[redacted]

[redacted]

INCORPORATED TOWN OF MOUNTAIN VIEW *v.* LACKEY.

5-660 278 S. W. 2d 653

Opinion delivered May 9, 1955.

*Ben B. Williamson* and *Ivan Williamson,* for appellant.

*W. D. Murphy, Jr.,* and *Chas. F. Cole,* for appellee.

ED. F. MCFADDIN, Justice. The question posed is whether the 10-acre tract here involved is a *public park.*

The Chancery Court held that the tract was owned entirely by Appellee Lackey. The Town of Mountain View (appellant) claims that the tract is a public park. The other appellants, Storey *et al.*,[1] claim that if the 10-acre tract is not a public park then it is owned by Storey *et al.*, as tenants in common with Lackey. We hold that the 10-acre tract is a public park; and such holding makes it unnecessary for us to consider any part of the controversy between Storey *et al.* and Lackey.

I. *Dedication.* Mountain View (hereinafter called "Town") is and was at all times here involved an incorporated town. In 1921 Messrs. Lackey, Storey, Webb, Evans and Rosa—as partners—owned a tract of 186 acres north of and adjoining the Town. The partners platted this 186-acre tract into lots, blocks, streets, alleys and areas, and called the tract "White Water Addition to the Town of Mountain View." On this plat there was the herein disputed 10 acres labelled, "Laid out for City Park—10 acres"; and there was shown in the park the location of two springs of great notoriety in the community. This plat was placed of record; and lots and block were sold with reference to it. By 1926 more than half of the property in White Water Addition had been sold to the public. At the present time all of the property in the Addition had been sold except the 10-acre park here in issue.

We have many times held that when the owner of land makes a plat thereof and sells lots with reference to it, this amounts to a dedication of the streets and public ways shown on the plat. See *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003. In *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395, the rule is stated:

"The law bearing on the question of dedication of property to the public use is well settled by the decisions of this court. An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the

[1] These appellants are Messrs. Storey and Rosa, and the heirs of Messrs. Webb and Evans.

plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. He will also be held to have thereby dedicated to the public use squares, parks and other public places marked as such on the plat. The dedication becomes irrevocable the moment that these acts concur. *Hope* v. *Shiver,* 77 Ark. 177; *Davies* v. *Epstein, Id.* 221; *Dickinson* v. *Ark. City Imp. Co., Id.* 570; *Brewer* v. *Pine Bluff,* 80 Ark. 486; *Stuttgart* v. *John,* 85 Ark. 520."

In the case at bar the surveyor who made the original plat of White Water Addition testified that all of the five partners authorized him to make the survey and the plat, and to record it. A real estate broker testified that the said five owners of White Water Addition gave him a copy of the plat showing the 10-acre park and told him to sell the lots with particular emphasis on the fact that the park contained the two springs always to be open to the public. One witness testified that he purchased lots for himself and his relatives, just across the street from the park, because of the fact that it was a public park. Thus there was a dedication[2] within the holdings of our cases.

II. *Acceptance of Dedication.* It is urged by Appellee Lackey that in 1921 the White Water Addition was outside the boundaries of the Town so there could be no acceptance of the dedication by the Town. We conclude that this contention is without merit. Act 85 of 1913 (as now found in § 35-901, Ark. Stats.) gives municipal corporations the power of eminent domain to condemn property for parks, etc.; and the Statute provides:

". . . and, in case of municipal corporations, such parks and boulevards may be situated at a distance of not exceeding five miles from the corporate limits and shall yet remain under the jurisdiction of the municipal corporation."

[2] For other cases and statements regarding "dedication by plat" see *Butler* v. *Emerson,* 211 Ark. 707, 202 S. W. 2d 599; 16 Am. Jur. 365; 39 Am. Jur. 808; 19 C. J. 935; 26 C. J. S. 82; and 7 A. L. R. 2d 607.

Certainly if a municipal corporation has the power of eminent domain to acquire a park within five miles of the municipal boundaries, the municipality can likewise accept the dedication of a park within such distance.[3] Here the park was one-fourth of a mile from the corporate boundaries of the Town in 1921. Therefore the Town had the Legislative authority to acquire the park. In *Hankins* v. *Pine Bluff,* 217 Ark. 226, 229 S. W. 2d 231, we said:

"The two essential elements of a dedication are the owners' appropriation of the property to the intended use and its acceptance by the public. No specific duration of the public user is required to complete the dedication. *Ayers* v. *State,* 59 Ark. 26, 26 S. W. 19. Nor need the dedication be evidenced by a deed. *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399."

The Town Council of Mountain View did not adopt a Resolution formally accepting the park; but the fact of the actual acceptance is shown by a number of witnesses. One witness testified that he helped improve the park because he was helping the Town; that benches were built, paths cleared, stairways erected; that campers used the park; that many people came to use the water; and that rock steps were built from the springs leading toward the Town. The same witness testified that he lived across the street from the park from 1922 to 1928 and that he saw and participated in the improvements made in the park; that the work was done by the public and without any compensation; that a passageway was prepared from the springs in the park directly toward the Town; that no one in the area had a well; and that all depended on the springs for water supply.

Another witness testified that he, along with six or seven other persons, worked two or three days cutting underbrush, erecting benches and cleaning up the 10-acre

[3] We have not overlooked Amendment No. 13 to our Constitution adopted in the General Election in 1926 which allows municipal corporations to issue bonds for the purchase, etc., of public parks ". . . located either within or without the corporate limits of such municipality. . . ." But Act 85 of 1913 was the law in 1921 when the transactions involved in this case had their inception.

area; and that the work was done at the behest of the Town. Witnesses testified that when the water works were installed in Mountain View in 1936 the springs in the park were checked to determine whether they could furnish enough water for the Town, as the Town at that time considered it owned the 10 acres in controversy. Another witness testified that he, along with several others, helped clean up the park area for the Town; and that the work was donated.

The case at bar is in many respects similar to, and ruled by, the case of *Frauenthal* v. *Slaten,* 91 Ark. 350, 121 S. W. 395. The case of *Mebane* v. *Wynne,* 127 Ark. 364, 192 S. W. 221, is differentiated from the case at bar in factual matters: because in *Mebane* v. *Wynne* the opinion recites:

". . . the space designated as 'Franklin Square' has never at any time been put to any public use, and has never been accepted by the City Council as a public place. . . ."

In the case at bar the 10-acre park was used by the public over the years; the springs are still being used; and the cleaning up and improvement of the park was done "at the behest of the Town." In *Gowers* v. *Van Buren,* 210 Ark. 776, 197 S. W. 2d 741, we quoted earlier cases to the effect that a formal acceptance of dedication is not necessary; it is sufficient if there be in fact an acceptance[4] of such dedication. The facts in this case clearly show actual acceptance of the dedication.

III. *Limitations.* In the Lower Court Appellee Lackey claimed that he had acquired deeds from all of his former partners to all of the White Water Addition; that by 1946 all of the Addition had been sold except the 10-acre park here involved; and that since 1946 Lackey has paid taxes on this 10-acre park. This plea of limitations is without merit for a number of reasons, only one of which need be mentioned: Act 666 of 1923 (as

[4] For other cases and writings regarding acceptance of dedication see *Poskey* v. *Bradley,* 209 Ark. 93, 189 S. W. 2d 806; *Lester* v. *Walker,* 177 Ark. 1097, 9 S. W. 2d 323; 16 Am. Jur. 416; and 26 C. J. S. 103.

now found in § 37-109, Ark. Stats.) has this pertinent language:

"Hereafter no title or right of possession to any . . . public park . . . shall or can be acquired by adverse possession or adverse occupancy. . . ."

Since appellee does not claim any adverse possession to have started prior to 1923 the said Act 666 is a bar to his claim because the park was dedicated and accepted by the public prior to the effective date of the 1923 Act.

*Conclusion.*

It follows that the decree of the Chancery Court is reversed and the cause is remanded with directions to enter a decree declaring the 10-acre tract to be a public park in accordance with the views expressed in this opinion.

Chief Justice SEAMSTER not participating.

McDANIEL *v.* JOHNSON.

5-664 278 S. W. 2d 657

Opinion delivered May 9, 1955.

*Wiley W. Bean,* for appellant.

*D. B. Bartlett,* for appellee.

MINOR W. MILLWEE, Justice. The parties to this suit are neighbors who reside on adjacent properties in the city of Clarksville, Arkansas. Appellant shot and killed appellee's registered pointer bird dog on the night of June 27, 1954. In an action by appellee for damages appellant admitted killing the dog but asserted that it was done to protect his cattle from attack by the dog after due notice to appellee of prior trespasses and a request that the dog be kept away from appellant's property. The jury found for appellee and fixed the market value of the dog at $20. In response to a special interrogatory the jury also found the killing to be willful, malicious and wanton as alleged by appellee. The trial court entered judgment for treble damages in the sum of $60.00.

For reversal appellant challenges the sufficiency of the evidence to support the verdict, and asserts that he had a legal right to kill the dog under the undisputed evidence.

Each of the parties maintains a pasture on his premises in which he keeps several head of cattle. According to the testimony of appellant he talked to appellee's wife by telephone about 2 or 3 months prior to the killing and told her appellee's dog was running his cattle and asked that it be kept up. In response to a telephone call from Mrs. Fletcher Thompson, another neighbor, on the night in question, appellant stated that he secured his gun and a flashlight and proceeded to his pasture where he found appellee's bird dog and a German Shepherd chasing his cattle. He ran the dogs away and waited a few minutes when they returned and again started chasing and snapping at the cattle. After backing the dogs off he intentionally shot and killed appellee's dog but was unable to get a shot at the other dog because it was between appellant and a calf until it ran away. Appellant also stated that he noticed an insignificant bite on the tail of a calf the next morning; also a gash about 3 inches long on the left front leg of a steer which he first thought was a simple cut but which required treatment by a veterinarian about 2 months later when it failed to heal

properly. Although appellee's dog had chased his cattle and had been a regular nuisance around his place for 6 or 7 months, appellant admitted that he had never talked to appellee about it personally and only talked to appellee's wife the one time. Mrs. McDaniel testified that she had seen appellee's dog in their pasture running cattle "a number of times" previously but did not see it on the night in question.

Mrs. Fletcher Thompson, who telephoned appellant on the night in question, testified that she had heard dogs running appellant's cattle previously. Although she had seen appellee's dog in her yard and in appellant's yard often, she had never seen it running appellant's cattle.

Appellee testified that appellant had never notified him that the dog was running his cattle nor asked that it be kept up. Appellee and others who frequently hunted with the dog testified they never knew of it running cattle and that it was afraid of, and would run from, a cow. Appellant had the dead dog hauled to the "city dump" without informing appellee that he had killed it. Appellee learned of the dog's death when municipal authorities objected to it being placed on the dump. Appellee stated that he kept the dog up most of the time and that it had never chased the cattle he kept in his own pasture. On cross-examination appellee further testified: "Q. I will ask you this. Wasn't that dog awfully hard to keep up? A. Yes. Q. He would chew the wire into on the pen? A. Yes. Q. And get out? A. Yes. Q. Did you know that he ate the wire into on Charlie's [appellant's] pen and got in there with a little registered screw tail bull dog of his, and that they had to have her operated on, to take the pups from her? A. I think that is the reason that Charlie killed my dog was on that account, instead of him running his cattle. Q. That would be a good reason wouldn't it? A. That is not for me to decide."

Appellee's wife testified that 6 months prior to the killing appellant told her over the telephone that some dogs were running his cattle and that he thought one of

them might be appellee's dog but he was not sure. Appellant promised to call back and let them know if he found out for sure that appellee's dog was involved but he never did so. She informed appellee of this conversation.

Appellant says the undisputed evidence shows that he had a right to kill the dog in defense of his cattle. It is insisted there is no evidence to dispute the fact that the dog had been running his cattle for several months with appellee's knowledge and was attacking the cattle at the time of the shooting. The evidence as a whole shows a sharp factual dispute as to whether the dog had been molesting appellant's cattle or would chase cattle at all; also as to whether appellee permitted the dog to run at large with knowledge of any vicious tendency. While it may be true that appellant was the only person present at the time of the killing, we have repeatedly held that the testimony of a party to a suit, or even one interested in the result of litigation, is not to be treated as undisputed in testing the legal sufficiency of the evidence. *Phelps* v. *Partee,* 208 Ark. 212, 185 S. W. 2d 705; *Elliot* v. *Foster,* 216 Ark. 104, 224 S. W. 2d 353.

Since appellant admitted that he killed the dog intentionally, it devolved upon him to show that he acted in good faith in order to protect his property, and not negligently or wantonly. *Kanis* v. *Rogers,* 119 Ark. 120, 177 S. W. 413. This issue together with the questions whether appellee permitted his dog to run at large with knowledge that it would injure cattle, and whether appellant acted in good faith or willfully, maliciously and wantonly in killing the dog were submitted to the jury under instructions to which no objection was made by either side. In our opinion the evidence was sufficient to sustain the verdict. The fact that we might have reached a different conclusion if we had been the triers of fact would not justify us in invading the province of a Johnson county jury.

Affirmed.

Chief Justice SEAMSTER not participating.

5-639 278 S. W. 2d 659

Opinion delivered May 9, 1955.

[redacted]

*Heartsill Ragon* and *C. Randolph Warner, Jr.,* for appellant.

*Gean & Gean,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee, A. M. Marks, for specific performance of a contract by which he agreed to purchase certain real property from the appellants, Mr. and Mrs. Hoyt B. Moore. The negotiations leading up to the contract were conducted through a real estate dealer, Harward Barry. The pivotal question, upon which the validity of the contract depends, is whether Barry was acting as agent for the buyer or as agent for the sellers. The chancellor found that Barry was representing the sellers, and upon that finding the court granted the prayer for specific performance.

In August of 1954 the Moores attempted to sell this property themselves by advertising it in a Fort Smith newspaper. Barry saw the advertisement and called on

Moore, for whom he had previously bought and sold property. Barry testifies that he was employed by Moore and that his commission was discussed and agreed upon. It cannot be said that Moore denies this testimony; to the contrary, he pretty well admits it. These are excerpts from Moore's testimony:

"Q. Did you put the property in his hands to sell?

"A. Yes, sir, we had talked it over.

* * * * *

"Q. Did you authorize, or employ, Harward Barry to sell your property . . . ?

"A. (Pauses) Well, at that time I did."

Barry testified that after his employment by Moore he approached Marks as a prospective purchaser; Barry states positively that he had no agreement with Marks for the payment of any commission. It is not clear how long Barry negotiated with Marks, but on the afternoon of Friday, September 3, Marks orally made to Barry a tentative offer of $13,500, which was slightly less than the Moores had been asking. That evening Barry discussed this offer with the Moores, and they signed the contract now in issue, by which they agreed to sell the property at Marks's figure. Upon leaving the Moores that evening Barry took the signed contract to Marks and left it with him. The contract provided that it should be void unless earnest money were put up by noon on the following Tuesday.

On the next day, Saturday, September 4, the Moores received a better offer for the property. Hoyt Moore promptly telephoned Barry, but the exact effect of their conversation is in dispute. Moore says that when Barry told him that the contract had been left with Marks, he informed Barry that the deal was off and directed Barry to pick up the contract before Marks signed it. Barry says that he did not understand Moore's position to have been this clear-cut, but in the view we take the result is the same even if Moore's directions were as positive as he says.

On the following Monday, September 6, Marks signed the contract and delivered it, together with the earnest money, to Barry. If Barry had really been told to drop the matter he violated his instructions, for he accepted the contract and the earnest money. The Moores' subsequent refusal to perform the agreement led to this litigation.

In our opinion the fact that Barry was the agent of the Moores is practically undisputed. We have summarized the oral evidence, which consists of Barry's positive assertions that he was employed by Moore and of Moore's reluctant admissions that these assertions are true. In contending that Barry was not their agent the Moores rely almost entirely upon the terms of the contract of sale, which they think to show conclusively that Barry was the agent of Marks. In all material respects this contract is the identical printed form that was quoted in full in *Brissaud* v. *Rogers,* 218 Ark. 369, 236 S. W. 2d 439. The printed form is entitled Offer and Acceptance. By the form the buyer purports to authorize the named real estate agent "to offer for my account" a certain sum for the property, all the conditions of the contract being stated in the offer. After the buyer's signature spaces are provided for the agent to acknowledge receipt of the earnest money and for the seller to accept the offer. Here it happened that the Moores first signed the acceptance, on Friday, and Marks completed the execution of the contract on the succeeding Monday.

We think it plain that the language of this printed form did not convert Barry's agency for the sellers into an incompatible and disloyal attempt on his part to represent the buyer. The form is evidently designed for use in transactions in which a real estate dealer acts as an intermediary between the parties. Its purpose is not to declare the existence of an agency but merely to reduce to writing a firm offer that may be submitted by either party to the other. Here it was the Moores who made the written offer, by filling in the contract and

signing in the space provided for the seller's acceptance. Marks completed the contract by accepting that offer.

Once it is decided that Barry was the agent of the Moores, the case involves only simple and familiar rules of law. From the point of view of Marks, who appears to have acted in good faith all along, it can hardly be doubted that a binding contract came into existence. On Friday night Marks received from the sellers' agent a signed offer, which was subject to acceptance by noon of the next Tuesday. Without notice of the sellers' change of mind Marks accepted the offer within the time allowed and delivered his check for the earnest money to the agent. Marks had manifestly done all that was required of him.

Upon the undisputed facts it is clear that the Moores' effort to withdraw their offer was ineffective. One dealing with an admitted agent, even though he be a special agent, is entitled to assume that the agent is clothed with authority coextensive with its apparent scope and is not bound by the principal's specific instructions of which the third person has no notice. *Three States Lbr. Co.* v. *Moore,* 132 Ark. 371, 201 S. W. 508; *Slayden* v. *Augusta Cooperage Co.,* 163 Ark. 638, 260 S. W. 741. Two other more specific rules are also applicable. One is that if the principal knows that the agent has begun to deal with a third person, the agent's apparent authority cannot be terminated unless the third person has notice of the termination. Rest., Agency, § 129. The other is that similar notice of termination is required when the principal has entrusted to the agent a writing which manifests the agent's authority and which is meant to be shown to third persons. *Ibid.,* § 130. Here Hoyt Moore admits that he knew Barry was negotiating with a man named Marks, and the Moores entrusted Barry with a signed copy of the proposed contract. In these circumstances Barry's apparent authority to consummate the sale could not be withdrawn without notice having been brought home to Marks.

A minor contention is that Marks was required to pay the entire purchase price of $13,500, rather than just the earnest money, by noon on Tuesday, September 7. It is shown that when the printed form was filled out and signed by the Moores on Friday evening, the amount of the purchase price was inserted, but the spaces for the earnest money and for the remaining balance that was to be paid on delivery of the deed were left blank. The contract, however, clearly contemplated a deposit of earnest money, as it provided that this deposit had to be made by noon, September 7. It was patently intended that Barry and the buyer would fix the amount of the earnest money and insert this detail in the agreement. As completed, the contract requires that the entire unpaid balance be paid upon the delivery of the deed, which is all that the sellers are entitled to demand.

Affirmed.

MILLWEE, J., dissents. SEAMSTER, C. J., not participating.

HUTCHISON *v.* SHEPPARD.

5-659 279 S. W. 2d 33

Opinion delivered May 9, 1955.

[Rehearing denied June 6, 1955.]

*Pickens & Pickens,* for appellant.

*Kaneaster Hodges,* for appellee.

George Rose Smith, J. This is a suit by Kate Anthony Sheppard and others to recover possession of 120 acres of land. The defendants assert title to the property and, if their claim of title should be rejected, seek to recover the value of their improvements to the land. The chancellor held that Mrs. Sheppard has a life estate which entitles her to possession, but the defendants were awarded $1,000 for their improvements. The defendants have appealed on the issue of title, and the plaintiffs have cross appealed from the $1,000 allowance for improvements.

The principal issues turn upon the construction of three separate deeds, each presenting separate questions of law. The first deed was executed by Samuel Anthony, who was the father of four children—Kate (now Mrs. Sheppard), Edgar, Ethel, and Emma. On January 27, 1914, Samuel Anthony conveyed 280 acres, including the 120 now in dispute, to Kate and Edgar "for the term of their natural lives and to the heirs of each of their bodies in fee." The habendum clause reads: "To Have and To Hold, all of the above described lands unto the parties of the second part during the term of their natural lives, then to descend in fee simple to the heirs of their brother [body] begotten. If either one of the parties of the second part should die without issue surviving, then that one's live [life] estate, or the remainder thereof to vest in the survivor."

In 1924 Kate and Edgar partitioned 240 of the 280 acres, the land now in question going to Edgar. The material parts of the partition deed are these:

"Whereas, [Edgar and Kate] are the owners for life as tenants in common and are in possession of the following described lands [240 acres described], and;

"Whereas, the said tenants in common acquired a life estate in said lands under . . . a certain deed of conveyance from their father Samuel W. Anthony, dated the 27th day of January, 1914 . . . and;

"Whereas, the said tenants in common have agreed upon a partition of said lands so that each may have and hold his or her interest therein in severalty and in dividing said lands have made the allotment to each as near in value as possible:

"Now, Therefore, for the purpose of making partition of all the real property above described, and in consideration thereof, the parties hereto do mutually covenant and agree, each with the other, as follows:

"[First, Edgar, in language similar to that next to be quoted, conveys to Kate the 120 acres allotted to her.]

"Second: [Kate], for the purpose of said partition and in consideration thereof, does by these presents, grant, sell and quitclaim unto the said Edgar Anthony, all her right, title, interest and claim in and to [the 120 acres now in controversy].

"To Have and To Hold the same unto the said Edgar Anthony and unto his heirs and assigns forever, together with all the tenements thereon, and rights, ways, improvements, appurtenances and hereditaments thereunto belonging."

After the land had been so partitioned Edgar Anthony, on November 23, 1927, conveyed his 120 acres to Virgil Hutchison by the third deed involved, which we quote in part:

"Warranty Deed

"Know All Men By These Presents:

"That I, Edgar Anthony, . . . do hereby grant, bargain, sell and convey unto . . . Virgil Hutchison

and unto his heirs and assigns forever the following lands . . . :

"My entire interest in and to [the 120 acres now in dispute].

"To have and to hold the same unto the said Virgil Hutchison and unto his heirs and assigns forever, with all appurtenances thereunto belonging.

"And I hereby covenant with the said Virgil Hutchison that I will forever warrant and defend the title to my interest in said lands against all claims whatever."

Virgil Hutchison took possession under the above deed, and by various mesne conveyances his title has now passed to the appellants, Porter and Zelma Hutchison. Edgar Anthony died without issue on January 7, 1953, his only child having predeceased him before reaching maturity. After Edgar's death the present action in ejectment (later transferred to equity) was brought by Kate Anthony Sheppard, her sister Ethel, and the two children of the third sister, Emma Anthony Mantooth, who had died on some date not disclosed by the record. It is shown by undisputed proof that Mrs. Sheppard is childless and is past the childbearing age. In *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584, we gave effect to a stipulation that the life tenant, a woman of sixty-six, was too old to have children.

The appellants' two asserted claims to the fee simple title may be disposed of quickly. First, it is contended that the deed from Samuel Anthony to Kate and Edgar conveyed the fee by operation of the Rule in Shelley's Case. That rule, however, applies only when the remainder is to the life tenant's heirs generally. Here the remainder was to the life tenants' bodily heirs, and it has long been settled that such a conveyance creates a life estate in the grantee with a contingent remainder to his bodily heirs. *Horsley* v. *Hilburn,* 44 Ark. 458. Nor does it matter that Edgar Anthony had a child who predeceased him; for, as the *Horsley* case held, the remainder does not vest until the death of the life tenant with issue surviving.

Second, the appellants rely upon a tax title which they purchased in 1947 from R. D. Wilmans. It was, however, the duty of the appellants and their predecessors in title, as holders of the life estate, to keep the taxes paid. Ark. Stats. 1947, § 84-922. We need not cite the many cases holding that a life tenant's purchase of a tax title resulting from his failure to pay the taxes amounts merely to a redemption.

The appellants also contend that even if their claims to the fee simple are rejected they are nevertheless entitled to retain possession during Kate Anthony Sheppard's lifetime. It will be remembered that Samuel Anthony's deed to Kate and Edgar and their bodily heirs provided that if either should die without issue his life estate, or the remainder thereof, should vest in the survivor. It is the appellants' theory that, with respect to the 120 acres now in issue, Kate's rights as surviving life tenant passed to Edgar and his grantees as a result of the 1924 partition deed.

Such a construction would violate the principles that apply uniquely to partition deeds. The law sensibly holds that when cotenants simply agree upon a division of the common property, with no independent consideration being paid, their purpose is taken to be the severance of the unity of possession rather than the creation of a new estate in either party. "It is generally held that a partition of land creates no new title to the shares set off to the parties to be held in severalty, whether the partition be made by act of the parties or by a judgment or decree of the court. While its effect is to allocate the share of each in his allotted parcel of the land, and extinguish his interest in all of the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held." *Wofford* v. *Jackson,* 194 Ark. 1049, 111 S. W. 2d 542.

This court has often recognized and applied the rule. For example, in *Webb* v. *Nease,* 66 Ark. 155, 49 S. W. 1081, a mother and son owned 200 acres together, the son owning an undivided three-fourths and the mother own-

ing the other one-fourth, with rights of dower and homestead in the whole. By oral agreement, confirmed by possession, they partitioned the land so that each took about 100 acres. It was held that the mother did not thereby acquire the fee to her allotted acreage. "When it is ascertained that she had certain interests in this land, then the oral agreement of partition made with the other party interested in the land should, in the absence of evidence to the contrary, be attributed to a recognition and allotment of the interests that she actually owned, and not be allowed to create a new estate in her." Other applications of the principle may be found in *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361, and *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037. The Supreme Court of Illinois summarized the matter by saying: "A decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or different title. After the partition each party has precisely the same title which he had before, but that which was before a joint possession is turned into a several one. The same is true of a voluntary partition. Each party transfers or releases the interest which he had in all the land for an exclusive and fixed possession in a part, and he does not derive title or interest from his cotenant by such transfer so that either can be said to hold under the other." *Cole* v. *Cole,* 292 Ill. 154, 126 N. E. 752, 38 A. L. R. 719.

When Kate and Edgar Anthony voluntarily divided 240 acres in 1924 they declared in the preamble to their conveyance that they were "the owners for life as tenants in common," that they had acquired "a life estate" from Samuel Anthony, and that the partition had been agreed upon so that each might "hold his or her interest therein in severalty." Manifestly the only estate that Kate and Edgar held *in common* was the joint life tenancy that would exist only so long as both were living. This was likewise the only estate as to which unity of possession existed. By the rules of construction already mentioned, they are not deemed to have intended any-

thing more than a severance of their common right of possession.

It is true that each of the cotenants also had an estate in the land that was *not* held in common. That is, if either should die without issue the survivor would be entitled, under the terms of Samuel Anthony's 1914 deed, to a life estate in the whole rather than in an undivided half. But this right of survivorship was obviously not held in common; to the contrary, the distinct rights of survivorship were mutually exclusive, in that there could be only one survivor. Since there could never be a joint possession under the survivorship clause, there was no occasion to divide it so that each might hold his interest in severalty. Hence to construe the partition deed as transferring Kate's rights of survivorship (in this 120 acres) to Edgar would result in the creation of a new title in Edgar. He would then hold not of the common grantor but of his cotenant. As the law does not put this interpretation upon a simple partition deed, the appellants' claim to Mrs. Sheppard's right of survivorship must be denied.

There remains the question of improvements. The appellants' proof tends to show that the improvements are worth some $2,600. It is now contended that the chancellor's allowance of $1,000 is demonstrably inadequate. The appellees insist that the appellants knew all along that their tenure was limited, so that they could not in good faith have believed themselves to be the owners of the land. Ark. Stats., § 34-1423.

Inasmuch as the appeal and cross appeal bring this entire issue to us *de novo,* we must attempt to determine from the record what amount, if any, should be allowed for the improvements. In approaching this issue we are confronted at the outset by an insurmountable defect of proof in the record. That is, it is not shown whether Samuel Anthony was still alive when Edgar sold his 120 acres in 1927, nor, if Samuel was then dead, whether he had died testate or intestate.

The importance of this information is easily understood. When Samuel Anthony conveyed to Kate and Edgar for life, with remainder to their bodily heirs, there remained in the grantor a divestable reversion, by which the fee would revert to him if the grantees should die without bodily heirs. Such a reversion may be transferred by deed or by will and is a subject of inheritance upon the reversioner's death intestate. *Davis* v. *Davis,* 219 Ark. 623, 243 S. W. 2d 739; Core, Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111, 136.

Although the record is silent, it seems quite likely that Samuel Anthony died before 1927. It is alleged that part of the property described in the complaint was acquired by Samuel Anthony in 1866. If he was then as much as thirty years old he would, if alive, have been past ninety in 1927. But if he had died intestate his reversionary interest would have descended by the laws of descent and distribution, with Edgar inheriting a one-fourth interest.

In 1927 Edgar, by the third deed involved, conveyed his "entire interest" in the land now in question and warranted "the title to my interest" in the land. Although this deed does not purport to convey the fee or any given lesser estate, within the operation of the after-acquired title statute, Ark. Stats., § 50-404, *Wells* v. *Chase,* 76 Ark. 417, 88 S. W. 1030, it was clearly effective to transfer whatever alienable interest Edgar had in the land. If, therefore, he had received by will or by intestacy a share in the reversionary estate, that interest now belongs to the appellants. Since Edgar died without issue and since Mrs. Sheppard, the other life tenant, is about seventy years old and childless, it is a practical certainty that the reversion will become a fee simple estate upon Mrs. Sheppard's death.

These circumstances may bear upon the issue of improvements in at least two ways. First, if the appellants had not only an estate *pur autre vie* but also an interest in the reversion, even though they were not

aware of the latter, this fact may affect their legal right to improve the property—a question upon which we need not speculate in the absence of definite proof. Second, if the appellants have, for example, a vested one-fourth interest which will become an estate in possession upon Mrs. Sheppard's death, it would be inequitable to reimburse them *in full* for improvements which are partly theirs.

This question of the reversion seems to have been overlooked by the parties in both courts and of course was not called to the chancellor's attention. In this situation, where by common inadvertence an issue is not fully developed, it is our practice in equity cases to remand the case for further proof. *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728. We therefore set aside the award of improvements and remand the cause upon that issue.

McFaddin, J., is of the opinion that the entire suit is premature so long as Kate Anthony Sheppard is living.

Seamster, C. J., not participating.

Silvey *v.* Steele.

5-662 278 S. W. 2d 662

Opinion delivered May 9, 1955.

*Keith & Clegg* and *Wright, Harrison, Lindsey & Upton,* for appellant.

*Denman & Denman,* for appellee.

Ward, J. Appellant instituted this action in chancery court asking to be adjudged the owner of an undi-

vided one-third interest in certain oil and gas holdings which were claimed and held by Charles F. Steele and Amos T. Hutchinson, and asking the trial court to declare that Steele and Hutchinson in fact held one-third of said oil and gas holdings in trust for him. Appellant based his action on an alleged oral agreement between him and Steele whereby appellant was to secure certain correction deeds and certain mineral leases and Steele was to give him the said one-third interest. Steele, emphatically denying any such oral agreement, admits that appellant did considerable work of the nature above stated for him and Hutchinson but contends that he and Hutchinson have fully paid appellant for all such work.

The trial court held that the testimony was inadequate to support appellant's claim, and the essential question presented to this court concerns the weight and sufficiency of the evidence.

*Preliminary statement.* Since the testimony is voluminous and the varied activities of the parties were somewhat complicated, yet have a potential significance to the stated issue, it will be helpful to give a general background picture.

The oil and gas holdings of which appellant seeks an undivided one-third interest pertain to only 22 acres of land, but the bulk of the work which he did in securing leases and correction deeds affected the entire 116½ acres.

In Section 8, Township 15 South, Range 22 West, there is a tract of land consisting of 116½ acres known as the "Milwee Estate." For convenient reference this tract of land is divided in this manner: 1. 70 acres consist of the East Half of the SE¼ of the SW¼ less 10 acres squarely off of the north side thereof; 2. 5 acres consist of the East Half of the 10 acres excepted above; 3. 5 acres consist of the West Half of the 10 acres excepted above; 4. 17 acres join the two 5 acre tracts on the north and is in the shape of a parallelogram. This tract may also be described as all of the South Half of

the SE¼ of the NW¼ except 3 acres squarely off the north side thereof; 5. 19½ acres lie west of the 70 acre tract and the West 5 acre tract.

It appears that Charles F. Steele and Amos T. Hutchinson are associated in the oil and gas business and have been for about 10 years prior to this litigation. For the purpose of this opinion it is not necessary to refer to appellee, Minnette Hutchinson, hereafter. She is the wife of Amos T. Hutchinson and was made a party because she had some interest in the leases, nor is it necessary to refer to Berry Asphalt Company which was made a party, because its interest will not be affected by the outcome of this litigation. Mr. Hutchinson is a non-resident and apparently is counted on to furnish the money for drilling and leasing operations. Appellee Steele apparently is a man of small financial means who has vast knowledge and experience in the oil and gas business. He is advanced in years and was in very poor health during the whole period with which we are concerned here. Apparently it was his job to do the ground work for Hutchinson. He stated on one occasion that he wrote two letters a week to Hutchinson over a period of 5 years. Appellant Silvey is a resident of Arkansas, of good reputation and apparently has had experience in dealing with other people in securing oil and gas leases. The land covered by the oil and gas leases involved in this litigation consists of the 17 acre tract and the West 5 acre tract.

On January 1, 1952, appellees Steele and Hutchinson owned, or thought they owned, all of the oil and gas leases on the disputed lands except a 1/45 interest which was later secured by Silvey. They also had oil and gas leases amounting to a considerable interest in all of the 116½ acres. It developed that it was necessary to obtain certain correction deeds and to obtain certain oil and gas interests before it would be practical to drill on any of the land. Since Steele was physically unable to do this work he enlisted the help of Silvey. Silvey says he and Steele had two separate and distinct agreements, and,

for the purpose of this opinion, we will treat them as such.

*First agreement.* There is not much if any dispute concerning the first agreement. On or about January 1, 1952, it appeared to Steele that a reasonable amount of work would clear up the lease situation and he had an agreement with Silvey to do this work for him. After some disagreement it was finally decided that Silvey should receive for his work a 1/96 (of 7/8) interest covering the entire 116½ acres. Silvey completed this work within 3 or 4 months and he was given an assignment of a 1/96 interest covering all lands. Silvey has this interest and is now drawing remuneration as a result of wells having since been drilled.

*Second agreement.* Apparently during the time that Silvey was working under his so-called first agreement the abstract of title to the "Milwee Estate" was being examined by Mr. Steele's attorney, Charles H. Tompkins. As a result of this title examination Mr. Tompkins discovered that certain correction deeds would have to be obtained to perfect the title to the lands, and that there was a large amount of so-called splinter leases or interests outstanding on the lands. It was recognized that the work required by the attorney must be done before it would be practical to start drilling operations, and it was also apparent that it would necessitate considerable work on the part of someone to meet the attorney's requirements. This information was made known to Steele about the time that Silvey had completed his work under the first agreement. It is not disputed that Steele [and Hutchinson] desired and expected Silvey to do this work. The terms of the agreement under which Silvey undertook and did the required work are in dispute and form the basis of this lawsuit. Silvey has one version of the understanding or agreement and Steele has an entirely different version.

*Silvey's understanding of the agreement.* Generally speaking Silvey contends that he had a definite oral agreement with Steele to do the work required by Mr.

Tompkins whereby he, Steele, and Hutchinson would all be equal partners in all of the leases covering the entire 116½ acres of land, or, in other words, that he, Silvey, would receive for his work one-third of the oil and gas leases on all of the "Milwee Estate." It is not disputed that Silvey worked many months in accomplishing the work he did or that he did a good job. The record shows that Steele and Hutchinson have assigned to Silvey a one-third interest in the 70 acre tract and the 19½ acre tract. This suit is an effort by Silvey to obtain a one-third interest in the 22 acre tract. It should be stated here that the East 5 acre tract is not involved in this suit. Silvey admits that Steele had begun drilling a well on the East 5 acre tract before he performed his first agreement and that he at no time claimed any interest in that tract. Actually then, Silvey only claimed as to 111½ acres.

*Appellees' understanding of the agreement.* Again generally speaking, Steele denies emphatically that he made the agreement alleged by Silvey, and states that the understanding which he had with Silvey was substantially as follows: At no time did he agree to give Silvey a one-third interest in the 22 acre tract because, as he says, he already had that land under lease and did not contemplate much difficulty in clearing the title and lease situation as to that land. He admits that Silvey wanted an additional interest to compensate him for the extra work required by Tompkins and that consequently he (Steele) promised and did give him a one-third interest in the 70 acre tract and also the 19½ acre tract.

There are certain facts and circumstances disclosed by the record which each side points to as indicating substantiation for each respective contention.

*Appellant points out.* (a) Since work under the first agreement had been completed and he had been paid therefor by the assignment of a 1/96 interest in all of the "Milwee Estate" lands, appellant says that it is unreasonable to suppose that he would undertake and

perform the enormous amount of work required by Tompkins without requiring a one-third interest in the leases covered on all of the lands, and that it is significant that much of the work performed by him related to the 22 acres in question. Many of the leases which he obtained from the Milwee heirs included the said 22 acres as well as the 89½ acres.

(b) On January 19, 1953, Tompkins wrote a letter to Steele, enclosing a certain assignment covering the 19½ acre tract, in which he indicated it was his understanding that Silvey owned an undivided one-third of the leasehold interest in the "Milwee Estate" lands. It is significant, appellant says, that appellees, having thus been put on notice of Silvey's claim, made no protest at the time or at any time thereafter, and that it is also significant that Steele did not remember receiving this letter.

(c) Appellant says that Steele claims that he did not agree to give appellant a one-third interest in any of the lands until July, 1953. Therefore, says appellant, Steele's testimony cannot be reconciled because the letter just referred to above indicates that Steele must have known about appellant's claim of a one-third interest as early as January 19, 1953.

(d) A large number of the leases secured by Silvey were taken in his name—later assigned to appellees.

*Appellees point out.* (a) Appellees acquired the original leases on the "Milwee Estate" and had to a large degree secured all leases on the 22 acres before Silvey entered the picture. Appellee Hutchinson was looked to as the man to furnish the money to pay for leases, attorney fees and operational expenses, and Steele states that he paid $1,700.00 to keep liens from running against the leases so that Hollyfield-Warren could drill a well on the 70 acres.

(b) All parties including Silvey knew that the 22 acre tract was the most valuable and Silvey admits that on one occasion appellees refused to give him any interest in the 17 acre tract.

(c) While it is true that Silvey took leases in his name Steele gave him instructions not to do so and in any event the leases were assigned by Silvey to appellees.

(d) Silvey admits he knew that appellees assigned certain leases for the drilling of a well on the 17 acre tract and that he did not make any claim for his one-third interest at the time.

(e) Mr. Tompkins stated that he did not know what the trade was between Silvey and appellees and that it was none of his business, although he knew they had some kind of an agreement.

(f) Several letters written by Steele to Hutchinson were introduced in evidence which, appellant agrees, are competent. These letters indicate Steele was unwilling to let Silvey have any interest in the disputed lands on January 10, 1952; January 20, 1952, Silvey was not satisfied, and Steele said "to stop where he was if he was not satisfied," but Silvey said he would go on through with it; January 31, 1952, Steele said that he was sorry that he hired Silvey to get leases on the 70 acre tract and the 19½ acre tract and that Silvey wanted to buy an interest in the 22 acres because he realized "this is the high point," but Steele refused; on March 10, 1952, Steele wrote that Silvey "is never satisfied with what he is getting—I pay no attention to him any more."

(g) On one occasion after appellant claims the second agreement was made Steele and Silvey were present when Hollyfield-Warren were attempting to locate a well just south of the East 5 acres and Fred Forest, a witness for appellees, was asked, "Q. Did you hear any discussion between Mr. Silvey and Mr. Steele as to ownership of two tracts, North tract and South tract?" He answered, "I heard Mr. Silvey say it did not make any difference and Mr. Steele said 'Yes it does, I am not going to have that that close.' This is mine and that is yours and we are not going to drain my oil with that."

(h) Raney Ellis, age 82, a witness for appellees, stated that he was at Mr. Steele's home in July of 1953 when Silvey was there, and he heard Steele promise Silvey one-third interest in the 70 acres and one-third interest in the 19½ acres. Witness stated that Silvey was well pleased.

(i) Billy D. Stroups, a witness for appellees, stated that he lived with Mr. Steele during the first two or three months of 1953 and during July and August of 1953; he was in Mr. Steele's house on the occasion mentioned by Raney Ellis and he heard Silvey and Steele talking; that Silvey indicated he didn't think he was getting enough for his work; that Steele gave him a 1/96 of the "Milwee Estate" land; but that he didn't hear Steele say anything to Silvey about a one-third interest.

It can be readily seen from the above that much of the testimony is in hopeless conflict and much of it lacks clarity. One difficulty in trying to determine exactly which view the record substantiates is that most of the facts and circumstances relative to the dealings between Silvey and Steele are consistent with Silvey's understanding of the agreement and also consistent with Steele's understanding. On the one hand it seems probable that since Steele and Hutchinson had been working together for so many years, they would not readily take a third party into full partnership. It is equally understandable, and the record shows, that Silvey desired to have a one-third interest in all of the lands, and it is not denied that he did a difficult job well. On the other hand the record shows that Silvey is now receiving, as a result of his work, something like $500.00 a month and it appears likely he may receive more in the future. It is recognized, of course, as stated by the chancellor, that we are not here concerned with the amount of work done by Silvey except in so far as it may shed light on the agreement. Perhaps one of the most significant circumstances tending to corroborate Silvey and to discredit appellees' testimony generally, is the letter written by Tompkins on January 19, 1953, in which he, to some extent, put Steele on notice that Silvey was claiming a

one-third interest in all of the land, and which suggests the one-third interest had been discussed at that time. On the other hand it must be recognized that this does not constitute substantive testimony that Steele consented to such an arrangement. Tompkins admits that he didn't know what the agreement was between Silvey and Steele and it will be presumed that he got his information regarding the matter from Silvey, which of course could not bind Steele. It is possible also that Steele, having read the letter, concluded that it did not necessitate a positive denial on his part. Moreover we are not sure that Steele fixes July 1953 as the first time a one-third interest for Silvey was mentioned. One time Steele did fix this date, but at another time he said it was July 1952—it's possible the first statement was inadvertently made. It is noted also that appellant says the date cannot be determined, and the fact that one witness heard the conversation [about the agreement in 1953] does not necessarily preclude previous conversations of a similar nature.

We are impressed with the exhaustive and apparently conscientious effort put forth by the chancellor, reflected in a lengthy and comprehensive written statement, to arrive at a just determination. It was his opinion that the testimony failed to meet the burden imposed by law upon Silvey to prove he had an agreement with Steele to receive a one-third interest in the leases covering all the lands.

After a careful consideration of all of the testimony we cannot say that the conclusion reached by the chancellor is against the weight of the testimony, and therefore the decree of the trial court is sustained.

SEAMSTER, C. J., not participating.

CANNON *v.* FERRELL.

5-669 278 S. W. 2d 652

Opinion delivered May 9, 1955.

*Frank C. Douglas,* for appellant.

*James M. Gardner,* for appellee.

ROBINSON, J. The point involved here is whether a widow may, for the first time since the death of her husband thirteen years ago, claim as a homestead property on which neither she nor her husband was living at the time of his death, with the evidence leading to the conclusion that she had previously elected to take other property as her homestead.

Mr. and Mrs. W. E. Cannon were married in 1932 and moved to his home on a forty acre farm, which is now the subject of this litigation. Subsequently, Cannon's health failed and he was unable to carry on the farming operation. Mrs. Cannon bought a one acre plot of ground; they moved to it in 1936 and rented their farm. In 1941, Mr. Cannon died. Through the initiative of Mrs. Cannon, an administrator was appointed. No claim was made at that time that the forty acres constituted a homestead.

The administrator collected the rent each year and paid Mrs. Cannon one-third of the money, with the balance, less expenses, going to the children of Mr. Cannon by a former marriage. The administration was closed in 1952, but the person who had acted as administrator continued to collect the rent as agent of the parties. In 1954, he came to the conclusion that the rented farm property had been Cannon's homestead, and that Mrs. Cannon was entitled to all of the rent. He therefore

refused to pay any of the 1954 rent to the heirs of Cannon, and they subsequently filed this suit alleging that they were entitled to their two-thirds share. Mrs. Cannon answered and claimed the property as a homestead. The Chancellor held that her claim was barred at that late date, and she has appealed.

Assuming that the property did constitute Cannon's homestead, even though he was not actually living on it at the time of his death, and further that Mrs. Cannon could have claimed the property as a homestead immediately following his death, still we do not reach the conclusion that, under the circumstances existing here, she can claim the property as a homestead thirteen years after the death of her husband.

At the time of Cannon's death, he and his wife were living on her property which she could also claim as a homestead. *Gibson* v. *Barrett,* 75 Ark. 205, 87 S. W. 435. She continued to live there for thirteen years without making a claim of any other place as her homestead. She cannot have two homesteads. *Grimes* v. *Luster,* 73 Ark. 266, 84 S. W. 223, 108 Am. St. Rep. 34; *Van Pelt* v. *Johnson,* 222 Ark. 398, 259 S. W. 2d 519. She may, however, make an election as to the place she will claim as a homestead. *Bank of Hoxie* v. *Graham,* 184 Ark. 1065, 44 S. W. 2d 1099. By continuing to live on her own property for thirteen years without claiming any other property as a homestead, it appears that long ago she selected as her homestead the property where she has lived for so many years.

Affirmed.

SEAMSTER, C. J., not participating.

SAAD, EXECUTOR *v.* ARKANSAS TRUST COMPANY.

5-674 278 S. W. 2d 676

Opinion delivered May 9, 1955.

[Supplemental opinion on rehearing delivered June 27, 1955.]

*Richard W. Hobbs* and *B. W. Thomas,* for appellant.

*Wood, Chesnutt & Smith,* for appellee.

ROBINSON, J. This is an appeal from the allowance of a $5,000.00 executor's fee and an $8,500.00 attorneys' fee in the administration of the estate of DiMitry G. Saad.

Saad died testate about the first of January, 1952, and appellee, Arkansas Trust Company, was named executor. Appellees, Wootton, Land and Matthews, were employed as attorneys for the executor.

The deceased had operated a department store in the city of Hot Springs. An inventory filed shows personal property valued at $77,977.98 and real estate valued at $66,000.00. Claims against the estate were allowed to the extent of about $50,000.00; the widow elected to take against the will. The homestead valued at $18,000.00 was part of the real property.

After everything was considered, it was decided advisable to operate the store. The executor did so under orders of the court for about a year, during which time about $158,000.00 passed through the hands of the executor.

Appellant claims that the personal property amounted to $73,720.98 and, based on this figure, the executor is entitled to a fee of only $2,502.87 and that the attorneys' fee should not be more than $1,500.00.

Ark. Stats., § 62-2208, paragraph (a), provides: "The personal representative shall be allowed such compensation for his services when and as earned, as the court shall deem just and reasonable, not to exceed, except as provided in sub-section b hereof, ten percentum of the first one thousand dollars, and five percentum of the next four thousand dollars, and three percentum of the balance of the value of the personal property passing through the hands of the personal representative, provided that compensation shall be allowed only on the value of such property as shall have been fully administered."

Paragraph (b) provides that the executor may be allowed an additional sum for work done in connection with the real property.

At first glance, the fees allowed by the Probate Court may appear to be a little high. It is realized, however, that the Probate Court is in a much better posi-

tion to properly evaluate the services rendered than is this court, and when the work done by the executor and attorneys, as revealed by the record, is studied, we cannot say that the Chancellor abused his discretion in the allowance of fees.

In *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12, the court said:

"Being familiar with the services rendered, the judge, in fixing the allowance, could act upon his own knowledge of their value and we would not overturn his findings thereon unless clearly erroneous."

In *Lilly* v. *Robinson Mercantile Company,* 106 Ark. 571, 153 S. W. 820, it is said:

"The court was sitting as a jury in the determination of the matter and took into consideration the facts of the service performed, as well as the interested attorney's opinion of the value thereof, but he was not required to lay aside his own general knowledge and ideas of such service and the value thereof and should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinion expressed and in no other way could he have arrived at a just conclusion."

Appellant contends that the executor's fee should be limited to the original personal property inventory as adjusted as a basis for computing the fee, and that a proper construction of the statute fixing the executor's fee would so limit it. They further contend that if the fee can be based on the amount of money passing through the executor's hands when a business is being operated and merchandise is being bought and sold, it would be entirely possible for the whole estate to be consumed in fees. It will be recalled that the court is not required to allow the executor a minimum sum; only the maximum is limited and it cannot be anticipated that the court would allow an unreasonable fee or one not earned in good faith.

In this instance, the executor actually operated the store for about a year. About $158,000 passed through its hands. It is true that an accountant was employed at a salary of $75.00 per month plus a fee of $1,000.00, but his work consisted principally of bookkeeping. Of course a business of this kind would not operate satisfactorily without a bookkeeper. There were also other employees.

In so far as the executor is concerned, it appears that $5,000.00 is not too much to be paid for the management and operation of a store the size of the one involved for a period of a year, not considering the tremendous amount of other work that was also done.

It can be seen that there was hardly a day during the two year period that the executor and the attorneys did not have to perform some duty in connection with the administration of the estate. A will contest was filed and, although the cause did not actually go to trial, the Probate Judge was in a position to know the work the attorneys for the executor did in connection with preparing for the trial. It may have been due to their diligence and hard work that the contestants did not press for a trial. An alleged holographic will was also filed for probate. The record shows that the attorneys for the executor were prompt in looking into this matter, and after they filed a motion for an examination of the alleged will by experts it was withdrawn.

It is contended that the attorneys' fee is high when the value of the estate is considered. The value of the subject of the litigation, however, is only one factor in arriving at a reasonable attorney's fee. The actual hours spent in working on the litigation are also important, and in this particular case fifty-nine separate motions, petitions, reports and orders appear on the docket. The training, skill and diligence of an attorney should not be ignored. When all of these matters are taken into consideration, we do not believe an $8,500.00 fee is unreasonable.

In *Sain* v. *Bogle,* 122 Ark. 14, 182 S. W. 515, the court said:

"We think it fairly deducible from our own cases and from the case note above referred to that in determining what is a reasonable attorney's fee it is competent and proper to consider the amount and character of the services rendered, the labor, time and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys."

In *Rachels* v. *Garrett,* 153 Ark. 343, 240 S. W. 1071, the court said:

"The value of the plaintiff's services in the instant case is a matter with which the chancellor must necessarily have been familiar. The whole proceedings regarding the insolvent bank were before him. When the court is informed of the nature and extent of such services, its own experience furnishes it with an important element necessary to fix their value."

A lawyer, energetic and possessed of integrity and ability, has spent many long years preparing himself to look after his clients' interests in the best manner possible. He is entitled to collect fees commensurate with the position of responsibility and trust which he holds, and he is entitled to fees that will enable him to live with the dignity expected of him by the public in general.

Affirmed.

Justices George Rose Smith and Ward dissent.

Seamster, C. J., not participating.

## ON REHEARING

Robinson, J. On rehearing, we have reached the conclusion that the executor's fee allowed by the trial court should be reduced. It appears that the actual

operation of the store was under the management of Mr. Otis Honeycutt; that he and Mr. Oscar W. Luebben, a Certified Public Accountant, were both paid a salary and attended to practically all of the details; and that the work done by the executor was not substantially greater than the usual and customary duties of one acting in that capacity.

The first inventory filed by the executor shows a personal property estimate of $77,977.98; we believe that this is a fair value of the personal property actually administered by the executor. On this valuation, the executor's fee would be limited to 10% of the first thousand, 5% of the next four thousand, and 3% of the balance. Ark. Stats., § 62-2208. Figured on this basis, the executor would be entitled to a fee of $2,489.34. In addition, we believe the executor is entitled to a fee of $250.00 for work done in connection with real property. Ark. Stats., § 62-2208(b). The total executor's fee would then be $2,739.34.

The petition for rehearing is granted to the extent of reducing the executor's fee as indicated.

McDONALD *v.* STATE.

4804-5 279 S. W. 2d 44

Opinion delivered May 16, 1955.

*A. E. Johnson,* for appellant.

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

J. Seaborn Holt, J. A jury found appellant guilty of the crime of rape (Ark. Stats. 1947, § 41-3401) and assessed his punishment at a term of life imprisonment in the state penitentiary. From the judgment is this appeal.

Case No. 4805, consolidated with this appeal (Case No. 4804), relates to a motion for a new trial based on alleged newly discovered evidence.

—1—

For reversal appellant first questions the sufficiency of the evidence,—Assignment 1—(a), (b), (c). The prosecuting witness is appellant's thirteen-year-old daughter who was in the ninth grade in school. She testified that in early July, 1954, at about 1:30 P. M. her father, ". . . . came in and he said he wanted to take us berry picking, and I told him I didn't feel like going because

I kind of thought that was what he was going to do." A short time before, appellant in their home got in bed with the prosecutrix and tried to have intercourse with her. "Q. However, he didn't have intercourse with you on that day? A. No, sir. Q. He didn't force you to have intercourse with him? A. He tried to, but I jumped out of the bed, and he told me he would knock my head off for acting so smart with him about it." Continuing her testimony: "I went with him and the three little kids were with us. (Witness begins crying.) And so we got out there, and he told the little kids we were going to look for berries. I told him I didn't want to go—I wanted to stay in the truck, and he made me go with him, and so I got down, and I had on blue jeans, and he made me pull them off and he raped me, and we went back to the truck. He tried to start it and it wouldn't start and so he made me go back with him again, and when we came back, it still wouldn't start, and he made me go back the third time. . . . Q. Each time he carried you back in the woods, did you take off your clothes? A. Yes, sir. Q. And you put them back on each time when he had finished? A. Yes, sir. Q. What is your feeling toward your father, Miss McDonald? A. Well, I don't want ever to have to live with him again. Q. Isn't it true that you strongly dislike your father? A. Yes, sir . . . And when we got back to the truck, he pulled the truck and we started home, and we got to a little store on Highway 67, and he bought the children some ice cream, and we went on home. Q. Where was your mother? A. She was there at the house. We tried to get daddy to let her go with us and he wouldn't do it. He told her there wasn't any use, it wasn't any of her business—that she didn't need to go. Q. Did you tell your mother what occurred? A. No, sir, not then. Q. When did you tell her? A. That night. He told me if I told her, it would be too bad for me. He told me I had better not tell her. . . . Q. Do you know what intercourse is? A. Yes, sir. Q. Did he have intercourse with you? A. Yes, sir." The prosecutrix was afraid of her father. She testified as indicated that she resisted his

advances, that he chased her and brought her back and raped her forcibly and without her consent.

Appellant denied his daughter's accusations, or that he had ever tried to have illicit relations with her, however, the jury, which was the sole judge of the testimony and of the weight to be given to it, evidently chose to believe the child's version of what happened. When we give to her testimony and all the evidence in the case its strongest probative force in favor of the State, as we must, we cannot say that it is not substantial and legally sufficient to support the jury's verdict and judgment.

Her testimony standing alone was legally sufficient to convict. It was not necessary that it be corroborated. We held in *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747 (Headnote 4): "Since one of the essential elements in the crime of rape is that the act must be committed forcibly and against the will of the prosecutrix, she is not an accomplice and corroboration of her testimony is not necessary." The words "forcibly ravish a female" mean that the act "was done 'against the will' of the female or without her consent, which has the same meaning." *State* v. *Peyton,* 93 Ark. 406, 125 S. W. 416, 137 Am. St. Rep. 93.

The lesser offenses of assault with intent to rape, and carnal abuse of a female under the age of 16 years, were properly presented to the jury by the court, but, as indicated, the jury elected to find appellant guilty of the greater offense of rape.

— 2 —

Appellant in Assignment 2 argues that the State erred in offering as a witness appellant's wife knowing that she could not be compelled to testify against her husband (by virtue of §§ 43-2019—20), and that this offer prejudiced the jury against him. We do not agree.

On this issue the record discloses: "Essie Marie McDonald, being called as a witness for the State, and after having first been duly sworn, was seated in the witness chair. By the Court: Let the record show Essie

Marie McDonald, wife of the defendant, is called. Do you have a motion, Mr. Lowe? (Discussion off the record.) By the Court: The Court will hold that Mrs. McDonald is incompetent to testify. By Mr. Lookadoo: I want to make an objection to this later. By the Court: Mrs. McDonald, you may stand aside and go back to the witness room. Gentlemen of the Jury, the witness who is leaving the stand is the wife of the defendant, and the Court has held that a wife cannot testify against her husband except where she has been personally injured; the Supreme Court has held that this does not include children. All right, call your next witness. (Witness is excused.)''

It appears that appellant made no objection to the court's action and he is, therefore, in no position to complain for the first time here. *Lewis* v. *State,* 202 Ark. 6, 148 S. W. 2d 668.

— 3 —

In Assignment 3 appellant contends that he is entitled to a new trial on the grounds of newly discovered evidence. He says: ''That defendant has obtained newly discovered evidence that could not have been presented to the court at the trial on his behalf and in his defense at the original trial.

''One. Because, same is in the nature of medical evidence and was not made available to him or his Attorney at time of trial, nor could not have been found at the time because of concealment.'' Our rule is that one relying on newly discovered evidence for a new trial must show: ''Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.'' Ark. Stats. 1947, § 27-1901.

In this connection appellant argues that Dr. H. H. Holt made a physical examination of the prosecutrix after the trial which revealed that her hymen was still intact and that this testimony was concealed from the appellant. To secure a conviction it was not necessary

to prove that the hymen had been broken. " 'The carnal knowledge that is required to constitute rape must be a *res in re,* but to no particular depth,' and the hymen need not be ruptured nor the body torn." *Poe* v. *State,* 95 Ark. 172, 129 S. W. 292. The record shows that the attorneys for appellant at the trial in effect admitted to the trial court during consideration of appellant's motion for a new trial that they knew that a medical examination had been made of the prosecutrix prior to the trial but since it was made about thirty days after the alleged rape, they had concluded it would be of no material value. On this issue the court commented as follows: "The defense attorneys were aware that a medical examination had been made, and they were aware of that fact prior to the day of the trial, and that after consultation with a qualified neurologist, they concluded that the examination of the examining physician would be of no material value, particularly in light of the approximately 30 days which had elapsed between the date of the alleged act and the date of the examination . . . the attorneys for the defendant had unrestricted access to the prosecuting witness, and the mother, Mrs. McDonald, and that they questioned those parties at length." We hold that this proffered medical evidence failed to meet the above statutory requirement for admission. *French* v. *State,* 205 Ark. 386, 168 S. W. 2d 829.

Another doctor, Henry, also testified at the hearing on the motion for a new trial in effect that to have intercourse the hymen must be perforated. His testimony was based on hypothetical questions. He made no physical examination of the prosecutrix and admitted that he had never seen her. There was no proper showing that his testimony could not have been obtained by due diligence prior to the trial.

Three ladies also testified, at the hearing on the motion for new trial, in effect, that about January 27, 1955, about six months after the alleged rape, that they went to appellant's home and in the presence of the prosecutrix had asked her mother whether the appellant had had intercourse with the prosecutrix and that Mrs.

McDonald replied that appellant had tried to but did not succeed, and that her daughter did not know the difference, and that she took her to a doctor.

Appellant argues that the above statements of Mrs. McDonald were admissible for the reason so he says: "The mother can make statements for the daughter in her presence, if the daughter is silent and stands by, and makes no effort to refute them. What were the statements made, that were offered? Those are declarations against interest, as she is an interested party, also the State." As we view the testimony of those ladies its effect would be to discredit and impeach the testimony given by the prosecutrix which the evidence shows she had never recanted. Such testimony is not a ground for a new trial. "A new trial will not be granted for newly-discovered evidence which is merely cumulative of that offered on the trial or which tends to impeach the credibility of the State's witnesses." *Norrid* v. *State,* 188 Ark. 32, 63 S. W. 2d 526, Headnote 4. See also, *Edgeman* v. *State,* 183 Ark. 17, 34 S. W. 2d 753, and *Reeder* v. *State,* 181 Ark. 813, 27 S. W. 2d 989. So we hold that the court was correct in overruling the motion for a new trial on the ground of newly discovered evidence.

Finding no error, the judgment is affirmed.

ROBINSON, J., dissents.

Chief Justice SEAMSTER not participating.

ROBINSON, J., dissenting. I don't suppose that ever before in the entire history of civilized society has a human being been imprisoned for life on such weak and unsatisfactory evidence as that upon which the defendant was convicted in this case.

The thirteen year old daughter's testimony is uncorroborated by substantial evidence or circumstances of any kind. Although corroboration of the testimony of the alleged victim is not necessary in a case of this kind, lack of corroboration should be considered in passing on the motion for a new trial on the ground of newly

discovered evidence. The trial court appointed two lawyers for the defendant, but they took no part in the case subsequent to the trial. The attorney who represents appellant on appeal filed a motion for a new trial alleging, *inter alia,* newly discovered evidence.

At the trial, the prosecutrix testified that her father raped her three times within a period of about 45 minutes. Her younger brothers and sisters were nearby; some Negroes were also close to the scene. There is no evidence that anyone heard an outcry, nor does the prosecutrix testify that she made an outcry. The rape is alleged to have occurred on the first day of July, 1954. Prosecutrix says she told her mother about it that night, yet no charges were filed against the defendant until two months later on August 30, 1954.

The testimony of the prosecutrix is not convincing. She admitted that she dislikes her father and that such feeling existed a long time before the rape is alleged to have occurred. Her testimony that her father "raped" her is a mere conclusion on her part, since no showing is made that she knows the meaning of the word rape. The following is a question asked her and the answer she gave:

("Q. Wanda, I am sorry to have to ask you this, but did he penetrate you with his private organs? That is the question I want to ask you, for the jury to hear. Do you understand what I asked?

"A. No, sir."

It can be seen that two questions were propounded to the witness as one question. Her answer was "no". She could have meant that he did not penetrate her, or she could have meant that she did not understand the question. In the light of the evidence developed on the motion for a new trial on the ground of newly discovered evidence, it would appear that when she said "no", she meant that there was no penetration. As heretofore stated, the attorney who represented the defendant on the motion for a new trial on the ground of newly dis-

covered evidence did not represent him at the trial. This attorney discovered that prior to the trial, the State had the prosecutrix examined but did not produce the examining physician as a witness. This physician was called as a witness on the motion for a new trial, and testified that he examined the prosecutrix on the 4th day of August, almost a month before the defendant was charged with the offense. The doctor stated: "There was no physical evidence that this girl, Wanda Lou McDonald, had ever experienced sexual intercourse as we commonly speak of it." He testified further:

"Q. Doctor, in that examination, did you find the state of the hymen at that time?

"A. Yes, sir.

"Q. What was the state of the hymen?

"A. The hymen was imperforate.

"Q. Imperforate—what does that mean?

"A. It means that it had never been perforated. Its hymenal opening was annularial in shape—that means circular—and less than one c.c. in diameter. One c.c. is one-third of an inch. It would not admit the tip of my little finger."

The doctor also testified that there was no evidence of trauma or disease. On cross-examination, he stated:

"Q. Doctor, isn't it true that this—it's possible you could be mistaken as to whether or not this girl had had intercourse with her father or not, from the examination you made? I just ask you if it is possible that you could be wrong?

"A. I don't see how it could be possible, because on August 4, this child would not admit without severe pain—I caused her some pain in an effort to examine her—and she wouldn't admit anything larger than an ordinary cigarette.

"Q. Than an ordinary cigarette; isn't it true that at different times of the month, there is a difference in the expansion of a girl—a difference in the expansion?

"A. No, there is no change in it; I might add that there is quite a wide variation of the size of the hymenal opening in different individuals."

It was further shown in the hearing on the motion that, subsequent to the arrest of appellant, the mother of the prosecutrix stated in her daughter's presence that the child was not raped but she did not know the difference. The prosecuting witness was standing there when her mother made this statement and did not deny what the mother said.

When one of the attorneys who had represented the defendant at the trial was called as a witness on the motion for a new trial for the purpose of showing whether he knew that the prosecutrix had been examined by a doctor prior to the trial, he refused to testify. The court did not compel him to do so. In any event, a jury passing on the guilt or innocence of the defendant should have had the benefit of the testimony of the doctor who made the physical examination subsequent to the time the rape is alleged to have occurred.

Therefore, I would grant a new trial on the ground of newly discovered evidence.

THOMPSON *v.* HARPER.

5-641 279 S. W. 2d 277

Opinion delivered May 16, 1955.

[Rehearing denied June 13, 1955.]

*H. B. Stubblefield, W. J. Dungan* and *Campbell & Campbell,* for appellant.

*Wood, Chesnutt & Smith* and *Clayton Farrar,* for appellee.

ED. F. MCFADDIN, Justice. This is a suit brought by appellees who claim a commission as real estate brokers. In rendering judgment, the Chancery Court necessarily found: (a) that appellees had a valid and enforcible contract with appellants; (b) that appellees had not abandoned the contract; and (c) that appellees were the procuring cause of the sale of the property. On this appeal, several questions are argued; but we find it necessary to consider only one point: that the appellees had abandoned whatever contract they formerly possessed.

The Broadway Hotel Company, a corporation, owned certain property in Hot Springs: part of the property was operated as a hotel and part was rented for stores and offices. The appellees, Frank Harper and Charles Hughes, rented an office from the corporation and operated a real estate brokers' partnership known as "Hot Springs Realty Company." In January, 1952, the Broadway Hotel Company duly filed its Certificate of Dissolution in Garland County; and the three Directors named in the said Certificate were Vance M. Thompson, B. F. Lewis and Mrs. B. F. Lewis. By force of law (§ 64-807, Ark. Stats.) these three Directors became Trustees of the corporate property. They are the appellants in this case. B. F. Lewis continued to operate the Broadway Hotel for the benefit of the former stockholders.

In early April, 1953, B. F. Lewis told appellees, Harper and Hughes, that the Broadway Hotel Company's property was for sale; and that he thought the

property would be sold for $50,000 cash. Lewis signed no contract with the appellees. They were to get an offer and transmit same to Lewis who was then to submit the offer to the other parties interested with Lewis.[1] All of the "other parties" do not appear to have been named, but appellees understood that Vance M. Thompson was one such party interested with Lewis.

Shortly after the above conversation, appellees reported to Lewis that E. D. Murphy would buy the property for $65,000 provided (a) Murphy's home was taken as $15,000 payment and (b) the balance of $50,000 was to be paid $10,000 cash and $40,000 in deferred payments secured by vendor's lien note or first mortgage. Lewis agreed to submit this offer to Mr. Thompson; and in a few days Lewis advised appellees, Harper and Hughes, that there could be no deal made. Here is Appellee Harper's testimony as to this final conversation with Lewis:

". . . he informed me that he didn't think Mr. Murphy had enough money and he didn't think they would be interested in it. A little later on, a few days later on, I met him on the street and I asked him what he was going to do about it, if he was going to do anything about it, and he said no, Mr. Thompson wouldn't go along with him, so he let Mr. Thompson have all his interest in the hotel, so he sold out to him.

"Q. Mr. Lewis sold to Mr. Thompson?

"A. Yes.

"Q. Did you have any further dealings with Mr. Murphy after that?

"A. No, I didn't have any further dealings with Mr. Murphy after that."

[1] Here is Lewis' testimony as to the so-called "listing": "Well, one day I was passing the real estate office and Mr. Harper was there and I just remarked 'I believe I'm getting just about ready to quit the hotel business and if you ever have anybody that was interested in the hotel to get an offer and then I would submit it to the owner, Mr. Thompson, and if they wanted to sell, so far as I'm concerned we could sell it, that I was ready to stop,' and that was when I told him I couldn't list it with him that I didn't have any authority to list the hotel."

Also here is Appellee Hughes' version as to the final conversation[2] with Lewis:

"Q. You knew about Mr. Lewis? You heard his testimony that he said forget about everything, everything was off, some few days after you had this discussion with him?

"A. Yes, he said that. . . .

"Q. I am talking about Mr. Lewis said forget about it, did you contact them any more or have any further conversation with the Murphys after that?

"A. Yes, I did. . . .

"Q. Now, that was after they had already purchased it?

"A. Yes, sir.

"Q. In other words, you didn't talk to either Mr. Murphy or Mrs. Murphy after Mr. Lewis said for you to forget about it until after Mr. Murphy had already purchased the hotel from Mr. Thompson?

"A. That's right."

Lewis' testimony is to like effect:

"A. I told Mr. Harper that Mr. Thompson wouldn't take $50,000 and to just forget the whole thing, that I had washed my hands of it, that I wasn't going to have any more to do with it, and so far as I was concerned, I would continue to operate it."

After this conversation the appellees dissolved their real estate brokers' partnership. Appellee Harper had nothing further whatsoever to do with Hughes or the Broadway Hotel Company's property. Appellee Hughes went to Alabama on a trip and did nothing further in regard to the Broadway Hotel property. We emphasize that Lewis signed no contract with the real estate brokers; that they had no listing of the Broadway Hotel

[2] These questions and answers are taken from Hughes' discovery deposition which is in the record. Hughes testified to the same effect at the trial.

property for any definite time; that any offer they got they were to submit to Lewis and he to submit it to Thompson; and that when Lewis notified appellees of Thompson's rejection of the offer, appellees did what Lewis suggested—*i. e.*, they forget the entire matter.

Some time after the quoted conversation and, presumably, while Hughes was on his trip to Alabama, Murphy sought out Lewis in order to locate Thompson; and Murphy went to McCrory, Arkansas, to see Vance M. Thompson and there closed a deal with him for the purchase of the Broadway Hotel property for $60,000, being payable: $9,308.08 cash; first mortgage notes on some California property for $8,691.92; and the balance of $42,000 evidenced by vendor's lien note on the Broadway Hotel property. After Appellee Hughes returned from Alabama he learned of the sale of the Broadway Hotel property by Thompson to Murphy. No demand for real estate commission was ever made by either of the appellees: instead they filed this suit on July 3, 1953, for $15,000 as claimed real estate commission. Equity jurisdiction was invoked because the defendants, Thompson, B. F. Lewis and Mrs. B. F. Lewis, were by law (§ 64-807, Ark. Stats.) trustees of the Broadway Hotel property.

We have repeatedly held that a real estate broker's contract need not be in writing. See *Long* v. *Risley,* 208 Ark. 608, 188 S. W. 2d 132, and cases there cited. We have also held that when the owner sells the property even after the expiration of the real estate broker's contract, the owner is liable to the real estate broker for the commission if the broker was in fact the procuring cause of the sale. See *Hartzog* v. *Dean,* 216 Ark. 17, 223 S. W. 2d 820. But in the case at bar whatever kind of contract the appellees had regarding the Broadway Hotel property was entirely abandoned by them. Lewis told them they could "forget the whole thing" and they thereupon considered the matter entirely ended. Harper did nothing and Hughes went to Alabama. When Murphy went to see Thompson he did not tell Thompson that Hughes or Harper or anyone else had anything to do with the property; and Thompson testified that he did not know

of the connection of either of the appellees with the property. Lewis testified that Harper and Hughes had no contract and were not the procuring cause of the sale.

