material facts are simple. On January 9, 1954, the chancellor announced his decision in a letter sent to

the attorneys in the case. The precedent for the decree was not prepared and signed by the chancellor until a week or ten days later. Hence the appeal is governed solely by Act 555, for we have provided by our Rule 26 that appeals cannot be taken under the former statutes from judgments or decrees "entered" after January 10, 1954. Here the decree was rendered on January 9, but it was not entered until some days later. The distinction lies in the fact that the rendition of a judgment is a judicial act on the part of the court, while the entry of a judgment is a ministerial act performed by the clerk. *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

The appellant filed her notice of appeal on January 22, but she appears to have taken no other action toward perfecting her appeal. More than ninety days after January 22 the appellee filed a partial record here and asked that the appeal be dismissed. Both the special chancellor who tried the case and the regular chancellor have certified that no extension of time for lodging the record in this court has been requested or granted. Counsel for the appellant, having been served with a copy of the motion to dismiss and the printed brief in support thereof, have informed us that they do not intend to respond to the motion.

This is a situation not expressly covered by Act 555. Section 2 of the Act (§ 27-2106.1) provides that if an appeal has not been docketed in the Supreme Court "the parties, with the approval of the trial court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant." There is, however, no provision authorizing the trial court to dismiss the appeal upon motion of the appellee alone.

Section 17 of the Act (§ 27-2127.9) permits a party to file a partial record in the appellate court for the purpose of making a motion for dismissal. It is under this section that the appellee is now proceeding.

We think that the course adopted by this appellee is correct and that the appeal should be dismissed. The

reason that an order of dismissal is appropriate lies in that part of § 2, *supra,* which provides that, after an appellant has filed a timely notice of appeal: "Failure of the appellant to take any of the further steps to secure the review of the judgment or decree appealed from shall not affect the validity of the appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

This language is derived from Rule 73 (a) of the Federal Rules of Civil Procedure. The question now presented has frequently arisen in the federal courts, for Rule 73 (g) requires that the record on appeal be filed within forty days after the date of filing the notice of appeal, with power in the trial court to extend the time up to ninety days. The federal decisions hold that even though the appellant fails to lodge his record within forty days and fails to obtain an extension of time from the trial court, the appeal will not be dismissed if a valid excuse for the delay is shown. *Burke* v. *Canfield,* App. D. C., 111 F. 2d 526; *Miller* v. *U. S.,* 7th Cir., 117 F. 2d 256. Conversely, the appellee is entitled to have the appeal dismissed when no satisfactory reason for the delay is made to appear. *United States ex rel. Rempas* v. *Schlotfeldt,* 7th Cir., 123 F. 2d 109; *In re Gammill,* 7th Cir., 129 F. 2d 501.

In the case at bar the appellant filed a timely notice of appeal but took no further action for more than ninety days. The result was to leave the appellee in a state of uncertainty, as the appellant might either have abandoned the appeal or have intended to offer an excuse for the delay. In this situation the motion to dismiss, based upon a partial record, is the proper method of bringing the matter to an issue. Since the appellant does not see fit even to respond to the motion, the appeal must be dismissed. It is so ordered.

5-429 268 S. W. 2d 385

Opinion delivered May 31, 1954.

[redacted]

F. C. Crow and *Basil H. Munn,* for appellant.

Weisenberger & Wilson, for appellee.

WARD, J. Appellant, Benjamin Tom Ward, and appellee, Katie Marie Biddle Ward, were married on July 12, 1951. Approximately three months later appellee gave birth to a child.

On October 2, 1952, appellant obtained a decree of divorce from appellee on the ground of willful desertion by appellee for a period of one year. One month previous to the divorce decree appellant and appellee entered into a written agreement to the effect that if a decree of divorce should be granted appellee should have custody of the child, Brenda Marie Ward, and that appellant would pay $25 per month for the support of said child. The divorce decree itself did not contain or make any reference to the said agreement but it embodied the same provisions concerning custody and support.

On October 6, 1953, appellant filed a complaint against appellee asking to have the said marriage annulled and declared void *ab initio,* and that he be relieved from making further payments for child support.

The material allegations in the complaint were: He and appellee had kept company for a period of about two years prior to said marriage; that his consent to said marriage was induced by duress and fraud on the part of appellee and her relatives; that they threatened him in divers ways, and represented to him that appellee's

father had developed a heart disease and could not stand the strain caused by the unmarried status of his daughter in her pregnant condition; that if appellee's father should die as a result of the strain appellee's relatives would hold him responsible; that appellee and her relatives had no conclusive knowledge that he was the father of said child, and that they knew or ought to have known "that other persons and not plaintiff might have been or could have been the father of said child"; that in other ways he was induced, against his will, to marry appellee; that at the time he consented to the marriage appellee knew he was not the cause of said pregnancy and not the father of the child, but that it was another person, that he has only recently discovered that appellee had indulged in sexual intercourse with different persons at or about the time she became pregnant, and that he is not the father of said child, and; that he has only recently learned that he was not in fact the father of the child, a fact which appellee well knew at all times.

Appellee filed a motion to dismiss appellant's complaint alleging, among other things, that the divorce decree of October 2, 1952, is an existing final judgment rendered upon the merits of the issue in this case by a court of competent jurisdiction, without fraud or collusion, and is conclusive of the rights, questions and facts in issue as to the parties in this case, and that no marriage now exists between the parties and therefore there is no marriage to set aside or annul.

Attached to appellee's motion to dismiss was the original court file in a divorce proceeding, case No. 7434. Included in this file were the following: (a) A complaint, signed by appellant's attorney and verified by appellant, in which he alleged that he was married to appellee on July 12, 1951; that immediately after the marriage defendant deserted and abandoned him; that to the marriage was born one child, Brenda Marie Ward; that he was entitled to divorce from defendant; that it would be for the best interest of the child for the mother to have custody, and; that he was able to contribute the sum of $25 per month for the support of the child. The

prayer was for a dissolution of the bonds of matrimony; (b) A waiver of service signed by Katie Marie Ward; (c) An agreement dated September 2, 1952, and signed by appellant and appellee in which it was agreed that in event the court should grant a divorce appellee should have custody of the child and appellant to pay $25 per month for its support, and; (d) A decree dated October 2, 1952, which, among other things, gave custody of the child to the mother, ordered appellant to pay $25 per month for its support, and dissolved "the bonds of matrimony heretofore existing between the plaintiff and defendant."

At the hearing on appellee's motion to dismiss it was agreed by both sides that the instruments mentioned above were the authentic and original papers in said case No. 7434. It was stated by the attorneys for appellant that they were not trying to annul the divorce decree mentioned above but that they were trying to annul the marriage that had been perpetrated by fraud.

The trial court granted appellee's motion to dismiss and we sustain this finding.

By this action appellant sought only to annul or set aside his marriage to appellee on July 12, 1951. It is conceded that this marriage relationship was dissolved by the decree of divorce dated October 2, 1952, in case No. 7434, which cause of action was instituted by appellant. Consequently when appellant's complaint in this case was filed on October 6, 1953, seeking to annul the marriage relationship existing between him and appellee as a result of their marriage on July 12, 1951, no marriage relationship existed between them, and none can exist between them until the divorce decree of October 2, 1952, is canceled and set aside. Under these circumstances appellant could not maintain an action to dissolve or annul a relationship which did not exist.

Affirmed.

Justice McFaddin concurs.

5-415 268 S. W. 2d 617

Opinion delivered May 31, 1954.

[Rehearing denied June 28, 1954.]

Frances D. Holtzendorff, for appellant.

Lasley, Spitzberg, Mitchell & Hays, for appellee.

ED. F. MCFADDIN, Justice. This appeal results from the effort of the husband to obtain a reduction in alimony and support money payments. The Trial Court granted a reduction, and the wife has appealed.

Dr. and Mrs. Grant were married in February, 1942; and their one child, a daughter, was born in April, 1948.

In February, 1952, Dr. and Mrs. Grant separated; and on April 17, 1952, Mrs. Grant obtained a decree in the Pulaski Chancery Court, awarding her a limited divorce, and also recognizing the agreement the parties had made as to property division and the amounts Dr. Grant would pay for alimony and child support. The agreement as to property division appears to have been performed. Dr. Grant made the monthly payments of alimony and child support for several months; and then on September 18, 1952, he filed a motion to have the payments reduced. Mrs. Grant countered with a motion for payment of medical bills incurred. The Chancery Court reduced the monthly payments required of Dr. Grant from $353.00 to $250.00, and denied the motion for medical payments. Mrs. Grant has appealed.

What we said in *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409, is applicable here:

"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. . . ."

At the time the limited divorce decree was made in the case at bar on April 17, 1952, Dr. Grant was receiving a gross annual salary from the Veterans' Administration of $10,698.90; and at the time of the trial from which comes the present appeal, Dr. Grant was receiving a gross annual salary from the Veterans' Administration of $10,949.90. In addition to this salary, Dr. Grant also had at both times a small income from some real estate in another State. Thus, as regards Dr. Grant's income, there has been no change in circumstances so as to justify a reduction in the agreed monthly payments.

Dr. Grant claims that since the divorce decree, Mrs. Grant has taken the child to California; and that such

fact constitutes a change in circumstances (a) in removal, and (b) in increasing Dr. Grant's expenses to enjoy his right of visitation with the child. But the agreement between Dr. and Mrs. Grant—as contained in the decree—specifically recognized that Mrs. Grant might take the child from the State of Arkansas, and that Dr. Grant's payments would be $353.00 per month under such circumstances. As regards these matters, the decree recites:

"The parties have further agreed that in the event the plaintiff should move out of the State of Arkansas, the defendant will travel to the city and state where the said plaintiff and minor child are then residing at his own expense for the purpose of visiting with said minor child if he cares to do so. . . . .

"In the event plaintiff and said minor child move out of the State of Arkansas and cease to occupy the dwelling house described hereinabove, then the defendant has agreed to pay to the plaintiff for her support and maintenance the sum of $176.75 per month, together with an additional sum of $176.75 a month for the support and maintenance of said minor child, making a total of $353.00[1] each and every month until further orders of this court."

From these quoted excerpts, it is clear that Dr. Grant agreed to the monthly payments with the knowledge of the possibility of removal and his increased expenses for visitation; so he cannot be heard to urge these matters as beyond the contemplation of the parties, or as changed circumstances sufficient to justify a reduction of the monthly payments.

Again, Dr. Grant claims that his personal expenses —since the divorce—have been so large as to exhaust his surplus; and he urges such fact as a reason for reducing the monthly payments. But we observe that most of his personal expenses are within his power of control. He cannot urge the items he mentions as sufficient to justify

[1] It is evident that the figures of $176.75 should have been $176.50 in each instance.

a reduction of the monthly payments on the claim of change of circumstances.

We conclude that Dr. Grant has failed to show any such change of circumstances as would entitle him to have the payments reduced. This conclusion makes it unnecessary for us to discuss or decide (a) whether the original agreement between Dr. and Mrs. Grant was a contract within the rule of *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102, and not subject to modification, or (b) whether such agreement between Dr. and Mrs. Grant was within the rule of *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226, and subject to court modification. We pretermit any discussion or decision of that issue.

Mrs. Grant's claim for additional money for medical expenses is denied; but all costs are taxed against Dr. Grant; and Mrs. Grant's attorney is allowed $100.00 for services in this Court, and such amount will also be taxed as costs. The decree of the Chancery Court is reversed and the cause remanded, with directions to reinstate the monthly payments of $353.00, and for further proceedings in accordance with this opinion.

Justices Robinson and Geo. Rose Smith concur.

George Rose Smith, J., concurring. I agree that the decree must be reversed, but I would rest that action upon the ground that the contract between the parties is not subject to the modification now requested by the appellee. A decision upon that ground seems to me to be desirable, since it would prevent the appellee from making in the future fruitless applications for a reduction in alimony.

It is contended that the contract can be modified by the court for the reason that it provides for certain monthly payments "until further orders of this court." But the agreement also provides that if the appellee's earnings should materially increase, the payments to the appellant will be proportionately increased by mutual agreement, or, if the parties cannot agree, the amount of the increase will be determined by the court. Read as a whole, the contract contemplates the possi-

bility that the amount of the payments may be revised upward but not downward. Hence the clause now relied upon by the appellee does not, in my opinion, empower the chancellor to reduce the amount of alimony upon a finding that conditions have changed.

ROBINSON, J., joins in this opinion.

GREEN *v.* STATE.

4764 270 S. W. 2d 895

Opinion delivered June 7, 1954.

[Rehearing denied October 4, 1954.]

Jim Merritt and *Claude M. Cruce,* for appellant.

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

GRIFFIN SMITH, Chief Justice. The defendant, who has appealed to this court, was convicted of grand larceny for the theft of a cow, the property of Annie Lyles. He was sentenced to serve four years in prison. This is a second appeal involving proceedings under an information filed in 1952. See *Green* v. *State,* 222 Ark. 222, 258 S. W. 2d 56.

Thirteen assignments urged as errors are set out in appellant's motion for a new trial. The first three are those alleging that the verdict was contrary to the law, the evidence, and the law and the evidence. A supplemental motion alleged (a) that while one of the attorneys for the defendant was arguing the case and referring to testimony given by Sheriff Towler, the sheriff, who was in a position to be seen by jurors, "made a gesture with his right hand and a finger across his throat, indicating that he was being injured [by the attorney's argument] and [these gestures were particularly directed to the three colored jurors who were seated on the front left side of the jury box a few feet from the officer]. It was noted that [these three jurors] nodded their heads as if to accept the gesture made by the sheriff."

The succeeding supplemental assignment (b) charged that Homer Matthews, a colored juror, had said that he had heard the sheriff discuss certain phases of the case, and during this conversation the sheriff had asserted he was going to send Green to the penitentiary, or kill him.

The third supplemental assignment was that during the day preceding trial the judge announced that he wanted three or four Negroes for jury service, and directed or suggested that their names be placed near the top of the list. The regular panel, according to appellant's motion, did not contain any Negroes, "so the special panel was opened and contained nine [of that race]." Then, according to appellant's contentions, the problem

was ". . . as to which among the nine should be placed on the panel for trial of the action."

The sheriff, it is charged, walked to the clerk who had the list, and "[without] speaking to any one in particular . . . . stated that the first five should be chosen." A further contention is that the clerk replied, in effect, "I don't know about that," and did not attempt to make a selection. Then, says the motion, the sheriff walked to the dais, held a short conversation with Judge Golden, and the Judge told the clerk to take the first five, and this was done. The final complaint under this heading is that ". . . as to qualifications and standing in the community, the four that were omitted from the list did not compare with the five that were selected"—information well known to the sheriff.

We first dispose of matters raised in the supplemental motion, and to sufficiency of the evidence. As to the latter, substantial testimony was given tending to show that the cow had been stolen from Annie Lyles and that the defendant was feloniously implicated, hence a jury question was presented.

It is not shown that the defendant was in any manner injured by the sequence in which the Negro jurors were selected, and we fail to see wherein the court abused its discretion. There was no timely objection—no suggestion that the arrangement was unsatisfactory.

Whether the sheriff made gestures, to which there were inferential responses by the Negro jurors referred to by appellant, is not shown by any evidence. It is true that in the supplemental motion counsel for Green stated that he "offers to prove the allegations" or conclusions, but the only record reference to the supplemental motion appears to be a docket entry and nothing in it shows that the court refused to consider any pertinent matters. We have held that docket entries are not evidence. In *City of Monticello* v. *Kimbro,* 206 Ark. 503, 176 S. W. 2d 152, cases sustaining this rule were cited, including *Baker* v. *Martin,* 95 Ark. 62, 128 S. W. 579. In the Baker case Chief Justice McCulloch said that recitals in the bill of

exceptions cannot be looked to in order to ascertain whether the motion for a new trial had been presented to and overruled by the court, [for] "an order overruling a motion for a new trial is one which should appear on the records of the court." See per curiam orders of Oct. 22, 1945, and Oct. 4, 1948—*Hazelip* v. *Taylor,* No. 7723, and *Woods* v. *Pankey,* No. 8655.

But irrespective of the procedural rule excluding docket entries as substitutes for court orders, we would reject the assignment as a mere conclusion of the movant.

The next assignment relates to the court's rejection of a juror for cause. When Wiley Baker's name was called he stated, in response to a court question, that he had served during the last court term. Judge Golden seriously doubted Baker's eligibility, in view of the limitations fixed by Act 205 of 1951, Ark. Stat's, (supplement), § 39-225. Baker was accepted by each side, but was later excused by the court through fear that ineligibility might be assigned as error. Assuming, without deciding, that the disqualification could be waived, appellant has failed to show that he was prejudiced by the ruling. Insistence is that when the juror was removed the defendant had exhausted his challenges. He does not, however, show that the person accepted in lieu of Baker was objectionable, or that the court on request would not have excused a questioned substitute under a rule of fairness if the person objected to could with reason be regarded as unfit, or favorable to the state's view of the transaction.

We have often said that a litigant is not entitled to a particular juror. *Rose* v. *State,* 178 Ark. 980, 13 S. W. 2d 25.

Inadmissibility of statements made by the witness Brown Calhoun is strongly urged. Calhoun operates the Drew County Auction Sale, where livestock is dealt with. He testified that Raymond Donaldson had been buying and selling cattle. The prosecuting attorney asked Calhoun whether, about June 26th, 1952, he had bought a red heifer (with white face) from Raymond Donaldson. Cal-

houn's reply was that he didn't buy the animal, [but] "I gave him his money back and held the heifer to see if I could find the owner."

Donaldson, said Calhoun, came to the sales lot during the morning bringing some calves, including the one alleged to have been stolen. Donaldson commented that he wanted to sell *that* calf. Calhoun got on the truck, made his inspection, and (in his testimony) said that he remarked that the calf was too gaunt. He also asked Donaldson where he got it. When Calhoun was about to testify what Donaldson told him the questioning was interrupted by an objection that the answer would be hearsay, and the objection was sustained. The court's remarks were: "You can't tell what Donaldson told you, [but] you can tell what he did."

After being told a second time that it was not permissible to repeat anything that Donaldson had said, the witness replied, "Well, I told Donaldson the calf was 'hot.'" When an objection was offered to this statement the court ruled: "This is not hearsay. It is not what Raymond Donaldson said. He is saying what he told Raymond." The final objection was that Calhoun's remarks to Donaldson were made in the defendant's absence; that Calhoun was merely assuming that the calf was "hot," and that the testimony was irrelevant, incompetent, and immaterial. When the court again held that the witness could repeat what he, himself, had said, the objection was renewed, with exceptions when the court reasserted Calhoun's right to tell what his statements had been.

While it is the better practice not to permit a witness to relay his own conversations, the objection does not come within the hearsay rule.

Hearsay is defined as evidence which derives its value in part or in whole from the veracity and competency of some person other than the one who is testifying. It has been held that where it becomes relevant to show that certain statements or declarations were made, such testimony is not hearsay and should be admitted. It is

evidence of what is sometimes spoken of as verbal facts. *State* v. *Corbin,* West Virginia Supreme Court of Appeals, 186 S. E. 179. In *Spivey* v. *Platon,* 29 Ark. 603, it was said that where a witness testifies to a fact without disclosing the source of his knowledge, such testimony will not be excluded on the presumption that it is hearsay; but the court [or jury] will attach less weight to it than would be the case if the means of information were made to appear, with a showing that the factual matter came from personal knowledge of the witness.

Even if the testimony should fall within the hearsay rule, its admission may be rendered proper by the difficulty of obtaining other proof, and because of the peculiar circumstances under which the declarations were made. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Gibson,* 113 Ark. 417, 168 S. W. 1129.

In *Motors Insurance Company* v. *Lopez,* 217 Ark. 203, 229 S. W. 2d 228, the plaintiff procured a judgment on a contract indemnifying the insured under an automobile collision policy. An error urged by the appealing insurance company was that prejudicial hearsay evidence was admitted when Lopez was permitted to testify, immediately after he had signed the loss or damage agreement, that the garage operators told him that the car—after receiving the repairs contemplated—would not be in as good condition as it was before the wreck: that "anybody would be able to tell it was a wrecked car, and that it would never again be as good a car as it had been before the wreck."

In the opinion, written by Mr. Justice LEFLAR, this statement appears: "If the evidence was received or considered by the jury for the purpose of establishing the truth of what was asserted in it, that is, for the purpose of proving the extent to which the car was damaged, it was inadmissible hearsay, and prejudicial error was committed in allowing it to go to the jury. If on the other hand the mere fact that the statements were made to and heard by Lopez was itself relevant to some issue in the case, and the jury was restricted to consideration of the

statements on that issue alone, there would be no violation of the hearsay rule. See 2 Ark. L. Rev., 26. A statement made out of court is not hearsay if it is given in evidence for the purpose merely of proving that the statement was made, provided that statement be otherwise relevant in the case at trial."

The Lopez jury was admonished that the testimony could be considered in determining why the plaintiff refused to accept a settlement offer, but it could not be considered "as going to the actual damage to the car."

In the case at bar there is no contention that Calhoun's statements that the calf was "hot" meant that he knew or had information that it had been stolen by Green. He was merely discussing with Donaldson a business transaction and explaining why, as between the two, the calf was a risky purchase.

The next contention is that the court erred to the defendant's prejudice in excluding from the jury's consideration a transcript of the testimony given by Annie Lyles at the first trial. The ruling was: "Annie Lyles has been on the stand [and has been] cross-examined from the record. She may be recalled now if [the defendant] wishes any additional testimony [from her]."

The ruling was correct. There is no contradiction of the court's statement that the witness had been examined and cross-examined, and that the very record offered in evidence was used in the cross-examination, presumptively for impeachment purposes. Annie Lyles admitted that during the first trial she was not as emphatic in her testimony as at this hearing. Her explanation was that she did not want to incur hard feelings.

But a controlling reason for not permitting the record to be introduced as a whole is that the method proposed would have deprived the witness of any opportunity of explaining her original testimony, or of asserting that the reporter had incorrectly written or transcribed her evidence. The court's offer to recall the witness was all the defendant could with reason request. Ark. Stat's § 28-713, has no application to the facts here.

On cross-examination the defendant was asked whether, in the presence of the sheriff, prosecuting attorney, and possibly others, he had admitted stealing the calf. He denied having made a confession, the substance of which had been testified to by Sheriff Towler. In an effort to procure a clear-cut answer the prosecuting attorney said: "I am not trying to put you in an embarrassing position: I really am not. But it is important here because you heard Mr. Towler testify, and I am going to have to ask you for a direct answer as to whether or not Mr. Towler's testimony is correct?" It was objected that Towler was a white man and the defendant was a Negro, therefore an unequivocal reply would be embarrassing. The court's comment was: "The witness knows whether [Towler's] testimony [is or is not] true. There is no distinction in color: we tried to wipe that out." The defendant's counsel then said, "He can answer [the question] without having to make that direct statement." The court's ruling was: "I will leave it up to the jury [to determine] whatever they believe and think is right." Exceptions were saved, but the witness did not answer the question. It must be assumed, therefore, that under the court's ruling he was not required to do so.

Sheriff Towler was recalled after the defendant had testified. He had previously stated that Green had made a voluntary confession—a fact denied by the defendant. The prosecuting attorney asked this question: "As the chief law-enforcement officer of Drew county, . . . would you tell a lie to send a man to the penitentiary"?

This, of course, is not an appropriate method of proving or disproving veracity. But it must be remembered that under the tension of trial where the requirement for prompt action is always present the niceties of examination and cross-examination cannot always be observed. We must, on appeal, determine whether particularized conduct, even though improper, was prejudicial; or, if prejudicial, was the matter waived? In the transcribed testimony the answer appears to have been given before the court made an affirmative ruling, but following coun-

sel's comment that exceptions were saved the reporter has written: "Defendant's objection being overruled, he saves his exceptions." There is no way to determine whether the objection was made before or after the court ruled—if, in fact, there was a ruling. A request that the jury be admonished to disregard the question in the form it was asked would have been in order, but it was not made.

We have examined the instructions—those given and refused—and do not find an erroneous declaration of the law or a failure to submit issues to which the defendant was entitled; nor do we find error in any of the other points argued as grounds for reversal.

Affirmed.

Mr. Justice George Rose Smith, Mr. Justice Millwee and Mr. Justice Robinson dissent.

Robinson, J., dissenting. In my opinion there are two errors in the record which call for a reversal. Therefore I respectfully dissent.

First, the testimony of Brown Calhoun was an expression of an opinion as to one of the principal issues in the case, the question of whether the animal was stolen was admitted over the objection and exception of defendant, and constitutes reversible error. At the time Calhoun expressed his opinion, the evidence of which was allowed to go to the jury, he did not pretend to know anything about the animal as a fact. The record clearly shows his opinion was based on mere suspicion. There is no rule of law permitting the introduction of opinion evidence such as given by the witness Calhoun in this case. He gave as his opinion testimony that the animal involved was "hot"; it is a matter of common knowledge that this is a term frequently applied to stolen property. "Conclusions of law or of fact upon which the decision of the case depends are not permissible to be drawn in evidence by expert witnesses." *Underhill on Criminal Evidence,* 4th Ed., p. 437. Prof. Underhill also says, in the same volume, page 436.

"Ultimate facts directly in issue are for the determination of the jury, and not for an expert witness." Here one of the ultimate issues was whether the animal had been stolen.

In *Criglow* v. *State,* 183 Ark. 407, 36 S. W. 2d 400, Mr. Justice Frank Smith said: "But the question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer, This was a question upon which one man as well as another might form an opinion, and the function of passing upon the credibility and weight of testimony could not be taken from the jury. *Dickerson* v. *State,* 121 Ark. 564, 181 S. W. 920; *Mitchell* v. *Lindley,* 148 Ark. 37, 228 S. W. 728."

Next, the action of the court in excusing a juror after all the defendant's peremptory challenges had been exhausted, when the juror had been accepted previously by both the state and the defendant was error. In selecting the jury, the second venireman called was Wiley Baker. During his *voir dire* examination it developed that he had served as a juror at the last term of court. Upon ascertaining this fact, the record shows the following: "By the Court: 'Do you want to raise that as a question? I seriously doubt he can serve. You are going to have to specifically waive it because under the law now he is not supposed to serve but once every two years.' By Mr. Merritt: [counsel for defendant] 'Because of the small number of jurors we have to select the jury from, we are going to waive it.' By Mr. Linder: [prosecuting attorney] 'Mr. Baker is a perfectly good and acceptable juror to the State but I would like to raise the question as to whether or not the defense counsel can waive that.' By the Court: 'I am going to tentatively pass him and reserve my ruling. I might take him off for cause later.' Whereupon the said Wiley Baker is accepted by both sides as No. 2 on the list of jurors to try the case. Thereupon after eleven jurors had been accepted as 'Good' and after the State had exhausted four

challenges and the Defendant eight challenges, the Court makes the following statement in Chambers: By the Court: 'As the law says a person is not eligible to serve as a juror except every two years I am going to excuse Mr. Baker. By Mr. Merritt: 'The defendant agreed to accept the juror and after having exhausted his challenges then the attorney for the State reraised the question with the Court and as a result the juror was excused and we object, and save our exceptions.' "

It is clear from the record as above quoted that both the prosecution and the defendant accepted Baker as a juror, but there was some doubt in the mind of the prosecuting attorney as to whether the ineligibility of the juror could be waived by the defendant. With this point under consideration the court reserved a ruling until later, but in the meantime Baker was accepted as a juror; when he was accepted, the defendant had not exhausted any of his peremptory challenges. After eleven jurors, including Baker, had been accepted and the defendant had exhausted all of his peremptory challenges, the court excused Baker over the objection and exception of defendant. Evidently the court had come to the conclusion that the defendant could not waive the disqualification of a juror, as no other reason is assigned for excusing Baker.

In this conclusion the court was in error; this Court has held several times that the disqualification of a juror may be waived; in fact, the disqualification can not be raised after the verdict if the defendant, through failure to exercise diligence failed to discover the disqualification and make proper objection before the jury was impanelled. *Daniel* v. *Guy,* 23 Ark. 50; *James* v. *State,* 68 Ark. 464, 60 S. W. 29; *Doyle* v. *State,* 166 Ark. 505, 266 S. W. 459. The state and the defendant had specifically waived their right to challenge the juror for cause, and had accepted him.

An attorney trying a case uses his peremptory challenges in accordance with the number of jurors remaining to be selected. No trial lawyer would exhaust his last peremptory challenge with several jurors

yet to be chosen, except in the most unusual circumstances or extreme emergency. But the last peremptory challenge is often used after eleven jurors have been selected; at that point the identity of the last venireman to be called is usually known.

It is argued that no prejudice is shown to the defendant in excusing the juror previously selected after all the defendant's peremptory challenges were exhausted. In that connection in *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709, the court said: "It is true that we cannot certainly say just how the discharge of these jurymen was prejudicial to the defendant. Indeed, we may not be able to say positively that it was prejudicial to him at all; but at the same time we cannot say that it was not detrimental to him, and in fact we are rather inclined to think it was. But this uncertainty is, of itself, a strong argument against the propriety of such a procedure." The cause was reversed by reason of the court's action in permitting a juror to be excused after defendant's challenges were exhausted.

In *McGough* v. *State,* 113 Ark. 301, 167 S. W. 857, the court said: "The defendant exhausted all of his challenges, and after he had done so the State was permitted, over his objection, to challenge three of the jurors who had been previously selected. It has been held that the court may, in its discretion, permit the state or the defendant to exercise peremptory challenges after having accepted a juror; but it has also been held that an election by the State to challenge a juror, after his acceptance by both parties, must be exercised before the defendant has exhausted his challenges, and it can not thereafter be done."

In all the cases in this state we have found, with the exception of one, it is clearly stated or implied that it is reversible error to permit a juror previously accepted to be excused after all of defendant's challenges have been exhausted.

"The record does not show that at the time the court permitted the prosecuting attorney to exercise a

peremptory challenge on a juror who had been previously accepted that the appellants' right to peremptory challenge had then been exhausted. The panel had not been completed, and the appellants at that time still had the right to one peremptory challenge." *Ruloff and Berger,* v. *State,* 142 Ark. 477, 219 S. W. 781.

"It is also contended by counsel for defendant that it was error for the court to permit the State to peremptorily challenge the juror G. W. Gunter. The juror was accepted on the first day of the trial and on the next day after the defendant had exhausted all of his challenge but one the State was permitted to exercise a peremptory challenge and excuse Gunter from the jury. Thus it will be seen that the defendant had not exhausted all of his peremptory challenges, and the Court, in the exercise of its discretion, could permit the State to peremptorily challenge the juror after he was accepted on the jury." *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582.

"These cases do not support the defendant in his contention, for there is no showing made that at this time the challenges of the defendant had been exhausted." *Hannah* v. *State,* 183 Ark. 810, 38 S. W. 2d 1090.

"It is not shown that the defendant had exhausted his peremptory challenges when the jury that tried him was completed; and that he was prejudiced by the discharge of McNew. Unless it so appeared, it was within his power to protect himself against the impanelling of an objectionable juror on account of the discharge of McNew. The record fails to show any reversible error in that respect was committed." *Bevis* v. *State,* 90 Ark. 586, 119 S. W. 1131.

Temple v. *State,* 126 Ark. 290, 189 S. W. 855, is directly in point. There the court said: "It was held in some of these cases that the court, in its discretion, might permit the State to use a peremptory challenge on a juror who had been accepted by both sides where the defendant had not exhausted all his peremptory

challenges; but in all the cases in which it was held not to have been error to permit this action, the defendant had not exhausted his peremptory challenges. The test seems to be whether the defendant has remaining as many challenges as the State is permitted to exercise, and upon the authority of these cases, the judgment of the court must be reversed."

In *Collins* v. *State,* 200 Ark. 1027, 143 S. W. 2d 1, the action of the trial court was sustained in permitting the state to challenge a juror after the defendant had exhausted all of his challenges; but in that case the trial court offered to permit the defendant to exercise an additional peremptory challenge, and therefore on that point is distinguishable from all the other cases heretofore cited, and is not in point with the case at bar, because here the trial court did not offer to permit the defendant to exercise an additional challenge.

In my opinion the law in this state up to this time has been well settled that it is reversible error to excuse a juror who has been selected by both sides after the defendant has exhausted all of his challenges.

Justices MILLWEE and GEORGE ROSE SMITH join in this dissent.

LATHROP *v.* SANDLIN.

5-439 268 S. W. 2d 606

Opinion delivered June 7, 1954.

O. J. Fergeson and *Caviness & George,* for appellant.

Lynn Wilson, for appellee.

WARD, J. On November 1, 1926, one D. A. Ward executed a deed to his wife, Susan J. Ward, purporting to convey Lot 10, Block 5, in the town of Plainview and also their homestead consisting of four and one-half acres. The description of the four and one-half-acre tract was indefinite and both parties to this appeal agree that it does not describe the parcel of land in question. This deed, which we shall hereafter refer to as the "1926 deed" and which was filed for record February 25, 1927, was irregular in form and phraseology as is shown by the following excerpts therefrom. The granting clause reads as follows:

"Do hereby grant, bargain, sell and convey unto the said Susan J. Ward and unto her heirs and assigns forever, the following lands lying in the County of Yell and State of Arkansas, to-wit: *Durinh er* [during her] *naturenal* [natural] life *anf* [and] after life and after death shall return back to *her* bodily heirs." (Emphasis and brackets supplied.)

The habendum clause reads as follows:

"To have and to hold the same unto the said Susan J. Ward, during her natural life and at her death the above land shall return back to *my* bodily heirs." (Emphasis supplied.)

The record shows another deed from D. A. Ward to Susan J. Ward, dated March 20, 1936, filed for record July 19, 1949, conveying a fee simple title, in regular form, to lots 9 and 10, block 5, of Plainview and also to the four and one-half-acre homestead by a definite and correct description.

On November 5, 1952, Susan J. Ward deeded all the property described in the 1936 deed to appellees, J. R. Sandlin and Josie Sandlin. D. A. Ward died April 4, 1952, and Susan died June 6, 1953.

On August 11, 1953, this suit was instituted by appellants as the heirs of D. A. Ward against appellees, alleging the execution of the several deeds mentioned above, stating they were the owners of the land because Susan J. Ward received only a life estate in the property by virtue of the 1926 deed and consequently had no interest which she could convey to appellees, alleging the sole effect of the 1936 deed was to reform the first deed and only to the extent of correcting the description of the four and one-half acre tract. The prayer was: That the 1926 deed be reformed as to description only, that the 1936 deed be declared void except for the purpose of reforming the first deed, and that the deed to appellees be removed as a cloud on their title. Appellants filed two additional pleadings in which other issues were raised but they are not inconsistent with the conclusion we hereafter reach, and so need not be discussed.

In appellees' answer and amended answer they allege it was the intent of Susan J. Ward to receive a fee simple title by the 1926 deed; if the 1926 deed is held not to convey a fee then it should be reformed as a fraud on Susan J. Ward, and, in the alternative, that the 1936 deed conveyed a fee title to Susan J. Ward. The prayer was that they be decreed a fee title to all of said property and that appellants' complaint be dismissed.

At the conclusion of the testimony the chancellor found that the 1926 deed should be stricken because there was no acceptance by Susan J. Ward, and appellants' complaint was dismissed. From this decision appellants prosecute this appeal.

There is no dispute about the factual situation as it relates to the issues herein discussed. D. A. Ward, who had children by a former wife, married Susan in 1920. To the latter union no children were born. After marriage it appears that Susan advanced her husband a loan

of approximately $3,000 and in order to secure the loan he took out a $5,000 insurance policy payable to her. After making several payments the policy was allowed to lapse and, apparently in lieu of the policy, D. A. Ward executed the 1926 deed and the 1936 deed, both of which recited a consideration of $3,000.

The 1926 deed, insofar as the homestead is concerned, was ineffective to convey any title to Susan or to create a remainder in appellants because of the defective description. See *Howell* v. *Rye, et al.,* 35 Ark. 470; *Adams and Another* v. *Edgerton,* 48 Ark. 419, 3 S. W. 628; *Northern Road Improvement District of Arkansas County* v. *Zimmerman,* 188 Ark. 627, 67 S. W. 2d 197, and *McClelland* v. *McClelland,* 219 Ark. 255, 241 S. W. 2d 264.

Appellants' action to have the 1926 deed reformed cannot be sustained because this conveyance, insofar as their claim is concerned, was voluntary. They paid nothing to their father and he was under no legal obligation to convey to them the homestead. See *Smith* v. *Smith,* 80 Ark. 458, 97 S. W. 439; *Wells* v. *Smith,* 198 Ark. 476, 129 S. W. 2d 251; *Kaylor* v. *Lewis,* 212 Ark. 785, 208 S. W. 2d 185, and *Ketchum* v. *Cook,* 220 Ark. 320, 247 S. W. 2d 1002.

Since appellants cannot reform the 1926 deed to make it an effective conveyance of the homestead, D. A. Ward's deed to Susan in 1936 conveyed to her a fee simple title. The same is true as regards said lot 9 because it was not included in the 1926 deed.

The conveyance of the homestead to Susan by the 1936 deed was not in violation of Ark. Stats., § 50-415. This section in effect says that a conveyance of a homestead by the husband is invalid unless signed by the wife, but we have consistently held that this restriction does not apply to a conveyance by a husband to his wife where the conveyance is accepted by her. There is no contention here that Susan did not accept the 1936 deed. In *Kindley* v. *Spraker,* 72 Ark. 228, 79 S. W. 766, the court said:

"We think the conveyance by the husband directly to his wife, which meets her approval, shows her consent to it, and meets the intent of the act to the same extent as a conveyance by the husband to a third person in which the wife joins."

In conformity with the above, we conclude that the trial court was correct in dismissing appellants' complaint insofar as it relates to said lot 9 and the four and one-half acre homestead. Lot 10 presents a different situation.

The 1926 deed contained a proper description of said lot 10 and therefore need not be reformed in order to constitute a valid conveyance as to that lot. This deed, as we gather the intent of the grantor from the language in the deed itself, conveyed only a life estate to Susan J. Ward with the remainder to the bodily heirs of D. A. Ward. As stated before Susan Ward left no bodily heirs.

We do not entirely agree with the chancellor's finding that Susan J. Ward did not accept the 1926 deed. We think the evidence is clear that she did accept it insofar as it was an effective conveyance, *i. e.,* as to lot 10. It was retained for approximately four months and then placed of record. The registration of a deed raises a presumption of its delivery and acceptance where it is beneficial to the grantee. *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033. The evidence also shows that she was aware of the existence of the 1926 deed and that she attempted to collect rents from the property conveyed. This acceptance, however, in no way prevented her from also accepting the 1936 deed.

Therefore the bodily heirs of D. A. Ward, who are the appellants here, had an interest in said lot 10 by virtue of the 1926 deed that could not be extinguished by the 1936 deed which they did not sign. This Court has uniformly held that a remainderman has such an interest as will sustain a suit to prevent waste. *Watson* v. *Wolff-Goldman Realty Company,* 95 Ark. 18, 128 S. W. 581, and *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379. The former case cited with approval *Kollock* v.

Webb, 113 Ga. 762, 39 S. E. 339, which held a remainderman had this right whether his interest was vested or contingent. In *Tatum* v. *Tatum,* 174 Ark. 110, 295 S. W. 720, the right of a contingent remainderman was said to be similar to the inchoate right of dower. We conclude therefore that the trial court was in error in dismissing appellants' complaint insofar as it relates to said lot 10.

The decree of the trial court is affirmed insofar as it affects lot 9 and the homestead, it is reversed insofar as it affects lot 10, and is remanded with directions to the trial court to enter a decree consistent with this opinion.

ROGERS *v.* STILLMAN.

5-421 268 S. W. 2d 614

Opinion delivered June 7, 1954.

Sid J. Reid, for appellant.

Ed F. McDonald, for appellee.

MINOR W. MILLWEE, Justice. Appellant, L. H. Rogers, and appellee, A. G. Stillman, own adjacent livestock farms in Grant County. Appellee brought this action against appellant to recover damages which he allegedly sustained in the sum of $1,000.00 on account of the destruction of a hay meadow, corn crop and fences by appellant's cattle which were knowingly allowed to run at large along a public highway in the vicinity and broke into appellee's fenced fields. Trial resulted in a verdict and judgment in favor of appellee for $400.00.