In 8 Am. Jur. 1069, in discussing the effect of abandonment on the part of the broker, the holdings are summarized in this language:

"If a broker, after introducing a prospective customer to his employer to no purpose, abandons his employment entirely, or if, after procuring a person who proves to be unwilling to accept the terms of his principal, he merely ceases to make further endeavors to negotiate a deal with that particular individual and all negotiations in that direction are completely broken off and terminated, he will not be entitled to a commission if his employer subsequently renews negotiations with the same person, either directly or through the medium of another agent, and thus effects a sale without further effort on the part of the broker first employed."[3]

In an Annotation in 9 Ann. Cas. 435 many cases are cited to sustain this statement:

"If a broker does not procure a purchaser on the terms authorized and he abandons further efforts to sell to a prospective purchaser, or if negotiations between the broker and the purchaser are completely broken off and terminated, the broker will not be entitled to a commission if the owner subsequently enters into negotiations with the same party and effects a sale."

The rules stated in the foregoing quotations are completely applicable to the case at bar; and find inferential support in our own holdings. Our cases, while factually different nevertheless, recognize the rule that abandonment of the contract by the broker leaves the owner free to act without being liable for a commission. See *Stogsdill* v. *Holmes,* 144 Ark. 574, 169 S. W. 961;

[3] Annotations listing the cases supporting the quoted textual statement are contained in: 9 A. L. R. 1194; 12 A. L. R. 2d 1367; 27 A. L. R. 2d 1402; 44 L. R. A. 346, 613; 16 L. R. A. (N. S.) 432; 139 A. S. R. 231; 9 Ann. Cas. 435; Ann. Cas. 1913D, 824; and Ann. Cas. 1913E, 788.

*Johnson* v. *Knowles,* 169 Ark. 1089, 277 S. W. 868; and *Oliver* v. *Dent,* 207 Ark. 843, 183 S. W. 2d 302. We conclude that the appellees abandoned whatever contract that might have been originally made, and therefore they are not entitled to any recovery.

Reversed and dismissed.

Chief Justice SEAMSTER not participating.

Justice HOLT dissents.

MURREL *v.* BRIDGES.

5-670 279 S. W. 2d 30

Opinion delivered May 16, 1955.

*Longstreth, Witt & Brooks* and *Arthur G. Frankel,* for appellant.

*Guy B. Reeves,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Roger L. Murrel, brought suit against appellees, Joe Bridges and George Washington, to recover a balance of $1,281.79 alleged to be due on two separate promissory notes and to foreclose a chattel mortgage given to secure payment of the first note. The chancellor found in appellant's favor for $281.79, which represented the balance due on the first note of $664.89, and directed foreclosure of the chattel mortgage. This appeal is from the action of the

court in sustaining appellee's plea of failure of consideration as to the second promissory note for $1,000 and in dismissing the complaint as to said note.

Appellant is an attorney and had previously represented appellee, George Washington. The evidence indicates that Washington sought the advice and assistance of appellant relative to a feasible plan for the operation by appellees of a night club for Negroes in the city of Little Rock without too much interference from law enforcement officers. Acting on appellant's advice, a "fraternal corporation" known as the "Imperial Order of Animistic Swahili, Big Rock Council" was formed with 17 charter members. On July 22, 1954, appellees entered into a partnership agreement drafted by appellant under which they agreed, "to carry on the business of a catering service, entertainment and social hall, and generally speaking operate a night-club business" under the trade name of "Temple of Swahili." According to appellant the corporation "concessionaired out the consessions, handling of the bar and sale of beer, and so forth," to the partnership. Under the partnership agreement Bridges agreed to donate certain personal property used in the operation of the business and Washington was designated, "the active and sole manager of said business." It developed that the equipment used in the operation of the business actually belonged to Bridges' wife but she apparently acquiesced in the donation to the partnership. The partnership agreement further provided that neither party should endorse any note without the written consent of the other, and that appellees should retain appellant as their attorney individually and as a partnership.

On August 6, 1954, George Washington, as "President & General Manager of Temple of Swahili," executed a note payable to appellant for $664.89 and a chattel mortgage on the personal property donated by Bridges as security for the payment of said note. On August 13, 1954, Washington executed another note in the same capacity for $1,000 payable to appellant on demand. Bridges could not read but signed the partnership agree-

ment after his wife read it. Insofar as the record discloses he knew nothing about the execution of the notes and mortgage. Although he was to remain in the background it was shown that he operated the business on certain days and Washington was in charge on week ends. Income of the business was apparently confined primarily to proceeds from the sale of intoxicants by the drink and the operation of dice tables. The business did not prosper and became involved with the state Alcoholic Beverage Control Board. Operations ceased about the time the second note for $1,000 was executed by Washington.

Appellant testified that both notes were executed for legal services and advancements he made to the partnership. Except for the drafting of the partnership agreement, he gave vague and evasive answers concerning the nature of such legal services and the specific amount of any cash advancements to the partnership. Relative to the first note and a $200 payment to him by Bridges on July 22, 1954, appellant stated that same were, "to cover the expenses of the entire operations which were entwined basically in a partnership," and, "as a basic part of a series of legal involvements and relationships." When pressed for an answer as to the specific nature of the consideration for the $1,000 note he stated it was for "legal services fully rendered as per oral agreement with the parties." He also stated that he spent many evenings and hours with appellees and "helped them in many ways toward management of the club." Washington testified that appellant interceded once before the Alcoholic Beverage Control Board when the business was closed and that appellant told him the $1,000 note was for legal fees. Bridges stated he had no knowledge of the execution of the notes and mortgage.

In holding the second note based upon an illegal consideration and void, the chancellor found that any legal services performed by appellant were in furtherance of the operation of an illegal business under the guise of a lodge. While the testimony was not as fully developed on this issue as it might have been, we have concluded

that such finding is supported by a preponderance of the evidence. It is a well-settled principle that contracts between attorney and client which have for their subject-matter any interference with the due enforcement of the criminal laws are against public policy and, therefore, void. 5 Am. Jur., Attorneys, § 56. It is clear from this record that any services performed by appellant in connection with the note for $1,000 were in furtherance of the operation of an illegal business and to prevent the due enforcement of the laws against gambling and the illegal sale of intoxicants.

The decree is accordingly affirmed.

Chief Justice SEAMSTER not participating.

DAVIS *v.* LITTLE.

5-671 279 S. W. 2d 31

Opinion delivered May 16, 1955.

*W. J. Dungan* and *H. M. Cooley,* for appellant.

*John D. Eldridge, Jr.,* for appellee.

GEORGE ROSE SMITH, J. The question in this case is whether the appellant, as the vendor in a conditional sales contract, has elected to retake the property in satisfaction of the debt and has thereby lost his right to recover the purchase price. The trial court, by the two

orders now appealed from, held that the seller had elected to pursue his remedy against the property sold.

In 1950 the appellant sold a threshing machine to the appellee for $1,875. The purchaser was allowed a credit of $300 for a trade-in and executed a conditional sales contract for the unpaid balance of $1,575. By mutual mistake, however, the two promissory notes that were given for this balance totaled only $1,475 instead of $1,575.

Upon the appellee's failure to make any payment of either principal or interest the appellant brought this suit in equity. By his complaint he asked (*a*) that the notes be reformed to reflect the true amount of the debt, (*b*) that he have judgment for $1,575 with interest, (*c*) that, if the judgment were not paid within a reasonable time to be fixed by the court, the sheriff be directed to take and sell the thresher, and (*d*) that the plaintiff have execution for any deficiency remaining after the proceeds of sale had been applied on the judgment. The appellee was served with summons on May 30, 1952, but made default. On September 8, 1952, the chancellor entered a default decree by which the plaintiff was awarded precisely the relief sought. Upon the appellee's failure to pay the debt within the time fixed by the court the sheriff, in obedience to the decree, took the threshing machine from the appellee, advertised it for public sale, and on September 20, 1952, held the sale, at which a third person bought the property for $50.

On November 13, 1952, which was before the term of court had lapsed, the appellee filed a petition asking that the decree be amended to eliminate personal liability for any deficiency remaining after the application of the proceeds of sale. A hearing on this petition was delayed by the illness and death of the plaintiff's attorney; but in December of 1954 and January of 1955 the court entered the orders now under review. By these orders the sale was confirmed, the appellee's request for an amendment of the decree was granted, and the

creditor was denied execution for the unsatisfied balance of the purchase price.

It is contended by the appellant that his complaint is primarily a demand for a money judgment and that the prayer for a sale of the thresher should be treated as a request for a specific attachment—a remedy available to a conditional seller. Ark. Stats. 1947, §§ 34-2301 *et seq.* The appellee in turn argues that the complaint is an impermissible attempt to foreclose a conditional sales contract and that, apart from the equitable cause of action for reformation of the notes, the suit is in substance an action in replevin. Upon this premise the appellee invokes the familiar rule that a conditional vendor who replevies the property cannot have judgment for the purchase money as well.

It is unnecessary to determine whether this suit is in effect one for specific attachment or an effort to "foreclose" the contract, for in either event the appellee's position is not well taken. The complaint was specific in asking for relief which the appellee now contends to be without precedent. This asserted defect, however, did not involve a complete want of judicial power. Within the time allowed for answer the defendant was free to raise the objection now urged, thereby either forcing the plaintiff to elect his remedy or preserving the objection as a basis for appeal.

Instead of pleading to the complaint the appellee let the matter go by default. The decree directed that any overplus resulting from the sale be paid to the appellee. It was not until the property had been sold to a third person for an amount less than the debt that the appellee finally appeared in court and sought at the same time to take advantage of that part of the decree which might be construed as an election by the plaintiff and to reject that part of the decree which imposed personal liability on the defendant. "A party cannot ratify and yet repudiate the same transaction in one breath. He must make his election at the outset, to repudiate it *in toto* or take it *cum onere,* and when once made and acted upon, he is

estopped from assuming an attitude inconsistent with his first position and detrimental to the rights of others." *Dismukes* v. *Halpern,* 47 Ark. 317, 1 S. W. 554. Having chosen to remain silent and speculate upon the possibility of deriving a benefit from the decree, the appellee cannot now be permitted to change his position to the plaintiff's prejudice.

Reversed.

SEAMSTER, C. J., not participating.

SCOTT *v.* SHAIRRICK.

5-682 279 S. W. 2d 39

Opinion delivered May 16, 1955.

*Henry B. Means* and *W. H. McClellan,* for appellant.

*Cole & Epperson,* for appellee.

WARD, J. Appellee, James Shairrick, while riding as a guest in an automobile owned and driven by appellant, J. L. Scott, was injured by the alleged willful negligence of appellant in operating the automobile. Suit was filed by appellee, resulting in a jury verdict and a judgment against appellant.

The complaint contained the following material allegations of negligence: On or about the second day of March, 1954, the plaintiff was riding as a guest in an automobile owned and being operated by the defendant, J. L. Scott, who on account of willful negligence, wrecked said automobile and injured the plaintiff; that just prior to the said wreck, the defendant was willfully operating at a high and excessive rate of speed, and willfully whipping in and out of traffic and from one side of the road to the other, and was willfully passing vehicles under extremely dangerous circumstances; and although the plaintiff and others in said car earnestly protested the manner in which the defendant was driving, and made numerous requests that he slow down and get in his proper line of traffic, and warned the defendant that he was going to hurt himself or someone else, the defendant ignored them and continued to operate the automobile in a willful, wanton and careless disregard to the rights of the plaintiff and others; that at the point where the wreck occurred, the defendant was willfully attempting to pass a vehicle traveling in his direction in the face of oncoming traffic and willfully ran his vehicle into a

ditch causing said wreck and personal injuries to the plaintiff.

Appellant's answer was a general denial, contributory negligence on the part of appellee, and that appellee, being a gratuitous guest, was barred from recovery by Ark. Stats., § 75-913 and § 75-915—commonly called the Guest Statutes.

*Testimony.* There is very little conflict in the testimony given by the witnesses for both sides. On March 2, 1954, appellant and appellee together with Milton Van Dusen, Paul Register and C. L. Honold, all single boys in their early twenties, got together in Malvern during the noon hour and arranged to go to the horse races at Hot Springs. They left in appellant's car with appellant driving and arrived at the race track shortly before the races began. Appellee, Van Dusen and Register went into the track while appellant and Honold went to a liquor store nearby where appellant purchased a pint of whiskey and Honold purchased a pint of vodka or gin before they joined the others inside. During the time the races were in progress and between each race all of the boys except appellant drank some beer, perhaps as much as 4 to 6 bottles each during the entire period. Appellant during this time drank the liquor as a mixed drink, perhaps mixed with beer. None of the boys were observed by the others as becoming drunk or unduly under the influence of liquor. After the wreck, however, and after the boys had been taken to different hospitals appellant's doctor testified that he [appellant] was to some extent under the influence of liquor, while appellee's doctor testified that he found nothing to indicate that appellee was under the influence of liquor or that he had drunk any liquor.

After the races were over appellant stayed to cash a ticket on the last race while the other boys went to the car. When appellant returned to the car no one noticed that he was under the influence of intoxicating liquor and they all got in the automobile and started home. Van Dusen and Register were in the front seat with

appellant and appellee and Honold were in the back seat. While they were on a cut-off road that connects with Highway 270 appellant drove across a bridge and around a sharp curve at a speed so great that it prompted Register to ask him to slow down. Soon after they reached Highway 270 appellant drove off onto the shoulder of the highway almost hitting a mailbox, and appellee and Register protested that appellant was driving too fast and asked him to slow down. Further down the highway appellant approached a curve and Register again reminded him to be careful because he (Register) had turned over there once before. As appellant approached the curve he passed a car going in the same direction while a truck was coming in the opposite direction, and appellant in an apparent attempt to avoid a collision ran onto the gravel shoulder of the highway causing the car to skid and turn over, injuring appellee seriously and injuring some of the other boys slightly. Appellee testified that he warned appellant about his fast driving and asked him to slow down more than once but the other boys remembered appellee giving such warning one time only.

*Points relied on by appellant.* Appellant sets out several separate grounds on which he relies for a reversal, but we deem it necessary to discuss at length only three of the assigned grounds, to-wit: (a) The refusal of the trial court to direct a verdict in his favor; (b) Giving appellee's requested Instruction No. 4; and, (c) The refusal of the trial court to set aside the verdict.

(a) At the conclusion of all of the testimony appellant requested the trial court to instruct the jury to return a verdict in his favor, but the court refused to do so. The reason assigned by appellant for asking for an instructed verdict is that "the undisputed evidence shows appellee guilty of negligence in drinking with appellant and riding with him in his condition." This reason and this contention cannot be sustained. In effect this was a plea by appellant of contributory negligence on the part of appellee, yet this very question was, by proper

instructions, submitted to and passed on by the jury. The testimony in this case did not justify the court in holding as a matter of law that appellee was guilty of contributory negligence. The jury was justified in finding that appellee did not know when he entered the car to return to Malvern that appellant was under the influence of liquor. Also it is undisputed that appellee protested one or more times against the manner in which appellant was driving, and that there were other protests—all apparently unheeded by appellant.

Appellant cites *Sparks* v. *Chitwood Motor Company,* 192 Ark. 743, 94 S. W. 2d 359, and *Lewis* v. *Chitwood Motor Company,* 196 Ark. 86, 115 S. W. 2d 1072, where verdicts were directed for the defendants, and he states that they directly govern this case. The facts in both cited cases were very similar but they are readily distinguishable from the facts in this case, as a few excerpts from the opinion in the *Sparks* case will demonstrate. In speaking of the testimony we said: "There was some conflict in the testimony but all of the testimony shows that they were all drinking and the preponderance of the testimony shows that they were all drunk." Again it was pointed out "appellant was bound to know all about it; he knew that Miller was drunk and careless, and according to all of the evidence, acquiesced in it, and made no protest." It was also said: "Of course the guest might not be guilty of negligence simply because he failed to protest. If the occupant of the automobile did what a person of ordinary prudence would have done under the circumstances, he was not guilty of contributory negligence." In the *Lewis* case, *supra,* it was recognized that before the plaintiff would be barred from recovery he must know, or by the exercise of ordinary care should know, "that the driver was intoxicated or under the influence of liquor to such an extent as to make him a careless or incompetent driver." Under the evidence in the case under consideration it was for the jury and not the court to decide the extent of appellee's knowledge concerning the appellant's condition as well as his opportunity for such knowledge.

Appellant cites *Wilson* v. *Holloway,* 212 Ark. 878, 208 S. W. 2d 178, to sustain his assertion that the negligence of appellant should be imputed to appellee. The cited case is not in point because there the occupants of the car were on a joint enterprise and damages were sought against a third party and not against the driver of the car in which they were occupants.

Associated with above contention is the further argument that "the evidence was insufficient to prove willful and wanton negligence as required by the Guest Statutes." It is specifically urged that, under the Guest Statutes, the evidence failed to show willful and wanton negligence on the part of appellant. Appellant says he considers Ark. Stats., § 75-913 and § 75-915 to be synonymous with respect to the conditions of recovery. We agree with this statement since it was similarly so stated in *Steward, Administrator* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901. In the first cited statute, before there can be a recovery, the automobile must be "willfully and wantonly operated in disregard to the rights of others." In the latter statute the "injury shall have been caused by the willful misconduct" of the driver.

It is clear from the evidence in this case that the trial court had no right to declare as a matter of law that appellant's negligence was not of the degree described in the above statutes. The degree of appellant's negligence was therefore a matter to be presented to the jury, as was done here. In *McAllister, Administrator* v. *Calhoun,* 212 Ark. 17, 205 S. W. 2d 40, we quoted with approval from *Splawn, Administratrix* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248: "Whether an automobile is being operated in such a manner as to amount to wanton and willful conduct in disregard of the rights of others must be determined by the facts and circumstances of each individual case." We further stated "the excessive rate of speed at which the car was being driven at a time when war-time driving restrictions were in effect together with the driver's failure to heed the protests of guests, were sufficient, in our opinion, to make a ques-

tion for the jury on the issue of willful and wanton negligence."

It is true, as stated in *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723, that gross negligence is not enough, and, as stated in the *Splawn* case, *supra,* the "grade of negligence should be unusually strong and convincing before the operator can and will be convicted of such."

Under many circumstances it is difficult to draw the line between willful negligence and gross negligence. "To be willfully negligent," as stated in the *Splawn* case, *supra,* "one must be conscious of his conduct, and, although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." Since the testimony here indicates that appellant was driving at an excessive speed under the existing conditions and since it shows that he barely avoided a wreck on two different occasions just previous to the wreck and that he repeatedly ignored warnings to drive more carefully, we are forced to the conclusion that the trial court properly allowed the jury to decide the degree of appellant's negligence.

(b) Appellant strongly insists that it was error for the trial court to give appellee's requested Instruction No. 4. In this instruction the court told the jury in effect that if they found appellant *willfully drove* his car at such speed and in such manner as to contribute to the wreck, it could take that into consideration in determining whether appellant was guilty of *willful misconduct* in the operation of his car. Appellant's specific objection is that the court used the words "willfully drove" when he should have said "willfully and wantonly drove" the car in disregard to the rights of others. We think this objection is not well taken. It will be observed that the gist of the instruction is not the words "willfully drove" but it is the words "willful misconduct," and that the latter words are the exact words used in Ark. Stats., § 75-915. Also in the *Steward* case, *supra,* it was said: "It is hard to see how a person could act

in willful and wanton disregard of the rights of others without being guilty of willful misconduct or vice versa." Under the quoted statement, with which we agree, it appears then that the wording of the instruction objected to by appellant is sufficient to comply with either or both of the Guest Statutes.

(c) It is insisted by appellant that the trial court should have set the verdict aside because of misconduct on the part of the jury. On appellant's motion to set aside the verdict it was contended in effect that the jury obtained [inferentially] information that appellant was protected by insurance, and that he [appellant] knew nothing about it until after the jury had returned its verdict. We have carefully read the record and have concluded that the trial judge did not commit reversible error in refusing to set the verdict aside. According to the testimony of the sheriff, who was the only witness on the motion, the incident complained of was substantially this: After the jury had been charged by the court and after the attorneys had made their arguments, the sheriff in company with several other men, was in a room adjacent to the courtroom. Someone pointed to a certain person and asked the sheriff who he was. It developed that the person inquired about was Herman Lindsey, former Chief of the Arkansas State Police. At that time someone in the group mentioned that he was an insurance adjuster. When the sheriff was asked if all of the members of the jury were in the group he stated "One was. One of them was a member of the jury but who the others were I just really don't recall." The person who identified Lindsey as an insurance adjuster was not a member of the jury but he thought the man who asked about the identity of Lindsey was a member of the jury. He was sure that nothing was said about the appellant being covered with insurance. At the hearing on the motion the attorney for appellant stated that Herman Lindsey was not subpoenaed as a witness for the defendant but that he had been directed to be present and that he was excused from the witness rule and permitted to remain in the courtroom throughout the trial. It was

shown that Lindsey was in and out of the courtroom during the trial, but it was not shown that he sat with or in any way was associated with the defendant or his counsel.

Under the above factual situation it seems unlikely that the jury was in any way prejudiced, or that the trial court abused its discretion in refusing to set aside the verdict. Appellant objects to the court's refusal to allow him to call one of the jurors to testify at the hearing on the motion. The trial court was of course correct. A juror cannot be examined to establish a ground for a new trial unless the alleged ground be that the verdict was arrived at by lot. See Ark. Stats., § 43-2204. Although this statute is digested under title of Criminal Procedure, it has many times been held to apply in civil cases. See *St. Louis, I. M. and S. R. R. Co.* v. *Cantrell,* 37 Ark. 519, 40 Am. Rep. 105; *Griffith* v. *Mosley,* 70 Ark. 244, 67 S. W. 309; *Reiff* v. *Interstate Business Men's Accident Association of Des Moines, Iowa,* 127 Ark. 254, 192 S. W. 216; *Chess & Wymond Company* v. *Wallis,* 134 Ark. 136, 203 S. W. 274; and *Burns* v. *Vaughan,* 216 Ark. 128, 224 S. W. 2d 365, 12 A. L. R. 2d 433.

Appellant makes certain allegations of error on the part of the trial court in giving certain instructions requested by the appellee and in refusing to give certain instructions requested by him. We have carefully read all of the instructions questioned by appellant and find no reversible error. Some of the alleged errors were cured by other instructions given by the court and some have already been disposed of in this opinion.

Affirmed.

Chief Justice SEAMSTER not participating.

ASKEW *v.* MURDOCK ACCEPTANCE CORPORATION.

5-666 279 S. W. 2d 557

Opinion delivered May 16, 1955.

[Rehearing denied June 20, 1955.]

*Tilghman E. Dixon,* for appellant.

*James M. McHaney* and *Owens, Ehrman & McHaney,* for appellee.

ROBINSON, J. Appellant, Jess Askew, filed a suit in the Pulaski Chancery Court against appellee, Murdock Acceptance Corporation, asking that a certain note and mortgage be canceled on the ground that a usurious rate of interest was charged. The property covered by the mortgage is an automobile.

While the cause was pending in Chancery, Murdock filed a replevin suit in the Circuit Court alleging that, under the terms of the mortgage, the Acceptance Corporation was entitled to immediate possession of the automobile so that the car could be sold to satisfy the mortgage.

Askew demurred to the complaint in the Circuit Court, the demurrer alleging that the Circuit Court does not have jurisdiction for the reason that there is an action pending in Chancery between the same parties and involving the same subject matter. The demurrer asked that the complaint in the Circuit Court be dismissed, and

that the automobile taken from Askew on the order of replevin issued by the Circuit Court be restored to him. The Circuit Court overruled the demurrer and Askew has appealed.

The pleadings in the Chancery case were made a part of the record in the Circuit Court. This was done by stipulation. However, appellee did not stipulate that such pleadings were admissible but objected on the ground that they were inadmissible in the hearing on the demurrer in the Circuit Court.

The so-called demurrer should have been treated as a motion to dismiss, and when treated as such, the Chancery pleadings were admissible. The record shows that appellant Askew had filed in the Chancery Court a complaint alleging, *inter alia,* that he had borrowed $1,100 on his 1951 Buick automobile, motor number 63655635 (which is the same automobile involved in the replevin suit in the Circuit Court); that he was required to execute a note in the sum of $1,561.68; that he is the actual owner of the automobile; that his sister, Alice R. Askew, as a matter of accommodation signed the note and mortgage given as a security for the loan; that these facts were fully known to the defendant; and that the loan made by the Murdock Acceptance Corporation to him is usurious and void. The complaint further made the sister, Alice R. Askew, a party defendant, and the plaintiff asks that the note and mortgage be cancelled and that the title to the car be vested in him free of all claims of the defendant.

The record further shows that the plaintiff moved that he be allowed to deposit in the registry of the Chancery Court the monthly payments required by the note, and that the payments be held subject to the order of the court. Undoubtedly, Askew's pleading called a "demurrer" should have been regarded as a motion to dismiss when viewed in the light of the evidence introduced in support of the pleading. The character and sufficiency of a pleading is to be determined, not by what it is called by the pleader, but by the facts which it sets up. *Ran-*

*dolph* v. *Nichol,* 74 Ark. 93, 84 S. W. 1037. Courts regard substance of pleadings rather than form. *Teal* v. *Thompson,* 180 Ark. 63, 20 S. W. 2d 307.

The issues and the parties in both courts are the same. In the Chancery Court, Askew said he owned a certain Buick automobile; that he borrowed some money on the car, but the lender, Murdock, charged a usurious rate of interest; that the note and mortgage given to secure the loan are void and Murdock is not entitled to collect the debt.

In the Circuit Court, Murdock contended that it held a valid mortgage on the Buick automobile; that the payments on the note securing the mortgage were delinquent; and asked that the Acceptance Corporation be given possession of the automobile so that it could be sold under the terms of the mortgage. (This was the very same mortgage the validity of which was at that time an issue between Murdock and Askew in the case pending in the Chancery Court.)

*Wilson* v. *Sanders,* 217 Ark. 326, 230 S. W. 2d 19, is cited as sustaining the ruling that Murdock can maintain the action in the Circuit Court. But, in the Sanders case, the parties were not the same and the issues were not the same. Moreover, the second suit was filed in the same court where the first suit was pending. In the first suit, Wilson was plaintiff and some Improvement Districts were defendants. During the pendency of the litigation, Sanders acquired some kind of title to the property involved. The Wilson suit had been lying dormant in the Chancery Court for three years; no answer had been filed and no issue joined. There was no showing that a final determination in the suit of Wilson against the Improvement Districts would have concluded the issue between Sanders and Wilson. In the case at bar, the Chancery Court had authority to make whatever orders that were necessary to protect properly the interests of the parties during the pendency of the litigation, and a final determination of that cause could have completely settled the issue raised in the Circuit Court.

Appellee also relies on *Garibaldi* v. *Wright,* 52 Ark. 416, 12 S. W. 875, as sustaining the view that the case could proceed in the Circuit Court although the automobile about which the suits were brought was the same in both cases. In the Garibaldi case, the court held that a conversion suit regarding property which was in litigation in the Chancery Court did not have to be litigated in Chancery. However, subsequent to the Garibaldi case, in *Chicot Lumber Company* v. *Dardell,* 84 Ark. 140, 104 S. W. 1100, it is held that the legal issue of conversion may be adjudicated in equity where the Chancery Court has properly taken jurisdiction for any purpose.

The principle that the Chancery Court, having taken jurisdiction for any purpose, will completely settle the rights of the parties in the subject matter of the controversy is so firmly established that it needs no citations of authority. However, a few of the cases so holding are: *McDonald* v. *Shaw,* 92 Ark. 15, 121 S. W. 935, 28 L. R. A., N. S. 657; *Jarratt* v. *Langston,* 99 Ark. 438, 138 S. W. 1003; *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A., N. S. 782; *School District No. 36* v. *Gladish,* 111 Ark. 329, 163 S. W. 1194; *Hall* v. *Huff,* 114 Ark. 206, 169 S. W. 792. Also, damages may be allowed. *Evans* v. *Pettus,* 112 Ark. 572, 166 S. W. 955.

Undoubtedly, the Chancery Court had jurisdiction to completely settle the rights of the parties. It being determined beyond any question that the Chancery Court had such jurisdiction, the question that necessarily follows is: did the Circuit Court commit error in assuming jurisdiction in the circumstances?

The appellee cites authorities on the subject of abatement as sustaining the view that the Circuit Court case is not abated by reason of the pendency of the action in Chancery. This is not a question of abatement, but one of comity between courts. In 14 Am. Jur. 435, it is said:

"It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues, subject only to

the appellate authority, until the matter is finally and completely disposed of, and that no court of co-ordinate authority is at liberty to interfere with its action. This doctrine is applicable to civil cases, to criminal prosecutions, and to courts-martial. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely."

On page 438 of the same volume, it is said:

*"It simply demands as a matter of necessity, and therefore of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draw to itself the exclusive right to dispose of it for the purposes of its jurisdiction."*

In 14 Am. Jur. 439, it is said:

*"Where the pendency of a suit in one court is relied on to defeat a second suit in another court of concurrent jurisdiction, the identity of the parties, of the case made, and of the relief sought should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication."*

That is exactly the situation we have here. If Askew had prevailed in the Chancery case on his allegation of usury, it could have been pleaded as a complete defense in the Circuit Court in the suit filed there by Murdock.

In 21 C. J. S. 745, it is said:

"Where two actions between the same parties on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains

its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action. This rule rests on comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Among the authorities for the text, C. J. S. cites the following cases: *Wasson, Bank Commissioner* v. *Dodge, Chancellor,* 192 Ark. 728, 94 S. W. 2d 720; *Moore* v. *Price,* 189 Ark. 117, 70 S. W. 2d 563; *Davis* v. *Lawhon,* 186 Ark. 51, 52 S. W. 2d 887; *Wright* v. *LeCroy,* 184 Ark. 837, 44 S. W. 2d 355; *Vaughan* v. *Hill,* 154 Ark. 528, 242 S. W. 826. These cases clearly point out that Circuit Courts and Chancery Courts are of equal dignity, and in cases where there is concurrent jurisdiction, the court that first acquires jurisdiction has the right and jurisdiction to conduct the matter to an end without interference by another court of equal dignity.

And, in *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467, Mr. Justice HART said:

"While these remedies are concurrent, it must not be understood that concurrent remedies may be pursued concurrently. Mr. Works say: 'Where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgment or decree.' Works on Courts and Their Jurisdiction, § 17.

"Mr. Bailey says: 'In the distribution of powers among courts it frequently happens that jurisdiction of the same subject-matter is given to different courts. Conflict and confusion would inevitably result unless some rule was adopted to prevent or avoid it. Therefore it has been wisely and uniformly determined that whichever court, of those having jurisdiction, first obtains jurisdiction, or, as is sometimes said, possession

of the cause, will retain throughout, to the exclusion of another; and this jurisdiction extends to the execution of the judgment.' 1 Bailey on Jurisdiction, § 77.

"The Supreme Court of the United States says that this proposition is firmly established. 'When a State court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.' *Harkrader* v. *Wadley,* 172 U. S. 148."

Reversed, with directions to issue orders not inconsistent herewith.

Mr. Justice Holt dissents; Mr. Justice George Rose Smith concurs.

Chief Justice Seamster not participating.

J. Seaborn Holt, J., (dissenting). June 30, 1953, Alice R. Askew, sister of appellant, Jess Askew, executed a note in favor of appellee, Murdock Acceptance Corporation, for $1,561.68, in monthly payments, and as security, executed a chattel mortgage on a 1951 Buick automobile, which Alice had purchased about a year earlier, from Little Rock Motor Company. It appears that this original purchase of the car by Alice had been financed by Associated Discount Corporation, and the proceeds from the loan from appellee, Murdock, above, were used to pay off this earlier debt of Alice Askew, and title to the Buick was in her at all times. Jess Askew, as indicated, was not a party to the above note and mortgage.

On November 15, 1954 Jess Askew brought suit against Murdock (Appellee) and his sister, Alice Askew, alleging in effect that the above note and mortgage should be cancelled on the grounds of usury, and title to the Buick car should be vested in him. December 6, 1954 appellant (Askew) filed a motion asking for "an order permitting him to make the payment on the car involved in this action to the Clerk of this Court and that the

Clerk of the Court hold same in the registry of the court during the pendency of this action and that the defendant be restrained from molesting or harassing plaintiff and his sister Alice R. Askew during the pendency of this action (Tr. 14)." The court denied this motion, on the day filed, and also on this same day, Murdock (Appellee) filed in the Pulaski Circuit Court an action in replevin against Jess Askew to gain summary possession of the Buick auto. Alice Askew was not made a party in this suit but she was a party to the usury suit filed by Jess Askew. Appellee, Murdock, in his complaint alleged: "On or about June 30, 1953, Alice R. Askew executed a note in favor of the plaintiff in the sum of One Thousand Five Hundred Sixty-one and 68/100 Dollars ($1,561.68), payable in twenty-four (24) monthly installments of Sixty-five and 07/100 Dollars ($65.07) each. Said note was secured by a chattel mortgage of the same date conveying to plaintiff a 1951 Buick, two door sedan, motor number 63655635, a certified copy of which is attached hereto and made a part hereof. The said Alice R. Askew was, at the time of execution of the aforesaid mortgage, the registered owner of said automobile, same having been purchased by her from Little Rock Motor Company in March, 1952. The proceeds of the aforesaid loan were used, exclusively, to pay off an indebtedness of the said Alice R. Askew to Associated Discounts Corporation of Little Rock, which said indebtedness was incurred as a result of the purchase of the aforesaid automobile by the said Alice R. Askew.

"The said Alice R. Askew is indebted to plaintiff on said note and chattel mortgage in the sum of Five Hundred Eighty-five and 63/100 Dollars ($585.63), which is now due and unpaid, and, although demand has been made therefor, payment has been refused.

"The property is of the value of Five Hundred Eighty-five and 63-100 Dollars ($585.63).

"The plaintiff is entitled to the immediate possession of said automobile by reason of the aforesaid default, said automobile is now in the possession of

defendant, the brother of Alice R. Askew, and is unlawfully detained by him under a false claim of ownership. Said Alice R. Askew has consented that the plaintiff may have possession of said automobile but the defendant refuses to surrender same . . ."

Murdock posted the statutory bond, the replevin writ was issued, and the car delivered to Murdock. Thereafter, Jess Askew filed a demurrer alleging that:

"DEMURRER

"Comes the defendant, Jess Askew, and for his demurrer to the complaint of the plaintiff herein, states:

"That this court does not have jurisdiction of this cause of action for the reason that there is another action pending between the same parties for the same cause and same subject matter, said action is pending in the Chancery Court of Pulaski County by the style of JESS ASKEW vs. MURDOCK ACCEPTANCE CORPORATION, NO. 101309, said suit being filed and summons issued on November 15, 1954, that in said suit the title to the car involved in this action and the right of possession to same is involved and can be fully determined in the Chancery Court in the suit pending therein.

"That this court should dismiss the complaint of the plaintiff and should order plaintiff to immediately restore said car to the possession of defendant. . ."

The court overruled the demurrer, whereupon appellant (Askew) refused to plead further and the court then entered judgment for Murdock for possession of the car and Murdock together with its surety were discharged from liability under the replevin bond. This appeal followed.

For reversal appellant stoutly contends that: "The Circuit Court erred in overruling the demurrer of the defendant and in rendering judgment against the defendant because the Circuit Court did not have jurisdiction of this cause of action for the reason that there was and is another action pending in the Chancery Court of

Pulaski County between the same parties for the same cause and involving the same subject matter, prior to and still pending at the time this action was filed in the Circuit Court of Pulaski County."

I think this contention is untenable in the circumstances. Our rule is that a complaint is subject to demurrer only for defects apparent on its face. § 27-1115, Ark. Stats. 1947, provides:

"Demurrer to complaint—Grounds.—The defendant may demur to the complaint where it appears on its face, either:

"First. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or, Second. That the plaintiff has not legal capacity to sue; or, Third. That there is another action pending between the same parties for the same cause; or, Fourth. That there is a defect of parties, plaintiff or defendant; or, Fifth. That the complaint does not state facts sufficient to constitute a cause of action. (Civil Code, § 111; C. & M. Dig., § 1189; Pope's Dig., § 1411.)" Ordinarily jurisdiction in the statutory action of replevin is in the circuit court, (§ 34-2101, et seq., Ark. Stats.). Here on the face of appellee's complaint I find none of the above grounds that would support a demurrer. The parties in the usury suit (equity) and those in the replevin suit (law) are not the same. Alice Askew was a party to the former suit but was not a party in the latter. In the replevin suit default in monthly payments by Alice Askew under the terms of the note and mortgage which she alone signed was alleged, and this default, if true, gave appellee the right to summary possession of the Buick car in a court of law. What we said in the recent case of *Wilson* v. *Sanders,* 217 Ark. 326, 230 S. W. 2d 19, relating to the above statute (§ 27-1115, Ark. Stats. 1947), applies with equal force here. "It is also urged by the appellee that the issues in the two cases are not the same. This contention is well taken. What the statute requires is that the two suits be 'for the same cause,' and our decisions have enforced this requirement. In *Garabaldi*

v. *Wright,* 52 Ark. 416, 12 S. W. 875 one partner sued the other for a dissolution of the partnership and a settlement of their affairs. The defendant later sued the plaintiff in a different court for conversion of part of the property involved in the first case. In stressing the need for an identity of issues we said: 'If the objects of two suits are different, they may progress at the same time, although the thing about, or in reference to which, they are brought, is the same in each case.' ''

The general rule is stated in 1 Am. Jur., § 30, Page 37: ''It does not necessarily follow from the mere fact that the same property is in controversy in both actions or that the same right or title is involved, that the prior action can be pleaded in abatement of the second one; it is necessary that the cause of action be the same in both suits.''

Appellant refused to plead further and elected to stand on his demurrer, which was in effect a speaking demurrer. *Dodson* v. *Abercrombie,* 218 Ark. 50, 234 S. W. 2d 30. He made no motion to transfer to equity. ''Under the code of practice, if a party commit an error in the kind of proceedings adopted, he may change and have the same transferred to the proper docket, either before answer filed, without motion, or after, on motion; but the court is not bound to make the transfer unless asked to do so by the party desiring it.'' *Berry, Adm'x, et al.* v. *Hardin, et al.,* 28 Ark. 458, Headnote 2.

I would affirm the judgment.

UNIVERSAL C. I. T. CREDIT CORPORATION *v.* HALL.

5-678 279 S. W. 2d 281

Opinion delivered May 23, 1955.

*M. P. Matheney* and *Wright, Harrison, Lindsey & Upton,* for appellant.

*Stein & Stein,* for appellee.

J. Seaborn Holt, J. This is another case involving usury pleaded under a conditional sales contract.

March 27, 1952, prior to June 30, 1952, the date on which our decision in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, became final, appellee Hall, purchased a Dodge pickup truck from the Green-Mouton Motor Company in El Dorado, Arkansas. The invoice to appellee recited:

| | |
|---|---|
| "The selling price of 1948 Dodge pickup | $695.00 |
| "Less: Trade-in allowance of 1941 Chevrolet | 245.00 |
| "Balance | 450.00 |
| "18 Months Insurance | 112.48 |
| "Service Charge | 56.87 |
| "Total Contract | $619.35" |

A conditional sales contract was executed by appellee on the above date (March 27, 1952) in favor of Green-Mouton which recited a "Time Balance" of $619.35, and provided for fifteen monthly payments of $41.27 each. This contract was duly assigned by Green-Mouton to appellant, Universal C. I. T. Corporation.

Appellee, after having made the payments for April, May and June of 1952 defaulted and brought the present suit in which he sought to cancel the contract for usury, and to recover the three monthly payments which he made on the contract. Appellant's answer was a denial

of every material allegation in the complaint not specifically admitted. The trial court found the contract usurious and ordered its cancellation but refused appellee's claim for a refund of the three payments on the ground that they were voluntarily made. From the decree is this appeal.

It is undisputed that the sales contract recited the price of the truck to be $695.00 and, after deducting $245.00 allowed on a trade-in, left a balance of $450.00. To this balance was added $169.35 (making a total of $619.35) to cover interest, insurance purchased by appellee, and certain service charges under a finance plan including bail bond and credit identification. This $619.35 was described in the contract as the "Time Balance" and in the invoice above as "Total Contract."

While some of the items charged against appellee Hall might have been considered usurious under our holding in the Hare case above, however, such items were permitted under many of our cases governing transactions made before the opinion in the Hare case became final. The present case is controlled by our holding in the recent case of *Crisco* v. *Murdock Acceptance Corporation,* 222 Ark. 127, 258 S. W. 2d 551, which case we reaffirmed in *Universal C. I. T. Credit Corporation* v. *Crossley,* 222 Ark. 200, 258 S. W. 2d 562.

Accordingly the decree is reversed, and the cause remanded with directions to enter a decree consistent with this opinion.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* SHANE, ADMINISTRATRIX.

5-685 279 S. W. 2d 284

Opinion delivered May 23, 1955.

*Hardin, Barton, Hardin & Garner,* for appellant.

*Shaw, Jones & Shaw* and *Shaw & Spencer,* for appellee.

J. Seaborn Holt, J. Appellee, as Administratrix of the estate of her deceased husband, sued appellant for damages in the amount of $151,000, for his death which resulted when a one-half ton auto truck he was driving was struck by one of appellant's freight trains on a public crossing in Mena, Arkansas. She alleged in her complaint that the negligent acts of appellant were: (1) Failure, while approaching the crossing, to keep a lookout, (2) Failure to ring the bell or blow the whistle as required by § 73-716, Ark. Stats. (1947), (3) Running the train at an excessive speed, (4) Failure to keep the crossing, which was hazardous, in a safe condition, and (5) Failure to provide signal warning devices, or a watchman at this "particular" crossing. Appellant's answer was in effect a general denial, and in addition contained the affirmative plea of deceased's contributory negligence, as a complete bar to any recovery.

A jury trial resulted in a verdict for appellee in the amount of $9,000 and it is not claimed that this verdict is excessive. From the judgment is this appeal.

For reversal appellant first argues that the court erred in giving, over its objections, appellee's Instruction No. 1 submitting the issue of failure of appellant's employees to keep a lookout as required under § 73-1002, Ark. Stats. (1947), and that the court erred in refusing to give appellant's requested Instruction No. 11 which was in effect peremptory.

After review of the record presented, we have reached the conclusion that this contention of appellant must be sustained. Appellee's Instruction No. 1 provides: "You are instructed that Section 73-1002 of the Revised Statutes of Arkansas for 1947 provides in part as follows:

"'*Duty of trainmen to keep lookout — Burden of proof of reasonable care.*—It shall be the duty of all persons running trains in this state upon any railroad, to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad, shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout.'

"In this connection, therefore, you are instructed that under the law of this state, the persons running the train of the defendant, Kansas City Southern Railroad Company, were under a duty to keep a constant lookout for persons and property upon the track or approaching said track, and if the person or persons running said train failed to keep such lookout and such failure, if any, resulted in the death of the deceased, Charles D. Shane, then the defendant Kansas City Southern Railway Company would be liable to the plaintiff for all damages to the plaintiff resulting from such neglect, if any, to keep such lookout."

Appellant's requested Instruction No. 11 provides: "You are instructed that the plaintiff has failed to prove, by a preponderance of the evidence in the case, her allegation that the defendant failed to maintain and keep a

constant lookout at the railroad crossing at the junction of Reine Street and U. S. Highway 71, and as to that allegation of negligence, your finding must be for the defendants."

The collision in question occurred about 6:45 p. m., November 28, 1953, on a dark, misty night. The deceased was driving a one-half ton truck east along Reine Street and was struck by appellant's northbound freight train on the Reine Street public crossing. Appellant's engineer who was operating the engine of the freight train testified in effect that he had been acting as an engineer for appellant for about thirteen years. The engine had four diesel units of the General Motors type, weighing about 900,000 pounds with a modern headlight of 32,000 candlepower which was ten feet, nine and one-half inches above the rails. You could distinguish an object (such as a man) about 800 feet and larger objects further than that depending on weather conditions. On the night in question he had a good headlight beam of about 600 feet from the end of the curve up to the crossing. His train consisted of fourteen loaded cars, four empties, and a caboose, and was going at a speed of about forty-five miles per hour, a speed he was required to make. As he approached the crossing in question he saw the headlights of the truck approaching the crossing when it was about 150 feet away going east. He immediately made an emergency application of the brakes. His brakes were working perfectly and responded promptly to his application. When the truck was about fifty feet from the crossing its driver, Mr. Shane, seemed to try to stop it but the pavement was wet and the truck skidded to the side upon the crossing almost sidewise. It required a distance of about 1,350 feet to stop the train and he stopped it as quickly as possible in the circumstances. He was passing through a cut about seven feet wide at its highest point and from his seat on the right side of the engine he was about thirteen feet above the rails. Two other employees, a brakeman and the fireman, were sitting on the seat beside him and their testimony tends to fully corroborate this engineer's tes-

timony. These three employees were the only eye-witnesses to the collision. A witness had testified that he thought the truck could have been seen by the appellant's operatives, when the train was approximately 258 feet away, for a distance of about 225 feet from the crossing. This difference between 150 and 225 feet as to the distance is not of material importance here in the circumstances because the physical facts show that this train could not have been stopped in time to have avoided the collision had the truck been discovered 225 feet away. In fact 1,350 feet was required in which to stop it.

As we read the evidence presented, the uncontradicted testimony shows that the operatives of appellant's train were keeping the lookout required by the lookout statute above, and, therefore, this issue should not have been submitted to the jury there being no evidence to support it.

In construing § 73-1002 above our rule appears to be well settled that where an injury is caused by the operation of a railway train a *prima facie* case of negligence is made against the company operating such train and the burden rests on the company to show that it was not guilty of negligence. The effect of the statutory presumption created by the lookout statute above has been construed many times by this court and its legal effect well settled by our decisions. In *St. Louis-San Francisco Railway Company* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992, this court said: "The Supreme Court of the United States recently said, in construing a statute similar to the Arkansas statute: 'The only legal effect of this inference is to cast upon the railway company the duty of producing some evidence to the contrary. When this is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence.' *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884.

"After the introduction of evidence by the railroad company, as we have already said, the inference is at an end. It cannot be considered by the jury as evidence. . . .

"Under the construction placed upon statutes like ours, the presumption of negligence is at an end when the railroad company introduces evidence to contradict it, and the presumption cannot be considered with the other evidence, because to do this would, as stated by the Supreme Court of the United States, be unreasonable and arbitrary, and would violate the due process clause of the 14th Amendment. . . .

"The duty of the railroad to take precautions begins when it discovers, or should have discovered, the peril of the traveler. . . .

"The jury could not arbitrarily disregard the testimony of the engineer and fireman. *St. L. I. M. & S. R. Co.* v. *Landers,* 67 Ark. 514, 55 S. W. 940.

" 'The public interest requires that trains be run on time and that railroads dispatch their business promptly.' *Davis* v. *Porter,* 153 Ark. 375, 240 S. W. 1077."

The record reveals that appellee requested no instruction on the alleged negligence of appellant in failing to give the statutory signals (ringing the bell or blowing the whistle) required under § 73-716, Ark. Stats. (1947) and none was given. He also did not request any instruction on the issue of the alleged negligent speed of the train and none was given. The court did, however, give appellee's requested instructions on the issue as to the alleged hazardous condition of the crossing such as might require a "watchman, gongs, lights, or similar warning devices" and on the issue of the alleged negligence of appellant in failing to keep the right-of-way free of view obstructing objects. The jury, therefore, was not given an opportunity to pass on the issues as to warning signals and excessive speed.

We, therefore, reverse for the error above, and we remand the cause for a new trial. Our rule in reversing a law case is to remand the case for a new trial unless there be an affirmative showing that there can be no recovery. See *Fidelity Mutual Life Insurance Company* v. *Beck,* 84 Ark. 57, 104 S. W. 533, 1102.

In view of a new trial we think it only fair to point out that we find no abuse of the trial court's discretion in refusing to admit in evidence certain photographs offered by appellant which were taken some eleven months after the collision. Accordingly, the judgment is reversed and the cause remanded for a new trial.

Justice MILLWEE dissents.

KEITH *v.* ARKANSAS STATE HIGHWAY COMMISSION.

5-661, 5-689 (consolidated) 279 S. W. 2d 292

Opinion delivered May 23, 1955.

*Moore, Burrow, Chowning & Mitchell,* for appellant.

*W. R. Thrasher, Lawson E. Glover* and *Cole & Epperson,* for appellee.

ED. F. MCFADDIN, Justice. Two appeals, consolidated in this Court, stem from the efforts of certain property owners (hereinafter called "appellants") to

enjoin the City of Malvern (hereinafter called "City") and the Arkansas State Highway Commission (hereinafter called "Commission"), from constructing a viaduct over certain railroad tracks in the City.

In January, 1954, the City[1] adopted its Ordinance No. 494 captioned:

"An ordinance accepting the responsibility and liability for furnishing all required right-of-way free of obstructions and free of property damage for a grade separation (viaduct) on U. S. Highway 270 and Main Street over the Missouri Pacific and Rock Island Railroad Tracks in the City of Malvern, Arkansas."

The ordinance stated, *inter alia,* that the Commission had agreed to construct the overpass at a cost of approximately $600,000.00 if the City would adopt and fulfill the provisions of the said ordinance, which included the matters mentioned in the caption.

In keeping with the ordinance, the City on November 27, 1954, filed its complaint in the Circuit Court of Hot Spring County attempting to name as defendants all[2] of the property owners whose property abutted on the street in the area affected by the overpass. The action was a proceeding in eminent domain. The complaint alleged, *inter alia*:

"That a portion of said viaduct and an approach thereto will be in that portion of Main Street adjacent to the lands described in paragraphs IV and V hereof, but not actually, physically touching any lands belonging to any of the defendants. Some or all of said property owners are claiming that the proposed construction

[1] We judicially know that the City of Malvern is a City of the first class and is the County seat of Hot Spring County, Arkansas. *Lyman* v. *State,* 90 Ark. 596, 119 S. W. 1116.

[2] An amendment was filed to the complaint on December 6, 1954, adding other defendants and property in a further effort to join all parties. This amendment was before any order had been made in the two cases here appealed. All of the appellants in this Court are parties in the *eminent domain* proceedings.

and grade separation will damage their respective lands, and constitute a technical taking of a portion."[3]

Instead of filing a pleading in the eminent domain case in the Hot Spring Circuit Court the appellants, on December 3, 1954, filed complaint in the *Pulaski Chancery Court,* naming as defendants the Commission and the City, and alleging that the appellants' properties would be damaged in a sum aggregating $70,000.00. The complaint alleged, *inter alia*:

". . . that the plaintiffs have not been compensated by the defendant City of Malvern or the Arkansas State Highway Commission for the taking and damaging of their property for public use; that the City of Malvern is without legal authority and without necessary or sufficient funds legally available or appropriated to compensate the plaintiffs; . . . that defendant Arkansas State Highway Commission has advertised for sealed bids from contractors for the construction of said overpass viaduct, to be submitted and opened by said defendant on December 9, 1954, and unless restrained and enjoined by this Court will enter into a contract with a private contractor for the construction and will go forward with the construction of said overpass viaduct, to the irreparable damage to the plaintiffs and each of them; that the plaintiffs have no adequate remedy at law."[4]

---

[3] The prayer of the complaint was: "WHEREFORE, Premises Considered, Plaintiff prays that the Court determine in which instances, if any, the proposed improvement constitutes the taking of the respective defendants property; and in such instances in which it is found that said improvement does constitute a taking, that the court determine by a proper proceeding the amount of damages, if any, due therefor, and enter proper judgment against the plaintiff accordingly."

[4] The prayer of the complaint was: "Wherefore, Plaintiffs and each of them pray that this Court issue a restraining order restraining and enjoining the defendants and each of them from proceeding further or taking any further action toward contracting for the construction of said overpass viaduct or the approaches thereto, or constructing same, until the issues in this cause have been heard and finally determined and until the plaintiffs and each of them have been fully compensated in damages as by law in such cases made and provided; and for costs herein expended, and all other relief, equitable and legal, to which they may be entitled."

On December 7, 1954, the Pulaski Chancery Court temporarily enjoined the Commission from letting a contract; but quashed service on the City and refused to enjoin the City. From such order the appellants have appealed. (See § 27-2102, Ark. Stats.) Even if the service of process on the City had been sustained, nevertheless the Pulaski Chancery Court had discretion as to temporarily enjoining the City. The temporary restraining order against the Commission prevented the letting of any contract. The City was left free—as it should have been—to proceed with its eminent domain case in the Hot Spring Circuit Court. The Pulaski Chancery Court did not abuse its discretion in refusing, on December 7, 1954, to issue a temporary restraining order against the City even if the City had been properly summoned.

Case No. 689 in this Court involves further proceedings in the Pulaski Chancery Court. As aforesaid, an order was made on December 7, 1954, temporarily restraining the Commission.[5] The City, being unrestrained by the Pulaski Chancery Court, proceeded in its eminent domain case in the Hot Spring Circuit Court. Appraisers were appointed to appraise the property damage of the appellants and of other abutting property owners. The City deposited in the Hot Spring Circuit Court the sum of $21,505.00 to cover such damages; and this was an amount in excess of the total of all appraised damages. Thereupon the Hot Spring Circuit Court issued an order of immediate possession to the City (see § 35-902, Ark. Stats.). This order, reciting the deposit of $21,505.00, was made by the Hot Spring Circuit Court on January 8, 1955; and all this was made to appear to the Pulaski Chancery Court in the motion filed by the

[5] This order recited: "Defendant, Arkansas State Highway Commission be and it is hereby restrained and enjoined from proceeding further or taking any further action toward contracting for the construction or constructing of an overpass viaduct in the City of Malvern until the issues in this cause have been heard and finally determined and the Court hereby fixes the 12th day of Jan., 1955, at 10:00 A.M. as the day certain at which the causes here presented shall be heard finally."

State Highway Commission for dissolution of the temporary restraining order.[6]

On January 24, 1955, the Pulaski Chancery Court dissolved the temporary restraining order of December 7, 1954, thus leaving the State Highway Commission free to proceed. From such order of January 24, 1955, dissolving the temporary restraining order, the appellants have appealed to this Court in this Case No. 689; and the appellants claim, *inter alia,* that the temporary restraining order should have remained in force. An order dissolving a temporary restraining order is appealable (see § 27-2102, Ark. Stats.); but the test is whether the Trial Court abused its discretion in dissolving the restraining order. See *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26.

We see no abuse of discretion in the case at bar. In the original complaint the appellants alleged that the City was without funds to pay the damages that the appellants' property would sustain. That was a good ground of equity jurisdiction. See *Fordyce* v. *Dallas County,* 195 Ark. 552, 113 S. W. 2d 500. To allow private property to be taken, appropriated or damaged for public use, without just compensation would be a violation of the Constitutional guaranties. (See Art. II, § 22, of the Arkansas Constitution.) So the temporary restraining order of December 7, 1954, against the Highway Commission was proper. But by the time of the hearing on January 24, 1955, the Hot Spring Circuit Court had required a deposit far in excess of the appraised valuation of damages. The Statute provides for deposit prior to

[6] The said motion recites in part: "That since the granting of the temporary restraining order in this case the City of Malvern has proceeded with its condemnation proceedings in the Circuit Court of Hot Spring County. That on the 8th day of January, 1955, the Circuit Court of Hot Spring County entered an order condemning said property for this right of way easement and that a sufficient and adequate sum of money was deposited in the Registry of the Court to secure these plaintiffs the payment for any property or damages resulting to them by reason of the construction of this viaduct. A certified copy of said order is attached hereto and made a part hereof and marked Exhibit 2. Further Orders were entered by the Court on the same day, certified copies of which are hereby attached and made a part hereof and marked Exhibits 3 and 4. That the Circuit Court of Hot Spring County has jurisdiction of this subject-matter and that the plaintiffs have a complete and adequate remedy at law and that their complaint should be dismissed."

entry. (Section 35-902, Ark. Stats.) Such was done in the Hot Spring Circuit Court; so there was no reason for any restraining order against the Highway Commission on January 24, 1955, after it was shown that the City had made deposit in the eminent domain proceedings.

Therefore the Pulaski Chancery Court was correct in dismissing the temporary restraining order on January 24, 1955. Any further relief that the appellants may seek against the City of Malvern must be in the proper forum in Hot Spring County. See *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58; and *Burton* v. *Ward,* 218 Ark. 253, 236 S. W. 2d 65.

Affirmed.

JOHNSON *v.* WERT.

5-676 279 S. W. 2d 274

Opinion delivered May 23, 1955.

*Johnston & Rowell,* for appellant.

*Gordon & Gordon,* for appellee.

MINOR W. MILLWEE, Justice. Appellant instituted this action against appellees, directors of East Side School District No. 5 of Conway County, to recover dam-

ages for the breach of an alleged contract of employment as superintendent of schools of said district. This appeal is from the action of the trial court in directing a verdict in favor of appellees at the conclusion of the testimony on behalf of the appellant.

According to the evidence appellant had been employed as superintendent by the district under written contract which was to expire June 30, 1953. At a regular meeting of the five-member board of directors on Friday night, February 27, 1953, a motion was made to re-hire appellant as superintendent for a period of two years. After discussion for two hours the motion carried by a vote of three to one with Directors Lee Wert, Carl Odom and Samuel Criswell voting in the affirmative and E. L. Brewer voting in the negative. Rupert Hemphill, president of the board, did not vote. Appellant was not present during the discussion and nothing was said about salary or other contract provisions except there was some objection about appellant's failure to visit the Ward schools and talk of placing a clause in the contract to make him "do right." After the vote was taken appellant was notified and he thanked the board for their action on the motion.

On Saturday night, February 28, Director Criswell went to appellant and asked him to resign. He told appellant that the patrons of the district were "on him" about his vote the night before and that he could not stay with appellant. On Sunday, March 1, Criswell together with his father and another patron again talked to appellant and asked him to resign but appellant declined. On Monday, March 2, appellant went by the office of the County School Supervisor and had a secretary in the office prepare a contract on a regular form prescribed by the State Board of Education and which contained blank spaces for the signature of appellant and the president and secretary of the board of directors. The proposed contract provided a salary of $325 per month for the new two-year term and other provisions similar to the former contract except that the following clause in the old contract was omitted: "Other Conditions: It is

understood if the work is not satisfactory, this contract may be cancelled on 30 days notice by the board." Appellant signed the proposed contract and took it to the home of Carl Odom, secretary of the board, about 7 p. m. and obtained Odom's signature. He did not advise Odom of Criswell's request that he resign and he knew that Brewer and Hemphill were opposed to his reëmployment as superintendent.

On March 3, 1953, Hemphill, Brewer and Criswell signed and mailed notices to the other two directors of a call meeting of the board to be held March 6 to reconsider the election of the superintendent. At said meeting attended by all members and appellant the minutes of the previous meeting were read and disapproved as to the rehiring of appellant. On motion by Criswell, duly seconded, to rescind the board's action of February 27, Criswell and Brewer voted in favor of the motion and Wert and Odom against it. President Hemphill then broke the tie by voting for the motion. Prior to taking the vote there was considerable discussion by interested patrons and board members. When Criswell was questioned about his change of position he stated that this had been explained to appellant, that, politics was involved in the schools as in other matters, and that there was nothing either he or the appellant could do about it. There was also some discussion concerning the objection by certain patrons to the nature of certain teachings in a course taught by appellant on health or sex.

President Hemphill refused to sign the contract and appellant never presented it to him until several weeks after the board meeting on March 6. Pursuant to action taken at a regular board meeting on March 28, the president and secretary mailed to appellant a notice of the action taken on March 6, and that his services would not be needed after June 30, 1953. Appellant presented the contract to the board on April 27, 1953, when its execution was again declined. Hemphill, Criswell and Brewer were reëlected directors in the school election on March 15, 1953, and Wert was defeated. Odom resigned and did not seek reëlection.

In sustaining appellees' motion for a directed verdict on the ground that the testimony offered by appellant was insufficient to establish a valid contract of employment between the parties, the trial court said:

"The evidence in this case shows that at a meeting had on February 27, 1953, the Board at that time by a majority vote announced to the plaintiff, Johnson, that it had reëlected him for the position as superintendent of East Side School District No. 5 for a period of two years. His school year for which he had already been elected would have expired at the end of June 1953. Under the law in effect in this state, it is required that all contracts of employment of teachers be in writing. So, the court would hold that the action of the Board on February 27, 1953, in which by a majority vote they stated to Johnson they would employ him for a period of two years, did not of itself constitute a valid contract, in that subsequent to that time there must have been entered between the parties by mutual consent and understanding a written contract of employment, because the law requires that it be done."

The court further found that the action of the board on February 27, 1953, was only tentative and ineffective to bind it in the absence of proper authority in Odom to do so alone; and that on March 6, 1953, the board rescinded its original action prior to the execution of a binding contract in conformity with the law.

Appellant contends that under the testimony a jury question was made as to whether a valid written contract of employment was fully executed by the board's action on February 27, 1953; that such action amounted to a substantial compliance with the statutory requirement of a written contract; and that the validity of the agreement entered into on February 27 was unaffected by the subsequent refusal of the president or a majority of the board members to sign or approve such agreement. We cannot agree with these contentions. Most of the cases cited by appellant involve the elements of ratification or estoppel where a contract, invalid in its inception, is

subsequently ratified by the district accepting the benefits of the teacher's services. These elements are not present here. In other cases cited either a majority of the board or its president and secretary joined in the actual execution of the written contract.

The discretion of school boards in respect to the making of employment contracts with teachers is very broad. Ordinarily the board has the absolute right to decline to employ or reëmploy any applicant for any reason whatever or for no reason at all. 47 Am. Jur., Schools, § 114. Under Ark. Stats., § 80-509(d), the board of directors is empowered to make written contracts with teachers and other employees, "in the form prescribed by the State Board of Education." Section 80-1304(b) provides that every teacher in the state, "shall be employed by written contract." Section 80-1306(a) provides that if the board does not make contracts in accordance with this and other statutory requirements, the County Superintendent shall notify the County Treasurer of the invalidity of such contracts and the latter shall refuse payment of any warrants issued thereon. In *Bald Knob Special School Dist.* v. *McDonald,* 171 Ark. 72, 283 S. W. 22, we held the requirement of a similar statute that employment be by written contract to be mandatory and not merely directory as appellant contends. This holding conforms to the general rule that compliance with the formal requisites prescribed by statute is essential to the validity of a teacher's or superintendent's contract except insofar as the statutory requirements are directory only. 78 C. J. S., Schools and School Districts, § 189.

It is also well settled that in order to be entitled to recover compensation, a teacher must have been appointed or elected to the position for which it is sought, and have a valid contract for his services. 78 C. J. S., Schools and School Districts, § 218c. The second requirement of a valid contract was never consummated in the case at bar. The election of appellant for a new two-year term on February 27, 1953, was merely preliminary to the further requirement that a valid written contract in

the form prescribed by the State Board of Education be executed. Under the undisputed evidence this second and final step essential to support a recovery of compensation was never met, and the trial court correctly directed a verdict in favor of appellees.

The judgment is affirmed.

Chief Justice SEAMSTER not participating.

UNIVERSAL C. I. T. CREDIT CORPORATION *v.* STANLEY.

5-679 279 S. W. 2d 556

Opinion delivered May 23, 1955.

[Rehearing denied June 20, 1955.]

*M. P. Matheney* and *Wright, Harrison, Lindsey & Upton,* for appellant.

*Spencer & Spencer,* for appellee.

GEORGE ROSE SMITH, J. This is a suit filed by the appellee to obtain cancellation, for usury, of a conditional sales contract that was executed after the decision became final in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973. The chancellor canceled the contract and quieted the plaintiff's title to the car that had been sold. It is contended by the appellant that the apparently usurious nature of the agreement was the result of mutual mistake and that even if the contract should be set aside the purchaser is not entitled to keep the automobile.

On July 13, 1953, the appellee Stanley bought a used car from Brown Motor Company for an agreed price of $1,895. By cash and a trade-in Stanley made a down payment which left due a balance of $1,000. On forms furnished by the appellant the seller prepared two instruments relating to the sale. First is the conditional sales contract now in issue, which recites a "time balance" of $1,260.54, payable in eighteen monthly installments. Second is an invoice which discloses that the time balance was composed of these items:

| | | |
|---|---|---|
| "[Unpaid balance of purchase price] | | $1,000.00 |
| "Insurance 18 months w/pkg | $129.00 | |
| "Finance Charges | 131.54 | |
| | | 260.54 |
| | | $1,260.54" |

Within a day or two after the sale the appellant bought the commercial paper from the seller. Stanley made two monthly payments and then filed this suit for cancellation.

It is conceded by the appellant that if the invoice charges of $1,000 for purchase money and $129 for insurance are the only items owed by Stanley, then an interest charge of $131.54 is usurious. The appellant undertook to prove, however, that insurance "w/pkg" (with package) includes not only a comprehensive automobile policy, for which the appellant paid the recited $129 premium, but also life and accident policies for which the appellant paid an additional $39.32. It is insisted that the latter item should have been designated by Brown as part of the finance charges, leaving a difference attributable to interest that would be within the legal rate.

The trouble with this argument is that there is almost nothing in the conduct of either party to confirm the existence of a mutual mistake. Stanley, on the one side, denies that he agreed to pay the extra insurance charges now demanded by the finance company. As was said in the similar case of *General Contract Corp.* v. *Duke,* 223 Ark. 938, 270 S. W. 2d 918: "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." And the appellant, on the other side, presumably examined the invoice and found it satisfactory. The company accepted two monthly payments and put forward no suggestion of error until suit had been brought. Even at the trial the appellant failed to show just how Brown, who admittedly used the appellant's rate book in computing the amount owed, arrived at a finance charge of exactly $131.54. In the absence of persuasive proof that either party intended to make the agreement now asserted by the appellant it would manifestly be difficult to hold that both parties so intended.

The appellant's second contention is that the chancellor erred in allowing Stanley to keep the car. Here the argument is that Stanley's only claim to the vehicle derives from the conditional sales contract and that if that contract be abrogated Stanley's assertion of title must fail as well. This line of reasoning disregards the basic fact that, by the ruling in the *Hare* case, *supra,* a transaction such as this one is in reality a loan rather than a sale. It is not our intention to undermine the *Hare* case by reverting to the outmoded fiction that what is actually a loan must be treated as a sale. The present contract plainly comes within the purview of Act 39 of 1887: "The maker of a usurious contract may by suit in equity . . . have such contract . . . 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 . . ." Ark. Stats. 1947, § 68-609; *Bailey* v. *Commerce Union Bank,* 223 Ark. 686, 269 S. W. 2d 314.

Affirmed.

SEAMSTER, C. J., not participating.

MISSOURI PACIFIC RAILROAD CO., THOMPSON, TRUSTEE *v.* HEITMAN, ADMINISTRATOR.

5-672 and 5-673 (consolidated) 279 S. W. 2d 280

Opinion delivered May 23, 1955.

*Pat Mehaffy* and *Richard M. Ryan,* for appellant.

*Cole & Epperson* and *Joe W. McCoy,* for appellee.

GEORGE ROSE SMITH, J. These two cases, consolidated on appeal, are actions for the wrongful deaths of Paul Heitman and Ronny Hardwick, who were killed in the same railroad crossing accident, and for the destruction of the car involved in the collision. The verdicts were in the amount of $10,160 for the Heitman estate, $10,000 for the Hardwick estate, and $1,000 for the car, which was owned by Hardwick's father. The only contention on appeal is that the railroad company and its trustee were entitled to a directed verdict in each case.

Although the cases were separately tried, the material evidence in the two suits is to the same effect. The collision occurred at the Main Street crossing in the city of Malvern, a few minutes after midnight on the morning of February 7, 1954. Four of the occupants of the automobile were killed; the only survivor is a seventeen-year-old boy who was asleep at the time. The proof shows clearly enough that the appellants' train was traveling at about seventy-five miles an hour and that the view of all concerned was obstructed by a number of freight cars that were standing on a nearby track. The railroad engineer did not see the automobile at all before the collision, and the fireman did not see it until both train and car were some six or eight feet from the point of impact. Since the crossing was in effect a blind intersection the

railroad's conduct in the giving of signals is of primary importance, it being the appellants' contention that the sole cause of the collision was the automobile driver's failure to heed signals that were plainly visible and audible.

This urban crossing is protected by red electric lights that are supposed to begin flashing automatically whenever an oncoming train reaches a point about 3,500 feet from the crossing. There is, however, substantial evidence to show that the warning system was not operating properly on the night in question. The witness Helms testified that earlier in the evening his truck had been obstructed by a line of vehicles and that he had gone to the center of the highway to look ahead for the cause of the delay. He says that he was in a position to see the red signals, had they been working, but he looked for them and did not see them. After reëntering his truck he observed the end of a train going by and could then see the lights of Main Street on the other side of the tracks. A State policeman who investigated the accident testified that he stayed particularly to see if the lights were operating and that when a train arrived about thirty minutes later the signals did not begin blinking until the train reached the edge of the highway. This belated operation of the signals was also observed by the witness Gerety, and there is other testimony of a corroborative effect.

We need not detail the conflicting testimony as to whether the operators of the train sounded its air horn and bell, for a jury question was presented by the proof that the automatic warning system was defective. In *Chicago, R. I. & P. Ry. Co.* v. *Hamilton,* 92 Ark. 400, 123 S. W. 379, there was proof that the railroad company had failed to close a gate that was intended to keep travelers from attempting to cross when trains were passing. It was there said: "This was an invitation to a traveler, or an assurance to him that the way was clear and that he might proceed in safety. Whether or not it constituted negligence for him to cross without taking the further precaution of looking or listening was a question for

the jury to determine under all the circumstances of the case. For, when the plaintiff attempted to cross, upon the invitation of the company's agent and under the implied assurance that it was safe for him to do so, it cannot be said as a matter of law that he was guilty of negligence in failing to look or listen for danger." To the same effect are *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322, and *Mo. Pac. R. Co.* v. *Brown,* 186 Ark. 339, 53 S. W. 2d 587. In view of these decisions the defendants were not entitled to directed verdicts in the cases at bar.

Affirmed.

SEAMSTER, C. J., not participating.

CHIOTTE *v.* CHIOTTE.

5-686 279 S. W. 2d 296

Opinion delivered May 23, 1955.

*Wright, Harrison, Lindsey & Upton,* for appellant.

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

WARD, J. This appeal presents two issues: (a) *Res judicata,* and (b) sufficiency of the evidence to establish *bona fide* residence in a divorce action.