For reversal it is first insisted that the trial court erred in refusing to direct a verdict in favor of the appellant. It is contended that the verdict is based on speculation and conjecture, and that there is a total lack of evidence to prove the cash value of the crops destroyed or to "prove the measure of damages involved." It is undisputed that appellant, before and since the trespass complained of, has allowed his cattle to run at large along a public road that divides the two farms. Appellee offered testimony showing that he caught 15 or 16 head of appellant's cattle in his field after he had notified appellant that said cattle were eating up his crops. He succeeded in corralling seven of the cattle and pointed out to appellant the damage done when the latter claimed and accepted the cattle. Appellee and others testified that the cattle destroyed a sudan grass hay meadow which was fully matured and would make 900 to 950 bales of hay. They further testified that said hay meadow had a cash value of $600.00 at the time it was destroyed. They also testified that 2½ acres of corn were destroyed which would have produced 60 to 65 bushels and that a pasture and fences were damaged in the sum of approximately $275.00. This testimony was admitted without objection. Appellant did not deny that his cattle damaged appellee's crops but insisted that appellee's fences were in bad repair. He first stated that appellee's meadow consisted of unmatured Johnson grass, but later testified

that some of it was mature and "had done headed." He thought sudan grass hay was only worth 50¢ a bale while appellee's witnesses testified it was worth 75¢ to $1.25 per bale.

Both parties rely on the case of *Farm Bureau Lumber Corp.* v. *McMillan,* 211 Ark. 951, 203 S. W. 2d 398, where a judgment for damages was affirmed upon testimony similar to that adduced in the instant case. It is true that in the case at bar, as in that one, there was no direct proof as to actual cost of gathering and marketing the damaged hay crop. However, the witnesses in both cases testified that the hay was growing and had a certain value at the time it was destroyed. Appellee's witnesses testified that the growing hay crop here had a cash value of $600.00 at the time of its destruction. In addition, 2½ acres of corn were destroyed and a pasture and fences were damaged in the amount of $275.00, according to appellee's witnesses. In determining the extent of the loss the jury had a right to take into the jury box with them their common sense and experience in the every day affairs of life. See *Missouri Pacific Railroad Co.* v. *Benham,* 192 Ark. 35, 89 S. W. 2d 928, and cases there cited. In our opinion the testimony offered by appellee was sufficient to sustain the verdict of $400 and the trial court correctly refused to direct a verdict for appellant.

It is next contended that the court erred in giving the following instruction over the general objection of the appellant: "You are instructed that it is a violation of law, in this State, for an owner of livestock to allow said stock to run at large along or upon the public highways of this State. If you find from a preponderance of the evidence that the defendant allowed his stock to run at large along or upon the public highways and that they damaged plaintiff's property then you are told that this is a circumstance which you may consider along with all the other facts and circumstances in the case in determining whether the defendant is liable." This instruction is based on Initiated Act No. 1 of 1950 (Acts 1951, p. 1013), which made it a misdemeanor for the owners of

cattle and certain other livestock to allow them to run at large on any public highway in the State. The instruction is unambiguous and correctly states the law. We have frequently held that, while the violation of a statute does not constitute negligence *per se,* it is evidence of negligence which the jury may consider, along with the other facts and circumstances, in determining the negligence or non-negligence of the defendant. *Mays* v. *Ritchie Grocer Co.,* 177 Ark. 35, 5 S. W. 2d 728; *Gill* v. *Whiteside-Hemby Drug Co.,* 197 Ark. 425, 122 S. W. 2d 597. There was no error in the giving of the instruction.

There was also a general objection to Instruction No. 2 requested by plaintiff and given by the court. This instruction defined a public highway. Although appellant says the instruction was prejudicial and misleading, there is no contention that the definition given is incorrect. Since there was no error in the giving of Instruction No. 1, it was entirely proper for the court to define "public highway."

It is also argued that other instructions given at appellee's request were inherently erroneous because they were based on said Initiated Act No. 1. Appellant has not pointed out such error nor do we find it.

Affirmed.

PENCE *v.* PENCE.

5-402 268 S. W. 2d 609

Opinion delivered June 7, 1954.

Wayne Foster, for appellant.

Edward H. Boyett and *Terral & Rawlings,* for appellee.

ED. F. MCFADDIN, Justice. This is a proceeding to obtain judgment for child support payments alleged to be past due and unpaid. The Chancery Court refused judgment, and this appeal ensued.

On February 5, 1942, the Pulaski Chancery Court awarded Mrs. Winnie Pence (the present appellant) a divorce from her then husband, Royce Pence (the present appellee). In the divorce decree, Mrs. Pence was awarded the custody of their infant child, Charles Royce Pence, and was awarded the sum of $2.50 per week for the maintenance of the said minor child. The decree gave Mrs. Pence the custody of the child, and made no provision for the father's right of visitation, because such visitation rights seem to have been mutually agreed upon outside of the decree. The child visited Mr. Pence over the week-ends until Mr. Pence entered the naval service on March 3, 1942. The maintenance payments had been regularly made to that time.

Mr. Pence was in the United States Navy, and he made an allotment of $15.00 per month for the benefit of his son, Charles Royce Pence, and this allotment was regularly paid by the Navy until May, 1945. Even though these monthly allotments were in excess of the amount ordered by the Court, nevertheless, Mr. Pence claims no credit for such monthly overpayments. *Loomis* v. *Loomis,* 221 Ark. 743, 255 S. W. 2d 671.

In May, 1945, Mr. Pence stopped the allotment, and made no further monthly payments; and on September 18, 1953, Mrs. Pence filed motion in the original proceedings in the Pulaski Chancery Court for $1,285.00 as the accumulated monthly payments at $2.50 per week. Mr. Pence resisted the motion for judgment; and the evidence disclosed that Mr. Pence and his family had been unable to locate the whereabouts of Mrs. Pence and the boy, Charles Royce Pence, from 1944 until the filing of

this motion in September, 1953. The evidence showed that shortly after the divorce in 1942, Mrs. Pence married a Mr. Weaver, and divorced him in a few weeks; and then married her present husband, Mr. Nelson. We will continue to refer to her as Mrs. Pence.

In 1944, Mr. Pence was coming home from the Navy on a 30-day furlough, and he wrote his mother to ask Mrs. Pence to let him have the boy for a visit during the furlough. Mrs. Pence refused the request; and just before Mr. Pence reached Arkansas, Mrs. Pence wrote Mr. Pence's mother a postcard from some Western State, saying: "We are on our way to the coast. Don't know where we are going or when we will be back." Mr. Pence's mother sent telegrams trying to locate Mrs. Pence, and offered to send someone up to get the boy and to return him safely. Mrs. Pence had lived in Joplin, Missouri, but the Telegraph Company was unable to make any delivery. Mrs. Pence testified that after leaving Joplin, they lived for a time in Washington and Oregon, and then returned to Joplin, Missouri. It was not until 1950 that they finally returned to Arkansas to live. They have lived at Bauxite, Arkansas, since 1950.

The sum of $40.00 (from the Navy allotment money) remained in the registry of the Pulaski Chancery Court until June, 1947. When Mrs. Pence wrote for that money in 1947, a check was sent to her. She denies the receipt of this payment, but the cancelled check bears an endorsement strikingly similar to her admitted writing.

At the hearing in the Pulaski Chancery Court on October 29, 1953, the Court directed Mr. Pence to pay into the Registry of the Court $40.00 every two weeks thereafter for the future support of his son; and Mr. Pence raises no objection to that order. The Court refused to award Mrs. Pence judgment for the payments of $2.50 per week from 1945 to 1953, and she has appealed from such refusal. She claims that the case of *Sage* v. *Sage,* 219 Ark. 853, 245 S. W. 2d 398, is in point; that it requires that she have judgment for the unpaid and accumulated monthly payments. The issue in this case is

whether the law and the facts in *Sage* v. *Sage, supra,* require Mrs. Pence to receive judgment for all the payments due and unpaid from 1945 to 1953.

In *Sage* v. *Sage,* it was held that accrued installments, decreed as support money, become fixed with rendition of the judgment and the court is without power to remit them. The opinion contains a citation from 27 C. J. S. 1238, in which it was stated that payments exacted by the original decree become vested. This Court's opinion then said that in Minnesota it had been held that payment of accrued installments were only suspended "until the child" (for whose benefit the judgment was rendered) "was returned to the jurisdiction of the court." In using the word "suspended" there was not an intention to say that the payments were extinguished during the period covered by contumacious conduct. But there is a distinction between cancellation of the indebtedness by court action, and a course of conduct by the child's mother—conduct exemplified by circumstances showing that the amounts involved were supplied by the mother for her own convenience. Insofar as the child was concerned, it received payment. As to the mother, she waived the right to claim repayment for her own benefit.

We reach the conclusion that Mrs. Pence is entitled to judgment for payments of $2.50 per week from June 15, 1950, to October 29, 1953, which totals $425.00. But we conclude that she is not entitled to judgment for any unpaid amount prior to June 15, 1950, because from 1944 until June 15, 1950, she had the boy outside the jurisdiction of this Court, and thereby prevented visitation rights to Mr. Pence. We hold that the right of Mrs. Pence to enforce the payments was suspended until June, 1950, when she returned the child to this State. The rule is stated in *Sage* v. *Sage, supra:*

"There are a few states which hold that accrued installments may be remitted or modified. One such state is Minnesota from which appellee cites *Eberhart* v. *Eberhart,* 153 Minn. 66, 189 N. W. 592. In this case, however, we understand the holding to be that payment of accrued installments was only suspended until the child was re-

turned to the jurisdiction of the court. We agree with this conclusion as we understand it."

In the cited case of *Eberhart* v. *Eberhart,* the Minnesota Court said:

"The plaintiff has taken the child from the jurisdiction of the court. So long as she keeps him without the jurisdiction, the defendant should be relieved from the payment of support money to accrue in the future and that already accrued should not be enforced against him."

In 1944 Mrs. Pence, without permission of the Pulaski Chancery Court, deliberately decided to take the boy to the Pacific Northwest. Evidently she determined that the financial returns to herself would outweigh the $2.50 per week she would receive from the order of the Pulaski Chancery Court. Mr. Pence and his family continued to look for the child, but were unable to find him. Now, after a lapse of years, Mrs. Pence wants all of the accumulated payments, without having allowed Mr. Pence —in the intervening years—to have the pleasure of seeing his child. Equity cannot aid her in such a situation. In *Antonacci* v. *Antonacci,* 222 Ark. 881, 263 S. W. 2d 484, in a somewhat similar situation, the Chancery Court refused to render judgment for $500.00 for unpaid installments of maintenance, because the mother had kept the child in California during the time that such payments accumulated. The situation in that case points the way to our holding here.

The Chief Justice and Justice MILLWEE agree with the views herein expressed; Justice ROBINSON expresses his views in a separate opinion, and believes that Mrs. Pence is not entitled to as much as this opinion gives her. Justices HOLT, GEORGE ROSE SMITH, and WARD, in their dissenting opinion, believe that Mrs. Pence is entitled to the full amount she claims. The effect of these various views results in the composite conclusion now made:

The decree of the Chancery Court is reversed and the cause is remanded, with directions to enter judgment in

favor of Mrs. Pence for $425.00 as the accumulated unsuspended and unpaid payments due up to October 29, 1953.

ROBINSON, J., concurring and dissenting. These parties were divorced in 1942. Pence paid support for the child in excess of the amount provided in the order of the court until 1945. $40 paid during this time remained in the registry of the court uncalled-for until 1947. Mrs. Pence made no effort whatever to contact Pence or to collect payment subsequent to May, 1945, until the motion was filed in September, 1953, a period of more than 8 years. She was married twice after her divorce from Pence. Pence married again and has a child by that marriage. He earns $400.00 per month and there is no showing that he has accumulated any savings. To require him to pay the entire sum in arrears, or a large portion thereof, would be wholly inequitable.

Of course Pence owes for the support of his child; and he would owe for such support without a court order. *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677. Obviously the child was supported by someone, and Mrs. Pence furnished such support; but the question is, can she recoup for her expenditures over the eight year period, or is she barred by laches from recovering for a period greater than some reasonable period prior to the time she filed her motion to enforce payment? Although appellee does not plead laches by using that word in his response to appellant's motion, he did plead that appellant had waived her right to the collection of the amount in arrears, and he further pleaded the statute of limitation. The court made a finding that appellant had kept the child concealed from the father, and had waived her right to the aid of the court in reducing to judgment any payments which fell due during that period. Thus the court treated the complaint as alleging laches, and as heretofore stated there was a specific plea of waiver.

Laches is "The established doctrine of equity that, apart from any question of statutory limitations, its courts will discourage delay and sloth in the enforcement of rights. Equity demands conscience, good faith, and reasonable diligence. In their absence the court will not act. The object of the doctrine of laches is to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes, there is danger of doing injustices, and there can be no longer a safe determination of the controversy." Ballantine's Law Dictionary, 2nd Edition.

The doctrine of laches is a species of estoppel and rests upon the principle that if one remains silent when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent; and further, the equitable maxims that he who seeks equity must do equity, and that equity aids the vigilant, and that hence while there is a great variety of cases in which the equitable doctrine is invoked, each case must depend on its own particular circumstances and courts of equity discourage laches and delay without cause. *Stewart* v. *Pelt,* 198 Ark. 776, 131 S. W. 2d 644; *Neal* v. *Stuckey,* 202 Ark. 1119, 155 S. W. 2d 683; *Hardy* v. *Hilton,* 211 Ark. 991, 204 S. W. 2d 163; *Grimes* v. *Carroll,* 217 Ark. 210, 229 S. W. 2d 668.

"The right to enforce a judgment or decree for alimony may be lost by laches." 27 C.J.S. 1034.

In *Stone* v. *Stone,* 162 Mich. 319, 127 N. W. 258, the parties at the time of separation had one child, and the defendant was ordered to pay $5 per week for alimony, and a solicitor's fee of $25. Nothing was done to enforce the collection of this alimony for 13 years, and there the Supreme Court of Michigan said: "Can she be heard at this late day, and under this state of facts, to object to the dismissal of her bill of complaint upon the ground of gross laches in failing to seasonably prosecute her suit to a final

decree? We are of the opinion that it would be inequitable and against sound public policy to permit her to do so. . . . Equity will not lend its aid to those who are not so diligent in protecting their own rights."

In *Herman* v. *Herman,* 17 N. J. Misc. 127, 5 Atl. 2d 768, the New Jersey court said: "If the wife unduly delays or neglects to apply for alimony or to seek collection of arrearages under an existing alimony order, the court will be inclined to find in her delay a waiver of evidence of payment. See *Wilson* v. *Wilson,* 181 Atl. 257."

In *Franck* v. *Franck,* 107 Ky. 362, 54 S. W. 195, the Supreme Court of Kentucky said: "Upon the question of enforcing the payment of alimony long in arrears, Mr. Bishop, in his work on Marriage and Divorce (§ 1098) says: 'As this allowance is for the wife's maintenance from year to year, the court will not ordinarily compel payment beyond a year prior to the application, unless some explanation of the delay is made or appears.' And the rule was very thoroughly established in the English ecclesiastical courts that, where both parties have long abstained from applying to the court, the one for a reduction of alimony, or the other to enforce the regular payment, it will not enforce payment of arrears beyond one year prior to the monition, without sufficient cause being shown for delay. See *De Blaquiere* v. *De Blaquiere,* 5 Eng. Ecc. R. 126. And in the case of *Wilson* v. *Wilson, supra,* upon an application by the wife to enforce a monition for the payment of alimony, the court said: 'Unless the husband is absent from the country, or some particular reasons are set forth, it would be productive of great inconvenience and injustice if, after the lapse of so many years, the court should enforce such monition. If the wife is aggrieved, she should make her application within a reasonable time; otherwise, the court will infer she has made some more beneficial arrangement. As a general rule, therefore, the court is not inclined to enforce arrears of many years' standing'."

The order in the case at bar providing for payment of $2.50 per week was for the purpose of providing the

necessaries of life for the child of the parties. Subsequent to 1945 the appellant furnished those necessaries, but she could have compelled the appellee to do so if she had so desired; but now, in my opinion, she is barred on the principle of laches from recovering any amount accruing prior to a reasonable time beyond the time of making the application, which I believe should be one year. Therefore I would modify to that extent the decree of the Chancellor, and as modified, affirm.

Hence I concur in the majority opinion insofar as appellee is required to pay arrearages for a period of one year prior to the time appellant filed her motion to enforce such payment; and I dissent insofar as the majority opinion allows the collection of such arrearages for a period of more than year.

WARD, J., dissenting. The majority opinion leaves in hopeless confusion the law relative to the power of the courts to void accrued installments for child support. Regardless of the strained effort in the majority opinion to avoid doing so, the net result is to overrule the case of *Sage* v. *Sage,* 219 Ark. 853, 245 S. W. 2d 398, delivered January 21, 1952.

In the *Sage* case, supra, this court, discussing the power of the courts in this regard, said:

"In our opinion the rule that courts have no power to remit accumulated payments under the circumstances here is a sound one and we adopt that view."
Following the above we quoted with approval from Vol. 27 C. J. S. at page 1239 the following:

" 'Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively, unless some reservation is made in the decree itself; the modifying decree relates to the future only and from the time of its entry.' "

If this court does not feel bound to follow a precedent so recent and so clearly stated as that laid down in the *Sage* case, supra, it has the power to do so, but, in such event we should be bold enough to so state, and not attempt to camouflage the result with strained deductions.

The strained deductions on the part of the majority, mentioned above, are apparent.

After the clear cut announcements in the *Sage* case, supra, copied above, we referred to the fact that a few states held to the contrary, and we commented on the case of *Eberhart* v. *Eberhart,* 153 Minn. 66, 189 N. W. 592. We stated that we agreed with the Minnesota case as we understood it to hold "that payment of accrued installments was *only suspended* until the child was returned to the jurisdiction of the court."

I submit there is no reason for the majority to conclude from the above reference to the Minnesota case that we thereby meant to abrogate the clearly expressed rule which we had just previously announced. The power of the court to *suspend payment* of accrued installments until a child is returned to the jurisdiction of the court cannot, by the common sense interpretation of plain english, mean that the court has power to forever cancel such payment. Moreover in the *Eberhart* case, supra, the court stated specifically that it was not passing on the power of the court to void or cancel accrued payments.

Justices HOLT and GEORGE ROSE SMITH concur in this dissent.

RICH, EXECUTOR *v.* ROSENTHAL.

5-397, 5-445 (Consolidated) 268 S. W. 2d 884

Opinion delivered June 7, 1954.

Joseph Morrison, for appellant.

Virgil Roach Moncrief, John W. Moncrief and *W. A. Leach,* for appellee.

ROBINSON, J. Herbert M. Lindsey owned a lot in the city of Stuttgart on which is situated a two-story building. The upper story of the building consists of rooms and apartments; Lindsey lived there. The lower floor was rented to Joe Rosenthal who operates a store. On June 28, 1947, Lindsey and Rosenthal entered into a written lease contract whereby for the consideration of $100 per month payable in advance on the first day of each month during the term of the lease, the lower floor of the building was leased to Rosenthal for a period of five

years, with the option of extending the lease for two additional five year periods. The written contract also gave Rosenthal the option of purchasing the property upon the death of Lindsey for the price of $12,000 in cash. The contract further provides: "It is further agreed and understood that in the event the option to purchase as herein contained shall be exercised by the said Lessee, then the said Lessor binds himself to furnish a complete abstract of title showing in him a good merchantable title." The option to purchase could be exercised at any time during the period of the lease or any extension thereof, provided Lindsey died during such time.

On July 18, 1948, Lindsey mortgaged the property to C. S. Rich to secure a loan of $3,000 and interest. This mortgage was placed of record prior to the time the lease contract containing the option to purchase was recorded. On September 9, 1948, Lindsey executed a will; Item 6 thereof leaves to Miss Odie Smith a life estate in the top floor of the two-story building in question. Paragraph A of Item 8 of the will provides that Joe Rosenthal shall be permitted to occupy the lower floor of the building so long as he pays not less than $75 per month rent. Paragraph B of Item 8 provides: "The aforesaid Miss Odie Smith, so long as the aforesaid Joe Rosen [Rosenthal] shall occupy the lower floor of the business house on Main Street as tenant the aforesaid Miss Odie Smith, shall be permitted to occupy the upper story of said business, on the further condition that she will keep the interior thereof in a reasonably good state of repair."

Lindsey died December 14, 1950, which was within the original lease period. On December 20, 1950, C. M. Rich was appointed executor of Lindsey's estate. Lindsey's will was filed for probate. A half brother and some cousins survive him. Rosenthal decided to exercise his option to purchase the property, but his attorney entertained considerable doubt as to whom the $12,000 purchase price should be paid. Also there was a question of whether the continuation of payments of rent would constitute a waiver of the option to purchase.

Rosenthal's attorney talked the matter over with the attorney for Rich, the executor, and on January 2 wrote to him as follows:

"On June 28th, 1947 Herbert M. Lindsey and Joe Rosenthal entered a lease contract, which lease contract contained an option giving the said Joe Rosenthal the right to purchase the following described real property to-wit:

> The South Half of Lot Four in Block *sic* of Bordfeldt's Addition to the City of Stuttgart

upon the death of the said Lindsey at and for the sum and price of $12,000 in cash.

"The said Herbert Lindsey is now dead and the said Joe Rosenthal desires to exercise his option and is now ready, willing to pay the full purchase price in cash and to deposit the cash with any responsible person that may be agreed upon to be delivered over to the person or persons entitled to receive the same when the transaction is ready to be closed.

"The Probate Court records show that the said Herbert M. Lindsey died testate; that his last will and testament has been duly admitted to probate and that Clarence Rich is now the duly appointed, qualified and acting Executor of said will and said estate.

"Knowing that you are the attorney for the Executor and the estate, this letter is addressed to you to the end and that the matter of closing up the transaction may proceed as rapidly as possible."

On January 4, the attorney for the executor replied to the attorney for Rosenthal as follows:

"Replying to your letter of January 2, relative to purported contract between Herbert M. Lindsey and Mr. Joe Rosenthal concerning the South Half of Lot 4, Block 6, Bordfeldt's Addition to the City of Stuttgart.

"I have conferred with Mr. Rich, the Executor, and he advises that he does not have sufficient knowledge or

information at this time to know whether or not the purported contract is valid or not and, therefore, must await judicial determination thereof.

"He directs that Mr. Rosenthal's attention be called to the clause in the will which specifically provides that Mr. Rosenthal is to have preference as a tenant of the downstairs so long as he pays the rent promptly and keeps the interior in good repair. Neither Mr. Rosenthal nor the tenant of the upper story are permitted to sublet without written permission of the Executor or Trustee.

"The Executor further advises that if Mr. Rosenthal desires to he may deposit his rent in the bank as was done before, but insists that this rent be paid promptly until such a time as the validity of the contract can be determined. Mr. Rich also advises he could find no record of a payment of the December rent. The January rent is now due."

On January 5, Rosenthal's attorney replied to Rich's attorney:

"On June 28, 1947 Herbert M. Lindsey and Joe Rosenthal entered into a lease contract covering the store building now occupied by the said Rosenthal. This lease was for a term of years not yet expired.

"Under the terms of the contract Mr. Rosenthal was to pay rent at the rate of $100 per month, due and payable on the 1st day of each month. The rent due December 1, 1950 has been paid.

"In this lease contract was an option to purchase the building for $12,000 upon the death of said Lindsey, notice of his intention to exercise this option has been given.

"Mr. Rosenthal has no objection to continuing the payment of such during the pendency of any proceeding to determine the validity of his option to purchase provided such payment shall not be considered as a waiver of the claimed option, so I am tendering a check for $100 in payment of the January rent with the understanding that the tender of the rent for this month and succeeding

months, if any, and the acceptance thereof does not operate in any way as a waiver of his option to purchase nor prejudice any of his rights under said option.

"This lease contract also contains an option to extend the lease at the same terms of another stated period."

The check for the January rent was retained by the executor.

On January 8 Rosenthal filed this suit against Rich, the executor, asking for specific performance, alleging that Rosenthal had exercised his option to purchase and asking that the executor be required to convey the property to him according to the terms of the contract. The next day, January 9, the parties secured from the probate court an order providing that neither side would be prejudiced by the payment or acceptance of the rent during the time the validity of the contract was in litigation. Rosenthal continued to pay $100 per month rent to and including the month of July, 1951.

Subsequently the executor filed a motion to dismiss the cause, alleging that in ceasing to pay rent Rosenthal had abandoned his alleged right to purchase. This motion was overruled. On November 20, 1951, Rich, the executor, filed an unlawful detainer suit against Rosenthal in Circuit Court, asking for possession of the property and damages for the detention thereof. Later Rosenthal deposited $12,000 in Chancery Court as the purchase price.

Without going into detail with reference to all the pleadings that were filed, suffice it to say that the cause finally went to trial in Chancery Court, and is here on these issues: (1) Was Lindsey competent to make the contract giving Rosenthal the option to purchase? (2) Was the contract procured by Rosenthal by the use of undue influence? (3) Was the contract in full force and effect at the time Rosenthal exercised his option to purchase? (4) What effect does the mortgage from Lindsey to Rich have on Rosenthal's option to purchase? (5)

Just what is the status of the life estate left to Odie Smith, now Odie Smith Moss, under the terms of the will?

A matter in Probate Court dealing with the rights of Odie Smith Moss in which the Probate Court held that she acquired a life estate in the second story of the building subject to maintenance at her expense, and which was appealed by Mrs. Moss contending that she acquired an absolute life estate without any qualification thereon, has been consolidated with the appeal from the Chancery Court and is hereby dealt with accordingly.

In the Chancery Court the Chancellor decreed that the lease contract giving Rosenthal the option to purchase is valid; and Rich, the executor, was ordered to execute a deed to Rosenthal for the property involved, free and clear of all liens and mortgages of any kind, subject however to a life estate of Odie Moss in the upper story of the building. The decree provides that she must keep the premises in reasonable repair as required by the will; and further, that the value of the life estate shall be ascertained and the amount thereof paid to Joe Rosenthal out of the $12,000 on deposit in the registry of the court, and the balance of the money be paid to Rich, the executor and trustee of the estate of Herbert M. Lindsey.

All of the parties have appealed. Rich, the executor, and the relatives of Lindsey contend, first, that Lindsey by reason of alcoholism was incapable of making a valid contract; second, that the contract was obtained by undue influence; third, that if there is a valid contract Rosenthal has not complied with the conditions thereof and therefore cannot exercise the option to purchase; fourth, that Rosenthal is precluded from exercising the option to purchase by failure to make a tender of the $12,000; fifth, that the contract is subject to the mortgage and life estate.

We cannot say the Chancellor's finding that Lindsey was capable of entering into a valid contract is contrary to a preponderance of the evidence. In fact, there is no substantial evidence to the effect that he was incapable

of entering into a valid contract. It is true that the evidence shows he had been a habitual user of alcohol for about five years immediately preceding his death, but the record is utterly void of any testimony that the use of alcohol had caused a condition that would render him unable to carry on his business. A handwriting expert testified that Lindsey's signature on the contract, as compared to his signatures written before and after the date of the contract, indicated that Lindsey was not normal at the time he signed the instrument; that he was probably under the influence of something. The handwriting expert was qualified to testify as to the genuineness of the signature, or whether it was slightly different from signatures made on other dates; but he was not qualified to testify as to just what caused the signature to be slightly different. His testimony certainly cannot be said to constitute substantial evidence to the effect that Lindsey was incompetent on the day he signed the contract. There was other testimony to the effect that Lindsey had been drinking regularly during the five year period, but none of this testimony had the effect of showing that he was not fully capable of transacting business. As to when a contract may be rescinded on account of drunkenness, see *Cook* v. *Bagnell Timber Co.,* 78 Ark. 47, 94 S. W. 695.

Likewise as to the allegation of undue influence, there is no substantial evidence to support this charge. Appellant argues what appears to him to be some suspicious circumstances, but such suspicions are not evidence, and we are unable to find any evidence in the record giving rise to an inference that anybody exerted any undue influence over Lindsey.

Next it is contended that Rosenthal forfeited his right to purchase under the option by not paying rent subsequent to July, 1951. It will be recalled that there was some doubt as to whom the $12,000 purchase money should be paid; that Rosenthal's attorney talked to the attorney for Rich, the executor, and wrote to him on the 2nd of January that Rosenthal desired to exercise his option to purchase, and was willing and ready to pay the

full purchase price in cash, and would deposit the cash with any responsible person that might be agreed upon until the transaction could be closed. In his reply on January 4, the attorney for the executor stated that he did not have sufficient knowledge or information to know whether the purported contract was valid, and suggested that the rent money could be deposited in the bank until such time as the validity of the contract could be determined. Rosenthal's offer to deposit the $12,000 at that time was not accepted. The next day, January 5, the rent was paid to the executor. In his brief on appeal the attorney for the executor says: "If the five day delinquency of one month's rent were all, perhaps the court would overlook it as being of little significance," but appellant contends that by stopping the payment of rent several months later Rosenthal forfeited his right to purchase. Rosenthal had exercised his right to purchase in his letter of January 2, and he was under no obligation to pay rent thereafter. "Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceased and that of vendor and purchaser arises. The lessor may not, by a breach of a covenant to convey, compel the continuance of the relation of landlord and tenant for the purpose of creating a breach of covenant to pay rent so as to enable him to declare the option forfeited; and the lessee may not repudiate his election and reëlect to hold under the lease, in the absence of a provision therefor in the contract. The possession of the lessee becomes that of owner, and he will be entitled to such other rights as may be said to attach to his character as vendee, in so far as the rights of the parties are not peculiarly controlled by express stipulations in the lease." 51 C. J. S. 640. Rosenthal wrote the letter on January 2 stating that he desired to exercise the option, and offered to put the money up with anybody named by the executor. He had done everything he could do at that time, and when his offer was not accepted he promptly filed suit asking for specific performance.

Appellant Rich next contends that Rosenthal forfeited his option to purchase by failing to make tender of the $12,000 at the time he expressed a desire to exercise his option. In the first place, Rosenthal offered to put the money up with anyone Rich would suggest. Rich declined this offer which in itself would be a waiver of the tender even if a tender were necessary at that time. In *Doup* v. *Almand,* 212 Ark. 687, 207 S. W. 2d 601, we quoted from *Read's Drug Store* v. *Hessig-Ellis Drug Co.,* 93 Ark. 497, 125 S. W. 434, as follows: "On general principles, whenever the act of one party, to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done. *Isham* v. *Greenham,* 1 Handy 361, quoted in *Dodd* v. *Bartholomew,* 44 Ohio St. 171, 5 N. E. 866; *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 505, 58 S. W. 355; *Weinberg* v. *Naher,* 51 Wash. 591, 99 Pac. 736, 22 L. R. A., N. S. 956, and 28 Am. & Eng. Ency. Law, p. 8." See, also, *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. (180) 241, and *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74. However, here the contract does not provide that a tender be made at the time of exercising the option; on the contrary, it appears that the parties contemplated that if Rosenthal indicated his desire to exercise the option, the next step would be the furnishing of abstract of title by Lindsey's executor. The contract provides: "It is further agreed and understood that in the event the option to purchase as herein contained shall be exercised by the said Lessee, *then* the said Lessor binds himself to furnish a complete abstract of title showing in him a good merchantable title." The executor had a copy of the contract. At no time did he offer to furnish the abstract of title as provided by the contract. In view of the provision with reference to furnishing an abstract of title, it can hardly be said that the parties contemplated a tender of the full purchase price by the purchaser before he had an opportunity to examine the abstract. In *Northern Illinois Coal Corporation* v. *Cryder,* 361 Ill. 274, 197 N. E. 750, 101 A. L. R. 1420, the Court said: "Where

an option to purchase land within a stated time requires the optioners, upon the request to furnish an abstract showing good title in them, and allows the optionee a reasonable time for examination of the abstract, the optionee is not required on acceptance of the option, to tender the purchase money within the stipulated time, but the contract is to be performed within a reasonable time after acceptance."

With reference to the executor's contention that in exercising the option to purchase Rosenthal takes the property subject to the mortgage in the sum of $3,000 to Rich, and also subject to the life estate bequeathed to Odie Smith Moss, it is true the option to purchase is subject to the mortgage, since the mortgage was first recorded; however Rosenthal is entitled to deduct from the purchase price the amount necessary to pay the indebtedness secured by the mortgage; but since the decree of the Chancellor provides that the mortgage shall be paid out of the $12,000 on deposit in court, the same end is attained.

Now as to the interest of Mrs. Moss, her life estate is subject to the option to purchase. As devisee under the will she takes only what the testator had at the time of his death; and since specific performance can be compelled by reason of the contract executed by Lindsey, the life estate acquired under the terms of the will is subject to the contract. In *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6, it is said: "It is fundamental that heirs and devisees take only such rights as the intestate or testator had in the property at the time of his decease. The debts of the deceased must be paid before the distributees, be they heirs or legatees, receive anything. The rights of heirs or distributees can never be greater or rise above the rights of the intestate or testator." However, Mrs. Moss is entitled to the value of the life estate to be computed according to Act 122 of 1951, Ark. Stats., § 50-701-6, and to be paid out of the purchase price of the property.

That part of the will making it the duty of Mrs. Moss to keep the interior of the second floor in repair would be relevant only if Rosenthal continued as a renter and did not exercise the option to purchase. Therefore it is inapplicable.

That part of the Chancery decree holding that Rosenthal legally exercised his option to purchase and that the mortgage be paid out of the $12,000 on deposit in court is affirmed; but those parts of the decrees in both the Probate and Chancery Courts holding that Mrs. Moss's life estate is not subject to the option to purchase, and further holding that under the terms of the will she is responsible for repairs, are reversed with directions to enter decrees in that respect not inconsistent herewith.

Mr. Justice McFaddin dissents.

Ed. F. McFaddin, J. (dissenting). Without lengthening this opinion by quoting authorities or the evidence, I merely state that I entertain the following views about these cases:

(1)—Rosenthal lost his right to obtain a deed when he failed *for five months* to make the rental payments. He had joined with Rich in asking the Probate Court to allow him to make the payments without prejudice. Then Rosenthal failed for five months either to make the payments or to deposit the $12,000.00 in the Registry of the Court. So I concluded that he lost his right.

(2)—Mrs. Odie Smith Moss had a contract with Lindsey that she would receive the upper floor of the building for her life, if she looked after and cared for Lindsey during his life. This was a contract, and it was prior and superior to the Rosenthal option; and Mrs. Moss was in possession under contract when Rosenthal's opinion came into existence. Mrs. Odie Smith Moss performed her contract, and her rights are based on that contract, rather than the will; and her rights are superior to Rosenthal's option.

Because of the views herein expressed, I respectfully dissent.

HAMILTON *v.* COUNTY BOARD OF EDUCATION OF JOHNSON COUNTY.

5-449 268 S. W. 2d 873

Opinion delivered June 7, 1954.

J. G. Moore, for appellant.

Ed Gordon and *Wiley W. Bean,* for appellee.

J. SEABORN HOLT, J. This appeal is from a judgment of the Johnson Circuit Court affirming the action of the Johnson County Board of Education annexing certain portions of United Rural District No. 19 to Lamar District and another portion to Oark, and from the further action of the court in voiding the Board's order annexing certain territory of United District to the Lamar District, which had been previously offered to Clarksville District No. 17, and refused.

The United School District of Johnson County, called Rural District No. 19, comprised Ozone District and Ft. Douglas District and automatically came into existence as United District No. 19 on June 1, 1949, under Initiated Act 1 of 1948, Acts of 1949, page 1414, (§ 80-426, *et seq.*, Ark. Stats. 1947) since in the Ozone and Ft. Douglas Districts combined, there were less than 350

pupils enumerated. *Littleton* v. *Union County Board of Education,* 217 Ark. 268, 229 S. W. 2d 657.

Pertinent parts of Act 1 are: "Section 1. On June 1, 1949, there is hereby created in each county a new school district which shall be composed of the territory of all school districts administered in the county which had less than 350 enumerated on March 1, 1949, as reflected by the 1948 school enumeration. . . .

"Section 2. Within ten days after the creation of the new district as provided herein, the County Board of Education shall call a special election for the purpose of electing members of a school board to serve the new district. . . .

"Section 3. It shall be the duty of the newly elected school board and the County Board of Education not only to provide an accredited elementary school for every child as close to his home as possible, but also to provide every child access to an accredited high school. To accomplish this purpose, each County Board of Education shall study the entire school program of its county. If it is found that some or all portions of the new school District as created herein can be served more effectively and more efficiently by another district or districts, the County Board of Education with the consent of the Board of Directors of the school district to which such annexation is proposed, is hereby authorized and directed to make such annexation or annexations. . . .

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

On May 20, 1953, the Johnson County Board of Education ordered United District No. 19 dissolved and parts of its territory to be annexed to Lamar and Oark Districts, and also after having offered to annex other portions of the territory to the Clarksville District, which offer Clarksville refused, then later ordered this territory annexed to Lamar, Lamar having indicated its willingness to accept such annexation in case Clarksville

should refuse. As indicated, the Circuit Court affirmed the Board's actions, except its order annexing to Lamar the territory which had been refused by Clarksville.

For reversal, appellants say: "(1) The County Board of Education wrongfully disregarded Act 75 of the Acts of 1951, no notice having been given as to the intended actions of the County Board of Education herein complained of.

"(2) The several orders of the County Board of Education are not final judgments or orders, but are mere conditional statements by the Board and therefore void.

"(3) The several orders of the County Board of Education involved in this litigation are void because based upon Initiated Act No. 1 of the Acts of 1949 which said act is unconstitutional and void."

Related cases in which we have considered certain phases of Act 1 of 1948 are: *County Board of Education of Baxter County* v. *Norfork School District No. 61,* 216 Ark. 934, 228 S. W. 2d 468; *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23; *Littleton* v. *Union County Board of Education, supra;* and *Covington* v. *Prairie County Board of Education,* 218 Ark. 65, 234 S. W. 2d 203.

(1)

As to appellants' first contention, we hold it to be untenable. Act 75 of 1951 (§ 80-434, Ark. Stats., 1947) clearly had to do with re-zoning of new County School Districts (United) and not annexation, which is alone involved here. When the question of re-zoning is presented, notice required under Act 75 must first be given, but we hold that in matters of annexation, under Act 1 here, notice was not required, as we shall presently point out.

Act 75 provides: "The County Board of Education is hereby authorized at its discretion to re-zone or abolish all zones in the New County School District wherein changes or alteration in territory or population

have been affected since the original zoning procedures. The County Board may establish such number of zones in said school district with the number of local board members to be elected in the respective zones; provided there shall be no more than five zones and no more or no less than five local board members.

"Section 2. The County Board of Education shall publish in two issues of a local paper at least twenty days before the time in which the Board shall consider the matter of re-zoning, stating the purpose of the meeting. At said meeting of the Board an opportunity for recommendations or suggestions by interested patrons shall be given. The action of the board shall also be published."

As indicated, this act has to do with re-zoning only, and where there has been a population shift or changes from one zone to another, then the County Board "is authorized at its discretion," after twenty days public notice and a hearing, to re-zone. The legislative purpose of this act was "to authorize the County Board of Education to revise the re-zoning of new County School Districts."

In annexation proceedings under Act 1 of 1948, we held, in effect, in *Littleton* v. *Union County Board of Education,* above, that the County Board of Education had power to annex a part of United District to the larger district on consent of the larger district only and that no notice was required. "Under Initiated Act providing for creation in each county of a united school district composed of all school districts within county with less than 350 enumerated, the County Board of Education had power to annex a part of united district to a larger district only on consent of such larger district and did not have to give notice or obtain consent of patrons of united district as a prerequisite to such annexation order. Ark. Stats., §§ 80-426 to 80-428." (Headnote 2 of *Littleton* v. *Union County Board of Education,* 229 S. W. 2d 657).

In the body of the opinion, after referring to the following quoted language above in § 4 of Act 1: "Except as otherwise provided in this Act, all matters of reor-

ganization and annexation of school districts undertaken under the provisions of this Act shall be made in accordance with existing laws,'' we said:

" 'This quoted language gives the County Board of Education power to take any or all territory of the United District and annex such territory to any Large District or Districts, conditioned only on the consent of such larger Districts so affected. . . .' In regard to the language of § 4, above-quoted, we further said in the Stroud case: 'The italicized language thus clearly exempted from the provisions of the existing laws such reorganizations and annexations as might be accomplished under § 3 of the Initiated Act before the school directors could have been chosen in the United District. . . .' In the case at bar, directors had not been elected for the United District, and the consent of the Urbana-Lawson District had been obtained, which was the only condition imposed upon the County Board before ordering the annexation.''