On July 26, 1954, appellee, John E. Chiotte, filed suit for divorce against appellant, Angela M. Chiotte, alleging eight years separation. On August 20, 1954, appellant appeared specially and moved the court to dismiss appellee's complaint on the ground that he was not a *bona fide* resident of Arkansas. On September 1, 1954, appellant appeared specially and filed an amendment to her original motion to dismiss, stating that appellee filed a petition for divorce on June 1, 1953, which petition he voluntarily dismissed, and that appellee filed another petition for divorce on January 29, 1954, which the court dismissed for want of jurisdiction. The chancellor deferred action on the motion and amended motion to dismiss until after he heard appellee's testimony on his divorce petition, and on September 28, 1954, he dismissed said motion and amended motion and entered a decree of divorce in favor of appellee. This appeal followed.

(a) *Res judicata.* We cannot agree with appellant that the disposition made of the first two divorce suits is *res judicata* of this action. The record shows that the second divorce suit was dismissed by the court for lack of jurisdiction on May 17, 1954, which simply means that the trial court, as of that date, was of the opinion that the testimony did not show appellee to be a *bona fide* resident of Arkansas. The first divorce action was voluntarily dismissed by appellee less than a year before this suit was instituted. As stated in 30 Am. Jur., page 918, § 174, "In the application of the doctrine of *res judicata,* if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. . . . If, however, the two actions rest upon different sets of facts . . . a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has been designated as infallible." The above stated rule, which is generally recognized, is peculiarly applicable to the case under consideration.

Bearing in mind that, as we have heretofore held, the facts constituting residence must exist at the time a divorce suit is filed, it is obvious that the facts relative to appellee's being a *bona fide* resident of Arkansas might be [and they are] entirely different on July 26, 1954, when the present action was begun from those existing on June 1, 1953, and January 29, 1954, when the former divorce suits were filed respectively. For this Court to hold otherwise would lead to an absurdity, for then, if a person once failed to establish a residence in this state, he would forever be precluded from doing so in the future. Appellant recognizes, in her brief, the validity of this principle, but insists it does not apply here because the facts [indicating residence] are identical in both instances. We cannot agree with appellant. When this suit was filed appellee had not only resided longer in Arkansas but he had indulged in additional activities indicating a *bona fide* residence.

(b) *Sufficiency of the evidence.* The testimony on behalf of appellee, uncontradicted by any testimony on behalf of appellant, is substantially as follows: Appellee and his wife lived together in Peoria, Illinois, until they separated in the early part of 1947. After that Mrs. Chiotte resided in her home and appellee moved to a hotel where he lived until March 1953 when he moved to Little Rock. During the years mentioned appellee was the principal owner and president of the Western Coal and Fuel Company, from which business he was drawing a salary of $833 per month. He drew this same salary after coming to Little Rock until January 1954. From this date until August 1954 he drew a salary of $400 per month after which time he has been drawing a salary of $200 per month. As heretofore stated he filed the first divorce suit against his wife on June 1, 1953, which he voluntarily dismissed, and filed the second suit January 29, 1954, which the court dismissed because of lack of jurisdiction. After his separation appellee kept company with Mrs. Mildred Schwiette in Peoria, and in December 1953 he and Mrs. Schwiette purchased the Retreat Café on West Seventh Street in Little Rock for $6,000, $2,000 of the

purchase price being paid at the time. The two have jointly owned and operated the café continuously since the date of purchase. Mrs. Schwiette lives in North Little Rock and appellee lives in rooms adjoining the café, and they have a joint bank account at the Union National Bank. Appellee works regularly in the café except that he takes off occasionally for fishing or recreation. Since coming to Arkansas he has gone back to Illinois only twice, the first time for three months in the latter part of 1953 and the second time for four days in August 1954, when he attended a board meeting.

Appellee states that he is afflicted with arthritis and for that reason came to Arkansas for his health, and that he intends to make this his permanent residence. Appellee testified that he has assessed his property and paid his taxes here, has bought State and City automobile licenses, and has purchased or renewed business licenses five times. Several other witnesses corroborated appellee as to the fact that he works in the café and purchases supplies for the same and that he has continuously lived in Arkansas since early 1953.

Under the above factual situation as disclosed by the record we cannot say that the chancellor's finding that appellee was a *bona fide* resident of Arkansas is not supported by the evidence. It is true, as stated in *May* v. *May,* 221 Ark. 585, 254 S. W. 2d 957, that appellee "must in fact and in truth be a *bona fide* resident of Arkansas and that such residence must be shown by overt acts sufficient to demonstrate a real and *bona fide* intent to acquire such a residence." However, the question of whether appellee is a *bona fide* resident of Arkansas with the intention of remaining here and making this State his home is, as stated in *Walters* v. *Walters,* 213 Ark. 497, 211 S. W. 2d 110, "purely a question of fact." Obviously no court can look into the mind of a person and say with confidence what his intentions are, therefore the necessity of looking to "overt acts" for corroboration or contradiction of the person's expressed intentions. In determining this difficult question of fact in similar cases this Court has frequently followed the decision of the trial

court and has always done so unless the testimony shows the trial court to have held contrary to the weight of the testimony.

The facts in the case under consideration are somewhat similar to those in the case of *Knaus* v. *Knaus,* 223 Ark. 517, 267 S. W. 2d 16. In the cited case the parties lived in Pennsylvania and had not lived together since 1945. The husband came to Little Rock in June 1952 and filed suit for divorce on August 28, 1952. Testimony in his behalf showed that he had moved his belongings to Arkansas, opened a bank account, rented an apartment, paid taxes and had done other things tending to show that he had become a permanent resident of this State. In an effort to discredit his testimony it was shown that when he came to Arkansas a divorce suit was still pending in Pennsylvania and also that he had been absent from Arkansas approximately twenty-eight days. The trial court in the cited case concluded that a *bona fide* residence had been shown and we approved that finding. In doing so we said: "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."

Appellant, in support of her contention for a reversal, cites *Walters* v. *Walters, supra, May* v. *May, supra, and Hart* v. *Hart,* 223 Ark. 376, 265 S. W. 2d 950, but we think these cases are obviously distinguishable and are in harmony with the conclusion we have reached. In the first case the opinion shows that appellant virtually admitted he claimed to be a resident of Nebraska at the time he filed his suit in this state, and in the latter two cases the evidence [tending to show residence here] was different from [and weaker than] the evidence in this record, and, also, we upheld the trial court in both instances.

Finding no error, the decree of the trial court is affirmed.

5-681 279 S. W. 2d 283

Opinion delivered May 23, 1955.

[redacted]

*L. B. Smead* and *McKay, Anderson & Crumpler,* for appellant.

*Bernard Whetstone,* for appellee.

ROBINSON, J. The property line between neighbors is the issue. In December, 1934, appellants M. C. Spain and his wife, Daisy Spain, acquired by purchase from the Tri-State Savings & Loan Association a lot in El Dorado, hereinafter referred to as Lot 3. At that time, the lot adjoining on the north, herein called Lot 2, was owned and occupied by people named Schaff. Lot 2 is now owned by appellees Grady Jean and his wife Sallie.

The agent for the Savings & Loan Association pointed out what he claimed was the property line between the two lots. This line extends from the door facing on the Jean's servant's house on the west to a large crack in the sidewalk on the east. There is a large oak tree a few feet south of the crack in the sidewalk. A straight line from the southeast corner of the servant's house to the crack in the sidewalk would be diagonal to the true dividing line between the lots as shown by the plat; but a line from the corner of the servant's house to the center of the oak tree would be parallel to the east and west property line. As shown by a survey, the correct line dividing the two lots is 7 feet 8 inches south of the line from the southeast corner of the servant's house

to the oak tree. According to the plat, this 7 feet 8 inch strip is part of Lot 2.

The Chancellor held that the Spains, owners of Lot 3, had acquired this strip by adverse possession. The Spains appealed, contending that they have acquired by adverse possession that part of Lot 2 up to the crack in the sidewalk which is about 4 feet north of the oak tree. The appellees, Grady Jean and his wife Sallie, have cross-appealed, contending that the evidence does not justify a finding that the Spains have acquired any part of Lot 2 by adverse possession.

According to the plat, the northeast corner of Spain's house is on the property line, and the northwest corner is only about six inches from the line. If the plat is correct, and there is no showing to the contrary, a mistake as to the proper line must have been made at the time the Spain house was built. In the circumstances existing here, where there does not appear to be any good cause for building right up to the property line, it is unreasonable to believe that the house was intentionally constructed in that manner. No average person would suspect that a house had been built right on the line, and when the agent for the Savings & Loan Association pointed out the line as being several feet north of Spain's house, there was no reason to question his statement. At the time Spain made the deal for the property, there was a rose trellis which extended east from the southeast corner of the servant's house. This trellis appeared to indicate the line between the two lots. At that time there was also a large hedge at the rear of the west side of Lot 3 which extended north to a point about six inches past the south side of the servant's house on Lot 2.

After Spain bought the property, he maintained it and cut the grass to the line pointed out by the Savings & Loan agent. He fertilized the yard and planted various kinds of grass as well as a rose bush and a banana fruit tree up to the line he now claims. Spain and Schaff, the former owner of Lot 2, never had a dispute over the dividing line. However, it also appears that Schaff actu-

ally claimed past the crack in the sidewalk up to the oak tree. L. W. McGaugh testified that he worked in the yard for Schaff and was instructed to work up to a line from the servant's house to this oak tree.

When Jean, the present owner of Lot 2, decided to build a wall separating the two lots, the workmen he employed stretched a string from a few inches south of the servant's house to the center of the oak tree, indicating the place Jean intended to build the wall and that he was also claiming to that point.

The Chancellor made a trip to the property and looked over the situation. After considering the entire case, he made a finding that Spain had acquired by adverse possession the south 7 feet 8 inches of Lot 2. When this strip is added to Lot 3, it appears that the dividing line would then be about where Jean intended to build the wall in the first place. We cannot say the Chancellor's finding is contrary to a preponderance of the evidence.

Affirmed on appeal and on cross-appeal.

Mr. Justice George Rose Smith dissents as to affirmance on cross-appeal.

The Chief Justice not participating.

Pierce *v.* Stirling.

5-691 279 S. W. 2d 840

Opinion delivered May 30, 1955.

*Rose, Meek, House, Barron & Nash, Phillip Carroll,* Little Rock, for appellant.

*Robert J. White,* Russellville, for appellee.

J. SEABORN HOLT, J. March 31, 1954, appellant Pierce, a resident of Albuquerque, New Mexico, brought suit against appellee Stirling, an Arkansas resident, alleging in his complaint that: "During a period including February, 1949, to July 29, 1949, plaintiff was a General Agent for Reserve Loan Life Insurance Company of Texas and defendant was appointed by the plaintiff as a special agent of that company.

"During the aforementioned period, Reserve Loan Life Insurance Company of Texas, at the request of the plaintiff (Pierce), made cash advances to the defendant (Stirling) as follows: . . .," in the amount of $2,125.

"On July 29, 1949, Reserve Loan Life Insurance Company of Texas (including its accounts receivable) was purchased by Southland Life Insurance Company. Plaintiff and defendant continued in the same capacity with the new company.

"Thereafter, the following cash advances were made to the defendant by Southland Life Insurance Company at the request of the plaintiff," in the amount of $600.

"The total of all advancements made to defendant is $2,725. Defendant is entitled to credits in the amount of $903.15, leaving a balance owing of $1,821.85.

"On April 25, 1951, it became apparent that the defendant was not going to liquidate the account and the last mentioned balance was transferred to the account of

the plaintiff who thereby became primarily obligated under the terms of his contract with the insurance company, and said account was paid by the plaintiff."

Stirling answered denying every material allegation in the complaint and alleged that he was employed by Pierce at a guaranteed salary of $300 per month for a period of three years beginning February 1949, that on July 25, 1949, his contract of employment by mutual agreement with Pierce was terminated and all obligations thereunder cancelled and settled.

"That under the terms of said agreement, the defendant was to be paid a guaranteed salary of $300 per month, against which would be credited all earnings of the defendant from the sale of life insurance, and that in the event the earnings or commissions should exceed the minimum guaranteed salary, the excess should be paid to the defendant.

"That upon the sale of the Reserve Loan Company to the Southland Company, a complete account and satisfaction was had by plaintiff and defendant, and thereafter, plaintiff became general agent for the Washington National Life Insurance Company, and a new contract was entered into by plaintiff and defendant, which continued until the defendant left the employment of plaintiff in the year of 1952." He further pleaded as a defense the statute of limitations as a complete bar.

Trial was had and at the close of all the testimony the court granted the motion of Stirling for a directed verdict in his favor on the ground that the debt was barred by the statute of limitations as a matter of law. This appeal followed.

For reversal appellant says: "The Court erred in holding that the plaintiff's (Pierce) cause is barred by the Statute of Limitations because plaintiff's original relationship was one of surety to the defendant (Stirling) on the defendant's obligation to the Reserve Loan Life Insurance Company. Plaintiff made payments on his principal's obligation before the Statute of Limita-

tions had passed on his principal's debt, tolling the Statute of Limitations as to him, the surety. Thus, the payments later made by the surety, which are the subject of this suit, were all made within the period of the Statute of Limitations. . . .

"This suit, brought by the surety to recover from his principal on the implied obligation of indemnity, was filed within three years of the time of payment by the surety." In short, Pierce argues that the trial court erred in taking from the jury the disputed fact question, (a) whether appellant's relationship to Stirling was one of surety for Stirling on Stirling's alleged obligation to the insurance company, and also, (b) whether Pierce had released Stirling from any and all liability. The testimony on these two issues appears to be conflicting.

It is well settled that when this court is called upon to determine the correctness of the action of a trial court in directing a verdict for either party, the rule is that where there is substantial evidence to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury, and in determining this question that view of the evidence must be taken that is most favorable to the party against whom the verdict is directed. *Gray* v. *Magness,* 200 Ark. 163, 138 S. W. 2d 73, and cases there cited. Guided by the above rule, after reviewing the evidence, we have concluded that the court erred in taking the case from the jury.

In *Fausett Builders, Inc.* v. *Globe Indemnity Co.,* 220 Ark. 301, 247 S. W. 2d 469, we defined surety in this language: "Suretyship may be defined as a contractual relation whereby one person engages to be answerable for the debt or default of another. . . . The terms of the contract of which the surety promises performance must be read into his own contract. The principal's contract and the bond or undertaking of the surety are to be construed together as one instrument. . . . The suretyship contract must be express, as the surety's

promise will never be enlarged to cover the implications growing out of the language employed."

Pierce testified in effect that he arranged with his principal, Insurance Company, to make the advances by its voucher direct from the insurance company to Stirling, and they were so made. They were not made first to Pierce and then advanced to Stirling. He testified that he acted only as surety for repayment to his principal insurance company of all these advances. Pierce's general agent's contract provided: "RESPONSIBILITY: You will be fully responsible for the life insurance accounts and activities of agents appointed by you or transferred to you by the Home Office." The sequence of happenings after the last advance made by the insurance company on September 15, 1949, appear to be: From September 15, 1949, to April 25, 1951, credits were applied by the insurance company to the account from Stirling's renewal commissions. Pierce was called upon by the company to satisfy Stirling's indebtedness and it applied Pierce's renewal commissions on Stirling's account to the extent of $848.89 during the remainder of 1951. During 1952 $930.92 of Pierce's commissions were applied on the account and on January 1, 1953, a balance of $42.04 due on the account was taken from Pierce's commissions and the account paid in full. February 16, 1953, Pierce called upon Stirling to reimburse him (Pierce), and Stirling refused. Pierce then, as indicated, sued Stirling on March 31, 1954.

While Pierce's general agent's contract with his principal insurance company was entered into in New Mexico, the Arkansas statute of limitations, the law of the forum, must and does control. *Chicago, R. I. & Pac. Railway Co.* v. *Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562. See, also, 11 Am. Jur., Conflict of Laws, § 191, p. 505.

Pierce's testimony which is sharply disputed by Stirling was that the advances, or loans, were made to Stirling and that he, (Pierce), guaranteed their repayment to the company, and that he had never released Stirling from any liability. It appears that Pierce was called upon by the company to pay the balance due on Stirling's

account about nineteen months after the last advance was made to Stirling, and beginning on April 25, 1951, Pierce's renewal commissions were credited as indicated on the Stirling account until it was paid in full in January, 1953. Thus more than four and one-half years had passed since the last advance to Stirling when suit was filed. If, as Pierce testified, the advances were made to Stirling by the company and Pierce as surety guaranteed their repayment, then his cause of action against Stirling to be reimbursed by Stirling, if Pierce had any such right, was not according to Pierce's testimony, then barred. The fact that the statute of limitations might bar any claim of the company against Stirling did not necessarily prevent Pierce, if he were in fact a surety for Stirling, and after he had paid the account to the company, from claiming that Stirling should indemnify him, within the three-year period of limitations. "It is held in many jurisdictions that if the surety pays a debt which is at the time barred by limitation as against the principal, but is a valid obligation against the surety, such surety may recover against the principal, or against his estate in case of his death. The right of action in favor of the surety arises when he pays the debt, and is not based upon the original debt itself, but upon the implied contract of indemnity which exists by law between the principal and surety." 50 Am. Jur. 1062 (Suretyship, § 237). And, in Elder, Stearn's Law of Suretyship 523 (5th Ed., 1951), we find this language: "Where, for example, the running of the period of limitations has barred recovery from the principal, but not from the surety, the non-liability of the former does not impair the surety's right of indemnity. Thus, where no claim is asserted by the holder of a note against the maker, but judgment is obtained against the surety, who pays the judgment after the right of action by the holder against the maker is barred by the statute of limitations, the surety may recover from the principal.

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

George Rose Smith, J., not participating.

Opinion delivered May 30, 1955.

[redacted]

*Norton & Norton* and *John D. Eldridge, Jr.,* for appellant.

*Daggett & Daggett, Mann & McCulloch, Ronald A. May* and *Wright, Harrison, Lindsey & Upton,* for appellee.

ED. F. MCFADDIN, Justice. This is the second appeal of this case.* The first appeal involved only the matter of venue: the present appeal challenges the giving and refusing of certain instructions in the trial. The appellant is Woodruff Electric Cooperative Corporation (hereinafter called "Woodruff"). The appellees are Woodrow James (an individual) and Weis Butane Gas Company (hereinafter called "Weis Butane").

This case resulted from a series of traffic mishaps which occurred on U. S. Highway 79 about 2½ miles west of Marianna. At the place of the traffic mishaps the highway runs in an east and west direction; the concrete pavement is 23 feet wide with a suitable gravel shoulder, dirt shoulder and borrow pit on each side of the highway. About 6 p. m. February 27, 1951, a Chevrolet sedan, going west, collided with a Farmers' Supply truck going east, causing several persons to be injured. The Farmers' Supply truck went off the highway into the south side borrow pit and the Chevrolet sedan came to rest crosswise the highway, occupying all of the south lane of the concrete slab and a small portion of the north lane.

Immediately after this traffic mishap a Nash car driven by Captain and Mrs. Fagan, arrived at the scene and stopped on the north side of the highway, either on the concrete slab or the gravel shoulder. The Fagan car, facing west and with its headlights on, stopped a short distance west of the Chevrolet sedan. The Fagans stopped so that they could render aid to the injured parties. At about the same time the Weis Butane truck going east stopped on the gravel shoulder on the south side of the highway just west of the Chevrolet sedan. Woodrow James, the driver of the Weis Butane truck, also stopped to render aid to those injured in the Chevrolet sedan-Farmers' Supply truck mishap. Woodrow James and Captain and Mrs. Fagan assisted in loading the three injured parties into a vehicle going to Marianna; and the Fagans were in the process of giving their

* For first appeal, see *Woodruff Electric Cooperative Corporation v. Weis Butane Gas Company and Woodrow James*, 221 Ark. 686, 255 S. W. 2d 420.

names and addresses to James, when the Woodruff truck came from the west and crashed into the rear of the Weis Butane truck, resulting in the claims and counter-claims that are involved in the present case.

Woodruff filed action against Weis Butane and Woodrow James for damages to the Woodruff truck, and claimed: (1) that James had stopped on the highway, without having his rear lights burning or without putting out flares; and (2) that the headlights of Captain Fagan's car caused the driver of the Woodruff truck to be unable to see the Weis Butane truck. After the venue question was settled in the first appeal, as previously mentioned, Weis Butane and Woodrow James each filed answer and cross-complaint alleging: (1) that the driver of the Woodruff truck was solely negligent, and (2) that such negligence resulted in property damage to Weis Butane and physical injuries and loss of earning capacity to Woodrow James. Trial to a Jury resulted in a verdict and judgment for Woodrow James for $6,250 and Weis Butane for $2,500. Woodruff brings this appeal and presents four points, all relating to the giving or refusing of instructions. The total instructions given by the Court consume 17 typewritten pages in the transcript.

I. *Defendant's Instruction No. 6.* This instruction, as given by the Trial Court, reads:

(A) "You are instructed that, as a general rule, the test of whether one is to be charged with negligence because of his acts in particular circumstances is to be measured by a legally established standard of conduct; that is, whether he acted as a reasonably prudent person would have acted under the same or similar circumstances.

(B) "You are instructed, however, that when one is impelled by humanitarian impulses, those human instincts which prompt people to aid others who are in danger, the law itself makes allowances within the scope of the established standard for his acts in such circumstances, and he is not held to as high a degree of care or caution as he would ordinarily be.

(C) "So, in this case, if you should find from a preponderance of the evidence that at the time of the collision complained of, Woodrow James was acting under the stress of a situation with which he was suddenly confronted, and as a result of which he might reasonably have thought others were in peril of substantial injury or loss of life, and further find that he acted as he did in an endeavor to render aid to those he reasonably thought were injured or in danger; and, *if you further find that in so acting he did as the ordinarily prudent person would have done when confronted by the same circumstances and conditions,* then you are instructed that you should take all of these factors into consideration in determining whether Woodrow James was guilty of negligence as charged in the complaint." (Paragraph letters and italics are our own.)

Appellant objected in the Trial Court to this instruction for three reasons which we now list and discuss:

1. The first objection was that the instruction ". . . ignores the fact that it is possible that the emergency had passed at the time of the accident here involved." The testimony showed that Captain and Mrs. Fagan stopped their car at practically the same time that Woodrow James stopped the Weis Butane truck; that James and the Fagans supervised the loading of the three injured persons into a passing vehicle and sent them to Marianna for medical aid; that Captain Fagan stated that he was en route to Ft. Hood, Texas, on military orders for arrival at a definite time and could not delay any longer; that he offered to give his name and address to Woodrow James to be delivered to the proper persons; and that while James and the Fagans were writing out this information the Woodruff truck drove into the rear of the Weis Butane truck causing the injuries and damages involved in this present litigation. Thus only a few minutes elapsed from the time of the arrival of James and the Fagans until the Woodruff-Weis Butane collision. Paragraph (C) of the instruction submits to the Jury the decision of the question, whether ". . . at the time of the collision complained of Woodrow

James was acting under the stress of a situation, . . ." etc. If Woodrow James stopped because of the "rescue doctrine" and was continuing to act for such reason then the objection to the instruction is without merit. The "rescue doctrine" is now to be discussed.

2. The second objection to the Instruction No. 6 is ". . . that it is not pertinent to the situation." We find this objection to be without merit. This Instruction No. 6 is framed to submit to the Jury the "rescue doctrine." In *Central Coal & Coke Co.* v. *Porter,* 170 Ark. 498, 280 S. W. 12, we had occasion to consider this doctrine and Mr. Justice HUMPHREYS, speaking for the Court, there said:

"Under the rescue doctrine, human life being involved, a liberal rule prevails with relation to contributory negligence. In such cases one is called upon to act quickly without much time to consider results, and is not held by the law to as strict account as when performing ordinary acts in doing his work. The law excuses him when engaged in extraordinary duties or emergencies to save the life of human beings, unless his act is rash and reckless. The rescue doctrine is well stated in syllabus No. 1 in the case of *Corbin* v. *Philadelphia,* 195 Pa 461, 45 A. 1070, 49 L. R. A. 715, 78 A. S. R. 825, which is as follows: 'A rescuer who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushes into danger to snatch from it the life of a fellow creature, imperiled by the negligence of another, but he should rather listen to words of approval unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence.' "[1]

In the case at bar, Woodrow James had stopped to render aid to the injured parties. He had driven the Weis Butane truck entirely off the concrete slab and on

[1] For Annotations on the rescue doctrine see 19 A. L. R. 4 and 158 A. L. R. 189. See, also, American Law Institute's Re-Statement on "Torts," Vol. 2, § 472; and 166 A. L. R. 752.

the gravel shoulder of his extreme right side of the highway and had left all of his front, rear and side lights burning. Thus Woodrow James was certainly in the role of a rescuer and some instruction on the rescue doctrine was clearly pertinent to the situation existing at the time James received his injuries.

3. The third objection offered by appellant to the Instruction No. 6 was ". . . that it unduly singles out for consideration the humanitarian instinct of the driver of the Butane truck, Woodrow James, and Captain and Mrs. Fagan, the driver of the Nash." We find no merit in this objection. In stopping to render aid, the Fagans and Woodrow James did only what good people have been urged to do ever since the parable of the Good Samaritan as contained in Holy Writ. As previously mentioned, there were many instructions in the case. The Court had prefaced all of them by saying:

"You are instructed that you are not to single out any one of these instructions and consider it alone, but you are to take the instructions altogether and consider them altogether as one harmonious whole as the law in this case."

Then, after other instructions, the Court had told the Jury:

"If you find from a preponderance of the testimony that Woodrow James was guilty of any negligence and that such negligence was the proximate cause of the collision in which plaintiff's truck was damaged then you will find for the plaintiff, Woodruff Electric, in such amount as will fairly compensate it, under the other instructions of this Court, unless you should find that the plaintiff was guilty of negligence which caused or contributed in any degree, however slight, to the collision, in which event the plaintiff cannot recover."

The Court then gave a series of instructions on the applicable traffic Statutes; and in Instruction No. 5, said:

"The Court in these instructions has referred to certain traffic laws of Arkansas. If you find that any

party or parties violated any traffic law or laws as defined in these instructions, such violation, if any, does not constitute negligence in and of itself, but is only evidence for you to consider, along with all other evidence in the case, in determining whether such party was guilty of negligence."

Immediately following the last quoted instruction the Court gave the Instruction No. 6 here challenged. We give all of the foregoing to show that Instruction No. 6 did not ". . . unduly single out for consideration the humanitarian instinct. . .. ." While the Instruction No. 6 is long and not worded as smoothly as it should have been, and certainly not to be used as a model in other cases, nevertheless it is a good instruction against the objections made by the appellant. What the instruction really says is, that what the ordinarily prudent person would do in an emergency situation is the test in rescue matters, rather than what the ordinarily prudent person would do in a non-emergency situation. The language that saves the instruction from fatal error is found in the last paragraph thereof, and heretofore italicized by us, to-wit:

". . . and if you further find that in so acting he did as the ordinarily prudent person would have done when confronted by the same circumstances and conditions. . . ."

The conduct of the ordinarily prudent person under the same or similar circumstances was used as the yardstick by which to measure the conduct of Woodrow James.

II. *The Trial Court Refused to Give the Plaintiff's Instruction No. 12,* which reads:

"If you find that Woodrow James violated any of the State laws referred to, and you find also that the violation was the proximate cause of the collision, then your verdict should be for the plaintiff, unless you are convinced by a preponderance of the evidence that defendant was not guilty of negligence, or, by a preponder-

ance of the evidence, that plaintiff was guilty of contributory negligence."

The Trial Court was correct in refusing to give this instruction. It was a binding instruction and one designed to emphasize a claim that the burden of proof shifted in the case. Certain language of this Court in *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. 2d 676, was seized on by the appellant as the basis for this instruction. But such language in the cited case was not designed to support such an instruction. Insofar as the Instruction No. 12 was correct it was covered by the defendant's Instruction No. 5 which was given and which reads:

"The Court in these instructions has referred to certain traffic laws of Arkansas. If you find that any party or parties violated any traffic law or laws as defined in these instructions, such violation, if any, does not constitute negligence in and of itself, but is only evidence for you to consider, along with all other evidence in the case, in determining whether such party was guilty of negligence."

III. *The Court Gave the Defendant's Instruction No. 8* which permitted the Jury to consider as an element of damages, Woodrow James' loss of earning, past, present and future; and the appellant complains of the instruction. The complaint alleged the loss of earnings, past, present and future. There was evidence that Woodrow James had been in the hospital and incapacitated for a considerable period of time; and the appellant introduced into the record a medical report dated May 4, 1951 (more than 60 days after the accident), which report said of Woodrow James: "Patient may return to his old occupation with a permanent loss of 5% of his earning capacity." In view of the foregoing, and also of other evidence in the record, we hold that the Trial Court committed no error in giving defendant's Instruction No. 8.

IV. *Along with other instructions on the highway safety statutes and the traffic laws, the Court gave an instruction to the Jury almost verbatim from § 75-652,*

*Ark. Stats., concerning more than three people in the driver's seat of a car.* Appellant says that this instruction should not have been given; but the evidence shows that four men were riding in the front seat of the Woodruff truck at the time it drove into the rear of the Weis Butane truck. One of the four persons testified that he could not see to the left because the head of one of his companions was in the way. In view of this testimony, and other in the record, the case of *Warren* v. *Hale,* 203 Ark. 608, 158 S. W. 2d 51, is authority for the Court to give the instruction herein challenged.

Affirmed.

ALPHIN, EXCR. *v.* ALPHIN.

5-694 279 S. W. 2d 822

Opinion delivered May 30, 1955.

[Rehearing denied June 27, 1955.]

*J. S. Brooks, Spencer & Spencer* and *Wright, Harrison, Lindsey & Upton,* for appellants.

*L. B. Smead, Robert C. Compton* and *Walter L. Brown,* for appellees.

MINOR W. MILLWEE, Justice. Appellee, J. Hendricks Alphin, brought this suit against appellant, Sam D. Alphin, individually and as executor of the last will of James A. Alphin, deceased, seeking specific performance of an alleged oral contract between appellee and the said James A. Alphin whereby the latter agreed to execute a will leaving to appellee one-half of the property received by James A. from his father J. S. Alphin, who was also the father of appellee and appellant. In the decree appealed from, the chancellor found that a valid oral contract was made and a will executed pursuant thereto; and that appellee was entitled to specific performance of the contract which had been fully performed on his part.

Appellee is the son of J. S. Alphin by his first wife who died in 1909. Sam D. and James A. Alphin are the sons of J. S. Alphin by a second marriage to Mary Armstrong who died in 1929 leaving a sizable separate estate to her two sons. The three sons are the sole heirs of J. S. Alphin who died in 1943. Appellee is 28 years older than appellant and 30 years older than James A. who died suddenly of polio in 1952.

J. S. Alphin was a successful businessman in El Dorado, Arkansas, for many years and owned considerable real property in and around that city. Because of his age and poor state of health he transferred all his property to his three sons by gift deed in 1937. Although appellee and appellant had previously been made trustees of the estate, appellant and James executed power of attorney to appellee who assumed the primary responsibility of managing and directing the estate which was left intact and operated under the name of "Alphin Properties." At the time of the transfer J. S. Alphin was indebted to appellee in the sum of approximately $41,000 and owed the other two sons jointly about $50,000. There was other indebtedness of about $12,500 against properties

valued at more than $400,000. The loan by appellee was from funds realized from an investment in oil producing land and the joint loan by the other two sons was from funds inherited from their mother. Appellee also inherited from his mother a block in the city of El Dorado which he deeded to his father in 1912. This block subsequently became the most valuable single tract of Alphin Properties. In discharging the family indebtedness appellee was paid interest on his loan to his father but no interest was paid to Sam and James on their loan.

Appellant and James were in school and military service much of the time from 1937 to 1945. During this period appellee had exclusive management of Alphin Properties for the three owners and also directed management of the household of their father until his death in 1943. Sam married and after 1945 lived in El Dorado and assisted in the operation of the properties. In addition he was interested in the ownership and operation of a cold storage plant and a well drilling outfit. After his discharge from the military service James continued in school for a time. In the spring of 1948 he and appellant became the owners of a soft drink bottling company in Monterrey, Mexico, where James spent most of the time in managing and operating the plant until his death in 1952. He was never married.

In operating Alphin Properties appellee disposed of approximately 5,000 acres of rural lands and reinvested the proceeds in business and residential properties in El Dorado. The residential units were then sold and more business buildings constructed, and the subsequent operation of the properties consisted primarily of collection of rentals and sale of oil and gas leases on the rural lands, the minerals under which had been reserved.

Alphin Properties maintained offices in El Dorado at all times after 1937 and had regular employees who collected rentals and kept the books and records of the business. These employees also kept appellee's personal books without pay from him and he transacted his personal business from the offices rent free. The office

phone was listed in his name but paid for by Alphin Properties. In addition to management of the properties appellee was local manager of Anderson Clayton Cotton Company until 1945 at a salary of $500 per month. He was also vice-president of an oil company and director of a bank. He also spent from 3 to 6 months each year from 1938 to 1951 in New Mexico in the management and operation of his 48,000-acre cattle ranch. He was active in state and local politics every two years and would postpone his trips to New Mexico until after the second primary election. He would occasionally return to El Dorado to look after some business of Alphin Properties but the expenses of these trips were paid out of personal funds. At the time of the trial Alphin Properties had a value in excess of a million dollars.

James A. Alphin made three wills. The first was executed in March, 1948, in which the bulk of his estate was left to appellant. The second was made April 14, 1948, in which, after specific bequests to relatives and churches, the Armstrong estate properties inherited by James from his mother were left to Sam and the residual estate was divided equally between Sam and appellee. The third will was made in February, 1950, in Monterrey, Mexico. After specific bequests similar to those in the second will, including a bequest of $1,000 to appellee, the bulk of the estate was left to appellant as in the first will.

After the death of James in June, 1952, the 1950 will was offered for probate in August, 1952. Appellee first filed a petition in the Union Probate Court on December 15, 1952, contesting probation of the will. No hearing was ever held on the petition which was dismissed following the decree in the instant case. In the latter part of 1953 appellee filed suit in the Union Circuit Court, Second Division, to enforce the alleged oral contract to make a will. The filing in circuit court was apparently by mistake and there was a transfer to Union Chancery Court, Second Division, and a subsequent voluntary dismissal in that court. The instant suit was then filed in the first division of Union Chancery Court on February 25, 1954.

It is undisputed that there was never any agreement or claim for compensation of any kind by appellee for services rendered in connection with his management of Alphin Properties prior to April, 1948. It is also admitted that appellee never sought nor expected compensation for services to Sam which were practically identical to those rendered to James. The instant suit is based on an alleged agreement between appellee and James shortly prior to the making of the second will on April 14, 1948. Appellee was permitted to testify, over appellant's objections, that he had several conversations with James at that time when only the two were present; that James told him of violent quarrels with Sam because the latter charged him room and board; that Sam had "high-pressured" him into making the March will; and that when appellee expressed a desire to get away from their quarrels and suggested a division of the Alphin Properties by arbitration, James said: "I will tell you what I will do, I need you here. While I love Sam dearly, I don't want to turn my part of the business over to him, and I am gone away from here quite a bit; I will will you half of the stuff that comes from papa if you will stay on and look after this business." Appellee agreed and a few days later James handed him a copy of the April, 1948, will on the streets of El Dorado in the presence of Judge Gus W. Jones.

In corroboration of appellee's testimony he offered the testimony of several close personal, political and business friends relative to the splendid manner in which he had managed Alphin Properties and concerning the actual execution and delivery of the April, 1948, will; also some general discussion of family arguments and a possible division of the estate about the time the will was executed. Only two of these witnesses gave any testimony bearing directly upon the making of the alleged oral contract. S. B. McCall, El Dorado postmaster and lifelong personal and political friend and associate of appellee, testified that he had a casual conversation with James in the lobby of the post office in the spring of 1948 in which the latter told him about making the will to

appellee because he had looked after and agreed to continue to look after the estate and hold it together. Witness described James as a distant and peculiar person who had little to say to anybody. He could not remember the substance of any other conversation with James and never mentioned the one in question to appellee or anyone else until he told it to appellee's attorney after the instant suit was brought. Mr. McCall experienced difficulty recalling some of the exact provisions of the oral agreement.

Bruce Bennett testified that he and another person, now deceased, went to appellee's office in the spring or summer of 1948 seeking appellee's political help in obtaining certain jobs, Bennett being interested in an appointment as deputy prosecuting attorney. Sam and James were in the office but Sam left and "the atmosphere was charged." When Bennett asked what was wrong, James said: "I have made a will leaving one-half of papa's property that I inherited to Big Brother and I have left the other half to Sam." Bennett then asked what was wrong with that and James replied: "I don't know." James then said he wanted appellee to continue taking care of the properties and had made a will under the agreement as related by appellee. Bennett attended summer school at Vanderbilt University in 1948. While he was on friendly terms with each of the Alphin brothers he admitted that he tried several times to persuade appellant to talk with counsel for appellee about probating the April, 1948, will. Appellee was a close friend and made loans and a donation to witness in his successful campaign for prosecuting attorney. He admitted having a conversation with appellant in Little Rock when Burney Dumas was present but denied their testimony to the effect that he then stated that appellee was his friend and he would testify to whatever was necessary to help him.

Opposed to the foregoing is the testimony of appellant, his wife and several other close personal and business friends of James. The effect of their testimony is that the close brotherly relation and association existing

at all times between Sam and James never existed between the latter and appellee; that appellee became very angry when he learned of the March, 1948, will and threatened to have a bank loan by James called unless he changed the will which he was forced to do but with the intention to again change it in accordance with his own wishes as expressed in the 1950 will; and that James never at any time mentioned any agreement or contract with appellee to make a will to any of said witnesses. Medlock Harbison was a close friend of James and his constant companion for about 4 years in the operation of the bottling company in Mexico. He drafted and was named co-executor of the 1950 will which was in his possession when James died. He testified about ill feeling between appellee and James and the close relationship between the latter and Sam who was present when the 1950 will was made. James never said anything to Harbison about any agreement to make a will to appellee.

One reason advanced by appellee for James contracting to will his property to one who was 30 years his senior is that James was a "blue baby" and in poor health, but this was refuted by uncontradicted medical evidence and appellee admitted that James served in the armed forces for several years with distinction and apparently without any serious illness. In all fairness it may be said that many of the material witnesses on both sides made little effort to conceal their bias or interest in favor of the party for whom each was testifying.

We first consider the admissibility of the testimony of appellee regarding his conversations and transactions with James relative to the making of the alleged oral contract relied upon. We agree with appellant's contention that this testimony was inadmissible under Schedule II of the Arkansas Constitution, commonly called "The Dead Man's Statute." Appellee is here seeking judgment against the appellant as executor for both real and personal property of the estate. In his answer appellant claimed all the personal property for the purpose of paying debts. His further assertion that it was necessary to use part of the real estate to pay debts is denied by

appellee. An almost identical situation was presented in *Jensen* v. *Housley,* 207 Ark. 742, 182 S. W. 2d 758. After holding that the legal title to personal property of which a decedent died possessed vested in the administrator or executor upon his appointment, the court said: "Since a judgment against the administrator for the personal property of the deceased was prayed by appellant in her complaint, it is obvious that, regardless of the situation as to the real estate, the administrator was a necessary party to this suit and that it was an action in which the testimony of a party as to transactions with the decedent was declared incompetent under the provisions of § 5154 of Pope's Digest, *supra.* Therefore, appellant was not a competent witness to establish the contract relied upon by her." See, also, Page on Wills, § 1751.

Appellee relies upon certain decisions both prior and subsequent to the Jensen case in which it is insisted that testimony similar to that in the instant case was given, apparently without objection. The privilege of the statute is waived when testimony is introduced without objection. *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9. Moreover, the question of admissibility was not raised or decided in those cases and we adhere to our holding in the Jensen case which is controlling here.

The principal remaining issue is the sufficiency of the evidence to support the decree for specific performance with this testimony excluded. While a valid oral contract to make a will or deed to real estate may be made, it is well settled that the testimony to establish such contract must be clear, cogent, satisfactory and convincing. *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310; *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926. In most all the cases 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. *Crowell* v. *Parks,* 209 Ark. 803, 193 S. W. 2d 483. Another generally accepted rule is stated in 69 A. L. R. 133, as follows: "It seems that in order for

part performance to operate to take a contract of the kind under consideration out of the operation of the Statute of Frauds, the services must be exceptional and extraordinary in character, or it must appear that the promisee's whole course of life was changed by performance of the contract. A change in the status of the promisee, or the assumption of a relation with the promisor different from that theretofore existing or which would ordinarily exist in the absence of a contract, is very highly regarded by the courts as evidence of an alleged oral contract to devise or bequeath property." The usual type of consideration is a promise by one party to change his place of abode and support and care for another during life in consideration of the party's agreement to devise the property. *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155; *Offord* v. *Agnew,* 214 Ark. 822, 218 S. W. 2d 370.

It seems doubtful there was any change in the *status quo* of appellee in the instant case. It is also questionable whether his services were so exceptional as not to be subject to pecuniary estimate as to value. However, it is unnecessary to determine such questions. When the testimony of appellee concerning the transactions and conversations with decedent about the alleged contract is excluded, it is our opinion that the competent evidence does not measure up to that high standard of clarity and certainty which the law requires. The decree is accordingly reversed and the cause remanded with directions to dismiss the complaint.

SEAMSTER, C. J., and ROBINSON, J., dissent.

ROBINSON, J., dissenting. In my opinion, the evidence, independent of Hendricks Alphin's testimony as to the transaction with James Alphin, is clear and convincing that James Alphin made a contract with his half-brother, Hendricks, whereby James would will to Hendricks one-half of the property James owned which came from their father.

In the first place, it is not unreasonable that James would enter into such a contract. Hendricks Alphin in-

herited from his mother the most valuable portion of the property involved in this litigation. He deeded this property to his father without any consideration whatever. Also, it is shown by the testimony of J. K. Mahoney, who had married the sister of Sam Alphin's wife and who was thoroughly familiar with the Alphin properties, that all of the property would have been lost if it had not been for the good management of Hendricks Alphin.

S. B. (Pete) McCall, who has been postmaster of El Dorado for 19 years, testified that James Alphin told him that he (James) was gone from El Dorado a large part of the time and that Hendricks had made a good job of looking after the Alphin properties; that he wanted Hendricks to continue to look after the properties and had therefore willed to Hendricks one-half of his interests in the property that came from their father.

Bruce Bennett, a well-known lawyer in El Dorado and Prosecuting Attorney for the 13th Judicial District, testified that in a conversation with James Alphin, James stated: "I have made a will, leaving one-half of Papa's property that I inherited, to 'big brother'; and I have left the other half to Sam . . . 'Big brother' has been taking care of this property for years, and I want him to continue to take care of that property, and I have made a will, under an agreement whereby Big Brother will keep taking care of the property, and I will leave him one-half of what I inherited from Papa, and Sam will get the other half." Bennett's testimony is plain and unequivocal. It is clear and convincing.

Gus W. Jones is Judge of the First Division Circuit Court in El Dorado, and has been Judge in that community for 26 years. He knows Hendricks Alphin and knew James Alphin in his lifetime. He knows that a disagreement arose between James Alphin and Hendricks Alphin because James had made a will leaving all of his interests in the J. S. Alphin properties to Sam Alphin, and that they settled their differences and made an agreement that was satisfactory to both of them. James

Alphin told Judge Jones that he had made a will in the office of Mahoney & Yocum whereby he had willed his interests in the Alphin properties half to Hendricks and half to Sam. In the presence of Judge Jones, James exhibited a copy of the will to Hendricks.

It is not disputed that James did make such a will in the office of Mahoney & Yocum. It is shown by Judge Jones that, in his presence, James exhibited this will to Hendricks. There can be no reasonable explanation of James exhibiting the will to Hendricks except the fact that he was proving to Hendricks that he had carried out his agreement. It is a matter of common knowledge that a person does not ordinarily go around exhibiting his will to the beneficiaries. Sam was also one of the beneficiaries named in the will, and there is no evidence that James exhibited the will to him. James was showing Hendricks that he had carried out the agreement. In fact, it is practically conceded in this case that for a consideration James did enter into an agreement with Hendricks whereby James would will part of the property to Hendricks, but appellant Sam Alphin contends that James agreed to do so in consideration of certain credit arrangements.

Disregarding the testimony of Hendricks entirely, the testimony of Judge Jones, Bruce Bennett and Pete McCall is convincing. This evidence, coupled with the fact that James actually executed the will, leaving part of the property to Hendricks, and exhibited such will to Hendricks in the presence of Judge Jones, proves conclusively in my opinion that there was an agreement between Hendricks and James that, in consideration of Hendricks' continuing to look after the property, James would leave to Hendricks part of the property which came to James from their father.

I am thoroughly convinced that the Chancellor's decree is correct and that it should be affirmed.

SEAMSTER, C. J., joins in this dissent.

MARK *v.* SPRINGS INVESTMENT CO., ET AL.

5-690 279 S. W. 2d 843

Opinion delivered May 30, 1955.

[Rehearing denied June 27, 1955.]

*J. B. Milham,* for appellant.

*F. O. Butt* and *A. J. Russell,* for appellee.

GEORGE ROSE SMITH, J. This is the second suit that has been brought by the appellant, Anson Mark, Jr., for the purpose of enforcing a mortgage executed by Springs Investment Company. In this case the chancellor dismissed Mark's complaint upon the ground that the decision in the first case was res judicata of the issues now presented.

In connection with the purchase of certain hotel property Springs Investment Company executed two mortgages, one to the appellant Mark and the other to Cecil Maberry. In Mark's first foreclosure suit a principal issue was that of priority as between the two mortgages. The decision was in Maberry's favor, *Mark* v. *Maberry,* 222 Ark. 357, 260 S. W. 2d 455, and the decree ordered the foreclosure of Maberry's first lien. Mark obtained judgment only for the accrued interest upon his second mortgage, since the debt was not due and there was no acceleration clause.

At the foreclosure sale, which was held on July 28, 1953, Maberry purchased the property for less than the amount of his judgment against the mortgagor. The sale was confirmed during the July, 1953, term of court. The exact date of confirmation is not shown, but it was necessarily before the term expired in January of 1954. Ark. Stats. 1947, § 22-406.

It was not until September 14, 1954, that Mark filed the present suit against Springs Investment Company, Cecil Maberry, and the purchasers to whom Maberry had sold the property. This proceeding is primarily an attack upon the validity of the 1953 foreclosure sale, it being alleged that proper notice of sale was not given, that the purchase price was inadequate, that Maberry was an officer of the defendant corporation and was therefore ineligible to bid at the sale, that the court's commissioner reported the sale of certain personal property which he had in fact neglected to sell, etc. All these asserted irregularities in the conduct of the sale could have been interposed as objections to the order of confirmation. The chancellor was therefore correct in holding that the confirmation order is res judicata of these matters. *Bank of Pine Bluff v. Levi,* 90 Ark. 166, 118 S. W. 250.

The plea of res judicata is also a defense to the appellant's present attempt to impose personal liability upon Cecil Maberry, since the issue of such liability was involved in the earlier case, *supra,* and is concluded by that decision. In one respect, however, Mark's complaint should not have been dismissed upon the plea of prior adjudication. He asserts in his present complaint that the first note in the series executed by Springs Investment Company became due, in the sum of $500, on July 1, 1954, and is unpaid. By amendment to the complaint Mark states that he is entitled to judgment upon this $500 note. The defendants' plea of res judicata does not reach this issue, since the principal of the debt had not yet matured when the first case was decided and was not involved in that litigation. It may be true that

Springs Investment Company no longer has any assets from which a judgment might be collected, but the plaintiff is nevertheless entitled to be heard upon his claim against the corporation. On this issue the decree is reversed and the cause remanded. Whether a receiver should be appointed for the corporation is a matter to be determined by the chancellor upon remand.

CAPITOL TRANSIT CO. *v.* MITCHELL.

5-697 279 S. W. 2d 569

Opinion delivered May 30, 1955.

*Bailey, Warren & Bullion,* for appellant.

*Wm. J. Walker* and *Carl Langston,* for appellee.

WARD, J. Appellee recovered a judgment for injuries received because of the alleged negligence of the driver of appellant's bus at a street crossing. Appellant contends that the judgment should be reversed for two reasons: *First,* it is alleged that there is no evidence to support the allegation of negligence on the part of the bus driver; *second,* it is alleged the evidence shows that appellee was guilty of contributory negligence as a matter of law.

Appellee, Mrs. Leonard Mitchell, was injured about 6:00 p. m. on November 21, 1953, while she was attempting to cross Main Street from west to east where said street intersects Fifth Street in the City of Little Rock. She was attempting to cross along the south side of Fifth Street. The testimony shows that Mrs. Mitchell waited for the traffic light to turn green and then stepped into the crosswalk or safety zone and proceeded east for the purpose of crossing Main Street. Main Street is 54 feet wide, and when Mrs. Mitchell was approximately 21 feet out into the street she was hit by the front bumper of appellant's bus and knocked approximately 4 feet, landing prone on the pavement, and was injured.

Just previous to the said traffic light turning green on this particular occasion appellant's bus had stopped, while traveling east on Fifth Street, several yards west of Main Street [in front of Franke's Cafeteria]. On the caution signal [just preceding the said particular green light] the driver, Charles Holmes, put the bus in motion and proceeded toward Main Street, apparently arriving at the west line of Main Street at about the time the traffic light turned green. It is not entirely clear from the testimony whether the bus was stopped before it entered the intersection although there is testimony that it did not but proceeded on into the intersection at about the same time appellee started to cross the street. It was the intention of the driver, as he had a right, to make a right turn in order to proceed south on Main Street. The bus was 28 feet long [slightly more than one-half the distance across Main Street] and it appears that it was necessary for Holmes to proceed some distance out into Main Street before making the turn in order to avoid striking the curb. The point of impact of the bus with appellee was slightly to the left of the middle of the front bumper.

At this particular time it was raining and the windshield wipers on the bus were in operation. In one portion of Holmes' testimony it is stated that he saw appellee just before or at the time the bus struck her, but from other portions of his testimony the jury could have found

that he didn't see her at all. Holmes testified that immediately before and at the time of the impact the bus was moving 2 or 3 miles per hour and that appellee was knocked a distance of about 2 or 3 feet, but there was other testimony that the bus was traveling approximately 8 miles per hour and that appellee was knocked a distance of approximately 4 feet. Holmes stated that the bus moved about a foot after hitting appellee. He stated also that just as he was entering the intersection he saw two or three people standing on the sidewalk facing north but that he did not see Mrs. Mitchell or anyone else facing east, and he had no explanation of why he didn't see Mrs. Mitchell.

The testimony does not show conclusively exactly how fast Mrs. Mitchell was walking as she was attempting to cross. Some testimony was to the effect that she was going fast or running and other testimony was that she was walking more or less normally. Mrs. Mitchell stated that she was crossing the street to buy a book at Walgreen Drug Store but doesn't remember any of the details of how the collision occurred. She said she didn't look for or see the bus after she entered the intersection. It is conceded that both Mrs. Mitchell and the bus entered Main Street on the green light and that they had a right to do so. The extent of the injuries or the amount of the judgment is not questioned.

Considering the factual situation above set forth and viewing the evidence in the light most favorable to appellee, as we must under our well established rule, we are unable to say as a matter of law either that there is no substantial evidence to support the allegation of negligence on the part of appellant, or that appellee was guilty of contributory negligence.

The jury would have, we think, been justified in finding that Holmes could and should have seen appellee preparing to cross the street in an easterly direction, should have seen her as she progressed across the street, should have seen her as he was turning his bus to the right when appellee was near the point of collision, and

that he should have driven his bus at a slower speed than he did. In weighing the degree of care exercised by the bus driver the jury could also take into consideration the late hour of the day and the condition of the weather. Holmes says that he stopped the bus within one foot after he struck appellee, so it would appear that had he seen Mrs. Mitchell he might have been able to have avoided hitting her. The point of impact on the bus bumper is an indication that appellee was in such position that she could have been seen by the driver at least momentarily before she was hit.

What we have just said also substantiates our conclusion that Mrs. Mitchell was not, as a matter of law, guilty of contributory negligence. The evidence in this case does not present the same situation as obtained where we have held, in cases cited by appellant, that a person is guilty of contributory negligence as a matter of law where he steps into the line of traffic without looking. In the case of *Ponder* v. *Carroll,* 193 Ark. 1120, 105 S. W. 2d 72, this Court stated: "Appellee was negligent in stepping from the wagon without exercising ordinary precautions for his own safety, and the trial court should have directed a verdict in favor of appellant." It was there stated that appellee while riding across a bridge on a wagon stepped into the line of oncoming traffic without looking and was hit by a car approaching from the rear. Here it is not disputed that appellee had a right to enter the intersection when she did or that she was in the crosswalk or safety zone. It is clear from the physical facts here that if appellee, at the time of stepping off the sidewalk preparatory to crossing the street, had looked at the bus which was entering the intersection at the same time, there would have been no indication to her that the bus would cross her line of procedure. Due to the length of the bus it was necessary for it to proceed in a more or less straight line for some distance into the street before attempting to make a turn to the right. The driver of the bus was of course aware of this and it imposed upon him the duty of exercising reasonable care before he changed the direction of the bus across the line along

which he knew pedestrians might be traveling. Having once entered the safety zone in her attempt to cross the street at a time when there was no apparent danger from the position of the bus, we cannot say, as a matter of law, that she was careless in thereafter failing to keep a continuous lookout for its movement.

Affirmed.

AMERICAN FIDELITY FIRE INS. CO. *v.* WINFIELD.

5-688 279 S. W. 2d 836

Opinion delivered May 30, 1955.

[Rehearing denied June 27, 1955.]

*E. J. Butler,* for appellant.

*Fletcher Long,* for appellee.

ROBINSON, J. This is a suit brought by appellee Ethel Lee Winfield against appellant American Fidelity Fire Insurance Company to collect on a policy of fire insurance covering an automobile which was destroyed by fire.

The insurance company contends that notice and proof of loss were not given according to the terms of the policy. The cause was tried before the court sitting as a jury and there was a judgment for the policyholder in the sum of $700.00. It is further maintained by appellant that the judgment is excessive.

Appellee lives on a farm, owned by C. B. Walker, which is about one and a half miles south of Whitmore, Arkansas. In July of 1952, she bought an automobile from the McCall Chevrolet Company in West Memphis. The purchase was financed through the Mid-Continent Finance Company, and that company procured the policy of insurance. Appellee never had any contact with the insurance company except through the finance company, and the policy was sent to her by the finance company. For its services in connection with the sale of the policy, the finance company was paid a portion of the premium by the insurance company.

On the 4th day of July, 1953, Walker, appellee's landlord, borrowed her car to go down in the fields to inspect his crops. While on this trip the car caught fire and was destroyed. Mr. Walker, in behalf of appellee, undertook to notify the insurance company of the loss. He wrote to the finance company from whom appellee had received the policy in the first instance. Receipt of this letter was acknowledged. It appears from the evidence that he also wrote to the insurance company by sending a letter in accordance with the terms of the policy to the Central States Insurance Agency, 1 Brentwood Street, Clayton, Missouri. In this letter he requested that forms be furnished to make proof of loss. Although the insurance company contends this letter was not received, it was never returned to the sender.

Where a letter is properly mailed, it is presumed that it is received by the party to whom it was addressed, and that it reached him in due course of mail. *Southern Engine & Boiler Works* v. *Vaughan,* 98 Ark. 388, 135 S. W. 913; Ann. Cas. 1912D, 1062.

In *Travelers Insurance Company* v. *Thompson,* 193 Ark. 332, 99 S. W. 2d 254, this Court quoted from the Southern Engine & Boiler Works case as follows: " 'This presumption could be rebutted by testimony that it was not in fact received, but the positive denial by plaintiff that same was received would not be sufficient, as a matter of law, to nullify the presumption of its receipt. Such testimony simply left the question as to the receipt of the letter for the determination of the jury under all the testimony adduced at the trial.' "

Walker testified to the effect that he properly mailed the notice in accordance with the terms of the policy. This testimony, coupled with the presumption that it was received by the addressee, constitutes substantial evidence to sustain the court's finding that the notice was in fact received by the company.

It being determined that the company received notice of the loss, the next question that arises is: Did the insurance company's failure to acknowledge receipt of the notice of loss relieve the policyholder from furnishing proof of loss within the 60-day period provided by the policy?

When appellee received no reply to the letter written to the insurance company, she engaged an attorney to look after her interests. The attorney wrote to the insurance company at 7 Brentwood Street, Clayton, Missouri, the address given as the office of the insurance company's agent, but the name of the insurance company was given as the addressee instead of the agency. This letter was unclaimed and returned to the attorney. He then notified the finance company as follows: "On July 7th, you wrote Mr. Walker that this claim should be taken up with the insurance carrier involved. A letter written by me to the address shown on the policy has been returned. Unless you can put me in touch with the company at once and some adjustment can be made of this loss, it will be necessary for Ethel to sue American Fidelity Insurance Company."

The finance company, which had received part of the premium in the first instance as its commission in selling the policy to appellee, merely replied to the attorney that they thought an American Fidelity Insurance Company policy had been mailed to appellee. We do not reach the point, however, as to whether the finance company was acting as agent for the insurance company, because Walker's testimony was sufficient to make a jury question as to the insurance company's being notified directly.

The insurance company did not acknowledge receipt of the notification, and proof of loss was not furnished within the 60 day period as provided by the policy; but, in the circumstances, the company is not in a position to declare a forfeiture by reason of the failure of the policyholder to furnish proof of loss. On the subject of acts constituting waiver of proof of loss, it is said in Appleman's *Insurance Law and Practice,* Volume 5, § 3633: "It has been stated that unless there is a bona fide attempt by the company to adjust a loss, there is a refusal to pay. Therefore, the mere effect of silence or inaction might be sufficient to excuse compliance."

In *Ward* v. *Pacific Fire Insurance Company,* 115 S. C. 53, 104 S. E. 316, it is said: "While there was no express or unequivocal denial of liability during the period of time prescribed in the policy within which proofs of loss were to be and might have been furnished, yet defendant's silence, in the light of facts and circumstances, clearly warranted the inference that liability was and would be denied, as it was in fact denied, and plaintiff was warranted in so believing and in acting accordingly. . . . The company received the notice of loss in due time, and, in fairness, it should have notified plaintiff that he must furnish proofs of loss, as required by the policy, if it intended to pay the loss."

In the case at bar, the court, sitting as a jury, found from substantial evidence that the company received notice of the loss. Having received such notice, and failing to acknowledge it or request proofs of loss, the company

could not declare a forfeiture because proofs of loss were not furnished.

As to the value of the car, Ben Few, Jr., an expert, testified that in his opinion the automobile was worth somewhere between $695.00 and $795.00. There was no other testimony on evaluation. The testimony given by Few was substantial evidence of a value of $700.00.

Affirmed.

Justices McFaddin and George Rose Smith dissent.

Ed. F. McFaddin, Justice (dissenting). I am of the firm opinion that the judgment in this case must be reversed because of the failure of the insured (appellee) to file proof of loss. It is not claimed that a proof of loss was filed; and I can find no facts making a case of waiver.

The policy sued on here provided:

"1. Insured's Duties When Loss Occurs. When loss occurs, the insured shall . . . (c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property."

We have held somewhat similar provisions in insurance policies to be valid. One of the most recent cases is that of *Cook. Comm.* v. *U. S. F. & G. Co.*, 216 Ark. 743, 227 S. W. 2d 135, in which Mr. Justice Leflar, speaking for a unanimous Court, said:

"Our holding is that, assuming that the plaintiff has rights under the contract, he still cannot recover because he has not complied with the proof of loss requirement in the contract.

"The proof of loss clause was a valid part of the insurance contract. Similar clauses have been many times sustained and enforced in this court. *Teutonia Ins. Co.* v. *Johnson,* 72 Ark. 484, 82 S. W. 840; *New York Life Ins. Co.* v. *Moose,* 190 Ark. 161, 78 S. W. 2d 64; *Home Life Ins. Co.* v. *Swaim,* 200 Ark. 819, 142 S. W. 2d 209; *Brotherhood of Railroad Trainmen* v. *Drake,* 204 Ark. 964, 165 S. W. 2d 947. The insurance company's right to rely upon non-compliance with the clause is not waived by a general denial of liability asserted by the company after the period for filing a proof of loss has expired. *Smith* v. *American National Ins. Co.,* 111 Ark. 32, 162 S. W. 772; *Illinois Bankers Life Assn.* v. *Byassee,* 169 Ark. 230, 275 S. W. 519, 41 A. L. R. 379. The clause is a part of the contract under which plaintiff claims, and he cannot ignore it in making his claim."

In the case at bar the majority opinion does not claim that any proof of loss was furnished; rather the majority says the proof of loss was waived. And how was it waived? The majority says the proof of loss was waived because the insurance company remained silent! ! ! Just why silence would be a waiver is too difficult for me to understand.

We have held that a denial of liability (within the time for filing proof of loss) is a waiver; we have held that sending blanks to the insured is a waiver of the time requirement; we have held that retaining the proof of loss is a waiver of its defects; we have held that questioning any attempted proof of loss is a waiver of its defects;[1] now we are holding that the failure to do anything is a waiver of proof of loss. Thus the insurance company is really "between the rock and the hard place": heretofore if the insurance company answered the letter and did anything at all, such was a waiver; and now if the insurance company does not do anything, it is a waiver. In short, the proof of loss requirement in an insurance contract is just about entirely eliminated by judicial *destruction!*

[1] Cases to sustain the foregoing statements regarding waiver are collected in West's Arkansas Digest, "Insurance", § 557-561, inc.

So far as I can find, the statement quoted in the majority opinion from Appleton on "Insurance", (Vol. 5, § 3633) is based entirely on the South Carolina case of *Ward* v. *Pacific Fire Ins. Co.,* 115 S. C. 53, 104 S. E. 316. I submit that the facts in that case differentiate it from the facts in the case at bar. A study of the South Carolina case discloses that the fire loss occurred March 31, 1916; and within three days the defendant insurance company was notified. On May 8th, the insurance agent forwarded a letter to the company; on July 21st the insured's attorney wrote the company inquiring about the matter; and then on July 28th the insurance company wrote the attorney this letter: "We have for acknowledgment your favor of the 21st inst. under above loss, and beg to advise that the matter has had our attention"; and on the letter there was the pencil notation: "Having attention". When the suit was filed in January, 1917, the company claimed, *inter alia,* that no proof of loss had been filed. This claim was held to be without merit probably also because the South Carolina Court holds that denial of liability *at the time of the trial* is a waiver of the proof of loss. (See *McBryde* v. *Ins. Co.,* 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769.)

Our cases hold that denial of liability at the time of the trial *is not a waiver of proof of loss.* So the South Carolina case is not based on a line of authorities consonant with our own. Furthermore, in the South Carolina case, the insurance company lulled the plaintiff and his attorney into a feeling of safety by advising them that the matter was "having attention". We find no such "lulling" in the case at bar; so I submit that the South Carolina case is not a good authority on which to base the holding of waiver that the majority is making in the case at bar.

For the reasons herein stated, I respectfully dissent.

4815 279 S. W. 2d 818

Opinion delivered June 6, 1955.

[redacted]

*Hendrix Rowell* and *William I. Purifoy,* for appellant.

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

LEE SEAMSTER, Chief Justice. This is a Petition for Writ of Error Coram Nobis. Petitioner was the appellant in the case of *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24; and our opinion was delivered on January 24, 1955.

The appellant in due time filed a petition for a rehearing in the case and the petition was denied on the 28th day of February, 1955. The appellant now complains of the action of the Circuit Court in this; that before the trial of the case the appellant on May 17th, 1954, filed a motion in the trial court that he be sent to the State Hospital for Nervous Diseases for a mental examination; that the trial court appointed two doctors to examine the appellant and report to the court their findings as to the sanity of the appellant at that time and on April 14th, 1954, the day the deceased was shot. The two doctors examined appellant and found him to be sane on both occasions. A Motion was filed in the trial court by Turner's lawyers asking permission to cross-examine the doctors making the report. Their report does not go to the merits

of the case and was never presented to the jury. The trial court appointed the doctors to examine the appellant as provided by law for the purpose of ascertaining whether the appellant had any symptoms of insanity at that time or at the time of the shooting, so that the court might determine the advisability of sending him to the State Hospital to have a psychiatric examination of the prisoner.

This same question was before the court on appeal. The opinion in this case takes up most of four closely printed pages discussing this very point. The last sentence is as follows: "But no rule of law requires that cross-examination be allowed of the doctors who make the examination in the first instance merely for the purpose of determining whether there are grounds for sending the defendant to the State Hospital for a mental examination." The appellant now complains that the order placed on the record of the trial court would indicate that the appellant or his attorneys selected the two doctors to examine the prisoner—The majority opinion clearly indicates that the two doctors were selected by the trial court and that they examined the prisoner, reported their findings to the court for the court's information, and for its action on appellant's motion to be sent to the State Hospital for a sanity test.

The State has filed a response to the petition herein, and has attached to the response a detailed certified report from the State Hospital, covering the period from March 28th to May 11th, 1955—The report finds that the prisoner is now and was at the time of the shooting and at the time of the trial sane.

The question raised here has been determined by this court on the appeal of the case from the Circuit Court.

The sworn affidavit of Dr. Rowland R. Robins is attached to the petition. He states, in substance that he has been Turner's family doctor for 10 years. Has treated him for peptic ulcer and on a few occasions opiates were required to relieve him from severe pain; that he is emotionally frustrated and quick tempered from the slightest provocation. This behavior pattern suggests that there

must be some psychotic tendencies. The record further reflects that Dr. Robins was in the court room and appellant's attorney offered his testimony at the preliminary hearing when the court had before it the motion to send the prisoner to the State Hospital. The court refused to hear his testimony then, but did call two other doctors of the court's choosing. Dr. Robins was present again at the trial (Tr. P. 544-548). He testified in chambers about the prisoner's condition with reference to his ability to testify at that trial. He had administered medicine to him on the morning of the day he was to testify. Also gave him a nimbutal to make him sleep—The effects of which would be gone in about 3 hours. He thought because the prisoner had not slept the night before that he would be stronger mentally and physically, and his mind would be clearer after a night's sleep. Dr. Robins was not used as a witness before the jury to testify as to the sanity of the appellant and did not question his sanity while testifying in chambers—It was his physical condition in question then, together with the mental dullness that goes with pain and lack of sleep.

In the recent case of *Jenkins* v. *State,* 223 Ark. 245, 265 S. W. 2d 512, we had occasion to consider and discuss the writ of error *coram nobis;* and what was there said applies here:

"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."

The appellant had a trial which was affirmed on appeal and a rehearing was denied—all the facts now alleged were set out in the transcript and fully discussed by the court in its opinion in this case. We hold that no error of fact has been shown to exist in this case. The Writ is denied.

5-702 279 S. W. 2d 819

Opinion delivered June 6, 1955.

*Tom Gentry,* Attorney General; *James L. Sloan* and *Thorp Thomas,* Assistant Attorneys General, and *Ed E. Ashbaugh,* for appellant.

*H. G. Leathers,* for appellee.

J. SEABORN HOLT, J. This appeal involves the question of the right of the Arkansas Game and Fish Commission to adopt rules and regulations for the conservation and regulation of wildlife in Arkansas. Specifically the question is whether the Commission could promulgate a rule to require a license fee of $1.50 on each hound dog used for chasing foxes for pleasure, and also a penalty for failure to comply.

The question arose in this manner: Appellee Chester Casey was on March 31, 1954, charged in a Justice of the Peace Court with the offense of hunting foxes with a fox hound without first having procured a license at a cost of $1.50 for said hound. Appellee, before trial was had in the Justice Court, filed petition in the Carroll Circuit Court alleging "that the Justice of the Peace was without jurisdiction to try said cause, for the reason the petitioner is not charged with an offense in violation of the laws of the State of Arkansas or any municipality therein and asked that said Justice of the

Peace be prohibited and restrained from proceeding further in said cause." Hearing was had on this petition January 29, 1955, and the court found that the petition should be granted "for the reason that Section J of the Game and Fish Commission Code No. 100 issued and effective January 1, 1953, is an attempt to abrogate § 47-201, Sub-section K, of the Arkansas Statutes (1947) which fixes the fee at $.50 and that the Fish and Game Commission is without power to arbitrarily raise the fees for revenue purposes, fixed by the legislature."

This appeal followed. In this court the appellant has waived any objection to the method of proceeding, by prohibition, in the circuit court, and that issue is not before us. Amendment 35 to the Constitution of Arkansas became effective July 1, 1945, by which the Arkansas Game and Fish Commission was created and given broad and comprehensive powers. This amendment "is complete within itself, and prior legislative Acts, whether directive or restrictive in nature, have been superseded. It seems to have been the purpose of those who wrote the Amendment to cover the whole subject, and to either provide, or leave to the Commission, methods for reaching these ends," *W. R. Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948.

Section 1 of the amendment provides "The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservation and all property now owned, or used for said purposes and the acquisition and establishment of same, the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission" and in Section 8 we find this provision, "Resident hunting and fishing license, each, shall be One and 50/100 Dollars annually, and shall not exceed this amount unless a higher license fee is authorized by an Act of Legislature."

We think it clear from this unambiguous language that the people in enacting Amendment 35 intended that

the Game and Fish Commission should collect from all resident hunters and fishermen a license fee of $1.50 each for the privilege of hunting and fishing, until such time as the Legislature should authorize a higher license fee to be collected. The power to fix this license fee at more than $1.50 rested solely with the Legislature and not the Commission.

The Commission on January 1, 1953, promulgated in its "Game and Fish Code" the following rule and regulation in Section 22-J-100, "It shall be unlawful to hunt, pursue, chase or take any deer, rabbit, squirrel, raccoon, opossum, fox or other fur-bearing animal, wild turkey, wild duck, quail, snipe, woodcock or other wild fowl, game bird or wild animal or fur-bearing animal in this State with a dog without first procuring a license for each dog so used for which license the sum of $1.50 shall be paid."

As indicated, Appellee argues and the trial court held that this Section J in so far as it raises the license fee on fox hounds used for pleasure in chasing foxes, from $.50 to $1.50, violates or abrogates § 47-201-K-Arkansas Stats. 1947, which section provides "It shall be unlawful to hunt, pursue, chase, or take any deer, wild turkey, wild duck, quail, snipe, woodcock or other wild fowl or game bird in this state, with a dog, without first procuring a license for each dog so used, for which license the sum of one dollar and fifty cents ($1.50) shall be paid, provided a special license, at a fee of fifty cents (50 cents), shall be procured for each dog used in chasing fox for pleasure."

We do not agree. The above § 47-201 was enacted by the 1943 Legislature which was prior to the effective date of Amendment 35 (July 1, 1945). This Amendment 35 in § 1, as pointed out above, gave the Commission broad power and authority to control, manage, restore, conserve and regulate the game and wildlife resources of Arkansas, including sanctuaries, refuges, reservations, and all property now owned or that may be acquired by the Commission and used for said purposes.