(2)

As to the effect of the County Board's orders, we hold that as to the annexation of the territory to Lamar and Oark, these annexation orders were certain and definite, subject only to acceptance by Lamar and Oark, and on acceptance became final. The record reflects that they were accepted by Lamar and Oark Districts, to which they were annexed. The trial court held these annexations valid and correctly so.

As to the territory offered to Clarksville by the Board in its order of May 20, 1953, it appears undisputed that such order was conditioned on Clarksville's acceptance by a certain time limit, and in the event that Clarksville refused to accept said territory, then the Board directed its annexation to Lamar by 10 a.m. of August 1, 1953. Lamar had previously indicated that it would accept such annexation.

We think in these circumstances that this part of the territory of District No. 19 could not, as the trial court

found, be legally annexed under such uncertain and indefinite proceedings. The Board's order lacked finality and was too indefinite to constitute a binding order of annexation.

(3)

Appellants' final contention is that Act 1 of 1948 is "unconstitutional and void." They appear, by their argument, to base this contention on the following ground, for they say "that Act 75 of 1951 was part of 'existing law' when the County Board acted in the instant case in March, 1953. Thus, the Board was required to give 20 days notice by publication in some newspaper, which it is agreed was not done, as required by Act 75. . . . Action of the County Board without the publication of notice required by the statute is void. Such is the plain ruling in many of the decisions of this court, one of those decisions is in *Lyerley* v. *Manila School District,* 214 Ark. 245, 215 S. W. 2d 733," and that it contravenes the "due process clause in § 8, Article 2 of our Constitution," and that the "due process demands that provision for notice . . . be made."

The cited case is clearly distinguishable on the facts. We held in that case: (Headnote 1) "The County Board of Education may dissolve any school district and annex the territory thereof to any district within the county when petitioned to do so by a majority of the qualified electors of the district to be dissolved or by an election held in the district to be dissolved where a majority of the votes cast are in favor of the dissolution and annexation and upon the consent of the Board of Directors of the district to which the territory is to be annexed. Pope's Digest, § 11488, as amended by Act 235 of 1947."

But here, we are dealing with a new and later statute, Act 1 of 1948, covering a new situation and a field of school law not heretofore in existence, creating "in each county a new school district which shall be composed of the territory of all school districts administered in the county which had less than 350 enumerated on March 1, 1949, as reflected by the 1948 school enumeration."

We agree that Act 75 was a part of existing law on May 20, 1953, when the Board here acted. However, as has been pointed out, it has no application to the present case, nor do we find that this Act No. 1 or any part thereof contravenes the Arkansas Constitution on any ground argued by appellants. Certainly, its constitutionality may not be attacked for lack of notice since, as indicated, none was required. No other ground is pointed out or argued.

Affirmed.

STEBBINS & ROBERTS, INC. *v.* ROGERS, TRUSTEE.

5-326 268 S. W. 2d 871

Opinion delivered June 7, 1954.

Moore, Burrow, Chowning & Mitchell and *Owens, Ehrman & McHaney,* for appellants.

Harry E. Meek, for appellee.

ED. F. MCFADDIN, Justice. We have here a motion by appellants for a Rule on the Clerk, to require him to file a record tendered on appeal (See Rule 5 of the Rules of this Court, effective January 10, 1954). The Clerk

refused the filing, in the belief that the record was tendered too late. Because this is an appeal admitted by all parties to have been attempted exclusively under Act 555 of 1953, we are delivering an opinion to discuss the applicable portions of that Act.

The controversy between the appellants and the appellee involved the validity and superiority of mechanic's liens claimed by appellants,[1] and denied by the Chancery Court. Two separate decrees—each appealable—[2] were rendered by the Chancery Court: one decree was dated April 20, 1953, and the other was dated July 9, 1953. We discuss these separately.

I. *The Decree of April 20, 1953.* In this decree there was the following language:

"And the Court being well and sufficiently advised in the premises doth order, adjudge and decree that no part of the claim of Courtney Building Material Company, Inc., Big Rock Stone & Material Company, Stebbins & Roberts, Inc., C. R. Hubbard, Arkansas Foundry Company, and/or Garner Smith, d/b/a Kraftco Building Supply Company constitutes any lien on Lot Three Hundred Fifty-eight (358) of Kingwood Place, an Addition to the City of Little Rock, Pulaski County, Arkansas, any buildings or improvements thereon, or any part thereof; . . .

"It is further ordered, adjudged and decreed . . . that the lien of cross-complainant Glen F. Rogers, Trustee, for the amounts heretofore adjudicated in his favor constitute a lien on the property involved herein. . . .

"To all of which, Courtney Building Material Company, Inc., Big Rock Stone & Material Company and Stebbins & Roberts, Inc., and the other parties to this action who are adjudged not to have a lien on said land and improvements involved, at the time excepted and

[1] The appellants are Stebbins & Roberts, Inc., Big Rock Stone & Material Co., and Courtney Bldg. Material Co., Inc.

[2] That each of the decrees is appealable, see *Cooper* v. *Ryan*, 73 Ark. 37, 83 S. W. 328; *Parker* v. *Bodcaw Bank*, 161 Ark. 426, 256 S. W. 384; *McGowan* v. *Burns*, 182 Ark. 506, 31 S. W. 2d 953; and *Carnes* v. *DeWitt Bank*, 201 Ark. 1037, 147 S. W. 2d 1002.

asked that their exceptions be noted of record which is accordingly done, in which connection Courtney Building & Material Company, Inc., Big Rock Stone and Material Company and Stebbins & Roberts, Inc., pray an appeal from this decree to the Supreme Court of Arkansas, which appeal is hereby granted."

This decree (a) denied the appellants the superiority they claimed for their liens; and (b) awarded Rogers a lien superior to appellants; and they prayed an appeal to this Court. It is repeatedly stated by appellants that they are proceeding under Act 555 of 1953, rather than under the old procedure that existed before that Act.[3] Yet we find that it was not until August 5, 1953, that appellants filed the notice of appeal, designated in § 2 of said Act 555. This notice of appeal was filed entirely too late as regards the decree of April 20, 1953.

If we should hold that the notice of appeal as contained in the last paragraph of the decree, as previously copied, was a sufficient compliance [4] with § 2 of Act 555, nevertheless, the appellants have been too late under other provisions of the said Act 555. Section 20 of the Act fixes the time for filing the record in this Court, and concludes:

". . . but the trial court shall not extend the time to a date more than seven months from the date of the entry of the judgment or decree."

The record was not filed in this Court until April 15, 1954, which was more than eleven months from the date of entry of the decree. So, under § 20 of Act 555, the appeal from the decree of April 20, 1953, is too late, even if § 2 be not considered.

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[3] By order of this Court of June 8, 1953, it was provided that until further notice, litigants might appeal by either pursuing the provisions of Act 555 of 1953, or by pursuing the appellate procedure that existed prior to that Act. But by Rule 26 of the Rules of this Court issued in January, 1954, it was provided that with respect to any judgment or decree rendered *after January 10, 1954,* Act 555 of 1953 was exclusive method of appeal.

[4] We do not so hold. We leave the question open for further consideration. We merely state the possibility here in order to show that even so, this appeal is too late.

Therefore—as regards the decree of April 20, 1953—we hold that the Clerk was correct in refusing the record tendered here on April 15, 1954.

II. *The Decree of July 9, 1953.* By this decree the Chancery Court distributed[5] the proceeds of the sale, and the decree recites:

"And defendants and cross-complainants, Courtney Building Material Company, Inc., Big Rock Stone & Material Company, and Stebbins & Roberts, Inc., object and except on account of the failure and refusal of the Court to direct payment of their respective claims from proceeds held by the Clerk of the Court as claims prior and paramount to the claim of Glen F. Rogers, Trustee, and ask that their exceptions be noted of record which is accordingly done."

On August 5, 1953, the appellants gave the notice of appeal from this decree, as provided by § 2 of Act 555; but the appellants—so far as the record here shows—never applied to the Chancery Court to enlarge the time for filing the record, pursuant to the provisions of § 20 of Act 555. Under that section, the appellants were required to either file the record in the Supreme Court within 90 days from August 5, 1953, or to apply to the Chancery Court for enlargement of the time. Neither of these requirements was observed.

Later, on October 27, 1953, the appellants filed in this Court a certified copy of the decree of July 9, 1953, and prayed that a writ of certiorari issue out of this Court for the record.[6] The writ was issued on October

[5] The decree of distribution was appealable, but did not present anew the question of the lien superiority which had been determined by the decree of April 20, 1953. See the cases cited in Footnote 2, *supra.*

[6] This *certiorari* proceeding was authorized by the procedure that existed prior to Act 555. See *Bolls* v. *Craig,* 220 Ark. 880, 251 S .W. 2d 482. But attention is called to the fact that under the new rules of this Court effective January 10, 1954, there is no such provision for *certiorari* proceedings out of this Court. Such omission is significant. Furthermore, in *Bolls* v. *Craig,* it is shown that when the *certiorari* issued out of this Court, the bill of exceptions had to be approved by the Trial Court; and the bill of exceptions here tendered does not show that it has ever been so approved. See *Blackburn* v. *Ford, ante* page ____, 267 S. W. 2d 519 (opinion of April 19, 1954).

27, 1953, returnable in 20 days. It was not returned until April 15, 1954, and the Clerk thereupon refused to receive the tendered record. We have already stated that the appellants failed to obtain an extension from the Chancery Court. But appellants claim that under § 17 of Act 555,[7] they filed here within 90 days a copy of the decree of July 9, 1953; and that our certiorari was, in effect, a grant of additional time to bring up the completed record. Even if the filing of the certified copy of the decree here on October 27, 1954, gave us power to extend the time for filing the record, nevertheless the fact remains that no petition for additional time was filed in this Court, *and no additional time was granted.*

The date of the decree was July 9, 1953. Under § 20 of Act 555, the Chancery Court could not have extended the time for filing the full record in this Court past the seven months from the date of the decree; and we did not extend the time. The record was not tendered here until April 15, 1954, nine months and six days after the decree of July 9, 1953. So the record was tendered too late: and the rule on the Clerk is denied.

Mr. Justice George Rose Smith not participating.

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[7] In *Malvern Brick & Tile Co.* v. *Alexander*, 222 Ark. 587, 261 S. W. 2d 798 (opinion of November 9, 1953), we discussed portions of said § 17.

Haralson, Administratrix *v.* Jones Truck Lines.

5-418 270 S. W. 2d 892

Opinion delivered June 14, 1954.

[Rehearing denied October 4, 1954.]

Gordon & Gordon, for appellant.

Louis Tarlowski and *J. M. Smallwood,* for appellee.

George Rose Smith, J. This is an action for wrongful death, brought by the appellant as administratrix of the estate of Carl Brady Charles. The three defendants are the Jones Truck Line, its employee Jack Fulfer, and Clifton Duvall. At the close of the plaintiff's proof the trial court directed a verdict for the defendants. The question is whether the plaintiff made a case for the jury.

At the trial the plaintiff called the defendants Fulfer and Duvall as witnesses, and she now relies principally upon their testimony. These two men, who appear to have testified with complete candor, are in agreement as to the manner in which Charles met his death.

On the night of April 24, 1953, Fulfer was driving one of his employer's trucks west on Highway 64. For some distance Duvall, in his own truck, had been following Fulfer, awaiting an opportunity to pass him. On a long straight stretch near the town of Blackwell the two trucks met a car coming from the opposite direction. Both men dimmed their headlights. As soon as the approaching car had gone by, Fulfer, with his own headlights still dimmed, flashed his rear clearance lights. Both witnesses testify that this is a signal, well understood among truck drivers, by which the leading driver invites the other to pass.

Duvall, acting upon this signal, entered the left-hand traffic lane and overtook Fulfer's truck; but in doing so he did not switch his headlights to the bright beam. When the vehicles were abreast the two drivers for the first

time saw Charles, who was walking west on the left side of the highway, with his back to the oncoming trucks. Both drivers swerved to their right in an effort to avoid an accident, but the extreme left-hand side of Duvall's truck hit Charles and killed him. The point of impact was two or three feet from the left-hand edge of the pavement.

An issue common to all three defendants is whether Charles was guilty of contributory negligence as a matter of law. We cannot say that he was. Pedestrians as well as motorists are entitled to use the public highways; each must act with regard to the presence of the other. *Oliphant* v. *Hamm,* 167 Ark. 167, 267 S. W. 563; *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. 2d 1110. One who walks on the right-hand side of the street, with his back to traffic, is not necessarily guilty of contributory negligence. *Yocum* v. *Holmes,* 222 Ark. 251, 258 S. W. 2d 535. The plaintiff's position is even stronger, for Charles was walking on the left side of the highway, as recommended by the safety rules of the Highway Department. In these circumstances it was for the jury to say whether Charles was contributorily negligent.

The remaining question is whether the proof would have supported a finding of negligence on the part of the truck drivers, or either of them. With respect to Duvall, whose vehicle actually struck Charles, little need be said. His lights were still dimmed when he first saw the decedent, who was then only twenty or twenty-five feet away. The law requires that the bright headlight beam be of sufficient intensity to reveal persons at a distance of at least 350 feet. Ark. Stats., 1947, § 75-713. The jury would have been justified in concluding that Duvall was negligent either in failing to brighten his lights or in failing to keep a proper lookout.

Fulfer's truck, on the other hand, did not come in contact with Charles. Hence this defendant and his employer insist that they violated no duty owed to the decedent, since their vehicle remained continuously on its own side of the highway. This argument would be highly persuasive were it not for the fact that Fulfer signaled

the trailing vehicle to pass him. We think this fact to be of controlling importance in the case.

Although we all know the signal in question to be widely used by truck drivers, the exact question now presented does not seem to have been considered in any reported decision. In principle, however, it is not difficult. We have defined a negligent act as one "from which an ordinarily prudent person . . . would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797. It seems perfectly plain that the driver who gives this signal cannot invariably be absolved of all responsibility in the matter. If, for example, the leading driver should reach the crest of a hill and should give the passing signal when he alone could see a car approaching dangerously close from the other side, no one would regard the giver of the signal as wholly blameless if a head-on collision resulted from his action. In that situation an ordinarily prudent person would certainly foresee an appreciable risk of harm to others.

In the case at bar Fulfer testified that he would not have flashed his clearance lights if he had seen a man in the road. Yet he did give that signal without having returned his headlights to the bright position. The proof is that the dim beam is lower than the bright one and is directed to the right, so that the darkest part of the highway is to the left. That is where Charles was walking when he was struck. There was substantial evidence from which the jury might have found that Fulfer's failure to brighten his lights before signaling to Duvall involved a foreseeable risk of injury to others, a risk that an ordinarily prudent man would not have taken.

Nor does it matter that Fulfer was under no legal duty to give any signal at all. As Judge Cardozo observed in the leading case of *Glanzer* v. *Shepard,* 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of

acting carefully, if he acts at all." Even though Fulfer's invitation to Duvall was gratuitous the law required that his conduct be characterized by ordinary care.

Reversed.

SCHIRMER *v.* COCKRILL, JUDGE.

5-490 269 S. W. 2d 300

Opinion delivered June 14, 1954.

[Rehearing denied July 7, 1954.]

ECLECTIC STATE MEDICAL BOARD *v.* HUGHES.

5-480

Opinion delivered June 14, 1954.

Q. Byrum Hurst, for petitioner.

Tom Gentry, Attorney General, for respondent.

C. A. Stanfield, for petitioner.

Joseph C. Kemp, for respondent.

ED. F. MCFADDIN, Justice. These two cases stem from the efforts of the Attorney General to have a hearing by the Eclectic State Medical Board (hereinafter called "Board") regarding the validity of the license of Dr. J. S. Schirmer.

On September 14, 1953, the Attorney General of Arkansas filed suit in the Circuit Court of Clay County, Arkansas, against Dr. J. S. Schirmer, seeking a hearing for the purpose of cancelling the license of Dr. Schirmer to practice medicine in this State. That matter reached this Court in the case of *Schirmer* v. *Light,* which was a prohibition proceeding, and in which an opinion was delivered by us on November 23, 1953. See *Schirmer* v. *Light,* 222 Ark. 693, 262 S. W. 2d 143.

In keeping with the views expressed in the foregoing opinion, the Attorney General, on December 8, 1953, filed a petition with the said Board, seeking a hearing on the validity and legality of the license which Dr. Schirmer claimed to have been issued by the said Board. The hearing was sought under the provisions of § 72-611, *et seq.,* Ark. Stats. On December 15, 1953, the Board decided that May 11, 1954, was the earliest date on which the Board would hold a meeting. The Attorney General felt that the Board was unduly delaying the hearing, and filed suit against the Board in the Pulaski Circuit Court, seeking a writ of mandamus to compel the Board to meet at an earlier date. The Pulaski Circuit Court, Third Division (J. Mitchell Cockrill, Judge), thereupon issued its order, directing the said Board to meet and have its hearing on April 12, 1954.

The Board did meet on April 12, 1954, and decided that its hearing should be secret, and not open to the public. Thereupon, certain newspaper, radio, and television representatives obtained an order from the Pulaski *Chancery* Court, requiring the Board to have open hearings. The Chancery Court in issuing this order was

apparently relying on Act 343 of the Acts of Arkansas of 1953. When the Chancery Court order was served on the Board, it immediately suspended the hearing in the Schirmer matter, and filed Case No. 480 in this Court,[1] in which the Board sought a writ of certiorari to bring up to this Court and quash the order of the Pulaski Chancery Court which required the Board to have public hearings.

After the said Board suspended its hearings on April 12, 1954 (which hearings were being held in accordance with the mandamus order of the Pulaski Circuit Court), the Attorney General of Arkansas then filed in the Pulaski Circuit Court, Third Division, Case No. 40487 against the said Board and Dr. Schirmer, praying for certiorari against the said Board, alleging that the Attorney General had appeared before the Board at the hearing on April 12th and had sought to introduce his evidence and present his case, regardless of whether the sessions were open or closed, and that the Board had indefinitely adjourned its meeting of April 12th, without giving the Attorney General any opportunity to present his case, and that such indefinite adjournment on April 12th was in violation of the mandamus order of the Pulaski Circuit Court, Third Division, directing the Board to proceed on that date to a hearing.

The Attorney General also alleged that the conduct of the Board had been such as to clearly demonstrate that it would be futile and useless for the Attorney General to present his case to the Board, and that the Board had clearly demonstrated that it was not going to proceed with the hearings as directed by the Pulaski Circuit Court. The Attorney General prayed (1) that the Pulaski Circuit Court should issue a writ of certiorari directing a copy of all the proceedings and records of the respondent, Eclectic State Medical Board, to be brought before it for review; and (2) "that this Court enter an order setting down for full and complete hearing, and its subse-

[1] That case is styled: *Eclectic State Medical Board* v. *William W. Hughes, Bobbie Forster, Wm. H. Hadley, Jr., Dick Evans, Bill Neel, Bud Lemke, Sam G. Harris, and Dean Duncan.*

quent determination thereof, the charges filed before the respondent Board herein, which said respondent has failed and refused to hear.'' This was case No. 40487 in the Pulaski Circuit Court, in which the said Board and Dr. Schirmer were respondents. Dr. Schirmer filed a response in the Pulaski Circuit Court, denying all material allegations of the petition for certiorari, and praying that it be dismissed.

The Circuit Court issued its order granting the first prayer of the Attorney General's complaint (*i.e.,* that the Board bring to the Circuit Court all copies of proceedings and records in connection with the Schirmer matter). Thereupon, Dr. Schirmer, without waiting for further Circuit Court action, filed Case No. 490 in this Court, seeking to prohibit the Pulaski Circuit Court (Third Division, J. Mitchell Cockrill, Judge) from any further proceedings in Case No. 40487 therein pending. Dr. Schirmer claimed that the said Circuit Court was entirely without jurisdiction, and that the Eclectic State Medical Board had exclusive jurisdiction.

Thus Cases No. 490 and 480 in this Court are intertwined and grow out of the efforts of the Attorney General to have a hearing regarding the validity of the license of Dr. J. S. Schirmer.

CASE No. 490

This is Dr. Schirmer's petition seeking a writ of prohibition against the Circuit Court; and the petition of Dr. Schirmer is denied. The rule is well established that prohibition does not issue if the court (in this instance the Pulaski Circuit Court) has jurisdiction; and clearly such Court does have jurisdiction. If the Court should wrongfully act within its jurisdiction, then the remedy is by appeal. If it acts in circumstances where there is no jurisdiction or proceeds beyond its jurisdiction, a void order may be quashed by certiorari. But prohibition cannot be used as a substitute for appeal or certiorari. *Keenan* v. *Strait,* 221 Ark. 83, 252 S. W. 2d 76; *Harris* v. *Marlin,* 220 Ark. 621, 249 S. W. 2d 3, and *Gordon* v. *Smith,* 196 Ark. 926, 120 S. W. 2d 325.

The legal residence of the Eclectic State Medical Board is Pulaski County, Arkansas. *Baker* v. *Fraser,* 209 Ark. 932, 193 S. W. 2d 131; *Leonard* v. *Henry,* 187 Ark. 75, 58 S. W. 2d 430; *Downey* v. *Toler, Judge,* 214 Ark. 334, 216 S. W. 2d 60. The said Board had power and authority to conduct a hearing at Little Rock in reference to the revocation of Dr. Schirmer's purported license. See § 72-611, Ark. Stats., and the case of *Schirmer* v. *Light,* 222 Ark. 693, 262 S. W. 2d 143. The Pulaski Circuit Court has supervisory jurisdiction over the said Eclectic State Medical Board. Section 22-302, Ark. Stats., provides:

"Said Circuit Courts shall have power to issue writs of certiorari to any officer or board of officers, city or town council, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding or ordinance, and to hear and determine the same; . . ."

Thus the Pulaski Circuit Court could legally issue a writ of certiorari to the Board; and if the Circuit Court found that the Board was failing and refusing to act in accordance with the order of the Pulaski Circuit Court directing the hearing for April 12, 1954, then the Pulaski Circuit Court could act in lieu of the Board.[2] Some of the cases involving the authority of the Circuit Court over Boards are *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041; *Green* v. *Blanchard,* 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84; *Eclectic State Board* v. *Beatty,* 203 Ark. 294, 156 S. W. 2d 246.

Therefore the issue now before the Pulaski Circuit Court is to decide whether the said Board has been so

[2] In *Smith* v. *Ill. Bell Tele. Co.,* 270 U. S. 587, 70 L. ed. 747, 46 S. Ct. 408, it was shown that the Telephone Company had filed an application with the State Commerce Commission of Illinois for a schedule of rates; and that the Commission had allowed the petition to remain dormant for a period of two years. In holding that the Courts could act when the administrative agency had failed, the U. S. Supreme Court said: "For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal . . ." Thus, the U. S. Supreme Court held that an unreasonable delay by a Board gave the courts just power to act. On the general subject of the exhaustion of administrative remedies, see 73 C. J. S. 351 et seq.

dilatory and slothful in the matter of the Attorney General's efforts to have a hearing against Dr. Schirmer as to justify the Circuit Court in lifting—because of such extraordinary circumstances—the entire proceeding against Dr. Schirmer to the Circuit Court for trial and determination. If the Circuit Court should so find (a matter within its sound discretion), then the Circuit Court will proceed to a hearing on the Attorney General's case against Dr. Schirmer, and at the conclusion of that hearing, a final judgment may be entered by the Circuit Court, from which there may be a review, as in any other final judgment.

If the Circuit Court should decide that the Board should be allowed to continue to hear the Attorney General's case against Dr. Schirmer under strict orders of the Circuit Court that prevent any delay in hearing and decision, then such conclusion is for the Circuit Court.

At all events, we deny Dr. Schirmer's petition for prohibition in Case No. 490.

CASE No. 480

In this case the Board is seeking to quash the order of the Pulaski Chancery Court, which directed the Board to have public hearings. Because of what we have said in Case No. 490, it is obvious that the Pulaski Circuit Court had undertaken to exercise jurisdiction, and was exercising jurisdiction in directing that the Board meet and conduct its hearing on April 12, 1954.

It is clear that there must be no conflict of jurisdiction between the circuit courts and the chancery courts; and the Circuit Court had jurisdiction to order the Board to meet and conduct its hearing, and such meeting was being held in accordance with the order of the Circuit Court. Under these peculiar facts, it is obvious that the Chancery Court should have remitted Hughes, *et al.*, to the Circuit Court for such relief as they desired, because the Circuit Court had already taken jurisdiction. In instances in which law and equity courts have concurrent jurisdiction, then when one court as-

sumes jurisdiction, the other court must not thereafter attempt to act in the same matter. *Ford* v. *Judsonia Merc. Co.,* 52 Ark. 426, 12 S. W. 876, 6 L. R. A. 714; *McCracken* v. *McBee,* 96 Ark. 251, 131 S. W. 450; *Home Fire Ins. Co.* v. *Benton,* 106 Ark. 552, 153 S. W. 830, and *Shields* v. *Shields,* 183 Ark. 44, 34 S. W. 2d 1068.

We therefore hold that in Case No. 480, the newspaper, radio, and television representatives should have gone into the *Circuit Court,* which had already undertaken to exercise jurisdiction; and this makes it unnecessary for us to decide anything about the meaning of Act 343 of 1953. It is only fair to say that nothing in the record shows that the Board ever advised the Pulaski Chancery Court that the Pulaski Circuit Court had taken jurisdiction, but rather it used the Chancery order as an excuse to indefinitely adjourn the hearings. Therefore, in quashing the order of the Pulaski Chancery Court, we do so at the expense of the Board, which did not raise the proper question in the Court below. Our holdings in each case herein are effective immediately so that the Pulaski Circuit Court may proceed without awaiting any time for rehearing.

Justice WARD dissents in Case No. 490.

The Chief Justice and Justice WARD dissent in Case No. 480.

PAUL WARD, J., (dissenting). My reasons for disagreement with the majority in both of the above cases are set out below.

Case No. 480. The majority opinion quashes the order of the Chancellor which required the Eclectic State Medical Board to hold open meetings. The reason given by the majority for its conclusion is that the Chancellor had no jurisdiction to issue said order. The reason why the Chancellor had no jurisdiction, says the majority, is because, at the time the order was issued, the Circuit Court of Pulaski County had already taken jurisdiction of the case.

In my opinion the conclusion of the majority is erroneous because:

(a) The question of lack of jurisdiction by the Chancellor was not raised by either party either in the pleadings or the arguments. The court should, it seems to me, confine its decisions to the issues raised by the parties unless grave questions of justice dictate otherwise. No such questions appear here. It is recognized that this court can and should raise the question of jurisdiction whether it is pleaded or not, but, as is pointed out presently, the majority can not justify its opinion on this basis.

(b) Where does the majority get its information that the Circuit Court had jurisdiction of the Schirmer hearing on April 12th when the Chancellor issued his order? It must have gotten this information from hearsay, the newspapers, or some other litigation, none of which sources are approved if my understanding of law is correct. There is not one word or sentence in the entire record on file in this case which says or remotely suggests that the Circuit Court of Pulaski County had acquired jurisdiction on April 12, 1954 when the Chancellor's order was issued.

Aside from the above I agree with the dissenting opinion in this case written by the Chief Justice.

Case No. 490. The majority opinion holds that the Circuit Court, by virtue of its two orders issued herein on April 24, 1954, did not take jurisdiction to try all the issues in the Schirmer case. Its conclusion was that the Circuit Court have another hearing to determine whether (a) it will try the case or (b) send the matter back to the Eclectic State Medical Board for trial. Under the situation thus created by the majority opinion I can see but one result when the matter is presented to the Circuit Court, and that will be to send the matter back to the Board for trial. The reason I say this is: The only thing, so far as the record shows, that stopped the Board from proceeding with the hearing on April 12th was the order issued by the Chancellor, and now, the majority says, the order of

the Chancellor was illegally issued. Thus, I envision another round of delays and appeals to this court.

In my opinion, based on the record in this case, the Circuit Court took complete jurisdiction, by virtue of the two orders issued by it on April 24th, to try this cause, and this court should now order the Circuit Court to proceed with the trial and make a complete disposition of the cause. My reasons are set out below.

(a) On April 15, 1954, after the Board had refused to proceed with the hearing on the 12th of April, the Attorney General filed in the Circuit Court a Petition For Certiorari alleging, among other things, that; he had "vainly and futilely attempted to present evidence" before the Board; "it was obvious that said respondent Board had no intention of conducting a hearing on said charges," and; "it is impossible for the petitioner to obtain a hearing before the respondent Board." Petitioner's prayer was: (1) That copies of the proceedings and records of the Board be brought up for review: (2) That the Circuit Court "set down for full and complete hearing and its subsequent determination thereupon the charges filed" before the Board; (3) That the Circuit Court revoke and cancel the purported license of Schirmer, and; (4) That the Circuit Court enjoin Schirmer from practicing medicine in the State of Arkansas.

To the above petition Schirmer filed a Response in which he denied all the allegations made by the petitioner, and he also alleged that he was entitled to a closed-session hearing before the Board.

On the above state of the pleadings a hearing was had before the Circuit Court on April 24, 1954. The court, after stating it was "well and sufficiently advised," found "that said petition for Writ of Certiorari should be granted," and gave the Board 10 days in which to file "a full and complete transcript of the record of the entire proceedings."

(b) If the above does not make it sufficiently clear that the Crcuit Court took complete jurisdiction of the

case, then all doubt was removed when the Circuit Court issued its next order on the same day. This order reads as follows:

"The defendant, Jacob Sass Schirmer, is ordered to appear in the court room of the Pulaski Circuit Court, Third Division, on April 30th, 1954, at 1:30 P. M., for the purpose of answering questions propounded to him in accordance with the provisions of Act 335 of the Acts of 1953."

A casual reading of Act 335 of 1953 reveals the fact that the Circuit Court had no authority to issue this order unless it was taking jurisdiction to try the case. Respect for the trial judge's familiarity with the law compels the conclusion that he intended to and did take complete jurisdiction to try the case against Schirmer.

GRIFFIN SMITH, Chief Justice, dissenting. At a time when circuit court had merely ordered the Eclectic Board to conduct a hearing, but had not attempted to control its discretion, the Board concluded that Act 343 of 1953 vested it with power to determine whether the investigation it had hesitated to undertake was affected by a requirement that its meetings be open to the public. The applicable part of Act 343 is copied in the margin.[1]

Effect of the court's holding is that Judge Cockrill had not assumed jurisdiction to the extent of lifting proceedings from the Board's control. At least this had not been done when, on April 12th, the Chancellor's mandatory order was issued. Ten days later circuit court directed that Dr. Schirmer submit to depositions, but it is stated that the order was predicated on Act 335 of 1953—

[1] "The meetings of all Boards and Commissions of this State, and of the political subdivisions thereof, including cities, counties, towns, and meetings of city councils, and the meetings of all departments and agencies of the state, or its political subdivisions and of each and all meetings of the board of directors of local school districts shall be open to the public, except in those instances when such boards and commissions meet to consider privileged matters, communications, and information concerning individuals, [and] . . . it shall be unlawful for said board to take any official action on any non-privileged matter [except publicly]."

discovery. The statute applies to circuit, chancery, and probate courts.

It will therefore be seen that when Judge Williams directed that the proceedings be public circuit court had merely ordered the board to hold hearings; but when Hughes and those associated with him procured the order against closed-door sessions, the board promptly adjourned.

Unless this court's majority is willing to say that circuit court had assumed jurisdiction for the purpose of hearing the evidence relating to Schirmer—a course that could be taken only upon a finding that the board was not functioning—the conclusion is inescapable that there could have been no jurisdictional conflict April 12th. The board was acting as a statutory agency; it had met for the ostensible purpose of investigating charges against Schirmer; circuit court had not undertaken to direct the manner of operation, and as far as circuit court was concerned the board was as least theoretically making an independent investigation, procedurally and otherwise.

But the board concluded that it was considering "privileged matters, communications, and information concerning individuals," hence under its construction of the law Act 343 permitted complete secrecy in respect of all persons other than the principal and his attorneys, the state's legal staff, and such witnesses as the board might choose to call.

I do not think this is a correct construction of the statute. Until such time as the court sees proper to say what the Act means, it is not appropriate for a dissenting judge to undertake that task in a detailed sense. Rather, I prefer to rest my point of disagreement upon the proposition that circuit court had not assumed jurisdiction of the board's conduct; and, this being true, the Chancellor had power to compel obedience to the policy declared by the General Assembly. The charges against Schirmer, whether true or false, are not privileged communications or matters. Evidence tending to prove that a physician

procured his license fraudulently is not to be classed as "information concerning individuals."

One whose profession is regulated by law, and who thereby becomes a licensee under restrictions imposed for the public good, must accept the benefits with such reasonable restrictions as the state may impose. Whether Act 343 was wise or improvident (and I am personally persuaded that implicit in the mandate the good far outweighs objections that have been urged) is a determination for the state's policy-forming department to make, as distinguished from the courts.

I would therefore hold that the mandatory order was properly issued, thus putting into effect what the General Assembly clearly intended, and obviating the probability that the issue will be back for a second or a third review. Appellate indecision should not be permitted to militate against expeditious hearings openly conducted.

DOBRZENIECKI *v.* DOBRZENIECKI.

5-225 270 S. W. 2d 891

Opinion delivered June 14, 1954.

[Rehearing denied October 4, 1954.]

Kaneaster Hodges and *Max Owen Bowie,* for appellant.

Pickens & Pickens, for appellee.

GRIFFIN SMITH, Chief Justice. Mary Garbowska Dobrzeniecki has appealed from an order modifying a divorce decree of 1949. The issues are twofold: First, it is insisted that changed circumstances justify an increase of the allowance of $35 per week made for maintenance of the couple's twins—a boy and a girl eight years of age when the separation occurred. They are now almost thirteen.

The Dobrzenieckis were married in 1940 and separated in 1946. At that time they were living in Brooklyn, New York, where the mother and children have remained. Approximately eight months after the separation occurred Dobrzeniecki came to Newport, Arkansas, where he secured remunerative employment. February 5th, 1949, he sued for divorce, alleging separation for more than three years without cohabitation. In his complaint Dobrzeniecki stated that his wife was a proper person to have custody of the children; that he had been making weekly payments to his wife for their support, and he asked that the court award a reasonable sum for their benefit.

In her answer Mrs. Dobrzeniecki denied that there was cause for divorce, adding that "if we were ever separated it was by reason of and directly the result of the plaintiff's own conduct". But, said she, if the petition should not be dismissed for want of equity, then in the alternative the prayer was for adequate provision for herself and the two children.

The evidence in the divorce case is not before us, so we do not know why the only award for support of Mrs. Dobrzeniecki was limited to half of what the Chancellor termed incentive pay—sums earned in addition to the weekly salary of $100 then in effect.

When in May, 1952, Mrs. Dobrzeniecki petitioned for modification of the 1949 decree, the children were then

eleven years of age. Parochial school expenses, the desirability of summer camps attendance, increasing costs of living, and the former husband's greater earning power, were mentioned. His base pay was then $160 per week, subject to certain necessary deductions. He had remarried and maintained his own home in Newport. The new wife's father lived with him, and he sent small contributions to his mother-in-law, ($5 per week) who resides at Forrest City.

The court found that Dobrzeniecki's incentive or bonus pay for 1950, 1951, and 1952 amounted to $2,149.78, and that none of this had been sent to his former wife. The decree directed that half of this sum, $1,074.89, with interest at six per cent, be paid to Mrs. Dobrzeniecki, but permitted the obligation to be liquidated at the rate of $10 per week. Contempt proceedings were dismissed. But there was a further order that the father have custody of the twins "during the summer vacation period." A fee of $50 was allowed to counsel for the petitioner.

We have concluded that the showing of changed conditions, particularly those relating to additional requirements for the children, was not sufficient to warrant modification of the decree, and the Chancellor's action in that respect is affirmed. It was error, however, to modify the custody award. Dobrzeniecki chose his own course when he left New York, and later when he invoked the Arkansas statute permitting a non-aggrieved spouse to sue for divorce without alleging any cause other than the lapse of time. When doing this he stated that his wife was a proper person to whom custody of the children should be given. The pathetic family involvements attending appellee's departure from New York and his voluntary course in asking the Chancellor to make the order of July 21, 1949—an order that so vitally affected the lives of these children—are matters that cannot be easily undone.

That part of the decree affecting custody of the children is reversed. In addition, the attorney for the

appellant will be allowed a fee of $100. Appellee will pay all costs.

Mr. Justice Ward did not participate in the consideration or determination of this appeal.

HAMILTON *v.* THE NORTHWEST LAND COMPANY, INC.

5-331 268 S. W. 2d 877

Opinion delivered June 14, 1954.

Carl Langston and *Wayne Foster,* for appellant.

Roy Danuser, Catlett & Henderson, Lasley, Spitzberg, Mitchell, Hays and *Wright, Harrison, Lindsey & Upton,* for appellee.

GRIFFIN SMITH, Chief Justice. Clara Hamilton was adjudged insane by Pulaski Probate Court October 30, 1939. She entered the State Hospital for nervous diseases that day and has remained there. At the time of her adjudication she was owner of 113 lots in Hamilton & Brack's Addition to the City of Little Rock and a home on Cedar Street. A guardian was immediately appointed, but he died about 10 years ago. H. J. Burney, a Little Rock attorney, succeeded the decedent.

The present controversy arises out of four transactions wherein sales of the ward's property were ordered

by Probate Court. In December, 1952, Don Cameron, a Little Rock abstracter, offered to purchase all of Block Five at a private sale. The guardian petitioned to make this sale and a court order was entered immediately. On May 25, 1953, the guardian requested authority to sell 56 lots to Gladys Knighton, and in a separate petition asked leave to sell 16 lots to Ed Lester, trustee. An order was entered fixing May 25th as the date of hearing. Appraisement, order of sale, report of sale, order confirming sale, and an additional bond, were filed the same day.

On June 3, 1953, the guardian petitioned to sell five lots to Floyd Barry, and again appraisement, report of sale, and order of sale, were entered the same day.

On August 27th, two nieces and a nephew of the incompetent intervened in the probate proceeding. They alleged that the sales were fraudulent and should be set aside. The guardian was charged with neglect amounting to legal, though not intentional, fraud; and his removal was requested.

The intervention was filed during the term of court the sales had been ordered, and it was requested that the approving directives be reopened and the transactions nullified. The court promptly ordered hearing, and after a careful procedural course denied the motions.

Appellants contend that the sales were in violation of various sections of the Probate Code and that the guardian had failed to exercise the required diligence to ascertain whether the price received (approximating $50 per lot) was a fair standard of worth.

The property is located close to Little Rock Junior College and Fausett's Broadmoor Addition. Each adjoins Hayes Street on the western boundary of Little Rock. The developments are of comparatively recent origin and it is argued that they increased the value of all surrounding property.

Several persons familiar with property in Little Rock and in the area under examination testified as to market values. As is frequently the case, there was a

wide divergence of opinion. Many influencing factors received consideration.

The principal contention of appellants is this: The guardian was admittedly uninformed respecting the property. He made no effort to acquaint himself with factors bearing on the advisability of accepting offers to purchase in stated amounts. His failure to affirmatively represent the ward's interest, and to handle the trust in a manner at least approximating methods he would have applied to his own business, are alleged to have tainted each transaction to a point of avoidance. It is urged that the court's refusal to set the sales aside amounted to an abuse of discretion.

A discovery deposition was taken from Burney and attached to a motion to set aside. Burney testified that the first sale now questioned was made to Cameron, who came to his office and offered to buy Block 5. All the property had forfeited in 1938 for non-payment of the 1937 general taxes and had been certified to the state in 1941. Burney agreed to sell to Cameron, and appraisers suggested by Cameron were chosen. The guardian had frequently disposed of single lots at $50 to persons holding tax forfeiture deeds. Cameron expected to get the lots in Block 5 for $50 each. The appraisers, however, fixed the price at $75. An order of sale was made in December, 1952, but was not consummated until May 20, 1953.

In all subsequent sales the names of appraisers were suggested by purchasers. Blank appraisals were given to Burney. The pleadings utilized in handling procuring orders were prepared by the purchasers or their counsel, except the sale to Floyd Barry. It was prepared by Burney.

Burney did not know how close Little Rock Junior College was to this property, and his information was only general concerning Fausett's development of Broadmoor Addition. He understood that Hayes Street had been paved, but did not know where his ward's property lay with reference to Hayes.

Previously, no one had offered more than $50 a lot, said Burney. Some public sales of single lots were made and no other than the ultimate purchaser appeared. The last public sale was in 1952. Until the lots were appraised at $75 each in the Cameron transaction none sold for more than $50. The guardian last saw the realty in 1945 or 1946. Because of the condition of title as affected by tax forfeiture Burney felt that the value was precarious.

Cameron, purchaser of Block 5, testified that he suggested the names of appraisers to Burney only after Burney requested him to do so.

Cameron employed counsel to assist him in the purchase, and this attorney prepared the preliminary papers and the orders. The petition relating to lots in Block 5 recites that sale was conditioned on the guardian's redemption from a 1930 tax sale. Further conditions were that Cameron would pay all court costs, attorneys' fees, abstract expenses, and provide revenue stamps incidental to redemption. Cameron had been advised that it would facilitate matters if the guardian proceeded to redeem instead of having a purchaser do so.

Before redemption was accomplished Floyd Barry acquired the tax title from Ned Dumas, the original tax title purchaser, and Cameron eventually negotiated a settlement with Barry so that Block 5 was divided,—the east half to Barry and the west to Cameron. The amounts each had paid were added, each paying 50%.

The condition of the title was ascribed by Cameron as a factor materially affecting values. The purchase was speculative, the property was unimproved, there was no ready access to utilities, and persons were in possession of certain portions which clouded the title. Cameron's partner owned 20 acres immediately across the street from Block 5. It was Cameron's thought that he and this associate would gradually accumulate enough lots to "partially control the situation"; but they were apprehensive each time they bought the property that

it might have to be held for a long time before a profit could be realized.

In his position as an abstracter Cameron knew, in February, 1953, (from a newspaper article), that Broadmoor Addition was to be developed, but the actual location had not been settled. He regarded the presence of Little Rock Junior College—about three-quarters of a mile from Block 5—as having no connection with the value of Block 5.

On being questioned about the purchase of five lots in Block 3 from a man named Lee for $750, Cameron said that if the guardian had been able to produce a good title without uncertainty of litigation the lots in Block 5 might have been purchased from the guardian at the same price.

Several real estate brokers testified on behalf of appellants. They had appraised the property and they gave varying estimates of its worth—values all substantially in excess of the price paid by appellees. These witnesses thought the announcement that Broadmoor Addition was to be developed would immediately increase the value of the property and that actual development would further enhance it.

Elbert Fausett, the developer of Broadmoor Addition, testified that he paid $52,000 for the land on which the Addition was located. It includes 190 acres. His contract for actual development was not let until June of 1953 and the plat was filed in August, 1953. He did not purchase any property in Hamilton & Brack's Addition because he didn't care to expand farther west. He said: "I couldn't take the gamble and the risk and then wait on the addition to clean out and become more desirable. . . . I consider this property in the same class as other property west of my Addition." In his opinion Hamilton and Brack's Addition is not suitable for development in the manner of Broadmoor. The announcement of a development is not always followed by actual improvement, because plans are sometimes abandoned. The announcement incidental to Broadmoor appeared in February, 1953.

Louis Nalley, a real estate broker called by appellees, testified that he acquired a tax title to Lots 10 and 11 in Block 7, Hamilton & Brack's Addition, in January, 1952, and purchased a guardian's deed in February, 1952. He described the condition of the property as of May, 1953, as "raw land". In his judgment the fair market value at that time would range from $40 to $75 a lot. His opinion was predicated on the lack of utilities, location of the land, and the fact that he himself was an owner of property in the addition and had bought and sold lots there. It was common knowledge that these lots could be purchased from the guardian. Mr. Nalley was one of the appraisers.

Other real estate brokers testified on behalf of appellee and each felt that the mere announcement that Broadmoor was to be developed did not influence the value of Hamilton & Brack's Addition.

Appellants complain that the sale proceedings and confirmation were fatally defective because no sworn evidence was presented to the court to support the petitions for sale (Don Cameron's petition being the only one that was verified by affidavit); that the appraisers were selected by the purchasers instead of the guardian or the court; that the guardian was unfamiliar with the location and value of the lands and had not exercised diligence in keeping abreast of valuation changes; that contrary to the guardian's belief the title was not so clouded as to depress the value and justify sales at the low figure shown; that no facts existed to substantiate actions of the guardian—this for the reason that the estate was supplied with funds sufficient to meet current needs of the ward, hence the petitions requesting sales were not supported by a showing of reasonable necessity.

Because opinions as to the true value of the property were so divergent we have concluded that no error resulted from the court's refusal to set the sales aside because of price inadequacy. Value standards are so flexible that failure of the probate judge to accept appellants' version cannot be said to involve an erroneous consider-

ation of the weight of evidence. Likewise, confirmation of the sales cured all errors not jurisdictional or clearly violative of some fundamental right secured through the provisions of the probate code.

The duties of a guardian of the estate of an incompetent are defined in Ark. Stat's § 57-624. The guardian must "exercise due care to protect and preserve [the property]". And "to the extent applicable, the law of trusts shall apply to the duties and liabilities of a guardian of the estate."

Sales by guardians are controlled by the decedent's estate law, Ark. Stat's § 62-2707 to 62-2723 inclusive. Under the provisions of Ark. Stat's § 62-2710, an order of sale is secure against collateral attack but an appeal from an order of confirmation permits appellate review not only of the order of confirmation but also a review of the original order authorizing the sale, although time for appeal may have elapsed. Sales not in substantial compliance with the provision of the code are defined as void.

The controversy resolves itself into one paramount question: Was the price received so demonstrably disproportionate to lot values as to require us to say that the trial court abused its discretion? Stated differently, was the evidence of enhanced worth of a character necessitating a finding that the guardian, in the first instance, was derelict in his duty, and in the second instance that the court improperly appraised the evidence relating to progressive steps in area development thought by appellant to have been so generally known that the purchasers were parties to unfair tactics?

Because of the broad alternative rights vested in the Probate Court in matters such as we are dealing with and the better public policy of sustaining judicially-directed sales unless imperative reasons are shown for avoidance, the judgments are affirmed.

Mr. Justice McFaddin dissents.

4774 270 S. W. 2d 904

Opinion delivered June 14, 1954.

[Rehearing denied October 4, 1954.]

[redacted]

J. Hugh Wharton, for appellant.

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

J. S. HOLT, J. George Nunley, appellant, was found guilty by a jury September 17, 1953, of the crime of assault with intent to kill (§ 41-606, Ark. Stats. 1947) and his punishment fixed at a term of five years in the State Penitentiary. From the judgment is this appeal.

For reversal, appellant first contends that the evidence was not sufficient to support the jury's verdict and that the trial court erred in refusing his request for a directed verdict at the close of all the testimony. We

hold that there was ample evidence to sustain the jury's verdict and that the court correctly refused appellant's request for a directed verdict.

On May 7, 1953, Nunley went to the home of his former wife's parents with full knowledge that she, after having been divorced from Nunley, had remarried and was then the wife of P. J. Ross. He had armed himself with a loaded automatic pistol, a deadly weapon. Ross was there at the time with his wife and had been there about five minutes when he noticed Nunley standing on the sidewalk in front of the house. Ross said to his mother-in-law: "There is George," and she said: "What does he want," and Ross answered: "I don't know." Ross's mother-in-law then called to Nunley and asked him what he wanted, whereupon Nunley walked to the front porch and asked if P. J. (meaning Ross) and Eunice were married. She told him that they were, and he replied: "That is all I want to know." Ross then asked Nunley if he had been seeing Eunice since their divorce and Nunley told him to let Eunice answer the question, and she answered in the negative, whereupon Ross walked off the front steps and Nunley pulled a pistol and began firing at Ross. Six shots appear to have been fired, four taking effect. Ross was wounded in the left wrist, left arm and in the right and left hips. Some of the bullets entered from the rear.

Ross's mother-in-law, an eye witness, testified: "Q. After the first shot what did P. J. (Ross) do? A. He turned and started walking off. Q. Then what happened? A. George (Nunley) shot again. Q. Then what did he do again? A. After he shot all the shots out of the gun he turned and went on. Q. P. J. did? A. George did. Q. Was anything said by George or P. J.? A. You mean before that started? Q. No, after George got through shooting? A. After George left he said he was going, but he would be back. Q. That is this defendant? A. That is right. Q. Was it dark then? A. It was pretty dark, it was around eight o'clock. Q. But you could recognize George and P. J. from standing distance? A. Yes, sir, because they were not too far from me. Q. Do you know how many

times George shot at P. J.? A. Imagine he shot at least five or six times. Q. Did he empty his gun? A. I am sure he did. Q. Did he click the gun after he emptied it? A. I am sure it was once or twice. . . . Q. Did you see P. J. Ross with any kind of weapon at the time? A. No, sir, I didn't see him with anything in his hand."

Appellant argues that intent to kill was lacking, admitted the shooting, but claimed that it was done in self defense. This presented a fact question for the jury, which found him guilty of assault with intent to kill. The jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351; *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813.

"While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault, such as the use of a deadly weapon in a manner indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death, or great bodily harm. In determining whether or not the intent to kill should be inferred, the trier of the facts may properly consider the character of the weapon employed and the way it was used, the manner of the assault and the violence attendant thereon; the nature, extent and location on the body of the wound inflicted, if any; the state of feeling existing between the parties at and anterior to the difficulty; statements of the defendant, if any; and all other facts and circumstances tending to reveal defendant's state of mind. (Citing cases.) It is not essential that the intent should have existed for any particular length of time before the assault, as it may be conceived in a moment." *Davis* v. *State,* 206 Ark. 726, 177 S. W. 2d 190.

Here Nunley's actions, from substantial testimony, warranted the jury's finding that he intended to kill Ross. Had he succeeded in killing Ross, the evidence would have warranted a conviction of murder.

As indicated, there was no error in the trial court's refusal to instruct the jury to direct a verdict since the

evidence was ample to take the case to the jury. "The trial judge may direct a verdict only where the evidence raises no material question of fact for the jury's determination." *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80, and *Ruffin* v. *State,* 207 Ark. 672, 182 S. W. 2d 673. See also, *Keese and Pilgreen* v. *State, ante* page 261, 265 S. W. 2d 542.

Finally, appellant contends that the court erred in refusing to sustain his objections to certain alleged leading questions propounded to witnesses, Ruby Elder, Eunice Ross and P. J. Ross.

The record reflects that the trial court, in each instance, sustained appellant's objections and where the questions appeared to be leading required the prosecuting attorney to rephrase his questions. We hold, therefore, that this contention is without merit.

Affirmed.

LOTT *v.* STATE.

4771 268 S. W. 2d 891

Opinion delivered June 14, 1954.

George F. Edwardes and *Harkness & Friedman,* for appellant.

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

J. SEABORN HOLT, J. November 30, 1953, a jury returned a verdict of guilty of the crime of possessing stolen property (Section 41-3934, Ark. Stats. 1947) against both appellants, Gladys and Maxie Lott, and fixed the punishment of each at a term of three years in the State Penitentiary. From the judgment is this appeal.

For reversal, appellants set forth thirteen assignments of alleged errors. Assignment No. 9 was, in effect, that the trial court erred in instructing the jury in its instruction No. 5 to the effect that possession of recently stolen property would be sufficient, if unexplained, to sustain a conviction of receiving stolen property, for the reason that this instruction amounted to a comment upon the weight of the evidence and a charge upon the facts.

After a careful review of the record, we have concluded that the trial court erred in giving, over appellants' exceptions and objections, instruction No. 5, which we presently consider. But for this error we would affirm the case.

Since we are reversing and remanding the case for a new trial, we point out, as indicated, that all other assignments of alleged errors are without merit and we do not discuss them.

Instruction No. 5 to which appellants object contains this language: "Now, Gentlemen of the jury, the defendants are also charged in count two with receiving stolen property knowing it to be stolen;

"The law provides that: 'Whoever shall receive or buy any stolen goods, money or chattels, knowing it to be stolen, with intent to deprive the true owner thereof, shall be upon conviction, punished as it, or may be, by law prescribed for the larceny of such goods or chattels.'

"In this connection, you are instructed that in a prosecution for receiving stolen goods, proof of receiving the stolen goods or being in possession thereof knowing them to be stolen is an essential element of the offense. *It is not sufficient, Gentlemen, to merely show*

that the goods were stolen, and that the defendants were in possession thereof, but the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of receiving stolen property. It is for your determination to find whether or not at the time the defendants came into possession thereof, if in fact they were in possession thereof, knowing them to be stolen, they did so with the intent to deprive the true owner of the value thereof."

The sentence above in italics (supplied) constitutes the vice in the instruction.

We hold that the instruction was inherently wrong since, in effect, it was on the weight of the evidence and an invasion of the province of the jury. Such was the effect of our holding in the recent case of *Holcomb* v. *State,* 217 Ark. 407, 230 S. W. 2d 487, wherein we said:

"In *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029, we said: 'We have held in repeated decisions that unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or of the crime of knowingly receiving stolen property; but that an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury.

" 'In *Duckworth* v. *State,* 83 Ark. 192, 103 S. W. 601, the instruction told the jury that 'the possession of property, recently stolen, unexplained, is evidence of the defendant's guilt,' and that if such unexplained possession is corroborated by other evidence tending to connect the accused with the larceny, 'then you will find them guilty.'

" 'In *Thomas* v. *State,* 85 Ark. 138, 107 S. W. 390, the court charged the jury that "the possession of property recently stolen, unexplained, . . . would be sufficient under this indictment to sustain a conviction."

" 'In each of these cases, we held that the instructions given were erroneous for the reason that they were on the weight of the evidence.' . . .

" 'The rule is that the unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn.' It is wholly within the province of the jury to draw or not to draw such inference, and it is an invasion of the province of the jury to tell them, as a matter of law, that the unexplained possession of recently stolen property raises a presumption of guilt."

State's counsel, however, argues that there was no general or specific objection made to this instruction by appellants. The record reflects, however, that appellants' counsel made a general and specific objection to instruction No. 4 given by the court, which immediately preceded No. 5, and presented to the court his objections to instructions 4 and 5 in this language:

"In this instruction, the court further told the jury that 'the possession of recently stolen property by the defendants, if you find from the evidence in this case beyond a reasonable doubt that they actually were in possession of recently stolen goods is a fact from which their complicity in the original stealing of the property may be inferred, but this fact standing alone, if you find it to be a fact, is not sufficient to sustain a conviction.' The court made further references to the possession of recently stolen property and the defendants object and except to such references to such charge as such charge constitutes a singling out of evidence. A statement of the court's opinion of the weight that would be given thereto and constitutes an invasion of the province of the jury. The defendants here cite *Denmark* v. *State,* 58 Ark. 576, 25 S. W. 867, and *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029. Any reference to possession of recently stolen property is in violation of the law, and the defendants object and except to said references and to the giving of said instruction.

"Defendants object and except to the court's instruction No. 5 on the ground that it is contradictory to the

alleged charge of importing stolen property into the State of Arkansas, and excepts to the action of the court in giving the same.''

We think a fair inference to be drawn, and the effect to be given to this language, is that it amounted to a general objection to instruction No. 4 and to the giving of instruction No. 5 also and was sufficient since we hold that instruction No. 5 was inherently wrong.

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

The Chief Justice and Justices MILLWEE and WARD dissent.

JAMIESON *v.* JAMIESON.

5-425 268 S. W. 2d 881

Opinion delivered June 14, 1954.

Caldwell T. Bennett, for appellant.

Charles F. Cole, for appellee.

ED. F. MCFADDIN, Justice. This appeal results from the unsuccessful effort of Mrs. Jamieson to set aside—after the lapse of the term—a divorce decree obtained by Mr. Jamieson. The divorce was granted on September 8, 1952, and it was not until April 14, 1953, that Mrs. Jamieson filed her present petition asking the Court to vacate the decree. She claimed that Mr. Jamieson

testified falsely in the divorce case when he said that he was a *bona fide* resident of Arkansas.

In the record before us, we have the pleadings and the testimony in the divorce case. In the complaint, filed on May 2, 1952, Mr. Jamieson alleged that he moved to Independence County, Arkansas, on February 20, 1952, ". . . with the intent then and there of becoming a *bona fide* resident of Independence County, Arkansas, and has since that date been domiciled in Independence County, Arkansas, having rented a home there and having secured employment in said county, and has lived in said county continuously since removing here from Rock Island County, Illinois."

A warning order was duly published on the complaint, and Mrs. Jamieson, a resident of Illinois, was notified by the *attorney ad litem,* who is her present counsel. Later this attorney appeared for Mrs. Jamieson in the divorce proceedings and cross-examined the witnesses. Mr. Jamieson testified on September 8, 1952, that he had lived in Batesville approximately six months. On cross-examination, this occurred:

"Q. You are telling us you have moved to Arkansas and going to become an Arkansawyer, is that right?

"A. That is right."

In the divorce decree of September 8, 1952, Mr. Jamieson was directed to pay Mrs. Jamieson $10.00 per week thereafter for maintenance; and seems to have complied with such order. Shortly after the decree, Mr. Jamieson returned to Illinois; and then on April 14, 1953, Mrs. Jamieson filed the present petition to set aside the divorce decree, saying:

"That the plaintiff, Wallace V. Jamieson, is not and was not a *bona fide* citizen and resident of the State of Arkansas, or of the County of Independence, at the time of filing his petition for divorce, nor at the time of the rendition of the decree.

"That after the rendition of the aforesaid decree, that the plaintiff, Wallace V. Jamieson, left the City of

Batesville, County of Independence, State of Arkansas, and returned to the City of Moline, Illinois, where he has been actively engaged in the operation of an automotive garage."

The only evidence offered to support the petition to vacate was the deposition of Mr. Jamieson taken in Rock Island County, Illinois; and in that deposition he still insisted that as soon as he could conclude some litigation and business matters involving his Illinois property, he intended to return to Arkansas.[1]

We have repeatedly held that after the lapse of the term, the Trial Court loses jurisdiction to set aside its

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[1] Here are typical portions of Mr. Jamieson's testimony:

"Q. What was your intention in going to Arkansas in regard to establishing your residence?

A. My intention was to get an easy job and buy a place along the river and hunt and fish.

Q. Was it your intention to establish a residence in Arkansas?

A. Yes.

Q. When were you divorced?

A. September 8, 1952.

Q. Now after the divorce was granted did you leave the State of Arkansas?

A. I did.

Q. About when?

A. It was about the 15th.

Q. Of September?

A. Yes.

Q. Was there any reason for leaving Arkansas?

A. My boy took sick.

Q. Which boy?

A. Verne.

Q. You got word that he was sick?

A. They called me long distance that he was in the hospital.

Q. You came back for that reason?

A. I did.

Q. Did you intend when you came back here to leave Arkansas permanently and establish your residence in Rock Island County, Illinois?

A. I did not.

Q. What is your intention with respect to returning to the State of Arkansas as a place of permanent residence after your building is completed and your deal with the City of Moline has been completed?

A. I intend to go back and to remain and to become a citizen of Arkansas.

Q. Do you know where you intend to go?

A. I'd like to go to Batesville, Arkansas."

decrees, except by (a) proceedings under § 29-506, Ark. Stats., or (b) Bill of Review in Equity, or (c) for error of law apparent on the face of the record. *Fawcett* v. *Rhyne,* 187 Ark. 940, 63 S. W. 2d 349; *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583; *Hagen* v. *Hagen,* 207 Ark. 1007, 183 S. W. 2d 785, and *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162.

The present proceeding is one brought under § 29-506, Ark. Stats. If we consider it as being under the first sub-division—*i.e.,* evidence discovered after the term —we find that Mrs. Jamieson has not acted promptly in filing this proceeding. Mr. Jamieson returned to Illinois on September 15, 1952; yet Mrs. Jamieson delayed the filing of this petition until April 14, 1953. *Mo. Pac.* v. *George,* 200 Ark. 560, 140 S. W. 2d 680; *Trumbull* v. *Harris,* 114 Ark. 493, 170 S. W. 222; *Tune* v. *Vaughan,* 170 Ark. 971, 281 S. W. 906, and *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517.

If we consider this as a proceeding to set aside the judgment of divorce because of the fourth ground set forth in § 29-506, Ark. Stats.—*i.e.,* fraud practiced by the successful party in obtaining the decree—we likewise reach the conclusion that the judgment of the Trial Court must be affirmed. The question of Mr. Jamieson's *bona fide* residence in Arkansas was an issue in the divorce case, yet Mrs. Jamieson did not appeal from the decree of divorce. In *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234, in discussing what is fraud in the procurement of the original decree sufficient to justify the Court in setting aside the decree under § 29-506, Ark. Stats., we quoted from *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517:

"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."[2]

[2] To the same effect see *Blankenship* v. *Montgomery,* 218 Ark. 864, 239 S. W. 2d 272; and *Manning* v. *Manning,* 206 Ark. 425, 175 S. W. 2d 982.

Likewise, in *Alexander* v. *Alexander, supra,* we quoted from *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93, as to acts which constitute intrinsic or collateral fraud:

"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. . . . On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

The question of Mr. Jamieson's *bona fide* residence in Arkansas was an issue in the divorce case. He testified that he was a resident. Mrs. Jamieson's present attorney cross-examined Mr. Jamieson on that point. If Mr. Jamieson was not a resident of Arkansas, then he committed perjury, but perjury in the original case is not an *extrinsic* fraud.

On the showing here made by Mrs. Jamieson, we conclude that the Trial Court was correct in refusing to vacate the original decree of divorce. Affirmed.

The Chief Justice concurs.

Justice WARD not participating.

BRANDON *v.* GENERAL MOTORS ACCEPTANCE CORPORATION.

5-441 268 S. W. 2d 898

Opinion delivered June 14, 1954.

Eugene Coffelt, for appellant.

Vol T. Lindsey, for appellee.

WARD, J. The decisive issue on this appeal is: Under what facts and circumstances does the holder of a Conditional Sales Contract repossess the merchandise so that he is precluded from maintaining an action for the unpaid balance?

Appellant, Emerald Brandon, a resident of Pea Ridge, Arkansas, purchased an automobile from the Griffith Motor Company of Neosho, Missouri, on May 10, 1952. Brandon executed a Conditional Sales Contract to said motor company, which was promptly assigned for value to appellee, General Motors Acceptance Corporation, where he agreed to pay the total time balance due on the purchase price of $835.38 in 18 monthly installments of $46.41 each beginning June 1, 1952. At the same time Brandon took out an insurance policy on the automobile with the Motors Insurance Corporation protecting him against loss or damage by fire, with the usual clause insuring General Motors Acceptance Corporation as its interest might appear.

On February 27, 1953, the automobile was destroyed by fire. At this time Brandon had made all payments due up to March 1, 1953. The Motors Insurance Corporation

refused, on demand, to pay Brandon for the fire loss because, apparently, the officers were investigating a suspicion that the automobile was set on fire.

The automobile was found in a badly burned condition in the woods near Gravette, Arkansas, and the insurance company had it stored in Ballard's garage in that town.

On May 1, 1953, Brandon sued the Motors Insurance Corporation, alleging among other things that the automobile was "burned to such an extent that it was a total loss," and on July 13, 1953, Brandon obtained a judgment against the insurance company in the Benton Circuit Court in the sum of $575.

In the meantime General Motors Acceptance Corporation made demand on Brandon to continue his monthly payments, but Brandon refused to do so. The first week in April after the fire in February, Amon Bumgarner, field representative for General Motors Acceptance Corporation, saw the burned automobile for the first time in Ballard's garage, and, understanding it had been left there by the insurance company, had it transported to Anderson, Missouri, where it was stored.

On July 27, 1953, General Motors Acceptance Corporation filed this suit against Brandon for the unpaid balance due under the sales contract amounting to $417.69, and in the same action Dale Jefferson, Clerk of the Benton Circuit Court, was made defendant, as garnishee, alleging that he had funds in his possession belonging to Brandon and that he was holding, as trustee for it, the proceeds of the judgment on the insurance policy mentioned above. Brandon answered "that any claim General Motors Acceptance Corporation had against him [defendant] has been adjudicated and disposed of at a time when plaintiff repossessed and took possession of the automobile."

After hearing the testimony offered by both sides, the trial judge, sitting as a jury by agreement, rendered judgment in favor of General Motors Acceptance Corporation against Brandon and Anderson (garnishee) in the

sum of $342.69. This exact amount was arrived at by the court after deducting $75 for the salvage value of the automobile which was still in possession of General Motors Acceptance Corporation. The evidence fully sustains the trial court in fixing the value of the salvage at $75. The trial judge gave no written statement of the grounds or reasons upon which it based its final judgment.

In our opinion the judgment of the trial court was correct and must be affirmed by us.

The rule of law applicable to a case of this nature is well settled by the decisions of this state and is not questioned by either party. In substance the rule is this: The holder of a Conditional Sales Contract has the right to elect, in case of a breach, (a) to treat the contract as canceled and repossess the property, or (b) treat the sale as consummated and sue for the balance of the purchase price. See *Dixie Cab Company* v. *Black & White Cab Company,* 214 Ark. 624, 217 S. W. 2d 602, and *Loden* v. *Paris Auto Company,* 174 Ark. 720, 296 S. W. 78. Substantially this same rule, as it relates to the facts of this case, is in force also in the State of Missouri. In the *Keystone Press* v. *Bovard,* 236 Mo. App. 156, 153 S. W. 2d 130, the Supreme Court of Missouri said:

"From an examination of authorities cited by both parties, it seems to be well settled in this state that under a conditional sales contract, upon default in the payment of the balance of the purchase price, the vendor may, at his option or election, either (1) retake the property, with or without suit, or (2) sue for the purchase price, or (3) by proper suit foreclose his equitable lien."

In neither state can the seller have more than one remedy and the election of one excludes the other.

Applying the above rule, appellant strongly urges that General Motors Acceptance Corporation made its election of remedies when Bumgarner had the burned automobile taken to Anderson, Missouri, that General Motors Acceptance Corporation thereby elected to repossess said automobile and that, consequently, it there-

after had no right to sue for the balance of the purchase price.

We cannot agree with this contention made by appellant. We must assume that the trial court knew that if General Motors Acceptance Corporation actually repossessed the automobile it could not maintain this suit for the balance due on the Conditional Sales Contract. Therefore, since it is undisputed that the agent of General Motors Acceptance Corporation did have the automobile moved from Ballard's garage to Anderson, Missouri, the court must have found from the evidence that this taking by General Motors Acceptance Corporation did not amount to a repossession of the automobile such as is contemplated under the rule heretofore announced. In our opinion the evidence in this case is substantial to support such a finding by the trial court. We think the testimony sustains the finding that the action of General Motors Acceptance Corporation, through its agent Bumgarner, was taken only for the purpose of preserving the salvage value of the automobile, believing it to be abandoned by appellant. All of the testimony, including that of appellant, was to the effect that the automobile was burned beyond any possibility of repair and that the damage by fire caused a total loss.

Although appellant denies that he abandoned the automobile after it was damaged or destroyed by fire, yet his own actions and testimony are substantial evidence to support a finding to the contrary. Appellant made no effort to reclaim the automobile after the fire and of course refused to make further payments, although the car remained in Ballard's garage at the nearby town of Gravette from the latter part of February to the first week in April. On the contrary he states that he left Arkansas and went to Kansas some two weeks after the fire occurred, and that he thinks he first saw the car about the first of April. Appellant attaches significance to the fact that Bumgarner wanted his permission to sell the salvaged automobile, contending this indicated General Motors Acceptance Corporation had repossessed the automobile. We do not think this conclu-

sion necessarily follows. Under the facts and circumstances of this case, this action on the part of Bumgarner, might just as well suggest that he was merely trying to preserve assets which he recognized belonged to appellant. Bumgarner said he wanted appellant's permission to sell the automobile in order to reduce appellant's liability.

Appellant seeks to explain his failure to assume immediate control of the burned automobile by the fact that a criminal investigation was in process, and the sheriff advised him to stay away, but this does not explain why he never at any time attempted to take possession of it.

The trial court, we think, was justified in finding that appellant abandoned the damaged automobile and that the Insurance Company and General Motors Acceptance Corporation took custody of it solely for the purpose of preserving the salvage value, pending a final disposition of the whole matter. Their interest in the automobile and the lack of concern on the part of appellant justified their actions.

Accordingly the judgment of the trial court is affirmed.

SUTTERFIELD *v.* BURBRIDGE.

5-440 268 S. W. 2d 900

Opinion delivered June 14, 1954.

Ben F. Williamson and *Chas. F. Cole,* for appellant.

John B. Driver, for appellee.

ROBINSON, J. This case stems from a contract for the sale of real estate. The appellants, James F. and Ina Sutterfield, entered into a written contract to sell to appellee, Vern Eugene Burbridge, certain real estate. The purchaser paid $200 at the time of the execution of the contract, agreed to pay an additional $500 within 60 days, and another $500 within 30 days thereafter, with the balance to be paid within 12 months from that time. The contract states: "Provided however, that all moneys paid hereunder are paid on the condition of the grantor herein furnishing good and sufficient and marketable title to said lands and an abstract of the title thereto together with a Warranty Deed, tendered upon full payment of the purchase price therefor."

In due time the sellers made demand for the first $500 payment, but in the meantime the purchaser had ascertained that the sellers could not deliver a marketable title in accordance with the terms of the contract, since they had previously sold the timber on a portion of the land to another party, and the timber had not been removed at the time of the contract to sell to Burbridge. Hence Burbridge refused to make any additional payments unless the Sutterfields would make proper arrangements so that Burbridge, the purchaser, would not only get title to the land itself but the timber standing on the land. Later Burbridge filed suit against the Sutterfields for breach of contract, but a non-suit was taken. Subsequently Burbridge filed this suit in the chancery court to enforce the terms of the contract, asking for specific performance, with the alternative prayer that if title to said lands could not be conveyed to the plaintiff according to the terms of the agreement, the defendants be required to make restitution to the plaintiff of the $200 down payment plus $405 as damages.

The Sutterfields, defendants in the lower court, filed a motion which in effect was a plea in abatement, giving rise to the issue of whether in filing the first suit for damages, Burbridge had made his election of remedies and was thereby precluded from maintaining an action for specific performance. There was a decree for the

plaintiff for the sum of $200, and from that decree comes this appeal.

Appellants are correct in their contention that since Burbridge had made his election of remedies and sued for damages, he could not thereafter shift his ground and sue for specific performance, although he had taken a non-suit in the suit asking for damages. *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107. However, here there is the alternative plea for restitution of the $200 down payment and also $405 damages. This part of the complaint asking for restitution and damages is not inconsistent with the suit previously filed; therefore the trial court treated the pleadings in this case asking for specific performance as surplusage and rendered a decree for $200, but allowed no other damages. There is no cross appeal from the court's action in allowing only $200 damages.

We cannot say the chancellor's decree allowing the $200 is contrary to a preponderance of the evidence.

Affirmed.

WHETSTONE *v.* TRAVIS, ET. AL.

5-451 269 S. W. 2d 320

Opinion delivered June 21, 1954.

Bernard Whetstone, for appellant.

Walter L. Brown and *Robert C. Compton,* for appellee.

MINOR W. MILLWEE, Justice. This appeal involves the reasonableness of an attorney's fee allowed appellant under Ark. Stats., § 25-301 and growing out of a settlement made by the parties litigant without the knowledge or consent of appellant. On January 23, 1952, S. M. Edwards retained appellant to collect an account against appellees totaling $715.00. It was agreed that appellant should receive as his fee $215.00 if recovery was obtained without suit being filed, and 50% if suit was filed. That same day appellant prepared a verified complaint against appellees, but the complaint was not filed until August 5, 1952. Appellee's answer alleged that the account had been paid. On November 19, 1953, the court, sitting as a jury, rendered a judgment for the appellees, having found that the account sued upon was settled by appellees' paying S. M. Edwards $520.00 on February 4, 1952.

The same day the judgment was rendered, appellant filed a motion for an attorney's fee for his work in the case and alleged that a reasonable fee would be $357.50. The motion set out that appellant had written a registered letter to Charles E. Travis as agent for appellees on January 23, 1952, and forwarded it by special delivery mail with a return receipt requested and also forwarded by unregistered mail a copy of said letter to George James, another appellee. This letter, made an exhibit to appellant's motion, informed appellees that appellant had been instructed to file suit against them. Appellant's motion further alleged that because of this letter he obtained an attorney's lien on the cause of action for his fee under the statute. On January 12, 1954, a judgment on the motion was rendered, awarding appellant a fee of $75.00.

By a stipulated narrative statement of the testimony it appears that Edwards called appellant and told him

that Sonnell J. Felsenthal had contacted him and contemplated paying Edwards' claim against appellees, but that Felsenthal wanted a letter of assurance setting out the amount of the demand and stating that payment of that amount would constitute payment in full and settlement of the claim. On January 28, 1952, appellant wrote Felsenthal a letter directing that payment of $520.00 to Edwards and $215.00 to appellant would constitute full and complete release of all claim against appellees. Appellant never received any money from anyone, and he filed suit on August 5, 1952, suspecting that a settlement had been made, but unable to confirm his suspicions. Appellant testified and the pleadings so indicate that his motion for attorney's fees was based on a *quantum meruit* theory, and that between January 23, 1952, and February 4, 1952, the date the settlement was made, his activity in the matter had consisted of preparing a complaint and writing two letters for his client. G. E. Snuggs, attorney and court reporter, testified that in his opinion a reasonable fee for the services outlined by the petitioner would be from $75.00 to $100.00. He thought appellant's efforts were more extended than the circumstances required and stated that the reason for his modest estimate was that he considered the claim for attorney's fee a secured one from the beginning.

Ark. Stats., § 25-301, *supra,* insofar as it is pertinent to this case, provides that an attorney shall have a lien on his client's cause of action from and after service upon the adverse party of written notice by registered mail, or, in the absence of such written notice, from and after the filing of suit. If the adverse party then compromises the claim without the attorney's consent he is liable to the attorney for a reasonable fee. The present case seems to be clearly within the purview of this statute, and the trial court was correct in holding appellant entitled to a reasonable fee for his services. See *Slayton* v. *Russ,* 205 Ark. 474, 169 S. W. 2d, 571 146 A. L. R. 64.

Thus, the case devolves into the single consideration of what is a reasonable fee. Mr. Snuggs and appellant were the only witnesses who testified on this issue. Ap-

pellant testified that $357.00 would be reasonable under the circumstances but that if he were compensated for everything he had done a reasonable fee would be $1,000.00. But such estimates are not necessarily controlling. As we said in *Shackelford* v. *Arkansas Baptist College,* 181 Ark. 363, 26 S. W. 2d 124: "Neither the trial court, nor this court on appeal, is bound by the testimony of appellant and his expert witnesses in determining the value of his services." And, as the court said in *Lilly* v. *Robinson Mercantile Company,* 106 Ark. 571, 153 S. W. 820: "It may be conceded that the opinion of the attorney familiar with the subject was entitled to great weight, but it was not to be blindly received, it was to be intelligently examined by the court trying the case in the light of his own general knowledge of the subject of inquiry and should control only as it was found to be reasonable, otherwise the opinion of the witness would be substituted for the judgment of the court." In *St. Louis-San Francisco Ry. Co.* v. *Hurst,* 198 Ark. 546, 129 S. W. 2d 970, 122 A. L. R. 965, we set out the rules for determining the reasonableness of a fee awarded an attorney. There the only testimony as to the value of the attorney's services estimated it as $1,000.00 to $1,500.00. In reducing an award of $1,000.00 to $500.00 we said: "Although this testimony [as to a reasonable fee] was not directly contradicted by appellants, the trial court, and this court on appeal, are not required to lay aside their general knowledge and ideas of values of such services, and are not entirely controlled by testimony of this nature." We further said in that case: "In determining what would be a reasonable fee we take into consideration the amount of time and labor involved, the skill and ability of the attorneys, and the nature and extent of the litigation."

Under the facts and circumstances presented, we have concluded that $175.00 would be a reasonable fee to appellant for his services. The judgment is accordingly modified to that extent and, as so modified, is affirmed.

The Chief Justice would affirm without modification.

Opinion delivered June 21, 1954.

[redacted]

L. V. Rhine and *Carl L. Hunter,* for appellant.

Fred M. Pickens, Jr., for appellee.

PER CURIAM. This is an appeal by Horace W. Whitsitt from a Circuit Court judgment permanently disbarring him as an attorney.

After investigation and hearing—at which Mr. Whitsitt appeared—the Bar Rules Committee,[1] filed complaint

[1] At the General Election in 1938, the People of Arkansas adopted Constitutional Amendment No. 28, which reads: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Pursuant to that Amendment, this Court, by order of April 24, 1939, adopted the Canons of Ethics of the American Bar Association as the standard of professional conduct of attorneys at law. By the same order, this Court also established a Bar Rules Committee, with power and duty, *inter alia,* to investigate all complaints involving professional misconduct of attorneys, and upon finding reasonable grounds, to file complaint in circuit or chancery court against any offending attorney. To the credit of the high ethical conduct of the Bar of this State, it should be noted that since 1939 only three contested cases of disbarment have resulted in formal opinions of this Court. See *Hurst* v. *Bar Rules Committee,* 202 Ark. 1101, 155 S. W. 2d 697; *Bar Rules Committee* v. *Richardson,* 202 Ark. 417, 150 S. W. 2d 953; and *Armitage* v. *Bar Rules Committee, ante* page 465, 266 S. W. 2d 818 (opinion of April 12, 1954). There have been other cases of uncontested disbarment, but only the three mentioned have resulted in formal opinions.

against Mr. Whitsitt, charging him with four specific acts of professional misconduct, being designated as (1) the Jackson case in 1951; (2) the Scott case in 1951; (3) the Wilson case in 1950, and (4) the Horn case in 1948. Circuit Judge GUY AMSLER tried the case on exchange of circuits. The hearing began on November 7, 1952, and continued for two days. Then Mr. Whitsitt's rebuttal witnesses were heard on February 14, 1953; and the Circuit Court's opinion and judgment were delivered on June 13, 1953. The record is voluminous, consisting of more than 568 pages. We copy and adopt as our own the opinion of the Circuit Judge.

JUDGE GUY AMSLER'S FINDINGS, CONCLUSIONS AND JUDGMENT

STATEMENT

On the 5th day of April, 1952, the Bar Rules Committee of the State of Arkansas filed a complaint in the Circuit Court of Greene County, Arkansas, charging Horace W. Whitsitt with gross unprofessional conduct in the practice of law as follows:

"On September 8, 1951, C. A. Jackson, aged 73, of Greene County, Arkansas, was arrested and charged with the crime of rape of a 5-year-old girl, and shortly thereafter his son-in-law, Rev. Glen Thompson of Paragould, employed Defendant Horace W. Whitsitt to represent him. A fee of $150 was paid Defendant Whitsitt by C. A. Jackson's son, Rev. Gayle Jackson of Sikeston, Missouri, to cover services of the preliminary hearing, which was waived on September 14, 1951. On September 25, Rev. Gayle Jackson discussed his father's case at Paragould with Defendant Whitsitt, who told him that there was grave danger of his father being sent to the electric chair but that for a fee of $2,500 or $3,000 he thought he could save him. Defendant Whitsitt demanded $1,000 cash which Rev. Jackson paid in cash, with the amount of the balance of the fee to be determined later. At the request of Defendant Whitsitt, Rev. Jackson met him in Hayti,

Missouri, on September 30, 1951, to discuss the balance of the fee, and was told to bring $1,000 cash and a check for $1,000. Defendant Whitsitt again emphasized the seriousness of the case, the danger of the electric chair, and attempted to minimize the fee with suggestions of unethical expenses on his part of at least $1,500 in making contacts through high officials to bring influence on the outcome of the case, to bribe jurors, paying off the proper persons, and in having the child's mother as prosecuting witness leave the State. Rev. Jackson was told to come alone to the office of Defendant Whitsitt with the money the following day. On October 1, 1951, Rev. Jackson paid $1,000 in cash and also a check for $1,000 to Defendant Whitsitt at the latter's office, and signed a contract reciting a consideration of only '$1,000' as full payment of all attorney's fees for the complete representation of C. A. Jackson, with no additional fees except in the event of a mistrial and retrial of the charges.

"Having obtained the consent of Rev. Jackson for his father to plead guilty to the lesser charge of assault with intent to rape and to accept a penitentiary sentence, Defendant Whitsitt entered into an agreement on November 16, 1951, with the Prosecuting Attorney to so plead, which was recommended by the Prosecuting Attorney to the Circuit Judge on November 19, 1951, and accepted by the Circuit Judge, all these facts being well known by Defendant Whitsitt. On November 24, 1951, Rev. Jackson was called to Defendant Whitsitt's office where Defendant Whitsitt wrongfully withheld the concurrence of the Prosecuting Attorney and Circuit Judge in the proposed plea, and falsely represented to him that the Judge and Prosecuting Attorney were demanding a bribe of $2,750 of which the Defendant would pay $1,500 if Rev. Jackson would advance an additional $1,250 to cover the alleged demands. Defendant Whitsitt again magnified the seriousness of the case, and later confirmed his fraudulent demand by offering to escrow $1,000 of his own money with $1,250 from Rev. Jackson to guarantee the acceptance by the Court of a plea of guilty of C. A. Jackson to the lesser offense with a penitentiary sentence. Rev. Jackson declined the offers of Defendant Whitsitt, and

after consulting others he reported the matter to the proper authorities and made affidavit before the Greene County Bar Association, which in turn referred the complaint to Plaintiff Bar Rules Committee.