Section 8 of the amendment further provides, "The Commission shall have the exclusive power and authority

to issue licenses and permits, to regulate bag limits and the manner of taking game and fish and fur-bearing animals, and shall have the authority to divide the State into zones, and regulate seasons and manner of taking game, and fish and fur-bearing animals therein, and fix penalties for violations." Under these provisions of this amendment we hold that the Commission has been given full and complete administrative power and authority to promulgate rules and regulations necessary for the conservation and preservation of all wildlife including not only the power to establish a bag limit, set seasons in which to hunt and fish and the penalty for violations but also the power to levy a license fee on all hunting dogs, just so long as such license fees are not unreasonable or arbitrary and are for regulatory purposes—as appears here—and not for revenue. This power to levy and to fix the amount of license fee on each hound dog has been reserved to the Commission alone. Obviously the people by enacting this amendment intended that the Commission should have sufficient and ample funds with which to function in preserving and propagating wildlife in the manner provided therein. As pointed out above, it was the purpose of those who wrote this amendment to cover the whole subject relating to the wildlife conservation and to provide or leave to the Game and Fish Commission methods of reaching those ends.

Section 8 above contains this further language "The fees, monies, or funds arising from all sources by the operation and transaction of the said Commission and from the application and administration of the laws and regulations pertaining to birds, game, fish and wildlife resources of the State and the sale of property used for said purposes shall be expended by the Commission for the control, management, restoration, conservation and regulation of the birds, fish and wildlife resources of the State, including the purchases or other acquisitions of property for said purposes and for the administration of the laws pertaining thereto and for no other purposes."

We hold, therefore, that Amendment 35 vested in the Commission the power to fix the amount of license fees, with the exception that the fees for resident hunting and

fishing licenses can be increased only by legislative act. With respect to other license fees, such as the one involved here, the Commission's authority is clearly stated in this sentence in the Amendment: "All laws now in effect shall continue in force until changed by the Commission." It follows that § 47-201-K of the statutes, which fixed the annual license fee for fox hounds at fifty cents, has been repealed and superseded by the Commission's regulation raising the fee to $1.50 annually.

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

Chief Justice SEAMSTER and Justice MILLWEE dissent.

CRANNA, ADMINISTRATOR *v.* LONG.

5-675 279 S. W. 2d 828

Opinion delivered June 6, 1955.

[Rehearing denied June 27, 1955.]

*Herrn Northcutt,* for appellant.

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

Ed. F. McFaddin, Justice. Aside from a procedural matter, the question here presented is whether the Trial Court was correct in sustaining the demurrer to the complaint.

On May 27, 1954, appellant Cranna, as administrator of the estate of Chumley, deceased, filed complaint against appellees, Long and wife, alleging that in January, 1950, Chumley (then 83 years of age) was mentally incapable of transacting business; that the Longs, by duress and undue influence, obtained a deed from Chumley for certain lands; and that the Longs also received and converted personal property (cattle, furniture and silverware) belonging to Chumley of the value of $5,000.00. The prayer of the complaint was for cancellation of the deed, and for judgment for the value of the converted personal property. The Trial Court sustained the Long's demurrer to the entire complaint; and Cranna, administrator, brings this appeal.

I. *Procedural Matter.* The appellees have moved to dismiss the appeal, saying: ". . . that the notice of appeal, as required by § 2 of Act 555 of 1953, was not given within 30 days after the date of the decree of the Fulton Chancery Court on October 12, 1954." The majority of this Court holds this motion to be without merit. The record shows: that on October 12, 1954, the Trial Court announced that the demurrer would be sustained; that on October 14, 1954, the attorneys agreed on the form of the decree which sustained the demurrer and dismissed the complaint; that on October 16, 1954, this de-

cree was filed with the Clerk for entry; and that the notice of appeal was filed on November 12, 1954, which was within thirty days from the date the judgment was filed with the Clerk for entry.

Section 2 of Act 555 of 1953 says: "When an appeal is permitted by law . . . any party to the action may appeal from a judgment or decree, by filing with the Court in which the case is tried a notice of appeal within 30 days from the *entry of the judgment* or decree appealed from. . . ." (Italics our own.) The filing of the judgment with the Clerk for entry is the decisive date under the above quoted Statute. A case indicating this conclusion is *Norfleet* v. *Norfleet,* 223 Ark. 751, 268 S. W. 2d 287.

II. *Sufficiency of the Complaint to Cancel the Deed.* The administrator was the only plaintiff; the deceased had died intestate; and there was no allegation that the land was necessary to pay debts or expenses of administration. Prior to Act 140 of 1949 (the Probate Code), § 66 of Pope's Digest was the governing Statute and said: "Lands shall be assets in the hands of the executor or administrator, and shall be deemed in their possession and subject to their control for the payment of debts." Sec. 94 of the Probate Code (as now found in § 62-2401, Ark. Stats.[1]) says: ". . . real property shall be an asset in the hands of the personal representative when so directed by the will, or when and if necessary for the payment of debts, or expenses of administration." The quoted language of the Probate Code was not designed to make the administrator automatically entitled to the real estate of a deceased intestate. The quoted language of the Probate Code continues the rationale of our cases decided under § 66 of Pope's Digest; and these cases hold that the legal title of an intestate's land, upon his death, descends and vests in his heirs at law, subject to the widow's dower and the payment of debts through his administrator. See *Stewart* v. *Smiley,* 46 Ark. 373; *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117; and *Mayo* v. *Bank of Marvell,* 188 Ark. 330, 65 S. W. 2d

[1] The section references herein are to those in the Cumulative Pocket Supplement to Ark. Stats.

549. Sec. 62-2701, Ark. Stats., in abolishing the priority between personal property and real property for the payments of the debts of the deceased, applies *after* it has been determined that the lands are necessary for the payment of debts. That section does not change the long established rule of our cases, as above cited.

Sec. 62-2401, Ark. Stats., says: "When real property has become an asset in the hands of the personal representative, as hereinbefore provided . . . the personal representative may . . . maintain or defend an action for the possession thereof, or to determine or protect the title thereto until such real property is sold. . . . " In the case at bar, there is no allegation that the real property had ever become an asset in the hands of the administrator, so the above quoted section does not support the appellant's claim in this Court. The complaint contained no allegation so as to make applicable § 62-2402. Likewise, neither § 62-2409 nor § 62-2714 has been invoked. Therefore, we find no allegation in the complaint sufficient to support the administrator's effort to recover the lands; and the Chancery Court was correct in sustaining the demurrer to the complaint insofar as the lands were concerned.

III. *Sufficiency of the Complaint to Recover the Value of the Personal Property.* The complaint alleged that the Longs had converted to their own use various items of personal property of Chumley's of a value of $5,000.00, and there was prayer for judgment. The Trial Court was in error in sustaining the demurrer to that portion of the complaint concerning the personal property. Sec. 62-2401, Ark. Stats., says: "A personal representative shall have the right to and shall take possession of all of the personal property of the estate of the decedent. . . ." This section is in keeping with our Statutes and the cases theretofore existing. The administrator is empowered to sue for and recover the personal property of the estate, so the complaint stated a good cause of action insofar as the personal property is concerned.

If the defendants thought the complaint indefinite they should have filed a motion to make more definite and certain. A demurrer was not proper for that purpose. *State* v. *Aetna Fire Ins. Co.,* 66 Ark. 480, 51 S. W. 638; *Murrell* v. *Henry,* 70 Ark. 161, 66 S. W. 647; and *Ottinger* v. *Ferrell,* 171 Ark. 1085, 287 S. W. 391. Limitations did not appear on the face of the complaint so the demurrer could not raise that issue. *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. 2d 408; and *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835.

Therefore the decree is reversed insofar as it dismissed the complaint as to the personal property, and the cause is remanded as to the personal property.

REITER *v.* REITER.

5-699 278 S. W. 2d 644

Opinion delivered June 6, 1955.

*J. C. Dugan,* for appellant.

*Wood & Smith,* for appellee.

MINOR W. MILLWEE, Justice. This is an appeal from a decree denying appellant's petition to require appel-

lee, her former husband, to resume weekly payments for the support of their 12-year-old son in accordance with the original decree of divorce.

On March 3, 1953, appellant procured a divorce from appellee on the ground of general indignities. In the decree appellant was awarded custody of the child except that appellee was given custody one day each week and during the month of July in accordance with a written property settlement and agreement of the parties which was incorporated in and made a part of the decree. This agreement further provided that appellee should pay appellant $20 weekly for the child's support except during the month when appellee had custody. After a finding that the written agreement should be confirmed the decree further recites:

"For the purpose of clarity, the court finds that the property settlement binds the parties as to custody of Pat, their minor child, but that said child is not bound thereby and is subject to such future orders as may be necessary for his welfare. The defendant, S. J. Reiter, father of Pat, acknowledges that the award of custody is for the purpose of fixing rights between himself and May Bell Reiter, plaintiff, and further acknowledges that in the event the child does not desire to accompany him during the period or periods which he is entitled to custody such child will not be compelled to do so."

On July 9, 1953, a hearing was held upon appellee's application for an order directing delivery of the child to him for a month in compliance with the original decree. This hearing resulted in an order on the same date directing that the child should spend Saturday and Sunday of each week with appellee but that the previous provision that appellee also have custody for one month be held in abeyance.

On July 23, 1953, a hearing was had upon appellee's petition for contempt citation against appellant for interfering with the weekly visitation order by alienating the child from appellee so that he preferred not to comply with the court's order respecting said weekly visits. The court found that appellant had improperly influ-

enced the child and alienated him from appellee, and that the latter should be relieved of making the support payments during any week the child should fail to visit him in accordance with the court's order.

On October 20, 1954, appellant filed a petition alleging that circumstances were such as to require resumption of weekly support payments in accordance with the agreement of the parties incorporated in the original decree. When the parties appeared for a hearing November 9, 1953, counsel for appellant called the court's attention to the provision in the original decree to the effect that the child would not be compelled to visit in appellee's new home against his wishes. Appellant also offered the testimony of several witnesses, including the child, to prove the child's present need for support. Upon being informed that the child was not then making the weekly visits permitted by previous orders, the court declined to hear any testimony and entered the decree appealed from, which found there had been no changed conditions since the order of July 23, 1953; that the child's refusal to visit appellee was being caused by the actions of appellant; and that the court declined "to take any action" against appellee or "permit its process to be used" to enforce payment of support money for the child in the circumstances.

Appellant contends the trial court was without authority to modify the original decree as to the payments for child support because it was based upon an independent written contract between the parties which was incorporated in the decree and approved by the court. Appellant relies on such cases as *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, and *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938, to the effect that the independent agreement of the parties in these circumstances does not merge into the court's award and is not subject to modification except by consent of the parties. As appellee points out, these cases involve agreements relating to payments of alimony while we are here concerned with child support payments. It is true that the rule was also applied in *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439, where the agreement involved a monthly payment for both ali-

mony and child support, but it was there pointed out that the court might subsequently decline to enforce by contempt proceedings the payment of a greater sum than changed circumstances would warrant, thereby remitting plaintiff to her remedy at law to collect the balance due under the contract. In this connection courts of equity are empowered by Ark. Stats., § 34-1212 to enforce separation agreements or orders for alimony and maintenance by sequestration, equitable garnishment, contempt proceedings or other lawful means.

In a case where only payment for child support is involved, as here, we hold that a court of equity has the power to modify an award for child support when required by changed conditions and the best interests of the child even though the award is based on an agreement of the parties. This was the effect of our recent holding in *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409, where we said: "The power of a court to modify a decree for the support of minor children cannot be defeated by an agreement between the parents even when the agreement is incorporated in the decree, 27 C. J. S., Divorce, § 322a. Although the court may adopt the agreement of the parents and incorporate it in the decree, it still has the power to modify the decree when it shall be made apparent that changed conditions make a modification necessary." (Citing cases). While this statement was in the nature of *dicta* we think the principle is sound and salutory. It is in harmony with the following observation of the court in *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012: "In this connection it may be said that, whatever the result of the agreement between the husband and wife with respect to the custody and support of their minor child, such agreement does not affect the right of a court of equity to award the custody of the child to either parent and to make reasonable provision for its support and education. The reason is that the public has an interest in the matter, and that the interest of the child is the paramount consideration of the court." See also, *Penny* v. *Penny,* 210 Ark. 16, 193 S. W. 2d 811.

The primary issue here is whether the trial court correctly deprived the child of the right to his father's continued support solely because of the mother's misconduct in alienating the child from him. We have repeatedly held that the law makes it the duty of a father to support his minor child even though its custody is awarded to the mother. The misconduct of appellant in teaching the child to entertain feelings of hatred toward appellee, whatever may be its effect as a consideration for withdrawing custody from her, should not be allowed to prejudice the child's right to support. 17 Am. Jur., Divorce and Separation, § 703. The misconduct of appellant, wrong as it is, and painful as it must be to appellee, should not be visited upon the child so as to deprive him of all aid from his father. See *Buckminster* v. *Buckminster,* 38 Vt. 248, 88 Am. Dec. 652. This rule is peculiarly applicable here since appellee expressly acknowledged and the original decree stipulated that the child should not be compelled against his wishes to visit appellee in his new home nor be bound by the agreement between the parents in fixing future custodial rights.

It should be pointed out that there is no claim of inability to make the support payments. It should also be noted to appellee's credit that he has never sought to be relieved of making the support payments nor has he been delinquent in any manner in complying with the court's orders. Appellant's contention that appellee should be required to make payments accruing since July 23, 1953, is without merit since she did not appeal from the July order which became *res judicata* of her right to enforce the original decree as to payments accruing prior to filing the instant petition. *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954.

The decree is reversed and the cause remanded with directions to enter a decree for appellant for support payments accruing since October 20, 1954, and for such proceedings as may be necessary to enforce due compliance with such order.

5-695 279 S. W. 2d 831

Opinion delivered June 6, 1955.

[redacted]

*Shaver, Tackett & Jones,* for appellant.

*Charles Conway, Charles C. Wine* and *LeRoy Autrey,* for appellee.

WARD, J. This action was originated by appellant to enjoin the City of Texarkana from enforcing an ordinance which purported to regulate heavy traffic on certain streets. The trial court held the ordinance valid, hence this appeal.

*Complaint.* Petitioner (appellant) is a resident and citizen of Miller County, residing on East 24th Street outside but near the city limits of Texarkana; he operates

a wholesale and retail butane gas business adjoining his home; his business requires the use of trucks of more than one-half ton capacity on East 24th Street. The City Council of the City of Texarkana passed Ordinance B-866 which reads (insofar as material here) as follows:

"Section 1. Hereafter it shall be unlawful for any person, firm or corporation, or its agents, officers or employees, to operate any motor truck, truck-tractor with semi-trailer or any full trailer, either of which is of more than one-half ton capacity upon 24th Street, 12th Street or Jefferson Street in the City of Texarkana, Arkansas.

"Section 2. (a) This Ordinance shall not be construed to prohibit motor vehicle trucks from crossing said streets at their intersections with other streets, (b) nor apply to delivery trucks serving the *residents* in the immediate area, (c) nor shall this ordinance be construed so as to prevent any person living within the *corporate limits* of Texarkana, Arkansas, from operating such trucks upon said streets where it becomes necessary for them to reach their homes."

(Separation of clauses and emphasis supplied for convenience.)

Section 3. Provides for appropriate street signs.

Section 4. Penalty for violation.

"Section 5. This Ordinance being necessary to protect the pavement upon said streets, and for the immediate preservation of the public health, peace and safety of said city, an emergency is hereby declared to exist and this Ordinance shall be in full force and effect from and after its passage, approval and publication."

The enforcement of said ordinance will cause petitioner irreparable damage, in that it is reasonably necessary for petitioner to make use of said East 24th Street within the city in going to and proceeding from his place of business in connection with the delivery of butane gas to his customers residing within and at points beyond the city. The enforcement of the ordinance will cause petitioner further irreparable damage in that his customers

are prohibited from using East 24th Street within the city, compelling them to purchase butane gas from other distributors, and the enforcement of the ordinance will compel him to discontinue his business.

It was further alleged that said ordinance violates the 14th Amendment to the Constitution of the United States and Article 2, §§ 18 and 22 of the Constitution of Arkansas because it is discriminatory, provides unreasonable and inequitable class legislation, is confiscatory of his personal and property rights and deprives him of his property without due process of law. The answer was a general denial.

*The testimony* (in substance). Appellant's home and place of business abuts East 24th Street on the north side and is about a block and a half east of Jefferson Street which runs north and south the full length of the City, 24th Street running east and west. About a mile west from appellant's home 24th Street intersects Highway 71 (sometimes referred to as the State Line) which runs north and south, and it is about the same distance east from appellant's home to where 24th Street intersects Highway 67 which (from the point of intersection) runs northeast toward Hope and southwest toward Dallas, intersecting Highway 71 on the south side of the City. In conducting his business appellant has several heavy trucks (more than one-half ton) which he uses to deliver gas to 8 or 9 wholesalers and to haul gas to his place of business from the refinery located on or near Highway 71 south of the City. Also as a part of his business he makes deliveries to individual customers and he sells gas to large trucks and other customers who come to his place of business. It is not disputed that the most convenient route for appellant to reach Highway 71 is 24th Street. (It is noted here that in his complaint appellant makes objection only to the regulation of 24th Street.) It is insisted by appellant that in order to reach the refinery or to travel south of the City on Highway 71 it is necessary for him to go approximately 4 to 6 miles farther than he would have to go by using 24th Street. One route, he says, would be to go east on 24th Street to Highway 67, thence southwest on 67 to where it inter-

sects Highway 71 or a distance of approximately 4 or 5 miles. Evidence shows that the corporate line runs in the middle of 24th Street for a distance of about 400 feet from appellant's home west to the intersection of 24th Street with Jefferson Street. It is also shown that north of 24th Street the corporate line runs in the middle of Jefferson Street from 28th Street to 32nd Street and thence west along the middle of 32nd Street (approximately a mile) to Highway 71 or State Line. It is conceded that appellant can drive his trucks from his home 400 feet west to Jefferson Street, thence north on Jefferson Street (approximately one-half mile) to 32nd Street, thence west on 32nd Street to Highway 71. From this point appellant can drive his trucks south on Highway 71 (approximately one-half mile) to the intersection with 24th Street. From this it must be observed that by taking the last mentioned route appellant would have to go from one mile to a mile and a half farther to reach the intersection of 24th Street and Highway 71 than he would have to go by direct route west on 24th Street to reach the same point. It is admitted that trucks returning to appellant's place of business could not follow the route detailed above for the reason that the west half of Jefferson Street (from 32nd Street south to 28th Street) is within the city limits. There is other testimony however to the effect that other return routes are available to appellant which would not be materially longer than the one along 24th Street. The testimony shows that at least a portion of 24th Street has a gravel base with a thin blacktop covering and that the street would be damaged by the use of heavy trucks.

*Issues eliminated.* Much argument on both sides is directed to the several exceptions contained in Section 2 of the ordinance. One exception is that delivery trucks may serve residents [of the City] living along or near the prohibited streets. Another exception is that the ordinance shall not prevent residents of the City from using the streets where it is necessary to reach their homes, even in trucks of more than one-half ton capacity. Appellant's argument is that these exceptions provide a classification based on residence and is therefore invalid.

We do not, in this opinion, reach this question for the reason that these exceptions are not attacked by the pleadings or supported by the evidence. It is not within the province of the duties of this court to declare an entire ordinance invalid merely because we might feel that some portion of it, not attacked, is invalid. In *Ferguson Coal Co.* v. *Thompson, Mayor, et al.,* 343 Ill. 20, 174 N. E. 896, where a similar issue was raised, it was said:

"Under no circumstances will a court of equity entertain a bill to enjoin the enforcement of an ordinance on the ground alone that it is void, but those seeking to restrain its enforcement must allege and prove facts showing that their interests are affected. They have no right to challenge provisions which do not affect them."

*The Issue.* Therefore the only issue left for our consideration is the validity of Section 1 of the ordinance which prohibits the use of trucks [of over one-half ton capacity] on the named streets. While the pleadings refer only to 24th Street we will consider the pleadings as amended to include Jefferson Street also. There is no mention of 12th Street in the pleadings or testimony.

Appellant bases his argument for a reversal of the trial court on five grounds which we shall discuss in order.

*1, 2.* It is urged, first, that the ordinance violates the Federal and State Constitutions, and second, that the City of Texarkana has no power to enact such an ordinance. These two arguments, with which we do not agree, may be considered together.

There can be no doubt that cities such as Texarkana have the power, under our statutes and decisions, to pass ordinances of this nature. The exercise of similar powers on the part of cities has been recognized in *Sander* v. *Blytheville,* 164 Ark. 434, 262 S. W. 23; *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187, and *Goldman & Company, Inc.* v. *City of North Little Rock,* 220 Ark. 792, 249 S. W. 2d 961.

This power has also been granted to the cities either directly or inferentially by statutes. Ark. Stats., § 19-

2303, gives cities the right "to regulate the transportation of articles throughout the streets, and to prevent injury to the streets from overloaded vehicles." Section 19-3801 gives cities "supervision and control of all the public highways, bridges, streets . . . within the city." Section 19-2401 gives cities the general power to pass ordinances, not inconsistent with the laws of this state, as seem necessary and provide for the safety, preserve the health, and promote prosperity and convenience of the inhabitants.

Appellant practically concedes that cities had the power to enact ordinances such as the one under consideration prior to 1937, but says, in effect, that Act 300 of 1937 repealed or superseded the statutes above quoted. We see no merit in this argument. Portions of said Act 300 dealing with the regulation of the size of trucks have been superseded or modified by Act 152 of 1953 which in turn has been likewise changed by Act 98 of 1955. Trucks weighing in excess of 56,000 pounds are prohibited from using the highways. None of these acts specifically repeal the statutes above set out. After a careful reading of these acts we are convinced that they do not repeal them by implication. Moreover, repeal by implication is not favored. See *Moncus* v. *Raines,* 210 Ark. 30, 194 S. W. 2d 1, and *McDonald* v. *Wasson,* 188 Ark. 782, 67 S. W. 2d 722. Appellant calls attention to § 25 of said Act 300 which states that the provision of the act shall be applicable and uniform throughout the state and all municipalities, and states that no local authority shall enact any regulation in conflict. The last sentence in this section however states that local authorities may adopt traffic regulations which are not in conflict with the act. We are unable to find where the provisions of the ordinance under consideration conflict with either the spirit or the letter of Act 300. In fact § 26 of said Act 300 provides that the act "shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of police power from . . . restricting the use of highways as authorized in Article 16 of this act." As we understand the provisions of said Article

16 they regulate the maximum weight of trucks allowed on the highways and in no way take away the right of cities to reasonably regulate the use of all heavy trucks on certain streets. Certainly cities would have no power to permit trucks weighing more than 55,000 pounds to use the streets and highway. So, if they can't regulate lighter trucks, the language in § 26 is meaningless.

*3, 4.* It is next argued that the ordinance is invalid in that it sets forth unconstitutional class legislation. Many cases are cited to the effect that legislation based on residence or other unreasonable classifications is invalid. It is not necessary for us to consider this line of reasoning since the exceptions contained in Section 2 of the ordinance are the only portions based on classification and they have been eliminated. It is not contended by appellant that Section 1 of the ordinance in any way deals with classification.

*5.* Finally appellant insists he is entitled to injunctive relief because the enforcement of the ordinance would deprive him of his property without due process of law. In view of what we have already said it appears to us that the only issue left for consideration is whether or not the ordinance is unreasonable or arbitrary. In this connection we are confronted at once with a presumption that the ordinance is valid and that it is not unreasonable or arbitrary. We have announced this rule in the *Sander* case, *supra, City of Fort Smith* case, *supra,* and *Goldman & Company, Inc.,* case, *supra.* A similar question involving the validity of an ordinance was considered in the *Sander* case, *supra,* where the court said:

". . . notwithstanding these allegations, it was nevertheless within the option or discretion of the city council to determine whether the welfare of the city demanded the abatement of these structures; and, unless such discretion was exercised in an arbitrary, discriminatory and unreasonable manner, or in such manner as to invade the constitutional rights of property, the court will not interfere and declare the ordinance void."

In the *Thompson* case, *supra,* it was stated that "where an ordinance is within the grant of power con-

ferred upon municipalities, the presumption is that it is reasonable."

Under the facts and circumstances of this case as heretofore set out we cannot say that the ordinance was unreasonable or arbitrary, and we do not feel that we would be justified in holding that the chancellor's finding on this point was against the weight of the evidence. While the testimony regarding the feasibility of the routes which the ordinance forces appellant to use in the conduct of his business is somewhat contradictory and uncertain, this only makes it more difficult for us to say the chancellor erred. It is not clear from the testimony that appellant does not have reasonably feasible routes of ingress and egress to his place of business. Conceding the testimony shows that appellant will be inconvenienced and that he will suffer some pecuniary loss, yet that alone is not sufficient ground for us to declare the ordinance unreasonable. It was so held in the *Thompson* case, *supra,* where it was also said "in order to justify a court in interfering on the ground that an ordinance is unreasonable the proof must be clear and strong, and the action of the city council is final, if there is room for reasonable difference of opinion upon the question."

Although the argument is not specifically made by appellant, it might be said, with some reason, that his pleading and testimony entitles appellant to rely on the last exception in Section 2 of the ordinance. The argument would be that appellant [a non-resident of the City] is denied the use of 24th Street in returning to his home in a heavy truck—a privilege allowed those living within the corporate limits. On the face of it, this appears to be a discrimination based on residence alone, but we do not think it is in fact. Obviously the ordinance grants this privilege to those who merely want to return to their homes after work is finished, and not to those who intend, as appellant does, to use it for transaction of a business.

Having found no error, the decree of the trial court is affirmed.

4801 280 S. W. 2d 224

Opinion delivered June 6, 1955.

[Rehearing denied July 4, 1955.]

[redacted]

*Q. Byrum Hurst* and *C. A. Stanfield,* for appellant.

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

ROBINSON, J. This is an appeal from an order overruling defendant's motion that the case be dismissed because he had not been brought to trial within three terms after the filing of the information. This is an appealable order. *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934.

Ark. Stats., § 43-1709 provides: "If any person indicted for any offense, and held to bail, shall not be brought to trial before the end of the third term of the court in which such indictment is pending, which shall be held after the finding of such indictment, and such holding to bail on such indictment, he shall be discharged, so far as relates to such offense, unless the delay happened on his application."

The record reflects that on the 8th day of May, 1953, the Prosecuting Attorney filed in the Circuit Court an information charging the defendant with murder in the first degree. On the 12th day of May, 1953, defendant was released on bond. The term during which the information was filed ended in September, 1953, with a new term beginning at that time. The case was set for trial for the 2nd day of November, 1953, which was during the September term, and which was the first term subsequent to the time that the information was filed.

The record shows that the case was continued on the motion of the defendant. The next term of court began in March, 1954, and the case was not set for trial during that term. The case was again set for trial for December 3, 1954, which was during the September, 1954, term. Prior to December 3, 1954, the defendant filed a motion for continuance which was granted. He then filed a motion to dismiss.

The leading case on the subject is *Stewart* v. *State*, 13 Ark. 720. There it was held that the term at which the defendant is indicted is to be counted as one of the three terms mentioned in the statute. In other words, the statute is applicable where the defendant is not brought to trial at the end of the second term held after the term during which the indictment was filed. Here, the case was set for trial at the first term following the term in which the information was filed. Although the record shows that the case was continued at that time on motion of the defendant, it is contended by the defendant that the Prosecuting Attorney actually did not intend to try the case because of insufficient evidence that; the case was not brought to trial because the State was not ready. In any event, the record clearly shows, according to the testimony of defendant's counsel, that the defendant acquiesced in the continuance. The Prosecuting Attorney testified that, as he remembered it, the defense counsel moved for a continuance, and that the State did not oppose it. This motion was made during the first term subsequent to the filing of the information.

The case was not set for trial during the March, 1954, term of court, but was set for December 3 during the September, 1954, term. In other words, the case was set for trial twice, and both times the defendant either moved for a continuance or acquiesced in a continuance. At no time did two terms of court following the filing of the information expire without the case being set for trial. The statute is not applicable where the delay is due to the application of the defendant, or where the defendant concurs in the delay. *Stewart* v. *State, supra;*

*Dillard* v. *State,* 65 Ark. 404, 46 S. W. 533; *Fox* v. *State,* 102 Ark. 393, 144 S. W. 516; *Williams* v. *State,* 210 Ark. 402, 196 S. W. 2d 489.

Affirmed.

McARTHUR *v.* CAMPBELL, COUNTY JUDGE.

5-747 280 S. W. 2d 219

Opinion delivered June 13, 1955.

*S. Hubert Mayes,* for appellant.

*Frank Holt* and *Mehaffy, Smith & Williams,* for appellee.

LEE SEAMSTER, Chief Justice. The appellant, a citizen of Pulaski County, has appealed this case from a judgment of the Chancery Court of the County sustaining a demurrer and dismissing a complaint filed by him in said court, against the appellee the County Judge of said County.

On February 4, 1955, the Pulaski County Court entered an order declaring the necessity for the construction of a county jail, for the handling, detention and rehabilitation of juveniles in said county. The court appointed architects who prepared and filed plans for the jail and estimated the cost thereof at $386,000.

The complaint sets out the above facts and alleges that unless the appellee is enjoined he will proceed to call an election to see if the voters of the county will approve the proposed project and vote a tax to pay for the same. He further alleges that the county court is proceeding under the provisions of Amendment No. 17 to the Constitution of this State and that such amendment does not authorize the construction of such a building as proposed in the order; that the order is void and appellee has spent and is preparing to spend county funds illegally in carrying out the order so made by the county court.

Amendment No. 17 provides the only method by which a county without current funds, can construct a county jail. It's admitted by both parties that the county is without current funds to construct the building.

The principal contention of the appellant is that the proposed building is not a county jail because it is proposed to house therein delinquent juveniles, dependent juveniles and the juvenile court administration together with other personnel. Amendment No. 17 makes it the business of the County Court to determine in the first place, the necessity for the construction of a county jail, before it can proceed with the construction of the building the voters of the county have to approve, by their vote, the construction thereof and vote for a tax to pay therefor. The law prohibits the placing of juveniles with adult prisoners.

It is conceded that the county does not now have a suitable place for the detention of juveniles. The purpose to be served by the proposed building is a proper function of the county government. It is generally known that a county jail is a building where a person or persons may be legally detained for many different reasons, for investigation and observation to answer a charge of some offense, to serve out a fine, to await transfer to another state, or another prison and for many other reasons.

The jail buildings generally provide a place for the jailer, and other personnel to live, a place to prepare

meals, and sanitary conditions are maintained therein. The proposed building according to the plans will provide separate facilities for the juvenile court, the duties of such court are more administrative than judicial. It also provides a place to keep the administrative records and conference rooms; separate compartments for dependent children such as sleeping, and eating quarters and other facilities. The plans also provide for delinquent juveniles the same facilities on another floor level so that such children will not be housed together but kept separate as provided by law. No child will be detained in said building except for legal cause, just the same as in any county jail. They will be detained for processing in a legal manner, the dependent children will have shelter, food and clothing until suitable homes can be found for the homeless. For those who have homes until their homes can be improved and a proper home life provided for them. The delinquent children, whether because they are incorrigible or law violators will be held in the building on a separate floor from any other department in the building until arrangement can be made with their parents, other relatives, or some suitable person or persons to provide for them a normal home life where they may have an opportunity to become useful citizens.

Our law requires that juveniles be kept separate from adult prisoners. The County Court found that the County now has no separate facilities for the care of juveniles. Amendment No. 17 authorizes the construction, reconstruction or extension of county jails. The contention of the appellant is that the proposed building is not a county jail. Webster's Dictionary defines a jail (among other definitions) "as a building for the confinement of persons held in lawful custody." A county jail, whether for adults or juveniles, in the common acceptation of the term, is a place for the legal detention of all persons, who come within the provisions of our laws which authorizes our law enforcement officers to detain them. Many persons, who are not criminals, are taken by officers to the jail. They may never be charged with any offense and still be legally in the custody of some

officer. They are sometimes held for investigation, as a witness or for any reason which would tend to protect society or the person detained.

A jail is no longer just a prison. It is rather a place also where persons in lawful custody are processed or handled and may be liberated, passed on to other legal entities, detained for a short or long time—So long as the detention thereof is legal.

We hold the proposed building comes within the provisions of amendment No. 17, which authorizes the construction, reconstruction and extension of county jails. The County Court to date has proceeded legally in this matter. The case is affirmed.

Justice McFaddin thinks this suit is premature.

Justice George Rose Smith dissents.

McArthur *v.* Campbell, County Judge.

5-748 280 S. W. 2d 221

Opinion delivered June 13, 1955.

*S. Hubert Mayes,* for appellant.

*Frank Holt* and *Mehaffy, Smith & Williams,* for appellee.

Lee Seamster, Chief Justice. On February 9, 1955, the County Court of Pulaski County entered an order finding it necessary that certain improvements be made by remodeling and reconstruction of the County Court House, including the air conditioning thereof, and the making of other necessary repairs and improvements.

The court found it was urgently necessary to make such improvements for the proper and efficient conduct of the county's public business.

Architects were appointed and they filed plans for the remodeling of the court house and estimated the cost thereof at $175,000.

The appellant, a citizen of Pulaski County, filed a suit in the Chancery Court of the County, setting out the above facts and further alleged that the county court was preparing to call an election, and ask the voters of the county to approve the making of such improvements and vote a tax to pay therefor.

He alleged that unless enjoined by the Chancery Court the County Court would call said election and expend the county funds for such purpose; and also that the action of the Court in entering said order was void for the reason that the only way the county could pay for the improvement would be under the provisions of Amendment No. 17 to the Constitution; that the amendment does not authorize the reconstruction or remodeling of a court house as provided in said order. The appellant alleged that in proceeding with said project the County Court was illegally expending the county's funds.

A demurrer was filed by the county to the complaint, the demurrer was sustained by the Chancery Court and the complaint was dismissed. This appeal is from the action of the court therein.

Amendment No. 17 provides for the construction, reconstruction, or extension of any county court house—There is authority for the equipping and furnishing of buildings authorized by Amendment No. 17. See *Atkinson* v. *Pine Bluff,* 190 Ark. 65, 76 S. W. 2d 982; *Lindsay* v. *White,* 212 Ark. 541, 206 S. W. 2d 762; *Railey* v. *City of Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273; *Tunnah* v. *Moyer, Mayor,* 202 Ark. 821, 152 S. W. 2d 1007.

It has been the usual thing to include telephones, heating, sewer, water and lighting facilities in the construction of court houses. Such additional equipment

has been standard work in the construction of court houses in the past. Air conditioning units are fast becoming standard equipment in the home, the office, business houses and public buildings. It, no doubt, contributes to the comfort and efficiency of all the people who have occasion to utilize its benefits.

Authority is contained in the amendment for the County Court to proceed to reconstruct the Pulaski County Court House so as to include air conditioning therein. The County Court has proceeded in a legal manner, under the provisions of Amendment No. 17, to date in this matter. The case is affirmed.

Justice McFaddin thinks this suit is premature.

McCord *v.* Robinson.

5-693 280 S. W. 2d 222

Opinion delivered June 13, 1955.

*French & Camp,* for appellant.

*Westbrooke & Westbrooke,* for appellee.

Ed. F. McFaddin, Justice. Appellants and appellees are, together, all the heirs of A. A. Armstrong, deceased. The appellants brought this suit to set aside a deed from

A. A. Armstrong to appellee. At the close of the plaintiff's case the Chancery Court sustained defendant's motion for decree. See Act 470 of 1949; and *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. The question here presented is whether the testimony for the plaintiffs was strong enough to present a question of fact for decision. If the plaintiffs made a case, then the decree must be reversed under the authority of *Werbe* v. *Holt, supra,* which was recognized by the Chancellor as stating the applicable test.

The complaint alleged, and there was evidence tending to show, that prior to July 21, 1934, A. A. Armstrong and his wife lived on the land here involved; that Mr. Armstrong was involved in litigation which he feared might result in a judgment against him; that an attorney advised him that any judgment rendered against him would not disturb his homestead during the lifetime of himself and wife, but would be a lien thereafter if the homestead had not been previously transferred; that Mr. Armstrong and his wife then executed and acknowledged a general warranty deed to the property in question which recited a good and valuable consideration and conveyed the property to Mildred Armstrong, who is now Mildred Robinson, the defendant below and the appellee here. The said deed had this provision: ". . . reserving, however, the said A. A. Armstrong and Ella Armstrong, his wife, the use, benefits and right of occupancy of said lands for and during the natural life of either or both the said A. A. Armstrong and Ella Armstrong. . . ."

The trial in the Chancery Court involved the actual or constructive delivery of the deed to the grantee, as well as the acquiescence of Mr. Armstrong in the grantee having the deed recorded. That a deed was signed and acknowledged by Mr. Armstrong and his wife [1] as grantors is an admitted fact; but the plaintiffs maintain that the deed was never delivered, either actually or presumptively. Our reports are replete with cases presenting

[1] Mrs. Armstrong is also deceased.

various factual situations regarding delivery.[2] The facts in the case at bar are not entirely identical with any one of our cases; so we state the applicable rules and then measure the facts in the case at bar by such rules. In *Cavette* v. *Pettigrew,* 182 Ark. 806, 32 S. W. 2d 808, Mr. Justice FRANK G. SMITH used this language:

"It is elementary law that delivery is essential to the validity of a deed, but it is frequently a mixed question of law and fact as to whether there has been a delivery, and the law on the subject has been declared in a number of our cases. *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617; *Maxwell* v. *Maxwell,* 98 Ark. 466, 136 S. W. 172; *Battle* v. *Anders,* 100 Ark. 427, 140 S. W. 593; *Stephens* v. *Stephens,* 108 Ark. 53, 156 S. W. 837; *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568; *Watson* v. *Hill,* 123 Ark. 601, 186 S. W. 68; *Fine* v. *Lasater,* 110 Ark. 425, 161 S. W. 1147; *Bray* v. *Bray,* 132 Ark. 438, 201 S. W. 281; *Davis* v. *Davis,* 142 Ark. 311, 218 S. W. 827; *Hardin* v. *Russell,* 175 Ark. 30, 298 S. W. 481.

"In the case of *Battle* v. *Anders, supra,* it was said: 'The important question in determining whether there has been a delivery is the intent of the grantor that the instrument should pass out of his control and operate as a conveyance. The intent of the grantor is to be inferred from all the facts and circumstances adduced in the evidence. His acts and conduct are to be regarded in ascertaining his intent.' "

In *Battle* v. *Anders, supra,* Mr. Justice HART said:

"It is only where the acts or words unequivocally evince the purpose of the grantor that the question of delivery becomes one of law. *Cribbs* v. *Walker,* 74 Ark. 104; *Russell* v. *May,* 77 Ark. 89; *Eastham* v. *Powell,* 51 Ark. 530."

---

[2] Some of our cases not elsewhere listed in this opinion are: *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033; *Taylor* v. *Calaway,* 186 Ark. 947, 57 S. W. 2d 410; *Johnson* v. *Young Men's Bldg. & Loan Assn.,* 187 Ark. 430, 60 S. W. 2d 925; *Ransom* v. *Ransom,* 202 Ark. 123, 149 S. W. 2d 937; and *Ellis* v. *Shuffield,* 202 Ark. 723, 152 S. W. 2d 535.

In the case at bar the facts stated most favorably to the plaintiffs—as must be done in testing the motion—show that Mr. Armstrong never knowingly allowed the deed to pass from his possession; that the grantee acted surreptitiously in obtaining the deed and placing it of record; that the grantor discovered such fact shortly before his death and insisted that as soon as he was able he would have the grantee go with him to the courthouse to have the deed cancelled of record. There was evidence that the grantor kept the deed in a box in a trunk; there was no showing that the grantee had either the legal or moral right of access to the trunk or the box; and there was testimony that the grantee admitted she had "done wrong" in getting the deed and placing it of record.

Thus the testimony in the case at bar was sufficient to present factual issues as to whether there had been (1) actual delivery, (2) acquiescence, or (3) the overcoming of presumptive delivery. The fact questions could not be settled on a motion to dismiss; they required a weighing of the evidence and the exercise of fact finding powers. The motion to dismiss should have been overruled, and the case should have proceeded to a final decision on the facts.

Reversed and remanded.

WOOD *v.* HENDERSON.

5-744 280 S. W. 2d 226

Opinion delivered June 13, 1955.

*Rose, Meek, House, Barron & Nash,* for appellant.

*Robert C. Downie,* for appellee.

ED. F. MCFADDIN, Justice. The question presented is whether Act 115 of 1955 applies to a suburban improvement district organized under the provisions of § 20-701, *et seq.,* Ark. Stats. In considering the posed issue, we leave open any and all questions regarding the constitutionality of the Act 115. Constitutional questions are never decided unless necessary. *Porter* v. *Waterman,* 77 Ark. 383, 91 S. W. 754; *Honea* v. *Federal Land Bank of St. Louis,* 187 Ark. 619, 61 S. W. 2d 436; and *Winston* v. *Personal Finance,* 220 Ark. 580, 249 S. W. 2d 315.

The appellants are the Commissioners of Highway 67 Water Pipe Line Improvement District No. 25 (hereinafter called "District"), created by order of the Pulaski Chancery Court on January 3, 1955, pursuant to said § 20-701, *et seq.,* Ark. Stats. The District was created —as its name implies—to lay a water pipe line for use of suburban property owners. On April 20, 1955, appellee filed his complaint in the Pulaski Chancery Court, alleging: (1) that he was a property owner in the District and sued for himself and all other property owners; (2) that the District originally intended to issue $175,000.00 in bonds, which was sufficient to make the contemplated improvement; and (3) that after the passage of Act 115 of 1955 the Commissioners decided to increase the bond issue to $185,000.00 because the provisions of the Act will add $10,000.00 to the labor cost of the improvement. The complaint also alleged:

"Said Act 115 of 1955 is not applicable to the construction work to be done by said District. It is not a 'taxing agency' within the meaning of that phrase as used in said Act 115. On the contrary, it pays for the cost of the improvement by special assessments levied against the lands of the property owners in the District. The improvement which is to be made by the District does not come within the meaning of 'public buildings or public works' as used in said Act 115. On the contrary, the funds used for the construction work come solely

from the property owners in the District and the improvement is made, not for the benefit of the public but for the property owners who bear the cost thereof."

The prayer of the complaint was that the Court find that the said Act 115 was not applicable to this improvement and that the District be empowered to issue only $175,000.00 of bonds. The answer stated that the Act 115 was applicable to the District and prayed that the complaint be dismissed.[1] The case was tried on facts stipulated substantially as hereinbefore stated; and resulted in a decree holding that the Act 115 was not applicable to the District. This appeal challenges that decree.

The Act 115 is captioned:

"An Act to provide for minimum prevailing wages to be paid on certain state, county, municipal or taxing agency, public construction or works; to repeal conflicting laws; to declare an emergency; and for other purposes."[2]

Section 1 of the Act says:

"The advertised specifications for every contract to which the State of Arkansas, any county of this state, any city or town in this state, *or any taxing agency of this state,* or any of the agencies thereof, is a party, for construction . . . of public buildings or public works of the State of Arkansas, any of its counties, cities or towns, *or of any taxing agencies of this state except as herein provided* . . . shall contain a provision stating the minimum wages. . . ."

Section 7 of the Act says:

"It is the purpose and intent of this Act to provide and prescribe and establish minimum prevailing wage scales on all public state, county, municipal *or taxing*

[1] Originally the Commissioner of Labor of Arkansas intervened to defend the Act; but has been allowed to withdraw after both sides agreed that the question of the constitutionality of the Act could be eliminated from the decree.

[2] The Legislative records show that the emergency clause received sufficient affirmative votes in each branch of the Legislature to make the Act effective immediately upon approval.

*agency buildings and works,* except as herein exempted. . . ."[3] (Italics our own.)

If the suburban improvement district here involved is a "taxing agency," then the Act applies. That is the point for decision.

Our method of making improvements, by the formation of districts which make assessments of benefits against the property for the improvement made, has long been recognized in legislative enactments and judicial decisions. A scholarly two-volume treatise was written by Honorable Horace Sloan of the Jonesboro Bar in 1928, entitled "The Law of Improvement Districts in Arkansas." In § 69 of that treatise, Mr. Sloan quoted Art. II, § 23 of our Constitution:

" 'The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded; and the General Assembly may delegate the taxing power, with the necessary restriction, to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well being, but no further.' "

Immediately following the above quotation, and in § 70 of his work, Mr. Sloan states the following as the rationale of our holdings:

"The words 'taxation' and 'the taxing power,' as employed in the foregoing provision, refer to general taxation only and not to local assessments. The words 'the State's subordinate political and municipal corporations' do not include districts (whether corporations or not) created for the special purpose of constructing or maintaining public improvements to be paid for by local assessments on the real property benefited, but do include counties and municipal corporations. Under these definitions there is no constitutional restriction to prevent the Legislature from delegating to an improvement district the power to fix and levy local assessments upon property specially and peculiarly benefited; but it can-

[3] Section 3 of the Act says that it does not apply to any highway, state or bridge construction.

not delegate to an improvement district any powers of general taxation."

Our cases hold that a local improvement district is not a *taxing agency.* In *Whaley* v. *Northern Road Imp. Dist.,* 152 Ark. 573, 240 S. W. 1, 24 A. L. R. 934, we said:

". . . a local improvement district is not a subordinate political agency of the State, but is merely a governmental agency created for the specific purpose of constructing or maintaining a local improvement. *Altheimer* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 229. General powers of taxation cannot be delegated to such an agency, for, as we have already said, the only theory upon which taxation of any kind can be justified in the construction of local improvements is that benefits accrue corresponding in value with the cost of the improvement."

Again, in *State* v. *Berry,* 158 Ark. 84, 249 S. W. 572, we said:

"Taking all of the provisions of this act together, it would be more appropriately classified as a delegation of power to improvement districts to lay a privilege tax than a delegation of power to the county. But it cannot be upheld as a delegation of power to improvement districts, for they do not constitute subordinate political agencies of the State for the purpose of taxation, under the Constitution, and are therefore not authorized to lay a tax of any kind."

It is true that in some of our Statutes regarding improvement districts the Legislature has used the words "tax" and "taxes" in reference to annual payments of installments of benefits and interest;[4] but it is clear that in all such instances the words "tax" and "taxes" were intended to mean "matured assessment of benefits and

[4] A few such instances may be noticed: in §§ 20-710 to 712, inclusive, Ark. Stats. (the suburban improvement district law here involved) the word "taxes" occurs several times; likewise in §§ 20-1120-1128, inclusive, in speaking of various kinds of districts, the word "taxes" occurs several times; and also in § 20-412 and in § 20-420 (the municipal improvement district law) the word "tax" and the word "taxes" occur several times.

interest due thereon." It would do violence to our entire theory of assessment of benefits of local improvement districts to allow these isolated instances of the loose use of the words "tax" and "taxes" to be seized on to support a claim that an improvement district levied a tax, particularly in view of the cases heretofore cited and the many cases in which this Court has repeatedly held to the contrary, some of which are: *Sanders* v. *Brown,* 65 Ark. 498, 47 S. W. 461; *Paving Dist. of Ft. Smith* v. *Sisters of Mercy,* 86 Ark. 109, 109 S. W. 1165; *Shibley* v. *Ft. Smith Dist.,* 96 Ark. 410, 132 S. W. 444; and *Lewis* v. *Delinquent Lands,* 182 Ark. 838, 33 S. W. 2d 379.

We therefore conclude that the Chancery Court was correct in holding that the district here involved is not a "taxing agency" within the purview of Act 115 of 1955.

Accordingly the decree is affirmed.

Justice George Rose Smith not participating.

Ware *v.* Benedikt.

5-703 280 S. W. 2d 234

Opinion delivered June 13, 1955.

*H. A. Tucker* and *Bailey, Warren & Bullion,* for appellant.

*Richard W. Hobbs,* for appellee.

MINOR W. MILLWEE, Justice. The question for determination is the validity of a by-law of a public hospital which requires the approval and recommendation of a county medical society as a condition precedent to the right of a duly licensed physician and surgeon to practice his profession in such hospital.

Appellee, Dr. Alex Benedikt, is a native of Germany and graduated from Heidelberg University School of Medicine in 1924. After 4 years training in city and county hospitals at Stuttgart, Germany, he practiced medicine there until 1936 when he immigrated to this country and established his residence at Hot Springs, Arkansas. After passing the examination and complying with other requirements in the state of Texas he was admitted and licensed to practice medicine there. Subsequently, he was duly licensed to practice in this state by the Arkansas Medical Board on the basis of reciprocity with Texas. Since 1937 he has practiced medicine in the city of Hot Springs and is duly licensed as a qualified physician by the United States Department of Interior. During the past fifteen years appellee has applied for membership in the Garland County Medical Society 12 times and each time his application has been rejected. Officials of the society have declined to give a reason for the systematic exclusion.

Appellants are the administrator and members of the Board of Governors of the Ouachita General Hospital, a county hospital constructed under the provisions of Amendment 32 to the Arkansas Constitution and sup-

ported by public funds. All of the appellants are businessmen. Appellee's application to the Board of Governors for admission to practice in the hospital and to have his patients admitted for treatment therein was denied on the ground that he was not a member of the Garland County Medical Society as required by Article 5 of the hospital by-laws. Thereupon he instituted this suit to enjoin appellants from further denying him staff privileges and use of the facilities of said hospital as a duly licensed physician and surgeon. After appellants had demurred to the complaint they were advised by the attorney general that Article 5 of said by-laws was invalid and unconstitutional. An answer was then filed alleging that Article 5 had been amended so as to make the approval and recommendation of the Garland County Medical Society a prerequisite to admission to use of the hospital facilities by a physician instead of the former requirement of membership in said society.

Trial resulted in a finding in appellee's favor and entry of a decree restraining appellants from denying staff privileges in said hospital to appellee so long as he remained a duly qualified and licensed physician in this state and abided by all reasonable hospital rules and regulations applicable alike to all physicians on the medical staff. Hence the effect of the decree was to hold the amended by-law unreasonable and invalid and this is the sole issue presented.

The general rule is that a regular licensed physician and surgeon has the right to practice in the public hospitals of the state so long as he stays within the law and conforms to all reasonable rules and regulations of such institutions. 26 Am. Jur., Hospitals and Asylums, § 9; 41 C. J. S., Hospitals, § 5. While a duly licensed practitioner has no right *per se* to practice his profession in a public hospital and cannot complain of his exclusion therefrom by the operation of reasonable rules and regulations, it is equally well settled that he cannot be deprived of the right or privilege to such practice by rules, regulations, or acts of the institution's governing authorities which are unreasonable, arbitrary, capricious or

discriminatory. See *Findlay* v. *Board of Supervisors,* 72 Ariz. 58, 230 P. 2d 526, 24 A. L. R. 2d 841, and authorities cited in an exhaustive annotation of said case in 24 A. L. R. 2d 850.

It is undisputed that appellee was denied the right or privilege to practice in, or have his patients admitted to, the Ouachita General Hospital on the sole grounds (1) that he was not a member of the Garland County Medical Society and (2) that he did not have the approval and recommendation of said society. In *Hamilton County Hospital* v. *Andrews,* 227 Ind. 217, 84 N. E. 2d 469, a rule of a county hospital conditioning the right of a duly licensed physician to practice therein on his being a member of a county medical society was held unreasonable and invalid. In commenting on the rule as applied to said applicant the court said:

"His admission to this society depends entirely upon the sole determination of the society. *Medical Soc. of Mobile County* v. *Walker,* 1944, 245 Ala. 135, 16 So. 2d 321; *Harris* v. *Thomas,* Tex. Civ. App. 1920, 217 S. W. 1068; *McKane* v. *Adams,* 1890, 123 N. Y. 609, 25 N. E. 1057, 20 Am. St. Rep. 785. 4 Am. Jur., Associations and Clubs, § 11, p. 462. Whether he could ever become a member depends upon conditions beyond his control. By this rule the hospital again delegates its power to determine what physicians may use its facilities. It amounts to a preference in favor of the society and a discrimination against those physicians who by choice or otherwise, are not members of same."

Like other courts, we recognize it as a matter of general knowledge that medical societies have rendered a great and valuable public service over the years in developing and maintaining high standards of professional conduct and practice, and no implication is intended that such organization may not adopt any reasonable methods to preserve such standards. *Group Health Cooperative* v. *King County Medical Soc.,* 39 Wash. 2d 586, 237 P. 2d 737. However, we agree with the chancellor's finding that the amended by-law in question is un-

reasonable and invalid. As affecting validity, we perceive no material difference between a rule that makes membership in a medical society a prerequisite to staff privileges and one that requires approval and recommendation by the membership of said society. An organization that has consistently refused a physician membership over a period of 15 years without any announced reason would hardly be expected to approve and recommend such a physician to staff privileges in the hospital. The membership of a society that would reject the application for membership in the first instance would in all probability withhold its approval in the second instance. It would be contrary to human nature to indulge in the supposition that they would do otherwise.

In holding the by-law unreasonable and discriminatory we do not mean to infer that a public hospital may not validly enact rules and regulations applicable to all physicians and surgeons alike and which bear a reasonable and fundamental relation to the safety, interest and welfare of patients and the general public. The by-law in question does not meet this test. In urging its reasonableness appellants assert the necessity of having some group to whom they can turn for advice in considering the qualifications of applicants for staff membership since appellants themselves are not medical men. But the fact that appellants are unlearned in medicine does not preclude them from procuring the assistance and advice of medical and hospital organizations and groups, including county societies, in the formulation of rules which bear a reasonable relationship to public safety and welfare. A medical society is a private organization whose membership conceivably may bestow or withhold approval of a fellow physician's application for a valid reason, or for no reason at all, under the by-law in question. That appellee was not a member of their group might be reason enough for them to withhold approval of his application.

Appellants also argue that it was incumbent upon appellee to resubmit his application for admission to

practice in the hospital after appellants amended Article 5 of the by-laws and that the instant suit is, therefore, premature. Reliance is had on the general rule to the effect that one must exhaust his administrative remedies before he is entitled to apply for injunctive relief. But it should be remembered that appellee had exhausted his administrative remedy when he filed this suit and any change in the *status quo* in that respect was occasioned by appellant's action in changing the rules while the game was in progress. Thus equity had complete jurisdiction when the suit was filed and appellants should not be permitted to defeat it by a change of rules where the court could have justifiably concluded, in the circumstances, that a reassertion of the administrative remedy would have been a vain and fruitless undertaking.

The decree is affirmed.

UNIVERSAL C. I. T. CREDIT CORPORATION *v.* AVERY.

5-677 280 S. W. 2d 229

Opinion delivered June 13, 1955.

*M. P. Matheney* and *Wright, Harrison, Lindsey & Upton,* for appellant.

*T. O. Abbott,* for appellee.

GEORGE ROSE SMITH, J. The principal question in this case is whether a certain conditional sales contract, now attacked by the appellee for usury, was executed before or after the decision became final in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d

973. That decision overruled a series of earlier cases but stated that the new rule would apply only to transactions entered into "after this opinion becomes final." The contract now before us would have been valid under the theory that formerly prevailed but would be usurious and void under the doctrine announced in the *Hare* case. The chancellor held the agreement to be usurious and granted the plaintiff's prayer for cancellation.

The opinion in the *Hare* case concededly became final when the petition for rehearing was denied on June 30, 1952. We know, without proof, that the court's action was announced within a few minutes after nine o'clock on the morning of June 30. Supreme Court Rule 1. Late that afternoon the appellee bought a car on credit and executed the contract which he now contends to be void for usury. It is his position that since the purchase was made several hours after the court's announcement of its action, the case falls within the new principle adopted by this court.

In answer to this argument the appellant relies upon the familiar rule that the law is not concerned with fractions of a day. Hence, it is said, the former opinion did not become final until the end of June 30. The flaw in this argument is that the appellant would have us disregard the wrong fraction of a day. When a change in the law becomes operative upon a certain day, the rule as to fractions of a day results in that entire day being included in, rather than excluded from, the operative effect of the new law. For example, a statute which contains a valid emergency clause is effective during the whole day on which it is approved by the governor. *Lee Wilson & Co.* v. *Wm. R. Compton etc. Co.,* 103 Ark. 452, 146 S. W. 110. Again, where a city fireman died before eight o'clock in the morning it was held that his widow was entitled to a pension under an ordinance adopted later in the day, since the law was regarded as being in force for the entire day. *McLaughlin, Trustee,* v. *Lovett,* 204 Ark. 708, 163 S. W. 2d 826. Thus under the principle advanced by the appellant the *Hare* opinion became final at the

first moment of June 30, not at the last moment of that day.

It is also insisted that to apply the new rule of the *Hare* case to the activities of June 30 would in practical effect deprive the appellant and other lenders of any notice that the law had been changed. It is plain, however, that ample notice was actually given. The original *Hare* opinion was announced on May 26. Had no petition for rehearing been filed it would have become final at the expiration of seventeen days. Supreme Court Rules 20 and 22. Hence if the appellant was deliberately relying upon the old law more than a month after this court had issued its warning, this lender must have known that a petition for rehearing was pending and must also be taken to have known that the opinion would be final during the entire day in which that petition was acted upon.

The remaining contention, that the appellee should not be permitted to keep the car upon cancellation of the purchase agreement, was rejected in *Universal C. I. T. Credit Corp.* v. *Stanley*, 225 Ark. 96, 279 S. W. 2d 556, and need not be reexamined.

Affirmed.

FIKES *v.* LEE.

5-698 280 S. W. 2d 230

Opinion delivered June 13, 1955.

*Frank J. Wills,* for appellant.

*George W. Shepherd* and *John W. Bailey,* for appellee.

WARD, J. This suit was instituted to cancel a deed on the grounds that the grantor lacked the necessary mental capacity and that the grantee, having knowledge of the grantor's mental condition, exercised over persuasion, fraud, duress and undue influence. The trial court decreed a cancellation on the ground of lack of mental capacity, hence this appeal.

*Background facts.* Henry Hamilton, a negro 86 years of age at the time he made the deed in question, held legal title to real property in North Little Rock described as Lots 5, 6, 7 and 8, Block 5, Foraker Grove Addition which he had owned for several years. There was a seven room residence on one of the lots in which Hamilton lived and there was a small rent house on each of the other three lots. The value of this property is estimated at from $3,000 to $9,000. On June 14, 1954 Hamilton, for a consideration of $3,000 paid in cash, executed and delivered to appellant Dick Fikes [and his wife] a regular warranty deed to all of said property. On June 23, 1954 Croteal Lee, a daughter of Hamilton, was legally appointed his guardian and on the same day filed a complaint to have the said deed canceled.

*Appellee's testimony.* The record reflects the following testimony, in substance, to establish Hamilton's lack of mental capacity. Dr. N. T. Hollis, a licensed physician since 1935, served on the staff of the State Hospital until 1947 when he entered the private practice of psychiatry in which field he has specialized for 19 years. He examined Hamilton physically and psychiatrically on June 29 and July 1, 1954 when he also talked to two of Hamilton's daughters. He found Hamilton to be

86 years old, suffering from hypertension, almost blind, hearing affected, mentally confused, and senile, and it was his opinion that this condition developed gradually over a period of years. In his opinion Hamilton was mentally incompetent on June 14, 1954 to fully understand a transaction involving the sale of real estate, its value, or to execute a deed conveying the same. On cross examination he stated that his examination lasted about a half hour on each occasion; that Hamilton showed confusion and uncertainty on many scores although he knew the names of all of his children and where they were located; and he based his opinion partially on the ground that Hamilton is obviously senile and physically crippled.

Dr. A. C. Kolb, 68 has engaged in the practice of medicine and psychiatry since 1917 and has served as superintendent of the Arkansas State Hospital for several years. He has also been employed by the Veterans Administration in the department of psychiatry and was Chief of the Neuropsychiatric unit of the Medical Division until April 1, 1954, and is certified by the medical board of neurology and psychiatry. He examined Hamilton on October 7, 1954 when he obtained a thorough case history after talking to Hamilton and several members of his family. From this he learned that Hamilton had quit work in January 1954 because his eyesight was not good and because he could not work as efficiently as he had in the past; that his wife died in May 1954 since which time he had become depressed and had drunk considerable liquor—something like one pint a day, and; his arteries were hard and tortuous with ringlike formations that could be felt, indicating very marked arteriosclerosis. He made a diagnosis of generalized arteriosclerosis which affected Hamilton's brain and his judgment in conducting business affairs. The doctor also stated Hamilton had a marked mental enfeeblement, secondary only to arteriosclerosis and he didn't think he had the capacity to make the deed on June 14. On cross examination the doctor stated that if you could see Hamilton's brain it would be very much sunken due to lack of nourishment.

Some 8 or 10 witnesses, including the County Judge and contractors for whom Hamilton had worked on previous occasions, testified in substance that Hamilton began to fail rapidly about 18 months previously and that while he was working he would often have to stop and sometimes he would forget to go to work; that he was forgetful and sometimes failed to recognize people whom he knew well; that for 4 or 5 years his wife had attended to most of the business; that since the death of his wife and up until the deed was executed he drank as much as a pint or more of liquor a day, and; that he was apparently worried and morose. Judge Campbell stated that Hamilton had worked for him for many years and that he had never known him to drink during that time but that he saw him about the first of June 1954 and knew he had been drinking and could see "his old friend was slipping"; and that he saw him later in June or July and his mental and physical condition was still about the same. Ben Hogan, a general contractor, for whom Hamilton had worked, saw him shortly before the trial and he noticed that he tottered and seemed very feeble and his statements were not coherent, certainly not comparable to what they were years ago. Two real estate men after carefully inspecting the property estimated it to be worth approximately $9,000.

*Appellants' testimony* was substantially as follows: Dr. Elizabeth Fletcher, a graduate of Arkansas School of Medicine in 1934, and at present engaged in the private practice of psychiatry, examined Hamilton on September 20, 1954. She found evidence of generalized arteriosclerosis and a white ring about the eyeballs called arcus senilis; he weighed 123 pounds, shoulders stooped and bent, oral hygiene poor, and eyesight impaired, with no indication of cardiac decomposition. In her opinion his physical condition does not affect his mental capacity. He was quiet, agreeable and cooperative, she found no unusual mannerisms and no evidence of delusions or hallucinations and, in her opinion, he knew what he was doing when he signed the deed and knew the consequences of his act. On cross examination she stated that arcus senilis is indicative of hardening of the arteries. She

also found a white ring completely around the iris of his eyes, his heart somewhat enlarged as was to be expected, a loud systolic murmur indicating an ortic insufficiency, but he gave no evidence of lack of blood supply to the brain. She found that he was bright and smart and could evaluate the sale of a piece of land as well as the average person. Hamilton left the impression on her that he had made a mistake in selling the land but since he had agreed to the transaction he ought to suffer the consequences.

Fikes stated that Hamilton first asked him $3,500 for the property and that later he agreed to take $3,000; that after his attorney had examined the abstract, which had not been brought up to date, he gave Hamilton three One Thousand Dollar bills and that Hamilton's daughter gave him a receipt; and, that later on the same day he went back when Hamilton signed the deed. In his opinion the property was not worth more than $3,000 and there was nothing in Hamilton's appearance to indicate that he had been drinking or that he did not fully understand what he was doing. Under their agreement Hamilton was to get one month's free rent and after that he was to pay $30 a month rent to live in the main house. Two real estate men estimated the value of the property to be around $3,500. There was testimony that Hamilton did not drink after his wife's death and that his mind was not affected.

It was shown by the testimony for both sides that at about the time the deed was executed Hamilton contracted for lumber to the extent of $178.95 in order to repair a house nearby which did not belong to him, and that a few days later the lumber was returned and he was refunded the $100 which he had made as a down payment.

In the words of appellants "the sole question (for us to decide) is the adequacy of the evidence to support the chancellor's finding that Hamilton did not realize the effect, result or import of his acts in selling the property." In the beginning, however, it is necessary to set forth the correct rule by which we are to be guided. Appellants start their argument with the statement that "the proof of incompetency must rise above a prepon-

derance and must be clear, cogent and convincing to justify setting the deed aside". In this statement of the rule appellants are in error, and they are not sustained by *Braswell* v. *Brandon,* 208 Ark. 174, 185 S. W. 2d 271, which they cite. There the "preponderance rule" was stated at page 176 [Arkansas Reports]. The *Braswell* opinion does however cite *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253, as sustaining the "clear, cogent, and convincing rule", but in that case there was no question of mental capacity involved. The correct rule by which we are to be guided in this kind of a case is, as stated in *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888, and *Oliphant* v. *Oliphant,* 217 Ark. 446, 230 S. W. 2d 653, whether or not the chancellor's finding is contrary to the preponderance of the evidence.

The definition of what constitutes mental capacity to execute a deed has been stated in varying language by many decisions of this court. Perhaps the language most uniformly approved by our decisions is that set forth in *Seawel* v. *Dirst,* 70 Ark. 166, 66 S. W. 1058, *McEvoy* v. *Tucker,* supra, and *Beaty* v. *Swift,* 123 Ark. 166, 184 S.W. 442, to the effect that proof which is designed to invalidate a person's deed or contract on the ground of insanity must show inability to exercise reasonable judgment in regard to the transaction involved, and it must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act.

Guided by these rules we are unable to say that the trial court's finding in this case was against the preponderance of the evidence.

At the outset we cannot help but be impressed by the qualifications and testimony of the two psychiatrists who, after careful examinations, concluded that Hamilton lacked the necessary mental capacity to execute the deed to appellants. This specialized testimony was corroborated by the lay testimony of several individuals, some interested and some apparently disinterested, who had

the opportunity to observe Hamilton and to compare his physical and mental condition at the time the deed was executed with his condition at prior times. We cannot say that the chancellor was wrong in being more impressed by this testimony than he was by the testimony of the one psychiatrist and other individuals who were of the opinion that Hamilton did have sufficient mental capacity at the time he executed the deed on June 14, 1954 to understand the nature and consequences of his act.

There are some other circumstances in the case which confirm the view we take. Although the price paid for the property by appellants is not shown by the evidence to be so inadequate as to shock the conscience or to be conclusive of the lack of mental capacity on the part of Hamilton, yet the chancellor may well have found it was worth considerably more than $3,000, and, if so, was a circumstance which the chancellor had the right to take into consideration in his over-all view of the case. In *McEvoy* v. *Tucker,* supra, the court said: ". . .we think the evidence in this case shows an inadequate consideration, and that is a circumstance to be considered in determining whether relief shall be granted in cases of this character, for if, in addition to mental incapacity, there is also inadequacy of consideration, equity will the more readily intervene to set aside a conveyance".

While we agree with the chancellor that there is nothing in the testimony in this case to show that Fikes' conduct in dealing with Hamilton amounted to fraud or deception, yet there is one incident of such significance as to evoke comment by Dr. Kolb which may properly be mentioned. The testimony shows that before the abstract of title had been brought up to date and before the deed in question had been executed appellant Fikes went to Hamilton's home and offered him three One Thousand Dollar bills for the property, and that Hamilton accepted them with apparent relish. Not only was this procedure on the part of Fikes somewhat unusual, but Dr. Kolb thought it was calculated to produce a psychological effect on Hamilton. The doctor stated it was his frank

opinion that Fikes recognized Hamilton's mental enfeeblement and used the One Thousand Dollar bills as a psychological wedge, and that it worked. Mention is made of this merely because we think it might well have impressed the chancellor as it did the doctor.

Accordingly, the decree of the trial court is affirmed.

TRIEBSCH *v.* ATHLETIC MINING & SMELTING COMPANY.

5-621 280 S. W. 2d 719

Opinion delivered June 13, 1955.

*Heartsill Ragon,* for appellant.

*Daily & Woods,* for appellee.

ROBINSON, J. The appellant is the widow of Arnold G. Triebsch. Prior to his death, Triebsch had been awarded compensation for an injury received in the course of his employment, and for which he was being paid compensation at the time of his death. The issue is whether he died from the effects of the injury causing his disability or from some other cause. The Workmen's Compensation Commission held that his death was not the result of the disability for which he had been awarded compensation and hence that the widow is not entitled to recover death benefits.

The law is settled in this State that if the employee dies as a result of the disability for which he had been awarded compensation, the cause of such disability is *res judicata.* We said in *Bell* v. *Batesville White Lime*

*Company,* 217 Ark. 379, 280 S.W. 2d 643: "We think the Commission erred in retrying the issue of accidental injury. When the Commission's finding upon an employee's claim is *res judicata* as to his widow and children is a question of first impression in Arkansas. Several states have held that the rule of *res judicata* does not apply, but in most of them the peculiar wording of the compensation act permits the commission to modify its awards at any time. Our own provision for modification is not so broad. See § 81-1326. We believe the better reasoned cases to be those holding that a decision rendered during the employee's lifetime upon his assertion of compensable disability is binding when his dependents raise the same issue after his death."

This court has held previously that Triebsch's disability was compensable. *Triebsch* v. *Athletic Mining & Smelting Company,* 218 Ark. 379, 237 S. W. 2d 26. Hence, there is only one issue in the case at bar and that is: Did Triebsch die from the same cause that brought about his disability?

For nineteen years, Triebsch had worked in the boiler room of the Athletic Mining & Smelting Company's plant at Fort Smith. On the night of January 28, 1949, he became disabled. With reference to his disability, this court made the specific finding: "In the course of his work on that night appellant (Triebsch) collapsed and suffered a physically disabling attack, or breakdown, so that he is now totally and permanently disabled."

The record in the first case was made a part of the record in the case at bar. There was evidence in the first case that Triebsch suffered with bronchial asthma, bronchiectasis, emphysema and chronic nephritis. Whether the nephritis was caused by the pulmonary trouble, which was in turn caused by his working conditions, was a sharply contested point. In the first case, the employer contended that Triebsch's disability was due to a "combination of renal (pertaining to the kidney) and pulmonary factors, the primary cause being principally of renal origin", and that "the renal disease was degenerative in

character and in no way associated with the pulmonary condition".

Whether the kidney condition resulted from the lung condition was an issue in the first case. In that case, Dr. Cull, who was a witness on behalf of the employer, said: "In my opinion, Mr. Triebsch's disability is definitely due to a combination of both pulmonary emphysema and nephritis. . . . I do not regard the pulmonary emphysema in this case as either a causative or contributory factor in the chronic nephritis." On the other hand Dr. Hoge, who testified on behalf of the employee, stated: "I further disagree with Dr. Cull in his statement that the pulmonary emphysema is not a causative or contributory factor in the chronic nephritis. I disagree with this statement because his (Triebsch's) previous records show that he had had an infection associated with emphysema, and there is no other factor to which one can attribute the etiology of this nephritis. It is a known fact that infection in any part of the body can and usually is the etiologic factor causing chronic glomerulonephritis." Appellees' principal contention in the case at bar is that Triebsch did not have glomerulonephritis; that glomerulonephritis can be due to an infection but that the kind of nephritis that Triebsch had could not be caused by an infection. This is one of the same issues that was present in the first case.

In the first case, it was shown that Triebsch was totally and permanently disabled due to lung and kidney trouble which was aggravated by his working conditions and was therefore compensable. According to the undisputed evidence in the case at bar, he died because of lung and kidney trouble, the very same lung and kidney trouble this court has previously held to be compensable. Therefore, the issue is *res judicata* and appellant is entitled to collect the death benefits provided by the Workmen's Compensation Law.

Reversed.

Justices McFaddin and George Rose Smith dissent.

Justice Holt not participating.

ED. F. MCFADDIN, Justice. (dissenting). The first three paragraphs of the majority opinion give a succinct statement of this case; and these paragraphs conclude with this sentence: "Hence, there is only one issue in the case at bar, and that is: did Triebsch die from the same cause that brought about his disability?" That question is correctly stated; and, from the record in the present case, I am convinced that there was substantial evidence to support the Commission's findings, which were that Mr. Triebsch died from *kidney trouble* and *not from the bronchial ailment* for which he received compensation.

A careful study of the opinion in the first case[1] shows that Mr. Triebsch was allowed compensation solely because of his collapse from a bronchial ailment. The question now is whether he died from the bronchial ailment. Dr. Koenig was a pathologist who made an extensive postmortem examination of Mr. Triebsch; and it was Dr. Koenig's view that Mr. Triebsch's death was due to the kidney ailment. Dr. Chamberlain was asked this question and gave the answer as follows:

"Q. In your opinion, and based on Dr. Koenig's findings from the evidence disclosed by the post-mortem examination, and your own examination and treatment of Mr. Triebsch during his limetime and the other medical and laboratory evidence in the record before the commission, did Mr. Triebsch's exposure to the dust, smoke and fumes and other environmental factors disclosed by the record at his working place at the Smelter prior to January 29, 1949, so affect any of his existing diseased conditions that his death occurred any sooner than it would have occurred had he never worked at the Smelter, but had engaged in other labor involving equivalent exertion out of doors?

"A. In my opinion, no."

The foregoing is the testimony of a doctor to the effect that Mr. Triebsch's death was not hastened in

[1] *Triebsch* v. *Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S. W. 2d 26.

any way by the bronchial trouble, and that his death came about by reason of the kidney trouble.

Dr. Hogue testified that Mr. Triebsch died because of the bronchial trouble. Dr. Koenig, the pathologist, admitted that Mr. Triebsch's death might have been hastened 24 hours by reason of the bronchial trouble. If there were no testimony in the record except that of these two witnesses, I would have reversed the Commission, because if Mr. Triebsch's death was hastened to any extent by reason of the bronchial trouble (the original injury for which he drew compensation), then his widow was entitled to compensation. But Dr. Chamberlain flatly stated, as quoted, that Mr. Triebsch's death was not hastened one iota by the bronchial trouble for which he drew compensation. Dr. Chamberlain's testimony is substantial and supports the Commission's findings; and, under our cases, we must affirm the Commission's findings when they are supported by substantial testimony.[2]

It is not a question of what our views may be as between the conflicting opinions of the medical experts. I wish that we weighed these cases on the "preponderance of the evidence rule" rather than the "substantial evidence rule." My views in this regard are contained in my dissenting opinion in the case of *J. L. Williams & Son* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; but until the Legislature changes the rule for weighing the evidence, or until the Court adopts the views of said dissenting opinion, then I feel honor bound to decide these cases on the "substantial evidence rule"; and under that rule, I must dissent from the majority holding in the case at bar.

[2] For a collection of the cases so holding see West's Ark. Digest "Workmen's Compensation," § 1939 of Cumulative Pocket Supplement.

MARVIN *v.* BROOKS.

5-701 281 S. W. 2d 926

Opinion delivered June 20, 1955.

[Rehearing denied October 3, 1955.]

[redacted]

*Rex W. Perkins* and *E. J. Ball,* for appellant.

*James R. Hale,* for appellee.

ED. F. MCFADDIN, Justice. This case stems from the sale of a stock of groceries, by appellant Marvin to ap-

pellee Brooks; and is here on an appeal by Marvin (from a judgment quashing his writ of attachment), and a cross-appeal by Brooks (from directed verdicts which denied him damages and awarded Marvin a judgment for debt).

The facts are somewhat complicated. We refer to the parties by name. Marvin owned, or was interested in, grocery stores in Prairie Grove, Springdale and Fayetteville. Brooks had managed Marvin's Springdale store for several years on a salary of $60.00 per week. In February, 1953, and apparently without any previous negotiations, Marvin proposed to sell to Brooks the stock of groceries at Prairie Grove, which inventoried slightly in excess of $11,000.00. From the inventory there were deducted accounts payable of $2,302.00 and an overdraft at the bank of $1,098.00. These deductions left Marvin's equity at $7,664.08, to evidence which amount Marvin took Brooks' unsecured note. The maturity date of the said note presents a sharply disputed factual issue. It is undisputed, however, that Brooks was to draw $75.00 per week from the store for the services of himself and wife; and that he was to pay Marvin $135.00 a month rent for the fixtures and $60.00 per month rent for the building.

Brooks operated the store from February, 1953 to May, 1954 and had paid the bank overdraft and most of the accounts payable, when, without demand or notice, Marvin filed the present action against Brooks for $8,009.08 and also had the stock of groceries attached. The Sheriff sold the groceries *pendente lite*. Brooks resisted the attachment as well as the claim for debt, and also counter-claimed for damages for wrongful attachment. At the conclusion of the trial, the Circuit Court (1) found that Marvin had not established any grounds for attachment and ordered the proceeds of the attachment sale returned to Brooks; (2) directed the Jury to return a verdict for Marvin on Brooks' claim for damages for wrongful attachment; and (3) directed the Jury to return a verdict for Marvin for $7,934.08 on the debt sued on. Marvin has appealed from so much of the

Court's action as quashed his attachment; and Brooks has cross-appealed from the Court's action regarding the two directed verdicts.

I. *Marvin's Appeal in Regard to the Attachment.* When Marvin filed his action he filed his affidavit and bond for attachment and the Sheriff seized the entire stock of groceries. Marvin's claim to the right of attachment was two-pronged: (1) he claimed he was the vendor of the stock of groceries and entitled to attachment under § 34-2301 et seq., Ark. Stats.; and (2) he claimed he was entitled to attachment under the general attachment statute, which is § 31-101, Ark. Stats.

It was proper for the Trial Court to decide as to the existence of the alleged grounds for attachment, rather than to submit such issue to the Jury. See *Stair* v. *Jones,* 223 Ark. 882, 269 S. W. 2d 297, and *Ward* v. *Nu-Wa Laundry,* 205 Ark. 713, 170 S. W. 2d 381, and cases there cited. Furthermore the finding of the Circuit Court, as regards the grounds for attachment, is to be sustained if supported by substantial evidence. *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 2d 462; and *Wallace* v. *Wells,* 221 Ark. 750, 255 S. W. 2d 970, and cases there listed.

The Court was correct in denying Marvin's claim for attachment under § 34-2301, Ark. Stats. In *Borengasser* v. *Chatwell,* 207 Ark. 608, 182 S. W. 2d 389, we pointed out that a vendor's lien attachment could only reach the property actually sold by the vendor to the vendee. Here, Marvin was attempting to attach a stock of groceries that had been replenished and regularly exposed to sale over a period of 15 months from the date of the original transaction. Marvin made no effort to show that any article of groceries was other than one recently purchased by Brooks from some wholesaler; and there was ample evidence that Brooks had been purchasing from wholesalers all during the 15 months' period in which he had been running the store. The Court was correct in deciding against Marvin on this phase of the attachment claim.

The Court was also correct in deciding against Marvin in his claim for attachment under the general statute, § 31-101 et seq., Ark. Stats. Marvin's affidavit claimed that Brooks (1) was about to remove his property without leaving enough to satisfy the plaintiff's claim; (2) had disposed of his property with fraudulent intent to cheat, hinder or delay his creditors; or (3) was about to do so. While not stated in the words of the statute, it is evident that Marvin's affidavit was designed to contain the allegations as found in Items 6, 7 and 8 of the first subdivision of § 31-101. But Marvin's testimony in no wise sustained the affidavit. In fact, Brooks' attorney used Marvin as a witness to show that no grounds for attachment existed. We therefore conclude that the Court was entirely correct in finding and ordering that the attachment had been wrongfully issued.

II. *Brooks' Claim for Damages for Wrongful Attachment.* Our cases hold that an action for damages for wrongful attachment is a jury case (*Bank of Wynne* v. *Stafford,* 129 Ark. 172, 195 S. W. 397); but these cases necessarily mean that some evidence must be offered as to the elements of damages claimed. Here no such evidence is in the record; and in the absence of evidence the Court correctly directed a verdict for Marvin on this phase of the case.

III. *Brooks' Cross-Appeal on the Judgment for Debt.* As previously stated, the Court directed a verdict in favor of Marvin and against Brooks for $7,934.08 as the debt to Marvin. We hold that a fact question was made as to the time and manner of paying the debt, and that this issue should have been submitted to the Jury.

The evidence was in sharp dispute as to what the agreement was between Marvin and Brooks concerning the maturity of the original debt of $7,664.08. Brooks testified that no part of this amount was to be due until he had paid all of the accounts payable of $2,302.00, and that some of these had not been paid. One of these creditors made proof that its debt had not been paid. So, if

the $7,664.08 was not due, the action was premature; and a Jury question was made on that point.

Marvin testified that Brooks executed a note to him for the $7,664.08 and the note was introduced in evidence and stated that it was payable "$50.00 monthly, payable every six months, plus interest." But Brooks stoutly insisted—and other evidence corroborated him—that the monthly payment clause was placed in the note after he signed it and without his knowledge or consent. But against that insistence, Marvin established that the note merely evidenced the amount. The maturity of the debt presented an issue of fact.

Again, Brooks testified that Marvin agreed that if Brooks could not pay the $7,664.08, then Marvin would take back the store and cancel the debt. This defense also presented a Jury question.

Therefore, the judgment is affirmed on all issues except the judgment in favor of Marvin for the debt. As to that issue, the judgment is reversed and the cause is remanded. In view of such remand, we think it proper to mention that the record shows that Brooks made an assignment of some of the funds in the hands of the Sheriff but that Marvin superseded the entire judgment of the Lower Court. In view of Brooks' testimony that Marvin agreed to take back the stock and cancel the unpaid debt, we order that the Sheriff will hold all funds on hand until the Court below makes disposition of the same. The costs of this appeal are to be paid by appellant.

BUCTON CONSTRUCTION CO. *v.* CARLSON.

5-704 280 S. W. 2d 408

Opinion delivered June 20, 1955.

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

*John H. Wright* and *D. H. Crawford,* for appellee.

LEE SEAMSTER, Chief Justice. The appellees, Mr. and Mrs. William C. Carlson, owned and operated a service station, café and tourist court which was located about seven miles south of Arkadelphia, Arkansas, in Clark County, on Highway No. 67. The right-of-way of this highway was to be widened in 1951 and it became necessary for the State to acquire that portion of the appellees' property on which these buildings were situated since they were located on a portion of the proposed right-of-way for the highway. The State and the County reached a settlement with appellees for the value of the property to be taken for this purpose. One item in the settlement agreement was the stipulation that the State was to move the buildings from their location to another location on the appellees' property which was a proper distance from the proposed new right-of-way of Highway No. 67, and have them "set up in the same condition as they were before moving and without alteration."

The structures were to be moved and relocated in accordance with job plan No. 7403 of the State Highway Department. The plans for job No. 7403 provided that

the structures were to be moved back and reconstructed in the same condition as they were before the moving.

Prior to the settlement agreement, the appellant, BucTon Construction Company, Inc., an Arkansas Corporation with its principal place of business in Prairie County, Arkansas, was awarded the contract by the State to perform the work necessary for the completion of job No. 7403. Appellees alleged that they had no contract with the appellant. At the completion of this work the appellees brought this suit in Clark County Circuit Court, against the appellant, alleging that BucTon Construction Company, Inc. took down such buildings and equipment in a most careless, negligent and destructive manner, so that much of the materials and equipment in said buildings was badly damaged and its usefulness destroyed. It is contended that the appellant then re-erected such buildings and appurtenances in a careless and slovenly manner. Therefore, as a result of the carelessness and negligence of the appellant in taking down, moving and re-erecting the buildings and equipment the appellees' property was damaged in the sum of $40,000.00. The appellees set out in detail the many items that had been damaged and the manner in which the damage had occurred. This included such items as flood lights, which were used to light the premises and metal troughs which had been installed under the eaves of the buildings for drainage purposes. It is contended that these two items were removed and were never replaced.

The appellees testified to having spent more than $7,000.00 for labor and materials to repair the damages that had been inflicted to their buildings. This was in addition to their own labor which had been expended to try to restore the buildings to their former condition. They stated that there was yet other repairs to be made before the buildings and equipment could be restored to the former condition that existed before the removal and re-erection of the buildings and equipment.

The appellant filed a motion to dismiss upon the grounds that the venue would not be in Clark County, Arkansas, for the reason that: (a) the suit was upon a breach of contract; (b) that the appellant is a domestic corporation with its principal office in Prairie County, and therefore, the venue would be in Prairie County. This motion was overruled by the court and the appellant filed an answer, reserving its rights under the motion to dismiss on the jurisdictional grounds. The answer denied all the material allegations of the complaint and as a further defense set up its contract with the State. It attached a copy of the plans and specifications for job No. 7403. The plans and specifications required the contractor to move the buildings and equipment from their location to another location and thereby re-erected and set up in the same condition as they were before removal. The contract that the appellant had with the State on this job provided that the engineer in charge of supervision would be the final arbitrator over the work performed by the contractor and that he (contractor) would be bound by the engineer's estimates and would be paid upon the engineer's approval of the work. The appellant also alleges, as a defense to the suit, that it performed the work of removing and rebuilding the buildings on the appellees' premises under the approval of the State supervisor for the State Highway Department and that it has been paid for the work performed. It is stated that if any defects appear in the work then the liability would fall upon the State. It is contended that the appellees had a contract with the State and not with the appellant; that the appellant's contract was with the State and that it had completed its contract in accordance with the terms in every respect and in a workmanlike manner; that it reconstructed the appellees' buildings according to the plans and specifications furnished it by the State and the drainage for the new location of said buildings was put in according to plans furnished it by the State. Therefore, it is alleged, that if any defects are found with its work in performing its contract, the

fault would be the responsibility of the State, not the appellant.

This case was submitted to the jury; whereby the jury awarded the appellees the sum of $6,000 for damages other than drainage damages. There was no sum awarded for drainage damages. The Court awarded a judgment accordingly.

For reversal, the appellant insists that the lower court erred in overruling its motion to dismiss because of improper venue. This question of venue and jurisdiction is covered by the Arkansas Statutes.

Section 27-601, Ark. Stats., 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, except as provided in Section 27-616; 4. For injury to real property."

Section 27-618 of said Statutes further provides: "In any action which may lawfully be brought only in some one or more particular counties in this State, and not in any county of the State in which service may be had on the defendant, so that the venue for such action is local and not transitory in nature, summons may be served upon the defendant or defendants in such action in any county in this State."

Section 27-605 of said Statutes, the one under which appellant contends the venue is in Prairie County, provides: "An action, other than those in Sections 84, 85 and 90 (27-601—27-603) against a corporation created by the laws of this State may be brought in the County in which it is situated or has its principal office or place of business, or in which its chief officer resides. . . ."

In order to determine the question presented here, it must be determined whether the appellees have alleged damage to real property. If they have, then the suit must be brought in Clark County. The section which the appellant relies upon says that suits against a domestic corporation *may be* brought in the county in which it is situated, but that statute specifically exempts suits

for damage to real property. The appellees in this case have alleged, among other things, that they have been damaged by the carelessness and negligence of the appellant in moving the buildings, and also claim for damage to the land for improper drainage. The allegation of improper drainage is sufficient to give the lower court venue and therefore jurisdiction to try the case.

Further, under the allegations of the appellees' complaint it is clearly evidenced that the buildings located on the real property owned by them before they were moved were a part of the realty. A further analysis of the suit indicates that it was never the intention of either party that the buildings in any manner be converted to personal property. They were simply to be moved back off the right-of-way of the highway. The mere transitory action of moving the buildings back could not be considered sufficient to legally change their status. They were certainly a part of the realty before the operation and are a part of the realty now. An action for injury to real property is local in nature and must be brought in the county in which the land is situated. See *Mayner* v. *Utah Const. Co.,* 108 Fed. Supp. 532. Damages to buildings by highway construction contractor is an action for damages to land and must be brought in the county where land lies. See *Southeast Const. Co.* v. *Wood,* 223 Ark. 325, 265 S. W. 2d 720; *Southeast Const. Co.* v. *Wood,* 223 Ark. 328, 265 S. W. 2d 722. This court has held in the case of *Arkansas Highway Commission* v. *Holt,* 190 Ark. 868, 81 S. W. 2d 929, that: "A contractor who injures another's land while engaged in constructing a state highway may be sued in the county where the injury was committed."

The appellant next contends that the lower court erred in refusing to grant appellant's requested instruction for a directed verdict. It is contended that the appellees had no cause of action, either *ex contractu* or *ex delicto,* for any of the alleged items of damage, by reason of the appellant's contract for job No. 7403 with the State Highway Department. The trial court was correct in overruling the appellant's request for an instructed ver-

dict in its favor. The completion of its contract with the State and the State's approval, thereof, does not relieve the appellant from liability for its negligent act, if it results in injury to appellees' property. The case of *Bickford* v. *Richards,* 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224, held: "The plaintiff's right of action does not depend on the existence of a contract between himself and the defendants, as would be the case if he were suing for damages resulting from some non-feasance on their part, but on the fact that they have wrongfully and negligently done, or caused to be done, something to his property which has injured it. The gist of the action is the breach by the defendants of the duty which they owed to the plaintiff not to injure his property by any wrongful or negligent acts of theirs." See also *Arkansas Highway Commission* v. *Holt,* 190 Ark. 868, 81 S. W. 2d 929; *Southeast Const. Co.* v. *Wood,* supra; 12 Am. Jur., § 458, p. 1042.

The jury was previously instructed as to the generality of the law of negligence. The court also instructed the jury that if appellant performed the work of removing and re-erecting the buildings and appurtenances in a negligent, careless or unworkmanlike manner; and if such negligent, careless or unworkmanlike work proximately caused damage, and without which such damage, if any, would not have occurred, the appellant would be liable for the damage caused by its negligence.

The trial court gave instruction No. 9 on the measure of damages. The instruction stated: "If you find for the Carlsons and against BucTon, your verdict should be for such a sum as you believe from a preponderance of the evidence will reasonably be necessary to restore the property to as good condition as it was prior to the movement; provided all elements of damage assessed against BucTon must be those elements properly chargeable to BucTon in accordance with previous instructions of the Court.

"If you find for the Carlsons and against BucTon, your verdict should be for such a sum as you believe

from a preponderance of the evidence will be necessary to restore to as good a condition as immediately prior to the moving those elements of damage, if any, which are properly chargeable to BucTon under these instructions."

This was a proper instruction and justified by the facts in the case. *Lewis, et al.* v. *Phillips, et al.,* 223 Ark. 380, 266 S. W. 2d 68. The Court properly refused to give the numerous instructions offered by the appellant, since the instructions that were given covered the law in this case. No error appearing, the judgment of the trial court is affirmed.

JEFFETT *v.* AMERICAN INSURANCE COMPANY OF TEXAS.

5-708 280 S. W. 2d 395

Opinion delivered June 20, 1955.

*Dinning & Dinning,* for appellant.

*Burke, Moore & Burke* and *Percy Fewell,* for appellee.

J. SEABORN HOLT, J. De Soto Life Insurance Company of Little Rock issued its "Non-cancellable Health and Accident Policy" to Dr. W. F. Jeffett, appellant, December 1, 1943. Dr. Jeffett became disabled within the provisions of the policy, and disability payments of $200.00 per month were made to him at intervals beginning November 15, 1944, (*De Soto Life Insurance Co.* v. *Jeffett,* 210 Ark. 371, 196 S. W. 2d 243), until October 15, 1949, when it was found that De Soto was in effect insolvent and owing $20,258.75 disability claims in excess

of its assets. At this junction De Soto reinsured its members (or policyholders) with appellee, American Insurance Company of Texas, a Texas Corporation, pursuant to Ark. Stats., §§ 66-254 to 66-256, by written agreement duly approved by the insurance commissioners of Arkansas and Texas. The re-insurance agreement contains this provision:

"Receipt by the Insured or the legal holder of such policy of any company Certificate of Assumption issued in pursuance to the provisions of this agreement, shall be deemed acceptance and ratification of this agreement and the insurance of such Insured's Association Policy by the Company Certificate in accordance with the terms of this agreement unless each Insured or the legal holder of any Association policy shall within sixty (60) days after the effective date of this agreement, return such Company Certificate to the company at its Home Office together with notice of his refusal to accept the company policy and make request for the payment of the actuarial portion of the net Mortuary and Disability Funds of Association, as hereinafter defined, apportionable to such member who refuses to accept the Certificate of Assumption offered him. In the event of such refusal and request, the Company will remit to any such insured or legal holder of said policy such actuarial portion."

This agreement was embodied in an Assumption Certificate, No. 1081, issued to Dr. Jeffett by appellee, American. Under the terms of this Certificate (1081) Dr. Jeffett was given a choice of proceeding against De Soto, taking his actuarial portion of the resources of this insolvent company, or of accepting Certificate No. 1081, under which appellee, American Insurance Company of Texas, assumed the obligations of De Soto Life Insurance Company of Little Rock to the extent stipulated in the re-insurance agreement and appearing in the certificate, but not to exceed $5,000 in the aggregate for any and all benefits, claims and indemnities of every kind.

Dr. Jeffett admitted that he received and accepted the Assumption Certificate No. 1081 knowing that Amer-

ican's (appellee) maximum liability was $5,000.00, and further that he filed a claim with appellee each month for $200.00 for a period of 24 months, for a total of $4,800.00, and that appellee paid him this amount ($4,800.00). Each of the drafts were identical except as to date, total previous payments, and balance due; for example, the May 2, 1950 draft was as follows:

"AMERICAN INSURANCE COMPANY OF TEXAS

Dallas, Texas May 2, 1950

"Pay To The Order of Dr. W. F. Jeffett - - $200.00

American Ins. Co. of Tex. $200 and 00 Cts. DOLLARS

For Value Received and Charge the Same
to Account of

Claim for one month's disability certificate No. 1081 with original coverage of $5000.00 Maximum less this payment and previous payments of $1000.00 reducing balance of benefits on said certificate to a maximum of $3800.00 in the aggregate."

When American sent to appellant its twenty-fifth and last draft for $200.00, dated December 3, 1951, it was refused by appellant because it contained the following words: "In full and final settlement of any and all claims of any kind and character against the American Insurance Company of Texas under Certificate No. 1081." It is conceded that Dr. Jeffett had overpaid his insurance premiums in the amount of $20.00.

The present suit was filed July 25, 1953, by appellant against American Insurance Company of Texas for alleged monthly benefits claimed to be due. The complaint contained this recital:

"That the defendant now is in arrears in the payment of its monthly benefits under the terms of the policy for the period of twenty (20) months and is now indebted to the plaintiff in the sum of Four Thousand Dollars ($4,000.00), by reason of such default less the sum of One Hundred Eighty Dollars ($180.00) which is the

amount required to have been paid by the plaintiff as the premium to maintain said policy of insurance in full force and effect.

"WHEREFORE PREMISES CONSIDERED, the plaintiff prays judgment against the defendant for the said sum of Three Thousand Eight Hundred Twenty Dollars ($3,820.00) together with the statutory penalty of 12% and a reasonable attorney's fee, together with all costs herein expended."

Appellee answered denying liability and in a cross complaint sought to recover the $4,800.00 paid appellant. On a trial before the court (jury having been waived) the court found:

"That plaintiff overpaid the amount of premiums due defendant over the period of twenty-five months in the sum of $20.00 which amount defendant tendered to plaintiff at the trial of this cause. Defendant also tendered to plaintiff at the trial the sum of $200.00 representing the last of 25th monthly payment under the assumption certificate. That defendant owes to plaintiff the sum of $220.00.

"And the Court makes the following conclusions of law:

"That the actions of plaintiff amounted to a legal acceptance of the Certificate of Assumption issued by the American Insurance Company of Texas and is bound by the terms thereof. A party to a contract cannot accept the benefits of a contract and at the same time repudiate it nor can he accept a part of the contract and repudiate a part, but he must accept or reject the whole contract.

"That defendant, having approved and paid monthly claims for benefits to plaintiff is now estopped from claiming that plaintiff was not permanently disabled during the period of time for which it paid him and should take nothing by their cross action.

"IT IS THEREFORE considered, ordered and adjudged that plaintiff have and recover of and from the

defendant the sum of $220.00 which has been tendered to plaintiff by defendant and that defendant take nothing by its cross action which is hereby dismissed."

This appeal followed. There is no cross appeal. We hold that the findings of the trial court are supported by the evidence and that the judgment is correct.

For reversal appellant contends in effect that appellee, American Insurance Company of Texas, when it took over De Soto, as above pointed out, became liable for all matured and outstanding claims then owing by De Soto and had no right to limit the amount it would pay in satisfaction of such matured claims and that appellant was not estopped in any manner. In a situation similar in effect to the present case the Supreme Court of Iowa, *Garretson* v. *Western Life Indemnity Co.,* 175 Iowa 172, 157 N. W. 160, announced the general rule in this language:

"The general rule as to reinsurance contracts is that the reinsurer is to be held liable either under its reinsurance contract or upon a subsequent agreement made between it and the assured, and that assured has the right to accept the reinsurance offered him, or to sue the original company for damages. If he accepts the reinsurance contract and pays premiums to the reinsurance company, he is bound by the terms of the reinsurance contract, and cannot recover of the reinsuring company on the old policy unless the reinsurance contract in terms, or by necessary implication, contains an agreement to assume or be responsible on the policy reinsured." See *Central States Life Ins. Co.* v. *Morris,* 202 Ark. 969, 155 S. W. 2d 333.

Here it is undisputed that appellant accepted the Assumption Certificate No. 1081, regularly paid all premiums to American, accepted the benefits under said certificate for a period of twenty-four (24) months. He thus made his choice and is bound thereby. In *Northwestern Nat. Life Ins. Co.* v. *Gray,* 161 Fed. 488, (Eighth Circuit Court of Appeals) it was held in effect that a policyholder, in a similar situation such as here, when

two insurance companies entered into a re-insurance contract under which one transfers its assets to the other and ceases business, while the other assumes such contract upon terms agreed upon, if the policyholder accepts the re-insurance offer he is bound by the terms of the contract between the two companies. In the opinion we find the rule stated in this language:

"Without hesitation, so far as this record discloses, and presumably with full knowledge of the provision made for him in the event he concluded not to accept the proposition, and with like full knowledge of the remedies available to him for the breach of his contract, Gray elected to accept and did accept the terms offered to him by the new company. He entered upon the performance and continued in the performance of the terms agreed upon for a period of four and one-half years, until his certificate matured. This amounted to a novation, a new contract voluntarily entered into by Gray, and he cannot now repudiate it. His election was final and conclusive."

Finding no error, the judgment is affirmed.

TIMMONS *v.* BRANNAN.

5-707 280 S. W. 2d 393

Opinion delivered June 20, 1955.

*J. G. Moore,* for appellant.

*Phillip H. Loh,* for appellee.

ED. F. MCFADDIN, Justice. This is the second suit to reach this Court between the same parties, who are adjoining property owners. The other case is *Timmons* v. *Brannan,* 219 Ark. 636, 244 S. W. 2d 136; and is hereinafter referred to as "the first case."

In the first case we sustained a contract between the parties which established the entire West boundary line of Timmons' property and the entire East boundary line of Brannan's property. The written contract between the parties, dated May 20, 1950, was copied in full in our opinion in the first case. For convenient reference we recopy two of the paragraphs:

"It is hereby mutually agreed that the iron stake as now located at the southwest corner of the property of the party of the first part[1] is hereby established as the true boundary line between the southwest corner of the property of the party of the first part and the southeast corner of the property of the party of the second part[2] . . .

"It is hereby agreed that said line shall run directly or due north of the iron stake hereinabove mentioned to the northwest corner of the property of the party of the first part to the now placed post in said northwest corner of the property of the party of the first part."

In the first case Timmons, as plaintiff, claimed that he had been induced to sign the said boundary line settlement agreement through fraud and misrepresentation, and also that there was a mutual mistake. Brannan filed a cross-complaint and claimed the contract settled the boundary question and prayed that his title be quieted. Timmons answered the cross-complaint. The Trial Court

[1] i.e., Timmons.
[2] i.e., Brannan.

held against Timmons and we affirmed, saying: ". . . the contract is effective to establish the boundary line."

Our opinion in the first case was delivered December 3, 1951. On August 11, 1953, Timmons filed the present suit against Brannan claiming that Brannan was obstructing certain streets in the City of Morrilton and praying that the Court order the removal of such obstructions. Brannan offered several defenses to the present suit but the only one we need to mention is that of *res judicata.*[3] Here is a pertinent portion of Brannan's pleading in the present case:

"That the case of *Timmons* v. *Brannan,* 219 Ark. 636, 244 S. W. 2d 136, was decided by the Supreme Court of Arkansas, on December 3, 1951. That the parties herein are the same as the parties thereto, and that the land, upon which are located the alleged streets as set out in plaintiff's interlineations to his complaint, is the same land and properties; that the issues are the same as were in issue in the case which was decided by this court and affirmed by the Supreme Court of Arkansas on the above date. That basis of the matters complained of by the plaintiff herein have been fully adjudicated by the courts in another action by and between the same parties in the same case, and that the defendant pleads *Res Judicata* to plaintiff's complaint with interlineations."

At the trial of the present case, the entire transcript in the first case was made a part of the evidence; and we now sustain the plea of *res judicata* and thus never reach any of the other questions ably argued in the brief for the appellant.

In the present case, Timmons claimed: (1) that Ridge Street is between the West side of Timmons' property and the East side of Brannan's property and that Brannan is blocking a portion of Ridge Street; and (2) that Spring Street goes East and West through Bran-

[3] In *Seaboard Finance Co.* v. *Wright,* 223 Ark. 351, 266 S. W. 2d 70, we said: "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.'"

nan's property and that Brannan is blocking Spring Street. But in the first case we sustained a boundary line settlement agreement between Timmons and Brannan which established a common boundary between them along all of Timmons' West line and all of Brannan's East line. If Timmons had thought, at that time, that Ridge Street separated the two property-holders, then he should have so asserted and the issue as to Ridge Street could have been decided: instead, Timmons claimed that there was a common boundary line between him and Brannan. Likewise as to Spring Street, the fence on the common boundary between Timmons and Brannan effectively blocked Spring Street, if there be such a street. It is too late for him now to raise questions of streets between his property and that of Brannan: these were matters that should have been litigated in the first suit.

In *Shorten* v. *Brotherhood of Railway Trainmen,* 182 Ark. 646, 32 S. W. 2d 304, a plaintiff attempted to bring a second action on a matter that could have been litigated in the first action between the same parties. In sustaining the plea of *res judicata* we quoted from the case of *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610:

" 'The test in determining the plea of *res judicata* is not alone whether the matters presented in the subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issue and might have been litigated in the former suit.' "

The test is not whether the matters in the second suit were *actually* litigated in the former suit between the parties, but whether such matters were *necessarily within the issues and might have been litigated in the former suit.* The following recent cases declare and follow the rule of *res judicata* as above quoted: *Thomas* v. *McCullum,* 201 Ark. 320, 144 S. W. 2d 467; *Meyer* v. *Eichenbaum,* 202 Ark. 438, 150 S. W. 2d 958; *Ripley* v. *Kelly,* 209 Ark. 389, 190 S. W. 2d 526; *Lillie* v. *Nunnally,* 211 Ark. 202, 199 S. W. 2d 751; *Crump* v. *Loggains,* 212

Ark. 394, 205 S. W. 2d 846; *Andrews* v. *Gross and James Tie Co.*, 214 Ark. 210, 216 S. W. 2d 386; *Seaboard Finance Co.* v. *Wright,* 223 Ark. 351, 266 S. W. 2d 70; *Timmons* v. *Clayton,* 222 Ark. 327, 259 S. W. 2d 501. The rule of *res judicata* applies in the case at bar.

Affirmed.

JOHNSON *v.* MARYLAND CASUALTY COMPANY.

5-714 280 S. W. 2d 398

Opinion delivered June 20, 1955.

*John H. Joyce* and *Glen Wing,* for appellant.

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

MINOR W. MILLWEE, Justice. In 1951 the E. V. Bird Construction Company, hereinafter called "Bird," entered into a contract with the University of Arkansas for the construction of the Arkansas Law School Building at the university. On October 4, 1951, Bird as principal and Maryland Casualty Company, hereinafter called "Maryland," as surety executed the standard "Statutory Performance Bond" whereby they became obligated to pay all indebtedness for labor and materials furnished in the construction or repair of said building.

Shortly after execution of the bond, Maryland ascertained that Bird's financial condition was such that Maryland would be unable to reinsure part of its obligation under the bond as it desired to do. The manager of Maryland's Arkansas office in Little Rock directed W. R. McNair, President of Cravens and Company, the local agent of Maryland at Fayetteville, Arkansas, to endeavor to have Bird increase its capital structure in the approximate sum of $20,000. McNair communicated the request to Floid Bird, son of Mrs. E. V. Bird, and one of Bird's managers at the time. There were some negotiations with Mrs. Bird relative to procurement of additional capital by the assignment of certain life insurance annuities by her, but this was not done. After an unsuccessful attempt to secure additional capital from another uncle, Floid Bird sought the assistance of the appellant, L. E. Johnson. Appellant was shown some of the letters from Maryland's Little Rock manager to McNair which the latter had furnished to Floid Bird. These letters emphasized the necessity of Bird securing additional operating capital and suggested that the furnishers of same execute a "Subordinate Loan Contract" in which Maryland's priority over all other claimants in the event of a default under the construction contract would be recognized.

On November 6, 1951, appellant advanced $5,000 to Bird and the latter executed its demand note to appellant for the advancement. The next day, November 7, 1951, appellant wrote Maryland at Little Rock as follows:

"About twenty-five years ago E. V. Bird let me have money to get my start. Of course this was repaid years ago, but I will always feel grateful for his help, therefore, I loaned his two sons, Floyd and Larry, $5,000.00 on their note and stand ready to back them to a limit of $20,000.00."

Sometime later appellant had a telephone conversation with the manager of Maryland's Little Rock office in which the latter suggested the execution of some kind of agreement by appellant that he would furnish the

balance of the money to Bird and also a financial statement.

On November 28, 1951, appellant entered into a written "Investment Agreement" with Bird in which he agreed to advance a total of $20,000 from time to time, including the $5,000 already advanced, to be used by Bird for payment of labor or materials used in the construction project and for which Bird should execute promissory notes payable to appellant upon completion of the construction contract. Appellant advanced to Bird the further sums of $10,000 on August 15, 1952 and $5,000 on November 3, 1952, pursuant to this agreement. Proper notes were executed by Bird to appellant and the monies so advanced were used by Bird in the payment of labor and material accounts. On August 18, 1952, Bird advised the University of Arkansas by letter that it desired that any money held by the university as retainage upon completion of the building be paid jointly to Bird and appellant. This letter was duly approved by the university on August 19, 1952, without the knowledge or approval of Maryland.

Bird defaulted in the performance of its contract which was taken over by Maryland. On July 12, 1953, the University of Arkansas paid retainage to Maryland in the sum of $34,073.32 which was used in payment of labor and material bills incurred in construction of the building. Maryland also paid additional sums in excess of $20,000 to complete the construction according to contract. In making the three loans to Bird the appellant did not execute the "Subordinate Loan Contract" suggested by Maryland's agent. The laborers and materialmen made no assignment of their respective liens. There was no express agreement between Maryland and appellant relative to such liens nor was there any agreement between them that appellant would be protected under the surety bond or have a superior lien on the retainage.

Appellant brought this action against Bird and Maryland to recover the $20,000 advanced to Bird under the investment agreement. In the complaint it was al-

leged that appellant and Maryland made an agreement to the effect that if appellant would make the $20,000 available to Bird then Maryland would include within the provisions of the surety bond any loss that appellant might incur; that Maryland consented to and ratified Bird's assignment of the retainage under the construction contract to appellant and agreed that he would have a lien on same for the payment of his advances to Bird; and that Maryland had been unjustly enriched and should be estopped to deny that appellant's claim was within the provisions of the surety bond. In an amendment to the complaint appellant asserted that by reason of his advancement of the $20,000 with Maryland's knowledge that it was to be used to pay labor and material bills, appellant was thereby subrogated to the rights of the laborers and materialmen to the retainage held by the university and paid over to Maryland. Maryland answered with a general denial and affirmatively pleaded that the agreement between appellant and Bird was not binding on Maryland, and that any agreement between appellant and Maryland was without consideration and barred by the Statute of Frauds.

There was a jury trial of the cause as between appellant and Maryland. At the conclusion of the testimony offered by appellant as outlined above, the trial court sustained Maryland's motion for a directed verdict in its favor. This appeal is from the judgment rendered upon said directed verdict. Thus the question is whether the evidence, when given its strongest probative force in favor of appellant, is legally sufficient to support a jury finding of Maryland's liability to appellant for the $20,000 advanced to Bird.

The performance bond involved in the instant case is the ordinary statutory bond which obligates the surety only to pay all indebtedness for labor and materials furnished in the construction or repair of the building. In 9 Am. Jur., Building and Construction Contracts, 1954 Pocket Supplement, § 92.1, the author states:

"The well established general rule is that a claim for money loaned or advanced to a building or construction contractor is not within the coverage of the ordinary form of contractor's bond conditioned for the performance of the contract and the payment of all claims for labor and material, even though the borrowed money has been wholly applied to the payment of the cost of labor and material actually going into the construction project. Generally, the recovery of such money loaned or advanced is sought on the theory that inasmuch as the money loaned to the contractor had been used to pay for labor or material going into the project, the lender of the money was entitled to be considered as a furnisher of labor and material, and therefore protected by the bond. However, the courts almost uniformly hold to the view that a lender of money to the contractor may not recover the amount thereof from the contractor's surety as a claim for material or labor furnished to the contractor within the conditions of the ordinary form of contractor's bonds."

See, also, annotations fully supporting this text statement in 127 A. L. R. 974 and 164 A. L. R. 782. Among the numerous cases cited by the annotators in support of the rule are our own cases of *Norton* v. *Maryland Casualty Co.,* 182 Ark. 609, 32 S. W. 2d 172, and *Ayres and Graves* v. *Ellis,* 185 Ark. 818, 49 S. W. 2d 1056. In following this rule in the Norton case we held that a surety company, which executed a bond to pay all of the contractor's bills for labor and materials used in the construction of a road, is not liable for money borrowed by the contractor even though the money was used to meet the contractor's payrolls.

Although appellant alleged in his complaint that he and Maryland made an agreement giving him priority over the latter in the retainage paid over by the university, it is now frankly admitted that no express agreement to that effect was proved. In his testimony appellant repeatedly denied that he had any agreement with Maryland. He also testified that the only agreement he had was with Bird and that when he told Maryland's

agent of Bird's assignment of the retainage to him the latter objected to it. There is also an absence of proof that any agent of Maryland ever made any assurance to appellant that his claim to the retainage would be superior to that of Maryland. On the contrary, it is admitted that Maryland's agent requested that Bird secure from any lender his acknowledgment of the priority of Maryland's claim thereto.

However, appellant insists that the testimony here is such that a jury would be warranted in finding that Maryland so influenced, encouraged and induced appellant to make the $20,000 advances as to entitle him to be subrogated to the rights of laborers and materialmen, or the rights of Maryland, in and to the retainage, either under the doctrine of conventional subrogation or so-called legal or equitable subrogation. In support of this contention appellant relies on the case of *Western Casualty and S. Co.* v. *Meyer,* 301 Ky. 487, 192 S. W. 2d 388, 164 A. L. R. 769. In that case the contractor had defaulted in the payment of material bills and the agent of the surety company participated in a conference with the contractor and the prospective lender in which the latter was assured by the surety's agent, or by the contractor's attorney in said agent's presence, that the loan would be protected by the contractor's bond. This is in contrast to the undisputed facts in the instant case that there had been no default when the appellant made the loans to Bird without any assurance from Maryland's agent, or anyone else, that his claim would be superior to the rights of the surety.

In the circumstances surrounding the procuring of the loan in the Meyer case the Kentucky court held the lender was not a mere volunteer and became subrogated to rights superior to those of the surety; and that the particular circumstances were such as to constitute an exception to the well-settled general rule. In so holding the Kentucky court stated that it had perhaps been more liberal than other courts in its treatment of lenders to contractors in the situation there presented. It is unnecessary for us to determine whether we would follow

the holding of the Kentucky court under the same state of facts that were presented in that case. It is sufficient to say that the evidence adduced by the appellant does not bring the case within the exception to the general rule there recognized. The facts here are more in line with those in *American Bank and Trust Co.* v. *Langston,* 180 Ark. 643, 22 S. W. 2d 381, where it was held that a surety was entitled to preference over a bank which made a loan to the contractor secured by assignments of the accounts to become due under the contract. In so holding the court said the bank was a mere volunteer and acquired no lien of any kind; that the surety rather than the bank was entitled to subrogation; and that its equity was superior to that of the bank. See, also, *Goode* v. *Aetna Casualty and Surety Co.,* 178 Ark. 451, 13 S. W. 2d 6.

The evidence offered by appellant was insufficient to establish an agreement, express or implied, between appellant and Maryland that the claims of appellant would come within the provisions of the surety bond; or that any agreement between appellant and Bird in reference to the retainage should, in any degree, bind Maryland. In these circumstances the trial court correctly held the general rule applicable in sustaining the motion for a directed verdict. The judgment is accordingly affirmed.

STATE OF OKLAHOMA, EX REL. OKLAHOMA TAX COMMISSION *v.* NEELY.

5-684 282 S. W. 2d 150

Opinion delivered June 20, 1955.

[Rehearing denied October 3, 1955.]

*Harper, Harper & Young, R. F. Barry* and *E. J. Armstrong,* for appellant.

*Warner & Warner,* for appellee.

George Rose Smith, J. This is an action by the State of Oklahoma to recover income taxes in the amount of $9,292.91, with interest. The complaint contains three separate counts, one for the year 1948, one for 1949, and one for 1950. It is alleged that for each of those years the defendant failed to pay the Oklahoma income tax upon rentals received by him upon mining machinery located in that state. The defendant's demurrer to each count in the complaint was sustained by the circuit court, and the action was dismissed.

The basic question is whether Oklahoma can maintain a suit in the Arkansas courts for the recovery of taxes. By Act 73 of 1951 it is provided: "Any State of the United States of America, or any political subdivision thereof shall have the right to sue in the courts of Arkansas to recover any tax which may be owing to it when the like right is accorded to the State of Arkansas and its political subdivisions by such State, whether such right is granted by statutory authority or as a matter of comity." Ark. Stats. 1947, § 84-3203. It is conceded that Oklahoma has a similar statute and thus meets the condition imposed by our law.

The appellee, relying upon *Jacobus* v. *Colgate,* 217 N. Y. 235, 111 N. E. 837, Ann. Cas. 1917E, 369, contends that the statute should not be applied retroactively to a suit involving a tax liability that accrued before the effective date of the act. The appellant answers that a prospective application of the statute would merely limit its operation to suits filed after its passage, regardless

of when the tax accrued. See *Oklahoma ex rel. Okla. Tax Com'n* v. *H. D. Lee Co.,* 174 Kan. 114, 254 P. 2d 291.

Without determining the merits of this question we prefer to rest our decision upon the simpler premise that Oklahoma could have maintained this action even if the tax reciprocity statute had not been passed. In our opinion the oft-repeated dogma, that one sovereign does not enforce the revenue laws of another, is rapidly approaching a deserved extinction in those instances in which the dispute is not international but merely interstate.

The history of this rule is traced in a note in 29 Columbia Law Review 782. It originated in England in the latter part of the eighteenth century and is based largely upon two statements by Lord Mansfield, to the effect that one nation does not take notice of the revenue laws of another. The English cases of course involved the laws of nations rather than the laws of the American states. Too, in none of those cases was a foreign sovereign actually denied access to the English courts. Instead, the rule was announced in situations in which the courts elected to enforce commercial contracts despite the fact that they were in some way violative of the revenue laws of the country in which they were executed.

In America the fact that the rule was a familiar principle of law may well have deterred the states from seeking one another's assistance in the collection of taxes. At any rate, for whatever reason, in the American cases prior to the twentieth century the rule is seldom mentioned and is usually dictum. In 1905, however, North Carolina departed from precedent to the extent of permitting New Jersey to prove a tax claim in an insolvency proceeding. *J. S. Holshouser Co.* v. *Gold Hill Copper Co.,* 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183. The court may have considered the doctrine not to have been involved, for the opinion did not mention it.

It was not until 1921 that the traditional rule was unequivocally applied by an American court of last resort as a ground for denying the assertion of a tax claim by a sister state. In *Colorado* v. *Harbeck,* 232 N. Y. 71,

133 N. E. 357, New York refused to entertain a suit brought by Colorado for the collection of inheritance taxes. The *Harbeck* decision is sometimes referred to as the leading case on the subject, and so it is in New York, where it has been often followed by the lower state and federal courts. Elsewhere, however, its adherents are few, and even in New York the law has been changed by statute. McKinney's Consolidated Laws of New York, Tax Law, § 249-t.

After the *Harbeck* decision the soundness of the ancient doctrine, by then a hundred and fifty years old, became increasingly the subject of reconsideration, at first in the law schools and later in the courts and legislatures. We have already cited an early law review note. In 1932 Robert A. Leflar painstakingly analyzed the entire question and demonstrated, we think unanswerably, that there is no reason whatever for one American state to reject another's suit for the recovery of taxes, absent some strong ground of local public policy or some inability to provide the remedy sought. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 215 *et seq.*

The original rule, in its application to cases of international aspect, may well find some justification in one sovereign's reluctance to inquire into another's system of law or to risk the giving of affront by the denial of a sovereign demand. Obviously these considerations are without weight in litigation originating in and confined to the United States.

On the other hand, the rule encourages willful, dishonest tax evasion. As Professor Leflar points out, the higher tax rates that have resulted from the broadening of governmental services have provided a correlatively stronger incentive for tax avoidance. A few decades ago taxes were generally modest enough to constitute an annoyance rather than a substantial burden upon income or property. But today an income or estate levy may consume half or more of the object taxed, supplying a tempting motive for tax evasion.

Enforcement of the rule now in question offers a legally respectable asylum to the tax dodger. An heir, for example, may frequently be in a position to convert an inherited fortune into cash and move to another state. If pursued in his new home by the defrauded state he may confidently demur even to allegations of conscious and deliberate wrongdoing, for one sovereign does not notice the revenue laws of another. Other similar examples come readily to mind.

Once the fallacies in the traditional view had been exposed, the doctrine quickly became obsolescent. By now about half the state legislatures have approved reciprocity laws. In the courts the trend is in the same direction. In 1946 the original principle was re-examined and rejected in Missouri. *State of Oklahoma ex rel. Okla. Tax Com'n* v. *Rodgers,* 238 Mo. App. 1115, 193 S. W. 2d 919, 165 A. L. R. 785. Kentucky quickly followed Missouri's lead. *State of Ohio ex rel. Duffy* v. *Arnett,* 314 Ky. 403, 234 S. W. 2d 722. In its 1948 supplement to the Restatement of Conflict of Laws, § 610, the American Law Institute rescinded its earlier assertion of the older view and stated that if a position were to be taken it would seem desirable to follow the Missouri decision.

Since the case at bar is one of first impression in this state, our legislature could not have been certain of the Arkansas law when it adopted a reciprocity statute in 1951. Quite evidently the legislative purpose was not primarily to change the law but to put Arkansas in a position to take advantage of like legislation elsewhere; for the emergency clause declares that the evasion of Arkansas taxes has been continuous and frequent and that there is no adequate legal machinery for the recovery of taxes due the State of Arkansas. In adopting what we think is now the majority rule we confirm the legislative declaration of Arkansas's position in the matter.

Even though Oklahoma's action is maintainable, there remains a question of limitations, as to which the

law of the forum governs. *Moores* v. *Winter,* 67 Ark. 189, 53 S. W. 1057. The appellee demurred separately to the three causes of action, as the Civil Code permits. Ark. Stats., § 27-1120. We assume, without deciding, that the parties are correct in their common contention that the three-year statute of limitations is controlling. Ark. Stats., § 37-206.

By Oklahoma law an income tax return is due and the tax payable on March 15 next succeeding the close of the taxable calendar year. Okla. Stats., Title 68, §§ 884 and 901. Hence the taxes for the three years now in issue were respectively due on March 15 of 1949, 1950, and 1951. The present suit was not filed until February 11, 1954. It follows that the action is barred for the first two years but not for the third.

Affirmed as to counts one and two, reversed as to count three.

McFaddin, J., concurs in part and dissents in part.

Ed. F. McFaddin, Associate Justice (concurring and dissenting). It is my mature conclusion that the State of Oklahoma is entitled to prevail as to *all* counts in this case. Kansas has a tax reciprocity statute similar to our Act 73 of 1951. The Supreme Court of Kansas construed the Kansas Statute in the case of *State of Oklahoma* v. *H. D. Lee Co.,* 174 Kan. 114, 117, 254 Pac. 2d 291. I agree with the construction which the Kansas Supreme Court gave to its tax reciprocity statute; and I think that, under the Arkansas tax reciprocity statute, the State of Oklahoma is entitled to full recovery in this case.

Pinkert *v.* Baird.

5-713 281 S. W. 2d 929

Opinion delivered June 20, 1955.

[Rehearing denied October 3, 1955.]

*U. A. Gentry,* for appellant.

*O. W. Garvin* and *Linwood L. Brickhouse,* for appellee.

WARD, J. Appellant Pinkert instituted this action in chancery court to quiet his title to certain vacant lots and to remove as a cloud on his title an adverse claim asserted by appellee Baird. Appellee answered setting forth his claim of title to the same property and in the alternative asked that the court require appellant to reimburse him for all improvement and general taxes he had paid on said lots since 1939. To the latter plea appellant interposed the three year statute of limitation. The trial court found that appellant had good title to the lots and confirmed his title to the same, and from this portion of the decree appellee has not appealed. The trial court further held that appellee was entitled to judgment against appellant for the amount of all taxes paid by him, and for a lien on the lots to secure payment of same. From this portion of the decree appellant prosecutes this appeal.

Since no question is presented here as to the title to the property, the facts relative thereto may be briefly stated. On December 15, 1938 appellee received from the City of Little Rock a deed to lots 1, 2 and 3, Block 19, Capitol Hill Extension to the City of Little Rock and since that date, up to and including the year 1953, appellee has paid improvement and general taxes on said lots in the amount of $1,941.68. On May 26, 1944 appellant received a deed to the same lots from W. I. Stout, trustee, who in turn had received a deed through Sewer Improvement District 94.

Appellant concedes that appellee is entitled to be reimbursed for all taxes paid on said lots for three years

prior to the institution of this suit, but strongly insists that appellee is barred by the three year statute of limitation from recovering for taxes paid previously thereto. In support of this contention appellant relies on *Brookfield* v. *Rock Island Improvement Company,* 205 Ark. 573, 169 S. W. 2d 662, 147 A. L. R. 451, stating that it settles the question here presented. We are unable to agree with appellant in this contention.

Briefly stated the facts and the holding in the *Brookfield* case, supra, are as follows: Rock Island sued Brookfield "alleging that, under a *bona fide* claim of title, it had paid taxes for many years on lands owned by Brookfield. It asked judgment for such taxes, with interest, for a lien on the land to secure the payment of the judgment, and for a foreclosure of such lien." Brookfield plead the three year statute of limitation. The trial court gave judgment in favor of appellee for taxes paid over a period of 18 years, with interest, and declared a lien on the land. On appeal we held that, notwithstanding there was sufficient evidence to show that Rock Island had paid the taxes in good faith, claiming to be the owner of the land, the three year statute of limitation barred a recovery for all amounts paid more than three years before the suit was instituted.

The *Brookfield* case, supra, was cited and followed in *Lincoln National Life Insurance Company* v. *Huff,* 210 Ark. 833, 197 S. W. 2d 927, wherein the facts were essentially the same as in the *Brookfield* case.

After a careful review of other decisions of this court, we have, with some hesitancy, concluded that the facts in the above cited cases are distinguishable from the facts in this case, and that they are therefore not controlling here.

It will be noted that in the *Brookfield* case, supra, and the *Huff* case, supra, the party seeking to recover for taxes paid on land in good faith under color of title was the same party who instituted the action. In such cases the holding seems to be that the three year statute of limitation will apply in favor of the adverse party.

These holdings are apparently based on the theory that the plaintiff's cause of action [for the recovery of taxes] accrued when the taxes were paid and that his right of action to recover the same must be brought within three years after payment. We have held however that the situation is different where the plaintiff comes into a court of equity to have his title quieted to certain lands against one who has, under color of title, paid the taxes for many years, and is met by a request by the defendant for a repayment of all taxes paid by him on the land. In such instances we have held that before the plaintiff can invoke equity he must do equity by repaying all taxes. This is on the theory that the plaintiff has been benefited to the extent of the tax payments which he would have had to make had they not been made by the defendant.

The *Brookfield* case, supra, was thus distinguished in the case of *Turner* v. *Grove Land and Timber Company,* 208 Ark. 921, 188 S. W. 2d 121, where it was specifically referred to. In speaking of the *Brookfield* case the court said:

"The defendant pleaded the three year statute of limitation. We held the trial Court was in error in not sustaining the plea. But the opinion, by express language, states the facts to be that the plaintiff had paid taxes on land owned by Brookfield. It could not, therefore, become the beneficiary of equitable relief in a proceeding it instituted, when met by the legal defense of limitation."

In applying the equitable doctrine mentioned above the court also said: "Our view is that the Court properly imposed the condition that, as a prerequisite to his plea for equitable dispensation, Turner was required to reimburse the defendant for money necessarily applied to protect its property, full benefits of which went to the plaintiff to prevent forfeiture." Just as in the case under consideration Turner prevailed in the trial court on the question of title and was ordered to refund to the Timber Company all taxes it had paid on the land [for

more than three years]. On appeal the decree of the trial court was sustained.

In *Walsh* v. *Buckner,* 209 Ark. 320, 190 S. W. 2d 447, the *Turner* case, supra, was referred to and followed although it was not discussed at length. There, again, appellant filed a petition in chancery court to confirm title to [among other lands] the NE¼ of the SE¼, Section 18, Township 3 South, Range 10 West, and the trial court upheld his title. In that case Buckner was allowed to recover all taxes paid since 1918—a period of approximately 20 years. This court there cited the *Turner* case as authority for requiring Walsh to reimburse Buckner for all the taxes which he had paid.

In the case under consideration appellee in good faith and under color of title paid the improvement and general taxes on the lots in question over a period of approximately 14 years which otherwise appellant would have had to pay. Appellant invoked the aid of the chancery court to cancel appellee's deed as a cloud on his title. As an incident to the trial court's granting the relief prayed for by appellant it required appellant to do equity by reimbursing appellee for all the taxes which he had paid. After a careful consideration of the decisions of this court in the above cited cases we have concluded that the decree of the trial court was correct and that the same should be and the same is hereby affirmed.

BAXTER *v.* STATE.

4800-6 281 S. W. 2d 931

Opinion delivered June 20, 1955.

[Rehearing denied October 3, 1955.]

*Virgil Roach Moncrief* and *John W. Moncrief,* for appellant.

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

Robinson, J. Appellant Walter Baxter was convicted of murder in the first degree and sentenced to death for the killing of Bert O. Burbanks, town marshal and police chief of DeWitt. Baxter roomed at the home of Mrs. Sally Bittner. On the day of the homicide, he had some trouble with his landlady resulting in a neighbor reporting the disturbance to the police. In response to this call, Burbanks went to the Bittner home and while at the front door he was shot and killed by Baxter.

Baxter claims that he had been persecuted by Burbanks; that Burbanks had stopped him on numerous occasions without just cause and searched him, apparently looking for illegal liquor. Appellant contends that at the time of the killing the officer was attempting to arrest him illegally; that Burbanks, while trying to make the arrest, reached for his gun; and that he (Baxter) fired the fatal shot in self-defense. On the other hand, the evidence is sufficient to sustain the verdict.

On appeal, there are numerous assignments of error. It is contended that there was error in qualifying the jury on the death penalty, but this was done in accordance with the statute. Ark. Stats., § 43-1920. Furthermore, if the court erred in excusing any particular juror, that would not be ground for reversal. *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24. Appellant also says the court erred in failing to keep the jury together, but this was a matter within the discretion of the court. Ark. Stats., § 43-2121. Appellant further contends that the court erred in permitting the Deputy Prosecuting Attorney to read the indictment to the jury, but this procedure is authorized by Ark. Stats., § 43-2110.

It is insisted that the court erred in failing to give defendant's instruction No. 6 as follows: "If the deceased was about to arrest or attempting to arrest the defendant for this misdemeanor not committed in his presence and without a warrant and if this defendant resisted such an arrest and, in so doing, took the life of the deceased, then this defendant is not guilty of murder in either the first or second degree. In such case, the defendant could not be guilty of any crime greater than manslaughter." This instruction is not a correct statement of the law, and was properly refused. According to this instruction, it would be possible for any person, with malice aforethought and after premeditation and deliberation, to kill an officer attempting to arrest him, for a misdemeanor not committed in the presence of the officer, and still not be guilty of any crime greater than manslaughter. In a situation of this kind, the law in this State is clearly announced in *Coats* v. *State,* 101 Ark. 51, 141 S. W. 197, where this court said:

"An illegal arrest is no more than a trespass to the person. 'The attempt to take away one's liberty is not such an aggression as may be resisted with death. Nothing short of an endeavor to destroy life will justify the taking of life.' 1 Bishop's New Criminal Law, § 868; *Creighton* v. *Commonwealth,* 84 Ky. 103; 4 Am. St. Rep. 193; 25 Am. & Ency. of Law, p. 278 and cases cited;

Wharton on the Law of Homicide (3 ed.), § 407; *Robertson* v. *State* (Fla.), 52 L. R. A. 751.

"Mr. Bishop says that the reason why a man may not oppose an attempt on his liberty by the same extreme measure permissible in an attempt on his life may be because liberty can be secured by a resort to the law.

"So it appears that, even in a case where the defendant kills an officer in resisting an illegal arrest, he can only oppose force with force as in other cases where he is assaulted; and if the circumstances of the killing show that he acted with malice and premeditation, he is guilty of murder in the first degree. In short, he is placed in no better position than is any other person assaulted, and can only kill his assailant when the danger appears to him as a reasonable person so urgent and pressing that he is in danger of losing his own life or receiving great bodily injury."

The court said in *Edgin* v. *Talley,* 169 Ark. 662, 276 S. W. 591, 42 A. L. R. 1194: "Although he might have believed that he was being illegally arrested, it was his duty to have submitted to the officers."

After the introduction of the evidence was completed, the defendant requested that the jury inspect the scene of the alleged crime. Thereupon, the court said: "Gentlemen of the jury, it has been requested that you visit the scene of this alleged killing. The officers will go with you. They will point out where Mr. Burbanks fell. They are not to discuss this case with you. If they know, they will point out the room where this alleged shot came from. You can view this room. Don't discuss the case with the officers or anyone else. After you have viewed the premises you will report back to this courtroom."

Ark. Stats., § 43-2119, is as follows: "When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body,

in the custody of proper officers, to the place, which must be shown to them by the judge, or a person appointed by the court for that purpose." Section 43-2120 provides: "The officer[s] must be sworn to suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so themselves, except the mere showing of the place to be viewed, and return them into court without unnecessary delay, or at a specified time."

Ark. Stats., § 43-2120, was not complied with, and the officers conducting the jury to the scene of the alleged crime were not sworn in accordance with the statute. The defendant made no request that the officers be sworn as the statute provides.

Was there error in the failure to comply with the statute and, if so, was it such an error as could not be waived by the defendant? In *Whitley* v. *State,* 114 Ark. 243, 169 S. W. 952, the officers conducting the jury to the place of the alleged crime were not sworn in accordance with the statute. It was held, however, that a previous oath administered to the officers in charge of the jury sufficed. The court said:

"The sheriff and his deputy had been specially sworn in relation to their duties of keeping the jury together during the progress of the trial, and had been instructed not to allow the jurors to communicate among themselves, and they had been specially instructed not to communicate with the jury themselves, nor to allow anyone else to do so. . . . True, no specific oath was administered to the sheriff or his deputy on the particular occasion of sending the jury to make a view, but the record shows that the sheriff had the jury in charge the night before 'under proper oath and instructions as to the guarding of the jury,' and that the court 'instructed the officers that they were under the same oath and instructions about guarding the jury as they were the night before, and not to permit any discussion of the case while they were viewing the scene of the killing, or while they were absent from the court room.' "

But, in the case at bar, the defendant's motion that the jury be kept together in charge of an officer was denied. Hence, the jury had been permitted to separate and were not under the charge of an officer. The record does not show what officers were assigned the duty of conducting the jury to the scene of the alleged crime, nor does the record show that any kind of oath was administered to the officers at any time. And there is no showing that the very things that the oath is calculated to guard against did not occur.

In *Atterberry* v. *State,* 56 Ark. 515, 20 S. W. 411, the defendant was convicted of grand larceny, and it was held that by his failure to call the court's attention to the necessity of administering the oath to the officers in charge of the jury during its deliberation, the defendant had waived the oath required by statute. But, in *Johnson* v. *State,* 68 Ark. 401, 59 S. W. 34, on the question of admonishing the jury when they were allowed to separate as provided by Ark. Stats., § 43-2122, it was held a reversible error to fail to comply with the statute.

In the Johnson case, the court emphasized the fact that the statute, now Ark. Stats., § 43-2122, provides that the jury must be admonished on being allowed to separate. Likewise, in the case at bar, § 43-2120 provides that the officers conducting the jury to the scene of the alleged crime *must* be sworn to suffer no person to speak or communicate with the jury. Also in the Johnson case, the defendant did not request the judge to admonish the jury. We think that the statement of the court in *Stroope* v. *State,* 72 Ark. 379, 80 S. W. 749, is especially applicable here:

"It is not for the court to say that no harm was done in this way. No one can foresee or foretell whether there be harm in such case, or what the harm may be, if any. We are of opinion that this was error, for which the judgment following thereon should be reversed. This may seem to be overstrictness in the application of the rule governing such matters, but it is best to avoid the very approach of an evil. To permit a breaking over of the

rule in one instance is likely to set a precedent fraught with the greatest embarrassment in future cases."

The legislature has deemed it proper to adopt as the law of this State Ark. Stats., § 43-2120, which makes it mandatory that officers conducting a jury to the scene of an alleged crime be required to take an oath in accordance with the statute. This statute is calculated to have a salutary effect and should not be nullified by this court.

There are other assignments of error, but they are not such as are likely to occur at another trial.

Reversed.

Justices MILLWEE and GEORGE ROSE SMITH dissent.

GEORGE ROSE SMITH, J., dissenting. I am unable to agree with the majority's conclusion that this case must be reversed on account of the failure of the record to show that a special oath was taken by the officers who were in charge of the jury when the premises were viewed. In my opinion this case is controlled by *Atterberry* v. *State,* which the majority cite but do not expressly overrule.

In the *Atterberry* case, as here, there was involved the matter of administering a special oath to an officer in charge of the jury. The governing statute was § 2265 of Mansfield's Digest (now Ark. Stats. 1947, § 43-2121), which provides that the officers "must be sworn" to keep the jury together during the adjournment of the court. There, as here, there was no showing (as there was in *Whitley* v. *State,* also cited by the majority) that the officer in question had taken a similar oath earlier in the trial. There, as here, no objection was made at the time and no prejudice was shown by the record. In holding that the accused's failure to object was a waiver of the statutory requirement the court said:

"Under our system of trials in felony cases, the defendant is present in court. He is aided by counsel of his own choice, when he is able to employ them; of the court's appointment when he can employ none. His attitude is widely different from that of the defendant in the courts

of England a century ago. The court still owes him an absolutely fair and impartial trial—the right to make proof of everything he offers in denial, mitigation or excuse of the act charged, and to have it fairly passed upon by a jury; but he owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed too trivial at the time to bring to its attention, and which are not shown or charged to have affected the fairness of the trial or prejudiced his rights. . . . [We] hold that it is too late, after verdict, to object, for the first time, that a jury retired from court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the special oath be administered to him nor objected to his taking charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct. It appears from the record in this case that the jury retired in charge of an officer acting under the general oath of his office, and that the defendant and his attorney were present; but it does not appear that he asked the court to administer the special oath or objected to the officer taking charge of the jury.

"He conceded to the jury, thus attended, the right to determine the cause, if it gave him his liberty; and should not be permitted to question such right, merely because it took an unfavorable view of his case."

I am unable to distinguish the *Atterberry* case from this one. On the other hand, the case of *Johnson* v. *State,* relied upon by the majority, is readily distinguishable. There the trial court permitted the jury to separate without admonition, so that each individual juror became the possible subject of improper influence. There was not, as here, the safeguard resulting from the jury remaining together as a body while the premises of this crime were being viewed. The court held in the *Johnson* case that the court's failure to admonish the jury, although not objected to, was reversible error. But here the jurors were admonished by the court when sent to the scene of the murder; so the defect present in the *Johnson* case is

absent. The only irregularity asserted is the court's failure to have the special oath administered to the officers in charge, which is the very point considered in the *Atterberry* case. I must therefore dissent from the reversal of this judgment.

MILLWEE, J., joins in this dissent.

FERRILL *v.* COLLINS.

5-616 281 S. W. 2d 939

Opinion delivered June 27, 1955.

[Rehearing denied October 3, 1955.]

*H. B. Stubblefield,* for appellant.

*Carroll C. Cannon* and *Giles Dearing,* for appellee.

LEE SEAMSTER, Chief Justice. This suit involves a written lease agreement between the appellant, the lessor and the appellee, the lessee, whereby certain business property located in Wynne, Arkansas was leased to appellee for a seven year period.[1] Appellant filed suit in St. Francis Circuit Court seeking to recover damages in the amount of $10,012.22 against the appellee based on the alleged breach of the provisions of said lease to make repairs to the property and surrender the premises in good condition at the termination of the lease. The appellee filed a cross-complaint containing two counts. Count I alleged water damage of $2,000 to appellee's goods, wares, merchandise and fixtures due to appellant's failure to repair the roof of the building as required by the terms of the lease and Count II alleged fraudulent representations on the part of the appellant whereby appellee was led to believe that a new lease would be tendered at the expiration of the old lease and appellee purchased large quantities of merchandise which he subsequently had to dispose of at a loss of $7,900.

On April 1, 1946 the lessee, E. M. Collins, entered into a written lease agreement with the lessor, Eugenia B. Ferrill whereby he leased the ground floor of a two story business building for a period of seven years. The contract details obligations of upkeep, enjoining upon the lessee a duty to take good care of the property at his own expense, making all inside and outside repairs, including sidewalks, windows, glass, and inside painting. At the termination of the lease period the premises were to be returned in good order and condition. The lessor was not to be called upon for any outlay whatsoever, except to make a conscientious and reasonable effort to keep the roof in good repair. A covenant in the lease excluded the lessee from use of the second floor where

[1] This is the second appeal in this case. See *Ferrill* v. *Collins,* 222 Ark. 840, 262 S. W. 2d 885.

the lessor had certain merchandise stored therein. The door to the second floor was kept locked at all times.

The lease expired March 31, 1953. Conversations relating to the drafting of a new lease occurred from time to time, starting in September, 1952. These discussions culminated in the drafting of a tentative contract which was written by the attorney of the appellant. This proposed contract was presented to Collins on February 26, 1953 at which time he asked for and secured additional time so that he might examine the contents of the proposed contract more thoroughly. Collins took a copy of the proposed contract to Forrest City where he had his attorney examine and copy the proposed contract. He contended that the new contract was unacceptable because it required construction expenditures inconsistent with what had been thought to be Ferrill's assurances of renewal, and it limited the duration of the lease to a term of 39 months with no option to renew the lease. He also objected to the paragraph that limited his business activities in Wynne to this one store.

On March 4th the landlord wrote Collins whereby demand was made for possession of the premises by March 31st. A suggestion was that Collins remove his air conditioning unit at once in order that any repairs rendered necessary either by installation or removal could be made by the lessee before March 31st. Other repairs and restorations, except archways and the two front entrances, were to be made by March 31st. Attention was directed to a contractual provision extending to the lessor a specific time within which to give notice regarding restoration of the archways and front entrances.

In reply, Collins wrote March 28th that there was a hole in the plaster near the rear of the building that he felt he should repair; also there might be some other work that would fall upon him under terms of the lease, but he had not checked this building with this thought in mind. Ferrill thought that he received the keys to the building from Collins on April 3, 1953.

On April 27, 1953, Eugenia B. Ferrill sued Collins for $10,012.22. For necessary inside repairs and conditioning she asked $2,467.22; for outside work $5,945; and for the reasonable rental value of the premises $400 per month for four months, or $1,600.

Collins' answer was coupled with a cross-complaint containing two counts. The jury found for Collins on appellant's complaint and awarded him the sum of $3,500 on his cross-complaint without making any apportionment as to the two counts.

The appellant urges four grounds for reversal. Initially it is insisted that the court erred in excluding evidence relating to repairs to the second floor of the building, and in giving an instruction requested by counsel for Collins. By this instruction the jury was told that Collins was not required to make repairs to any outside portion of the leased premises except that he was obligated to maintain the sidewalk, the windows of the first floor, glass in the first floor of the leased premises and outside painting to the first floor, etc.

The court's error, it is said, was the failure to give effect to Collin's obligation to make repairs, "including . . . windows, glass, and all outside and inside painting, and to conform to all reasonable regulations governing said building . . . and to make any reasonable repairs . . . that the lessor may deem necessary for the protection and preservation of said building and its appurtenances."

What the appellant fails to consider is that the contract (Paragraph II) from which the excised quotation is taken—including deletions as they appear in the brief—begins with this language: "The lessee hereby covenants and agrees to take good care of the *leased premises* and at all times to keep the same in good and proper repair and condition at his own cost and expense, making all inside and outside repairs, including all sidewalks, windows, glass, and all outside and inside painting, . . . the lessor is to make a conscientious and reasonable effort to keep the roof of the building in good repair

. . . ." The 8th paragraph of the 1946 lease states: "It is further understood and agreed that the lessee is not to have access to the second floor of the building." The *leased premises* in so far as Collins was concerned could mean nothing but the ground floor. He was expressly forbidden access to the second floor. The lease was prepared by Mrs. Ferrill's agent and it is not ambiguous. The objection cannot be sustained.

The trial court rightfully held that under the instant lease, the appellee was not required to make repairs or improvements to the second floor which was that part of the building not under his control as demised in the lease. In determining the construction of the lease, the court had to look to the whole contract in order to determine its meaning and had to reconcile paragraphs 1, 2 and 8. A tenant's covenant to keep premises in repair did not extend to parts not under tenant's control. *Capital Amusement Co.* v. *Anheuser-Busch, Inc.,* 94 Colo. 372, 30 P. 2d 264; *Rathbun Co.* v. *Simmons,* 90 Cal. App. 692, 266 P. 369; *Mederlander* v. *Cadillac Clay Co.,* 264 Mich. 434, 250 N. W. 281. The construction put upon the 1946 lease by the appellant, would require the lessee to repair the entire building and would be in direct conflict with paragraph 8 which denies tenant access to the second floor and with the expressed terms of the paragraph of the lease which provides that the lessor is to keep the roof of the building in good repair.