"In addition to the foregoing acts of withholding the true facts from his clients, of extracting an excessive fee from his clients on exaggerated and fraudulent representations, and in attempting to extort a further undeserved fee by means of false and slanderous statements defaming the administration of justice and reflecting on the integrity of the court and its officers, Defendant Whitsitt has shown a pattern and course of conduct in the past in the following instances of unprofessional dealings between lawyer and client:

"In 1948, Defendant Whitsitt filed two damage suits in the Greene Circuit Court under the style of (1) *Thelma Howard, Admx.* v. *Gulf Refining Co., J. S. Horne* and *B. C. Lloyd,* and (2) *Clifford Howard, Sr., Gd.* v. *Gulf Refining Co., J. S. Horne and B. C. Lloyd.* During settlement negotiations between Defendant Whitsitt and counsel for Gulf Refining Company, Defendant Whitsitt called the local Gulf dealer, J. S. Horne, into his office for conference. Defendant Whitsitt expressed dissatisfaction over the amount of fee he would get from the proposed settlement, and suggested to J. S. Horne that if he would secretly pay him $1,000 or $2,000 the settlement with the Gulf Company could be consummated and Horne would benefit by being relieved of his part in the litigation. According to the terms of this unethical proposal, Defendant Whitsitt's clients were not to know of or share in the payment he suggested Horne make to him in confidence. J. S. Horne declined the unethical offer made to him by Defendant Whitsitt.

"Early in 1951, Defendant Whitsitt was employed by Gertrude Scott and paid $575 on his representation that he could secure for her the release from the penitentiary of her husband, Daniel Monroe Scott, who had been convicted of Second Degree Murder and sentenced to imprisonment for seven years, beginning December 12,

1950. Pursuant to this employment Defendant Whitsitt secured a 6-day furlough for Scott in the Spring of 1951, and upon representations of being able to get Scott a furlough of indefinite duration, so as to amount to virtual freedom, Gertrude Scott and her husband made further payments to Defendant Whitsitt of about $175.00. The only other service rendered for these fees was the securing of another furlough totaling 50 days. Defendant Whitsitt did not act with candor and fairness in his assertions and representations to these clients and was guilty of gross over-reaching in his dealings with them.

"Cosmo Wilson of Greene County, Arkansas, was charged with the crimes of rape and incest, and inasmuch as he was without funds to employ counsel, the Court appointed Defendant Whitsitt as a member of the bar without fee, to represent the indigent defendant Wilson. A special setting of the case was made for February 13, 1950. In the meantime, Defendant Whitsitt learned that Wilson had acquired some money, and on February 12, 1950, he informed Wilson that unless he employed his law partner for a fee of $150 he (Defendant Whitsitt) would feign illness at the trial the following day, and the case would have to be continued over until the next term of court in May. Since Cosmo Wilson was unable to make bail, he would be held in jail without trial until that time. Wilson refused to pay the fee demanded, and according to his threats Defendant Whitsitt reported to the Court the following day that he was ill and unable to proceed to trial, although he was not ill and as a matter of fact transacted some business at his office during the day. The Court was not aware of Defendant Whitsitt's malingering, however, and upon his representation continued the case until May 18, 1950, when Wilson was tried and convicted."

Issues were joined by the filing of a general denial on behalf of the defendant and the taking of testimony was concluded on February 14, 1953. Following oral arguments, the case was taken under advisement. The record is rather voluminous and no attempt will be made to abstract the evidence in detail. In a general way, the proof

as it relates to the specific charges of misconduct will be analyzed.

The defendant is 41 years old and was admitted to the Bar in 1933. From the date of his being licensed to practice law until 1947, he was employed by a number of insurance companies, was connected with the claims division of the Ford Motor Company in Detroit, served as chief enforcement attorney in the lumber division of the Office of Price Administration (OPA) and for a brief period was special assistant U. S. District Attorney. In 1947 he formed a partnership in Paragould where he was born and reared, and has continued in the private practice there since that date. He was elected City Attorney of Paragould and served two and a half years. Over a period of some four years, he formed and dissolved partnerships with three different lawyers. Two of his former partners were character witnesses against him. He has been active in civic, fraternal and boy scout work and is a director of the Board of Commerce of Paragould.

FINDINGS

1 & 2.

Paragraphs 3 and 4 of the complaint charge in brief that the defendant was employed by the son and son-in-law (both ministers) of C. A. Jackson to defend Jackson against a charge of raping a 5-year-old girl; that after charging and receiving a fee of $3,000 for handling the case, the defendant signed a contract reciting a consideration of $1,000 in full payment of all attorney's fees; after having obtained the consent of the accused to enter a plea of guilty to the lesser charge of assault with intent to rape and accept a penitentiary sentence, an agreement was made with the prosecuting attorney whereby the prosecuting attorney recommended to the Court that the plea to the lesser offense be accepted and that such recommendation was accepted by the Circuit Judge on November 19, 1951; that notwithstanding this arrangement, of which the defendant had full knowledge, the defendant

failed to reveal the true facts to his client or client's son, but instead falsely represented to the client's son that the trial judge and the prosecuting attorney were demanding a bribe of $2,750 for granting C. A. Jackson the proposed leniency.

It is also alleged in the same paragraphs that the fee charged by the defendant was excessive and that there was an attempt by the defendant to extort an additional undeserved fee by means of false and slanderous statements which were defamatory of the administration of justice and which brought in question the integrity of the court and its officers.

The allegation that an excessive fee was charged by the defendant for representing Jackson is not sustained by the proof. In fact, there was no evidence of a substantial nature offered on this point. When the gravity of the charge against Jackson, the time, labor and skill required to properly conduct his defense, and the customary charges of other lawyers for similar services are taken into consideration, surely it cannot be said that the fee collected by the defendant was excessive, exorbitant or unreasonable.

The evidence bearing on the allegation that the defendant undertook to extract an additional fee from his employer (the son of the accused C. A. Jackson) by falsely representing that the Judge and Prosecuting Attorney were demanding bribes will not be discussed in detail. It seems sufficient to suggest that on this point, the controversy resolves itself into the simple proposition of accepting the version of the defendant or the statements of two ministers, the prosecuting attorney, the deputy prosecuting attorney, and other witnesses who gave evidence of a corroborative nature. It appears beyond question that the aforesaid charge has been established by a clear preponderance of the evidence.

3.

Another paragraph in the complaint charges the defendant Whitsitt with unethical practice in approaching

one of several defendants (all represented by counsel) whom Whitsitt had sued on behalf of his clients (the plaintiffs) for the purpose of procuring a separate settlement with that defendant. The alleged vice, in addition to by-passing opposing counsel, is that by the terms of the proposed settlement the particular defendant to whom overtures were made was to gain an advantage over the other defendants in the settlement of the cases while Whitsitt's clients were not to be apprised of the side agreement whereby Whitsitt was to be compensated in excess of the fee for which he had agreed to represent the plaintiffs.

The evidence on this charge is rather brief. Jones Horne, who was one of the defendants in the cases in which Whitsitt represented the plaintiffs, testified that he went to Whitsitt's office in response to a request by telephone from Whitsitt and that Whitsitt said, "It is not you we are after . . . We are after the company." (Meaning the Gulf Oil Company, which was a defendant with Horne.) Horne further stated that Whitsitt said "I thought if we could work out a deal where you would pay half as much as the company, we could compromise it. I would recommend to my clients to accept the compromise."

This conversation which was categorically denied by Whitsitt is said by Horne to have taken place in the absence of Horne's attorney, the attorney for the Gulf Refining Company and a Jonesboro lawyer whom Whitsitt had associated with him in the cases. The proof on this charge is sufficient to support a finding that the defendant Whitsitt violated the rules of the Supreme Court of Arkansas governing the professional conduct of attorneys.

4.

Another paragraph in the complaint relates to the employment of the defendant by Gertrude Scott for procuring the release of her husband, Daniel Monroe Scott, from the Arkansas State Penitentiary to which Institution Scott had been committed on December 12, 1950,

for a term of seven years. The evidence on this charge is not too convincing one way or the other. If the testimony of the complaining witnesses on this point is accepted as true and accurate, the defendant Whitsitt may have received greater remuneration than the services he rendered justified and there may have been assurance to the distressed wife of relief that could not have been reasonably expected. The proof on this issue, even if clear and convincing, would not justify disbarment, but it is of value in determining whether the defendant has pursued a course of conduct that is condemned by the accepted canons of professional ethics.

5.

The final charge leveled against the defendant by the Bar Rules Committee relates to the Cosmo Wilson case. Here again we have a situation where the proof is sufficiently clear to show that the defendant did not deal with the court and the prosecuting attorney with that measure of candor and fairness which is required of those who are primarily responsible for maintaining the integrity and dignity of our judicial structure. The conduct of the defendant in this instance while subject to censure would not, if considered alone, justify disbarment, although it does point toward a course of conduct that is not to be condoned.

CONCLUSIONS

Having determined that the defendant is guilty of unprofessional conduct, the court is then confronted with the extremely serious problem of fixing the punishment. . . .

The privilege of practicing law is a lofty and valuable one that should be terminated only after a cautious and sedulous study of the facts. Courts are properly reluctant to disbar or suspend a practicing attorney. On the other hand, the Judiciary and members of the legal profession are duty bound to see that the honor and integrity of the Bench and Bar are maintained free from tarn-

ish and condemnation. When one is accorded the high honor of being admitted to the bar, he is thereby dedicated to the all important task of maintaining the time honored ethics of the profession and failing in this, he should expect to make recompense for his transgressions.

The Defendant Whitsitt has pursued a course of conduct that is not in keeping with the high standards of ethics that ought to circumscribe the acts of those in a profession which must maintain the absolute confidence and respect of the public. He has made marked progress in overcoming the desire for strong drink, but unfortunately he has displayed a rather obvious lack of appreciation of the exalted, moral and ethical code that should motivate every act, relation and transaction of one engaged in the time honored profession of practicing law.

JUDGMENT

Based upon the foregoing findings and conclusions, it is by the Court, CONSIDERED, ORDERED and ADJUDGED THAT Horace Whitsitt be, and he is hereby from this date permanently disbarred from the practice of law in all of the courts of the State of Arkansas, and he, the said Horace Whitsitt, is hereby ORDERED and DIRECTED not to engage in the practice of law in any manner whatsoever in this State.

This judgment is rendered and entered in open court this 13th day of June, 1953.

GUY AMSLER,
Judge on Exchange.

Per Curiam. A careful study of the entire record convinces us that Judge Amsler was correct in his findings and conclusions. Therefore the judgment of the Circuit Court is in all things affirmed.

5-450 269 S. W. 2d 313

Opinion delivered June 21, 1954.

[redacted]

David L. Ford, for appellant.

Floyd E. Barham, for appellee.

SAM ROBINSON, J. The issue here is the custody of two children. Appellant Robert W. Carlton and appellee, who is now Sally Kopisca, were married the first time in 1942. Two children were born of that marriage. Appellant and appellee were divorced in 1948; in that case Sally was given custody of the children. Later Robert married another person, but they lived together only 9 days and were divorced. Subsequently Robert and Sally again married, but lived together only about a year when Sally left and went to the home of her mother in Minnesota, leaving the children with Robert. Sally testified she left Robert because he abused her to such an extent that she could not live with him. Later Robert filed suit in the Sebastian Chancery Court asking for a divorce, which was granted, and he was given custody of the children. That decree were entered December 1, 1951. Later Sally married her present husband, John Kopisca; also Robert married for the fourth time, but he and his new wife lived together only 18 days when they separated.

On the 15th day of December, 1953, Sally filed a motion to modify the decree of December, 1951, asking that she be given custody of the children. After a full hearing the Chancellor granted the motion. From the order changing the custody from the father to the mother comes this appeal.

It would serve no useful purpose to abstract the testimony here, since in no two cases of this kind are the facts the same; and each case necessarily must be decided by its particular facts. The Chancellor heard and saw the parties, the witnesses, and the children involved, and after hearing all the testimony and arguments, the Chancellor said: "This lawsuit has developed more into a contest between the grandmother [the father's mother] and the mother. . . . I am not going to say that either side is bad. I am not going to say that the children could not be brought up in the old house out there [the grandmother's house] and reach maturity and make fine adults, because I know that many people have come up from circumstances such as these, so far as money is concerned, and have done mighty well in this country. In fact, this country might be in a bad shape except for some people who came from such circumstances. I am thinking of the stability of mind and the character of the people. Whether this mother was bad at one time, I don't know. Probably she did do something at one time that she should not have done, and she has honestly said so. But it is also true that Mr. Carlton does not have the best record. His mother said he drank a great deal at one time; his present marital status is uncertain. Of course, his last wife did not leave him because Mrs. Kopisca was coming down and might cause trouble, because his present wife left him before any mention was made of bringing this action, so it was some other cause that separated them. They lived together 18 days; if that were a stable marriage, the separation would not have happened, and she [Robert's present wife] would go back with him now and stay right in there and fight for him and help him get these children. She has just been a convenient witness in this case. I am inclined to think that the old grand-

mother has not always been too careful with her language. . . . The property where her son lives is hers; she will say what happens. The only thing that halts me and makes me shudder and wonder what will occur in the future is whether the mother of these children and her husband will continue to agree and make a good home as long as they live; because if I give them the children, their happiness will depend on that. This little boy and girl will not understand, but I wish they could, that the court has their interest at heart and their well-being for the rest of their lives, in making this decision. In a few other cases in my life I have heard testimony indicating that a mother some time in her life had been an unfit person to have custody of her children, and yet I reached the conclusion that after another marriage and settling down and facing life she had straightened up and would, if given an opportunity, during the rest of her life make a good mother and a good citizen. There is too much forgiving the man if he makes such mistakes, but letting the stigma rest on the woman always. I am inclined to think that, with the mother and her husband up there, they will have a better home, better surroundings. Therefore it will be the order of the court that the decree heretofore made will be modified and the mother will be awarded the custody of these children.''

At the time the father was given the custody of the children, the mother had no home, no way of supporting them, and no place to take them; but now she has a good home, a good husband, and a place for them. Thus there is a change of circumstances and we can not say that the court's order changing the custody of the children is not justified by the situation of the parties as it now exists.

Affirmed.

FONTAINE *v.* WOFFORD.

5-433 269 S. W. 2d 309

Opinion delivered June 21, 1954.

Bedwell & Bedwell, for appellant.

Wilson & Starbird, Robinson & Edwards and *Hardin, Barton, Hardin & Garner,* for appellee.

PAUL WARD, J. This suit was brought by appellants in the Circuit Court to eject appellees from the E ½ of the SW ¼ of Section 9, Township 8 N, Range 30 W. The vital issue developed was: Did appellants or appellees hold legal title to the lands involved? This issue was properly developed. See *Brasher* v. *Taylor,* 109 Ark. 281, 159 S. W. 1120. The trial resulted in a judgment in favor of appellees and appellants have appealed.

The Factual Background, about which there is no dispute is as presently set forth. The land in dispute lies adjacent to the Arkansas River and, concededly at times pertinent hereto, was located in the bed of the river. In a similar suit filed by appellants before this suit was filed they claimed title to the land from two different sources. *First.* Appellants claimed title as the ancestors of one C. B. Fontaine who had undisputed title of the lands in 1905. In 1910 the lands were completely submerged in the Arkansas River and they ceased to be assessed for taxes. The lands continued in this status until 1924 when Fontaine died. Apparently appellants have now abandoned this source of title. *Second.* Prior to 1933 Lee Collins owned the W ½ of the SW ¼ of said Section 9,

and, claiming the lands in dispute as accretion, he assessed the entire Southwest quarter in his name. After Collins' death his widow, as legatee under his will, deeded said southwest quarter to one John Q. Allen. Said John Q. Allen took possession of the lands in dispute and assessed the same in his name. The lands were so assessed in 1946 but the taxes for that year, payable in 1947, were not paid, probably because Allen died in that year. In 1953 appellants procured a deed from Mamie Allen, widow of said John Q. Allen, and later [after the present suit was filed] they procured deeds from the collateral heirs of John Q. Allen.

Appellees' title to the lands in question is based on the validity of the 1946 forfeiture mentioned above. As a result of said forfeiture, the sheriff, on November 10, 1947, sold the lands to one Addis Byran. In due course Byran received a tax deed, had it recorded, assessed the lands in his name, and paid taxes thereon until January 29, 1953, when his widow and heirs conveyed the land in question to appellee Jay Neal. Neal conveyed a one-half interest in the land to Boyce Wofford.

During the course of the trial in which voluminous testimony was introduced it became apparent that the validity of the 1946 forfeiture was a vital question. Appellants contend that the forfeiture was void because during 1945 and 1946 all of the lands in dispute were wholly in the bed of the Arkansas River, that consequently the land belonged to the State of Arkansas, and that therefore the assessor of Crawford County had no right to place them on the tax books. Appellants' further contention was that, since the 1946 forfeiture was void, they had good title by virtue of deeds from the heirs of John Q. Allen. Appellees took the position that said lands were not wholly submerged, as hereafter defined, in the Arkansas River during 1945 and 1946, that the 1946 forfeiture was valid, and that therefore they received good title by virtue of the deed from Addis Byran.

After much testimony was introduced by both sides as to whether the lands were so submerged, the trial

court, pursuant to an agreement by all parties, submitted to the jury this one question of fact:

"Did the entire East Half of the Southwest Quarter of Section Nine, Township 8 North, Range 30 West disappear into the normal bed of the river in the year 1945 and remain completely in the bed of the river through the entire year 1946?"

Under specific directions by the court for the jury to answer the above question "Yes" or "No" the jury found the answer to be "No".

In order to assist the jury to intelligently consider the question submitted to it the court gave several other instructions to which no objections were made by either side. In one instruction the court defined the phrase "high water mark" in this language:

"The high water mark of a navigable stream is to be found by ascertaining where the presence and actions of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil."

In another instruction the court said:

"You are further instructed that even though land formations lying in the bed of a navigable river are not completely submerged in the water, yet if the area is so completely covered with sand and silt or other such matter deposited by the flow of the water to the point that it loses its character as soil capable of supporting vegetation, and its fertility is gone for agricultural purposes, then it is nevertheless to be regarded as within the bed of the stream and the property of the State of Arkansas."

The sole contention of appellants is that the verdict of the jury is not supported by substantial evidence. Appellants, to sustain their contention, quote many portions of the evidence which tend to show that all the lands were wholly submerged for the years 1945 and 1946. It would serve no useful purpose for us to point out the testimony relied on by appellants, because we are convinced

that the record does contain substantial evidence to support the verdict of the jury. This court has consistently held, as we held in the cases of *Persons et al.* v. *Miller Levy District No. 2,* 218 Ark. 86, 237 S. W. 2d 38, and *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322, that the verdict of a jury will not be disturbed if there is substantial evidence to support it.

A brief reference to some of the testimony introduced by appellees is sufficient to show that there was substantial evidence to support the jury's verdict.

James H. Rutledge, an engineer, identified certain maps, photographs and aerial mosaics purporting to show that in the year 1945 approximately ninety per cent of the land in question was above high water mark and covered with vegetation; that trees, some 12 inches in diameter, were growing along the edges of the land. The witness states that flood stage on the Arkansas River at or near this point was approximately 22 feet on the river gauge and that the land in question was substantially above that mark. He further stated that although the river stage on October 25, 1945, was approximately 24 feet an aerial map made on October 10, 1945, showed a large portion of the land was above that stage. Another witness testified that in 1945 and 1946 he hunted all over the land in question and that there were trees 3 or 4 inches in diameter in 1945. Other witnesses testified to substantially the same thing. Another witness testified that he had lived within one-quarter of a mile from this land since 1920, that he was thoroughly familiar with the land in 1945, 1946 and 1947 and that he pastured his cattle and hogs on the land during those years.

Appellees discuss other issues which they contend would call for an affirmance of this case but in view of our conclusions announced above it becomes unnecessary to discuss them.

Affirmed.

STANLEY *v.* EUREKA SPRINGS SALES COMPANY.

5-456 269 S. W. 2d 319

Opinion delivered June 21, 1954.

H. G. Leathers, for appellant.

J. E. Simpson, for appellee.

PAUL WARD, J. The only question presented by this appeal is the sufficiency of the evidence to support the jury's verdict. The accepted rule is that substantial evidence is sufficient.

The Background Facts leading up to this litigation are not disputed. On or about May 19, 1951, certain cattle which were stolen from M. Crow were delivered to appellee, Eureka Springs Sales Company. At the auction sale conducted by appellee one Fred Oliver bought the cattle for the purchase price of $438. Later after it became known that the cattle were stolen from Crow, Crow repossessed the cattle and Oliver sued appellee for the purchase price and interest. The issues raised in this suit by Oliver were determined by a former appeal to this court. See *Oliver* v. *Eureka Springs Sales Company, et al.,* 222 Ark. 94, 257 S. W. 2d 367. On remand to the Circuit Court appellee confessed judgment in favor of Oliver in the amount of $496.02 which amount included the price paid by Oliver, interest and court costs.

In this same suit Oliver sued not only appellee but also Hobert Stanley [appellant herein] and Harve Hopper. In the answer filed by appellee it was alleged, in effect, that Stanley and Hopper had delivered the cattle to it for sale claiming to be the owner of the cattle and that it had no reason to suspect the cattle had been stolen. Appellee's prayer was "that in the event the court should find any liability against the defendant [appellee herein]

it have judgment against the said Hobert Stanley and Harve Hopper for a like amount'' etc.

Upon the issue raised in appellee's answer the trial was had before a jury, resulting in a judgment against both Stanley and Hopper in favor of appellee. From this judgment Stanley has appealed.

The only issue raised by appellant in his motion for a new trial is the sufficiency of the evidence to sustain the verdict of the jury. In our opinion the evidence, as reflected by the record, is substantial and sufficient to support the verdict of the jury and the judgment of the court.

It was stipulated by the parties that: The cattle in question were stolen from M. Crow; The cattle were transported to appellee company near Eureka Springs and were checked in in the name of Harve Hopper; They were sold by appellee to Fred Oliver; Oliver paid Crow for the cattle and appellee has paid Oliver the amount which he had paid Crow.

W. A. Ferguson one of the owners of appellee company stated: When property is brought to the sales barn for sale it is checked in by the owner as appears on the check slip which is given to the owner; The cattle in question were checked in in the name of Harve Hopper, and; At the direction of Harve Hopper appellee company paid out of the sales price of the heifers two amounts, $375 and $63 which was the amount Fred Oliver paid for the heifers at the sale.

Harve Hopper testified: I know appellant and I am acquainted with the operations of appellee sales company; Appellant and I have done business together and I am familiar with the transactions relative to the cattle in question; The cattle were in a big truck outside the sales barn near the loading dock when appellant had me look at them; Appellant told me he had bought them for $375 and that if I would look after them through the sale he would give me one-half of the profit, since he had to meet a man in Berryville; Hobert Stanley unloaded

the cattle from the truck into the sales barn and tried to sell them to one Frank Jones for $140 a piece; I did not know the cattle were checked in in my name but when they were sold to Fred Oliver I went to the office to get my share of the profit; Appellee had the entire check made out to me but I gave it back to them and they paid me my profit of $63; and I took the $63 and gave Hobert Stanley one-half of it. *Frank Jones* testified that, on the occasion in question, Hobert Stanley tried to sell the cattle to him.

The court's instructions are not abstracted and appellant urges no objections to any of them. We will thus assume they were correct.

Affirmed.

WICKER *v.* WICKER.

5-458 269 S. W. 2d 311

Opinion delivered June 21, 1954.

M. C. Lewis, Jr., for appellant.

Q. Byrum Hurst, Michael B. Heindl and *Earl J. Lane,* for appellee.

GEORGE ROSE SMITH, J. This is an appeal from a decree granting a divorce to the appellee, Arthur H. Wicker. For reversal it is contended that Wicker failed to prove himself to be a resident of Arkansas and failed to adduce testimony completely corroborating his state-

ment that the parties have lived apart without cohabitation for more than three years.

The couple were married in 1930 and lived together in South Carolina for more than eighteen years. On March 15, 1949, they entered into a written separation agreement by which they agreed to live apart in the future. Pursuant to this contract Wicker surrendered to his wife what seems to have been the greater part of his property, and she in turn released him from liability for support, alimony, dower, etc.

The separation agreement left the parties in a technical state of marriage, but both had renounced the privileges and duties that give substance to the relationship. This is Wicker's fifth attempt to end a status that is nominal rather than real. In 1949 he unsuccessfully sought a divorce in the South Carolina courts. In 1950 he moved to Florida and remained there for almost two years. Wicker twice sued for a divorce in Florida, but both complaints were dismissed without prejudice. The record does not disclose whether the dismissals were based upon an absence of proof of residence or a lack of grounds for divorce. In this respect the case differs from *Smith* v. *Smith,* 219 Ark. 278, 242 S. W. 2d 350, relied upon by the appellant. There we had before us the complete transcript of the proceedings in other courts, and their effect was to undermine the plaintiff's credibility.

Wicker came to Arkansas in June, 1952. Upon some date not shown by the proof he filed suit for divorce, but later on he voluntarily dismissed that case. The present complaint was filed more than a year after Wicker arrived in Hot Springs, Arkansas, and at the time of trial Wicker had been a residence of this state for over sixteen months. The chancellor concluded that Wicker had acquired an Arkansas domicile.

The record does not convince us that the trial court was in error. Wicker, since coming to Arkansas, has obtained what seems to be permanent employment, has brought all his property to this state, has paid his var-

ious taxes here, and has in other ways conducted himself as one who means to make his home in Hot Springs. If it were not for Wicker's earlier efforts to obtain a divorce in South Carolina and Florida it could hardly be seriously contended that the decree is against the weight of the evidence.

The previous suits are certainly a basis for suspecting, despite Wicker's protestations to the contrary, that his removal to Arkansas was influenced by his undoubted desire for complete marital freedom. But it does not follow that this motivation is an absolute bar to the acquisition of a domicile in Arkansas. "The motive actuating establishment of the new home is wholly immaterial. It may be for the purpose of taking advantage of lower tax laws, or easier divorce laws, or to evade civil or criminal liabilities about to be imposed in another state, or for any other purpose, worthy or unworthy." Leflar, Arkansas Law of Conflict of Laws, § 13. Of course no one except Wicker himself knows whether his presence in Arkansas is, on the one hand, actuated by a sincere desire to comply with our requirement of *bona fide* domicile, or, on the other, a mere sham that will be continued only long enough for the accomplishment of its purpose. The same question arises in every case of this kind and can never be answered with complete certainty. Upon this record we are not persuaded that the decree is contrary to the preponderance of the evidence.

On the merits there is sufficient corroboration of the asserted three-year separation. E. S. Blease, who has known Wicker for fifteen years and Mrs. Wicker for thirty, testifies positively that the two have not lived together for more than four years. Mrs. Wicker did not take the stand to contradict the plaintiff's evidence; instead, she argues that cohabitation could have occurred without Blease's knowledge. Obviously the same argument could be made in every case; to sustain it would be to abolish three years separation as a ground for divorce.

The decree is affirmed. The appellant's application for an attorney's fee in addition to that already allowed by this court is denied.

Opinion delivered June 21, 1954.

W. J. Arnold, for appellant.

Ivan Williamson and *Ben B. Williamson,* for appellee.

ED. F. MCFADDIN, Justice. From a judgment in his favor for $100.00, the plaintiff has appealed; and claims errors to have been committed which caused the Jury verdict to be much less than the plaintiff thinks it should have been. We will refer to the parties as they were styled in the Trial Court.

Plaintiff Stair sued Willie Jones and his son, Herman Jones, for damages for cutting and removing timber from plaintiff's lands; and in aid of the damage suit, plaintiff had a writ of attachment levied on personal property of the defendants. The defendants filed (a) a general denial to the complaint, and (b) a motion to dismiss the attachment, claiming damages of $500.00 for

wrongful levy. The case was submitted to the Jury on both issues—*i.e.*, the unlawful cutting of the timber, and the attachment question—and resulted in a verdict for the plaintiff for $100.00. On appeal to this Court, the plaintiff lists for reversal the three assignments which we now discuss:

I. *Testimony and Instructions About Defendants' Tax Certificates.* In accordance with *Peek* v. *Henderson,* 208 Ark. 238, 185 S. W. 2d 704, the Trial Court instructed the Jury as to the three separate measures of damage available to one who seeks to recover for timber taken from his land by a trespasser—*i.e.*, treble damages under what is now § 50-105, Ark. Stats.; double damages under what is now § 54-203, Ark. Stats.; and the common law rule of simple damages. The correctness of these instructions is not questioned. In the evidence, the defendants admitted that they cut approximately 5,311 feet of timber from Stair's land, and that such timber had an actual value of approximately $20.00 per thousand. Under the rule of *Sturgis* v. *Nunn,* 203 Ark. 693, 158 S. W. 2d 673, the defendants would not be liable for treble damages if they honestly believed they owned the timber and had a right to cut it. Under the rule of *Rosengrant* v. *Matthews,* 55 Ark. 440, 18 S. W. 541, the defendants would not be liable for double damages if they had probable cause to believe and did believe that the land was their own.

The defendants testified that they thought they were cutting timber from a 40-acre tract immediately east of the plaintiff's land, and that they were innocently mistaken in getting on the plaintiff's lands. In support of such claim of innocence, the defendant, Willie Jones, testified that the forty acres immediately east of the plaintiff's land had been owned by Koppers Company; and Jones had talked to representatives of Koppers, and "they told me if I wanted it, it was mine, I considered that good enough."[1] Thereupon, Jones learned that the

[1] This quoted testimony appeared on Tr. 105, and was admitted without objection. There had previously been objections to other portions of the testimony, but there was no objection to this.

Koppers' 40-acre tract was delinquent, and purchased it at the County Clerk's sale for taxes. To the above testimony there was no objection. When defendants offered to introduce the Certificate of Purchase, dated November 10, 1952, the plaintiff objected.[2] The Court sustained the plaintiff's objection, and the Certificate of Purchase was not introduced; but later, when Willie Jones was on the witness stand, he gave the following evidence *without* objection:

"Q. At the time you cut the timber on the Koppers land, state whether or not you honestly believed you owned it and had a right to cut it.

"A. I absolutely did.

"Q. You had a certificate of purchase where you bought it at a delinquent land tax sale?

"A. I sure did.

"Q. You honestly thought you had a right to cut it?

"A. Yes, sir."

Because the plaintiff allowed the foregoing testimony to be admitted without objection, he is in no position to claim that the Court committed any error in the admission of evidence about the tax certificate.

The plaintiff's requested Instruction No. 6 read:

"There has been some testimony introduced here about a tax sale purchase. This will instruct you that the purchaser at a tax sale has no right to cut the timber on a tract that he purchased at such sale."

The Court modified the Instruction, and gave it as follows:

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[2] The plaintiff's objection was:

"Plaintiff objects to the introduction of the certificate or to questions relating to it generally and for the following specific reasons: 1. A certificate of purchase conveys no interest in either land or timber and would be no justification for cutting timber. 2. A certificate of purchase is redeemable within the period of redemption and in this particular case, F. F. Mobley and Son Lumber Company did properly redeem this land and therefore defendant's certificate of purchase would convey no right, either to title to the land or timber on the land."

"You are further instructed, there has been some testimony introduced in this case with reference to purchase of the property involved at a tax sale and the payment of taxes; this evidence will be considered by you only in determining the willfullness or intention of the defendants."

Of course, the tax certificate gave Jones no right to cut the timber. (See *Hendrix* v. *Black,* 132 Ark. 473, 201 S. W. 283.) But the question was not whether Jones had a *right* to cut the timber, but whether he acted *willfully* and with no cause for honestly believing he had a right to cut the timber. The fact that he had the conversation with Koppers Company (admitted without objection, as heretofore copied), coupled with the fact that he had a tax certificate (which fact was admitted without objection, as heretofore copied), together justified the Court in submitting to the Jury the issue contained in the modified Instruction No. 6, in regard to Jones' good faith. The finding of the Jury, awarding plaintiff only simple damages, shows that the Jury evidently believed that Jones had not acted willfully, or without probable cause. Because of the issues here concerned, we find no error in the Instruction as given.

II. *Refusal to Admit Photographs.* Plaintiff, Stair, had five photographs, which the Court refused to admit in evidence, and such refusal is assigned as error. Four of these photographs depicted the blaze marks on the South boundary of Stair's 40-acre tract. The fact that there were blaze marks on the *South line* of Stair's land would not have clarified the issues in this case, because the trespass was not from a North to South direction, but from an East and West direction. The South line of Stair's land was an extension of the South line of the 40-acre tract that Jones thought he was on when he cut the timber. So these four photographs in no way clarified the issues. The fifth photograph offered by Stair showed the stumps of two or three trees. The cutting was admitted, so these photographs added nothing to clarification.

We have repeatedly held that the admission or rejection of a photograph is a matter which rests largely in the discretion of the Trial Court. *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79, and *Powers* v. *Long,* 221 Ark. 400, 253 S. W. 2d 359, and other cases therein cited. In the case at bar, it is not shown that the Trial Court abused its discretion in rejecting the tendered photographs.

III. *Submitting the Attachment Issue to the Jury.* In *Ward* v. *Nu-Wa Laundry,* 205 Ark. 713, 170 S. W. 2d 381, we said:

"In this connection, we point out that the better practice is for the trial court to determine the existence of the ground of attachment rather than to submit that issue to the jury. As was stated in *Von Berg* v. *Goodman,* 85 Ark. 605, 109 S. W. 1006: 'The statute contemplates the trial before the court of the issue raised as to the existence of grounds for attachment, and not by trial by jury. It was not reversible error, however, to submit this issue to the jury, though it is the proper practice for the court to determine this issue, instead of submitting it to a jury. *Holliday* v. *Cohen,* 34 Ark. 707.' See, also, *Bank of Wynne* v. *Stafford & Wimmer,* 129 Ark. 172, 195 S. W. 397; *Ford* v. *Wilson,* 172 Ark. 335, 288 S. W. 712."

In the case at bar, as in *Ward* v. *Nu-Wa Laundry,* the Jury verdict sustained the attachment, and the Court rendered judgment in accordance therewith; so we fail to see how the plaintiff, Stair, has shown prejudicial error to have been committed against him. He claims that when Jones testified as to how much he was inconvenienced by the levy of the attachment on his truck, the effect was to arouse the sympathy of the Jury in Jones' favor, and to materially reduce the plaintiff's verdict. That argument is highly speculative: the main issue was whether the plaintiff was entitled to single, double, or treble damages. The Jury awarded him single damages, and we see no sound foundation on which to base an argument that the verdict for single damages was caused by the evidence as to the defendants' inconvenience because of the attachment. At all events, the Jury sustained

the plaintiff's attachment, so certainly the "sympathy" did not go far enough to give the defendants a verdict. It would have been far better for the Court to have settled the attachment issue, without submitting it to the Jury; but in view of the verdict for the plaintiff, we do not see how the plaintiff can now be heard to claim prejudicial error on the attachment issue.

Affirmed.

CLEM *v.* MISSOURI PACIFIC RD. CO.

5-444 269 S. W. 2d 306

Opinion delivered June 21, 1954.

Kincannon & Kincannon, for appellant.

Pat Mehaffy and *Thomas Harper,* for appellee.

J. SEABORN HOLT, J. Appellant, W. O. Clem, brought this suit to quiet and confirm alleged title, by adverse possession, to a tract of land containing 3.51 acres, Block B, in the town of Branch, Franklin County. Appellees answered with a general denial asserted possession, title

and ownership of the land, and payment of taxes thereon since 1921.

Trial resulted in a decree for appellees and confirmation of title to the 3.51 acre tract of land in question in the name of "Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Bankrupt."

For reversal, appellant says: "Appellant, W. O. Clem and his ancestor in title, H. L. Wilburn, had sole, exclusive, peaceable, adverse and hostile possession of this property continuously without interruption from September 13, 1939, to June 9, 1953, and had paid the taxes thereon for seven years; the tax deed from the State Land Commissioner, Claude A. Rankin, of the date of September 13, 1939, to H. L. Wilburn, appellant's ancestor in title, constituted color of title, even though the property was described as being a pt. of the SW ¼ of SW ¼, Sec. 2, Twp. 7 N, Range 28 West, 3.51 acres," and that appellees had done nothing to interrupt the running of the Limitation's Statute.

The record reflects that H. L. Wilburn attempted to purchase the property here in question at a tax sale and on March 13, 1939, the State Land Commissioner issued the State's Deed to him, describing the land in Franklin County as:

"Parts of Section	Sec.	Twp.	Range	Acres	100th	Year for which forfeited
Pt. SW ¼ SW ¼	2	7 N	28 W	1	75	1933
Pt. SW ¼ SW ¼	2	7 N	28 W	3	51	1930"

Wilburn, on January 2, 1953, executed a Quit Claim Deed to this 3.51 acre tract to appellant, Clem, under the same description as in the State's Deed to Wilburn with an added metes and bounds description.

The State's Deed to Wilburn was void for an indefinite description. It conveyed nothing and Wilburn acquired no interest or title by it, in fact, not even color of title. He, therefore, had nothing to convey to appellant, Clem. *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660.

Although appellant has no record title or color title, he might have prevailed had he shown that he had held possession adversely,—as he argues,—for the statutory period of seven years. The burden was on him to prove such possession and this we hold he failed to do.

"What is necessary to constitute adverse possession was announced by this Court in *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, as follows: 'It is well settled by the authorities that this possession must be actual, open, continuous, hostile, exclusive and be accompanied by an intent to hold adversely and in derogation of and not in conformity with the right of the true owner. . . . It must be hostile in order to show that it is not held in subordination and subserviency to the title of the owner.' " *McCulloch* v. *McCulloch,* 213 Ark. 1004, 214 S. W. 2d 209.

The evidence shows that this tract in question had been assessed since 1921 to date of trial on the tax records of Franklin County either in the name of the Arkansas Central Railroad Company, Missouri Pacific Railroad Company, or Guy A. Thompson, Trustee, and that appellee, Thompson as Trustee, (or his predecessors) has continuously since 1921 paid the taxes each year on this property.

According to appellant, Clem, Wilburn deeded the tract to him in 1944, but Clem went to California thereafter and lost the deed. Just how long Clem stayed in California, the record does not disclose.

Prior to 1939, Mrs. Baker had a lease on the property from the Railroad.

Clem wrote a letter to appellees' superintendent February 12, 1953, in which he claimed to own the property but proposed: "I am willing to compromise and settle this controversy provided that you will execute to me a lease for a $5.00 annual rental to be paid in advance, said lease to run in full force and effect as long as I pay the rentals. . . . These premises are now enclosed with a three and four barb wire fence. . . . In this connection

I call your attention to the fact that Mr. Arrie Terry is now using this land as a pasture and claims to have a lease on it. I would want Mr. Terry to surrender possession up to you and to myself, up to date."

Witness, Terry, testified that in November, 1952, he leased the tract from the Railroad and took possession. Clem asked him to get off, which he did, but later (within a few days) Terry resumed possession on advice of the Railroad and held possession until the Railroad cancelled his lease on March 12, 1953.

From all the testimony (which we do not detail), we think the trial court was justified in finding that appellant had not held the 3.51 acre tract continuously and adversely, but a fair conclusion to be drawn was that appellant, by seeking to lease the property, and the removal of Terry from possession, recognized appellees' claim of ownership and superior right thereto, and that appellant's possession was permissive only.

On the whole, we hold that the preponderance of the evidence is not against the following findings of the trial court: "I doubt very much if you (W. O. Clem) have any open, notorious possession for a period of 7 years, without adverse claim. The railroad company owns the property. It has paid the taxes each year. He (Wilburn) bought property from the State with a deed that describes nothing. He kept it for a while and went to California, and Mr. Clem went to California for a while and came back. It's not clear how long he was gone. He leased it and asked them to get the folks off."

Affirmed.

KANSAS CITY SOUTHERN RY. CO. *v.* MCKENZIE.