Appellee's instructions Nos. 6 and 7 dealing with damage to the merchandise through failure of the landlord to satisfactorily repair the roof are alleged to be erroneous. Mrs. Ferrill's commitment was to make a conscientious and reasonable effort to keep the roof in good repair. The evidence shows that on one occasion she spent eight dollars to stop leaks. But there is substantial testimony that Collins complained of the condition. It is also true that shortly after repossessing the property an entirely new roof was placed on the building by the appellant. While standing alone this reconstruction is not conclusive of the proposition that the old roof

was virtually useless, it is a circumstance from which a factual inference of practical necessity could be drawn.

Attention is directed to *Kennedy* v. *Supnick,* 82 Okla. 208, 200 P. 151, 28 A. L. R. 1520, and Amer. Jur., Vol. 32, § 711, p. 588, which states: "As we have before said, the plaintiff had no access to or control over the upper part of said building. By the clause in said lease above quoted the first party agreed to keep said building in such repair that the party of the second part's stock of goods shall not be damaged by the elements. Under this provision in the lease it was not incumbent upon the plaintiff, Supnick, to give any notice whatever to Dr. Kennedy. It was Dr. Kennedy's business to see that the upper part of said building over which he had control was kept in such condition that the plaintiff's goods would not be damaged by any rains that might fall. On his failure to do this, he was liable for whatever damage the plaintiff might sustain." In the case at bar the tenant was expressly excluded from the second floor. He had no means, during rainy periods, of making an inside examination of the roof to identify small leaks. Certainly an outside examination would have been unsatisfactory unless the deterioration became obvious. Mrs. Ferrill's obligation was to make a *conscientious and reasonable* effort to keep the roof in good repair. It was for the jury to determine whether, in the light of competent evidence, a reasonable effort was made, and whether, in view of Collins' exclusion from the second story, he acted as an ordinarily prudent man to prevent progressive damage to his merchandise.

Instruction No. 8, given on request of counsel for Collins, permitted a recovery if it should be found (a) that Mrs. Ferrill assured Collins that the lease could be renewed in substantially the same form; (b) that if relying solely upon such representation Collins purchased large quantities of merchandise; (c) that if the representations were made at a time when the landlord did not intend to renew the lease in substantially the form of the old lease, and (d) if the representations were coupled

with fraudulent intention of putting Collins in a position where he either had to suffer a serious financial loss or execute a lease on unconscionable terms: if these facts were present and Collins sustained financial loss because of the conduct complained of, damages might be assessed in the sum to reasonably compensate him for such loss, but not exceeding the sum of $7,905.00.

Count II of the cross-complaint alleged that Mrs. Ferrill represented to Collins that it was her intention and purpose to execute a new lease substantially in the same form as the old one. There was no assertion that the assurance was fraudulently made to the determent of the appellee.

Collins was asked repeatedly regarding the representations of inducements held out by the Ferrills respecting a renewal of the lease, or the negotiation of a new lease. Finally, on cross-examination, he was admonished " . . . to be careful about this, and as correctly as you can tell what was said with reference to the building being yours." Quoting Ferrill he replied: "You have made us an excellent tenant and you know we are going to give you every consideration; so as soon as we can decide exactly what terms we want and how much we want for the building, we will proceed with the lease."

There was no showing of any definite statement or understanding to support Count II; it was speculative and indefinite; no evidence exists of its being the proximate cause of any damage to appellee; it refers to the future and not to the past or present; and the elements of fraud have not been proven. Therefore, no cause of action accrued against the appellant simply because she did not submit a contract that was acceptable to the appellee. An oral lease of land for more than one year is void under the Statute of Frauds. An option in a written lease to renew upon terms and conditions to be agreed upon is void for uncertainty. *Keating* v. *Mitchell,* 154 Ark. 267, 242 S. W. 563. See also *Hatch* v. *Scott,* 210 Ark. 665, 197 S. W. 2d 559.

Therefore, we must reject for want of substantial proof of promissory estoppel any allowance for misleading conduct incidental to renewal of the lease. The testimony indicates that the negotiations between the parties were indefinite and speculative as to the form and terms of the proposed lease. When asked about his objections to the proposed lease, Collins stated that the only terms and conditions that were objectionable to him were: the terms that called for him to make repairs to the building, which would include upkeep on the roof; the fact that the lease had a duration of only 39 months, with no option for renewal; and the clause in the lease that limited his business activity to this one business in Wynne.

We think that the trial court correctly sustained appellee's motion to strike all items for repairs to the second floor of the building involved and was correct in giving appellee's instruction No. 2. However, we think that the trial court should have directed a verdict in favor of the appellant on Count II of the cross-complaint and for the error in failing to do so that cause of action will have to be reversed, with directions to dismiss Count II of the cross-complaint. Since the amount of damages was not apportioned as to the two counts of the cross-complaint, the case is remanded for a new trial upon all issues except Count II of the cross-complaint.

COLLIE *v.* COLEMAN.

5-706 281 S. W. 2d 955

Opinion delivered June 27, 1955.

[Rehearing denied October 3, 1955.]

*Ed. B. Cook,* for appellant.

*Bruce Ivy* and *C. T. Coleman,* for appellee.

J. Seaborn Holt, J. This is the second appearance of this case here. The opinion on the former appeal is now the law of this case, *Collie* v. *Coleman,* 223 Ark. 206, 265 S. W. 2d 515. In reversing the case we gave this directive: "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."

On remand the trial court appointed a Master whose primary purpose was to state an account between Charles R. Coleman and his individual tenants and the tenants of Red Bud Plantation, Charles R. Coleman, Trustee, based on the facts disclosed by the original record, already made. The Master took no additional testimony but called on appellees to furnish him a statement of the accounts on the amounts appellees contended appellants owed them and also called on appellants to examine the statement and determine whether they would agree to its correctness. According to the Master's request the statement was furnished to him and he was advised by the parties that they did not question it. The record reflected that all cash refunds due to the tenants (appellants) were held by the Cooperative Gin Company where

appellants had had their ginning done, and that some of these cash refunds were paid over to Charles R. Coleman in cash, but the greater part was used to purchase preferred stock in the gin company in the name of Charles R. Coleman. The Master in his report treated this stock as having been converted by Mr. Coleman as of the date the cash payments were paid to him, and that the stock's par value of $10.00 per share should be paid over by Coleman in cash (rather than in stock) to appellants.

The Chancellor in effect held, however, that the stock itself and not its cash par value should be surrendered and reissued to the appellants (tenants), and rejected so much of the Master's report which found that appellants, after deducting any off-sets due to Coleman, were entitled to all refunds in cash and no part thereof in stock.

The Chancellor's findings contained these recitals:

. . . "The Court now finds from the original record, the Mandate of the Supreme Court, the Report of the Master, Exceptions thereto by defendants Charles R. Coleman and Redbud Plantation, Reply by plaintiffs, and all pleadings and additional proof offered by the defendants, as follows:

"The original complaint was filed Oct. 27, 1950, against Charles R. Coleman and The Little River Cooperative Gin, Inc., and an amended complaint filed Oct. 23, 1951, making Redbud Plantation, Charles R. Coleman, trustee, and John Lott defendants. The statute of limitations prevents any of these plaintiffs not tenants of Charles R. Coleman from recovering anything prior to Oct. 23, 1948; that the ginning season was regarded as not closed until March 31st of the year following, so that the three tenants of Charles R. Coleman may have recovery as herein provided for 1947, 1948 and 1949, but all other tenants are limited to the years 1948 and 1949, as herein set out.

"The figures contained in the Master's Report are hereby found to be correct in so far as they apply to the findings of the court outlined herein, and is the purpose

of this court to recognize said figures as being correct, but in reaching the amount of recovery due these plaintiffs, the court has taken into consideration only the cash refunds actually made, together with interest thereon and for the years herein indicated. If it should be determined that this court is in error as to the statute of limitation and as to the amounts due these plaintiffs, references to the Master's Report will materially lessen the task of figuring these amounts.

"Based on these findings, the court finds that the plaintiffs are entitled to recover as follows:

"(1) Odie Canada, for his share of cash refunds for 1947, $17.34 and 6% interest thereon from April 1, 1948 to Nov. 1, 1954, $6.93, total $24.27. No ginnings for 1948 and 1949, so no recovery for those years. Total stock issued on his ginning for 1947 was $160.00, and he should have stock for ½ this amount, or $80.00.

"(2) J. A. McConnell, for his share of cash refunds for 1947, $20.67 and 6% interest from April 1, 1948 to Nov. 1, 1954, $8.26. No cash refund for 1948. For 1949 cash refund of $39.20, with interest April 1, 1950 to Nov. 1, 1954, $10.96. Total for the three years $79.09. Total stock issued on his ginning for the three years $560.00 and he should have stock for ½ or $280.00.

"(3) Lethia Sibley, no cash payments made for 1947, 1948 or 1949. Total stock issued $130.00, of which the tenant gets ½ or $65.00, with ¼ to Jessie L. Collie, and ¼ to landlord.

"(4) Jesse L. Collie, 1947 payments cut off by statute of limitation as he was tenant of Redbud Plantation; no payments were made in 1948, but for 1949 he should recover $46.50, with interest at 6% from April 1, 1950 to Nov. 1, 1954, $13.02, total $59.52. He would have no recovery because he owes Charles R. Coleman $315.32. Total stock issued on his ginnings, only for year 1948, $370.00, and his share would be ¾ of said amount, or $277.50.

"(5) Floyd McConnell, can collect only for 1948 and 1949, but for these years no cash payments were made on his account. Total stock issued on ginning is for year 1948 in sum of $190.00, and he would be entitled to ½, or $95.00; with ¼ going to Jesse L. Collie in sum of $47.50, remainder to landlord.

"(6) Jerry Jackson, 1947 payment cut off by statute of limitation; no cash payments made for 1948; and for 1949 cash payments due him $24.76, with 6% interest from April 1, 1950 to Nov. 1, 1954, $6.94, total $31.70. Stock issued only for 1948 in total sum of $170.00, and he is entitled to ¾, or $142.50.

"(7) John Parnell, no recovery for 1947; cash payments for 1948 none, and not a tenant for 1949. Total stock issued on ginning for 1948 is $300.00, and of this amount he is entitled to ¾, or $225.00.

"(8) Ben Tyson, cut off for 1947 by statute of limitation; no cash payments made for 1948, but for 1949 he is entitled to $26.86 and 6% interest from April 1, 1950 to Nov. 1, 1954, $7.51, total $34.37. Total stock only for 1948 $310.00, and he is entitled to ½, or $155.00.

"(9) Willie Richardson, no recovery for 1947, and no cash refund for 1948; for 1949 he is entitled to recover cash refund of $16.10, with 6% interest from April 1, 1950 to Nov. 1, 1954, $4.50, or total of $20.60. No stock recovery for 1947, but for 1948 he is entitled to ¾ of $150.00 stock issued on his ginning, or $112.50.

"(10) Harry Morris, not a tenant for 1947, none paid for 1948, and no ginning for 1949. Stock issued on his ginning for 1948 was $1,450, and he is entitled to ¾ of this amount, or $1,087.50.

"(11) Charles Glenn was tenant only for 1948, and no cash payments were made. Total stock issued on his ginning was $270.00, and he is entitled to ¾ of this amount, or $202.50.

"(12) Sam Jones was not a tenant for 1947, only for 1948, when no cash payments were made. Total stock

issued for 1948 was $250.00, and he is entitled to stock in amount of ½, or $125.00. Not a tenant for 1949.

"(13) Robert Howard, tenant only for 1947, and entitled to no recovery for that year.

"(14) Doffie Walls, tenant only for 1947, and entitled to no recovery for that year.

"(15) Caleb Tyson and Ethel Tyson, no recovery as the indebtedness at time of their death exceeds any amount for which recovery might be had."

The court entered a decree in accordance with these findings and directed that the stock be surrendered and cancelled and that the proportionate part due each of the appellants be issued to them and appellees were perpetually enjoined and restrained from withdrawing or accepting all or any part of the reserve and patronage accounts held by the Little River Cooperative Gin Company. Appellants were given judgment for cost against Charles R. Coleman in the court below in amount of $120.85 and for $61.50 for costs on appeal to the Supreme Court, total $182.35, and required Coleman to pay the Master's fee in amount of $200.00.

We have concluded that the findings of the Chancellor and the decree that followed are with one exception in full compliance with our directive and not against the preponderance of the testimony. The one exception is this: the Trial Court held that twelve of the tenants could not recover their refunds from the period of October 27, 1947 to September 27, 1948. We hold that these twelve tenants were entitled to recover their refunds beginning October 27, 1947. Our first opinion fixed that as the date. The motion filed on September 27, 1951 related back to the date that the first complaint was filed, which was October 27, 1950. The motion went to a matter of form and not of substance. Thus on remand the Chancery Court will allow these twelve tenants their rights beginning October 27, 1947. Affirmed in part and reversed in part.

Justice MILLWEE thinks the Master's Report should have been adopted.

Justice GEORGE ROSE SMITH disqualified.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 295 *v.* BROADMOOR BUILDERS, INC.

5-710 280 S. W. 2d 898

Opinion delivered June 27, 1955.

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

*Wright, Harrison, Lindsey & Upton,* for appellee.

ED. F. MCFADDIN, Justice. The question here presented is the legality of the picketing in which the appellants were engaged. The Chancery Court found that the picketing was unlawful and issued a permanent injunction. The correctness of that decree is challenged by appellants, who are the International Brotherhood of Electrical Workers Local Union No. 295, and Harold Veazey the business agent of the Local Union.

Broadmoor is a residential addition in the City of Little Rock and contains an area of 190 acres. In the addition there are many streets dedicated and used by the public. The addition is just West of Hayes Street;

there are two streets opening from Hayes Street into Broadmoor; and there are two other streets that lead from Broadmoor to other streets in Little Rock. In short, there are four streets that serve as ways of ingress and egress for Broadmoor Addition, in which are many residences. Fausett and Company are the developers of Broadmoor; and the appellee, Broadmoor Builders, Inc., is the Fausett corporation that serves as a general contractor for the building of the homes in the addition. According to the evidence in the record here, all the electrical work in the construction of the houses in Broadmoor was sub-contracted by Broadmoor to Price-Fewell Company, an electrical firm.

A short time prior to July 9, 1954, Mr. Goode, Secretary of the Building Trades Council of Little Rock, contacted appellee for a conference for the purpose of having the electrical sub-contracts let to union contractors[1] for all electrical work on any houses to be constructed in Broadmoor. Mrs. Fausett, secretary of the appellee company, advised Mr. Goode that the electrical work was already sub-contracted to Price-Fewell Company and that there was nothing that appellee could do about it. Mrs. Fausett testified, without contradiction, that Mr. Goode told her ". . . there are always loopholes where you can break contracts."

The effort of Mr. Goode, as above stated, was the only attempt by any of the unions[2] to obtain sub-contracts for union sub-contractors, to gain recognition as bargaining agents, to obtain a higher wage scale, or to obtain any other benefits from appellee or Price-Fewell Company. Then on July 9, 1954, the appellant Union

[1] Mrs. Fausett testified that Mr. Goode's purpose was that he wanted the sub-contracts let to union sub-contractors. This was not denied in any way; and Mr. Veazey said that Mr. Goode reported the conversations with Mrs. Fausett just as Mrs. Fausett had testified.

[2] When appellee obtained injunctions against picketing in the Chancery Court in this case, there were other defendants besides the present appellee: Bricklayers, Masons & Plasterers International Union of America A.F.L., Local No. 1, and Ted Brewer, its business agent, were defendants, as well as United Brotherhood of Carpenters & Joiners of America Local Union No. 690 and Z. W. Burnett, its business agent. The said Local No. 1 and Local No. 690 and the business agent of each have not appealed to this Court from the injunction issued by the Chancery Court.

placed pickets at each of the four entrances to Broadmoor Addition, as hereinbefore described. Each picket carried a sign reading:

"No member of L.U. 295 I.B.E.W. Employed on this Job."

Appellee sought injunction to restrain the picketing, claiming (*inter alia*):

"The union is picketing the plaintiff for the further unlawful purpose of forcing and coercing the plaintiff and its employees in the choice of whether the plaintiff will employ union labor and whether its employees will join the unions. Said purpose is contrary to the law and public policy of Arkansas as expressed by Amendment 34 to the Constitution of Arkansas and Act 101 of 1947.

"In the course of picketing the plaintiff's construction job, the pickets have unlawfully obstructed traffic into and out of Broadmoor Addition. The principal entrances to Broadmoor Addition lie on Hayes Street in Little Rock which is a busy thoroughfare. The unlawful action of the pickets in blocking and obstructing these entrances is causing traffic to stop on Hayes Street an abnormal length of time, obstructs the view and attention of persons entering and leaving Broadmoor Addition, and creates a serious traffic hazard."

Among other defendants, the complaint named the present appellant Union and Harold Veazey, its business agent. These are the only appellants here. A portion of Mr. Veazey's deposition, taken by discovery under Act 335 of 1953, was introduced by appellee; and the remainder of the deposition was introduced by appellants as their only offered evidence.

As aforesaid, the Chancery Court held that the picketing by appellants was unlawful, and issued a permanent injunction; and appellants claim that the decree violates their right of free speech under the 14th Amendment to the United States Constitution; and appellants —in addition to cases from Arkansas and other State

Courts—cite the following cases from the Supreme Court of the United States: *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736; *American Federation of Labor* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568; *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769, 86 L. Ed. 1178, 62 S. Ct. 816; and *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, 88 L. Ed. 58, 64 S. Ct. 126. And to these we add other cases from the Supreme Court of the United States involving questions of picketing, to-wit: *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 81 L. Ed. 1229, 57 S. Ct. 857; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552; *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722, 86 L. Ed. 1143, 62 S. Ct. 807; *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal, Co.,* 335 U. S. 525, 93 L. Ed. 212, 69 S. Ct. 251; *American Fed. of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 93 L. Ed. 222, 69 S. Ct. 258; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684; *Hughes* v. *Superior Court,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718; *International Brotherhood* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; *Building Service Employees* v. *Gazzam,* 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; *Local Union No. 10* v. *Graham,* 345 U. S. 192, 97 L. Ed. 946, 73 S. Ct. 585; *Garner* v. *Teamster's Union,* 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161; *Capital Service* v. *N. L. R. B.,* 347 U. S. 501, 98 L. Ed. 887, 74 S. Ct. 699; and *United Const. Workers* v. *Laburnum Const. Corp.,* 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833.

The appellee urges several contentions, each designed to obtain an affirmance of the Chancery decree which found the picketing to be unlawful. Some of these contentions are:

(1) The real purpose of the picketing was to force the appellee to breach its contract with Price-Fewell Company; and on this point appellee cites our own cases of *Lion Oil Co.* v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569; and *Sheet Metal Workers* v. *E. W. Daniels Co.,* 223 Ark. 48, 264 S. W. 2d 597.

(2) The real purpose of the picketing was to force a violation of the Arkansas "Freedom to Work" Constitutional Amendment No. 34, and the Act 101 of 1947, passed in pursuance to said amendment.

(3) That the assigned reason for the picketing was at variance with the rights of picketing; and on this point appellant Veazey testified:

"Q. What was the purpose of the picketing?

"A. To advise our members that we weren't working on the job. We have an awful lot of workers fooling around loose. We did have and have had for the last four months; and they would telephone in; 'Is this or is that job paying the scale?'; and we would have to advise them."

(4) That the business of appellee was not within the economic context of any potential dispute between the Union and the sub-contractor; and on this point appellee gives Mr. Veazey's[3] testimony:

"Q. The picketing was aimed at Broadmoor Builders, Inc.?

"A. Not necessarily. It just happened on that job that the electrical scale was not that which we were receiving from contractors for whom we do work and on this job they were not being paid that rate. . . .

"Q. Had you or your Union ever had any negotiations with Broadmoor Builders, Inc.?

"A. No, our local Union as a rule does not furnish work direct to the building contractor; and Mr. Fausett being a mass builder, in our catalog, he would be a gen-

[3] Mr. Veazey also testified:

"Q. Was there anything Broadmoor Builders, Inc., could have done that would have brought about a removal of the Local No. 295 pickets?

"A. Yes, they could have insisted that the prevailing wage scale for electrical workers be paid. . . .

"Q. Assuming that Broadmoor Builders, Inc., did have a contract with Price-Fewell, was there anything that Broadmoor could have done which would have brought about the removal of your pickets?

"A. I don't know. . . ."

eral contractor. Even though he does not do any electrical work, he sub-contracts it out. I couldn't have had any contract with him. . . . We don't do business with general contractors. We work with sub-contractors."

We find it unnecessary to discuss any of the above listed points, because we rest our opinion on another ground; that is, the picketing was too broad and in too general a locality. It interfered with normal business transportation, entirely disconnected from the purpose or designs of lawful picketing.[4] It was shown that Price-Fewell Company was engaged in doing the electrical work in only six houses in Broadmoor Addition; that at least 75 other houses were under construction in the 190-acre area of the Broadmoor Addition; that at these other 75 houses there were no electrical workers and there was no labor dispute or other dispute of any kind; that these other 75 jobs of construction were in need of concrete, lumber, doors, etc.; that, because of appellant's picketing of the four streets leading into Broadmoor, the truck-drivers would not deliver concrete, lumber, doors, etc. to the other 75 jobs entirely distinct and separated from the six jobs on which there were electrical workers; that truck shipments of doors would normally have been delivered direct to some of the other 75 jobs, but, because of the pickets of the appellant over all of the four streets leading into Broadmoor, the truck shipments were left at a storage depot in Little Rock and appellee was forced to have the shipments delivered to the jobs by other truckers who would cross the picket lines of the appellant.

The right to picket under lawful conditions has been recognized in numerous cases by this Court, some of which are: *Local Union* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154; *Boyd* v. *Dodge,* 217 Ark. 919, 234 S. W. 2d 204; and *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45.

[4] In 70 C. J. S. 1049, et seq., picketing is defined as the stationing of men "at or near the plant or job." The basic idea, as reflected by the cases, is that the picketing must be in the immediate vicinity of the place of business of the institution or plant picketed. To the same effect, see 34 Am. Jur. 943.

The Supreme Court of the United States has recognized that the right of picketing has its limitations. In *Giboney* v. *Empire Storage Co.* (*supra*), picketing was enjoined where its purpose was to force a violation of the law. In *Hughes* v. *Superior Court* (*supra*) it was recognized that the picketing of a store to compel the employment of a proportion of Negro clerks was against the public policy of California. In *Hanke* v. *International Brotherhood* (*supra*) the U. S. Supreme Court declared that the Courts, as well as the Legislature, may declare the public policy of the State.[5]

In the case of *Mo. Pac.* v. *United Brick & Clay Workers Union,* 218 Ark. 707, 238 S. W. 2d 945, we refused to enjoin picketing which prevented the delivery of railroad shipments by a carrier to the affected plant; but at the first session of the Legislature after our opinion, the Arkansas Legislature passed Act 257 of 1953, which declared that picketing was unlawful when it prevented the moving of trains to a plant when the railroad company was not a party to the strike. That enactment of the Legislature as to trains clearly indicates the public policy of Arkansas, which we now declare, as to the delivery of merchandise or other articles to persons or places entirely disconnected from any picketing that might be legal as against the limited person or place to be picketed. Here, truck shipments to 75 jobs of Broadmoor Builders, Inc. were effectively stopped by the presence

[5] In the Hanke case, Mr. Justice FRANKFURTER used this cogent and descriptive language: "Here, as in *Hughes* v. *Superior Court,* 339 U. S. 460, ante, 985, 70 S. Ct. 718, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' Freund, On Understanding the Supreme Court 18 (1949). See also Jaffe, In Defense of the Supreme Court's Picketing Doctrine, 41 Mich. L. Rev. 1037 (1943). The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill* v. *Ala.*, 310 U. S. 88, 104, 84 L. Ed. 1093, 1103, 60 S. Ct. 736. A State's judgment on striking such a balance is, of course, subject to limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect."

of pickets who were concerned with only six jobs of Price-Fewell Company; and it has been recognized in many cases that the respecting of picket lines is prevalent.[6] If the appellant's picket line was aimed at anyone it was directed toward Price-Fewell Company, which had the electrical sub-contract and was working on six electrical construction jobs in Broadmoor. The appellant Union—as testified by Mr. Veazey—had no dispute with the appellee and would not have entered into a contract with the appellee, who is a general contractor. By placing the pickets as they were, appellants effectively stopped the delivery of concrete, doors, lumber, etc., to 75 jobs of appellee's construction, and these jobs were in no way connected with the electrical work then being done by Price-Fewell Company on six other jobs. If appellant could legally picket all the streets leading into Broadmoor because there were six houses under construction therein where there were electrical workers, then, by the same token, the appellant could picket all of the highways leading into Little Rock because Price-Fewell Company had six jobs in the City on which no member of appellant Union was employed, and on which jobs the wages paid were below the Union scale. The picketing by appellant should have been confined to the jobs on which Price-Fewell Company was working—provided the matters between Price-Fewell Company and the Union were at

[6] In *Hughes* v. *Superior Court (supra)*, Mr. Justice FRANKFURTER emphasized the force of the picket line, as compared to ordinary dissemination of information by publication in these words: "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than 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.' Mr. Justice DOUGLAS, joined by BLACK and MURPHY, JJ., concurring in *Bakery & Pastry D. & H. Local* v. *Wohl*, 315 U. S. 769, 775, 776, 86 L. Ed. 1178, 1183, 1184, 62 S. Ct. 816. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, 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. See Gregory, Labor and the Law 346-348 (rev. ed. 1949); Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180, 200, 202 (1942); Dodd, Picketing and Free Speech: A Dissent, 56 Harv. L. Rev. 513, 517 (1943); Hellerstein, Picketing Legislation and the Courts, 10 N. C. L. Rev. 158, 186, 187, note 135 (1932).

the picketing stage—and not to the entire addition of 190 acres on which were under construction 75 other houses in no way connected with the kind of work desired to be performed by appellant Union. We therefore conclude that the appellant's picketing is unlawful[7] under the facts in this case; and the decree is affirmed.

[7] We recognize that in *Capital Service* v. *N. L. R. B.*, 347 U. S. 501, 98 L. Ed. 887, 74 S. Ct. 699, and in *Garner* v. *Teamster's Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161, the Supreme Court of the United States held that in some matters the National Labor Relations Act preempted the field in labor matters and that the State courts were not free to act. Yet, in *United Const. Workers* v. *Laburnum*, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833, the United States Supreme Court recognized that actions in regard to labor matters might still be maintained in the State courts in some instances; and we understand the *Laburnum* case as recognizing that *Hughes* v. *Superior Court* and *Henke* v. *International Brotherhood of Teamsters*, still give the State courts the right to determine public policy and to "set the limits of permissible contests open to industrial combatants."

MISSOURI PACIFIC RAILROAD CO., THOMPSON, TRUSTEE
*v.* CLEMENTS.

5-717 281 S. W. 2d 936

Opinion delivered June 27, 1955.

[Rehearing denied October 3, 1955.]

*Cracraft & Cracraft* and *S. Hubert Mayes,* for appellant.

*E. E. Hopson* and *John C. Sheffield,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellee, W. Lee Clements, against appellants, Missouri Pacific Railroad Company and T. W. Keesee, to recover damages for trespass upon appellee's lands and to remove a cloud on his title thereto.

The appellant railroad maintained a wooden trestle over its line across Swan Lake in Desha County. In 1944 the trestle was damaged by fire and the company decided to replace it with an earthen fill. The proposed project required the acquisition of land in the vicinity, or easements to excavate such land, in order to obtain a suitable supply of dirt for that purpose. Appellee owned a 40-acre tract adjacent to the fill site upon which there was a high silt ridge of timbered land that was most suitable and economically desirable for making the fill. Appellant Keesee owned a tract immediately north of appellee's land.

There was an exchange of conveyances between the appellants in August, 1944, whereby the railroad conveyed to Keesee 47.5 acres of farm land lying about a mile north of the land desired for making the fill in exchange for an easement with right to excavate for a 10-year period on 38 acres described by metes and bounds adjacent to the fill site. The lease deed executed by Keesee embraced about 20 acres actually owned by appellee and included the high silt ridge from which the railroad planned to obtain dirt for the fill. The railroad proceeded with the excavation resulting in the digging of a 7.9-acre borrow pit upon and otherwise rendering worthless a total of 10 acres of appellee's land.

The excavation work was nearly completed before it was discovered by appellee whose protests resulted in extensive negotiations for a settlement without success

and the institution of this suit. Appellants offered no evidence at the trial and upon the proof presented by appellee the chancellor made extensive findings and entered a decree removing the cloud on appellee's title cast by the lease agreement and awarding him damages in the sum of $3,200 for the destruction of his land.

It is undisputed that the location and terrain of the land destroyed made it by far the most suitable and economical in the area for the railroad's use. The use of any other available land in the area would have entailed a much longer haul and added considerably to the cost of the project. Appellee testified that land in the area like the 10 acres in question was worth $70.00 per acre as timbered and uncleared farm land. He also testified that during the negotiations following the excavation he had a conference with H. H. Gudger, an engineer and Assistant Superintendent of the railroad at Wynne, Arkansas, in which the latter informed appellee that the railroad removed approximately 80,000 cubic yards of dirt from his land. Appellee further testified without objection that prior to the letting of the excavation contract he had a long conference with a contractor named Reed who was doing some work in the vicinity and was a prospective bidder on the excavation job. Reed had approached appellee about purchasing the land in question in the event he became the successful bidder and stated that railroad authorities had advised that the fill would require about 80,000 cubic yards of dirt. It was then and there agreed that Reed would pay appellee $100 per acre for the land used plus 4 cents per cubic yard for the dirt if Reed obtained the contract. There was also uncontradicted evidence to the effect that the 47.5 acres which the railroad deeded to Keesee in exchange for the 10-year lease agreement had a market value of $100 per acre.

In fixing the amount of appellee's damages the trial court found that the railroad was in reality buying dirt, and not timbered land, and that it removed 80,000 cubic yards of dirt worth 4 cents a yard from appellee's land in making the fill. The following further findings by the

court are fully supported by the record: "The evidence on the part of the plaintiff which may be treated as competent on the subject, together with the inferences therefrom, establish the gratuitous enrichment of Mr. Keesee in the sum of $4,750.00 and the enrichment of the Railroad Company by getting what it wanted, where it wanted it, and at considerable saving to itself. The evidence, also, shows that plaintiff furnished the dirt for this valuable fill or embankment for which he has not received one penny, with practically no effort on the part of the Railroad Company to see that he got remuneration and with actual opposition on the part of Mr. Keesee to prevent him from getting reasonable compensation."

I. *Measure of Damages.* Appellants first argue that the chancellor applied the wrong measure in arriving at the amount of appellee's damages. They point to appellee's testimony to the effect that the 10 acres in question was worth $70 per acre as timbered and uncleared farm land and say that this constituted the only evidence in the record which even purported to establish the market value of the land destroyed. As appellants suggest, we have held that the measure of damages for permanent injury to real estate is the difference in market value before and after the injury. *Standard Oil Co. of La.* v. *Goodwin,* 174 Ark. 603, 299 S. W. 2. It would follow that where the injury is both total and permanent, as here, the measure of damages would be the market value of the land destroyed. In establishing market value, however, it does not necessarily follow that the landowner is limited to the value of the land for one purpose only.

In *Fort Smith and Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440, the court stated: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes, comprehending its availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring most in the market." See, also, *Kansas City So. Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375; *Gurdon and*

*Fort Smith Rd. Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019. Thus in a proceeding to condemn a site for a railroad bridge this court held that evidence showing that the land required for that purpose possessed superior advantages as a bridge site was admissible as affecting the question of its market value. *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51. Also in *Yonts* v. *Public Service Co. of Arkansas,* 179 Ark. 695, 17 S. W. 2d 886, landowners were held entitled to judgment for the market value of land based on its availability as a damsite and reservoir. While the foregoing cases involved condemnation proceedings under the power of eminent domain of railroads or other utilities, we hold the same rule applicable here. It would be anomalous indeed to say that an owner should receive less for property taken from him tortiously and without authority than when taken by orderly legal process. It follows that the chancellor, in fixing the market value of the land destroyed, was not confined to a consideration of its use for agricultural purposes and had a right to base his findings upon its availability for the most valuable purposes for which it could be used, including its location, character and suitability for use in making the fill.

II. *The Evidence.* Appellants also contend there was no competent evidence upon which to predicate an award of $3,200 or base a finding that 80,000 cubic yards of dirt had been excavated. They point to the testimony of appellee relative to his conferences with, and statements made by, Gudger and Reed and urge its incompetency as hearsay. But this testimony was admitted without objection in the trial court and it is too late to make such objection here. We so held in *Gen. Fire Ext. Co.* v. *Beal-Doyle D. G. Co.,* 110 Ark. 49, 1605 S. W. 889, where there was a failure to object in the trial court to testimony fixing an erroneous basis for determining market value. See, also, *Sandidge* v. *Sandidge,* 212 Ark. 608, 206 S. W. 2d 755. The rule that all objections to evidence and witnesses must be made in a timely manner in the trial court, and will be considered as waived when the case reaches us on appeal, if not so made, is equally applicable in

chancery cases as in cases at law. *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495.

Moreover, we do not agree that the statement made by Gudger was incompetent. Several communications between the railroad and appellee tend to show authority to speak for the company. In addition there was the uncontradicted evidence of the peculiar adaptability of the land for the purpose at hand and that the land given by the railroad in exchange for the excavation right had a market value of $4,750. In our opinion the evidence is sufficient to sustain the damages awarded.

Affirmed.

HEDRICK *v.* HICKMAN, COUNTY JUDGE.

5-709 280 S. W. 2d 406

Opinion delivered June 27, 1955.

*Clifton Bond,* for appellant.

*John F. Gibson,* for appellee.

GEORGE ROSE SMITH, J. At a local option election held on August 7, 1954, Bradley County apparently approved prohibition by a vote of 2,001 to 1,673. Certain wets unsuccessfully contested the election in the county court and were also unsuccessful upon appeal to the circuit court. The circuit court's order of affirmance, entered February 22, 1955, permitted the judgment to be superseded pending an appeal to this court. That appeal was recently lodged here but is not yet ready for submission.

The case at bar is an allied proceeding by which several drys sought in the circuit court a writ of mandamus to compel the county court to enter an order declaring the result of the election and terminating the sale of intoxicants within the county. The circuit court, on the same day that it decided the election contest, denied the petition for mandamus.

On the merits the question is whether the filing of a contest can suspend the effect of a local option election until the contest is decided. It cannot be doubted that such a suspension was contemplated by the Thorn Liquor Law of 1935. By that act the county board of election commissioners was required to certify the election result to the county clerk. The clerk was directed to keep the certificate until the next regular term of the county court, when it became the duty of the county judge to have the certificate spread of record in his court. Ark. Stats. 1947, § 48-809. Ordinarily the dry law then became effective at the expiration of sixty days from the recording of the certificate. § 48-810. If, however, a contest were filed the law directed that the certificate not be recorded. § 48-820. It was also declared that contests should be governed by the laws applicable to the contest of any election of county officers. *Ibid.* The statutes so referred to permit appeals to be taken with or without supersedeas. § 3-1204. Thus under the procedure adopted in the Thorn Liquor Law the institution of a contest suspended the effective operation of the election, not only by the withholding of the certificate from the public records but also by the authorization of writs of supersedeas on appeal.

The appellants contend that the cited provisions of the 1935 statute have been repealed by Initiated Act No. 1 of 1942, which contains this sentence: "The County Court within twenty days after said election shall make and have entered of record its order declaring the result of said election." Ark. Stats., § 48-802. It is urged by the appellants that this sentence fixes a maximum period of twenty days within which the outcome of the election must be given effect, whether or not a contest is pending.

We are not willing to say that the 1942 initiated measure repealed by implication the plain terms of the 1935 law. In addition to the settled rule that repeals by implication are disfavored, the initiated act itself declares that it shall be cumulative to the liquor laws already in force. Ark. Stats., § 48-806. A conclusion of implied repeal would require either a finding that the later statute had covered the entire subject anew or a finding of irreconcilable conflict between the two statutes.

Neither finding can fairly be made in this instance. The Thorn law, by its own provisions and by its reference to other statutes, laid down a complete procedure for the conduct of local option election contests. By contrast the initiated act does not even mention such contests, much less undertake to re-cover that field in its entirety.

Nor does there exist such a conflict that both acts cannot be given their proper effect. Under the older law even if no contest were filed the newly adopted dry law did not go into effect until sixty days after the opening of the next term of court, which might involve altogether a delay of several months. The sentence in the initiated act now relied upon by the appellants reduced this period, in the absence of a contest, to a maximum of twenty days. To that extent the new law certainly supplants the old. But there is no compelling reason to think that this clause was intended to extend also to the matter of election contests—a subject which the initiated act does not purport to touch. In a closely contested contest, where the margin of victory consists of only a few votes, the appellants' construction of the statutes might result in a county alternating between a wet and dry status as the case progressed in four stages from the county board to this court. "It is contrary to public policy that the incumbency of a public office should be changed by the decision of the intermediate courts, so long as an appeal is being diligently prosecuted in good faith to a final hearing in the Supreme Court." *Williams* v. *Buchanan,*

84 Ark. 404, 106 S. W. 202. Here the asserted repugnancy between the two statutes is not sufficiently clear-cut to require a finding of implied repeal.

Affirmed.

ROBERTSON *v.* KING.

5-715 280 S. W. 2d 402

Opinion delivered June 27, 1955.

*Brockman & Brockman,* for appellant.

*B. Ball,* for appellee.

ROBINSON, J. The principal issue here is whether appellant, a minor, may rescind a contract to purchase a pick-up truck. On the 20th day of March, 1954, L. D. Robertson, a minor, entered into a conditional sales agreement whereby he purchased from Turner King and J. W. Julian, doing business as the Julian Pontiac Company, a pick-up truck for the agreed price of $1,743.85. On the day of the purchase, Robertson was 17 years of age, and did not have his 18th birthday until April 8th. Robertson traded in a passenger car for which he was given a credit of $723.85 on the purchase price, leaving

a balance of $1,020.00 payable in 23 monthly installments of $52.66 plus one payment of $52.83. He paid the April installment of $52.66.

It appears that Robertson had considerable trouble with the wiring on the truck. He returned it to the automobile dealers for repairs, but the defective condition was not remedied. On May 2nd, the truck caught fire and was practically destroyed. He notified the automobile concern and they stated that they would send the insurance man to see him. It appears that the insurance representative, upon finding out that Robertson was only 17 years of age, refused to deal with him.

On June 7th, appellees filed suit to replevy the damaged truck from Robertson. By his father and next friend, Robertson filed a cross-complaint in which he alleged that he is a minor and asked that the contract of purchase be rescinded and sought to recover that part of the purchase price he had paid, which he alleges is the amount of $723.85, allowed by the dealers on the car traded in, plus the one monthly payment of $52.66, totaling $776.51. A jury was waived and the cause was submitted to the court. There was a judgment for King and Julian on the complaint and the cross-complaint. On appeal, Robertson contends that he was 17 years of age at the time of the alleged purchase and that he has a right under the law to rescind the contract and to recover the portion of the purchase price he has paid.

Appellees contend that the judgment should be sustained because Robertson did not return the damaged truck to the automobile dealers. However, the judgment of the court states: "The court further finds the proof to be that the plaintiff has possession of the said GMC pick-up truck." Hence, there is no merit to this contention. Appellees also contend that Act 337 of 1953 applies in that a minor cannot rescind a contract of purchase without reimbursing the seller for any loss that he may have sustained by reason of such rescission. This statute deals with situations where a minor is 18 years of age at the time of making a purchase. The statute is not

applicable here because according to the undisputed evidence Robertson was only 17 years of age at the time of entering into the purchase agreement.

Appellees further contend that the minor is bound by the contract because the automobile was a necessary. The record does not contain any substantial evidence to support this contention. The only evidence on this issue is that the boy quit school in 1951 and has been earning his own living since that time, and that he has been working for a construction company and traveling around the country to different jobs with his father in his father's truck. The boy lives at home with his parents and there is no showing whatever that he needed the truck in connection with any work he was doing. One of the witnesses for the appellees testified that the boy stated he wanted to use the truck in a farming operation. The record contains no evidence that he was engaged in farming at any time. Another witness for the appellees testified that the boy stated that he wanted to purchase the truck on the "farmer's plan," but there is no showing that the car was sold to him on a "farmer's plan." He was allowed a sum on the car which he traded in, amounting to more than one-third of the purchase price of the new truck, and he was to make substantial monthly payments for the balance. Just what the "farmer's plan" is does not appear in the record, but it is a matter of common knowledge that the plan under which the boy bought the truck is the usual method of making purchases of automobiles. In a suit by a minor to rescind a contract the burden is on the defendant to show that the article was a necessary. *Barnes* v. *Rebsamen Motors, Inc.,* 221 Ark. 791, 255 S. W. 2d 961.

It is our conclusion that the evidence does not sustain a finding that the truck was a necessary to Robertson. In that respect, this case is distinguishable from *Sykes* v. *Dickerson,* 216 Ark. 116, 224 S. W. 2d 360, where the court said: "It was contemplated that he would use the truck in hauling lumber, and for some months he did so, as an aid to self-support." The law is settled in this State that a minor may rescind a contract to purchase

where the property involved is not a necessary. *Foreman* v. *Dickerson,* 177 Ark. 121, 6 S. W. 2d 829; *Arkansas Reo Motor Car Company* v. *Goodlett,* 163 Ark. 35, 258 S. W. 975; *Quality Motors, Inc.* v. *Hays,* 216 Ark. 264, 225 S. W. 2d 326.

The automobile dealers have disposed of the car they received in the trade, and cannot restore it to the minor. In a situation of this kind, the weight of authority is that the actual value of the property given as part of the purchase price by the minor is the correct measure of damages. Neither side is bound by the agreement reached as to the value of the car at the time the trade was made. This is true because the contract has been rescinded and there is no contract fixing the value. It is said in 43 C. J. S. 117: "While it is generally held that, where property traded in by the infant as part of the price is beyond reach of the seller, the infant is entitled to the reasonable value of the property at the time of the purchase, rather than the value fixed in the purchase agreement, it has also been held that he is entitled to receive the value fixed in the agreement."

In support of the rule that a reasonable value of the property at the time of purchase governs, C. J. S. cites *Collins* v. *Norfleet-Baggs, Inc.,* 197 N. C. 659, 150 S. E. 177, where the court said: "Where the infant parts with personal property, he may, upon disaffirmance, recover the value of such property, as of the date of the contract, but he is neither bound by, nor entitled to be awarded, the price fixed by the contract, for its real value may be more or less than the amount so stipulated." However, in *Lockhart* v. *National Cash Register Co.,* (Tex. Civ. App.) 66 S. W. 2d 796, the Court of Civil Appeals in Texas held the fixed trade in value prevailed. In 27 Am. Jur. 790, it is said: "Where, upon an infant's disaffirmance of a purchase of an automobile in exchange for his note and an old automobile, the old automobile cannot be restored, he is entitled to recover the value thereof, which is presumably the valuation at which the defendant took it." Cited as authority in *Schoenung* v. *Gallet,*

206 Wis. 52, 238 N. W. 852, 78 A. L. R. 387. In that case there was no showing that the automobile traded in by the infant had any value other than that mentioned in the purchase agreement. The court said: "As plaintiff's former automobile has been wrecked and cannot be restored by defendant, he is liable for the value thereof, which is, presumably, the sum of $50 at which he valued it when he obtained it from plaintiff."

In the case at bar, although the minor was allowed over $700.00 on his car in the trade, there is evidence to the effect that it was actually worth about $350.00. Although there is conflict among the authorities as pointed out above, we believe the better rule holds that the value of an article given in trade by a minor as a part of the purchase price is the reasonable market value of the article at the time of the purchase, and that neither party is bound by the value fixed in the purchase agreement.

Young Robertson is a minor; the truck was not a necessary; and Act 337 of 1953 is not applicable. Hence, the court erred in finding for the automobile dealers, and the cause is therefore reversed and remanded for a new trial.

Mr. Justice Holt dissents.

J. Seaborn Holt, Justice (dissenting). I think this case should be affirmed for the reason that as I read the record, there was ample substantial evidence to support the findings and judgment of the trial court.

A jury having been waived, we must give to those findings and judgment the same force and effect that we give to the verdict of a jury, therefore, when we find some substantial evidence to support the findings and judgment of the trial court viewed in the light most favorable to appellee (here), we must affirm.

In this case there was testimony in the record that appellant at the time he purchased the truck in question was an active, well developed, industrious young man and would easily pass for one of the age of 22 years. Mr. Turner King testified that appellant told him, at the

time he made the contract, that he was 22 years old and wanted the truck for farming purposes. Appellant testified that he had made his own living since he was about 15 years of age and according to his own testimony, and that of his father, he had been employed and working for more than three years. In fact, he had traveled with his father into many states working with him on contracts. He testified he quit school in 1951. Appellant's father testified that his son worked down in Texas, and he took his son with him, that they then went to Louisiana, next to Ohio, to Pennsylvania and from there to South Carolina. On these trips they sometimes used a bus or other times his father's pick-up truck. Appellant told the seller of the truck at the time the contract was made that he wanted the truck in his business and for farming purposes, and delivered a pleasure car, which he had previously without assistance purchased, and owned, to the dealer as part payment on the truck.

It seems to me that the above testimony alone is substantial and sufficient to show that the truck that appellant bought was necessary in his farming and contractural work, was bought for these purposes, and, therefore, that the judgment was correct. Of strong significance is the fact that appellant, who owned a pleasure automobile, would trade it in on the purchase price of a truck unless he felt the necessity for a truck to use in farming, his business, and undertakings.

In the very recent case of *Sykes* v. *Dickerson,* 216 Ark. 116, 224 S. W. 2d 360, we held that whether a truck was a necessary, such as would make a minor's contract valid, must be determined by the particular facts in each case. We there said:

"The remaining contention is that an automobile truck purchased by a minor for the purpose of use in making a living for himself is a necessary, so that the minor would be liable for it. This contention would in Arkansas today have to be based on the Uniform Sales Act, § 2, Ark. Stats. (1947) § 68-1402, which provides: 'Where necessaries are sold to an infant . . . he must pay a reasonable price therefor. Necessaries in this

section means goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of delivery.'

. . . "The closest Arkansas case on its facts is *Haynie* v. *Dicus,* 210 Ark. 1092, 199 S. W. 2d 954, where a minor had purchased a 'milk route' and truck. The decision there was that whether these items were necessaries was a question of fact and the finding in the lower court, that under the circumstances they were 'necessaries,' was sustained. . . .

" 'Whether the nature of a contract is such that it can, under any circumstances, be regarded as a contract for necessaries, is a question of law; but if the court decides that under some circumstances such a contract might be for necessaries, it then becomes a question of fact for the jury whether it was so in the particular case.' Williston, Contracts (Rev. Ed., 1936) § 241. There have been some intimations by legal writers that automotive vehicles purchased for business purposes would never be deemed necessaries where an infant is concerned. Compare 43 C. J. S. 190, 192. We do not so hold. Cases cited in support of that generalization have usually reached the result by reason of the peculiar facts in the individual case, or because of express findings of fact by jury or trial judge that a car was not a necessary for a particular infant."

Obviously, justice, common honesty and decency require all to pay their just obligations. Courts should therefore exhaust every means available to force slackers, including minors, to honor their contracts. Our lawmakers evidently came to this conclusion by enacting Act 337 in the 1953 Session. As I view the facts here, as pointed out above, we should declare this minor's contract good because he bought a necessary. I would affirm.

5-721 280 S. W. 2d 718

Opinion delivered June 27, 1955.

*Norton & Norton,* for appellant.

*John L. Anderson,* for appellee.

ROBINSON, J. The pleadings in this case give rise to the issue of the ownership of 80 acres of farming land. The cause is here at this time on the point of whether the Chancellor erred in appointing a receiver to take charge of the property and rent it out until the case can be decided on its merits.

The complaint filed by appellee alleges, *inter alia,* "that unless a receiver is appointed to take charge of said property immediately, to make necessary arrangements for farming same for the year 1955, to secure the proper allotment and to protect said property, the plaintiff will suffer irreparable injury." The hearing was held before the Chancellor on March 4, 1955 on the question of appointing a receiver. At that time, plaintiff J. B. Lambert testified that the condition of the farm was just about as bad as it could be. No effort had been made to put the land in shape for planting. Last year's cotton stalks were still standing and the Johnson grass was so bad one could hardly see the old stalks. Pictures were introduced in evidence showing the condition described. The witness J. B. Lambert, Jr., also corroborated the testimony of his father. On the other hand, appellant Alex Bragg testified that he had prepared several acres of the land and that he was equipped to make a crop.

The witnesses were before the trial court, and that court was in a much better position than is this court to judge their credibility. In making the decision to appoint a receiver the court said: "It would be for the protection of all parties that a receiver be appointed to insure a crop being made on this land this year. The defendant will not be disturbed in the possession of the house. Farming time is here—and it will be well to have a crop made on the land. . . . That is my greatest concern here. This is March 4 and the land must be prepared and planted soon if a crop is to be made at all." Ark. Stats., § 36-112, provides: "*Appointment of receiver pendente lite.* In an action . . . between partners or others jointly owning or interested in any property or fund, on the application of plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured, the court may appoint a receiver to take charge thereof during the pendency of the action and may order and coerce the delivery of it to him." This court said in *Ford* v. *Moore,* 212 Ark. 248, 205 S. W. 2d 209: "The general rule governing appointment of receivers 'is that the action of the court must be governed by a sound and judicial discretion.' "

We are unable to say there was an abuse of discretion by the trial court. Appellant argues the merits of the case, but on this appeal the only issue involved is the action of the Chancellor in appointing a receiver.

Affirmed.

Mr. Justice McFaddin concurs.

---

Ed. F. McFaddin, Associate Justice (concurring). I reach the same conclusion as that reached by the majority, but by a reasoning process slightly different. Here is my reasoning:

The appellant argues: (1) that the mortgage he executed to Lambert is void because it was not signed and

acknowledged by appellant's wife (see § 50-415, Ark. Stats.), and (2) that there can be no receiver because there is no valid cause of action. But in this argument appellant overlooks Lambert's right to invoke the doctrine of equitable subrogation. See *Stephenson* v. *Grant,* 168 Ark. 927, 271 S. W. 974; and *Teal* v. *Thompson,* 180 Ark. 63, 20 S. W. 2d 307. Here Lambert claims: (1) that Bragg contracted to buy the land from the Lambrook Corporation upon making stated annual payments; and (2) that Lambert—not as a volunteer—made some of the payments to the Lambrook Corporation. Therefore, under the doctrine of equitable subrogation, Lambert "stood in the shoes of Lambrook Corporation," and could successfully urge the petition for receivership without being compelled to prove the validity of the mortgage executed by Bragg to Lambert. This principle of equitable subrogation supports the appointment of the receiver independently of any question of the validity of the mortgage executed by Bragg to Lambert.

LESLIE MILLER, INC. *v.* STATE.

4807-8-9-10 281 S. W. 2d 946

Opinion delivered July 4, 1955.

[Rehearing denied October 3, 1955.]

*Sherrill, Gentry & Bonner,* for appellant.

*Tom Gentry,* Attorney General, *Thorp Thomas,* Assistant Attorney General, and *Mehaffy, Smith & Williams,* for appellee.

*Warren E. Gurger,* Asst. U. S. Attorney General, and *Osro Cobb,* U. S. District Attorney, *Amici Curiae.*

LEE SEAMSTER, Chief Justice. In each of these cases, the appellants were found guilty in Pulaski Circuit Court on each of two counts of an information filed by the Prosecuting Attorney of Pulaski County, Arkansas, on behalf of the State of Arkansas. The separate informations charged appellants with violating the provisions of Act 124 of 1939, as amended (Ark. Stats. 1947, §§ 71-701 to 71-721) in that each of the appellants, without authority from the Contractors Licensing Board, (1) submitted a bid to the United States for the construction of certain facilities at a cost in excess of $20,000 on property owned, or leased, by the United States in Arkansas and (2) thereafter executed a contract to do said construction and entered into the performance of the contract. In each case, appellants were assessed a fine in the sum of $100 on each of the two counts of the information.

The contract with appellant, Engineering Construction Corporation, is for construction of an Air National Guard installation in Sebastian County, Arkansas, on property leased from the City of Fort Smith for that purpose. The other appellants, Ramsey and Leftwich, Tecon Corporation and Leslie Miller, Inc., have contracts for construction of facilities at the Air Force Base in Pulaski County, Arkansas. All of the above contracts greatly exceed the statutory minimum of $20,000. It is agreed that the lands on which the facilities are being constructed were purchased or leased, by the United States with the consent of the State of Arkansas but that the United States Government has not accepted

jurisdiction over the lands as provided in 40 U. S. C. A. 255.

In each of the instant cases, appellants expressly deny that Act 124 of 1939, as amended, is applicable to its activities in placing the aforesaid bids, procuring the contracts, and performing work thereunder. The appellants contend that the stipulation in each of the cases shows that the lands upon which the contract is to be performed for the agency of the United States Government are either owned or leased by the United States or its agency for one of the purposes mentioned in Article 1, § 8, Paragraph 17, of the United States Constitution and the State by the provisions of § 10-1101 of the Arkansas Statutes, Anno., has consented to the acquisition by the United States of these lands, and has relinquished jurisdiction of the lands. The appellants rely upon the case of *Lynch* v. *Hammock,* 204 Ark. 911, 165 S. W. 2d 369, in which this Court stated: "We think it clear, under the above authorities, that the laws, supra, affecting the practice of medicine and surgery in Arkansas do not control and cannot apply to the rights of Dr. Lynch to practice on property, the jurisdiction over which has been surrendered to the United States, and the title to which property has been acquired by the United States by purchase."

There is nothing in this opinion to indicate that 40 U. S. C. A. 255 was called to this Court's attention at that time or that the statute was considered. On the other hand it is quite apparent that this Court, in deciding the Lynch case considered only two things: (1) had jurisdiction over the lands in question been surrendered by the State to the United States; and (2) had title to the property been acquired by the United States.

40 U. S. C. A. 255 provides in part as follows: "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent

establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In the case of *Adams* v. *United States,* 319 U. S. 312, 63 S. Ct. 1122, 87 L. Ed. 1421, the U. S. Supreme Court stated: "Since the Government had not given the notice required by the 1940 Act, it clearly did not have either exclusive or partial jurisdiction over the camp area. . . . Since the Government had not accepted jurisdiction in the manner required by the Act, the Federal Court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorize the Government to take jurisdiction, since at the critical time the jurisdiction had not been taken." The opinion in the Lynch case was delivered on November 9, 1942. The Adams case was decided on May 24, 1943.

There can be no argument to the well settled principle that state sovereignty is complete except as clearly abdicated to the Federal Government by the Federal Constitution or by legislative act of cession. Therefore, state sovereignty is presumed in the absence of clear and explicit constitutional or legislative enactment to the contrary.

The appellants next contend that Ark. Stats., §§ 71-701 to 71-721, directly interferes with the performance of federal functions and cannot, therefore, under the doctrine of implied inter-governmental immunity, con-

stitutionally apply to appellants' activities herein. It is contended that the enforcement of the provisions of the Act is in contravention of the sovereign power of the United States, as Article 4, § 3, Clause 2, of the Constitution of the United States expressly grants to Congress the power to make all needful rules and regulations respecting property belonging to the United States.

The facts in these cases clearly show that the appellants are independent contractors. The fact that each appellant had a contract, in excess of $20,000, with the United States to construct buildings on United States Government property does not grant to them immunity from the State's law (Ark. Stats., §§ 71-701 to 71-721) which requires contractors to procure a contractor's license before they can legally bid, contract or perform work on a contract, in Arkansas.

The United States Government is not a party to this suit, nor are the appellants herein, agents or representatives of the United States Government. An independent contractor is not clothed with governmental immunity solely because of his contractual relationship with the Federal Government. A tax imposed upon an independent contractor is not laid upon a government instrumentality. *Ernest K. James* v. *Dravo Contracting Co.,* 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208; *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384; *Alabama* v. *King and Boozer,* 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3; *Graves* v. *New York, ex rel. O'Keefe,* 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927.

By analogy to these tax cases, state regulation of independent contractors has also been sustained in the face of increased economic burdens passed on indirectly to the Government by the independent contractors. *Penn Dairies* v. *Milk Control Commission,* 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748; *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 60 S. Ct. 431, 84 L. Ed. 596; *Railway Mail Ass'n* v. *Corsi,* 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072; *E. E. Morgan Co., Inc.* v. *State, Use Phillips County,* 202 Ark. 404, 150 S. W. 2d 736; *Sollitt & Sons Construction Co.* v.

*Commonwealth of Virginia,* 161 Va. 854, 172 S. E. 290, 91 A. L. R. 774; *Ohio River Contract Co.* v. *Gordon,* 244 U. S. 68, 37 S. Ct. 599, 61 L. Ed. 997.

Since the appellants admit that they have violated the provisions of the Act, if the Act is applicable to them, we must therefore affirm the judgment of the trial court in each of the above cases.

MYERS *v.* WILLIAMS, CHANCELLOR.

5-712 281 S. W. 2d 944

Opinion delivered July 4, 1955.

**[Rehearing denied October 3, 1955.]**

*H. B. Stubblefield,* for petitioner.

*Talley & Owen* and *Dale Price,* for respondent.

J. SEABORN HOLT, J. February 15, 1954, Louise Myers filed suit, in First Division Pulaski Chancery Court (Case 99357) for divorce, property settlement, alimony, maintenance for the children, attorney's fees and court cost. Her husband, Johnnie Myers, answered with a general denial. He filed no cross complaint and

sought no affirmative relief. The cause was heard June 10, 1954 and the Chancellor, Rodney Parham, rendered a decree granting to Mrs. Myers a divorce from bed and board only, custody of the children, $175 per month ($50 as alimony and $125 maintenance) and $400 which her husband owed her up to July 1, 1954; directed Johnnie Myers to continue to collect the rentals on property jointly owned by them, except the home place together with personal property therein, which he awarded to Louise Myers as a home for her and the children. He further directed the husband to maintain the home, pay the expense of utilities (except telephone) incurred, and that he pay cost and attorney's fee of $500 incurred by his wife. The court retained jurisdiction and control of the cause "for such further orders and proceedings as may be necessary or proper to ascertain definitely and enforce the rights of the parties hereto."

Thereafter on December 15, 1954, Johnnie Myers brought suit in the Second Division Pulaski Chancery Court (Case 101532), praying for an absolute divorce and summons was had on his wife the same day. Thereafter Louise filed a petition in her original suit in First Division (Case 99357) again seeking an absolute divorce and also for additional maintenance, and a new summons was issued and had on her husband in February 1955. At this juncture Mrs. Myers filed a motion in the Second Division to dismiss her husband's suit (101532) in that division on the ground, "that the proceedings and decree in said action No. 99357, involve and determine the matters alleged and issues which would be involved in this action and is res judicata thereof." The court denied Mrs. Myers' motion holding in effect that it had jurisdiction; whereupon, Mrs. Myers filed motion in this court (an original proceeding) for Writ of Prohibition.

The sole question presented here is one of jurisdiction, it being asserted by Chancellor Williams of the Second Division that the court over which he presided had jurisdiction to hear Johnnie Myers' suit for divorce, and on the other hand Louise Myers claims that the First

Chancery Division, where the original suit was filed, retained and had sole jurisdiction.

On the record presented we hold that the Second Division of the Pulaski Chancery Court had jurisdiction. A decree as here granting a divorce from bed and board and a decree granting an absolute divorce "rest upon the same grounds the law merely permitting the Chancellor in his discretion" to grant either kind. *Crews* v. *Crews,* 68 Ark. 158, 56 S. W. 778; *Clyburn* v. *Clyburn,* 175 Ark. 330, 299 S. W. 38, and Stats. § 34-1202, Ark. Stats. 1947, in effect so provides. A decree of a court of equity pertaining to custody of children, maintenance, alimony, etc., is the same in a divorce from bed and board as in an absolute divorce, *Bauman* v. *Bauman,* 18 Ark. 320.

The parties are residents of Pulaski County and have been for many years. Clearly the First Division had jurisdiction over the parties to enforce its decree of June 10, 1954, but it did not have jurisdiction to try a new cause of action which was set out in the husband's complaint in which he sought an absolute divorce, and filed by him and summons had thereon prior to his wife's petition in the first suit (99357) in which she again sought an absolute divorce. The June 10, 1954, decree above, as pointed out, was only for separation from bed and board and did not affect the status of the parties as to the continued existence of the marriage ties. "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." Leflar, Conflict of Laws, § 139, page 286. The decree in the original suit was a final decree. There has been no appeal from it, and as indicated the husband did not ask for an absolute divorce or any affirmative relief in that suit and now for the first time filed, in effect, a new cause of action in the Second Division, Pulaski Chancery Court, asking for an absolute divorce. This he had

the right to do. The principles of law announced in the recent case, *Hill* v. *Rowles,* 223 Ark. 115, 264 S. W. 2d 638, apply with equal force here. In that case, while there was pending in the Pulaski Chancery Court a suit by the wife for separate maintenance and after decree had been rendered in her favor the husband filed a separate suit in the Saline Chancery Court seeking an absolute divorce. The wife sought a Writ of Prohibition in this court on the ground that the Saline Chancery Court was without jurisdiction in the divorce proceeding. In denying the petition for the writ we held, [Headnotes 3, 4, 5, 264 S. W. 2d 638] "A determination, in a wife's action for separate maintenance, that wife is entitled to separate maintenance is not a determination that her husband has no grounds for divorce. Wife's action for separate maintenance, pending in Pulaski County, did not bar her husband's action for divorce in Saline County, even though husband had not brought cross action for divorce in Pulaski County. The policy of the law is to support and maintain marital status wherever it is reasonable to do so in the circumstances."

In that case as here the husband had not asked for divorce in the Pulaski Chancery Court. That issue had not been determined. While the decree there was for separate maintenance, and in the present case for a divorce from bed and board, the marital status was not affected by the decree in either case, but continued existent just as before the decrees. The appellant's first suit (99357) was not res judicata and a bar to her husband's suit (101532) for divorce in the Second Division, Pulaski Chancery Court. The petition for Writ of Prohibition is denied.

WHITELEY *v.* WILCOX OIL COMPANY.

5-716 280 S. W. 2d 903

Opinion delivered July 4, 1955.

*Rex W. Perkins* and *E. J. Ball,* for appellant.

*Glenn R. Davis, Price Dickson* and *W. B. Putman,* for appellee.

Ed. F. McFaddin, Justice. Appellants filed this action for $1,979.90 against appellee, Wilcox Oil Company, a corporation. The theory of the appellants was that they were entitled to the "retainage" which the State allowed the appellee. The cause was tried on an agreed statement of facts before the Circuit Court without a jury and resulted in a judgment for the appellee. We copy the agreed statement of facts *in toto*:

"R. W. Whiteley and John F. Whiteley are partners operating a filling station on the corner of West Mountain Street and South School Street in the City of Fayetteville, under the firm name of R. D. Whiteley and Sons Service Station. Neither the partnership nor any members thereof were qualified as 'distibutors' or 'persons other than distributors' as provided by §§ 75-1109 and 75-1110, Arkansas Statutes (1947) and were not authorized to buy motor fuels for sale in the State of Arkansas without payment of the Arkansas Motor Fuel Taxes, during any period of time in which said plaintiffs purchased gasoline from the defendant.

"Wilcox Oil Company is a corporation duly organized under the laws of the State of Delaware and is authorized to do business in Arkansas and is qualified as a distributor of motor fuels in the State of Arkansas as provided by § 75-1109, Arkansas Statutes (1947) holding distributors Permit No. 151 issued by the Commissioner of Revenues of the State of Arkansas and was such licensed distributor at all times involved herein.

"Wilcox Oil Company sold motor fuels to R. D. Whiteley and Sons from time to time beginning in De-

cember, 1949, and the last sale being in February, 1954. Sales were made at the Wilcox bulk plant at Bristow, Oklahoma, and transported to Fayetteville by public carrier tank truck. Gallonages were measured at the bulk plant at Bristow, Oklahoma, with proper temperature correction. No shortages existed when delivery was made at Bristow. Gasoline was transferred from tank truck directly to Whiteley's retail tanks.

"During the period the parties were engaged in the purchase and sale of gasoline, Wilcox reported all gasoline sold to Whiteley for sales in the State of Arkansas and collected the correct Arkansas Motor Fuel Tax, making reports and remittances to the Commissioner of Revenues of the State of Arkansas, retaining therefrom the percentages authorized by § 75-1112C (1) (e) as amended by Act 352 of 1949. During the period herein covered, Wilcox retained one thousand nine hundred forty-six dollars and seventy-six cents ($1,946.76).

"At no time were any shortages in motor fuels suggested or claimed, either by evaporation, shrinkage or other losses from unknown causes by reason of the shipment of motor fuels from the Wilcox bulk plant to the Whiteley Retail Station."

The Circuit Court judgment was correct. Section 75-1101 *et seq.* Ark. Stats. is the "Motor Fuel Tax Law." Section 75-1106 levies a tax of 6½¢ per gallon on the motor fuel—gasoline, in the case at bar. Sections 75-1109 to 75-1113, inclusive, provide for the licensing of distributors and other persons; and require, *inter alia,* an application, a surety bond, accurate bookkeeping, regular reports, and remittances; and § 75-1112 (C) (1) (e), as amended by Act 352 of 1949, allows a "retainage" in this language:

". . . it being determined by the General Assembly that 2% on the first 200,000 gallons of motor fuel so received by the distributor and 1% of the remaining of the total gallonage so received is the actual and average amount of loss resulting from evaporation, shrinkage

and losses resulting from unknown causes irrespective of the amount thereof, and the cost of collection."

Thus, under the law, the person holding a permit and making the collections and reports is allowed to keep a "retainage" to cover losses and cost of collections. Appellee, Wilcox Oil Company, was the license holder and kept the "retainage" in the case at bar; and appellants are trying to recover the said retainage on all the gasoline that they purchased from the Wilcox Oil Company. Appellants never attempted to become licensed in any way by the State of Arkansas. They were willing to let appellee perform all the requirements of the Arkansas law; and now appellants want to recover from appellee the $1,946.76 which the State of Arkansas allowed appellee to retain for all of its shrinkage, losses, troubles, and expenses of collection.

The agreed statement demonstrates the fallacy of appellants' contentions. If they had wanted to have the "retainage," they should have complied with the applicable Statutes, as mentioned. The money appellee retained was allowed by the State to the appellee, as a licensed distributor. There is no merit in appellants' claim that appellee has been unjustly enriched. The case of *Cook, Comm.* v. *Sears Roebuck,* 212 Ark. 308, 206 S. W. 2d 20, does not support the appellants in any way. In 1 Am. Jur. 417, in discussing "Elements of Good Cause of Action," the holdings of the cases are summarized in this language:

"A cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done, . . . The essential elements of a good cause of action are the existence of a legal right in the plaintiff, with a corresponding legal duty in the defendant, and a violation or breach of that right or duty with consequential injury or damage to the plaintiff, for which he may maintain an action for the recovery of money damages, or other appropriate relief."

The law says 'there is no wrong without a remedy'; and the converse of the situation must also be true: there can be no remedy when there has been no wrong. Here the appellee has not wronged the appellants in any way so the appellants have no cause of action on the statement of facts to which they agreed. The Circuit Court was correct in so holding.

Affirmed.

ISGRIG *v.* CITY OF LITTLE ROCK.

5-723 280 S. W. 2d 891

Opinion delivered July 4, 1955.

*Bernal Seamster* and *Cooper Jacoway,* for appellant.

*O. D. Longstreth, Jr., Dave E. Witt* and *Mehaffy, Smith & Williams,* for appellee.

ED. F. MCFADDIN, Justice. The Chancery Court sustained the defendants' demurrer to the complaint and the intervention, and dismissed the case; and the question on appeal is whether the complaint and intervention stated a cause of action.

The plaintiff, W. B. Isgrig, is a resident of Pulaski County and a taxpayer of the County and of the City of Little Rock; the intervener, George Spann, is a taxpayer and a resident of Little Rock; the defendants are the City of Little Rock and the Little Rock Municipal Airport Commissioners; and the purpose of the suit was to obtain an injunction against certain activities that the Little Rock Municipal Airport was undertaking.

The complaint alleged that Isgrig was the owner of 250 acres of land immediately East of the City limits of Little Rock; that in traveling from his land to the City of Little Rock (where he owned other property) Isgrig necessarily had to travel either over East 10th Street or East 26th Street (sometimes called Roosevelt Road Extension); that in 1934 the City of Little Rock, in order to close East 17th Street, made an agreement with property owners like Isgrig that the City would construct and maintain a road on East 10th Street and on East 26th Street; that the right-of-way of the East 26th road was to be 160 feet; and that the City was about to violate its agreement by closing said streets, with no provision for payment of damages therefor. The complaint further alleged:

"10. The Defendants are attempting to eliminate and settle their obligation to some of the property owners in the plaintiff's vicinity by buying their lands but the Defendants are not treating all of the residents and property owners in a similar manner and do not have sufficient funds to pay to all of the property owners the damages they will suffer. Defendants' failure to pay all damages while paying for some damages is completely arbitrary and an abuse of their discretion.

"11. The area occupied by said airport is not capable of being expanded to fit the needs for airport

facilities in the Little Rock area and by devoting all available money to making improvements on this present property, which is and will continue to be obsolete for airport purposes, for the Little Rock area the Commissioners are not exercising reasonable judgment and are arbitrarily wasting the funds of Plaintiff and other taxpayers of the City of Little Rock."[1]

The intervention of Spann adopted all the allegations in the Isgrig complaint, and also contained this paragraph as to specific instances:

"The defendants, Airport Commissioners, have recently paid out funds to some of the property owners in this area in satisfaction of damages caused by the defendants and have filed suits to condemn other properties in this area among them the property of Addie Browning and Edgar Lovelace, under which defendants are proposing to pay for some of the damages caused by them; but said defendants are not paying or making any provisions to pay the damages suffered by other property owners, including intervener, and do not have sufficient funds to pay the damages which will be suffered by all of the property owners in this area if the defendants are permitted to proceed to wrongfully close, block and obstruct the streets and roads serving the area."

The defendants demurred to the complaint and the intervention on three grounds:

"1. That the plaintiff and the intervener do not have the legal capacity to sue and are not proper parties to this action.

"2. That there is another action pending between the same parties for the same cause, to-wit: E. H. Risser,

[1] The prayer of the complaint was: "Wherefore, Plaintiff prays that defendants be enjoined and restrained from closing East 10th Street and East 26th Street; that defendants be enjoined and restrained from spending any of the funds in their possession for improvements upon the airport until provision be made by said defendants for the payment of damages to the Plaintiff and others entitled thereto if said streets be closed, obstructed or blocked; and, that Defendants be enjoined and restrained from spending any of the funds in their possession for improvements upon the airport in its present location; for his costs herein and all appropriate relief."

Plaintiff vs. The City of Little Rock, et al., G. B. Oliver, Intervener, bearing the Clerk's filing number 98223 in the Pulaski County Chancery Court.

"3. That the Complaint and the Intervention do not state facts sufficient to constitute a cause of action."

At the outset it is well to mention some of the elementary rules concerning the place and scope of a demurrer. As stated in 41 Am. Jur. 436 *et seq.*:

"A demurrer is the method of raising an objection to the sufficiency in law of a pleading. It may be filed either by the plaintiff or the defendant to test the other's pleadings for defects therein apparent on the face of such pleadings. . . . A demurrer does not raise any question of fact or a mixed question of law and fact, but questions of law only; and it is erroneous for the Court, in passing on the demurrer, to determine a disputed question of fact."[2]

In the case at bar the defendants' first point in the demurrer was that neither the plaintiff nor the intervener had legal capacity to sue. Isgrig recited that he was a property owner in the area affected and also a taxpayer in the City of Little Rock, and that the Airport Commissioners were not exercising reasonable judgment ". . . and are arbitrarily wasting the funds of Plaintiff and other taxpayers of the City of Little Rock." Spann, as intervener, made similar and more detailed allegations. These are sufficient as against a demurrer. The right of any citizen and taxpayer to have equity restrain the misapplication or misappropriation of public funds has been recognized in a number of cases: *Town of Jacksonport* v. *Watson,* 33 Ark. 704; *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130; *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901; *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175; *Rose* v. *Brickhouse,* 182 Ark. 1105, 34 S. W. 2d 472; *Brookfield* v. *Harahan Viaduct Imp. Dist.,* 186 Ark. 599, 54 S. W. 2d 689; *Sitton* v. *Burnett,* 216 Ark. 574, 226 S. W. 2d 544; *Revis* v. *Harris,* 217

[2] Our own cases are to like effect and may be found collected under proper topics in West's Ark. Digest, "Pleadings," § 187 to § 218 (inc.).

Ark. 25, 228 S. W. 2d 624; and *City of Stuttgart* v. *McCuing,* 218 Ark. 34, 234 S. W. 2d 209. We conclude that the plaintiff and intervener, as citizens and taxpayers, had the capacity to maintain the suit.

The third point in the demurrer was, that the complaint and intervention did not state facts sufficient to constitute a cause of action. The cases previously cited are full authority for the holding that any taxpayer may invoke the aid of equity to prevent an unlawful expenditure of the public funds. Here there were the allegations as previously copied; and these were sufficient to state a cause of action.

Finally, we consider the second point in the demurrer, which alleged the pendency of another action. In *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8, in discussing the Statute that is now § 27-1115 (3rd subdivision) of Ark. Stats., we said:

"The Statutes of this State provide what shall be done in such cases. They provide that when it appears in the complaint that there is another action pending between the same parties for the same cause, the objection may be taken advantage of by demurrer; and if it does not appear in the complaint, it may be taken by answer; . . ."

In *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828, we said that it is only when the pendency of another action appears on the face of the complaint that the question may be raised by demurrer. See also *Keenan* v. *Strait,* 221 Ark. 83, 252 S. W. 2d 76. There was not a word or a line in the complaint or intervention about any other pending cause of action; and the defendants could not supply such information by a demurrer. To so attempt constituted a "speaking demurrer." In 41 Am. Jur. 440, the text states:

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

bad. The demurrer should be overruled, since extrinsic facts can be made available only by plea or answer."

We have many cases in this jurisdiction recognizing the above quoted rules as to "speaking demurrers." See *Rider* v. *McElroy,* 194 Ark. 1106, 110 S. W. 2d 492.

It is true that when the Chancellor sustained the demurrer in the case at bar on January 5, 1955, he knew that on November 15, 1954 he had decided the case of *Risser* v. *City of Little Rock* (which is now No. 724 in this Court). The Chancellor evidently saw no need to hear evidence in this case which he thought involved the same issues: therefore he sustained the demurrer. But in so doing he considered matters dehors the complaint. The demurrer, insofar as the other cause of action was concerned, was a "speaking demurrer" and should have been overruled. In view of our decision this day rendered in the case of *Risser* v. *City of Little Rock* (No. 724 herein), the defendants possibly will file other pleadings in the Chancery Court in this case. But, in order to "keep the law straight" as regards the force and effect of a demurrer, it is necessary that the decree be reversed in the present case.

Reversed.

The Chief Justice and Justice MILLWEE not participating.

JEFFERSON *v.* NERO.

5-726 280 S. W. 2d 884

Opinion delivered July 4, 1955.

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

*W. E. Phipps,* for appellee.

MINOR W. MILLWEE, Justice. The parties to this suit are residents of the Dixie Addition to North Little Rock, Arkansas, where the appellant, Sam Jefferson, operated a café and beer tavern. When appellee, Frank Nero, entered appellant's place of business on December 13, 1952, the two men engaged in an altercation in which appellant shot and critically injured appellee. Trial of an action for damages brought by appellee resulted in a verdict and judgment in his favor for $8,000.

There is a sharp dispute in the testimony concerning the shooting and the incidents leading up to it. According to the testimony of appellee, the parties were good friends and there had been no prior trouble between them when he went to appellant's place of business about 3 P. M. on the day in question for the purpose of purchasing a package of cigarettes. The business consisted

of two rooms, 14 ft. x 20 ft. each, facing East on "D" Street with the café located in the South room and the beer parlor in the North room. Appellee entered the café where appellant was sitting in front of the counter and the two exchanged greetings. Appellee then handed appellant a one-dollar bill to change so that he could get the cigarettes from a vending machine. Appellant went out the back door and returned shortly through the front door with a shotgun. When appellee started out the front door appellant drew the gun and told him to get back. When appellee backed up a few steps appellant made two or three motions with the gun which discharged and shot appellee at close range on the side of the face, seriously injuring him.

Appellee denied appellant's testimony to the effect that the two had quarreled on the morning of the shooting and at other times previously because of appellee's misconduct; and that appellee had been warned to stay away from appellant's place of business. According to appellant the shooting occurred when appellee insisted on playing a coin operated music machine, or nickelodeon, after appellant had told him not to do so. Appellant testified that appellee then advanced toward him with his hand in his pocket; that he was nervous and did not intend to shoot or hurt appellee but only to stop him; and that it was just an accident that he hit him.

I. *The Statute of Limitations.* The shooting occurred December 13, 1952, and this suit was filed March 19, 1954. Appellant pleaded, and now contends, that the action was one for assault and battery which must be brought within one year under Ark. Stats., § 37-201. The trial court agreed with appellee's contention that it constituted an action for negligence founded on an implied liability growing out of the proprietor-invitee relationship which may be brought within 3 years under Ark. Stats., § 37-206.

The amended and substituted complaint contained allegations as follows: "The plaintiff further states that when the defendant so shamefully thus shot and injured

him, he was a business visitor, an invitee, in defendant's café and beer tavern; that said business was open for business at the time; that plaintiff had entered for the sole purpose of buying a package of cigarettes; that at the time he was exercising due care as such business visitor and conducting himself as is customary for good customers; that the defendant owed him a duty to exercise ordinary care towards him, and not unlawfully, or otherwise, to injure him; that the defendant defaulted in such duties, and while in the course of his duties as café and beer tavern operator, did with willful and unlawful negligence injure the plaintiff as aforesaid; and as a direct and proximate cause thereof the plaintiff was rendered totally and permanently disabled . . ."

"That while the relationship of proprietor-invitee existed between the parties hereto, the defendant proprietor attempted to eject plaintiff invitee from said beer tavern café, and in doing so used more force than was necessary, and thereby proximately injured the plaintiff."

Appellant relies strongly on the case of *McAlister* v. *Gunter,* 164 Ark. 611, 262 S. W. 636, in which the court held that an action for shooting and wounding the plaintiff was barred by the one-year statute. The effect of our holding in that case was that an assault and battery was the only cause of action relied upon by the plaintiff, and that no special relationship, like that of proprietor-invitee asserted here, was alleged or proved. We think the principle followed in the earlier case of *St. Louis, I. M. and S. Ry. Co.* v. *Mynott,* 83 Ark. 6, 102 S. W. 380, is applicable and controlling here. There the plaintiff-passenger was allegedly assaulted, beaten and forcibly ejected from defendant's train by one of its trainmen. In rejecting the defendant's plea that the action was for assault and battery, hence barred by the one-year statute, the court held that the carrier-passenger relationship gave rise to an implied liability of the railway company for the wrongful acts of its servants in forcibly expelling plaintiff from the train. See, also, *St. Louis, I. M. and S. Ry. Co.* v. *Robertson,* 103 Ark. 356, 146 S. W. 482,

where the one-year statute was held inapplicable even though the relation of passenger and carrier might not have existed, provided the trainman used more force than necessary in expelling plaintiff as a trespasser.

Another well settled rule is stated in 53 C. J. S., Limitations of Actions, § 107, as follows: "If there is doubt as to which of two or more statutes of limitation applies to a particular action or proceeding, and it is necessary to resolve the doubt, it will generally be resolved in favor of the application of the statute containing the longest limitation." See, also, 34 Am. Jur., Limitation of Actions, § 50.

In determining the applicable statute of limitations in the case at bar, we think the trial court correctly construed the instant proceeding as an action growing out of the implied liability of appellant as a proprietor in either wrongfully and negligently injuring appellee, an invitee, or in using more force than was necessary in attempting to eject him as a trespasser.

II. *The Instructions.* Appellee's Requested Instruction No. 1 given by the court reads: "This is a case in which the plaintiff alleges a proprietor-invitee relationship between defendant and him and that under such relationship the defendant owed him a duty under an implied contract to be careful toward him and not to injure him negligently. You are instructed that when an owner sets up shop and opens his doors for the business of selling wares, services, or entertainment he is then a proprietor and such act is his general invitation for the public to enter, look, and buy, and any person who enters with an intention of probable buying is an invitee. So, in this case, if you find from the preponderance of the evidence, that on December 13, 1952, at or about 3:10 P. M. Sam Jefferson, the defendant, had his café-beer tavern open for business, and at that time the plaintiff, Frank Nero, entered said shop for the purpose of making a purchase, then said defendant was a proprietor and said plaintiff was an invitee, and at that time the relationship of proprietor-invitee existed between the

defendant and the plaintiff, and it is the law that the defendant owed the plaintiff a duty to exercise ordinary care towards him under such circumstances and conditions."

Appellant objected to the instruction generally, and specifically because the word "negligently" was not defined. It is now argued that the instruction is inherently erroneous because it assumed and told the jury that the relationship of proprietor-invitee existed between the parties at the time of the shooting. We think it is clear that the instruction merely set forth appellee's allegation in regard to the relationship and the state of facts under which the jury might find that it existed. Other instructions given by the court make this very clear. It is also well settled that the failure to instruct on a question is not ground for reversal, where no request is made therefor. See cases cited in West's Ark. Digest, Appeal and Error, § 216. Instructions defining such terms as "negligence" and "ordinary care" are usually given separately. If appellant felt the word "negligently" should have been more specifically defined it was incumbent upon him to request such an instruction before he could complain on appeal. The court defined "ordinary care" in a separate instruction and appellant's liability was predicated upon his alleged failure to use such care toward appellee. When the instruction in question is considered along with other instructions given, as the jury were told to do, the meaning of "negligence," or the failure to use "ordinary care," is made manifest.

Appellant also contends the court erred in giving appellee's Requested Instruction No. 2, which reads: "You are instructed that a proprietor owes an invitee on his premises a duty to exercise ordinary care not to injure him negligently. Such duty arises from an implied contract on the part of the proprietor when he opens his shop and thus invites customers to enter that the shop is safe to enter and that he will exercise ordinary care for such customer-invitee's safety, and that he will not negligently injure him. So, in this case, if you

find from a preponderance of the evidence that the plaintiff, while exercising due care entered and was an invitee upon the premises of the defendant and the defendant in the capacity of proprietor negligently injured the plaintiff as charged, then and under such findings you should bring in a verdict for the plaintiff and award him a judgment commensurate with his proved damages."

Specific objections to this instruction were that "negligence" and "ordinary care" were not defined and that the instruction failed to state that an invitee must enter a place of business "in a lawful manner." We think this instruction correctly submitted appellee's theory of the case to the jury. Under the instruction the jury were required to find not only that appellee was an invitee but that he entered appellant's place of business "while exercising due care." The defense theories of appellant to the effect that appellee was a trespasser, that appellant used no more force than necessary to eject him, or to protect appellant from bodily injury, were submitted under instructions requested by both parties which clearly and correctly defined such issues to the jury.

In connection with this instruction appellant again argues that appellee sought recovery for assault and battery only, which he asserts must be done intentionally, and not negligently; and that there is no proof of negligence in the case at bar. As previously indicated, appellee's complaint clearly stated a cause of action on an implied liability growing out of the proprietor-invitee relationship. Even if it be conceded that assault and battery were also involved in the proceeding, the trial court correctly applied the longer rather than the shorter period of limitations. The jury were also warranted in finding that appellant acted negligently, and not intentionally, in the shooting under his own version of the incident. Besides, if appellant thought the jury were not sufficiently advised on the issue of whether the shooting was intentional, he should have requested a proper instruction on the matter and cannot complain on this

appeal in the absence of such request. *Western Coal and Mining Co.* v. *Jones,* 75 Ark. 76, 87 S. W. 440.

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

BRAND *v.* RORKE.

5-720 280 S. W. 2d 906

Opinion delivered July 4, 1955.

*Wiley W. Bean,* for appellant.

*Rose, Holland & Holland,* for appellee.

GEORGE ROSE SMITH, J. This is an action brought by the appellant to recover for personal injuries sustained while she was riding as a passenger in the appellee's car. At the conclusion of the plaintiff's proof the trial court directed a verdict for the defendant. The question is whether the plaintiff made a case for the jury.

During the 1953-1954 school year Miss Brand was living in Clarksville but was employed as a school teacher at Oark, in the northern part of the county. Miss Brand, the defendant Rorke, and a third teacher made an arrangement by which the two men alternated in driving

their cars from Clarksville to Oark. It was decided that the operating expense of a car was $42 a month; so Miss Brand contributed her share by making a monthly payment of $7 to each of the two car owners.

The complaint alleges that Rorke was negligent in driving an automobile without brakes and with a defective lock on the right front door. At the trial the plaintiff testified that on the day of the accident, as Rorke was driving down a mountain on the highway, the brakes failed. The car gathered speed until Rorke stopped it by swerving to his left, but Miss Brand was thrown through the front door and injured. She was unable to give the cause for the failing of the brakes.

It is insisted by the appellee that this proof falls short of establishing negligence, since the mechanical defect might have arisen suddenly and without fault on Rorke's part. Even so it was not necessary for the plaintiff to anticipate and disprove this possible explanation. By statute every motor vehicle must be equipped with adequate brakes. Ark. Stats. 1947, § 75-724. It has often been held that proof of the violation of such a safety measure is evidence of negligence. *Union Securities Co.* v. *Taylor,* 185 Ark. 737, 48 S. W. 2d 1100; *Kendrick* v. *Rankin,* 219 Ark. 736, 244 S. W. 2d 495. The appellant's testimony constituted substantial evidence to the effect that the statute had been violated; it was for the jury to say whether the defendant was guilty of negligence.

It is also contended that the plaintiff must be held as a matter of law to have been a guest, precluding her from recovery in the absence of willful and wanton misconduct on Rorke's part. Ark. Stats., § 75-913. Here too the issue was for the jury. It is certainly true that, when a trip is undertaken for social and recreational purposes, a passenger may be found to be a guest even though he buys a tankful of gasoline for his host or contributes in some other way to the expense of the journey. Ordinarily, however, the issue is one of fact. *Corruthers*

v. *Mason,* 224 Ark. 929, 277 S. W. 2d 60. Especially is this true with respect to a car pool that is essentially a business arrangement between fellow employees rather than an instance of pure hospitality. *Bond* v. *Sharp,* 325 Mich. 460, 39 N. W. 2d 37; *Dennis* v. *Wood,* 357 Mo. 886, 211 S. W. 2d 470; *Rosa* v. *Briggs,* 200 Ore. 450, 266 P. 2d 427. In the case at bar it cannot be said that the proof shows without dispute that the guest statute is applicable.

Reversed.

GREEN *v.* GARRETT.

5-727 280 S. W. 2d 905

Opinion delivered July 4, 1955.

*McDaniel, Crow & Driver,* for appellant.

*Ben M. McCray,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellees to quiet their title to a strip of land lying along the boundary line between their property and that of the appellant. The chancellor granted the relief sought. It is now contended by the appellant that since the disputed strip lies on the appellant's side of an existing fence the plaintiffs were not in possession when the suit was filed and were therefore not entitled to have their title quieted in equity.

The objection now urged was not made below until after the trial, being mentioned for the first time in the appellant's designation of the record for appeal. The

plaintiffs' lack of possession does not involve a complete absence of judicial power over the subject matter, as would be true if a chancery court attempted to try a criminal case or to probate a will. Instead, the present objection goes merely to the adequacy of the remedy at law and is waived if not timelily interposed. *Love* v. *Bryson,* 57 Ark. 589, 22 S. W. 341; *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402. Here the objection is clearly too late.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* CROOM.

5-730 280 S. W. 2d 887

Opinion delivered July 4, 1955.

*Richard M. Hart,* for appellant.

*Hardin, Barton, Hardin & Garner,* for appellee.

WARD, J. This case arose out of the condemnation of certain lands situated in Sebastian County, Fort Smith District, Arkansas. On July 16, 1952, the County Court of Sebastian County, Fort Smith District, Arkansas, at the request of the Arkansas State Highway Commission, proceeding under Ark. Stats., § 76-510, entered its order condemning lands belonging to appellee, B. L. Croom, and other property owners, in connection with the widening and resurfacing of Towson Avenue located principally within the City limits of Fort Smith, Arkansas. The condemnation order specified that the City of Fort Smith and Sebastian County [Fort Smith District] were to share the cost of right of way acquisition on an equal basis, and that the Highway Commission was to remove and clear obstructions. The order further stated that claims for damages must be presented within one year.

Pursuant to said order appellant, the Arkansas State Highway Commission, entered upon the lands of appellee for the purpose of clearing the right of way and reconstructing the said street. However, appellee objected to such entry and thereupon appellant, on May 13, 1953, made application in the Chancery Court for an order enjoining appellee from interfering with and molesting its operations. The Chancery Court restrained appellee but required appellant to make a deposit in the registry of the court to guarantee the payment of any damages that might be adjudged in favor of appellee if same were not paid.

The pertinent part of the Court's order reads: ". . . the defendant [appellee] is entitled to have deposited in the registry of this Court the sum of $6,500 to be held therein as a cash bond to guarantee payment of defendant's damages, if any, occasioned by the taking of his said lands by condemnation order of Sebastian County Court, Fort Smith District, as is set forth in the complaint filed herein, and by construction of the highway, if such damages, if any, are not paid after being ascertained in the manner provided by law by Sebastian County, Arkansas, Fort Smith District and/or the City

of Fort Smith, Arkansas, in accordance with said condemnation order . . ."

Subsequent to the above proceedings appellee filed his claim for damages in the County Court, but not being satisfied with the allowance, he appealed to the Sebastian Circuit Court where a judgment in the sum of $6,500 was secured against the County. Appellant was not a party to that proceeding, and no appeal has been taken from the judgment.

Following the judgment in circuit court, appellee filed a motion in the Sebastian Chancery Court on January 11, 1955, praying that the deposit of $6,500 placed in the registry of the court by appellant be paid to him in satisfaction of the judgment theretofore rendered against Sebastian County. Appellant resisted the above motion and, after a hearing on January 14, 1955, the Chancery Court sustained appellee's motion and directed appellant to pay over to appellee the amount of its deposit. From the above order of the Chancery Court appellant prosecutes this appeal.

The trial court erred in sustaining appellee's motion and in directing that the sum of $6,500 be summarily paid to appellee. It is clear that appellant is not liable for damages caused appellee as a result of the County Court condemnation order since appellant was not a party to that procedure and was not otherwise bound thereby, as we have heretofore held in the cases of *Arkansas State Highway Commission* v. *McNeil,* 222 Ark. 643, 262 S. W. 2d 129, and *State of Arkansas Highway Commission* v. *Palmer,* 222 Ark. 603, 261 S. W. 2d 772. This court in those cases discussed the methods of obtaining rights of way as set forth in Ark. Stats., § 76-510 and § 76-511. It was stated in the latter case that if the procedure was instituted at the request of the Highway Commission [as it was in the case under consideration] "the county became liable for all damages for such taking." It was there also further explained that if the Highway Commission had instituted proceedings under § 76-511 [as it did not do here] "it would have been

obligated to pay all damages, but could have charged back to the County fifty per cent of the cost."

It follows therefore that if any liability for damages to appellee exists now or may exist in the future it is because of the deposit it made in chancery court as a prerequisite to obtaining the writ of injunction against appellee. It will be noted that the injunction order specified in effect that there would be no obligation on appellant to pay damages to appellee unless such damages, if any, were not paid by Sebastian County. Therefore it is obvious that the obligation placed on appellant [to pay damages to appellee] was in the nature of the obligation of a guarantor and not a primary debtor.

At the time the chancellor made the order from which comes this appeal no showing was made that appellee had legally and properly presented for collection his judgment against the County, no showing that the County had legally refused to pay him, and no adequate showing that the County was financially unable to pay. The only attempt on the part of appellee to show the County was unable to pay his judgment was testimony to the following effect: The Prosecuting Attorney said the County Judge said no appropriation had been made. The County Judge said that none had been made, that he had asked for none, that appellee had presented no claim, and that he thought the Arkansas Highway Commission's bond would take care of appellee's judgment. Appellee admitted that no formal or written claim had, to his knowledge, been presented to the County. In dealing with a similar situation, in *The State Life Insurance Company of Indianapolis, Indiana* v. *Arkansas State Highway Commission,* 202 Ark. 12, 148 S. W. 2d 671, this court said:

"Appellant had and still has a complete and adequate remedy at law. It is not alleged or attempted to be proven that Benton County is insolvent and cannot pay any damage suffered by appellant, and the burden was on it to do so. There is no presumption of insol-

vency as to the state or any of its political subdivisions. In fact the presumption is to the contrary."

In accordance with the many decisions of this court it is well established of course that a person's land cannot be taken under condemnation proceedings without just compensation, but we can think of no possible way by which appellee in this instance will not eventually receive compensation for his land, if he pursues the legal remedies available to him to collect the judgment he has against the County. If however it later develops that appellee cannot obtain compensation from the County because of its financial inability to pay, or for any other legal reason, the deposit which appellant has made will then be available in the Chancery Court for that purpose.

The views expressed above force the conclusion that the trial court was premature in ordering appellant's deposit in that court paid to appellee.

It was the opinion of the trial court that its action was justified under the holding in the *McNeil* case, supra. The trial court quoted and laid stress on a certain portion of the opinion where it was said "perhaps, as counsel suggest, the State will ultimately bear a substantial part of the liability as a result of having made the $15,000 deposit as a condition to entering upon the land." We can see nothing in the *McNeil* case to sustain the court in its conclusion. It was plainly stated in the cited case that "the State is not lawfully subject to liability in this case." It was further stated "the *Palmer* case and its predecessors have established the rule that in a proceeding such as this one, brought under Ark. Stats. 1947, § 76-510, the State is immune from liability; the sole responsibility rests upon the County, as a result of the County Court's action in granting the request that a right of way be provided at County expense." It is true that in the *McNeil* case the court said that *perhaps* the State will ultimately be liable on the deposit made in chancery court. The statement was correct in that case and it would be, as explained above, correct to make the

same statement in connection with the deposit in this case.

Appellee makes this statement: "This court's decision in *Arkansas State Highway Commission* v. *Partain,* 192 Ark. [127] at page 131, [90 S. W. 2d 968], we think, is clearly decisive of all the issues in this case," and quotes extensively from the opinion. Then special reliance is placed on this phrase [from the quote]: "This deposit is in effect the payment in advance which the Constitution requires as a condition upon which the property must be taken." A careful reading of the *Partain* opinion reveals facts and issues so different from those obtaining here that it obviously does not support appellee's contention. In the cited case there had not been any condemnation proceeding, the property owner had recovered no judgment for damages, and no deposit of cash or bond had been made in court for the property owner's protection over which the court had control. The language [quoted above] which appellee considers significant in this case is fully explained by the court's language immediately preceding the quotation. The explanatory language we refer to was a general statement of law made by the court as follows:

"There is authority in the law whereby the court, *in which condemnation is prayed,* may require a deposit in court of a sum of money sufficient to pay any and all damages which may reasonably be assessed; *and the deposit must be in the registry of the court where the damages will be assessed. . . .*" [Emphasis supplied.]

In using the above language and in using the language relied on by appellee, the court obviously was not talking about the kind of a deposit made in the case before us. Here the deposit of $6,500 was not made in the court which condemned appellee's property and it was not made by the condemner.

Accordingly the decree of the trial court is reversed.

RISSER *v.* CITY OF LITTLE ROCK.

5-724 281 S. W. 2d 949

Opinion delivered July 4, 1955.

[Rehearing denied October 3, 1955.]

*John R. Thompson, Bernal Seamster, Joseph C. Kemp* and *Cooper Jacoway,* for appellant.

*O. D. Longstreth, Jr., Dave E. Witt* and *Mehaffy, Smith & Williams,* for appellee.

ROBINSON, J. This is an effort by some of the residents of the Fourche Dam community, which is east of Little Rock in Pulaski County, to prevent the City of Little Rock from relocating a small portion of East 10th Street and East 26th Street in that city.

East 10th Street is on the north side of the Little Rock Municipal Airport and East 26th Street is on the south side. To facilitate the operation of modern aircraft, it is necessary for the city to install additional equipment at the ends of the northeast-southwest runway at the airport. In order to do this, the city seeks to abandon a small portion of East 10th Street and establish

a new route one block north on 9th Street. This will require traffic to make two sharp turns in traveling from 10th to 9th Street. By actual timing, it takes 35 seconds longer to travel the new route than it does the old one. On the south side of the airport, the city has relocated East 26th Street for a distance of a little over half a mile. This was done by building a crescent shaped loop which makes the new route approximately 600 feet longer than the old route. The old route is in such a condition that it cannot be traveled, hence the comparative time it takes to travel the two routes is not shown, but it requires a total of one minute and 15 seconds to drive the entire new route at a usual rate of speed.

Appellants filed suit to enjoin the city from abandoning the old routes in favor of the new ones. The chancellor denied the injunction and the residents of the Fourche Dam community have appealed. Appellants contend that "the City did not comply with the statutory requirement of securing approval from the Pulaski County Planning Commission; the City had no control or jurisdiction to close the roads in question; the City has failed to provide comparable roads that are equally safe and covenient; the fact that the plaintiffs' property does not abut on the portion of the road closed does not prevent the plaintiffs from suffering damages for which they are entitled to reimbursement; the court should have sustained the plaintiffs' plea of res adjudicata." Appellants also contend that the city is precluded from closing the roads by a contract made with the residents of the area. There are three points that merit discussion: first, is the city bound by a contract; second, is the cause *res judicata*; and third, have appellants suffered special and peculiar damages.

As to the question of whether the city is bound by an agreement heretofore made with the residents of the Fourche Dam area, appellants introduced evidence to the effect that, in 1934, the city undertook to close East 17th Street and the county road known as Fourche Dam Pike; that the residents of the Fourche Dam community ob-

jected, resulting in an agreement between the city officials, the county judge and the residents of that area, that the residents would not oppose the closing of East 17th Street, or seek damages for the closing of that street, if the city and county would construct a paved road on the north side of the airport; and that, in 1940, the agreement was modified whereby the city was to improve East 10th Street, and improve and maintain East 26th Street with a right of way of 160 feet. Appellants contend that this was a valid and binding contract between the Fourche Dam residents and the city, and that the city is not now at liberty to change the location of East 10th and East 26th Streets, which are the roads furnishing access to the Fourche Dam community.

Any attempt on the part of the city to enter into a contract relating to the permanent establishment or abandonment of its public streets would be *ultra vires*. In establishing, maintaining or abandoning its streets, the city acts in a governmental capacity and no city administration has the authority to bind a future administration in such matters. Cities have the authority to control, supervise and regulate all streets within their corporate limits. Ark. Stats., §§ 19-2313, 19-2304. "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. Thus, a municipal corporation cannot obligate itself to keep a particular street open forever." 38 Am. Jur. 174. It is also said in 25 Am. Jur. 553: "It is established that the governmental power to control and regulate the use of highways in the public interest cannot be surrendered, or impaired by contract. Particularly as to municipalities, control over streets is given to them for the benefit of the public. It is in the nature of a trust held by the corporation, from which arises a continuing duty on the part of such corporation to exercise legislative control over their streets at all times and places when demanded by the public good. They have no power, by contract, ordinance, or bylaw, to cede away, limit, or impair their legislative or governmental powers, or to disable themselves from performing their public duties in this regard,

at least without the explicit consent of the legislature, or to delegate the exercise of such powers and the performance of such duties to others, so as to relieve themselves of responsibility in this respect." In 37 Am. Jur. 735, 736, it is said: "It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or of the power of taxation." The law is clear that a city cannot contract away perpetually its rights, obligations and duties in connection with the public streets.

Next we reach the question of *res judicata*. Ordinance 9004 was adopted by the Little Rock City Council on September 22, 1952. Under the provisions of the ordinance, the portions of East 10th and East 26th streets involved herein were abandoned. The ordinance set out that the city council had ascertained that portions of such streets "have not been actually used by the public generally for a period of at least five years subsequent to the filing of the plat." It is perfectly obvious that the ordinance was adopted on authority of Ark. Stats., § 19-3825, which provides: "In all cases where the owner of property within a city or town shall have dedicated, or may hereafter dedicate, a portion of such property to the public use as streets or alleys by platting such property and causing such plat to be filed for record, as provided by law, and any street or alley, or section thereof, shown on the plat so filed shall not have been actually used by the public as a street or alley for a period of five years, the City or Town Council shall have power to vacate and abandon the street or alley, or any portion thereof, by proceeding in the manner hereinafter set

forth." After the adoption of Ordinance 9004, appellants in the case at bar filed a suit to enjoin the city from enforcing the ordinance by closing a portion of East 10th and East 26th streets. The complaint alleged, *inter alia,* that "The defendants are now attempting to close, block, obstruct and barricade a portion of said 10th Street and have already begun to tear up the roadway and to interfere with travel along said road." An intervention was filed alleging that "The defendants are purporting to act under the authority of Ordinance No. 9004 of the City. Said ordinance is void and a nullity. Said ordinance was not enacted in the manner required by law and contains a recitation and finding that the road or street in question has not been used for a period of at least five years subsequent to the filing of the plat. In truth and in fact, said road has been constantly and continuously used by the public, including the plaintiff and all others similarly situated, and said use has continued without abatement or interruption at the time it was opened until and through the present time. Because of the invalidity of the ordinance, the portion of East 10th Street that purports to be affected by the ordinance has not been vacated and the defendants have no right or authority to attempt to block, barricade, close and obstruct any portion of East 10th Street and the efforts of the defendants to close, barricade, block and obstruct East 10th Street are without authority of law and are of great damage to this plaintiff and to all others similarly situated." Both a demurrer and an answer filed by the city asserted the validity of Ordinance 9004 as a complete defense, and did not attempt to justify the closing of the streets on any other ground. In fact, there was no other ordinance authorizing the closing of the streets. On a final hearing, there was a decree enjoining the defendants from closing portions of the streets involved. (The pleadings must have been considered amended to apply also to East 26th Street.)

If Ordinance 9004 was void because it was based on the false premise that the streets in question had not been used for five years, then the city was without au-

thority to close the streets and the injunction was granted properly by the trial court. It appears conclusive that the streets had been regularly used within the five year period, and therefore, that Ordinance 9004 was not passed in accordance with Ark. Stats., § 19-3825, authorizing the closing of streets where they have not been used for five years. There was no appeal from the Chancellor's decree enjoining the city from closing a portion of the streets. The date of the decree was June 26, 1953.

A short time later, on August 10, 1953, the City Council, acting on authority of Ark. Stats., § 19-2304, which gives the city the power to vacate portions of public streets, adopted Ordinance 9290. It provides for the closing of the same portions of East 10th and East 26th streets as did the void Ordinance 9004. Seven days after the adoption of Ordinance 9290, the case at bar was filed attacking its validity. A copy of the ordinance is made a part of the complaint. (It will be recalled that this ordinance had not been passed by the City Council at the time of the trial involving the validity of Ordinance 9004.) The prayer of the complaint in the present case asks that Ordinance 9290 be declared null and void. An intervention filed by one of the appellants is to the same effect, and asks that the city be enjoined from closing the streets. There was no effort to enforce the order made in the first suit enjoining the city from closing the streets. The only issue in the first suit was the validity of Ordinance 9004. The city asserted no authority for closing the streets except the authority bestowed by that ordinance. True, the plaintiffs attacking the validity of the ordinance alleged damages, but such allegations were necessary to give them a standing in court. Without an allegation of damages, the complaint and intervention would have been demurrable. If the cause is *res judicata,* as appellants claim, then the filing of the present suit was wholly unnecessary. The injunction in the first suit would have been sufficient to prevent the closing of the streets.

The principle of *res judicata* is so well known that it need not be restated here. One of the necessary elements of the doctrine is that the issues must be the same. In the first case, the only real issue was the validity of Ordinance 9004. The right of the city to close a portion of the streets, had this ordinance been found valid, was never considered. The city's right to close a portion of the streets under the authority of Ordinance 9290 was not involved. This ordinance was not in effect when the first case was tried. At the time of the first suit, the city could close portions of the streets only under the authority of Ordinance 9004, and the only issue raised in those pleadings was the validity of that ordinance. Hence, the issue in the first case is not the same as the issue in the case at bar, and the cause is therefore not *res judicata.*

Next we come to the question of whether the appellants suffered special and peculiar damages. None of the plaintiffs own property abutting the portions of the streets being closed, but even if it is conceded that appellants have been damaged by the relocation of the roads, they have suffered no peculiar or special damages which could give rise to a cause of action. Travelers on 10th Street, as relocated, must turn two corners and travel a little farther, which requires less than a minute in additional time. This slight inconvenience, however, is not peculiar to appellants alone. This street is an outlet from the city to one of the most thickly populated sections of the county. Every person that travels the street suffers the same inconvenience as the appellants.

The principal contention of the appellants in regard to East 26th Street is that their property is especially suitable for industrial development and that the change in the street materially lessens the value of the property from that standpoint. They say that 26th Street, before being relocated, had a 160 foot right of way. (The paved section was formerly 18 feet wide, while the new pavement is 22 feet wide.) Appellants contend that the 160 foot right of way would be more attractive to industries than the new 40 foot right of way. The city owns all of

the property on both sides of the old right of way as well as that on both sides of the new right of way. No doubt the city is anxious to assist in the industrial development of the county and it is not unreasonable to believe that the city would cooperate to the fullest extent in providing the necessary facilities for industries. But, be that as it may, the fact remains that appellants have access to the city and that they have suffered no peculiar and special damages. Appellants own a few hundred acres of land, but the streets in question lead to an area consisting of thousands of acres of level, alluvial soil that is the same as that owned by appellants.

On the question of damages, the case of *Little Rock and Hot Springs Western Railroad Company* v. *Newman*, 73 Ark. 1, 83 S. W. 653, is in point. There the court said:

"The rule of law governing cases of this kind is that no private action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff be greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage be small, or though it be not confined to plaintiff, but be suffered by many others."

The court further said:

"If a railroad is constructed across the highway leading from the home of one who lives in the country to the town or city to which his business requires that he must often go, it is very natural that he should feel that the danger of delay or accident to which he may thus be at times subjected renders his property less desirable as a home, while as a matter of fact its market value may be actually increased by the construction of the railroad. If he suffers an injury in such a case, it is general, and not special. If one owning a home in the country could recover damages in such a case, the man who owns a home in the city and has often to visit the country might on the same principle claim damages to his home in the

city, and so there would be no end to such claims, for the injury is common to the whole public, whether in the town or country."

In *Wellbourn* v. *Davies,* 40 Ark. 83, the court said:

"The inconvenience to the complainant in visiting his patients, however often he may be called to do so, is not different from that which every citizen suffers, whose business or pleasure may call him to travel the road. It is of the same character, only perhaps different in degree, from that which others suffer, who have other business, and live further away. This will not sustain his right of action. . . . The new roads were not as convenient to complainant as the old, and gradually the enclosures of his neighbors came to annoy and embarrassed him very seriously. Doubtless they did diminish the market value of his property. Nevertheless, these were the accidents to him, of a change in the population, business and necessities of the community at large. He made several applications to the County Court to reopen the old roads, and they were all refused. Evidently the public necessity did not require them."

In *Stoutemeyer* v. *Sharp,* 89 Ark. 175, 116 S. W. 189, the court said:

"In the present case the obstruction did not abut Sharp's premises. It was north of his place, and was between the tracts of land of Stoutemeyer and Parker. Sharp says the obstruction greatly inconvenienced him in taking his stock to Spring River for water and preventing egress and ingress to that part of the country. This was an injury differing only in degree, and not in kind, from that suffered by Parker, Hutchinson and the rest of the community. Assuming the road obstructed to be a public highway, we do not think that Sharp has brought himself within the rule above announced."

Also, in *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. 2d 312, the court said:

"In this connection it may be said that there can be no change of an existing highway that does not cause some private inconvenience, and, in that sense, injury to the abutting property owners, who have adapted themselves to the existing order of things and have purchased property on a highway which they believed would never be changed. There is no question presented in the record that appellants have been entirely cut off from any public highway by the proposed change in the public road in question."

In *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S. W. 2d 1004, it is said:

"Appellant insists that the effect of the changing of highway No. 71 is to destroy the value of his property, which constitutes the taking of his property without compensation. But the case of *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. 2d 312, defines the attitude of this court on such questions. In that case the county court changed the location of a county road near the city of Hot Springs. Tuggle owned land on the old highway, and he appealed from the order of the county court making the change, and he appealed to this court from the judgment of the circuit court affirming the judgment of the county court. It was held on the appeal that the county court had the right to change the road, although the change subjected Tuggle to some inconvenience, and depreciated the value of his property. . . . Appellant has not been deprived of his means of ingress and egress, as Dudley avenue, on which his property is located, remains unaffected by the proposed change. Unaffected also is Jackson street, running into Dudley avenue at appellant's corner. Appellant's damage, as found by the court below, results from the diversion of the traffic; but this was not a recoverable element of damage."

Our conclusion is that the decree of the Chancellor is correct and is therefore affirmed.

The Chief Justice and Mr. Justice MILLWEE not participating.

Mr. Justice MCFADDIN dissents.

McArthur *v.* Smallwood.

5-764 281 S. W. 2d 428

Opinion delivered July 27, 1955.

*Williams & Gardner,* for appellant.

*Tom Gentry,* Attorney General, and *Mehaffy, Smith & Williams,* for appellee.

NED A. STEWART, Special Chief Justice. The appellant and plaintiff below, Wood McArthur (hereinafter referred to as appellant,) proceeding as a taxpayer, filed this case in the Chancery Court of Pulaski County, Arkansas against the appellees and defendants below, J. M. Smallwood, C. G. Hall, J. V. Satterfield, Jr., Harry W. Parkin and J. L. Shaver (hereinafter referred to as appellees), as members of the Arkansas Justice Building Commission, seeking to have Act 375

of 1955 declared unconstitutional and void and in violation of certain constitutional rights of the plaintiff and other taxpayers similarly situated, and seeking to enjoin the appellees from complying with, or in any manner carrying out, the provisions of the Act. The appellees waived service of summons, entered their appearance, and filed a demurrer to the complaint which was sustained by the Pulaski Chancery Court, and after appellant declined to plead further, that Court entered a decree dismissing the complaint.

The appellant duly perfected an appeal to this Court. Thereafter the regular Court disqualified itself and a Special Court (composed of the writer, J. G. Burke, Harry P. Daily, Surrey E. Gilliam, Harry L. Ponder, John Mac Smith and Edward L. Wright) was appointed to decide the case. In the public interest, this Special Court entered an order granting permission to any interested party in the State to file a brief with the Court covering any issue the party desired to raise concerning Act 375 of 1955. These briefs were to be filed by July 11, but none have been forthcoming, and the Court has proceeded to determine the appeal upon the record and briefs filed in Case No. 5-764 and upon its own investigation of the law.

Act 375 of 1955 creates the Arkansas Justice Building Commission and authorizes the Commission to construct a Justice Building on the capitol grounds in Little Rock, Arkansas, and to finance the construction by the issuance of bonds to be payable from and secured solely by a pledge of the funds in the Justice Building Fund, established by the Act. The funds therein will be derived from the rental of space in the building to the Workmen's Compensation Commission, the Public Service Commission, and such other persons or agencies as may occupy space therein; from moneys received from various county treasurers from additional costs taxed by the Act; from appropriations on a current basis; and from gifts, bequests, donations or other sources. Authorization is granted for lease agreements between the Commission and the Workmen's Compensation Com-

mission and the Public Service Commission, and provision is made for the payment of rentals thereunder from the Workmen's Compensation Commission funds and Public Service Commission funds directly to the Commission without said funds first going into the state treasury. The funds derived from the additional costs taxed by the Act are also paid directly to the Commission and do not go into the state treasury. The bonds to be issued by the Commission shall be general obligations of the Commission only and shall in no event constitute an indebtedness for which the faith and credit of the State of Arkansas, or any of its revenues, are pledged. Appellant makes several attacks upon the constitutionality of the Act which will be hereinafter considered in order.

*Delegation of Legislative Power*

It is alleged that there is a delegation of legislative power to the Commission contrary to and in violation of Article 5, Section 1, as amended by Amendment No. 7, and Article 4, Sections 1 and 2, of the Constitution of the State of Arkansas. It is well settled that legislative bodies have no right to delegate the lawmaking power to commissions and boards established by the legislature, but it is equally well settled that the legislature may delegate the power to determine facts upon which the law makes or intends to make its own action depend and that general provisions may be set forth with power given to those who are to act under such general provisions to complete the details. See, among other cases, *Fort Smith* v. *Roberts,* 177 Ark. 821, 9 S. W. 2d 75; *Fulkerson* v. *Refunding Board of Arkansas,* 201 Ark. 957, 147 S. W. 2d 980; *Currin* v. *Wallace,* 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441. We have carefully examined Act 375 and find no unconstitutional delegation of legislative power. The Act is complete in itself and when placed into operation the objects accomplished necessarily will be those provided for and intended by the Legislature. The Commission will do no more than find the necessary facts, complete the necessary details, and exercise a discretion, within clearly defined limits, as to

the execution of the Act. We have considered the various grounds urged by the appellant as constituting an unlawful delegation of the legislative power and find them to be without merit.

*Payment of Rent by the Workmen's Compensation Commission and Public Service Commission and Payment of the Proceeds of the Costs Levied Directly to the Commission.*

The Act provides that the rental payments under the lease authorized to be executed between the Workmen's Compensation Commission and the Commission shall be paid directly from Workmen's Compensation Commission funds to the Commission prior to the deposit of any of said moneys in the Workmen's Compensation Fund in the state treasury. And, the Act authorizes the sale of the present Workmen's Compensation Commission building and the deposit of the funds derived therefrom directly with the Commission to be applied to the rental payments in the manner provided in the Act. The Act contains a similar provision with reference to the rental payments by the Public Service Commission in that said payments are to be made from Public Service Commission funds prior to the payment of any of said funds into the state treasury. And, the costs collected pursuant to the provisions of the Act are also to be forwarded by the various county treasurers directly to the Commission, and none of the costs go into the state treasury. The appellant contends that these provisions of the Act are contrary to Article 5, Section 29 and Article 16, Section 12 of the Constitution of the State of Arkansas. In addition, appellant cites certain cases such as *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 395; *Jobe* v. *Caldwell,* 99 Ark. 20, 136 S. W. 966; *Dickinson, Auditor* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909; and others, for the propositions that one legislature cannot bind future legislatures concerning the expenditure of public funds by making continuing appropriations, that the life of an appropriation is two years, and that appropriations must state distinctly the maximum amount to be drawn in dollars and cents, and the pur-

pose for the authorized expenditure. These cases do not reach the issue raised since they deal with money in the state treasury and it appears to be well settled that such moneys must be disbursed by specific appropriations of not to exceed two years in duration. The real issue is whether these funds must be paid into the state treasury. If there is no such constitutional requirement, then there is no violation of the provisions relied upon by appellant and no conflict with the law of the above cited cases. This Court has held, *Gipson* v. *Ingram,* 215 Ark. 812, 223 S. W. 2d 595, that there are certain public moneys, designated in that case "cash funds," which may be controlled by the Legislature and in accordance with legislative directive need not be paid into the state treasury and need not be specifically appropriated. Appellant concedes that if the funds involved herein are "cash funds" within the *Gipson* v. *Ingram* case, supra, that decision is controlling. The Court in the *Gipson* v. *Ingram* decision, supra, defined "cash funds" as follows (pages 816 and 817 of 215 Ark.):

"So, for purposes of this topic 'cash funds' are those received by the state agencies and institutions from sources other than taxes, as that term 'taxes' is ordinarily used."

Appellant would distinguish the *Gipson* v. *Ingram* decision, supra, on the ground that the moneys involved herein are derived from "taxes" as that term is ordinarily used.

The Legislature has clearly designated the funds involved as "cash funds" and we find no express constitutional restriction upon the supreme power of the Legislature to deal with public revenues of any type prior to the time such revenues are placed in the state treasury. Therefore, since the Constitution is a restriction upon the otherwise supreme power of the Legislature rather than a grant of power to the Legislature, there would appear to be no sound constitutional reason for nullifying the express legislative action in this particu-

lar. Furthermore, these funds clearly qualify as moneys received from sources other than taxes, as that term is ordinarily used.

The Workmen's Compensation Act establishes a special fund in the state treasury known as the Workmen's Compensation fund and into that fund the various premium taxes and fees provided for by the Act are deposited. Original qualification fees are charged insurance carriers at the time of securing the first license to transact business and self-insurers at the time of qualifying as such, which fees are paid directly to the Workmen's Compensation Commission. A premium tax in an amount calculated on the basis of the administration cost of the Act, but not to exceed 3% on all premiums received, is levied against each participating insurance carrier, and these fees are collected by the Insurance Commissioner. The Commission collects directly a comparable tax on self-insurers. Thus, it is seen that the Workmen's Compensation Commission funds are collected from insurance carriers, who, by choice, participate in the writing of compensation, and from self-insurers, on the basis of financing the administration of the Act, and are segregated as a trust fund in the state treasury. These funds are collected and must be used for Workmen's Compensation purposes and are not available for the general or other purposes of the State of Arkansas. The leasing of adequate facilities peculiarly designed for the functions of the Workmen's Compensation Commission is obviously a proper part of the administration of the Compensation Act and a proper use of the funds collected therefor.

The cost of the operation of the Public Service Commission is financed by fees levied and charged against rail carriers, other carriers and utilities, and the amount of the fees collected is governed by the cost of the operation of the Public Service Commission. On receipt of the fees and charges provided for, the Secretary of the Public Service Commission pays the same into the state treasury and the amount so received by the treasurer is credited by him to the Public Service Commission

fund therein. The deposits so made replace money appropriated out of the treasury for the operation of the Public Service Commission, and whether or not there is in the strict sense of the word a trust fund, the result is the same because the Public Service Commission funds are neither collected for nor used by the State for the general purposes or any other purpose thereof. The leasing of adequate facilities for the functioning of the Public Service Commission is clearly a proper element of its operation and a proper use of the funds collected therefor.

The funds that will be realized from the additional costs levied by the Act fall in the same category. They will be paid by those securing the services of our courts and, as in the case of other costs, are designed to help finance the services received. It seems too apparent for comment to observe that the proper housing of the Supreme Court, the Clerk, the Library and the Attorney General is essential to the administration of justice. Also, these funds are not and will not be available for the general or other purposes of the State.

The funds involved, being special funds restricted in their use, are clearly moneys received from sources other than taxes, as that term is ordinarily used. Therefore, in our opinion, the *Gipson* v. *Ingram* decision, supra, is controlling and the legislative treatment of the funds involved is neither contrary to nor in violation of the Constitution of the State of Arkansas. This conclusion is entirely consistent with that reached by courts of other jurisdictions. See *Ziegler, State Highway Commissioner* v. *Witherspoon, City Controller,* 331 Mich. 337, 49 N. W. 2d 318; *State ex rel. Fatzer, Atty. Gen.* v. *Kansas Armory Board, et al.,* 174 Kan. 369, 256 P. 2d 143; *State* v. *Florida State Improvement Commission,* 158 Fla. 743, 30 So. 2d 97. In the last cited case, there was pledged to the payment of revenue certificates issued to finance the construction of an office building, among other things, funds collected by statute for the administration of the Workmen's Compensation Division of the Florida Industrial Commission. It was argued that this

pledge amounted to the pledging of a state tax for the payment of rentals. Concerning such use of the Workmen's Compensation fund, the court states (page 99 of 30 So. 2d):

"Here we have a clear declaration that these funds are not the property of the state but that they shall be administered by the Commission, the State Treasurer being the mere custodian of them for that purpose. They are trust funds held in like category as funds held and administered by the Board of Commissioners of Everglades Drainage District in the drainage of the Everglades. *Lainhart* v. *Catts,* 73 Fla. 735, 75 So. 47. These funds never reach the state treasury as state funds; are never available for the general purposes of the state, but are solely for the use of the Florida Industrial Commission. They are similar to funds allocated to the Florida Improvement Commission that were discussed in *State ex rel. Watson* v. *Caldwell,* supra. Under such a state of facts we can conceive of no theory by which these funds could be called state funds, and thereby immunized by Section 6, Article IX of the Constitution, from use in servicing the revenue certificates."

*The Financing of the Building, Including the Execution of Leases and the Issuance of Bonds.*

As previously pointed out, the Act authorizes the Commission to issue bonds to be payable from and secured solely by a pledge of the funds in the Justice Building Fund, and the Act expressly provides that the bonds shall be general obligations only of the Commission and in no event shall they constitute an indebtedness for which the faith and credit of the State, or any of its revenues, are pledged. Appellant challenges the provisions of the Act pertaining to the financing of the Justice Building as being in violation of Article 16, Section 1 as amended by Amendment No. 13, and Amendment No. 20. Article 16, Section 1 of the Constitution prohibits the state from lending its credit and from issuing any interest bearing treasury warrants or scrip. By the express language of Act 375, the credit of the State of Arkansas is not involved and this Court has held that

Article 16, Section 1 did not even prohibit the State from issuing bonds. In *Brown* v. *The Arkansas Centennial Commission,* 194 Ark. 479, 107 S. W. 2d 537, this Court stated (page 482 of 194 Ark.):

"It is plainly manifest from this language that the bonds to be issued are not obligations of the State, but 'shall be solely and exclusively the obligations of the Commission in its corporate and representative capacity.' This language is too plain to be misunderstood and is not open to construction. So the State is not lending its credit and it is not issuing any interest-bearing treasury warrants or scrip, and the provisions of said section of the Constitution are not invaded. *State Military Note Board* v. *Casey,* 185 Ark. 271, 47 S. W. 2d 23. Even where the State issued its own bonds to borrow money for its own uses and purposes we held there was no violation of this provision of the Constitution. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. 2d 44; *Tapley* v. *Futrell,* 187 Ark. 844, 62 S. W. 2d 32; *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. 2d 182."

The pertinent provisions of Amendment No. 20 are that "the State of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the State or any of its revenues for any purpose whatever, except by and with the consent of the majority of the qualified electors of the State." The Arkansas Justice Building Commission, although a public agency, is created as an entity with specified authority and powers and for purposes of Amendment No. 20, the Commission, in our opinion, is not the State of Arkansas. In similar situations this Court has authorized public agencies to issue bonds pledging for their payment revenues available to the particular agency and has rejected challenges of unconstitutionality under Amendment No. 20.

In *Davis* v. *Phipps,* 191 Ark. 298, 85 S. W. 2d 1020, 100 A. L. R. 1110, bonds were to be issued by the State Board of Education under Act No. 333 of 1935, which authorized the issuance of bonds to be secured by school district bonds which had been delivered to the State

Board of Education as security for loans from the revolving fund. The court stated, page 303:

"But, aside from further speculation, we may say that Amendment No. 20 prohibits bonds or instruments issued by the State itself for the security of which is pledged the State's faith and credit. A bond is a written promise to pay money, and we have said, in the foregoing discussion, that the State is not issuing these bonds, and it would not be bound for their payment. Therefore these bonds, which the State Board of Education is about to issue, are not within the prohibited class."

And on page 304:

"Finally, it may be suggested that the pledges contemplated by the State Board of Education are not within the forbidden class for another reason; that is, under Amendment No. 20 it would seem that pledges of revenue are forbidden only when such pledges are to secure State bonds. This seems to be in accordance with the language of Amendment No. 20."

In *Jacobs* v. *Sharp,* 211 Ark. 865, 202 S. W. 2d 964, there was involved Act No. 62 of 1947, which authorized the issuance of bonds by state institutions to finance buildings, the bonds to be obligations of the Board of Trustees of the particular institution only and not obligations of the State. The bonds were to be payable from revenues of the institutions, such as dormitory rental charges. The court upheld the validity of the Act and on page 870 of 211 Ark. stated:

"Therefore, it appears to us to be certain that the bonds to be issued by the Board of Trustees are not State bonds and that the faith and credit of the State are not pledged. Not being the obligations of the State of Arkansas, Amendment No. 20 has no application to them and is not violated because the prohibition therein relates only to State bonds."

The moneys pledged to the payment of the bonds in the *Jacobs* v. *Sharp* decision, supra, were admittedly

public revenues. Therefore, it seems to be well established by the decisions of this Court that the pledging of so-called state or public revenues is not prohibited by Amendment No. 20 unless the pledge is to the payment of State of Arkansas bonds. Thus, the real inquiry is whether the bonds that will be issued by the Commission, for purposes of Amendment No. 20, must be classified as State of Arkansas bonds regardless of the express provision in the Act that they are not. And, in making this inquiry, the Court must look to the substance of the transaction. *Carpenter* v. *McLeod, Comptroller,* 202 Ark. 359, 150 S. W. 2d 607; *State ex rel. Attorney General* v. *State Board of Education,* 195 Ark. 222, 112 S. W. 2d 18.

To properly determine the matter, it is necessary to analyze the funds that will be pledged to the obligations of the Commission. The Justice Building Fund is established as a trust fund by Section 15 of the Act. Subsection (a) of Section 15 covers the moneys that will be received from the various county treasurers from the additional costs taxed by Section 14 of the Act. Section 14 expressly provides that the costs will be collected only in the event the Legislature does not make an annual appropriation of at least $28,000 to the Justice Building Fund for the payment of rent for space occupied by the Supreme Court, the Clerk of the Supreme Court, the Supreme Court Library, and the Attorney General. There is no obligation on the Legislature to make this appropriation and there is no attempt to bind future legislatures in this particular. The appropriations, being current in nature, present no constitutional problem because they will simply amount to a bestowing by the Legislature of its bounty, and in this regard it is supreme. *Cone* v. *Hope-Fulton-Emmett Road Improvement District,* 169 Ark. 1032, 277 S. W. 544; *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. 2d 41; *Page, State Treasurer* v. *Rodgers, Trustee,* 199 Ark. 307, 134 S. W. 2d 573; *Clayton, State Treasurer* v. *City of Little Rock,* 211 Ark. 893, 204 S. W. 2d 145. Furthermore, there is no constitutional objection to the making by one legislature of a continuing levy. *Moore* v. *Alexander,* 85 Ark. 171, 107

S. W. 2d 395. The only other consideration necessary in the determination of whether there are sufficient obligations on the part of the State of Arkansas with reference to the additional costs levied to constitute this a State of Arkansas bond is whether the levy is irrevocable. There is no such express provision in the Act, but it does appear to be established under the decisions of this Court that the law in effect at the time of the making of a contract becomes a part of it, as if expressly referred to and incorporated in its terms. See *Adams* v. *Spillyards,* 187 Ark. 641, 61 S. W. 2d 686, 86 A. L. R. 1493; *Hospelhorn, Receiver* v. *Burke,* 196 Ark. 1028, 120 S. W. 2d 705; *City of Little Rock* v. *Community Chest of Greater Little Rock,* 204 Ark. 562, 163 S. W. 2d 522, 142 A. L. R. 1072; *Liebe* v. *Sovereign Camp Woodmen of the World,* 205 Ark. 540, 170 S. W. 2d 370; *Gulf Insurance Company* v. *Holland Construction Co.,* 218 Ark. 405, 236 S. W. 2d 1003. And, see the Michigan case of *Ziegler* v. *Witherspoon,* supra, wherein the court stated on page 327 of 49 N. W. 2d:

"It is not disputed that when the bonds are issued a contract will be made between the bondholders and the issuing authorities, and that the contract will include the provisions of all relevant existing laws. 'It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms.' *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 71 U. S. 535, 18 L. Ed. 403. See *Hammond* v. *Place,* 116 Mich. 628, 74 N. W. 1002; *City of Pontiac* v. *Simonton,* 271 Mich. 647; 261 N. W. 103. Thus the contract will include those acts which authorize the collection of taxes for the State highway fund."

Therefore, when bonds are issued by the Commission, the bondholders may well acquire contractual rights with reference to this and other provisions of Act 375 so that an attempt by a subsequent Legislature to abrogate or alter such provisions in such a manner as to impair the security of the bondholders would constitute

an impairment of their contractual rights. Even so, in our opinion, there would be no violation of Amendment No. 20. The levy of additional costs creates a special fund in every sense of the word and the funds never reach the state treasury. An irrevocable levy of this nature places no obligation upon any funds of the State which have heretofore been or which would otherwise be available for the general or other purposes of the State. The bondholders can look only to those sources of revenue made available by the Act, and if they are insufficient, no claim of any nature can be asserted against the State. We have carefully considered the *Carpenter* v. *McLeod, Comptroller,* supra, and *State ex rel. Atty. General* v. *State Board of Education,* supra, decisions, and have concluded that they are distinguishable. Those decisions were dealing with funds in the state treasury and one legislature was attempting to bind another as to the disposition of state treasury funds. This is not true in the instant case and we have heretofore pointed out the supreme power of the Legislature to deal with these funds without the necessity of future legislative action. Furthermore, our conclusion is consistent with what we believe to be the correct interpretation of Amendment No. 20, as set out in the *Davis* v. *Phipps,* supra, and *Jacobs* v. *Sharp,* supra, decisions — that is, the irrevocable pledging of state funds is condemned only when they are pledged to full faith and credit obligations of the State. There was necessarily an irrevocable pledging of public revenues in the *Jacobs* v. *Sharp* decision, supra, but, as is the case here, the pledge was not of state treasury funds, and, therefore, the bonds were not in fact State of Arkansas obligations. Our research reflects that this is the view taken by a substantial majority of courts of other jurisdictions.

The case of *State of New Mexico ex rel. Capitol Addition Building Commission* v. *James J. Connelly, State Treasurer,* 39 N. M. 312, 46 P. 2d 1097, 100 A. L. R. 878, is peculiarly in point from the standpoint of the additional costs levied by Section 14 of the Act. That case involved an Act of the New Mexico Legislature creating the Capitol Addition Commission and authorizing

the issuance of debentures secured by an irrevocable pledge of the proceeds of a $2.50 levy upon each and every civil action filed in the offices of the clerks of the various district courts. Concerning the point immediately involved, the court stated:

"And so we conclude that the debentures in question, neither requiring nor warranting a resort to the general taxing power of the State for their retirement, but payable instead from proceeds of an imposition in the nature of an excise laid upon all civil actions, filed with the various district clerks of the state, in addition to the regular docket fee, to be converged into a special fund in the hands of the state treasurer, will not constitute a general obligation on the part of the State. Hence, they are not within the interdiction of article 9, Sec. 8. of the State Constitution."

See the following New Mexico cases handed down subsequently in which that court adheres to the special fund doctrine: *State Office Building Commission* v. *Trujillo,* 46 N. M. 29, 120 P. 2d 434; *Stone* v. *City of Hobbs, et al.,* 54 N. M. 237, 220 P. 2d 704.

In *Ziegler* v. *Witherspoon,* supra, there was a pledge of the income received from motor vehicle taxes — a special tax not available for the general purposes of the state. On page 326 of 49 N. W. 2d, the court stated:

"For these reasons we find that the constitutional debt limitation will not apply to bonds issued under Act No. 22, supra.

"This conclusion has been reached by a large majority of other courts which faced the same problem. In *Gruen* v. *State Tax Commission,* 35 Wash. 2d 1, 211 P. 2d 651, 679, the court said:

"The cases which we have considered state what must be held to be the unanimous view of the courts of this country upon the question of whether or not bonds payable out of a special fund, supplied by an excise tax, constitute a debt within the meaning of constitutional limitations fixing a general debt limitation. Based upon those cases and the cited cases decided by this court,

which indicate an approval of the special fund doctrine and, further, that excise taxes are not controlled by constitutional provisions, we hold that the issuance and sale of bonds provided for in this act do not in any way constitute a debt against the state of Washington. The bonds provided for are to be paid from a special fund and solely from anticipated revenues to be derived from the sale of cigarettes. They are not, and cannot be, a general obligation of the state. In the event the anticipated profits do not materialize and the fund becomes exhausted, the purchaser of the bonds has no legal redress against the state. He must look solely to the fund upon which they are drawn.

" 'Whether there would be a moral obligation to redeem the bonds is a matter which does not concern this court. It is sufficient to say there is no legal obligation to do so in the event the special fund is exhausted. In that event, there will be no additional tax burden by reason thereof; for, as just stated, there is no general obligation on the part of the state to redeem the bonds.' " See also the following cases: *Nichols* v. *Williams, et al.,* 338 Mich. 617, 62 N. W. 2d 103; *State* v. *Florida State Improvement Commission,* supra, *State* v. *Florida State Improvement Commission,* 160 Fla. 230, 34 So. 2d 443; *State ex rel. Fatzer, Atty. Gen.* v. *Armory Board, et al.,* supra; *Guthrie, et al.* v. *Curlin, Com'r of Highways, et al.,* Ky., 263 S. W. 2d 240.

Turning to the other moneys that will be placed in the Justice Building Fund, Sub-section (b) of Section 15 of the Act covers rental payments under the lease agreement to be executed by the Workmen's Compensation Commission and the Justice Building Commission, and the sums to be received from the sale of the Workmen's Compensation Commission building. Section 11 of the Act expressly authorizes the Workmen's Compensation Commission and the Justice Building Commission to enter into a lease for such term, containing such provisions, and for such amount as the said parties shall determine. It is contemplated that a lease will be executed and that the term thereof will extend over the life of

the bonds to be issued by the Commission. There is express legislative authorization for the contemplated long term leasing and we see no constitutional objection to the action taken by the Legislature in this regard. Long term contracts are necessarily involved in every bond issue of state agencies heretofore approved by this Court, and this Court has approved similar long term contracts dealing with other subject matter. A ten year contract under which the Board of Penitentiary Commissioners obligated itself to furnish convict labor, was upheld in *McConnell* v. *Ark. Brick & Mfg. Co.*, 70 Ark. 568, 69 S. W. 559. In *Chidester School District No. 50* v. *Faulkner*, 218 Ark. 239, 235 S. W. 2d 870, it was held that the board of directors of a school district might enter into a contract covering the employment of a teacher or other officer for a term extending beyond that of the board itself, and that such contract was binding upon succeeding boards. See annotations 70 A. L. R. 794 and 149 A. L. R. 336.

The Court stated on page 242 of 218 Ark.:

"In *Gardner* v. *No. Little Rock Special School District,* 161 Ark. 466, 257 S. W. 73, this court approved the general rule announced in 24 R. C. L., page 579, as follows: 'In the absence of an express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith and without fraudulent collusion, binds the succeeding board. It has even been held that, under proper circumstances, a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not, of itself, render the contract void. But a hiring for an unusual time is strong evidence of fraud and collusion, which, if present, would invalidate the contract.'

See, also, *School District No. 45, Pope County* v. *McClain,* 185 Ark. 658, 48 S. W. 2d 841.

Similar leasing arrangements have been repeatedly approved by the highest courts of other jurisdictions. In *Preston, et al.* v. *Clements, Governor, et al.,* 313 Ky. 479, 232 S. W. 2d 85, it was held that the Kentucky State Property and Building Commission could legally enter into contracts with other state agencies to rent the Capitol Annex Building when ready for occupancy. The building was to be financed by revenue bonds. In *State* v. *Florida State Improvement Commission,* 159 Fla. 338, 31 So. 2d 548, revenue certificates were to be issued to provide funds for the construction of toll roads to be payable from the income derived from fees and tolls. Before construction, it was agreed to lease the same to the State Road Department in lieu of the actual collection of tolls and the plan was upheld as being valid. In *Loomis* v. *Keehn, et al.,* 400 Ill. 337, 80 N. E. 2d 368, an act authorizing the construction of armories and the renting of the same to the state was upheld. In *State* v. *Florida State Improvement Commission,* supra, in approving a somewhat similar lease arrangement, the court states (pages 99 and 100 of 30 So. 2d):

"* * * State agencies generally have authority to contract with each other in so far as necessary to administer duties within the scope of their authority.

"* * * It is also our view that the funds collected by the Florida Industrial Commission pursuant to Chapter 440.51 (b) Florida Statutes of 1941, F. S. A., are trust funds for the exclusive use of paying its administrative expenses, that it is a voluntary assessment paid by those who take advantage of the act, that it is not a state fund and that the Florida Industrial Commission was authorized to pledge said funds in payment of the lease contract with the Florida State Improvement Commission."

See also *State ex rel. Thompson, Atty. Gen.* v. *Giessel, Director of Budget and Accounts,* 267 Wis. 331, 65 N. W.

2d 529; *Dean* v. *Kuchel,* 35 Cal. 2d 444, 218 P. 2d 521; *State ex rel. Fatzer, Atty. Gen.* v. *Armory Board,* supra.

From the above, we conclude that the contemplated long term leasing arrangement between the Workmen's Compensation Commission and the Justice Building Commission is valid. Furthermore, the Workmen's Compensation funds are designated trust funds collected and used for a specific purpose and in no sense are they funds which have been or could otherwise be available for the general or other purposes of the State, and, of course, that portion thereof to be used for rental payments under the lease never reaches the state treasury. Therefore, for the reasons heretofore set forth with reference to the additional costs levied by the Act, we find no violation of Amendment No. 20 even though the authorization set forth in Act 375 is irrevocable in the sense that it cannot be abrogated by a subsequent Legislature in such a manner as to impair the obligation of the bondholders' contract.

As to the contemplated sale of the present Workmen's Compensation building and the placing of the proceeds thereof into the Justice Building Fund to be applied to the rent of the Compensation Commission, we find no diversion of funds because they will still be utilized for Workmen's Compensation purposes, and, as previously pointed out, the Legislature can bestow its bounty where it wishes. Also, all objections to the disposition of state property appearing in the decision of this Court in *Harris* v. *Emmerling,* 224 Ark. 40, 271 S. W. 2d 618, decided October 11, 1954, appear to be fully complied with.

The situation existing with reference to the lease agreement to be executed by the Public Service Commission and the Justice Building Commission is the same as in the case of the Workmen's Compensation Commission, and what has been heretofore said in this opinion with reference to the validity of the Compensation Commission lease is applicable and controlling as to the Public Service Commission lease. There is, in our opinion, no violation of Amendment No. 20 in either instance.

Any other funds that will be supplied by the State, covered by Sub-section (d) of Section 15, will be on a current basis and pursuant to no obligation on the part of the State to supply any such funds.

The only obligations of the State of Arkansas with reference to these bonds are entirely negative in form, being those in connection with the constitutional impairment of contract provisions, and since these obligations are with reference to clearly designated special funds, which never find their way into the state treasury, and which have not been and cannot be available for the general or other purposes of the State, and since there can be no obligation on the part of the State with reference to these bonds if the funds specified in the Act prove insufficient, it is our considered opinion that the bonds are not state bonds within the contemplation of Amendment No. 20. The cases relied upon by appellant are easily distinguishable. In *Opinion of the Justices,* 146 Me. 183, 79 A. 2d 753, the act made the execution of a lease to the State of Maine mandatory and in *McCutcheon* v. *State Building Authority, et al.,* 13 N. J. 46, 97 A. 2d 663, the leasing was restricted to state agencies. Furthermore, it appears that the obligations under the leases involved therein would have to be discharged from funds raised by general taxation which would otherwise be available for general or other state purposes. The obligations under the leases were not specifically restricted to designated special funds which would in no event be available for general or other state purposes, as is the case under Act 375. And, leasing is not restricted to state agencies by Act 375. As appears from the admitted facts in this case and from the authorization of the Act itself, the Justice Building Commission will covenant to charge and collect rent from the occupants of the building, whoever they may be, which, together with such other revenue of the Commission as may be available therefor, will always be sufficient in amount to insure the prompt payment of the principal of and interest on the bonds when due and to maintain an adequate reserve for contingencies, and it is entirely

possible that it may become necessary for the Commission to lease space to others.

*The Additional Costs Levied by Section 14 of the Act*

The appellant contends that this section of the Act violates Article 2, Section 13 of the Constitution, which provides in part that every person "ought to obtain justice freely and without purchase, completely, and without denial, promptly and without delay, conformably to the laws." This Court has held that it is within the power of the Legislature to make reasonable provisions for the payment of costs of litigation so as to help defray the expenses of the courts. *Marshall* v. *Holland,* 168 Ark. 449, 270 S. W. 609. The proper housing of the Supreme Court, the Clerk, the Library and the Attorney General is an obvious and necessary expense of the administration of justice and of our courts. These costs are levied at the circuit, chancery and probate court levels and appeals from those courts are directly to the Supreme Court. The mere fact that there are no appeals to the Supreme Court in a substantial number of cases filed in the circuit, chancery and probate courts, of which fact we take judicial knowledge, is immaterial. The right of appeal is a valuable asset to any litigant and is available to all litigants. The mere fact that these rights may not be utilized in every case does not detract from their importance and there is no constitutional objection to levying costs to contribute to the expense of the maintenance of those rights.