5-427 269 S. W. 2d 326

Opinion delivered June 21, 1954.

Hardin, Barton, Hardin & Garner, for appellant.

Bates, Poe & Bates, for appellee.

GRIFFIN SMITH, Chief Justice. Dennis McKenzie was eleven years of age when on July 9th, 1953, a railroad signal torpedo exploded, causing injuries that necessitated removal of his right eye.[1] The railway company has appealed from a judgment for $1,500.

Although the McKenzies were residents of Scott county when the suit was filed, they had formerly lived at Heavener, Oklahoma, where the railroad company maintains switching and supply yards approximately three miles in length, and wide enough to accommodate thirteen tracks extending generally in a north-south direction. Some of the tracks are used in "storing and making up trains."

Along the mainline track there are supply stations where tools and parts used in servicing trains are kept. North of the depot there is an independently owned ice house. It fronts upon a highway. The rear end of the ice house is near the west line of the railway company's right-of-way. One of the supply stations is maintained near the ice house, but slightly south of it. A building known as the carmen's "shanty" is north of the depot, but south of the ice house. In addition there is a roundhouse and a storehouse. At the time the torpedoes were

[1] Although the boy is named in the complaint, the action was brought by his father, Johnnie McKenzie.

picked up by young McKenzie he lived with his family east of the yards.

There is evidence that Dennis had frequently crossed the yards in going to the ice house for his parents. Other youngsters did likewise. There were no well-defined paths to be followed after entering the yards proper, but a trail did lead by a storage tank. Two crossties spanned a ditch and were used by persons having business at the ice house. A photograph clearly shows that the ties formed a crude bridge over the depression or gulley, and there was testimony that this route was so frequently used that the railway company should have known about it.

Dennis testified that while residing at Heavener he made frequent trips across the railway yards. During warm weather he went almost daily for a twelve-pound block of ice. Frequently his 7-year-old brother, Bernice, would accompany him. They would loiter as children frequently do, stopping to play when something of interest attracted their attention. In making these trips railway employes were encountered, but no one had told the children to stay off the premises. In utilizing the cross-tie bridge Dennis and his brother passed near a little house used for storage purposes. Dennis had observed that the house was not kept locked, and often the doors were open.

In looking through the open door Dennis had seen "some little old red square things," but at that time he did not know what they were. He had also seen them on the ground, and finally picked up two. This did not occur until he had passed them on one or two occasions. They proved to be torpedoes. Dennis carried them home because they were attached to lead that could be used for fishline sinkers. The torpedoes were placed in his fishing box and no further attention was given them for a month or more—not until the family had moved to Waldron. While trying to pry the lead away from one of the torpedoes it exploded, with the result heretofore mentioned.

The sole question is whether the defendant was entitled to an instructed verdict. Stated differently, was there substantial evidence of negligence?

Appellant concedes that Dennis' testimony placed one of the torpedoes between the rails of the main line track and the other on the shoulder of the roadbed, near a supply box. Neither was attached to a rail. But there is evidence that trainmen had access to the supply house and that when necessary they would procure the explosives.

Appellant's witnesses described the care with which torpedoes are handled, beginning with their removal from storage at Pittsburgh, Kansas, their shipment in sealed boxes, and delivery to the storehouse at Heavener where they are placed in charge of a keeper. Within the storehouse the torpedoes are taken from the sealed boxes and placed in a metal container. Appellant's keeper distributes the torpedoes to supply men in packages of six. The supply men, in turn, take the torpedoes to the so-called "shanty" where individual lockers are kept. As the supply men require torpedoes to be delivered to train operatives, (the trains are referred to as "cabooses") the torpedoes are taken from the lockers for delivery.

It is not customary to use torpedoes within yard limits unless a derailment has occurred. To discourage trespassing within the yards signs have been erected and are constantly maintained.

Appellant's sole attack on the judgment is that there was no testimony to show that the defendant had placed the torpedoes where they were found, or that its responsible representatives had reason to suspect that they were obtainable, hence the jury was permitted to infer that operatives had been negligent.

The close question is whether the inference is one that reasonable men would draw from established facts, —or was the verdict based on speculation and conjecture?

Appellant gives emphasis to the rule that under the law there is a presumption against negligence. *D. F. Jones Construction Company* v. *Mize,* 201 Ark. 702, 146 S. W. 2d 709. The difficulty in application is that there is substantial evidence that the torpedoes had been ob-

served in an insecure situation, and that sufficient time had elapsed for appellant's agents to have seen them. The testimony on this point may not be accurate, but it did present a jury question rather than one of law.

In *Missouri Pacific Railroad Co.* v. *Slatton,* 193 Ark. 356, 100 S. W. 2d 86, it was said that if one unnecessarily leaves an explosive so exposed that children have access to it—as, for example, where children play or are known to go—the person who left the explosive in that position will be responsible for consequential injuries. In the case at bar appellant insists that the roadmaster's testimony is conclusive on the question of care and that negligence must be ruled out. That might be true if the employee's witnesses had not been contradicted. True, no one said that the railway's custom was not what the trainmaster pointed to; but the injured boy's testimony, supported by others who knew that use of the premises by children had continued for a protracted period, was sufficient to establish negligent handling after the torpedoes passed from the storekeeper's control. With this factual background for the jury's consideration the next step was not a speculative or theoretical process of reasoning, but a natural inference resting on facts the jury was willing to accept.

We are not able to say that the court erred in refusing to instruct a verdict for the defendant-appellant.

Affirmed.

WINFREY & CARLILE *v.* NICKLES, ADMR.

5-454

ST. PAUL-MERCURY INDEMNITY COMPANY *v.* NICKLES, ADMR.

5-455 270 S. W. 2d 923

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

G. Byron Dobbs and *Goodwin & Riffel,* for appellant.

Rose, Holland, Holland & Smith, Robinson & Edwards, J. H. Lookadoo and *Hardin, Barton, Hardin & Garner,* for appellee.

George Rose Smith, J. These are two companion appeals, one from a circuit court judgment reversing an order of the Workmen's Compensation Commission and the other from an allied circuit court order distributing certain funds in the registry of the court. The only issue is whether the court was correct in directing that from the funds in question the sum of $3,031.35 be paid to the firm of Hardin, Barton & Hardin as an attorney's fee.

On August 4, 1952, Will Roy Nickles, an employee of Winfrey & Carlile, was killed in a traffic collision while acting in the scope of his employment. In due course his employers and their compensation insurance carrier, St. Paul-Mercury Indemnity Company, admitted liability under the Workmen's Compensation Act and began making weekly payments to the dependent parents of the decedent.

Jennings J. Stein and his wife, occupants of the car which collided with the truck being driven by Will Roy Nickles, were both injured in the collision. Shortly after the accident they brought suit for damages against the appellee, Bill Nickles, as administrator of the estate of his son, Will Roy Nickles. Bill Nickles employed the

Hardin law firm to defend the case and to file a cross-complaint against Stein for damages for the death of Will Roy. The contract provided for a contingent fee of fifty per cent of any amount recovered, after the payment of court costs and other expenses.

The Workmen's Compensation Act provides that when a tort action for the injury or death of an employee is brought against a third person, the employer or his compensation insurance carrier may intervene and assert a lien, up to two-thirds of the net recovery, for amounts paid and to be paid as workmen's compensation. Ark. Stats. 1947, § 81-1340. Accordingly St. Paul, as insurance carrier for Will Roy Nickles' employer, retained attorney G. Byron Dobbs to file an intervention in the Stein-Nickles litigation for the purpose of claiming a lien upon any recovery obtained by Bill Nickles as administrator.

It happened that St. Paul had also issued an automobile liability policy to Stein and was thereby obligated to defend the cross-complaint for him and to pay any adverse judgment, up to the policy limit. Thus St. Paul was asserting a lien upon the proceeds of Bill Nickles' cause of action and at the same time was required to defend against that cause of action. In an effort to be impartial St. Paul employed another law firm, Shaw, Jones & Shaw, to defend the case for Stein. The Shaw firm and St. Paul's other attorney, Dobbs, did not exchange information or make their files available to each other.

The case was tried on March 23, 1953, and resulted in a verdict for Nickles in the sum of $6,433.10. Dobbs took no active part in the trial, the case being handled by the Shaw firm for Stein and by the Hardin firm for Nickles. Judgment having been entered upon the verdict, St. Paul, as Stein's liability insurer, paid the amount of the judgment into the registry of the court.

There then arose the question of the correct distribution of the money. All parties agreed to a court order by which this question was referred to the Workmen's

Compensation Commission for determination. After taking testimony the Commission delivered an opinion holding that the contract between Nickles and the Hardin firm was binding only as to that part of the recovery that belonged to Nickles. The opinion further indicated that the Hardin firm could have applied to the Commission for a reasonable fee to be taxed against St. Paul's two-thirds interest in the recovery, but since no such application had been made the Commission did not charge any attorney's fee against St. Paul. Upon this reasoning the Commission first deducted the court costs and other trial expense incurred by Nickles and then directed that two-thirds of the remaining net recovery be paid to St. Paul and that the other one-third be divided equally between Nickles and his counsel.

Upon appeal from the Commission's order the circuit court set aside the Commission's action and held that, after the deduction of costs and expenses, the Hardin firm was entitled to half of the entire net recovery, with the other half to be distributed in the ratio of two-thirds to St. Paul and one-third to Nickles. Thus it will be seen that the appellee Nickles has no pecuniary interest in the present controversy, for both the Commission and the circuit court awarded him exactly one-sixth of the net proceeds. The issue is whether the Hardin firm is entitled to share in St. Paul's part of the net recovery.

This question centers entirely upon a construction of § 40 of the Compensation Act, Ark. Stats., § 81-1340, and really involves three distinct inquiries. First, was the Hardin-Nickles contract binding upon St. Paul? We agree with the Commission's view that it was not. In a third-party action of this kind § 40 quite plainly recognizes separate causes of action in the compensation beneficiary and in the compensation carrier. By subsection (a) the compensation beneficiary is permitted to institute the action, with notice to the carrier so that it may intervene. By subsection (b) the carrier itself may institute the action, joining the compensation beneficiary so that all issues may be settled in one case. There is nothing in the Act to indicate that either plaintiff may force his

own attorney upon the other. As a practical matter we know that the beneficiary is apt to have a lawyer of his own and that an insurance company almost always has counsel that are regularly retained. Hence the Hardin firm, in making its contract with Nickles, must be taken to have known that it did not thereby assume a contractual relationship with St. Paul. The Commission was correct in concluding that Hardin, Barton & Hardin's claim against St. Paul does not rest upon the contract with Nickles.

Second, does subsection (c) of § 40 require that in a case like this one the Commission must approve any allowance of attorneys' fees or other costs of collection? It will be remembered that subsection (a) allows the beneficiary to begin the action, subject to intervention by the carrier, and that subsection (b) allows the carrier to take this initiative, subject to joinder of the beneficiary. Both these subsections provide that the beneficiary is entitled to one-third of the recovery in any event, that the carrier is entitled to the other two-thirds or so much thereof as does not exceed its compensation liability, and that any excess above the latter goes to the beneficiary. Both subsections provide that the division is to be made after the deduction of "reasonable costs of collection." Then follows subsection (c), which reads:

"(c) Settlement of such claims under subsections (a) and (b) of this section must have the approval of the Court or of the Commission, except that the distribution of that portion of the settlement which represents the compensation payable under this act must have the approval of the Commission. Where liability is admitted to the injured employee or his dependents by the employer or carrier, no cost of collection shall be deducted from that portion of the settlement under subsections (a) and (b) of this section, representing compensation, except upon direction and approval of the Commission."

St. Paul stresses the second sentence of subsection (c) in arguing that since it admitted compensation lia-

bility to the dependents of Will Roy Nickles it cannot be charged with any costs of collection except by direction of the Commission. In making this argument St. Paul insists that the word settlement, as used in the second sentence, means any recovery. The appellees answer that the word settlement means a compromise settlement, and since the Stein-Nickles case proceeded to a jury verdict subsection (c) has no application.

Our study convinces us that subsection (c) is decidedly vague, that neither construction of the word settlement leads to consequences entirely logical. But we must take the statute as we find it, and in our opinion the legislature meant compromise settlements only. In reaching this conclusion we are influenced by the legislative history of subsection (c) and by the practical results of the two differing interpretations.

In the original Compensation Law, Act 319 of 1939, § 40 contained substantially the present third-party arrangement, in that the proceeds, after the deduction of reasonable costs of collection, were divided between the compensation beneficiary and the carrier in a similar one-to-two ratio. But what is now subsection (c) of the 1948 revision of the law was originally a single sentence: "Settlement of such claims and the distribution of the proceeds therefrom must have the approval of the court or of the Commission." Ark. Stats., § 81-1340, as it read prior to the 1948 amendment.

It cannot be doubted that the 1939 statute, in the sentence quoted, referred only to compromise settlements. When a case is brought to trial and results in a verdict for the plaintiff, there is no conceivable reason for the award to be specially approved by either the court or the Commission. There is, however, good reason to require that a compromise settlement be so approved, for it is a basic theory of workmen's compensation legislation that neither the injured employee nor his dependents are to be allowed to sacrifice their rights by improvident settlements.

Our present subsection (c) is a revision and an enlargement of the original sentence. It, too, however, requires that the settlement be approved by the court or the Commission, and for the reasons already stated we think the language refers to compromise settlements alone.

In practical effect this construction is desirable. Here we have a contested tort action, involving a trial that lasted for two days. The Commission is certainly in no position, without a hearing, to determine what is reasonable compensation for the plaintiffs' counsel. For it to make that determination in a case of this kind the record might have to be transcribed and submitted to the Commission. What began as one lawsuit might easily become two.

The circuit judge, on the other hand, is obviously the person best able to fix the fee. Not only has he presided over the trial but he is qualified by training and by experience to assess reasonable compensation for legal services. It would be manifestly illogical to require the circuit judge to surrender jurisdiction over a matter in which his own judgment is peculiarly valuable.

On the second question we conclude that subsection (c) of § 40 does not apply to a contested case. It was therefore unnecessary for the circuit court to refer the matter to the Commission, and we treat that reference as surplusage. The appeal to the circuit court merely reinstated jurisdiction that already existed, and we review the court's action without regard to the Commission's decision.

Third, was the court correct in allowing the Hardin firm fifty per cent of St. Paul's two-thirds interest in the net recovery? We think it was. This phase of the case is more easily understood if we disregard for the moment the fact that St. Paul was also Stein's insurer and was therefore in the position of suing itself.

Had it not been for St. Paul's dual liability the employment of counsel would have come about in this

fashion: Nickles, as administrator, retained the Hardin firm as his attorneys, for an agreed fee of half of his interest in the recovery. St. Paul would then have had a genuine interest in the case, since it stood to recoup its entire compensation liability from the third-party tortfeasor. Accordingly St. Paul might either have retained the Hardin firm as its counsel, for a compensation mutually agreed upon, or have employed another attorney of its own choice. In either event the present question would not have been likely to arise, for ordinarily the court would simply have apportioned the recovery between the two plaintiffs, leaving each to pay his own counsel. Thus in the normal situation St. Paul would incur liability for an attorney's fee in the course of pursuing the tortfeasor.

Here, however, St. Paul was pursuing itself, and its pecuniary interest lay entirely in defeating Nickles' claim. That is, its compensation liability was fixed regardless of the outcome, but at least one-third of any judgment against Stein would have to be paid by St. Paul to the administrator, in addition to the compensation payments. In these circumstances it was to St. Paul's interest to intervene on Nickles' side of the case, just to be certain that all of its own money did not go to Nickles, and then to resist the claim as strenuously as possible in behalf of Stein. Thus there was never any real possibility either that St. Paul would employ the Hardin firm or that St. Paul's own counsel would be of any assistance to that firm.

Accordingly it was entirely through the efforts of the Hardin firm that Nickles recovered a judgment for $6,433.10. That St. Paul stood to lose rather than to win by their services had no bearing upon the time, effort, and skill required in the preparation and trial of the case. Nor should this law firm be penalized by reason of St. Paul's unhappy predicament. Not infrequently it must happen that a casualty insurer finds itself bound to defend both sides of an automobile collision case, so that it pays one attorney for winning the case and another for losing it, in addition to paying the judgment. This

is simply one of the hazards that attend the business of writing liability insurance. The circuit court was right in assessing this attorney's fee upon the basis of what would have been fair had St. Paul been a wholehearted and enthusiastic cross-complainant in the litigation, and it is not contended that in that situation the sum allowed would be excessive.

Affirmed.

PUBLIC LOAN CORPORATION *v.* WEAVER.

5-420 270 S. W. 2d 888

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

Wright, Harrison, Lindsey & Upton, for appellant.

Digby & Tanner, for appellee.

GRIFFIN SMITH, Chief Justice. Public Loan Corporation of Little Rock, and Public Loan Corporation, Monroe, La., have appealed from decrees declaring certain contracts void because of usury.[1]

The Weavers, husband and wife, borrowed from Public Loan Corporation of Little Rock February 6, 1952. The application was by Mrs. Weaver, who testified that she did not inform her husband that the obligation had been incurred until complications arose, and she signed the notes for herself and her husband, executing a mortgage on personal property, including household goods.

Two Arkansas corporations were chartered under Act 203 of 1951, commonly known as the Small Loans Act, approved Feb. 28 of that year. The Weaver note was for $990, payable in equal installments of $55 over a period of eighteen months. Deductions were: Discount, $74.25; service charge, $45.60; life insurance premium, $29.70; health and accident insurance premium, $29.70. The total of these items is $179.25, leaving $810.75 for the borrowers. Momentarily disregarding the insurance charges, it will be seen that discount and service charges were $119.85. Treating the discount and service charges as interest the result would be an exaction of $119.85 for the use of $870.15. But the "use" was on a plan requiring the principal to be diminished at the rate of $55 per month, hence the actual interest rate without reference to insurance charges was substantially above ten per cent.

On May 19, 1952, in a suit brought by Mrs. Lovie Strickler against State Auto Finance Company, this court held that a service charge such as the one we now consider could not be authorized by the General Assembly in derogation of the constitutional provision against usury, and to the extent that such charges exceeded a ten per cent interest rate Act 203 of 1951 was no protection.

[1] Three corporations feature in the proceedings. Public Loan Corporation (without further identification) was chartered March 9, 1951. Public Loan Corporation of Little Rock was chartered April 3, 1951. The third entity is the Monroe (La.) corporation, organized under the laws of Ohio, with a permit to do business in Louisiana. [Although Little Rock is mentioned throughout the opinion, the business office was in North Little Rock.]

Twelve days after this court rendered its opinion on the validity of Act 203 Mrs. Weaver was asked by J. C. Evans, manager for Public Loan of Little Rock, if she needed more money. Upon receiving an affirmative reply three transactions were consummated. The balance of $825 remaining after three $55 payments had been made was disregarded and two new notes were executed: One was for $500 payable to Public Loan of Little Rock, with interest at ten per cent. The other was for $300 payable to Public Loan Corporation, Monroe, La., for $300. This note bore interest at 3½% per month on $150, and 2½% per month on $150. It was payable over a period of eighteen months in equal installments of $22.25. Mrs. Weaver was given rebates on the original $990 note as follow: Discount, $45.58; service charge, $33.08; life insurance premium, $23.17; health and accident premium, $23.17—total, $125.00.

In closing this transaction Public Loan Corporation [of Little Rock] handled all matters incidental to execution of the two notes and transmission of the $300 item to the Monroe corporation. There is testimony that the mortgage and notes and the payment of $100 to Mrs. Weaver were completed the same day, or at least not later than the day following the agreement. The Little Rock agency contends that the Louisiana note was sent to Monroe and that it received from Monroe a check that was applied on the Weaver obligation—that is, it was applied as a credit after the rebates had been entered. This left the Weavers owing the Little Rock corporation $500 and (presumptively) the Monroe branch $300. We say "presumptively" because L. M. Curtiss, an officer of the Monroe Corporation, testified that the stock of his corporation and the Little Rock organization was owned by American Investment Company of Illinois.

It was shown that the Monroe corporation was not authorized to do business in Arkansas. See Ark. Stat's, § 64-1202. The Weaver application, addressed to the Monroe agency, contains this statement: "Subject to acceptance by you in Monroe, La., I hereby make application by mail for a loan of $300 and enclose my note and

mortgage for same, which loan is to be made under the Louisiana Small Loan Law."

The Chancellor found that the renewals were a part of a scheme or plan to circumvent the Arkansas decision; that the borrowers were uninformed respecting their rights; that substantial acts connected with the so-called Louisiana loan were consummated in Little Rock, and that the taint of usury attached to the renewals.

We agree with the trial court that Public Loan of Monroe was doing business in this state. There is no evidence that its officers had ever seen the mortgage or that they knew what the security was. The time element was such that decisions must have been made in Little Rock.

We do not find it necessary to pass upon the insurance contracts, since without them the $990 contract was usurious. Manager Evans testified that he was an unpaid agent of the Old Republic Credit Life Insurance Company. He voluntarily gave his services. Evans was paid a salary by the Little Rock loan corporation. All Public Loan Corporations, he said, are controlled by American Investment Company, with headquarters at Springfield, Ill. During the period Evans was manager in Little Rock ". . . they always filled out papers that the Monroe office needed to complete a loan and let the person applying for the loan authorize the disbursement. No collections were made from the office in North Little Rock until they became delinquent, *and we would handle that transaction the same as any other capital. We would collect for them* with no charge . . ."

This testimony was given by Evans regarding the Weaver loan: "I gave [Mrs. Weaver] eighteen months on payment in Louisiana, at $22.25 per month, so she filled out the routine application—which is a Monroe application—and signed another application here which authorized us—rather the Monroe company—to make payment to us for $300 on the old loan, so we could clear it out with a $500 loan she was to get. . . . I gave her $125 off her old loan so she could get the extra hundred

dollars and keep the payments roughly the same as they were. We agreed to that, [but] the papers were drawn up on the Monroe, Louisiana, forms. . . ."

At another point in his testimony Evans said: ". . . No, sir; I told you I arranged it, but I didn't make the loan. The loan was made in Louisiana."

On September 9th, 1952, Evans, using stationery of the Little Rock office—wrote to Mrs. Weaver that her account was delinquent and that $22.25 had to be paid immediately: "Please phone me as soon as you receive this letter. If you cannot pay your account to date, I may be able to make arrangements for you, but if you fail to get in touch with me *it may be necessary for me to demand payment* of the entire unpaid balance." Following the signature this notation appears: "Monroe loan: This payment payable in North Little Rock office immediately."

Evans explained that this letter was sent out through mistake, but a little later he was asked whether (after forwarding applications to Monroe) the Little Rock office had anything further to do with the loan, and he replied: "Only when it became delinquent. As I stated, any time an account became delinquent—whether New York City, San Diego, or where—we give it prompt service. We give that to our Monroe office on delinquent accounts only."

In the Weaver case Evans did not contact the Monroe office "before the matter was closed . . . In order to maintain somewhat of a profitable operation we would endeavor to get people additional money—purely from a selfish standpoint, so they would not get mad and sue us."

Neal Taylor, a representative of the Little Rock Corporation, testified that money would not be loaned to customers unless they would execute a Louisiana loan. He did not know whether any security was taken in Mrs. Weaver's case, apportionable to the Monroe office.

Charles Hulteen, who stated that he was manager of the "branch office" in North Little Rock, testified that his instructions were to help an applicant who wanted more money. ". . . We would merely recommend them to the Louisiana office . . . We handled their signatures and the papers were sent down to be notarized, but the loan was not approved in our office."

Whether the Louisiana agency actually intended to do business in Arkansas is not the controlling issue. Preponderating evidence is that its business was being handled by the Little Rock office, and the three loans are so inextricably linked that the usurious nature of the original contract extends to all. *Pacific Finance Corp.* v. *Slayton,* 222 Ark. 745, 262 S. W. 2d 452. We are unable to see that interstate commerce is involved in the $300 loan when the people who were owners of each branch were rendering reciprocal services and extending essential accommodations. In this holding we do not impair such cases as *Mechanics Lumber Company* v. *Yates American Machinery Co.,* 181 Ark. 415, 26 S. W. 2d 80; *Peebles* v. *Columbian Woodman,* 111 Ark. 435, 164 S. W. 296; *Kelly* v. *Telle,* 66 Ark. 464, 51 S. W. 633, and *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L.R.A. (N.S.) 659, and like cases cited by the appellant.

Affirmed.

MURRAY *v.* MURRAY LABORATORIES, INC.

5-358 270 S. W. 2d 927

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

Price Dickson and *W. B. Putman,* for appellant.

Courtney Crouch, Rex W. Perkins and *E. J. Ball,* for appellee.

J. Seaborn Holt, J. Appellee, Murray Laboratories, Inc., sued appellant, Dr. Murray, to cancel 45 shares of stock, issued to and held by Dr. Murray, alleging failure of consideration for said stock, for the reason that said shares of stock were not issued for money or property actually received or labor done and were in violation of Article 12, § 8 of the Constitution of Arkansas, and were therefore void and cancellable.

Dr. Murray filed answer and cross-complaint in which he denied failure of consideration and prayed for an accounting and decree for his portion of the earnings of the corporation.

Trial resulted in a decree cancelling Dr. Murray's stock in accordance with appellee's prayer, and refused his plea for an accounting and restitution to him. This appeal followed.

The evidence discloses that Dr. Murray was a graduate veterinarian from Texas A. & M. College, having received a D.V.M. degree from that institution. While at Texas A. & M. Research Center, he studied the techniques of culturing and testing the strength of various species and strains of viri and the making of live virus vaccines. Dr. Murray, having conceived the idea of setting up a manufacturing laboratory in Northwest Arkansas, the center of a great chicken broiler industry, went to Fayetteville and interested six of the leading broiler producers in that area in his proposition. A corporation

was duly organized and on August 22, 1951, one hundred shares of capital stock, with par value of $50.00 per share, were issued, Dr. Murray receiving 46 shares (for one of which he paid $50.00 in cash) and 45 shares were issued to him for his formula for Newcastle Disease vaccine, representing $2,250.00 of the capital stock. The remaining stockholders, six broiler producers, subscribed and paid for nine shares each at $50.00 a share or a total paid by these six stockholders of $2,270.00. This stock was issued to these seven original, and only stockholders and directors by agreement.

Dr. Murray assumed his duties August 1, 1951, as manager and director of appellee, Murray Laboratories, Inc. The corporation began operations in August, 1951, and as of March 31, 1952, showed an earned surplus of $25,260.00, or a total of $30,730.26, including the value of Dr. Murray's stock, issued to him for the formula above mentioned. During all this operation, Dr. Murray acted as laboratory director, and the sole product manufactured and sold by the corporation was Dr. Murray's Newcastle vaccine.

Differences and friction having arisen, Dr. Murray tendered his resignation on March 31, 1952, and in writing demanded his share of the earnings of the corporation up to that time, or that he be reimbursed for his stock, in accordance with the stock subscription agreement which he claimed the corporation had with him. The written proposal of Dr. Murray contained these recitals: "I sell my stock in the corporation as provided in the stock subscription agreement, the book value as of March 1, 1952, being $12,337.20, and resign as general manager on April 1, 1952, or prior thereto upon payment of the value of my stock, at the discretion of the directors. II. I purchase all outstanding stock of the remaining 6 stockholders, computed on the same basis, sales to be consummated and stock delivered on or before April 1, 1952."

It appears that Dr. Murray was the originator of the plan to manufacture vaccine for Newcastle Disease in poultry.

At the first meeting of the Board of Directors on August 4, 1951, (regular meetings were held each month thereafter), the minutes contained these recitals: "After some discussion a motion was unanimously adopted that Dr. W. L. Murray be employed and retained as General Manager of the Laboratories to be operated by this Corporation at a salary of $300.00 per month, beginning on the 1st day of August, 1951. . . .

"WHEREAS, Dr. W. L. Murray, who has been retained as General Manager of the Laboratories of this Corporation, has developed a vaccine for the treatment of Newcastle Disease and, WHEREAS, Dr. W. L. Murray is conducting research for other vaccines, medicines, and formulas, for the treatment of diseases of poultry and livestock and, WHEREAS, the formula already developed by Dr. W. L. Murray is needed by this Corporation to manufacture vaccine for the treatment of Newcastle Disease and, WHEREAS, Dr. W. L. Murray has agreed to turn over all property rights in said formula to this Corporation, as well as all property rights in other formulas developed by him while in the employ of this Corporation, in exchange for forty-five shares of the capital stock of this Corporation and, WHEREAS since said formulas are needed by said Corporation, it is the belief of this Board of Directors that they are reasonably worth $2,250.00,

"NOW THEREFORE, BE IT RESOLVED that this Corporation issue to Dr. W. L. Murray forty-five shares of its capital stock at its par value of $50.00 per share in exchange for the Newcastle vaccine formula developed by him and in exchange for any formulas subsequently developed by him for the treatment of diseases of poultry and livestock, as well as any formulas developed for human use and consumption,

"BE IT FURTHER RESOLVED that all such formulas developed by the said Dr. Murray, while in the employ of this Corporation, shall become the sole and exclusive property of this Corporation, even though the same might be copyrighted in his individual name, and,

"BE IT FURTHER RESOLVED that the President and Secretary of this Corporation enter into an appropriate agreement with the said Dr. W. L. Murray in respect to the exchange of shares of stock for said Newcastle vaccine formula, and any other formulas subsequently developed by him while in the employ of this Corporation.

"The following resolution was unanimously adopted: BE IT RESOLVED that the Corporation rent from Louis M. Heerwagen a building located at 304 Johnson Street, at a monthly rental of $50.00 per month, which building shall become the general offices and headquarters of this Corporation."

At a meeting of the Board November 20, 1951, Dr. Murray's services appeared so satisfactory that his salary was, by unanimous vote, increased to $400.00 per month. Minutes of Board meetings thereafter reflect continuous increase and growth in assets of the corporation. It appears undisputed that a satisfactory vaccine was produced by Dr. Murray in November, 1951, and used by the corporation as long as Dr. Murray remained with it and that this formula was delivered to the corporation at Dr. Murray's resignation. It also appears that this formula was duly filed with the Arkansas State Board of Health, shortly after the corporation was organized.

Following Dr. Murray's resignation, Dr. Wadsworth was employed in his stead on a month to month basis, at a salary of $500.00 per month.

The minutes of January 8, 1952, recite "satisfactory results were reported on the performance of the company's vaccine."

The record reflects that Dr. Murray's formula in question provides:

"FORMULA NEWCASTLE DISEASE VIRUS VACCINE

two eight

"The formula is based on a four, six ratio. The virus is a mild strain of Newcastle virus which does not ordinarily cause the bird to exhibit symptoms of the disease, and will constitute the former of the above ratio. The diluent will be composed of a physiological saline solution, and will be the latter of the above ratio."

The minutes of appellee's Board of Directors disclose that as early as October, 1951, all directors were aware of and made recommendations in regard to the ratio of virus to diluent, that is, the strength of the vaccine; that in November, 1951, the Board agreed to adopt a 20% solution, or a 2-8 ratio, continuing tests on a 10% solution. The Directors were cognizant of every change made in the ratio and, as indicated, after many experiments with the vaccine made by Dr. Murray, with the Directors' knowledge and consent, a suitable vaccine was perfected, accepted, and used from November, 1951, to March 31, 1952, when Dr. Murray resigned, and assets grew from $5,000.00 to approximately $30,000 up to March 31, 1952. Since Dr. Murray's resignation, the corporation appears to have continued operations under the same corporate name.

There was no innocent third party involved here and no change in the stock ownership. No fraud has been shown. The corporation owes no debts, but on the contrary, has substantially profited. Those seven men, as the only stockholders and directors, who owned the corporation determined among themselves that the value of Dr. Murray's formula to them was $50.00 per share, the par value of the stock.

The principles of law announced in *Kimmel Sales Corp.* v. *Lauster, et al.,* 167 Misc. 514, 4 N. Y. S. 2d 88, apply with equal force here. "The consequences are different where rights of creditors or of the public are involved. Where the controversy is solely between the corporation and its stockholders, it is held that the stockholders unanimously can do what they will with the corporate assets, which are their own. . . . Where the public is concerned, *e. g.,* in the violation of a statute

limiting the powers of a public service corporation. *Berkey* v. *Third Avenue Ry. Co.,* 244 N. Y. 84, 90-92, 155 N. E. 58, 50 A. L. R. 599, or where creditors' interests are adversely affected, there can be no waiver or estoppel as a result of action or inaction by the stockholders, but where only the interests of the stockholders themselves are at stake, the contrary holds good. . . . 'An issue of stock by a corporation as a bonus or gratuity, at less than its par value, or on payment therefor in property at an overvaluation is binding . . . by estoppel, even when in violation of a constitutional or statutory provision, upon participating, consenting or acquiescing stockholders and their transferees, so that they cannot sue to set the transaction aside. . . .' 14 Corpus Juris, p. 452, § 613; *Id.,* p. 449, § 609."

They, as the seven directors, fully understood and agreed, as reflected by the minutes above of their regular monthly meetings, that Dr. Murray's formula in the beginning was not perfect or satisfactory, that he was to experiment and develop one that would be satisfactory to them, and the preponderance of the evidence shows that he did develop such a satisfactory formula three months before he resigned, and that the corporation operated under it to their substantial benefit, that is increasing an initial investment of $5,000 to approximately $30,000.

Jeff Brown, one of the directors, testified: "Well, in short, after some period of experimentation in producing the formula some formula was hit upon which satisfied you and the other incorporators? A. That's right. Q. And following that period of time did you and the others, if you know, purchase that vaccine from the corporation and use it on your flocks? A. Yes, sir. Q. Did you sell it commercially as a distributor? A. I didn't, some of the others did, I used mine. Q. Now, Mr. Brown, do you know what results followed with respect to those buyers who bought it commercially and used it on their flocks? A. Well, I think most of them are pretty well pleased; I wasn't selling any, I don't know much about that. . . . Can you give me any idea, Mr. Brown, as to about when it began to appear that a suitable vaccine

mix had been worked up? A. No, I would have to guess at that, I would guess about November. Q. Is it true, then, that from about November on that reasonably proper and reasonably satisfactory results were obtained from the use of the vaccine? A. Reasonably, yes, sir. Q. Are you in position to say whether you and the other incorporators from that time on got quantities of the vaccine for use on their own flocks? A. We did."

The value of the consideration for the 45 shares of stock issued to Dr. Murray was determined by the judgment of the seven directors (the only stockholders) which is conclusive.

"Shares of stock other than shares without nominal or par value may be issued only for a consideration having a value in the judgment of the Board of Directors of the corporation at least equivalent to the full par value of the stock so to be issued; and in the absence of fraud, or wilfull over or under valuation in the transaction, the judgment of the directors as to the value of any such consideration shall be conclusive." (§ 64-208, Ark. Stats., 1947.)

Here, it appears undisputed that these 45 shares were issued to Dr. Murray for a vaccine formula. The question of the validity of stock in a corporation issued in consideration of a formula, as here, has never been presented to this Court. It is unnecessary, however, for us to determine whether this formula constituted property which Art. 12, above contemplated. On the facts presented by this record, we have concluded that the trial court erred in holding, in effect, that Dr. Murray's shares were void and should be cancelled under said Art. 12 for the reason that it is not controlling, in the circumstances.

There is no rule of law better settled than that " 'A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains.' " *State ex rel. Inde-*

pendence County v. *Citizens Bank & Trust Company,* 119 Ark. 617, 178 S. W. 929.

It appears that six of the stockholders, the broiler producers, have claims against the corporation arising in various ways. The validity and amount of these claims should be determined and charged against the corporation assets before appellant obtains relief.

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

KENNEDY *v.* STATE.

4777 270 S. W. 2d 912

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

Cole & Epperson, for appellant.

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

ED F. MCFADDIN, Justice. Appellant was convicted of the offense of maiming,[1] and sentenced to two years in the penitentiary. For reversal, he prosecutes this appeal.

[1] At common law the word was spelled "mayhem", but the more recent spelling of the word is "maim". See 57 C.J.S. 461.

The indictment accused "the defendant, George Kennedy, of the crime of Maiming, committed as follows, to-wit: The said defendant on the 25th day of October, 1953, in Hot Spring County, Arkansas, did unlawfully, wilfully and of his malice aforethought, put out an eye of one Idella Kennedy, against the peace and dignity of the State of Arkansas."

The evidence established: that the appellant was the husband of Idella Kennedy; that after some marital arguments, the appellant went out of the house, got his shotgun, fired through the window and injured his wife; that she was seated on a couch and reading a book; that the shot fired by appellant hit her in the breast, arm, head and eye; and that as a result of such injuries, it was necessary to remove her right eye. Appellant admitted the shooting, but claimed that he had no intention of hitting his wife, or of putting out her eye: he claimed that he was only trying to frighten her. But the evidence is amply sufficient to support a finding that he deliberately aimed the gun at her and fired through the window for the purpose of injuring her.

The appellant urges a number of assignments for reversal:

I. *Necessity of Specific Intent to Put Out the Eye.* The Trial Court refused to give appellant's Instruction No. 11-a, which reads:

"You are instructed that if you should find from the evidence that the defendant unlawfully, wilfully and of his malice aforethought shot the prosecuting witness without any intention of putting out one of her eyes, then you are told to find the defendant not guilty of the charge of maiming."

In lieu of the foregoing Instruction, the Court gave its Instruction No. 5, reading in part as follows:

"In this case it is not necessary that the State prove that the defendant specifically intended to shoot out the eye of the prosecuting witness at the time he fired the shot. It is sufficient if you believe beyond a reasonable

doubt from the evidence that he intended to shoot at the prosecuting witness and to inflict upon her great bodily injury and that same was done wilfully and with malice aforethought, and that as a result of said shot the prosecuting witness' eye was shot out. . . ."

This is not a prosecution under the old common law against mayhem; but is a prosecution for violation of the Statutory offense of maiming. Our Statutes on maiming have existed since Statehood;[2] and may be found in § 41-2501, *et seq.*, Ark. Stats.

Sec. 41-2504, Ark. Stats., reads:

"If any person shall, from malice aforethought, shoot, stab, cut, or in any manner wound and disable any person, he shall be deemed guilty of maiming."

Sec. 41-2502, Ark. Stats., reads:

"If any person shall, wilfully and of his malice aforethought, . . . put out an eye . . . of any person, he shall be adjudged guilty of maiming."

The State was not required to prove, in this case, that the sole intention of the defendant was to "put out an eye." The Court's Instruction No. 5, as previously copied, correctly states the applicable law. In *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933, in affirming a conviction for maiming, we said:

"It is urged by appellant that the lower court should have granted his motion for a peremptory instruction for a verdict of not guilty, because the evidence failed to disclose any intent to commit the crime charged. The testimony on behalf of the State tended to establish that appellant, without justification, struck Bryant in the neighborhood of his left eye with a blackjack, and that by reason of this blow his eye was severely injured and had to be removed. 'Malice in law may be inferred from the absence of any just cause or excuse for the doing of an act which has caused injury to another.' 34 Am. Jur. 685.

[2] See Chapter XLIV, Art. III, Secs. 1 to 8 (inc.) of the Revised Statutes of Arkansas, adopted in 1837, commonly known as the "Revised Statutes of 1838."

Men are presumed to intend the reasonable and natural consequences of their acts. *Howard* v. *State,* 34 Ark. 433; *Hankins* v. *State,* 103 Ark. 28, 145 S. W. 524; *Rhine* v. *State,* 184 Ark. 220, 42 S. W. 2d 8. The jury had a right to assume from the proof as to the weapon used, the location of the injury and the lack of provocation or justification for the act that the maiming of Bryant was done maliciously and intentionally."

Our holding in the case of *Pate* v. *State, supra,* disposes of the contentions of the appellant in the case at bar regarding Instructions, and also regarding the sufficiency of the evidence to sustain the conviction.

II. *Rulings as to Evidence.* The appellant complains of several rulings of the Court, but we find no error committed.

(a) When one of the Deputy Sheriffs was called as a witness for the State, the Prosecuting Attorney was allowed to ask him if he (witness) did not remember that the Prosecuting Attorney had talked to appellant right after the shooting "in that little office in the City Hall." Whether the conversation took place at the Court House or the City Hall was quite immaterial; so no prejudice resulted from the manner in which the Prosecuting Attorney interrogated the Deputy Sheriff as to where the conversation took place.

(b) When Minnie Ruth Kennedy (daughter of the appellant) was testifying for the State, the Prosecuting Attorney asked her if the appellant had not made indecent proposals to her. The Trial Judge promptly announced:

"I will very strenuously advise the jury to disregard it and admonish the Prosecuting Attorney not to continue with that line of questioning."

In view of the Court's ruling, and the fact that the witness never made any answer to the question, we hold that there was no reversible error committed in regard to this question.

(c) When the appellant was on the witness stand, the Prosecuting Attorney asked him if he had been fined for whipping his wife, and the appellant answered in the negative. Then the Prosecuting Attorney asked the appellant how many times he had been to the City Hall; and there was an objection to the question. The Court ruled:

"The objection is sustained. The motion for mistrial is denied; but the jury is admonished very earnestly to disregard the prosecuting attorney's question."

The ruling of the Court was correct; and a careful reading of the record convinces us that the admonition was sufficient, and the Court did not abuse its discretion in refusing to declare a mistrial. See *Glover* v. *State,* 211 Ark. 1002, 204 S. W. 2d 373.

Conclusion

We have examined all the other assignments, and find no error.

Affirmed.

TROXLER *v.* SPENCER.

5-447 270 S. W. 2d 936

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

W. B. Howard, for appellant.

Ivie C. Spencer and *Penix & Penix,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Owen Troxler, as lessee, and appellees, Ivie C. Spencer and J. H. Cain, as lessors, entered into a written contract of lease in November, 1950, wherein appellees leased certain lands in Craighead County, Arkansas, to appellant for a term of three years, for the purpose of raising rice. On October 24, 1952, appellant brought this action against appellee, praying judgment for damages to the rice crop grown on these lands which purportedly occurred through appellees' failure to furnish the crop with adequate water as required by their rental contract. Appellant also sought to recover for expenditures in excess of $1,400.00 which he had allegedly made in repairing a water well on the rice farm in an effort to prevent or minimize damage to the crop in question.

On February 2, 1953, appellees filed an answer denying the allegations of the complaint. The case was continued at the February term of court, and on August 28, 1953, appellees filed an amendment to their answer and a counterclaim for the amount of a power bill for 1952 which they had guaranteed to the power company in order that the appellant might have electric power to operate the pumps necessary to the irrigation system. On September 19, 1953, still before trial, appellees amended their counterclaim, praying judgment for $1,116.08 for the 1952 power bill. Further, the amendment alleged that due to appellant's refusal to use electric power during 1953 as provided in the contract, appellees incurred a liability for the sum of $445.46 which the electric company had charged them for furnishing power and electric facilities during that year. On September 21, 1953, appellant filed an amendment to his complaint and reply to appellees' counterclaim in which he demurred to that

portion of said counterclaim praying judgment for the 1951 and 1952 power bills and increased his own claim for damages from $6,000.00 to $10,398.21. Subsequently and during the trial appellant objected to appellees' proof on their counterclaim on the ground that said pleading was "prematurely commenced."

A five-day jury trial beginning on September 21, 1953, resulted in verdicts: (1) for the appellant for repairs made to the well and pump in the sum of $968.59; (2) for the appellees on appellant's claim for damage to the rice crop; and, (3) for the appellees on their power bill claim in the sum of $1,370.62. Balancing these findings against each other resulted in a net judgment in favor of the appellees in the sum of $402.03.

For reversal, appellant makes three arguments: (1) that the court erred in allowing appellees to plead and offer evidence on their counterclaim, because the counterclaim was premature; (2) the court erred in refusing to allow the appellant to re-open his case for the purpose of proving that the power company had breached its contract and had elected to terminate such contract; and (3) the evidence was not sufficient to support a finding that appellant was liable for the power bill of 1953. The trial court held appellees' claim for electric service for 1951 barred by a previous suit and appellant's arguments apparently relate only to the 1953 claim for electric service.

(1) Appellant contends that since the 1953 power service bill was not due, and had not been paid by appellees, when the suit was filed in October, 1952, it could not be made the basis of a counterclaim because it was premature. The lease contract provided that appellant "furnish the cost of electrical service for the operation of the electrical unit for the purpose of watering said rice." As previously indicated, there was included in appellees' amendment to their counterclaim filed September 19, 1953, the sum of $445.46 for which appellees became liable to and paid the power company as a minimum service charge for 1953 when appellant failed to use electric power that year. Appellant relies on the general rule to

the effect that a claim to be available as a counterclaim must be due at the time of the commencement of the action and cites such cases as *Hornor* v. *Hanks,* 22 Ark. 572, and *Pearce* v. *Hollis Construction Co.,* 212 Ark. 434, 206 S. W. 2d 15, in support of his contention. In answer appellees rely on such cases as *Midland Valley Rd. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214, and *Mueller* v. *Breckenridge,* 121 Ark. 633, 181 S. W. 145. In the Mueller case a defendant was permitted to prove matters set up in a cross-complaint which accrued after the commencement of the suit. However, it is only fair to state that none of the cases cited by either party is exactly in point on the present issue.

In recent years there has developed a wave of procedural reform which tends to brush aside traditional limitations on pleadings of counterclaims and set-offs in order that circuity and multiplicity of actions might be avoided and litigants enabled to settle all matters between them in a single action. Arkansas has been in the forefront of this movement. Prior to 1917 our Civil Code (Kirby's Digest, § 6099) defined a counterclaim as follows: "The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action." This section was amended by § 1 of Act 267 of 1917 which now appears as Ark. Stats., § 27-1123, and reads: "The counterclaim mentioned in this chapter may be any cause of action in favor of the defendants, or some of them against the plaintiffs or some of them." It is also now provided in the fourth subdivision of Ark. Stats., § 27-1121, that a defendant *must* set out in his answer as many grounds of defense, counterclaim, or set-off as he shall have, and we have held the provision mandatory. *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S. W. 2d 193. We have repeatedly stated that the manifest purpose of the legislature in enacting the foregoing statutes was to permit litigants to settle all matters in dispute between them in

a single suit. *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7; *Futrall* v. *McKennon,* 187 Ark. 374, 59 S. W. 2d 1035.

Even under older and more restrictive code provisions in other states a defendant could have pleaded the 1953 power bill as a counterclaim, as appellees did in the instant case. In an annotation on the question in 17 Ann. Cas. 431, it is said: "In a majority of jurisdictions it is held under code provisions that a counterclaim which arises out of the same transaction as that which is the subject of the plaintiff's demand need not be an existing demand in favor of the defendant on which he could have maintained an independent action at the time of the commencement of the action, but it is enough if it is such a demand at the time it is pleaded as a counterclaim."[1] That is the situation presented in this case and it would seem elementary that appellees, when sued for a breach of the contract, should be permitted to recoup any damages sustained by reason of a breach of the same contract by appellant even though such damages had not accrued at the time of the commencement of the action. Appellant did not plead surprise nor request a continuance. Nor has he shown any prejudice to his rights by reason of the counterclaim. On the contrary, he resisted appellees' motion for a continuance and amended his complaint so as to increase his claim of damages by more than $4,000.00 on the day trial was begun. It is our conclusion that the trial court properly permitted the filing of the counterclaim by appellees and that such action was in line with the spirit and purpose of our statutes on pleadings.

(2) The second contention of appellant is based on the court's refusal to reopen the case on the fifth day of trial to permit appellant to offer proof that the power company had disconnected the electric power before the end of the 1952 pumping season, a fact alleged in the amended complaint but upon which no proof had been offered during the previous four days. The record reflects that after appellant had completed his rebuttal testimony on the afternoon of the fourth day of trial, both

[1] See also, Clark on Code Pleadings (2nd ed.) 633.

sides rested. On the morning of the fifth day of trial, and after counsel had made their respective objections to the instructions, counsel for appellant made his request stating that he had "inadvertently" closed his case on the previous afternoon without offering such proof. If the usual procedure was followed the court had already excused all the witnesses on the day before when both sides rested although the record does not affirmatively show that to be a fact. The reopening the case for further proof was, of course, a matter within the sound discretion of the trial court under our decisions. Under the circumstances presented here, we find no abuse of such discretion.

(3) Appellant's final argument is that the record is devoid of any evidence that appellees were entitled to recover for the 1953 power bill. As previously indicated, the contract between the parties required appellant to furnish "the cost of electrical service." There was testimony tending to show that the parties contemplated and intended that electrical equipment was to be used to irrigate the rice crops and that appellant was to pay the cost of such power. The questions whether appellant would be liable under the contract for only the electrical power which he actually used, as he contended, or, whether he would be liable for the minimum charge of the power company upon his failure to use the service in 1953, were submitted to the jury under instructions which are not questioned. The jury found in favor of appellees on this issue and their verdict is supported by substantial evidence.

We find no error, and the judgment is affirmed.

5-460 270 S. W. 2d 903

Opinion delivered June 28, 1954.

[Rehearing denied October 4, 1954.]

Peter G. Estes and *Jeff Duty,* for appellant.

Jameson & Jameson, for appellee.

PAUL WARD, J. This appeal involves the application of Ark. Stats. § 51-1101 which is to the effect that before any mortgagee shall proceed to foreclose on any mortgage on personal property he shall deliver to the mortgagor a verified statement of his account.

Appellants who were engaged in raising chickens for the market, on February 6, 1952, executed a chattel mortgage to Smelser and Eason, feed dealers at Fayetteville, covering 16,400 baby chicks, and on May 23, 1952, they executed another chattel mortgage to the same firm covering 13,200 baby chicks. The purpose of these mortgages was to cover the cost of the baby chicks and all advances for the feed necessary for growing and maturing the chicks. Soon after the chattel mortgages were executed they were assigned by Smelser and Eason to appellee company which thereafter furnished the chick feed under the terms of the mortgages, appellants signing promissory notes for the feed as it was furnished. It was provided in each mortgage that it covered: "All of the chicks, together with all increases thereof and additions thereto now owned by the mortgagors or hereafter acquired by mortgagors . . . It is the intention of the mort-

gagors to mortgage all of the chicks now owned or hereafter acquired by them."

On February 27, 1953, appellee filed suit in the Chancery Court alleging that appellants owed a total of $6,055.20 on the notes secured by the two mortgages and that the same were past due; that plaintiff was entitled to a foreclosure; that prior to the filing of this suit appellants had disposed of property covered by the mortgages and had failed to pay according to the terms of the mortgage, and; that appellants had several thousand chicks they were feeding for the market and that they were the increase and addition to the original flocks covered by the mortgages.

On April 14, 1953, appellants filed an answer denying generally the allegations of the complaint, and also filed a cross-complaint asking $7,000 damages because the feed furnished was moldy and unfit for use.

On May 25, 1953, the day set for trial, appellants filed a motion to dismiss appellee's complaint, alleging a failure to comply with said section 51-1101. The court refused appellants' motion to dismiss and they prosecute this appeal with this statement as to the issue involved: "The court overruled and denied the motion and this appeal is on this point of the case."

In our opinion the trial court was correct in overruling appellants' motion to dismiss and we agree with the reasons given by the trial court for its action.

Before appellants' motion to dismiss was filed on May 25, 1953, the pleadings had posed the following issues of law and fact: One; Appellee alleged that it had a mortgage lien on certain chicks in possession of appellants by virtue of said chicks being an addition to the original chicks which had therefore been mortgaged. This was denied by appellants. Two; In its complaint appellee alleged that appellants had disposed of some of the chicks on which they had the mortgage, and this was also denied by appellants.

Referring back to Ark. Stats. § 51-1101 it is noted that the mortgagee is not required to deliver to the mortgagor a verified statement if the mortgagor has disposed of any of the mortgaged property. So we agree with the view taken by the trial court that it was necessary to settle the issues noted above before passing on appellants' motion to dismiss under the provisions of said section 51-1101. After hearing testimony the trial court decided, in regard to issue "One" above, that appellee had no lien or mortgage on the chicks in possession of appellants, and, having decided this issue, the trial court proceeded to determine the amount appellants owed appellee and rendered judgment therefor in the amount of $5,776.82. As to issue "Two", it was not necessary for the trial court to make any finding in view of the disposition made of the first issue. Thus the foreclosure question passed out completely.

In view of the trial court's disposition of the issues as set forth above it was not error for it to deny appellants' motion to dismiss. We find no contention on the part of appellants that the amount of the judgment is incorrect and therefore the decree should be affirmed.

Appellee makes the point that said section 51-1101 was repealed by Act 209 of 1953 although said Act 209 had not been passed when this suit was begun but became effective before the case was tried. Its contention being that said section 51-1101 is remedial legislation and therefore would not apply to any case tried after the passage and effective date of said Act 209. We do not pass on this issue raised by appellee because the conclusion we have reached above makes it unnecessary.

Affirmed.

HESTER *v.* FINIGAN.

5-461 269 S. W. 2d 698

Opinion delivered June 28, 1954.

F. C. Crow and *Weisenberger & Wilson,* for appellant.

W. S. Atkins and *Louis E. Crain,* for appellee.

SAM ROBINSON, J. Appellee H. H. Finigan filed this suit against appellant Bob Hester to replevy two yearlings. The cause was filed in the municipal court where there was a judgment for Finigan. Hester appealed to the circuit court where the cause was tried before a jury and again there was a judgment for Finigan. On appeal to this court appellant argues there is no substantial evidence to sustain the verdict.

It was shown that Finigan had his cattle in a pasture; that two of them disappeared; that Hester had gone to the pasture without notifying Finigan and obtained two head of cattle. Hester claimed that the two cattle he obtained from the pasture belonged to him, but on the other hand Mrs. J. C. Finigan testified that there were no cattle in the pasture other than those belonging to appellee H. H. Finigan. Cecil Green testified that the two cattle involved in this litigation did not belong to Hester. All of this testimony considered together was sufficient to make a question for the jury as to whether the cattle removed from the pasture belonged to Hester or to Finigan, and the jury found that they belonged to Finigan.

Hester stoutly contends that the cattle he obtained from the pasture were his own, and that at no time did he have in his possession the two cattle belonging to Finigan which were described in the complaint and order of replevin. However, Hester filed a cross-bond to retain

possession of the cattle described in the action, and he is not now in a position to say he did not have possession. When he filed the bond to retain possession, he impliedly admitted that he had possession of the cattle involved in the suit; however, the filing of the bond to retain possession did not estop him from contending that he was the real owner of the property.

In *Strahorn-Hutton-Evans Commission Co.* v. *Heffner,* 74 Ark. 340, 85 S. W. 784, it is said: "While the defendant, having executed a retaining bond, was estopped from denying that he was in possession of the property seized by the officer, he was not estopped from denying that this property was included in the mortgage upon which plaintiff based its right to recover, nor from showing that it belonged to him individually and that plaintiff had no right to it." See also *Sibeck* v. *McTiernan,* 94 Ark. 1, 125 S. W. 136.

Therefore, in the final analysis, the question in this case is whether the cattle Hester took from the pasture belonged to him or to Finigan. There is substantial evidence to sustain the jury's verdict that they were Finigan's cattle.

In his statement of points to be argued on appeal, appellant mentions the giving of Instruction No. 3 requested by appellee. But it is not shown in what manner the instruction was erroneous nor is the point argued.

Affirmed.

JOHNSON *v.* STATE.

4778 270 S. W. 2d 907

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

Willis V. Lewis, for appellant.

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

MINOR W. MILLWEE, Justice. Appellant, Rennie Johnson, owner and operator of the Tip-On-Inn Cafe in North Little Rock, Arkansas, was charged by information with murder in the second degree for the killing of Jessie Lairy. Trial was had on November 20, 1953, and the jury returned a verdict of guilty of murder in the second degree, fixing punishment at confinement in the State penitentiary for 7 years. From that conviction comes this appeal.

It appears that at about 4:30 on the afternoon of March 7, 1953, Lairy was in appellant's place of business in North Little Rock when appellant came in from his home where he had been resting and ordered Lairy to leave the cafe. There is a conflict of evidence concerning appellant's reason for ordering Lairy's departure, the appellant and his witnesses testifying that Lairy was using objectionable language, while State's witnesses related Lairy was simply urging an elderly woman to leave with him and used but one comparatively mild expression of profanity. All witnesses agreed that appellant led Lairy to the door after the two had quarrelled, but from that point the evidence is again conflicting. The State's witnesses testified that after putting Lairy out of the

cafe, appellant closed the door, obtained a pistol from a box on the cafe counter, then went outside and started a fight with and shot Lairy who was attempting to get into his car parked some 15 to 20 feet north of the door of the cafe. On the other hand, appellant, his wife and an employee testified that appellant had the gun on him at all times, that he continued out the front door with Lairy, and that as the two stepped out the door Lairy turned on him with a knife. Appellant asserted that he shot in self-defense from a crouched position while Lairy was attacking him, and explained his possession of the loaded pistol as a custom he had adopted for protection in taking his money home at night. The police who investigated the incident testified they found Lairy's corpse lying approximately in the middle of the street running in front of the cafe and that the body's right hand clutched a blood-covered knife at the time they found it. Appellant was bleeding profusely from a severe cut in his neck and a stab in his left shoulder or arm. The State's witnesses saw neither the knife nor any cutting, but there was some scuffling when appellant drew his pistol and shot Lairy twice. Appellant and his witnesses asserted that the cutting preceded the shooting. There was one bullet wound in deceased's chest just below the collar bone and one in his back under the left shoulder blade.

It is first argued that the evidence is insufficient to sustain the verdict. Appellant says the jury failed to observe certain discrepancies and prejudices revealed in the testimony of the witnesses for the State. The same argument might be made regarding the testimony offered by appellant. Appellant admitted the killing and the questions whether it was done feloniously, maliciously and while appellant was acting as the aggressor, or whether it was done in appellant's necessary self-defense, were submitted to the jury under conflicting evidence and correct instructions. According to the testimony offered by the State, appellant was the aggressor in the encounter and shot Lairy without provocation while the latter was acting in his own necessary self-defense. Al-

though this testimony was sharply disputed, it was the jury's exclusive function to determine the credibility of the witnesses and the weight to be given their testimony. It is also well settled that in determining sufficiency we must give the testimony tending to support the verdict its highest probative value. *Powell* v. *State,* 213 Ark. 442, 210 S. W. 2d 909. When measured by this rule, the evidence here was sufficient to support the conviction of murder in the second degree.

Subsequent to trial, there were filed three affidavits. The first of these set out that the four affiants were present at the Tip-On-Inn Cafe the day of the shooting, that they all saw Lairy, without provocation, stab appellant, and that Lairy would have killed appellant except for his being shot. It further stated that these affiants knew that two witnesses for the State were not present and could not have seen the shooting as they testified at the trial. The second affidavit, of the same four affiants, recited that they had purposely concealed their knowledge of the facts because they did not want to become involved, and that they would not have disclosed said facts before the former trial. The third affidavit was made by appellant and set out that the statements of the four affiants were true to his best knowledge and belief, that this new evidence could not, with reasonable diligence, have been produced at the trial, that the evidence is not merely cumulative or impeaching in character, and would probably have changed the results had it been offered at the trial. It has repeatedly been held that a motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court whose decision will not be reversed unless an abuse of that discretion is shown. *Karnes* v. *Gentry,* 205 Ark. 1112, 172 S. W. 2d 424; *Hunt's Dry Goods Co.* v. *Ridenour,* 219 Ark. 628, 243 S. W. 2d 742.

Here, the testimony of appellant's witnesses at the trial was to the effect that appellant killed Lairy in self-defense, after an assault with a knife had been made upon him. They had further testified that the State's witnesses who the affiants state were not present were

absent at the time of the killing. Thus, the offered testimony of affiants would be merely cumulative of evidence already adduced at the trial. There was no abuse of discretion in the trial court's refusal to grant a motion for new trial based on evidence that is merely cumulative. *Jones* v. *State,* 196 Ark. 176, 116 S. W. 2d 610; *Thurman* v. *State,* 211 Ark. 819, 204 S. W. 2d 155. In addition there was no satisfactory showing made why the evidence was not discovered before trial. See *Ary* v. *State,* 104 Ark. 212, 148 S. W. 1032.

Appellant contends that the verdict was excessive, but it is clearly within the limits prescribed by Ark. Stats., 41-2228, and there is no merit to this contention.

Error is also assigned in the overruling of a motion to quash the information on the ground that it read: "And with a unlawful and felonious intent then and there, him, the said Rennie Johnson, wilfully and maliciously to kill and murder," when the wording should have been: "and with an unlawful and felonious intent then and there, him, the said Jessie Lairy, wilfully and maliciously to kill and murder." The court reuled that the error was a typographical one, and that the information was sufficient to apprise the defendant of the crime with which he was charged. It does not appear that appellant made a timely motion to quash the information. Ark. Stats., § 43-1206 provides: "Upon the arraignment, or upon the call of the indictment for trial, if there is no arraignment, the defendant must either move to set aside the indictment, or plead thereto." In the present case, appellant was arraigned September 8, 1953, at which time he entered a plea of not guilty. The motion to quash came after trial had begun. In discussing § 43-1206, *supra,* in *Whitted* v. *State,* 188 Ark. 11, 63 S. W. 2d 283, we held that it contemplated that the accused should present his objections to the return of an indictment before trial. See also, *Ogles* v. *State,* 214 Ark. 581, 217 S. W. 2d 259. The objection to the information here came too late. Even if it had been timely made the prosecuting attorney could have amended without changing the nature of the offense charged.

We have examined other assignments of error in the motion for new trial and find no merit in them. The judgment is, therefore, affirmed.

VAUGHAN *v.* VAUGHAN.

5-465 270 S. W. 2d 915

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

H. B. Thorn, for appellant.

Neal Sebastian and *Neill Bohlinger*, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal from an order setting aside a judgment and granting a new trial. The determinative question is when the setting-aside order was actually made. We hold that the appellant has failed to establish that the setting-aside order was made *after* the close of the October, 1953, term.

A. M. Vaughan died intestate in Monroe County, Arkansas, in August, 1952, the owner of real and personal property. A creditor, Scott Griffith, was appointed Administrator by the Monroe Probate Court on March 30, 1953. On June 3, 1953, Louise Vaughan, (appellee

here) filed her petition in the Monroe Probate Court, claiming (a) that she was the widow of A. M. Vaughan; (b) that he died without children or other heirs; and (c) that under § 61-107, Ark. Stats., she was entitled to his entire estate in fee. This petition was granted by Court order of August 3, 1953; but the order was set aside on October 5, 1953, when Odie Valley Vaughan (appellant here) appeared and claimed to be the child of A. M. Vaughan, and entitled to the estate.

Then, on October 9, 1953, the Monroe Probate Court entered a "final decree", finding and adjudging that Louise Vaughan was not, and never had been, the legal wife of A. M. Vaughan, and that Odie Valley Vaughan was the legal son and sole surviving heir at law of A. M. Vaughan. The "final decree" was that the entire estate of A. M. Vaughan, after payment of claims and costs of administration, be vested in Odie Valley Vaughan. On December 1, 1953, Louise Vaughan filed her petition to set aside the "final decree" of October 9, 1953, claiming, *inter alia*, that it had been entered without notice to her and should be set aside and the cause tried on its merits.

Appearing at Page 80 of the transcript herein, and duly recorded in the Probate Records, there is an undated order which reads:

"Now on this day is presented to the Court in Chambers the Motion of Louise Vaughan praying that the Order heretofore entered in the Monroe County, Arkansas, Probate Court, vesting the properties of the estate of A. M. Vaughan, deceased, in the claimant Odie Valley Vaughan, be set aside; and comes Louise Vaughan by Neill Bohlinger and Neal Sebastian, and comes the claimant Odie Valley Vaughan by Hon. Harve B. Thorne and Senator G. C. Crider; and the Court, being advised on all matters pertinent thereto, doth sustain the said Motion.

"IT IS THEREFORE ORDERED BY THE COURT THAT the Order of the Monroe County Probate Court heretofore made vesting the properties of

the Estate of A. M. Vaughan, deceased, in Odie Valley Vaughan, is hereby set aside and this cause continued for further hearing hereon.

"TO WHICH FINDING of the Court, Plaintiff saves his exceptions and prays an appeal to the Supreme Court of the State of Arkansas, which is by this Court granted.

"A. L. Hutchins,
Judge of the Probate Court of Monroe County, Arkansas."

Then at Page 81 of the Transcript, there is an "Amendatory Order", which reads:

"Now on this day there comes on for further consideration the motion of Louise Vaughan praying that the order heretofore entered in the Monroe County Probate Court vesting the properties of the estate of A. M. Vaughan, deceased, in the claimant, Odie Valley Vaughan and others be set aside, which motion was submitted to the Court on January 20, 1954, and by the court taken under advisement; and comes now Louise Vaughan by Neal Sebastian and Neill Bohlinger and comes the claimant Odie Valley Vaughan by Harve B. Thorne and Senator G. C. Crider; and the court being advised on all matters pertinent thereto, does sustain the said motion.

"IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT that the order of the Monroe County Probate Court heretofore made vesting the properties of the estate of A. M. Vaughan, deceased, in Odie Valley Vaughan is hereby set aside and this cause continued for further hearing hereon, and this order is entered *nunc pro tunc,* to which finding the plaintiff excepts, saves his exceptions and prays an appeal to the Supreme Court of the State of Arkansas, which is by this Court granted.

"A. L. Hutchins, Judge."

The terms of the Monroe Probate Court are the first Mondays in February, June, and October of each

year. See § 22-503, Ark. Stats. and § 22-406, Ark. Stats., and see *Southern Furn. Co.* v. *Morgan,* 214 Ark. 182, 214 S. W. 2d 905. We have two possibilities:

1. If the undated order appearing on Transcript Page 80, as previously copied, was actually made by the Court at any time prior to February 1, 1954 (the first Monday in February), then the said order was made during the October, 1953, term of the Probate Court, which was the term at which the October 9, 1953, "final decree" was made; and during the same term, the Court may set aside any of its orders within its sound discretion, and without requiring compliance with the provisions of § 29-506 Ark. Stats. See *McDonald* v. *Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325; and *Hawkeye Tire Co.* v. *McFarlin,* 146 Ark. 491, 225 S. W. 632.

2. On the other hand, if the undated order appearing at Page 80 of the Transcript, as heretofore copied, was not *actually* made by the Court at some time prior to February 1, 1954, then the Amendatory Order appearing at Page 81 of the Transcript, and reciting it to be *nunc pro tunc,* is without force; because *nunc pro tunc* orders can only be made *now* for what was actually made *then. Bridewell* v. *Davis,* 206 Ark. 445, 175 S. W. 2d 992; *St. L. S. F. Ry.* v. *Hovley,* 196 Ark. 775, 120 S. W. 2d 14; and *Dickey* v. *Clark,* 192 Ark. 67, 90 S. W. 2d 236. So if the undated order at Page 80 of the Transcript was not actually made until after January 31, 1954, then the "final decree" of October 9, 1953, is still in force, because Louise Vaughan's petition did not comply with § 29-506, Ark. Stats.

The issues being as heretofore stated, we reach the conclusion that the appellant has failed to establish that the undated order at Page 80 of the Transcript was not in fact made prior to February 1, 1954. In the Amendatory Order appearing at Page 81 of the Transcript, the Court said that it was a *nunc pro tunc* order to make clear what was not clear in the undated order at Transcript Page 80. What we said in *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361, is applicable here:

"The same judge who tried the case made the *nunc pro tunc* order, and it cannot be said that he was not fully justified in making it."

The appellant's argument to the contrary is not sufficient to overcome the record made by the Court. See also *Eiland* v. *Parker's Chapel Methodist Church,* 222 Ark. 552, 261 S. W. 2d 795.

Therefore we hold:

(1) That the Monroe Probate Court set aside the "final decree" of October 9, 1953, at the same term it was rendered;

(2) That the appellant, Odie Valley Vaughan—having failed to stipulate, as required by Sub-division 2 of § 27-2101, Ark. Stats.—is attempting to prosecute a premature appeal (see *McPherson* v. *Consolidated Casualty Co.,* 105 Ark. 324, 151 S. W. 283; and *Hawkeye Tire Co.* v. *McFarlin,* 146 Ark. 491, 225 S. W. 632); and

(3) That the cause between Louise Vaughan and Odie Valley Vaughan is still pending in the Monroe Probate Court for trial and determination therein.

Appeal dismissed.

GENERAL CONTRACT CORPORATION *v.* DUKE.

5-463 270 S. W. 2d 918

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

Rector, Cockrill, Limerick & Laser, for appellant.

Tom Gentry, for appellee.

ED. F. MCFADDIN, Justice. This is a usury case, involving a note given for the purchase of an automobile; and the transaction occurred *after* the effective date of the holding in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973. In the present case the Lower Court cancelled the note as usurious, and the noteholder has appealed.

On October 6, 1952, appellee Duke purchased a 1950 Oldsmobile from Dutch O'Neal's Auto Town No. 2 (hereinafter called "O'Neal"). Here are the figures on the invoice delivered to appellee:

Price of Oldsmobile		$2,117.00
Less Value of Buick Traded	$677.00	
Cash Paid	50.00	727.00
Balance due		$1,390.00
Insurance and Carrying Charges		333.44
Amount of Note Signed by Duke		$1,723.44

This note was payable $71.81 per month for 24 months. O'Neal speedily transferred the note to the present holder, the appellant General Contract Corporation (hereinafter called "General Contract").

The issue here involved grows out of the item, "Insurance and Carrying Charges, $333.44." On November 20, 1952, Duke brought this suit against General Contract and O'Neal, claiming that the transaction was tainted with usury and void because the total amount charged him for interest and insurance was $333.44; that the insurance premium was only $153.00, leaving a balance of $180.44 for interest; and that the $180.44 was a usurious charge. The defendants denied the claim of usury, but only General Contract appeared at the trial.

Duke introduced the insurance policy issued and delivered to him; and it described the car and showed the total premium for insurance to be $153.00 for the 24-months coverage. Deducting the $153.00 from the $333.44, there was thus left a balance of $180.44 for interest; and Duke proved by a certified public accountant that interest of $180.44 would exceed by $7.86 the maximum of 10% allowed by law.

For defense, General Contract offered evidence to show that it purchased the Duke note from O'Neal the day after its execution; that General Contract shortly learned that the insurance premium of $153.00 had been misfigured; that the correct premium was $171.00; and that General Contract actually paid $171.00. General Contract claimed that the addition of $18.00 to the insurance premium would prevent the transaction from being usurious.

Duke showed that the matter of the additional insurance premium paid by General Contract was never communicated to him until several days after he had filed this suit, and that he never agreed in any way to any increase of the insurance premium from $153.00. Thus the issue was whether at the time the contract was made, it was agreed that the insurance premium would be $153.00. If it was so agreed, then the amount charged for interest was usurious. Art. 19, § 13, of our Constitution reads:

"All contracts for a greater rate of interest than ten percent. per annum shall be void, . . ."

Our cases hold that the transaction is to be judged at the time the contract is entered into, and not thereafter. If it had been established that there had merely been a mistake in determining the amount of the insurance premium, then the mistake could have been corrected by General Contract, notifying Duke within a reasonable time; but here there was no notice to Duke until after the suit had been filed, and that was more than a month after the original transaction. The Chancellor in

deciding the case rendered a written opinion, from which we copy the following:

"It is admitted that at the time of the execution of the contract an insurance policy was issued in the American Fidelity Fire Insurance Company for a total premium of $153.00. . . . The amount of insurance contracted for at the time of the execution of the contract is of extreme importance since it seems to be undisputed that if the insurance premium contracted for was $153.00, the remaining charges, or the difference between $333.44 and $153.00, would constitute a usurious charge. The testimony was to the effect that after the contract was entered into, General Contract Corporation increased the insurance both by change in symbol and change in amount. Actually, according to the testimony, the insurance contract was rewritten and was an entirely different contract than that agreed upon between the seller and the plaintiff, Duke.

"The test of usury is whether a borrower promised to pay a greater rate of interest than the law permits, and whether the lender knowingly entered into a usurious contract. *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S. W. 2d 1009. . . .

"Our courts have many times held that the test of whether a contract is usurious is to be applied to the facts which exist *at the time the contract is made. Habach* v. *Johnson,* 132 Ark. 374, 201 S. W. 286. This case is authority for the statement that if the contract is usurious in its inception, no subsequent offer to remit the usury can give it validity. The court is of the opinion that in order to purge a contract which is usurious at the time it is entered into, there must be a subsequent agreement between the parties, and that the unilateral act of one of the parties, uncommunicated to the other party, is not sufficient to remove the taint of usury. It cannot be said here that the case involves a mutual mistake of fact, since the plaintiff merely accepted the terms given him by the seller. In view of the absence of any subsequent agreement to purge the usury in the contract executed between

the parties, the court must find that contract to be usurious, and the judgment will be entered for the plaintiff."

The decree of the Chancery Court is affirmed.

Justices WARD and ROBINSON dissent.

KENSINGER ACCEPTANCE CORP. *v.* DAVIS.

5-468 269 S. W. 2d 792

Opinion delivered July 5, 1954.

Barber, Henry & Thurman, for appellant.

Herndon & Schoggen, for appellee.

ROBINSON, J. This is an appeal from a judgment for compensatory and punitive damages growing out of the

conversion or wrongful repossession of a Ford truck. October 27, 1951, appellee, W. R. Davis, purchased from Union Motor Co. of North Little Rock a Ford truck for the price of approximately $2,900. $600 was paid at the time of purchase and the balance was to be paid in one installment of $350 and the remainder in monthly installments of $106.54 each. The Union Motor Co. transferred the title-retaining contract to appellant, Kensinger Acceptance Corporation. Davis failed to make his August, 1952, payment in the sum of $106.54; and he testified that on September 11 he went to the finance company to explain that he could only make one payment at that time, whereupon the company agreed to accept the one payment and Davis paid it. Davis further testified that they entered into an agreement whereby the company would accept Davis' check for the September payment in the sum of $106.54 and hold it for ten days, Davis stating the check would be good at the expiration of that time.

Davis owned a second Ford truck on which he was also making payments, and on the same day gave a check for the sum of $213.08 on this truck which he said the finance company agreed to hold for two weeks. Six days later the second truck was wrecked. In attempting to adjust the insurance, Davis drove the first truck to the finance company's place of business. The finance company demanded that Davis pick up both checks. This he could not do, but said the $106.54 check was good at that time and would be paid if presented to the bank; or he offered to take it up by paying the cash. Davis could not adjust the matter with the finance company, and attempted to leave by driving the truck away, but found the truck keys had been removed. Employees of the finance company informed him they had removed the keys, had repossessed the truck, and told him he could not move it. Davis testified that he told them he had another key and that he was going to keep the truck, that he had lived up to his agreement and had the right to possession of the truck. He testified that he then attempted to insert the key in the lock, but was prevented from doing so by employees of the company; that one of them caught hold of his hand preventing him from unlocking the ignition

switch; and that the employees made threats to the effect that he could not move the truck without "taking some of their hide."

Thereupon Davis walked away and later filed this suit, alleging conversion and asking for compensatory and punitive damages. There was a trial to a jury and Davis was awarded $100 compensatory damages and $800 punitive damages.

On appeal the finance company contends there is "no competent evidence as to the value of the truck allegedly wrongfully repossessed," and that the court erred by giving to the jury appellee's Instruction No. 4 submitting the issue of punitive damages. Davis testified without objection that at the time of the conversion the truck had a value of $2,400 or $2,500, that he owed a little over $1,500 on it. Thus the evidence is sufficient to show that he was damaged in a sum much larger than the $100 compensatory damages awarded.

As to the punitive damages, the court was correct in submitting that issue to the jury. The evidence is sufficient to show that the finance company repossessed the truck by intimidation and by threats to use force. Although the witnesses who testified in behalf of the finance company denied that they actually took hold of Davis' hand, or by physical force prevented him from inserting the key in the lock and ignition switch, Mr. Tom Enochs, who was branch manager of the finance company at the time, testified that he went out to the truck and took possession of the key. He further testified: "Q. Who was with you? A. We went out about the same time. He started to get in on the driver's side and I took the key out and he told me 'I have another key' and I told him it didn't make any difference that the truck stayed there until he made the payment. He did pull out another key and was going to put it in the switch and I told him he wasn't going to take it off unless his payments were brought up to date. Q. Where was he at the time you told him that? A. Sitting under the steering wheel. Q. Where were you? A. I was on the left hand side. Q. On the ground or in the truck? A. I was on the left

hand side standing on the running board outside the truck. Q. Did you at any time touch Mr. Davis or threaten any bodily harm to him? A. No, sir. Q. You told him he couldn't drive it off? A. I told him he wasn't going to leave in the truck." This was at a time when Davis was sitting in the truck with the key in his hand. It was not shown just how Enochs was going to prevent Davis from leaving in the truck except through violence. The evidence justifies a finding that Enochs' statement was a threat of violence, was so intended by him and so understood by Davis.

To sustain its contention that punitive damages are not recoverable, appellant relies on the cases of *Franklin* v. *Spratt,* 174 Ark. 268, 295 S. W. 26, and *Barham* v. *Standridge,* 201 Ark. 1143, 148 S. W. 2d 648. We do not think either case controls here. In the *Franklin* case, there does not appear to have been an issue of punitive damages; and in the *Barham* case there was no element of violence or threatened violence.

This court has held there can be a recovery of punitive damages where there has been a wrongful taking of property. In *Clark* v. *Bales,* 15 Ark. 452, the court said: "The trespass in this case, was rather a flagrant one. The plaintiff's premises were invaded, his close broken, entered, his hogs driven off, killed and converted; and on the trial, the defendants proved no color of title to the property. True, the value of the hogs was proven not to exceed $25, but the jury were not confined exclusively to the value of the hogs, in determining the amount of damages to be awarded the plaintiff. They had the right to take into consideration the invasion of the plaintiff's premises, the vexation to his feeling, the inconvenience to him arising from the deprivation of his property, as well as its value, and then to add something by way of 'smart money,' or exemplary damages."

A note in 9 A. L. R. 1180 states the rule to be: "By the great weight of authority it is held that where the buyer of property upon conditional sale makes default in his payments and by the terms of the agreement the seller is authorized in such event, to retake the property, he is

entitled under this power to repossess himself of the property if he can do so peaceably, but if the buyer objects and protests against the seller's retaking the property, and obstructs him in so doing, it is the duty of the seller to resort to legal process to enforce his rights to repossession. He is not entitled to use force, and he is guilty of an assault and battery or of trespass, as the case may be, if he does so." A large number of cases from numerous states supporting this rule are cited.

Affirmed.

ARKANSAS WESTERN RY. CO. *v.* CURRIER.

5-428 270 S. W. 2d 932

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

Hardin, Barton, Hardin & Garner, for appellant.

Bates, Poe & Bates, for appellee.

WARD, J. This appeal results from a jury verdict against appellant in a suit brought by appellee for damages for personal injury. Appellant seeks a reversal on two grounds: First, the trial court's refusal to grant appellant's motion for a directed verdict at the close of all of the evidence, urging (a) appellant's employees were acting outside the scope of their employment and (b) the insufficiency of the evidence, and; Second, the trial court's action in giving instruction No. 1.

The Facts and Circumstances out of which this litigation arose are as follows: Appellee, Harrison Currier, was injured early in the morning on June 2, 1953, while helping move one of appellant's railway cars by means of a tractor which he was driving and which had been attached to the end of the car by means of a rope. When the car was started it overtook the tractor and in some way a part of the tractor became engaged with the rail, causing the tractor to tilt and appellee to fall, resulting in the injury complained of. Also, in some manner, the foreman and members of appellant's section crew were either directing the movement or were attempting to help in the movement of the railway car.

At the time of the injury appellee was in the regular employment of one Dean Swift who was a contractor engaged in repairing streets in the town of Waldron, Arkansas. This repair work necessitated the use of gravel, and Swift had an agreement with appellant railway company to furnish the gravel in railway dump cars placed on a siding near Waldron. It appears that the dump cars were to be spotted on the side track in groups of from three to four at a time, and on this particular occasion there were three cars so spotted. By arrangement with appellant, Swift dug a tunnel under the side track where each car could be placed as necessity required and the gravel could be unloaded through trap doors in the bottom of the car, thus facilitating the loading of the gravel onto Swift's trucks. Appellant did not keep a switch engine at Waldron and so it was contemplated that each car of gravel would be "pinched" or rolled in place over the tunnel. Appellant contends, but appellee denies, that

such placing or the dump cars over the tunnel was the sole responsibility of Swift.

Appellee's allegation of negligence was appellant's "failure . . . to apply the brakes" on the railway car and to give proper warning to appellee, causing the car to run away and overturn the tractor, and resulting in the alleged injury. The extent of injury and the amount of recovery are not challenged. Much of the testimony on behalf of appellee herein set out is disputed or contradicted by appellant's testimony, but, under the well established rule we must accept the jury's finding on questions of fact as they are supported by substantial evidence.

The first contention by appellant is that the trial court should have instructed a verdict in its favor for the two reasons which we presently discuss.

(a) As before stated, appellant contends that it was Swift's sole responsibility to spot the cars, that it was no part of the duty or employment of the section crew to assist in any way, and that therefore any participation on the part of said crew was wholly without the scope of their employment. We do not agree with this contention because this was a question for the jury to decide under proper instructions, and although numerous instructions were given on this point by the court it is not urged by appellant that these instructions were erroneous. In the case of *W. P. Brown & Sons Lumber Company* v. *Oaties,* 189 Ark. 338, 72 S. W. 2d 213, in discussing this question, we said:

"Whether appellee was a mere volunteer and acting without the scope of his employment was a question of fact, and was submitted to the jury under instructions requested by appellant. We cannot say as a matter of law that he was a mere volunteer."

The above rule was restated in the case of *Missouri Pacific Railroad Company, Thompson Trustee* v. *Lester,* 219 Ark. 413, 242 S. W. 2d 714, 27 A. L. R. 2d 1182, where after posing the question, it was said: "At any rate, it

was a question for the jury under instructions which, in this case, were proper."

Testimony on the part of appellee, which the jury had a right to believe, was to the effect that Mr. Tom Gray, the station agent at Waldron, advised appellee late in the evening on the day before the accident that if he would wait until the next morning the railway company would spot the car. There was also testimony to the effect that while ordinarily it was not the business of the section crew to spot cars yet it was their duty, as agent of appellant, to see that the main track was kept clear for regular trains. The testimony shows that on the day of the injury the main track was blocked by the gravel cars and that it would be necessary to clear the track for the next train which was expected in a day or two. Appellee testified that the station agent instructed him to attach his tractor to the car and that Earl Sherrill, foreman of the section crew, gave directions as to how the car should be moved and as to when appellee should start to pull with his tractor. It is admitted that Sherrill and members of his crew did assist in helping spot the car.

In view of the fact that the section crew were in the general employment of appellant and in view of the circumstances and facts related above the jury was justified in holding appellant liable. In the case of *Vincennes Steel Corporation* v. *Gibson,* 194 Ark. 58, 106 S. W. 2d 173, this court, at page 60 of the Arkansas Reports having under consideration the question here discussed, quoted with approval the following:

"The difficulty lies in the application thereof, as there is no definite rule by which it can be said that the acts of a servant are within or without the scope of his employment, each case of necessity depending upon its own peculiar facts and circumstances."

Later in the same case and in the same connection the court said: "Whether the act was or was not such as to be within the employment's scope is ordinarily one of fact for the jury's determination."

(b) Appellant insists however that, regardless of the contention made above, there is no substantial evidence to support the verdict of the jury, the argument being that there is no substantial evidence to show that Sherrill or any member of the crew was guilty of negligence. Again we do not agree with this contention. Appellant pleaded contributory negligence on the part of appellee, but this question was submitted to the jury under instructions of the court which are not here challenged.

Appellee, after stating that he was servicing his tractor nearby just prior to the time when the car was to be moved, gave the following testimony:

"Q. While you were doing that, did anybody call you to come over there?

"A. They were over there trying to move this car.

"Q. Who are they, now?

"A. The section crew was there, Kelly Martin, Emmett Winchell, Dale Sheets and Harve Davis.

"Q. Where was the section foreman? Was he there?

"A. He was there by the car pulling this lever.

"Q. Now then who called you? What man called you over there?

"A. Tom Gray called me up there.

"Q. Told you to do what?

"A. To hook on and help the boys."

. . . . .

"Q. And you say you came on up there and hooked on to the car?

"A. When Tom Gray called me up there I went up there to hook on.

"Q. And where did you hook on to it again?

"A. Right on the front axle."

"A. Tom Gray told me to back my tractor up there and had them tie me on."

. . . . .

"A. Tom Gray called me up and told me to give the boys a lift."

. . . . .

"Q. And when you looked back you looked back where?

"A. I was looking back to see if they were all ready.

"Q. And they hollered that they were, didn't they?

"A. Earl Sherrill hollered 'let's go.' "

. . . . .

"Q. Did you succeed in moving the car? Was the car moved?

"A. Yes, sir, the car moved.

"Q. Were the section men pinching the car along at the same time?

"A. They gave me a start and we went on with it."

. . . . .

"Q. Did the car move with some speed when it did get started?

"A. Yes, sir, after it got across the switch when the flange in this switch here, after we got it over that, it just taken right off or it outrun me.

"Q. What happened when that took place?

"A. The truck just kept going; there was nobody there on the brake and the car went this way (indicating) and just turned it right around on its edge there and turned it up on its side."

It was the contention of appellee, who himself had formerly been employed in railroad work, that Sherrill, as section foreman, should have had one of his crew stationed at the hand brake on the car in order to slow it

down or stop it, and that this negligence or failure caused his injury. He testified:

"Q. When they attempted—the rule would have been that when they moved that car a railroad employee should have been put on the brakes? Is that right?

"A. Yes, sir.

"Q. Now then did they have a man on the brake?

"A. They did not have a man on the brake, no, sir.

"Q. Did you know that they didn't until after the accident?

"A. I did not know it."

Appellee was asked if he knew from his experience whether there was a company rule with reference to a man being on the brake when a detached car is moved in the switch yard, and he was asked:

"Q. That was the rule?

"A. Yes, sir, that was the rules and regulations for us to have a man on the brake. . . ."

. . . . .

"Q. And that was the practice that prevailed with reference to when a car was moved that a man be placed on the brake?

"A. That's right."

The second contention of appellant is that the court erred in giving instruction No. 1 to the jury. We see no reversible error in this instruction. It is rather lengthy and it would serve no useful purpose, we think, to set out the instruction in full. The instruction touched on the question of the scope of employment as it related to the station agent and the section crew but this question was covered in other instructions which are not objected to here. It ended by saying that appellee could not recover if he was guilty of contributory negligence, but this was properly explained in other instructions, likewise not questioned.

The main objection, apparently, to the instruction is based on the fact that it contained language which predicated recovery upon appellant knowing (or should have known) that *danger was apparent* in moving said car. It is insisted by appellant that this "so-called doctrine" was foreign to the issues in this case. If it be conceded however that this "doctrine" was foreign to the issues, still appellant has not been prejudiced because the instruction was more favorable to it than the law warranted. Since there is testimony from which the jury could have found that appellant's agents were directing appellee in the manner and method of moving the car, it was justified in fixing liability on appellant regardless of whether its agents recognized that danger was apparent if it should also find, as it had a right to do and apparently did, that appellee's injury was the result of negligence of appellant's agents.

A similar question of liability, posed by a different fact situation, was discussed and determined in *St. Louis, Iron Mountain & Southern Railway Company* v. *Washington,* 114 Ark. 184, 169 S. W. 770. There appellant sought to escape liability for an injury, received by appellee from an explosion of dynamite in an effort to remove piling, on the ground that it had not agreed to help and also on the ground that the person who set off the explosion was not its employee. The court held that the question of an agreement was not material and that the other question was for the jury to decide, and the court disposed of the question of liability with this statement: "The man who fired the dynamite being at work under the direction of the railroad company at the time determines its liability."

Here it is conceded that appellant's employees were actually engaged in [at least] helping move the car, and there was evidence to support the jury in finding that they were directing the work while in the scope of their employment. Under these circumstances it was not necessary for the jury to find that appellant's employees "could or should have known that danger was apparent." If their negligence was the proximate cause of appellee's

injury, as the jury was justified in finding under the testimony, then appellant was liable, and it cannot now complain if the jury also found said employees should have recognized that "danger was apparent."

Affirmed.

SCURLOCK, COMMISSIONER OF REVENUES *v.* CENTRAL DISTRIBUTORS, INC.

5-470 269 S. W. 2d 790

Opinion delivered July 5, 1954.

Frank O. Bass, Jr., for appellant.

Mehaffy, Smith & Williams, for appellee.

MINOR W. MILLWEE, Justice. This appeal involves a determination of the applicable statute governing the taxation, sale and distribution in this state of a malt beverage containing less than 5% alcohol by weight.

Appellee is a wholesale distributor of alcoholic beverages in Little Rock, Arkansas. Appellants are the director and members of the Alcoholic Beverage Control Board and the Commissioner of Revenues for the State of Arkansas. According to the complaint filed by appellee in the chancery court, it has for some time sold

and distrubuted a product known as "Country Club Malt Liquor" which contains more than 5% alcohol by weight. This product is distributed only through liquor dealers and is taxed and regulated under the provisions of Acts 108 and 109 of 1935[1] which acts govern the taxation, sale and distribution of "spirituous, vinous and malt liquors." It was also alleged that the producers of "Country Club Malt Liquor" also made a specialty beverage containing less than 5% alcohol by weight which appellee intended to distribute under the same trade name but in accordance with the Arkansas Laws[2] regulating alcoholic beverages containing not more than 5% alcohol by weight, otherwise designated as "beer or light wine."

The complaint further alleged that the appellants had advised appellee that the new product was not subject to taxation, regulation and control imposed on beer of not more than 5% alcohol; that the board would subject said new product to regulations pertaining to alcoholic liquors of more than 5% alcoholic content; that such product could not be allowed to bear the name "malt liquor"; and that appellees contemplated action would subject appellee to the revocation of its wholesale dealer's permit. The prayer of the complaint was that the court adjudge that the new product be classified as a beer or light wine for the purposes of taxation, regulation and control under the statutes of Arkansas; that appellee be allowed to sell and distribute said product as such; and that appellants be restrained from instituting any action against appellee as a result of appellee's failure to comply with Arkansas laws relative to malt liquors containing more than 5% alcoholic content by weight.

Appellants filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. Upon appellants' refusal to plead further, a decree was entered

[1] Act 108, as amended, is compiled as Ark. Stats., §§ 48-101 to 112, 48-201 to 206, 48-301 to 305, 48-311 to 326, 48-807 to 822, 48-909, 48-937 to 944.

Act 109, as amended, now appears as Ark. Stats., §§ 48-401 to 410.

[2] Ark. Stats., §§ 48-501 to 536, 48-601 to 625.

finding that for the purposes of taxation, regulation and control the new product, "Country Club Malt Liquor," is classified as a beer or light wine under Arkansas statutes, and restraining appellants from instituting action because of appellee's failure to comply with statutes relative to spirituous, vinous or malt liquors containing more than 5% alcohol by weight.

It is admitted that the product in question here is a malt beverage containing less than 5% alcohol by weight. According to the allegations of the complaint, appellants advised appellee that the Board would subject the product to taxation and regulations pertaining to alcoholic liquors of more than 5% alcohol by weight and that appellee's contemplated action of distributing the product under statutes applicable to the regulation and taxation of beer or light wines would result in the revocation of its wholesaler's permit. In passing on the demurrer, the truth of these allegations is admitted.

In 1933 the Legislature enacted statutes governing the sale of beer and light wines containing less than 5% alcohol by weight. Section 2 of Act No. 7 (Ex. Sess.) 1933 [Ark. Stats., § 48-503] defines beer as "any fermented liquor made from malt or any substitute therefor and having an alcoholic content of not in excess of 3.2 [5%] per cent by weight." The 1933 Act [Ark. Stats., §§ 48-501-48-527] provided for the taxation, regulation and control of beer and light wine. In 1935 Acts 108 and 109 were enacted which govern the sale of "spirituous, vinous, and malt liquors" containing more than 5% alcohol by weight. By § 6 of Act 108 [Ark. Stats., § 48-107] it is specifically provided that beer and other malt beverages containing less than 5% alcohol by weight are excepted from the provisions of the 1935 act and should be taxed and regulated as provided in Act 7 of 1933, *supra*. We think it is clear from these provisions that the alcoholic content of a malt beverage controls in determining whether it should be taxed, regulated and controlled as a "spirituous, vinous, and malt liquor" under the 1935 Acts or as a "beer or light wine" under the 1933 act, as amended. Hence the chancellor was correct in holding

the latter statutes applicable in the taxation and regulation of the product in question and the demurrer was properly overruled.

But appellants insist that the use of the words "malt liquor" in the trade name and label of the product in question renders it subject to the laws governing liquors containing more than 5% alcohol by weight; and that appellee should not be permitted to distribute the product as "beer" unless it is so labeled. Reliance is had on *McKeown* v. *State,* 197 Ark. 454, 124 S. W. 2d 19, where this court pointed out that the legislature in enacting § 48-107, *supra,* intended to classify beer having an alcoholic content of less than 5% by weight as a *malt beverage* as distinguished from *malt liquor.* There is nothing in the opinion, or the statutes upon which appellants rely, pertaining to the labeling or branding of alcoholic beverages. The question whether the Alcoholic Beverage Control Board under its broad powers may by rule or regulation prohibit the use of the words "malt liquor" in the labeling of the beverage in question is not in issue here.

Affirmed.

HAYDON *v.* HILLHOUSE.

5-443 270 S. W. 2d 910

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

[redacted]

Catlett & Henderson and *Barber, Henry & Thurman,* for appellant.

Harry T. Wooldridge, for appellee.

J. SEABORN HOLT, J. Appellee, Hillhouse, brought this suit and alleged in his complaint that on April 26, 1952, he purchased an automobile from appellant, Haydon, for $1,400.00, making a down payment of $550.00, and agreeing to pay a time balance in eighteen monthly installments of $67.55 each, that after the purchase Haydon transferred the contract (or notes) to appellant, Associates Discount Corporation; that he, Hillhouse, paid to Associates $743.05; that he was a minor at the time of the purchase; that for this reason the contract was void and no effect and prayed its cancellation, and for judgment against Haydon for $550.00 plus interest and against Associates for $743.05 with interest at 6% on each installment and that he be relieved from paying the seven remaining installments due on the contract. He offered to return and re-deliver the automobile. Appellants answered separately with general denials and as a further defense that Hillhouse, after becoming of age, by his conduct and actions, ratified the contract in question, which they pleaded as a complete defense. Haydon further pleaded estoppel and laches, and Associates pleaded appellee's default in payment of installment of April, 1953, and asked for return of the car.

Trial resulted in a decree for appellee and the relief for which he prayed. This appeal followed.

There appears to be little, if any, dispute as to material facts.

On the date (April 26, 1952) the contract, in question was made, Hillhouse was a student at Monticello A. & M. College where he kept the car. He was twenty years and ten months of age and became twenty-one on June 22, 1952. The car in question was a second-hand car. He testified that he did not clearly remember whether Hay-

don asked his age at the time he signed the contract. He frankly admitted that if Haydon had so inquired, he would have told him he was over twenty-one in order to get the car. "Q. You knew you had to be 21 to buy a car? A. Yes, sir. Q. Your testimony is to the effect you knew at the time you purchased it that when you became 21 you could buy a car? A. Yes, sir, that is right."

Appellee made eleven monthly payments, ten after he became twenty-one, some by postal money orders and some by cash, without complaint. He drove the car approximately 35,000 miles, after he was twenty-one, before he sought to rescind.

His own testimony disclosed that he knew his legal rights before he consulted his attorney. The car which appellee traded in, he had previously purchased from Glover Motors, which he financed through Universal C.I.T.

It is not disputed that appellee demanded and collected three collision damage losses after he reached twenty-one, the first was for $251.99 January 17, 1953, the next February 22, 1953, for $19.87, and the third for $12.10 on April 15, 1953. "Q. All three of those benefits you accepted after you became 21? A. Yes. Q. Did you file those claims with the company yourself? A. Yes, sir. . . . personally."

It further appears that at the time the contract was made Haydon agreed to replace the worn out cloth top on the car with a new one at the wholesale price of $45.00, when the retail price was $60.00. This agreement was consummated, as promised, after appellee became twenty-one, some time in October or November, 1952.

In the circumstances, we hold that appellee, by his conduct and actions, ratified the contract in question, which he executed during his minority and is therefore bound by it.

The law is well settled that such contracts are not void but voidable. As early as 1859, this court said: "Modern decisions, however, have established the rule,

that an infant's contracts are none of them absolutely void, that is, so far void that he cannot ratify them, after he arrives at the age of legal majority.

"It was, doubtless, competent for Kitsey Ann to ratify the contract of sale in question, after she was of full age, and this by parol.

"The mere fact that an infant does not disaffirm a contract after he attains his majority, is not, it would seem, of itself, a confirmation, but this fact may be made significant by circumstances." *Vaughan ad.* v. *Parr,* 20 Ark. 600.

We said in *Western Lawrence County Road Improvement District* v. *Friedman-D'Oench Bond Company,* 162 Ark. 362, 258 S. W. 378: "At § 537 of Page on Contracts (2d ed.), it is said: 'One who has entered into a contract which he might avoid because of personal incapacity, such as an infant, an insane person, a drunkard, and the like, has the election to affirm such contract, or to disaffirm it, and when he has exercised his election, with full knowledge of the facts, such election is final. Accordingly, if such person elects to affirm the transaction, his election is final and conclusive, without any new consideration.'

"It thus appears that ratification is a form of contract which requires no new consideration, if the voidable contract, made valid by ratification, was itself based upon a consideration."

Section 38-103, Ark. Stats. 1947, argued by appellee as supporting his contention, is not controlling here. This section provides: "No action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, unless such promise or satisfaction [ratification] shall be made by some writing signed by the party to be charged therewith." (Bracketed word inserted by compiler).

This section was approved March 5, 1838, but appears never to have been construed by this court.

Appellants are not basing their claim of ratification by appellee, Hillhouse, on any promises in writing and signed by him, *after he became twenty-one,* but on a promise and contract made by him during his minority and ratified by him after reaching his majority.

Kentucky and South Carolina have statutes, in effect, the same as above (§ 38-103) and the construction placed thereon by those cases, while not controlling, is persuasive on us. In *Robinson* v. *Hoskins,* 14 Bush Ky., 393, that court said: " It is true that the plaintiff can not sue upon the defendant's promise made after he was of age to pay the debt incurred during infancy, unless such promise is evidenced by a writing, but if the purchase is made during infancy, and the thing purchased has been kept and used by the infant till his arrival at age, and then converted to his own use, such conduct amounts to an election by the adult to stand by the contract made while he was an infant," and in *Jones* v. *Godwin et al.,* 187 S. C. 510, 198 S. E. 36 (1938), the South Carolina Court said: "Section 7048, Code, 1932, requiring written ratification of certain contracts of infants, is relied on by counsel for appellants, but as was said in the case of *Beam* v. *McBrayer,* 132 S. C. 72, 128 S. E. 34, an infant after attaining full age 'could be estopped by conduct to disaffirm the contract or to claim the benefit of the statute' (page 35)." See also, *Stern* v. *Freeman,* Ky. Rep., Vol. IV, (Metcalfe) page 278.

In the present case, we are dealing with a man who knew he could not legally buy a car until he became twenty-one, and was equally positive that he could legally buy a car after he had passed his twenty-first birthday. With this knowledge, after reaching his majority, he proceeded to sign and purchase money orders to apply on payments (10 of them), which he made. He also executed proofs of loss to recover for car damages growing out of three collisions, bought the new top, which was part of the original contract in question, and drove this used car in his own use approximately 35,000 additional miles within less than a year.

In the circumstances, we think the preponderance of the testimony shows that he affirmed the contract after his majority, became bound by it, is estopped from rescinding, and accordingly the decree is reversed and the cause is remanded for further proceedings consistent with this opinion.

CARNES, ADMX. *v.* STRAIT, JUDGE.

5-364

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

BRACKMAN *v.* WAGGONER, JUDGE.

5-467 270 S. W. 2d 920

Opinion delivered July 5, 1954.

Moncrief & Moncrief, Bailey & Bailey and *Barber, Henry & Thurman,* for petitioner.

Wright, Harrison, Lindsey & Upton, Williams & Gardner and *J. M. Smallwood,* for respondent.

J. M. Smallwood, Wright, Harrison, Lindsey & Upton and *Wm. C. Gibson,* for petitioner.

Moncrief & Moncrief, Bailey & Bailey and *Barber, Henry & Thurman,* for respondent.

George Rose Smith, J. These two petitions for prohibition arise from a conflict in jurisdiction between the circuit courts of Arkansas and Pope counties, in damage suits based upon the same automobile accident. Motions to dismiss having been filed, each circuit court ruled that it had jurisdiction. The plaintiffs in the Arkansas County case now seek to prevent a trial in Pope County, and one of the plaintiffs in the latter jurisdiction asks us to stay the proceedings against him in Arkansas County.

On July 4, 1953, four brothers-in-law, Leonard E. Templeton, Boone Brown, Odis E. Churchill, and Adrian Brackman, were riding in Pope County in a car owned and being driven by Templeton. This vehicle collided with a car owned by John Belcher and being driven by his minor son, Lonnie. The Belchers were residents of Arkansas County. Lonnie Belcher died the next day, on July 5, and on July 6 the administrator of his estate and the next of kin brought suit in Arkansas County against the four brothers-in-law, alleging that the four defendants had been engaged in a joint enterprise at the time of the accident. Four separate actions were later filed in

Pope County against Lonnie Belcher's estate. Our earlier decisions have established the rule that, in conflicts like this one, the party who first obtains valid service of process upon his adversary is entitled to have the case tried in the forum of his selection. *Kornegay* v. *Auten,* 203 Ark. 687, 158 S. W. 2d 473; *Sims* v. *Toler,* 214 Ark. 732, 217 S. W. 2d 928; *Healey & Roth* v. *Huie,* 220 Ark. 16, 245 S. W. 2d 813. The several disputes now before us involve different fact situations and must to some extent be considered separately.

It seems clear enough that the Pope Circuit Court first acquired jurisdiction of the Belcher-Templeton litigation. The Belcher complaint was filed in Arkansas County on July 6, but summons was not served upon Templeton until December 14. In that interval Templeton had brought his action in Pope County and had obtained personal service of process on all defendants by October 21. This order of events is the same as that presented in the *Healey & Roth* case, *supra,* and upon the authority of that case the jurisdiction of the Pope Circuit Court must be sustained.

The Belcher-Brown case and the Belcher-Churchill case are identical in principle and may be examined together. Summonses against Brown and Churchill were issued in Arkansas County on July 6 and were mailed to the sheriff of Pope County. But, as a result of their injuries, both these defendants died before summons was actually served. A return to that effect having been made by the Pope County sheriff, the circuit court of Arkansas County appointed a local citizen as special administrator of the two estates, and on July 15 process in the Arkansas County case was issued and served upon the special administrator. In the month of August the probate court of Pope County appointed a general administrator for the Brown estate and for the Churchill estate, both decedents having been residents of Pope County. That administrator filed separate suits against the Belcher estate and obtained service of process.

Upon these facts the Pope Circuit Court was the first to acquire jurisdiction. The Belcher claim to prior-

ity must rest solely upon the fact that summons was served upon the special administrator appointed by the Arkansas Circuit Court, presumably under the authority of Ark. Stats., 1947, § 27-1009. We regard that appointment as void. The statute in question concerns the revival of actions and permits the court to appoint a special administrator upon the death of the plaintiff or defendant. It seems plain, however, that this statute comes into play only when the court has already acquired jurisdiction over the person who dies *pendente lite*. In that event the statute provides a method of enabling the adverse party to continue the litigation. But here no process whatever had been served upon either Brown or Churchill prior to their deaths. It was certainly not the intention of the legislature, by this law, to allow a plaintiff to sue a nonresident defendant, to obtain no service of any kind upon him, and then, upon his death, to bring his estate into court by the appointment of a special administrator. We therefore sustain the authority of the Pope Circuit Court in the Brown and Churchill cases.

There remains the Belcher-Brackman controversy. In this case a summons issued in Arkansas County was served on Brackman on July 21, which was before Brackman obtained service in the Pope County action that he had filed on July 18. Upon these facts the ruling in the *Healey & Roth* case requires us to uphold the jurisdiction of the Arkansas Circuit Court.

Brackman makes two technical objections to the procedure in Arkansas County. First, when the Belcher complaint was filed the plaintiffs had the clerk issue two summonses against Brackman, one directed to the sheriff of Pope County and the other to the sheriff of Lincoln County. It was the latter summons that was eventually served on this defendant. Brackman now contends that, under Ark. Stats., § 27-311, an alias writ cannot be issued until the first writ has been returned unexecuted, and that therefore the Lincoln County summons was invalid. We do not so interpret the statute. This law merely empowers the clerk to issue an alias writ without an order of court. We perceive no objection, theoretical

or practical, to the simultaneous issuance of summonses directed to two or more counties. When the plaintiff is not certain where the defendant may be found this is evidently a convenient and desirable course for him to follow.

Second, C. A. Walker, the original administrator of Lonnie Belcher's estate, resigned on July 27, and an administrator in succession was appointed on the same day by the Arkansas Probate Court. It is now insisted that the action in Arkansas County abated upon the removal of the original administrator and had to be revived in the name of his successor. Ark. Stats., § 27-1003; *Hill* v. *Bryant*, 61 Ark. 203, 32 S. W. 506. Even so, the order of revivor would relate back to the date of the appointment of the administrator in succession, leaving no interval during which the Arkansas Circuit Court was without jurisdiction of the case. *Cf. Bentley* v. *Dickson*, 1 Ark. 165.

Brackman's main contention is that he and his brothers-in-law were not in fact engaged in a joint enterprise when the collision occurred and that consequently he was improperly joined as a defendant in the Arkansas County case. Whether a joint enterprise existed is a question of fact, which the Arkansas Circuit Court decided adversely to Brackman. We have often held that when the trial court has jurisdiction of the subject-matter and its jurisdiction of the person depends upon an issue of fact, an allegedly erroneous decision can be reviewed only by appeal, not by prohibition. *Robinson* v. *Means*, 192 Ark. 816, 95 S. W. 2d 98; *Keenan* v. *Strait*, 221 Ark. 83, 252 S. W. 2d 76. The rule is sound, for otherwise the trial court's orderly control of its own docket would be frequently disturbed by applications for prohibition. We are not convinced that certain hardships envisaged by Brackman require us to make an exception in his case.

Brackman's petition for prohibition to the Arkansas Circuit Court is denied. The petition of Belcher's administrator for prohibition to the Pope Circuit Court is granted in the Brackman case and denied in the other three cases.

GENERAL BOX COMPANY *v.* SCURLOCK, COMMISSIONER OF REVENUES.

5-508 271 S. W. 2d 40

Opinion delivered July 5, 1954.

[Rehearing denied October 4, 1954.]

Moore, Burrow, Chowning & Mitchell and *W. P. Hamilton, Jr.,* for appellant.

O. T. Ward, for appellee.

GEORGE ROSE SMITH, J. This case has not yet been submitted for decision on the merits. The appellant has filed a motion asking that the appellee's cross-appeal be dismissed, for the reason that the appellee failed to file a notice of appeal within thirty days after the entry of the decree below. The appellee contends that his cross-appeal was properly taken; but he asks that, if this contention be overruled, a cross-appeal be granted by this court.

The appellant brought this suit to recover income taxes paid under protest. In his answer and cross-complaint the appellee opposed the claim for refund and asserted that additional taxes were owed. By a decree entered on January 18, 1954, the chancellor dismissed both the complaint and the cross-complaint for want of equity. The decree recites that the plaintiff prays and is granted an appeal and that the defendant prays and is granted a cross-appeal. The appellant filed its notice of appeal on February 15, but the appellee did not file a notice of appeal.

Since the decree was entered after January 10, 1954, the case is governed by Act 555 of 1953. Supreme Court Rule 26; *Norfleet* v. *Norfleet,* 223 Ark. 751, 268 S. W. 2d 387. Inasmuch as the appellant's motion presents important questions concerning the construction of Act 555, we have thought it better to dispose of the motion by an opinion than by a *per curiam* order.

Act 555 is a comprehensive statute governing the time for taking appeals in civil cases, the method of taking such appeals, the manner in which the record is to be prepared, and various related matters. The question now before us is to what extent Act 555 has repealed by implication earlier statutes relating to cross-appeals. There are two familiar rules that are helpful in determining whether a repeal by implication has occurred. "One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an implied repeal by the later one which governs the subject so far as relates to the conflicting provisions, and to that extent only. . . . The other one is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject-matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new." *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649.

Act 555 plainly falls within the scope of the latter rule. By this Act the legislature effected a complete re-

vision of the law governing appellate procedure in civil suits. Hence the fact that earlier statutes empowered the trial court to grant a cross-appeal is not controlling; we must look to Act 555 alone for the procedure now to be followed.

We have not the slightest doubt that under Act 555 the filing of a notice of appeal within the time allowed is a jurisdictional prerequisite to the perfection of a cross-appeal. Section 2 of the Act (Ark. Stats., 1947, § 27-2106.1) provides that "any party" to the action may appeal by filing a notice of appeal within thirty days from the entry of the judgment or decree. Section 8 (§ 27-2127.2) states that if the appellee files the original designation of the record (which he would hardly do unless he too were appealing), the parties shall proceed as if the appellee were the appellant. It seems clear that the appellee would not become the appellant without having filed a notice of appeal. Section 18 (§ 27-2127.10) requires that a single record be used when more than one appeal is taken from the same judgment or decree. Nowhere in the Act is there the slightest indication that the appellee may take his appeal in a different manner from that prescribed for the appellant. In the federal courts, whose rules were used as a guide in the drafting of Act 555, an appellee who desires to cross-appeal must proceed in the same manner as an appellant. Cyclopedia of Federal Procedure (3rd Ed.), § 60.82.

Here the appellee did not file a notice of appeal, but the decree does recite that he prayed and was granted a cross-appeal. We do not think that this recital constitutes a substantial compliance with the requirement that a notice of appeal be filed. The theory of the former practice was that the trial court actually granted the appeal, even though it was a matter of right, and consequently the court's action was appropriately embodied in its decree. But the theory of legislation such as Act 555 is that the aggrieved litigant himself takes the appeal, simply by filing the required notice with the clerk. The decree represents the action of the court, not that of the litigant, and it is just as inappropriate for the

court to give notice of appeal as it would be for that tribunal to designate the contents of the record, to specify the points to be relied upon, etc. Indeed, if it were not for the fact that in the past the appeal has properly and customarily been granted by the court's decree, we do not suppose that any one would seriously contend that Act 555 contemplates or authorizes that procedure. As we have indicated, we are construing Act 555 as a complete revision of the law in this particular field, and when we confine our study to the Act itself we discern no reasonable basis for saying that the recital in this decree substantially complies with the mandatory requirement that notice of appeal be filed with the clerk of the trial court.

What we have already said pretty well disposes of the appellee's request that this court grant his cross-appeal. That request is bottomed upon the former statute authorizing us to allow a cross-appeal at any time before the case is submitted. Ark. Stats., § 27-2137. It is evident that this statute was superseded when the legislature took up the subject anew and enacted a comprehensive law that was intended to be a substitute for pre-existing statutes relating to appeals and cross-appeals.

As a matter of fact, there is no longer any need for this court to have the power to grant a delayed cross-appeal. By the former practice the trial court could grant both the appeal and the cross-appeal, and if the record were lodged in this court within ninety days both appeals would be heard. But the appellant could, if he chose, delay the filing of the record until the last day of the six months then allowed, thereby permitting the appeals granted by the trial court to lapse. By then obtaining his direct appeal in this court at the eleventh hour the appellant might have circumvented the cross-appeal had we not been empowered to grant it after the expiration of the six months allowed for the direct appeal. Act 555 eliminates this difficulty, as the whole matter is now concentrated in the trial court. It is now a simple matter for a litigant who is substantially but not completely satisfied with the judgment to file a notice of appeal as a

precautionary measure. If his opponent eventually takes the case to this court the notice protects the cross-appeal; otherwise it may be abandoned or dismissed in the trial court under § 2 of Act 555. In no event is there any real reason, as there was before, for this court to grant the cross-appeal.

The cross-appeal allowed by the decree below is dismissed; the prayer that a cross-appeal be granted by this court is denied.

ED. F. MCFADDIN, Associate Justice, (dissenting). The majority opinion is most alarming. It says that in Act 555 of 1953 the Legislature took up the entire subject matter of appellate procedure in civil cases, and substituted Act 555 for all such provisions previously existing. Here are two statements in the majority opinion which indicate the extent of the holding:

(1) "By this Act the Legislature effected a complete revision of the law governing appellate procedure in civil suits."

(2) "As we have indicated, we are construing Act 555 as a complete revision of the law in this particular field . . . "

If the majority holding be as I understand it, then the savings clause for minors and insane persons in § 27-2106 Ark. Stats. is abolished, and various other provisions are abolished. I cannot agree with the majority opinion: hence this dissent.

That Act 555 is taken from some of the Federal rules is true; but at most Act 555 is a patchwork of only *some* of the Federal rules. Below I give in parallel columns: (a) each section of Act 555 numbered *seriatim;* and (b)

the number of the Federal rule from which each such section was copied or modeled:

[1] There are several instances of material modification, but this table serves as a ready reference for comparative purposes.

Section No. of Act 555	Number of Federal Rule from which such section was copied or modified.
1	74
2	73 (a)
3	73 (b)
4	73 (c)
5	73 (d)
6	73 (e)
7	73 (f)
8	75 (a)
9	75 (b)
10	75 (c)
11	75 (d)
12	75 (e)
13	75 (f)
14	75 (g)
15	75 (h)
16	75 (i)
17	75 (j)
18	75 (k)
19	75 (n)
20	73 (g)
21	46

The foregoing table shows that in Act 555 only Federal rules 46, 73, 74 and 75 were concerned. One of the dangers in adopting some part of a law from another

jurisdiction is that the portion selected is all too frequently interwoven with other portions that precede and follow the particular part, and these "other portions" are not found in our Statutes. Another danger in accepting a law from some other jurisdiction is the fact that frequently the law adopted does not fit into our existing law, and yet the new law contains no express repealing clause. Both of these dangers are exemplified in Act 555.[2] By that Act the Legislature selected portions of four of the Federal rules on civil procedure. Since there are eighty-six of these Federal rules, it is very easy to see that selecting four out of eighty-six leaves much to be desired as regards a complete set of rules. Again, Act 555 contains no express repealing clause; and it is therefore difficult to tell just which of our previously existing Statutes are repealed by implication and which are left in force. The result is to add confusion in the matter of appellate procedure, whereas we had a fairly well understood system before the adoption of Act 555. The desire to "be like the Federal system" is certainly at variance with the idea of our founding fathers, who thought that each State would retain its individuality.

When Act 555 was adopted, this Court issued a rule, under date of June 8, 1953, by which appeals might be taken either under Act 555 of 1953 or under the earlier Statutes.[3] In other words, we then construed Act 555 as

[2] Our earliest compilation of Statutes was the Revised Statutes of 1838, adopted shortly after Statehood. Albert Pike, the great Mason, wrote the preface to that volume; and pointed out most vividly the evils of constantly changing existing laws and remedies. Here are typical sentences from Pike's preface: "Change and innovation in the law is generally a great evil, and every alteration in existing Statutes should be made slowly, cautiously, and with due deliberation." And again, Albert Pike said in his preface: "Crude and incongruous laws, hatched in prolific brains, and passed in haste and without consideration, load our Statute books, confuse people, lawyers and judges, create litigation and unsettle civil rights. Too much legislation is truly a curse. Hardly has the construction of one law been finally settled by the Supreme Court, at an expense to the litigants of thousands often, before another takes its place, more ambiguous in terms, and needing new adjudication before it can become a safe rule of action."

[3] This rule read: "The Court expects, within the near future, to revise its rules with a view of harmonization with Act 555 of 1953. Pending that action, the Court under its inherent rule-making power, authorizes litigants (at their option) to proceed under Act 555 or under the earlier Statutes—which by reference are hereby adopted as temporary rules of the Court—and the present rules of the Court."

being an alternative method of appeal. Those who wanted "to be like the Federal system" could take their appeal by Act 555; and those who wanted to "continue in the good, old-fashioned way" could ignore Act 555. This rule of June 8, 1953, seemed to me most sensible; and under it no one could have been hurt and litigants would not have lost their rights because some attorney failed to understand the full effect of the changed law. Particularly did I favor this alternative procedure, since Act 555 had no express repealing clause. We already had two statutes regarding appeals to the Supreme Court:[4] that is, an appeal could be prayed out of the Trial Court and prosecuted in 90 days;[5] or an appeal could be prayed out of the Supreme Court within six months from the date of judgment.[6] I took the view that Act 555 was only an additional method of appeal. That view prevailed from June 8, 1953, until January 10, 1954, when a revised publication of Rules of the Supreme Court contained Rule 26, which reads:

"Effective Date of Rules. These rules shall become effective on January 10, 1954, but this shall not affect any proper action taken before these rules became effective. The court's order of June 8, 1953, by which appeals might be taken either under Act 555 of 1953 or under the earlier statutes, is rescinded, with respect to all judgments or decrees entered after January 10, 1954."

So on all judgments and decrees entered after January 10, 1954, litigants who desire to appeal must pursue the course prescribed by Act 555. And what is that course? At most I had thought that Act 555 merely operated to impliedly repeal those sections of the pre-existing law with which it was in direct conflict; and that all other sections of the pre-existing law were left unaffected. But not so! In the present case, the majority says that in Act 555 the Legislature took up the entire subject matter of appellate procedure in civil cases and substituted Act 555 for every provision previously existing.

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[4] This does not include § 27-2102 on time for appeal in injunction cases.

[5] See § 27-2127 Ark. Stats.

[6] See § 27-2106 Ark. Stats.

To indicate the effect of such holding, let us turn to Arkansas Statutes and see some of the sections that are thus repealed. Sections 27-2101 to 27-2156 of Ark. Stats. are listed under the headings "Appeals to the Supreme Court." If the majority means what it says, then all of these sections—from 27-2101 to 27-2156, inclusive—are repealed by said Act 555. One of these sections is § 27-2106, which says in part:

"An appeal or writ of error in a civil case shall not be granted, except within six months next after the rendition of the judgment order or decree sought to be reviewed, *unless the party applying therefor was an infant, or of unsound mind at the time of its rendition, in which cases an appeal or writ of error may be granted to such parties, or their legal representatives, within six months after the removal of their disabilities or death . . .* " (Italics our own.)[7]

I find no provision in Act 555 which contains any savings clause for minors or insane persons, so when the majority says that Act 555 takes the place of all the previous law on appellate procedure in civil cases, then the majority is certainly saying that this § 27-2106 is repealed by Act 555. I submit that by so holding, the majority is obliterating "by one fell swoop" all the law on a savings clause for minors and insane persons, insofar as concerns appeals in civil cases.[8] I cannot believe that the Legislature of 1953 so intended; and because of this point, if for no other, I must dissent from the present holding of the majority.

Furthermore, if the majority means what it says about Act 555 constituting a "complete revision of the law governing appellate procedure in civil suits," then I ask these questions:

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[7] Act 213 of 1951 added a proviso to this section regarding method of extending time for transcript. It is not germane to the point here considered.

[8] This matter was discussed at the Legal Institute held in November, 1953. See 8 Ark. Law Review, page 5.

(a) If § 27-2131 is repealed by Act 555, where is there any law left to take care of the situation when the appellant dies pending appeal?

(b) If § 27-2132 is repealed, where is there left any law to take care of the situation where appellee dies pending appeal?

(c) If § 21-2130 is repealed, where is there left any law for the bringing of original papers?[9]

(d) If § 27-2142 and subsequent sections under the heading in the Digest, "Appeals to the Supreme Court," are repealed, then under what authority does the Court make rules, as provided in § 27-2142?

Surely the majority cannot mean that all these last numbered sections have been repealed; yet where is the line to be drawn? I submit it would be far better to hold that § 27-2137 on cross appeals to be granted by this Court had not been repealed by Act 555, than it is to hold—as the majority is now doing—that Act 555 has repealed all the previous law on appellate procedure in civil cases.

I maintain that Act 555 is *not* a complete and full revision of all of our law on appellate procedure in civil cases. Furthermore, I maintain that to hold that Act 555 is a complete repeal of all such laws, is to leave the Bar of Arkansas in absolute confusion on any questions, and is to wipe out all savings clauses for minors and insane persons in appeals in civil cases. How much better it would be for the majority to now hold that this Court can always grant a cross-appeal to an appellee! In the case at bar, the record shows that the General Box Company designated the record that it wanted brought to this Court. All the appellee wants us to do is to allow him to cross-appeal on the record that the General Box Company has designated. I cannot see why § 27-2137 should not be followed. At all events, I submit that the majority has assigned a reason for its opinion that will come back to plague us; and I respectfully dissent from the majority holding.

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[9] Federal Rule 75 (o) has such a provision, but our Act 555 has not.

[redacted]

[redacted]