*Exemption from Taxation*

Section 16 (f) of the Act exempts the bonds to be issued by the Commission from all taxes, state, county and municipal, including income taxation and inheritance taxation. Appellant challenges this provision as being unconstitutional under Article 16, Sections 5 and 6 of the Constitution of the State of Arkansas. We agree with the contention of the appellant insofar as property taxation is concerned. This Court has held that these provisions of the Constitution prohibit any legislative attempt to exempt bonds from property taxation at least where the bonds are held by any person or agency whose

property is not otherwise exempt from taxation. *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *Ward* v. *Bailey, Governor,* 198 Ark. 27, 127 S. W. 2d 272. However, the exemption from state income taxation is valid. *Ward* v. *Bailey, Governor,* supra; *Fulkerson* v. *Refunding Board of Arkansas,* supra; *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720; 4 Ark. L. Rev. 433, Property Tax Exemption in Arkansas. And, inasmuch as an inheritance or estate tax is not a property tax, that exemption is valid. *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112; *Gates* v. *Bank of Commerce & Trust Co.,* 185 Ark. 502, 47 S. W. 2d 806; *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. 2d 97.

The invalidity of the provisions of Section 16 (f) of the Act insofar as they purport to exempt the bonds from property taxation does not affect the validity of other provisions of the Act which we have herein sustained. Section 22 of Act 375, the separability provision; *Jernigan* v. *Harris,* supra.

## CONCLUSION

The action of the lower court in sustaining the demurrer, and upon the plaintiff's declining to plead further, in dismissing the complaint is affirmed.

LESTER *v.* PILKINTON AND HOWARD, JUDGES.

5-821 282 S. W. 2d 590

Temporary opinion delivered August 31, 1955.

[Confirmed by Court on October 3, 1955.]

*John H. Wright,* for petitioner.

*Lookadoo, Gooch & Lookadoo,* for respondent.

George Rose Smith, J. This application for a temporary writ of prohibition has been presented to me during the court's summer recess. The petitioner, Mae Thomas Lester, asks that the respondents, who are the judges of the Clark Probate Court, be prohibited from making any further orders in a guardianship proceeding in which this petitioner is the assertedly incompetent person. It is the petitioner's contention that this guardianship is void (a) for want of notice to her when the proceedings were originally instituted and (b) for want of a judicial finding that she is in fact incompetent.

On November 23, 1951, when this petitioner was thirty-nine years old, the proceedings in the probate court were instituted by her daughter. On that date the court entered an order finding Mrs. Lester to be incompetent and directing that she be transferred to the State Hospital for treatment. It does not seem ever to have been contended that Mrs. Lester is insane; instead, her asserted incompetency results from alcoholism, which by statute is a basis for a finding of incompetency. Ark. Stats. 1947, § 57-601. On November 27, 1951, the court appointed Arvin A. Ross as Mrs. Lester's temporary guardian, and Ross took charge of his ward's real estate and other property.

About two weeks later the State Hospital discharged Mrs. Lester, the staff finding that she was without psychosis but that she had a schizoid personality associated with chronic alcoholism.

On February 29, 1952, the court found that the temporary guardianship should be made permanent, the

order reciting that the court had appointed three named physicians to examine Mrs. Lester and that the court was acting after having heard the testimony of these doctors. By the same order Ross was discharged as temporary guardian and C. H. Berryman was named as permanent guardian. An order of April 3, 1952, approved the temporary guardian's final accounting and directed that the estate be turned over to the permanent guardian. On June 17, 1955, the court granted Berryman's request that he be discharged and designated George S. Dews as guardian in succession. It appears from the petition and from statements of counsel in oral argument that throughout the guardianship proceeding Mrs. Lester, except for her brief confinement in the State Hospital, has been living at home with her husband. She is free to come and go as she likes. Her various guardians, however, have continuously had charge of her property, collecting rents, making sales, paying bills for her, etc. Mrs. Lester insists that she is completely competent, that she no longer indulges in the use of alcohol, and that the allegedly void guardianship proceeding should be terminated by order of this court.

In my opinion the record fails to sustain the contention that the proceedings below are void. It is true that the initial order of November 23, 1951, failed to recite that a summons or other notice had been served on Mrs. Lester; but that fact, if it was ever of importance, has long since become immaterial. In so far as the temporary guardianship is concerned, the statute permits the appointment to be made without notice. Ark. Stats., § 57-620. With respect to the permanent guardianship proceeding Mrs. Lester has undoubtedly entered her appearance. Two of the orders mentioned above—those of February 29, 1952, and June 17, 1955—recite that Mrs. Lester was present with her attorney. The petition now before me alleges: "Petitioner has numerous times orally and by letter and twice by formal petition asked the Clark Probate Court to remove and revoke said above described guardianship orders and the order finding her incompetent, such petitions having been pre-

sented to Judge Pilkinton September 11, 1952, and to Judge Howard September 1, 1954." By participating in the case, in person and by her attorneys, the petitioner has undoubtedly entered her appearance if she is in fact competent. *Mercer* v. *Motor Wheel Corp.*, 178 Ark. 383, 10 S. W. 2d 852. And of course if she is incompetent then the entire theory of her present petition for prohibition fails.

Nor can it be said that there is merit in the assertion that the probate court has not made a finding of incompetency. That determination was expressly made in the order of November 23, 1951, and at least by inference was reaffirmed in the order of February 29, 1952, when the court considered the testimony of three physicians who had been appointed to examine the ward. It is insisted that the issue of competency should have been explored *de novo* when Dews was appointed as guardian in succession in 1955, for the reason that the statute provides that a successor shall be appointed "in the same manner and subject to the same requirements as are . . . provided for an original appointment of a guardian." Ark. Stats., § 57-622. In my view this language is merely intended to carry forward the original requirements with reference to the guardian's qualifications, bond, and the like. Since the existence of incompetency, as originally determined, is presumed to continue until a change has been established by proof, there would be no sound reason for requiring the court on its own initiative to reëxamine the issue whenever it happened to be necessary to appoint a guardian in succession.

If this petitioner wishes to assert her restored competency as a reason for terminating the guardianship, her petition should be addressed to the trial court. Ark. Stats., § 57-643. No basis for the issuance of a writ of prohibition has been shown.

Temporary writ denied.

4816 282 S. W. 2d 592

Opinion delivered October 10, 1955.

*W. S. Atkins,* for appellant.

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

LEE SEAMSTER, Chief Justice. On information, appellant was charged with the crime of arson. It was alleged that appellant did unlawfully, maliciously and feloniously set fire to and cause to be burned a nursing home, the property of Mrs. Jewell Massengill, located at 803 East Division Street in the City of Hope, Arkansas. Upon trial in the Hempstead Circuit Court appellant was convicted of the crime of arson and punishment was fixed at two years in the State Penitentiary. From the judgment on this verdict comes this appeal.

The appellant lists three points for reversal of the trial court's verdict, they are: (1) insufficiency of the

evidence; (2) the statement of the court to the jury with respect to suspended sentence; and, (3) the court grossly abused its discretion in not suspending sentence in keeping with its statement to the jury.

Initially, the appellant contends there is insufficient corroborative evidence to sustain his conviction of the crime of arson. He alleges that the testimony of record, when given its strongest force for the State, is only sufficient to raise a suspicion of guilt. It is further alleged that the testimony is as consistent with appellant's innocence as with his guilt and, therefore, is not sufficient corroboration of the accomplices.

In this case, the State relied heavily upon the testimony of the accomplices. They were, Mrs. Jewell Massengill, the owner of the nursing home that was destroyed by fire, her son Bob and Sam Sampson, an employee of Mrs. Massengill's.

Mrs. Jewell Massengill testified as follows: that she and appellant discussed the burning of her nursing home sometime in September of 1954, when he came to her home in response to her request, and that appellant said he and his company were in that business; that appellant told her that he would do the job for a price of $3,500—$750 of this amount to be paid in advance as a down payment; that she saw appellant several times after the first meeting and upon inquiry she was told by appellant that she could take some of the furniture out of the house before the burning; that she later took some of the furniture out of the nursing home and stored it at Prescott, Arkansas; that she went to Texarkana, Arkansas, with the appellant to look at some buildings that had been burned, to prove to her that it could be done; that she and appellant made a trip to Texarkana about two or three weeks before the fire, they looked at a tourist court; that she issued a $750 check, payable to cash, cashed it at First National Bank of Hope and gave the money to the appellant. She also testified that she had in force $25,000 worth of fire insurance on the nursing home and contents, which she had obtained from Leonard

Ellis, and she purchased an additional $15,000 fire insurance policy from the appellant on the home and contents shortly before the fire.

Bob Massengill testified to the following: that he was the son of Mrs. Jewell Massengill and that he knew about the storage of his mother's furniture in Mrs. Dudney's place in Prescott, Arkansas; that he and his brother-in-law moved said furniture to Weatherford, Texas; that Sam Sampson helped them move the furniture and that the furniture was moved at night; that he knew about the fire and the reason for hiding the furniture.

Sam Sampson, an employee of Mrs. Massengill's, testified to the following: that he took the furniture to Mrs. Dudney's place in Prescott, Arkansas; that he had made a confession to police officers to the effect that he knew about the fire and that he was under indictment and was awaiting trial; that he recognized the appellant and that he had seen the appellant several times in the past when he was visiting Mrs. Massengill at her home.

Mrs. Callie Dudney, a witness, testified to the following: that Mrs. Massengill stored some of her household goods in her house shortly before the fire and that appellant visited her home about three times after the fire; that at one time when shown the household goods of Mrs. Massengill's, he stated, "I told her she could move some of it, but I didn't tell her she could move all of it"; that appellant said that he thought she had better sense than to move that much; that after the fire the appellant returned to have her sign a statement that his lawyer had prepared, when she refused he returned again at a later date to try to secure from her a written statement, in her own words, to the effect that the appellant had nothing to do with the fire. She also testified that appellant in the past had tried to sell her a fire insurance policy and a box of matches; that she went to Texarkana with the appellant and Mrs. Massengill to look at a tourist court which Mrs. Massengill wanted her to operate

if she bought it, but she told her that she couldn't because of her own business.

Mr. Herman Morris, a witness, testified to the following: that he owned and operated the Morris Motel, a tourist court on East 9th Street in Texarkana; that the appellant and two women were in his place of business in October, 1954, and the appellant held himself out as a prospective buyer for the Motel; that he recognized Mrs. Massengill as one of the women and that she was going to help appellant buy the Motel or was interested in forming a partnership with appellant for the purchase of the Motel; that he told them that he wanted $75,000 for the Motel—$35,000 of this sum as a down payment.

Mrs. Herman Morris testified that appellant was at the Motel about September 22, 1954, and said that he liked the place and was going to try to make a deal for the purchase of it. She also stated that she saw appellant and the two women in the Motel in October, 1954, when they talked to her husband.

Lyle McMahan, a neighbor of the appellant, testified that before the fire the appellant tried to sell him an insurance policy on some of his trucks and that he replied that he already had them insured for more than they were worth; that when appellant told him that he could get a man to burn the trucks, he replied that he was not interested. He further testified that appellant saw him some two or three days later and asked him if he had changed his mind, he stated that he had not changed his mind.

Mr. Leonard Ellis, a witness, testified that the fair market value of the nursing home before the fire was $18,000 and the contents were worth about $10,000.

The appellant admitted selling the additional insurance to Mrs. Massengill on the nursing home before the fire and also admitted that he did not inform the insurance adjustor about the household goods that were stored in Prescott.

We think there is sufficient corroboration of the accomplices' testimony to sustain the conviction. The rule is laid down in *Casteel* v. *State,* 205 Ark. 82, 167 S. W. 2d 634, as follows: "This Court in the recent case of *Fleeman and Williams* v. *State,* 204 Ark. 772, 165 S. W. 2d 62, with reference to this section of the Statute, reiterates the long established rule in this language: 'The rule in this State is that the corroborating evidence need only tend to connect the defendant with the commission of the offense, and not that such evidence of itself be sufficient, and where there is substantial corroborating evidence tending to connect the defendant with the offense, its sufficiency is a question for the jury, together with that of the accomplice. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullen* v. *State,* 193 Ark. 648, 102 S. W. 2d 82; *Smith* v. *State,* 199 Ark. 900, 136 S. W. 2d 673; *McDougal* v. *State,* 202 Ark. 936, 154 S. W. 2d 810.' See also, *Powell* v. *State,* 177 Ark. 938, 9 S. W. 2d 583."

The appellant's objection to the Court's instructions to the jury with reference to suspended sentence is based upon the following statements:

"BY THE COURT: You want to know if you have authority to recommend a suspended sentence; I will answer that, members of the jury, this way: You certainly have the authority. I would, however, caution you that no juror should interpret that to mean that you are being encouraged to compromise on the question of guilt or innocence. The question of a man's guilt or innocence is based solely and exclusively upon the law given you by the Court and the evidence gleaned from the witness stand. Does that answer your question, or do you have any additional questions?

"MR. KENT: If anybody's got a question, speak up.

"MR. ATKINS: If the Court please, I would like, as the attorney for the defendant, to ask the Court to further instruct the jury that by recommending the suspended sentence, that the Court is in no way bound to give a suspended sentence.

"BY THE COURT: Yes, the Court would not intentionally say anything at any step in this proceeding, and particularly now, to lead you to believe that the Court wants anybody to compromise their convictions, and please be advised that the Court is not bound by your recommendation, one way or the other. *Thus far, I believe I have followed jury recommendations on matters of clemency,* but the Court is not saying that it will or that it will not; the Court will simply say to you that you have a perfect right to make this recommendation. *If you so desire, the Court will be glad to receive it.*"

We feel that the above italicized statements are objectionable. The only statement a Court should make to a jury about a suspended sentence is: That the jury has the right to recommend a suspended sentence for any defendant they convict, if they determine such recommendation is justified. That the Court is not bound by such recommendation to suspend the sentence and may or may not do so. The whole question as to whether a sentence of a convicted person will be suspended, or not, is to be finally determined by the Court trying the case. No statement should be made by the Court that might tend to lead the jury to believe a suspended sentence would be granted if requested.

No objections were made by the appellant at the time the statements were made. This Court in the case of *Pendleton* v. *State,* 211 Ark. 1054, 204 S. W. 2d 559, and in *Filtingberger* v. *State,* 216 Ark. 754, 227 S. W. 2d 443, upheld the trial court in similar cases where no objections were made in the trial court. The Ark. Statutes, § 43-2813, 1947, requires the parole officer, when requested by the Circuit Judge—of any Judicial Circuit, to investigate the past history of any persons applying for suspended sentence or other clemency and to make available to the Court his findings.

Judgment affirmed.

Justice George Rose Smith concurs.

4820 283 S. W. 2d 150

Opinion delivered October 10, 1955.

[Rehearing denied November 21, 1955.]

*John C. Sheffield,* for appellant.

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

J. SEABORN HOLT, J. December 21, 1954, appellant was charged by information with the crime of manslaughter as follows: "The said defendant on the 18th day of December, 1954, in Phillips County, Arkansas, did unlawfully, and feloniously operate his automobile upon the highways in a negligent and careless manner with willful, wanton and reckless disregard for the safety of others using said highways and did strike one Neville Hollowell and inflict upon him severe injuries from which said injuries he died."

A jury trial, May 9, 1955, resulted in the verdict of guilty of the crime as charged and his punishment fixed at a term of one year in the penitentiary. From the judgment is this appeal.

Appellant relies for reversal on the single ground that the evidence was not sufficient to support the verdict. We do not agree.

The evidence viewed in the light most favorable to the State was that about 5:00 o'clock p. m. December 18, 1954, Sergeant Galloway, of the State Police, went to the

scene of a collision of automobiles at a point near a bridge on the paved highway which runs east and west between Helena and Barton, Arkansas. On arrival he testified that he found one car off the highway in the ditch and another car involved was on the highway in the south traffic lane headed east. The north lane was clear. Officer Galloway directed Otto Vonkendal, father of Paul Vonkendal—who was involved in the first collision, to go across the east end of the bridge to flag oncoming traffic. Meanwhile Galloway, Junior Phillips and Neville Hollowell were pushing the damaged car off the highway. The first collision that occurred, before the officers reached the scene, happened about 235 feet from the east end of the bridge. Before Otto Vonkendal had reached the bridge he heard appellant's car coming and called to Galloway, "Dwight, look out, here he comes," and he tried to slow appellant down with a flashlight, but appellant made no attempt to stop but "plowed into" the car they were pushing off the highway. The pavement was dry and there were no skid marks following this collision. Officer Galloway was struck by appellant's car and knocked about 20 feet into a ditch at the side. When he got up he saw Phillips had been knocked down the road and the little Hollowell boy (who later died from his injuries) was lying unconcious with his left leg severed below the knee. Appellant, after he got out of his car, was staggering around in a drunken condition. Galloway said he smelled whiskey on appellant, who frankly admitted he had consumed about two-thirds of a bottle of whiskey that afternoon and that he was going between 50 and 55 miles per hour when the mishap occurred. Appellant further testified:

"A. . . . there were people standing around the cars.

"Q. Weren't you looking at the car before you hit it?

"A. No, sir, I saw some people around it, but it happened so fast I couldn't tell about it.

"Q. If the road was, as you say, wet and it was just dusk dark and your lights didn't do much good, do you think you were using proper precautions along there under those circumstances?

"A. No, sir, I guess I wasn't."

It was not dark at the time. The testimony of other witnesses tended to corroborate Officer Galloway.

Appellant testified that he was not drunk, that the road was slick, that he applied his brakes in an effort to avoid the collision but went into a skid and could not stop. As pointed out there was evidence on the part of the State that the pavement was dry and that there were no signs of skid marks.

The section of the statute under which appellant was convicted reads:

Stats. § 41-2209, Ark. Stats. 1947 — "Involuntary manslaughter defined.—If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. Provided further that when the death of any person ensues within one [1] year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter. [Rev. Stat., ch. 44, div. 3, art. 2, § 3; C. & M. Dig., § 2356; Pope's Dig., § 2982; Acts 1947, No. 169, § 1, p. 397.]"

We hold that there was ample evidence to support the State's contention that appellant was at the time of collision driving his car in "a reckless, willful, wanton disregard of the safety of others" and that the jury was warranted in so finding and in rendering a verdict of guilty. See *Campbell* v. *State,* 215 Ark. 785, 223 S. W. 2d 505.

There is no complaint as to any of the instructions. Finding no error, the judgment is affirmed.

UNITED LOAN & INVESTMENT COMPANY *v.* NUNEZ.

5-705 282 S. W. 2d 595

Opinion delivered October 10, 1955.

[redacted]

*Bailey, Warren & Bullion,* for appellant.

*George W. Shepherd* and *Robert D. Lee,* for appellee.

ED. F. MCFADDIN, Justice. From a decree quieting appellees' title, there is this appeal; and the question is whether appellant's judgment is a lien on appellees' property.

Mr. and Mrs. Nunez, who owned their homestead in Pulaski County as tenants by entirety, decided in 1954 to transfer the title to Mrs. Nunez. Their attorney advised them to deed the property to a third person, who would then convey the title to Mrs. Nunez. For such third person the attorney selected his friend, Mr. Kelly, who was not even acquainted with Mr. and Mrs. Nunez. Mr. Kelly signed and acknowledged a deed with grantee and date left blank; and this was exhibited to Mr. and Mrs. Nunez before they executed to Kelly their entirety deed, which was promptly recorded. Later it was learned that the appellant, United Loan and Investment Company (hereinafter called "United"), had an unsatisfied judgment

rendered against Kelly in 1953. When this was discovered, the Kelly deed previously signed and acknowledged, as aforesaid, was dated and Mr. and Mrs. Nunez were named as grantees and the deed was recorded.

Thereupon Mr. and Mrs. Nunez brought this suit to remove the judgment of United as a cloud on the title of the Nunez homestead. United claimed its judgment to be a valid lien, since the record showed that the deed from Nunez to Kelly was dated and recorded in August, 1954, and the deed from Kelly to Nunez was dated and recorded in October, 1954. The Chancery Court held that United's judgment was only a cloud on the Nunez title and cancelled such cloud. This appeal ensued.

I. *Evidence as to Consideration.* Appellant claims that the Nunez evidence was designed to show the entire absence of any consideration paid by Kelly to Nunez and was inadmissible, since evidence may show *real consideration* but not *entire absence of consideration*; and appellant cites such cases as *Leake* v. *Garrett,* 167 Ark. 415, 268 S. W. 608; *Tandy* v. *Smith,* 173 Ark. 828, 293 S. W. 735; *Hampton* v. *Haneline,* 125 Ark. 441, 189 S. W. 40; and *Moncrief* v. *Miller,* 178 Ark. 1069, 14 S. W. 2d 227. The holding of these cases is not applicable. Here, it was not attempted to show entire absence of consideration; rather, the offered evidence was designed to show *what* the actual consideration was—i. e., that Kelly was a conduit of title or a mere trustee and never a bona fide or beneficial owner of the property. The recital of consideration in a deed may be varied by parol for every purpose except to show that the deed was without consideration. *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *Mewes* v. *Mewes,* 116 Ark. 155, 172 S. W. 853; and other cases collected in West's Ark. Digest, "Evidence," § 419 (2).

Our judgment lien statute is § 29-130, Ark. Stats.; and says that a judgment is a lien on the land "owned by the defendant."[1] In *Howes* v. *King,* 127 Ark. 511, 192

[1] Two comparatively recent cases involving this Statute are *Tolley* v. *Wilson,* 212 Ark. 163, 205 S. W. 2d 177; and *Fears* v. *Futrell,* 216 Ark. 122, 224 S. W. 2d 362.

S. W. 883, property had been deeded to F. R. LaCroix, against whom there was a judgment lien; but it was shown that LaCroix was a mere conduit in the title, just as Kelly was in the case at bar. In holding that the judgment against LaCroix was not a lien on the land conveyed to and by him, Mr. Justice HART, speaking for this Court, said:

"There was no moment of time when LaCroix owned or held the lands free from the condition, nor when he could have voluntarily conveyed them except subject to the condition. This rule is based on principles of justice and public policy and can work no hardship to the judgment-creditor; for as we have already seen the lien of the judgment is in all cases limited to the actual interest which the judgment-debtor has in the estate. The judgment-creditor having parted with nothing on the strength of these conveyances, it would be highly inequitable to permit his judgment to be satisfied out of what in fact was the property of Howes. In support of the rule, see Kent's Commentaries, 14 Ed. vol. 4, star pages 173 and 174; *Thornton* v. *Findley,* 97 Ark. 432; *Murray Co.* v. *Satterfield,* 125 Ark. 85; *Western Tie & Timber Co.* v. *Campbell,* 113 Ark. 570, Ann. Cas. 1916C, 943, and case note at 949."

In accordance with the foregoing case,[2] we hold that the judgment of United against Kelly was not a lien on the Nunez property under the circumstances here existing.

II. *Fraudulent Conveyance.* Appellant says that Mr. and Mrs. Nunez were conveying their property to Kelly to discourage a possible lawsuit against Mr. Nunez; and therefore they were not entitled to any aid from equity to remove a cloud from their title. The evidence did not show the Nunez deed of the homestead was a "fraudulent conveyance," as such words are used in

[2] Some of the cases, citing *Howes* v. *King,* are *Snow Bros. et al.* v. *Ellis,* 180 Ark. 238, 21 S. W. 2d 162; *1st National Bank* v. *Meriwether,* 188 Ark. 642, 67 S. W. 2d 599; *Carroll* v. *Evans,* 190 Ark. 511, 79 S. W. 2d 425; and *Citizens Bank & Trust Co.* v. *Garrott,* 192 Ark. 599, 93 S. W. 2d 319.

our cases.[3] Furthermore, Mr. Nunez could have made direct conveyance to his wife. See Ark. Stats., § 50-413. The fact, that their attorney chose to use Kelly as the conduit of title, cannot give a lien to United. Such is the effect of our holding in *Howes* v. *King,* supra.

Affirmed.

[3] For cases on fraudulent conveyances and the validity of the transaction between the parties, see those collected in West's Arkansas Digest, "Fraudulent Conveyances," Key No. 172.

WEST *v.* SMITH.

5-633 282 S. W. 2d 597

Opinion delivered October 10, 1955.

*Melvin E. Mayfield, Wayne Jewell* and *Surrey E. Gilliam,* for appellant.

*Claude E. Love* and *Spencer & Spencer,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, Charles Smith, was injured while working as a carpenter in the construction of two houses on a 70-acre subdivision owned and being developed by appellant, J. A. West, just

outside the city of El Dorado, Arkansas. Smith filed a claim for compensation before the Workmen's Compensation Commission against the appellant and appellee, W. M. Holder. It was Smith's contention that Holder was either a foreman-employee on a construction job carried on by appellant, J. A. West, and therefore he (Smith) was an employee of West, or that Holder was an independent contractor, in which event Smith was the employee of Holder. Both West and Holder contended that Smith was the employee of the other.

Hearings before a single commissioner and the full Commission resulted in an award of compensation in favor of Smith against appellant based on a finding as follows: "It is clear from the evidence, and there appears to be no dispute, that J. A. West was engaged in the business of building houses for sale. The Commission is of the opinion that the status of W. M. Holder in building the houses for J. A. West was that of a foreman for West who retained and exercised the right of control and supervision over the work and the men doing it; that the exercise of this right of control was such as to create the relationship of master and servant between J. A. West and claimant, thus making claimant an employee of J. A. West on this particular construction job." On appeal to Circuit Court, the Commission's award was affirmed.

The only issue before this court is the sufficiency of the evidence to support the Commission's finding that Holder was the foreman-employee of appellant and not an independent contractor. In determining this issue, we view the evidence in its strongest light in favor of the finding of the Commission. *Hughes* v. *Tapley, Administratrix,* 206 Ark. 739, 177 S. W. 2d 429. While the question of the sufficiency of the evidence to support the findings of fact made by the Commission is one of law, such findings will not be disturbed on appeal if supported by any substantial evidence. See *Parker Stave Company* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620, where we said: "In determining whether one is an employee or an inde-

pendent contractor, the Compensation Act is to be given a liberal construction in favor of the workman, and any doubt is to be resolved in favor of his status as an employee rather than an independent contractor. *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674; 71 C. J., p. 449.

"No hard and fast rule can be formulated to determine whether a workman is an employee or an independent contractor, and each case must be determined upon its own peculiar facts. In the case of *Irvan* v. *Bounds, supra,* the decisions from other jurisdictions on this question are reviewed, and the various rules employed by other courts in determining the relationship are discussed. There are many well-recognized indicia of the status of the relationship, but the presence of one or more of them in a case is not necessarily conclusive of this status. In 27 Am. Jur. 486, it is said: 'The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor.' " See also, *Brooks, Inc.,* v. *Claywell,* 215 Ark. 913, 224 S. W. 2d 37.

According to the evidence presented by appellees, the appellant is a partner in the ownership and operation of several department stores in El Dorado and other Arkansas cities. He was also engaged in the development of the residential subdivision in question and had built several houses for sale therein prior to construction of the two houses on which Holder and Smith worked. The construction of these two houses was begun under an oral agreement between appellant and Holder whereby the latter and other carpenters employed by him were to do all the carpenter work. Under the agreement, Holder was to be paid $10.00 per day, or $50.00 per 5-day week, while the work was in progress and upon comple-

tion of the job was also to draw the difference between the total cost of all carpenter work and the sum of $4,300, if any. Thus, if Holder was able to keep the total cost of all carpenter labor under $4,300, he was to receive such differential as additional compensation for his own work. Holder had no money and appellant was to furnish all materials and advance all moneys necessary to pay all carpenter labor each week upon weekly reports by Holder as "foreman," setting out the number of hours and the hourly wage paid each carpenter on the job.

Appellee Smith was employed as one of the carpenters on the job and had worked about a week when he was injured. A few days prior to the injury, appellant came out to the job and directed Smith to get another man from Holder and dig some percolation test holes over the entire subdivision. After the two men had been engaged in this work for a short time, appellant telephoned Holder and told him to call the two men back and put them back to work on the houses and this was done.

Neither appellant nor Holder carried workmen's compensation insurance at the time of the injury, but, shortly thereafter appellant directed Holder to take out such insurance and furnished him the cash with which to do so. Subsequent to the injury, appellant also instructed Holder to withhold and pay social security and withholding taxes on the wages paid Smith. Smith and the other carpenters under Holder's supervision were paid by funds advanced by West to Holder each week. At times these payments were made in one of the West Brothers department stores in El Dorado.

Shortly after Smith's injury, Holder left to take a more lucrative job in Ohio. By agreement with appellant, Holder's son, Grover, took his father's place as foreman of the construction job. Two days later, appellant gave Grover Holder the money to pay off the other carpenters and instructed him to discharge them, and this was done. Thereafter, Grover Holder did some carpenter work for which he was paid $10.00 per day as previously, but neither of the houses had been completed

at the time of the final hearing before the Commission. After Holder returned from Ohio, appellant requested that he sign a back-dated written contract, but Holder declined to do so. Holder did not have a contractor's license at the time of the oral agreement and injury. He had previously done construction work for appellant under written contracts and at a time when he had such a license.

In our opinion, the foregoing evidence was substantial and sufficient to sustain the Commission's finding that the relationship of employer and employee existed between appellant and Smith at the time of his injury. While certain phases of the oral agreement tend to show that Holder was an independent contractor, the fact that appellant actually exercised some control over Smith in the doing of the work, together with the further fact that appellant could and did discharge the workmen employed by Holder, without liability, indicate the relationship of employer and employee. Other indicia of such relationship are the apparent financial irresponsibility of Holder and the furnishing of all materials and moneys with which to pay wages of all the workmen by appellant. See Annotations, 75 A. L. R. 725, 20 A. L. R. 751. These facts are sufficient to sustain the conclusion that appellant reserved a degree of control over the work of Holder incompatible with that usually enjoyed by an independent contractor and consistent with the relationship of employer and employee. The judgment of the Circuit Court is accordingly affirmed.

FIKE *v.* NEWLIN.

5-651 282 S. W. 2d 604

Opinion delivered October 10, 1955.

*Rex W. Perkins, Suzanne Lighton* and *E. J. Ball,* for appellant.

*Pearson & Pearson,* for appellee.

George Rose Smith, J. This is a suit by the appellees, Newlin and Black, to obtain compensation for their services in finding a purchaser for a tourist court owned by the appellant and her husband. The principal defense is that the appellees failed to produce a buyer willing to take the property on terms acceptable to the Fikes. The trial court, sitting without a jury, entered judgment for the appellees for $1,500.

In 1953 Mr. and Mrs. Fike listed their property with Newlin and Black, licensed dealers in real estate. Late in July the Fikes were taken by the appellees to Bolivar, Missouri, to inspect a business building that was owned by Eugene and Louella Hinton and that was also listed for sale with Black. At that time Black understood (erroneously, as it turned out) that the Hintons' property was subject to a $12,500 mortgage, payable $1,000 annually, and he so informed the Fikes.

On July 30 Mrs. Fikes signed a form of offer and acceptance by which the Fikes' equity in the tourist court was offered for the Hintons' equity in the Missouri property. Hinton came to Fayetteville on August 1, inspected the tourist court, discussed the proposed trade with the

Fikes, and signed the contract that Mrs. Fike had executed. August 15 was fixed as the date for the exchange of deeds. The parties promptly submitted their respective abstracts of title for examination. There is testimony by the appellees that after the meeting of August 1 the Fikes seemed happy with the deal and, in preparation for a surrender of possession, removed some personal property from the tourist court to their home.

On August 14 Mr. and Mrs. Hinton arrived in Fayetteville with the expectation of completing the exchange of lands on the following day. But when the Hintons, together with Black, called at the tourist court they were informed by Mrs. Fike that she had decided to "back out" of the transaction. The appellees later brought this action for their commission.

It is immaterial that the contract for the exchange of the properties was not signed by Mr. Fike or Mrs. Hinton, as a real estate broker earns his commission by producing a buyer ready, willing, and able to take the property on the terms fixed by the seller. It is not necessary that an enforceable contract be executed. *Dillinger* v. *Lee,* 158 Ark. 374, 250 S. W. 332; *Boyles* v. *Knox,* 211 Ark. 426, 200 S. W. 2d 966. The appellant contends, however, that she and her husband were originally given incorrect information about the Hintons' mortgage and did not learn until the abstract was examined that the encumbrance was substantially larger than it had been represented to be. It is argued that the Fikes did not agree to assume the larger indebtedness, and therefore the appellees failed to produce a purchaser willing to take the tourist court on terms acceptable to the sellers.

There is substantial evidence to support the trial court's rejection of this argument. It is true that when Black first showed the Missouri property to the Fikes he was mistaken in saying that the mortgage was for $12,500, payable $1,000 a year. For, unknown to Black, the Hintons had borrowed an additional $2,500, and as refinanced the debt was payable at the rate of $750 every six months. But Black and Hinton testified that the

true terms of the mortgage were explained by Hinton during his discussion with the Fikes on August 1. From this testimony the court may have concluded that the appellant and her husband were fully informed on August 1 and still went ahead with preparations for the completion of the exchange. Pointing to the same conclusion is the fact that, according to the testimony of all five persons who were present when Mrs. Fike backed out of the transaction on August 14, she did not then mention the increased mortgage as her reason for withdrawing.

A secondary contention is that Black forfeited his right to compensation by giving his principals incorrect information about the Hinton mortgage. The cases relied upon, such as *Bennett* v. *Thompson,* 126 Ark. 61, 189 S. W. 363, L.R.A. 1917B, 919, and *Carnahan* v. *Lyman Real Estate Co.,* 170 Ark. 519, 280 S. W. 5, are not in point. They merely state the rule that a broker who practices fraud upon his principal is not entitled to compensation. Here Black's misstatement was apparently made in good faith, and after learning the truth the appellant indicated by her conduct that she was nevertheless willing to go forward with the exchange of lands.

Affirmed.

SEAMSTER, C. J., not participating.

WELCH *v.* WELCH.

5-692 282 S. W. 2d 600

Opinion delivered October 10, 1955.

*Surrey E. Gilliam* and *Melvin E. Mayfield,* for appellant.

*Harry C. Steinberg,* for appellee.

WARD, J. We are concerned here with when and under what circumstances a wife is entitled to (a) maintenance and (b) an attorney fee in a divorce proceeding instituted by her husband.

*Pleadings.* On November 20, 1953 appellee, Grady Welch, filed a petition for divorce against appellant, his wife, alleging indignities in that she continually fussed and argued, displayed ill temper because he would not continually take her to spend most of her time at her parents' home, and finally deliberately left his home and went to her parents.

On December 3, 1953, appellant filed a motion for attorney fees, suit money and alimony, stating: She had no estate or money to employ counsel to defend the

action or to pay court costs and other expenses, and that appellee was earning about $300 per month. She asked for $25 a week as temporary alimony and an attorney fee.

On July 1, 1954, appellant filed an answer to the divorce suit, without waiving the motion she filed on December 3, 1953, consisting of a general denial and also an allegation that her husband ordered her to leave home and refused to allow her to return, and prayed for separate maintenance.

On July 8, 1954, on his own motion, appellee's petition for divorce was dismissed without prejudice, and on December 8, 1954 [the day of the hearing] he filed a general denial to appellant's petition for separate maintenance.

*Testimony.* The testimony, in substance, shows: The parties were married October 1, 1953 and separated five or six weeks later. Shortly before they were married appellee's mother died, and upon being married they went to the home of appellee's father to live with him. At the time of the marriage appellant's mother was sick. Appellant says her mother was "real sick," and in the worst stage of diabetes, that she tried to get the wedding postponed but appellee promised to take her once a week (on Sundays) to visit her mother who lived at Smackover—a distance of some 20 miles. During the few weeks they lived together appellee took appellant to see her mother each Sunday, except on one occasion when she voluntarily stayed at home for a family reunion.

Although there was some friction between appellant and her father-in-law over cooking and housekeeping, it seems that the only cause of trouble in the marriage relations was the matter of appellant making weekly visits to her sick mother.

The first difficulty arose three weeks after the marraige when, after returning home from a Sunday visit, appellee told his wife (she says) that he was going to quit taking her to see her mother. This apparently made appellant angry for she left for two or three days but

then returned to her husband. A similar incident occurred after again living together two or three weeks. Appellant says that when they got home (from a visit to her mother) she went to her room when appellee walked in and said: "Ruby, I want you to leave. I can't see any way for us to get along." Thereupon her husband and his father took her, together with her clothes, to her mother's home. Appellant later made an effort to effect a reconciliation and she says she is now willing to resume marital relations, but appellee refused and still refuses to do so.

Appellee's version of the final separation varies only slightly from that of his wife. He says she took offense (at her mother's home) when he wanted to leave in time to do the chores at his home, and that she didn't say a word on the way back; that when they arrived he asked her if she was going to cook supper and she replied: "No, I am not cooking supper on Sunday evening"; that later he went into the bedroom where she was and said: "Ruby, don't look like we can get along, you won't even try to cooperate. If you want to go and stay with your mother, go on up there and stay"; that she said: "Will you carry me tonight" and he said "I sure will." Appellee admits that the only difference they had was about going to her mother's. He filed suit for divorce five days after the separation. Other witnesses testified in corroboration of many of the facts above set forth but not as to what transpired at the time of the final separation.

Appellee works for the Union County Highway Department for $10 a day when the weather permits. He owns no property but has about $200 in the bank. He had an operation in the summer of 1954 and wasn't able to work for four months. Appellant has worked at odd jobs before and after her marriage but, as the result of an old back injury, is unable to do work that requires her to stand, and she has no money or property.

After hearing the testimony the Chancellor dismissed appellant's petition for separate maintenance and refused to allow her an attorney fee. He apparently

took the view that she had not met the burden of proving her husband caused her to leave his home or refused to let her remain there, and, particularly, that her testimony was not corroborated.

Appellee contends that the Chancellor's finding should be sustained under the well known rule that it will stand unless against the weight of the evidence. However, we are of the opinion that this is a case where the rule is not controlling, and that the decree must be reversed.

(a) *Separate Maintenance.* Appellant's suit for separate maintenance, unlike a suit for divorce, does not necessarily require corroborating testimony. See *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681. Where, as here, the husband files for a divorce and the wife asks for separate maintenance, it is not necessary for the wife to show merit. See *Jelks* v. *Jelks,* 207 Ark. 475, 181 S. W. 2d 235.

In order for appellant to be entitled to maintenance here it was not incumbent upon her to show appellee forced her to leave. On the other hand, before appellee could defeat her claim it was incumbent on him to show either that she deserted him without just or reasonable cause or that he left her for such cause. Reasonable cause was defined in *Rie* v. *Rie,* 34 Ark. 37, at page 41, in this language:

"It has been held, subject to some qualifications, that *reasonable cause,* which, within the divorce statutes, will justify one of the married parties in abandoning the other, must be such conduct as could be made the foundation of a judicial proceeding for divorce."

In *Bonner* v. *Bonner,* 204 Ark. 1006, 166 S. W. 2d 254, this court said:

"It was and is the duty of appellant to support his wife according to the station in which they live. This duty would not rest upon him if he were entitled to a divorce, but it does rest upon him as long as they are married unless she had abandoned him without just

cause. He is as much to blame as she for the separation, and it is his bounden duty to support her as long as the bonds of matrimony exist between them."

The record does not support the conclusion that appellant abandoned appellee without good cause, but rather that both were at fault. In fact any abandonment on the part of appellant was nullified when she offered to return to her husband. Likewise appellee failed to show that he quit living with appellant for reasonable cause as defined in the *Rie* case, supra. Apparently he thought no such cause existed because he dismissed his action for divorce.

Based upon the above applicable rules and the testimony in this case we conclude that the appellant should have been granted separate maintenance in this case in the amount later mentioned.

(b) *Attorney fee.* The Chancellor should also have allowed a fee for appellant's attorney. As shown by the record appellee first filed a suit for divorce. Then appellant filed a motion for attorney fee stating that she had no money with which to employ counsel and later counsel was employed and she filed an answer to the divorce suit. Since there was no showing that appellant had either money or property she was thereupon entitled to money with which to employ counsel. In the early case of *Glenn* v. *Glenn,* 44 Ark. 46, this court said: "In the absence of any proof of separate property in a wife, it is just and reasonable to compel the husband to furnish the wife with means to defend a suit by him for divorce. Otherwise she would be at his mercy." This rule was cited with approval in the case of *Slocum* v. *Slocum,* 86 Ark. 469, 111 S. W. 806, and in subsequent cases.

*Allowances.* We realize that the trial judge is ordinarily in a better position to ascertain the needs of appellant and the ability of appellee to pay than we are, but we also realize that appellant has been denied assistance for several months and that she might be denied assistance for some time in the future if we did not as-

sume this responsibility. Appellant asked the trial court for $25 a week for maintenance but we do not feel that the record justifies us in making an award in that amount. Based on what the record shows regarding appellee's financial status and his earnings we have concluded that he should pay to his wife the sum of $10 each week, beginning October 1, 1955. Based on the record we have concluded that appellee should pay $50 for her attorney's fee in the trial court and $50 for his fee in this court and that he should pay the cost in this court and the court below.

Accordingly the decree of the trial court is reversed with directions to enter judgment for appellant in accordance with this opinion.

WALKER *v.* GASKIN.

5-731 282 S. W. 2d 606

Opinion delivered October 10, 1955.

*J. E. Still,* for appellant.

*Lookadoo, Gooch & Lookadoo,* for appellee.

ROBINSON, J. The issue here is whether the owner of a city lot has acquired a portion of an adjoining lot by adverse possession. Appellants, J. C. and Joyce Walker, filed this suit alleging that they are the owners of Lot 3 in Block 5, Gresham's No. 2 addition to the city of Arkadelphia; that the defendants, W. C. and Melva

Gaskin, are claiming the ownership of a strip of land of about six feet on the west side of Lot 3. The Gaskins filed an answer alleging that, regardless of where the true line may be, they had acquired the disputed strip by adverse possession. The court made a finding that the appellees, the Gaskins, had acquired the strip as alleged. The Walkers have appealed.

Appellee, W. C. Gaskin, bought Lot 4 from Edgar C. and Elinor Ruth Diggs on May 28, 1947. Appellants, the Walkers, bought the adjoining Lot 3 from J. B. and Doris Wright on April 1, 1950. The size of the lots is 25 feet east and west by 142 feet north and south. This suit was filed on June 9, 1954.

Appellants introduced as a witness John Oliver, county surveyor, and attempted to establish the true property lines, but the testimony of this witness falls short of serving that purpose. Although no plat was introduced as evidence, the surveyor claims that the strip of land in dispute is a part of Lot 3. However, he arrived at that conclusion merely by guessing at an accurate starting point.

Walker states that he did not know Gaskin was claiming the land in question until shortly before this suit was filed when Gaskin constructed a small levee. A portion of this levee extended on to Lot 3 in such a manner as to shed water thereon. Previously, Gaskin had constructed a sidewalk in front of his property but did not extend it across the part involved in this litigation. About the year 1949, Gaskin constructed a garage, a portion of which, according to the testimony of the surveyor, extends over onto Lot 3.

J. B. Wright, who sold Lot 3 to Walker, was called as a witness by appellants. He testified that there is a gum tree which is considered to be on the line between Lots 3 and 4, and when he bought Lot 3 the gum tree was pointed out as being on the line; that a fence extended from the center of the tree to the rear of the lot; that he never claimed anything past the gum tree; that between the gum tree and the front of the lot, and on a line

with the gum tree, there was an old crape myrtle bush that was considered to be on the property line. Wright said that he planted two small trees on that same line and that there is only 45 feet from the gum tree to the front of the lot, hence the fence from the gum tree to the rear of the lot extended over the greater portion of the property. Wright also testified that he bought to the gum tree and sold to the gum tree; that at all times Gaskin had possession and control of the property west of the gum tree; that Gaskin has lived there since 1947 and built the garage in 1949 and the driveway extending from the garage to the street. Wright further testified:

"Q. Who mowed the lawn on that land up to the street from the gum tree?

"A. We did; split it.

"Q. When you mowed your lawn you mowed your lawn up to the gum tree and on straight to the street?

"A. Yes, sir, that is right.

"Q. Then from the gum tree over, he mowed it? He kept that land mowed from that point of the gum tree where the old fence ran back, and on straight out to the street? He kept that land mowed continuously? You never did do that?

"A. No, sir."

Wright also said that he and Gaskin had talked over the subject of the property line and had agreed that the line was the gum tree, and when he sold the property to Walker he explained that the gum tree was on the line. Mrs. Wright corroborated the testimony of her husband. Edgar Diggs, who sold Lot 4 to Gaskin, testified that when he bought the property the gum tree was pointed out as the line, and that when he sold the property he pointed out the gum tree as the line.

The Chancellor made a finding that the Gaskins had acquired by adverse possession any portion of Lot 3 that may lie west of the center of the gum tree, and we cannot say that the Chancellor's finding is contrary to the preponderance of the evidence. The decree is therefore affirmed.

ROACH *v.* OAKLAWN JOCKEY CLUB, INC.

5-797 282 S. W. 2d 814

Opinion delivered October 17, 1955.

[Rehearing denied November 7, 1955.]

*Tom Gentry,* Attorney General, and *Kay Matthews,* Asst. Atty. General, for appellant.

*Mehaffy, Smith & Williams,* for appellee.

LEE SEAMSTER, Chief Justice. On May 11, 1955, the appellee filed a suit in Pulaski Chancery Court, second division, against the Arkansas State Racing Commission, appellants herein, to permanently enjoin the commission from opening or considering any bids received by it pursuant to an advertisement for bids for the granting of a horse racing franchise in Garland County, Arkansas. The bids were to be received and filed no later than 10 A. M. on May 16, 1955. Appellee prayed for an order of the court temporarily restraining and enjoining the commission from opening or considering any of the bids received by it pursuant to this published notice, and from granting any franchise that would impair the appellee's rights under the franchise granted it by the former commission. A temporary order of the court was granted enjoining the appellants. Subsequently, a motion filed by the appellants to dissolve the temporary restraining order previously issued and to dismiss the complaint of

the appellee, was by the court overruled and the injunction was made permanent. The Chancellor further held that the appellee holds a valid franchise which became effective April 13, 1954, and extends for a period of ten years from that date.

The evidence reveals that the appellee was granted a valid and exclusive franchise on May 14, 1945, by the Arkansas State Racing Commission, to operate a horse racing track in Garland County, Arkansas. The franchise was to extend for a period of ten years from that date. In March, 1954, the Arkansas State Racing Commission had published a notice in the newspapers, as required by law, soliciting bids for the granting of a ten-year exclusive franchise for the purpose of horse racing in Garland County, Arkansas. The franchise was to commence on May 14, 1955, and extend for a period of ten years. In response to this published notice, the appellee submitted a bid in the amount of $100 for the franchise. On April 13, 1954, the commission declared appellee's bid to be the highest and best offered, therefore, it granted appellee the franchise for a period of ten years beginning May 14, 1955, which was 13 months subsequent to the time it was granted.

It is the contention of the present commission that the franchise granted in 1954, by the predecessor commission, is void as against public policy and as having been made without any power and authority in the predecessor commission to make the contract binding on the successor commission. Acting upon this premise and in compliance with an opinion of the Attorney General, the successor commission, on April 24, 1955, advertised and solicited bids for the granting of a ten-year exclusive franchise for horse racing in Garland County, to take effect after expiration of the previous franchise. In response to this published notice, the commission has received and now has in its possession, three sealed bids for the ten-year franchise. The bids have not been opened due to the injunction issued in this case.

The appellee has, under successive ten-year franchises, operated a horse racing track at Hot Springs, Arkansas, since 1935. During that period of time appellee has paid the State of Arkansas more than nine million dollars in revenue taxes. Once each year, for a 31-day period, the appellee has conducted a racing meet at Hot Springs. In 1955, the appellee paid the State the sum of $864,107.81, in revenue taxes. The appellee has expended large sums of money in improving and enlarging its racing plant; more than $300,000 since the issuance of the franchise of April 13, 1954. The appellee contends that these capital expenditures for plant improvement could not have been justified without first securing the franchise of 1954, which was to become effective on May 14, 1955, and extend for a period of ten years.

The controlling statute in this case is Act 46 of the Acts of 1935, as amended, appearing as Ark. Stats., Sec. 84-2701, et seq., (1947). The relevant portions of Section 9 of the Act read:

"Only one franchise to operate a race track shall be granted in any county, and said franchise shall in every instance be an exclusive franchise to hold racing meetings in the county for which it is issued . . .

"The franchise shall extend for a period of ten years from the date of the acceptance of the successful bid by the Commission . . .

"The Commission may at any time, and under the procedure above provided, advertise for bids on franchise in any county in the State in which there is not at the time an existing and exclusive franchise for the conduct of racing meetings."

The franchise that was granted to appellee on April 13, 1954, to commence May 14, 1955, is void. The statute is specific in providing that only one racing franchise can exist in any one county at any one time and that such franchise shall be an exclusive one. The commission is authorized to advertise for bids for a franchise

only in a county in which there is not at the time an existing and exclusive franchise in existence. Further, the franchise is void since it is to commence some 13 months after the acceptance of the bid by the commission. The statute provides that the franchise shall extend for a period of ten years from the date of the acceptance of the successful bid by the Commission. To grant a franchise at that time, April 13, 1954, would be granting an additional franchise in that particular county in violation of the plain wording of the statute.

The commission had no authority to accept a bid and award a franchise to commence at a time in the future subsequent to the expiration of the present valid existing franchise. That is particularly true in this case because the law fixes the time the franchise goes into effect, as heretofore stated.

Estoppel does not apply to the facts in this case. It cannot be used to make an unauthorized act of a state agency lawful, when such act is unlawful or beyond the agencies power to act. *State Highway Comm.* v. *McNeil,* 222 Ark. 643, 262 S. W. 2d 129, and cases there cited.

The trial court erred in granting the injunction herein, therefore, the cause is reversed and dismissed.

McKnight *v.* Ellis.

5-719 282 S. W. 2d 806

Opinion delivered October 17, 1955.

*Henry S. Wilson* and *Rieves & Smith,* for appellant.

*Hale & Fogleman,* for appellee.

J. Seaborn Holt, Associate Justice. January 5, 1953 appellant, McKnight, entered into a written lease contract with appellee, Ellis, under the terms of which he leased 600 acres of land to Ellis to be farmed for rice in 1953. McKnight, in addition to furnishing the land for one-half the crop produced and delivered at the drier, further agreed to furnish "All pumps, motors, and other necessary, proper and adequate equipment to provide water for said rice, including seed rice necessary for planting said acreage . . . one-half the cost of all bean poison, . . . The lessor will build and construct all necessary canals to and on said lands so that said land may be properly watered in accordance with good rice farming practice . . ."

Ellis brought this suit March 29, 1954, seeking damages against McKnight in the amount of $72,990.88 for breach of said contract. Ellis alleged in his complaint in effect that McKnight had breached the lease agreement in that he failed to furnish 600 acres of land, and in fact furnished only 300 to 325 acres of land; failed to furnish the equipment necessary to supply water in proper time to care for and make the crop and failed to build proper and adequate flumes for canals in time to seasonably furnish a proper and adequate water supply for the rice crop; failed to furnish one-half of the bean poison; failed

to provide fuel; and failed to furnish seed rice at proper times and in proper quantities, and by an amendment alleged that the defendant failed to furnish a power unit and a connecting unit at the well; that the same should have been furnished during the first fifteen days of April; that the flumes and canals were never completed in time to properly water the crop of rice; and that they should have been built prior to March 10 in order to permit same to settle and compact in order to hold and move a head of water.

McKnight answered, denying all material allegations in appellee's complaint and in a cross-complaint sought $19,000.00 damages for alleged failure on appellee's part to perform the lease agreement.

A jury trial resulted in a verdict for Ellis of $11,-500.00. From the judgment awarding Ellis this amount, and directing that McKnight "Take nothing by reason of his cross-complaint," is this appeal.

For reversal appellant relies on the following points.

"1. The Court erred in overruling the request of the appellant for a directed verdict at the conclusion of the plaintiff's testimony in reference to the plaintiff's claim for damages by reason of the alleged breach of the contract to permit the plaintiff to work the Norfleet lands.

"2. The Court erred in including in the Court's instruction No. 5 over the objection of appellant the following language: 'together with such a sum of money as you find from a preponderance of the evidence will compensate the plaintiff for his work and labor, if any, upon the Norfleet lands in readying them for cultivation and unless you do so find your verdict will be for the defendant on this count.'

"3. The Court erred in refusing appellant's requested instruction No. 1 as follows: 'The jury are instructed that the plaintiff in his complaint does not claim that the well furnished by the defendant was not capable of delivering an adequate amount of water to the rice

crop and that you will disregard and consider for no purpose whatever testimony as to the construction of another well in the year 1954 on the lands of the defendant.'

"4. The Court erred in overruling appellant's motion to strike the testimony relative to another well having been placed on the McKnight lands.

"5. The Court erred in permitting the introduction in evidence, over the objections of appellant, of changes and improvements made in reference to the lands subsequent to the year 1953."

POINTS 1 and 2

It appears undisputed that McKnight took 300 acres of the leased land (known as the Norfleet Place) away from Ellis the last of May, and farmed it himself. It was McKnight's theory that he was justified in so doing because he (Ellis) had failed to perform his part of the contract. It was for the jury to say, under proper instructions, whether Ellis was entitled to (nominal) damages from McKnight under this alleged breach. We hold that there was substantial evidence to support damages for at least $200.00. Ellis testified, without any objection by appellant, that of $300.00 he spent in ditching and burning on the leased land, $200.00 was spent on the Norfleet place above mentioned.

He further testified that he had the tractors, combine, disks, dike plows, seeders, harrows, trucks, grain buggies and equipment necessary to work the Norfleet land; and the necessary labor; that he had done some ditching on the land and burning off the fields; was ready to start work on this Norfleet land the day McKnight took over during the planting season; that McKnight did not contend that Ellis had failed to perform, but said that "we would work out something . . . but never did." Other witnesses tended to corroborate Ellis. On this testimony the Court was justified in instructing the jury as above indicated that their verdict be for "such a sum of money as you find from a preponderance of the evidence will compensate the plaintiff for his work and labor, if any, upon the Norfleet lands in

readying them for cultivation." We therefore conclude that these two alleged errors are untenable.

POINTS 3 and 4

Appellant next contends that the Court erred in refusing his instruction No. 1 as set out above in Point 3 in his points relied upon, and in refusing his request to strike certain testimony relating to construction of another well subsequent to the 1953 season. It appears that in 1954, following the 1953 rice crop season, appellant had constructed another well on higher land adjoining that here involved and that proof of construction of this new well was allowed to go to the jury. In considering these points we must bear in mind that appellee Ellis concedes that the 16″ well on the 600 acres in 1953 was adequate to furnish sufficient water if all flumes and canals had been in proper working condition to carry and spread the water. Appellant's son-in-law, Jack Ray, testified that he watered the 320 acres in 1954 which Ellis farmed in 1953 with the same flumes and canals used by Ellis but two of appellant's employees testified that the old flumes would not carry the water over the land and new flumes and a relift pump had to be used.

There was also evidence that, due to unprecedented dry weather in 1953, the flumes and canals cracked in places and absorbed more water than usual, thus reducing the amount of water necessary for the rice crop. Ellis' complaint did allege that he was not furnished enough flumes and water. The following colloquy between Court and Counsel occurred during the trial: Court: "Now, I don't find in the complaint where there was insufficient water coming from the well. Mr. Hale: From the well itself? Have not so plead, don't claim that. The Court: All right. Mr. Rieves: May I ask the Court, if counsel is contending the well furnished him wasn't sufficient and didn't supply an adequate amount of water to the flume? The Court: Insofar as the issues in the case are concerned, as the jury will get it to determine when it is presented to them, they will be limited to the allegations in the pleadings, which do not include any statement as to the inadequacy of the water

coming from the well. Mr. Rieves: If there is any such contention, I want to plead surprise. Mr. Hale: We have made no such contention, if the Court please, and still don't. Mr. Rieves: Then, I should like the jury to be instructed at this time not to consider any evidence relative to another well to put on the 160 acres. The Court: Motion to strike the testimony is denied. May consider it together with all the other evidence in the case regarding the issues left them for consideration. Mr. Rieves: Will Your Honor note our exceptions, please."

Here the evidence tends to show that the elevations, location of canals, flumes, and direction of slopes in 1953 of the lands involved were unchanged in 1954 from that condition in 1953 and that the new well (which was 12″) was constructed on high ground. The 16″ well would have been adequate but for improper and inadequate flumes and canals as alleged in the complaint.

The general rule is that evidence of a prior condition may be shown by evidence of a condition subsequent where the condition has not changed and where the lapse of time was not of sufficient duration to make any material difference . . . "Where, from the nature of the situation, the condition is of such a permanent character that the lapse of time would not make material difference, and it would be improbable that change had occurred, testimony as to conditions after the happening of an event is relevant to show the conditions existing at the time." 80 A. L. R., page 441, § 2.

POINT 5

As to appellant's final contention that the Court erred in admitting evidence "of changes and improvements made in reference to the lands subsequent to 1953," what we have already said relative to appellant's points and contentions above applies with equal force to this last contention and therefore, we hold that it cannot be sustained.

On the whole case we conclude that there was substantial evidence to support allegations in appellee's complaint of a breach of contract on the part of appellant, and the damages awarded appellee. Affirmed.

FULKS *v.* WALKER.

5-604 - 5-738 (consolidated) 283 S. W. 2d 347

Opinion delivered October 17, 1955.

[Rehearing denied November 28, 1955.]

*Ivan Williamson* and *Ben B. Williamson,* for appellant.

*Chas. F. Cole,* for appellee.

ED. F. MCFADDIN, Associate Justice. These two cases—one from Stone Chancery and the other from Independence Chancery—have been consolidated; as the

main question in each case is the custody of the three children of the parties.

In about 1945 Elmer Fulks and Martha Palmer were married in Arizona where they both were then residing; and to that marriage were born three girls, now aged nine, eight and seven years, respectively. Some time after the marriage, Mr. Fulks was sentenced to the penitentiary in North Carolina on a charge of burglary; and on August 3, 1950, Mrs. Fulks obtained a divorce from him in the Superior Court of Maricopa County, Arizona, where she then lived and resided. The decree of divorce gave Mrs. Fulks the care and custody of the three children. She later married Mr. Walker and continues to live in Arizona. In 1952 Mr. Fulks, having been released from the North Carolina prison and having returned to his old home in Arkansas, went to Arizona to see his children. First he asked for, and obtained, permission to take the children on a trip of about 17 miles; and then later he brought the children to Arkansas without Court authorization and without permission of Martha Fulks Walker. She tried to have him extradited to Arizona for trial on a kidnapping charge, but extradition was refused.

Some time after reaching Arkansas Mr. Fulks filed a petition in the Stone Chancery Court to have that Court award him the custody of the three children, which he then had in Arkansas. Mrs. Martha Fulks Walker resisted that petition; and considerable evidence was heard, in the course of which it was discovered that Mr. Fulks actually lived in Independence County, rather than in Stone County. The Stone Chancery Court thereupon dismissed the proceedings; and from that decree Mr. Fulks has appealed to this Court in Case No. 738 herein.

Upon the dismissal of the proceedings in the Stone Chancery Court, Mrs. Martha Fulks Walker filed, in the Independence Chancery Court, a petition for a writ of *habeas corpus* to regain the custody of her three children. Trial resulted in a decree awarding the custody to her, and also awarding support money of $45.00 per month and a small amount for attorney's fee. From

that decree Mr. Fulks has appealed in Case No. 604 in this Court.

I. *Custody Issue.* The real question is the custody of the three children. We start with the decree of the Superior Court of Maricopa County, Arizona—a Court whose jurisdiction is unquestioned. Mr. Fulks entered his appearance in that case in 1950; and the Court awarded the custody of the children to their mother, the appellee here. That decree has never been changed or modified. The record herein discloses that Mr. Fulks took the children from Arizona without the consent of appellee. The fact that she tried to have him extradited to Arizona for "child stealing" indicates her attitude in the matter.

Mr. Fulks claims that conditions have changed since the rendition of the Arizona decree, and that it is for the best interest of the children that he keep them in Arkansas rather than that the mother keep them in Arizona. Apparently the Independence Chancery Court gave little weight to the evidence in regard to such claim because the decree recites:

". . . there has been no substantial change in conditions which would warrant or authorize this Court to change the award of custody of said children made by the Arizona Courts, and that the plaintiff, Martha Fulks Walker, be awarded the immediate custody of said children . . ."

A careful reading of the entire record and study of the briefs, fails to convince us that the Chancery Court was in error. It would serve no useful purpose to review all the evidence or refer to the cited cases. Each child-custody case must rest on its own peculiar facts. That the Independence Chancery Court had the power to award support money is established by our holding in *Waller* v. *Waller,* 220 Ark. 19, 245 S. W. 2d 814.

II. *Procedural Questions.* When Mrs. Martha Fulks Walker filed the *habeas corpus* proceeding in the Independence Chancery Court, Mr. Fulks filed a motion that she be required to make a bond for costs, since she was a

non-resident. The Court refused the motion; and Mr. Fulks claims error. Our Statute (§ 27-2301, Ark. Stats.) requires a bond for costs of a non-resident, and makes the plaintiff's attorney liable for costs in the absence of such a bond (§ 27-2304). It is argued that in some *habeas corpus* proceedings a bond for costs is not required.[1] We need not consider that argument. Even if the Trial Court committed error in refusing to require bond for costs, nevertheless such error has become harmless, since the plaintiff prevailed in the lower Court and the decree is affirmed here.[2]

Likewise, we need not consider whether the Chancellor assigned a correct reason for the decree in the Stone Chancery Court because, at all events, the Independence Chancery Court had jurisdiction in the *habeas corpus* proceedings and exercised such jurisdiction to a wise conclusion.

Affirmed.

---

[1] Some jurisdictions hold that a bond for costs is not required in certain *habeas corpus* proceedings. See 20 C. J. S. 364; 25 Am. Jur. 255; and Annotation in 81 A. L. R. 151.

[2] In 5 C. J. S. 893 cases are cited to sustain this statement: "Error in refusing to require security for costs is rendered harmless where judgment is for plaintiff, particularly where it is affirmed . . ."

KINNEY *v.* PATTERSON.

5-725 282 S. W. 2d 809

Opinion delivered October 17, 1955.

*Batchelor & Batchelor,* Van Buren, for appellant.

*Mark E. Woolsey,* Ozark, for appellee.

MINOR W. MILLWEE, Associate Justice. This appeal is from a decree enjoining appellants, Earl L. Kinney and wife, from interfering with appellee, Gavin Patterson, in the cutting and removing of certain timber from a 180-acre tract of land which appellants own in Crawford County.

In 1951, Robert Hoffman and his wife, Josie Lee Hoffman, owned the 180-acre farm in question as tenants by the entirety. The Hoffmans were then making their home in Ft. Worth, Texas, having moved from the 180-acre Arkansas farm sometime previously. Appellee was operating a sawmill near the land on March 24, 1951, when Hoffman and his wife came to the sawmill and told appellee they would like to sell him the timber on the 180-acre farm in order to pay a debt they owed. It was then and there orally agreed that the Hoffmans would sell all merchantable timber 6 inches in diameter, or above, on the farm to appellee for $100.00 with no time limit for cutting and removing the timber. That night, appellee and Robert Hoffman went to a notary public in the town of Mulberry and had him draft the following written memorandum which was signed only by Hoffman and appellee: "Party of the first part, sells to party of the second part, all saleable timber from eight (8) inches up, on any part of my farm. No time limit to remove timber." Appellee paid the purchase price of $100.00 and entered into possession of the lands and began cutting the timber.

After sale of the timber to appellee, the Hoffmans listed the 180-acre farm for sale with an agent in Alma, Arkansas, who was advised of the terms of the timber sale to appellee. The agent negotiated a sale of the farm

to appellants, who were agreeable to purchase the farm subject to the timber sale to appellee, provided the timber was cut and removed within 60 days, but they objected to the provision that there was no time limit for removing the timber.

A written agreement of sale of the lands to appellants was entered into between them and the agent of the Hoffmans on February 1, 1952, which contained a provision as follows: "Mr. Patterson, who has bought the marketable timber from Robert Hoffman on this said property of 180 acres, will have 60 days from date of February 1, 1952, to remove said timber which has been bought, and it shall be required of the seller that he notify him of said terms of this contract." Appellee was not a party to the negotiations between appellants and Hoffman's agent and knew nothing about the contract. The Hoffmans conveyed the lands to appellants by warranty deed on February 9, 1952.

Appellee learned of the sale of the property to appellants about April 1, 1952. He continued to cut and remove the timber from said lands at different times until on or about April 17, 1952, when appellant, Earl L. Kinney, closed the fences around the lands and forbade appellee's cutting and removing any more of the timber. Appellee then filed the instant suit resulting in the decree rendered December 10, 1954, which gave appellee 90 days from January 10, 1955, in which to cut and remove the balance of the timber under his contract, or, in the event of an appeal to this court, 90 days from the filing of this court's mandate in the chancery court.

Appellants alleged as a defense in their answer that the contract between appellee and the Hoffmans for sale of the timber was void for the reason that the 180 acres constituted the homestead of Hoffman and his wife, and she did not join her husband in a written conveyance of the timber as required by Ark. Stats., § 50-415. This is also appellants' present contention for reversal. In considering this argument, we will assume, without deciding, that appellants are in position to rely upon any

homestead rights that the Hoffmans had in the lands at the time of the timber sale.

The burden was upon appellants to show that the land was a homestead. *Gibbs* v. *Adams,* 76 Ark. 575, 89 S. W. 1008. Other applicable rules are stated in *Gillis* v. *Gillis,* 164 Ark. 532, 262 S. W. 307, as follows: "The question of whether one who removes from his homestead has abandoned same is one of intention, which must be determined from the facts and circumstances attending each case. In order to avoid an abandonment, where one moves away from his home, there must not only be a present but a constant, abiding intention to return from time of removal. *Gray* v. *Bank of Hartford,* 137 Ark. 232. One who leaves his home and acquires another, where he resides for a reasonable time, will be presumed to have abandoned his old home, in the absence of convincing testimony to the contrary. *Wolf* v. *Hawkins,* 60 Ark. 262."

Under the scant evidence adduced here, the able chancellor would have been fully warranted in finding that the lands in question did not constitute the homestead of the Hoffmans at the time of the timber sale to appellee in March, 1951. They had sometime previously moved to Ft. Worth, Texas, and were merely on a visit with Mrs. Hoffman's mother at the time of the sale. They did not testify and there is no showing of any intention on their part to return to the Arkansas farm which they sold to appellants in February, 1952.

According to the testimony, Mrs. Hoffman was a party to the negotiations for the sale of the timber to appellee and the oral agreement as to the terms of such sale, although she did not sign the written memorandum of the agreement. It is also undisputed that appellee paid the purchase price and was placed in possession of the lands for the purpose of cutting and removing the timber. We have held that a contract for the sale of timber is taken out of the Statute of Frauds [Ark. Stats., § 38-101], even though the contract is oral, where the vendor receives payment of the purchase price and the purchaser enters possession. *Beattie* v. *Smith,* 146 Ark.

532, 226 S. W. 168. When appellee paid the purchase price and entered possession, the transaction was taken out of the Statute of Frauds and a valid sale of the timber was consummated. This conclusion renders it unnecessary to determine whether appellants were estopped from denying the validity of the sale.

Affirmed.

DOBBS *v.* DOBBS.

5-728 282 S. W. 2d 812

Opinion delivered October 17, 1955.

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

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

GEORGE ROSE SMITH, J. In December, 1953, the appellant came to Arkansas from Missouri. Some three months later he filed suit for divorce in the Fulton Chancery Court, the service of process upon the appellee being by warning order. At the term beginning in April, 1954, the court entered a default decree granting the divorce. During the same term of court the appellee filed a motion to set aside the decree, upon the ground that the appellant was not a resident of Arkansas. This motion was not presented to the court until the October term, at which time the chancellor, after hearing additional testimony, found that the appellant is not a *bona*

*fide* resident of Arkansas and that the decree should be set aside as having been obtained by fraud on the court. This appeal is from the order vacating the original decree.

Although the appellee's motion was filed during the April term of court, the court's discretionary power to grant the motion ended with the lapse of the term and could not be revived even by consent. *Mayor & Aldermen of Little Rock* v. *Bullock,* 6 Ark. 282; *Brady* v. *Hamlett,* 33 Ark. 105; *Ingram* v. *Wood,* 172 Ark. 226, 288 S. W. 393. Hence the question is whether there is a sufficient showing of fraud on the court to warrant the vacation of the decree under the statute that applies after the expiration of the term. Ark. Stats. 1947, § 29-506. It may be added that, since the appellee did not enter her appearance prior to the rendition of the divorce decree, the issue of residence is not *res judicata* and may be re-examined. *Anderson* v. *Anderson,* 223 Ark. 571, 267 S. W. 2d 316.

The proof follows a pattern familiar in cases of this kind. Dobbs had first sought to obtain a divorce in Missouri. On the day after his petition there was denied he came to Arkansas and undertook the establishment of residence in this state. At the time of the October hearing Dobbs had been in Arkansas for a little more than ten months. In that period he had started a salvage business (which took him frequently back to Missouri), had assessed and paid taxes in Arkansas, and had begun the construction of a home on land he had bought. Several witnesses corroborate the fact of Dobbs' presence in the community. Although some of these matters occurred after the entry of the decree in April, they are not without relevance to the question of whether Dobbs came to Arkansas with the intention of making it his domicile.

On the other hand, Dobbs admittedly migrated to Arkansas immediately after his complaint for divorce had been dismissed in Missouri. This is a circumstance to be considered, although it is not necessarily fatal to the acquisition of an Arkansas domicile. *Wicker* v.

*Wicker,* 223 Ark. 879, 269 S. W. 2d 311. It is also shown that during most of his stay in Arkansas Dobbs has been living in a tent pitched on the site where he is assertedly building a house.

In our opinion the record fails to establish the charge of fraud on the court. It is true that one who obtains a divorce upon perjured testimony as to residence commits a fraud on the court. *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498; *Murphy* v. *Murphy,* 200 Ark. 458, 140 S. W. 2d 416. But in those cases the plaintiff was guilty of conscious and deliberate perjury, his testimony as to physical residence having been wholly untrue. That is not the situation in the case at bar. Too, in each of the above cases the husband had concealed his wife's true address, so that she failed to receive notice of the suit. Here Dobbs supplied the appellee's correct address; her failure to receive notice was due to her own refusal to accept the registered letter mailed to her by the attorney *ad litem.*

In this case it is fair to say that the evidence as to residence is evenly balanced or very nearly so. If this were simply an appeal from a decree denying the appellant's request for a divorce it might well be said that the chancellor's decision was not clearly against the weight of the evidence. But that is not the case before us. The appellee's present burden of proof is not merely that of disputing the assertion of residence; she must go a step farther by showing that the decree was obtained by fraud. Reasons of public policy make it desirable that decrees affecting the marital status have a high degree of stability. "There are excellent reasons why judgments in matrimonial causes, whether of nullity, dissolution or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons that uncertainty and fluctuation in it would be greatly detrimental to the public." *Corney* v. *Corney,* 97 Ark. 117, 133 S. W. 813. We are unwilling to hold that fraud on the court is established by mere proof that the issue of

residence is a closely disputed question of fact that might be resolved either way. Under such a rule every uncontested divorce case would be subject to trial *de novo* for the indefinite future. This appellant undoubtedly made *prima facie* proof of residence. There being little if any evidence of deliberate perjury, wrongful concealment of the defendant's whereabouts, or other conduct by which the decree was fraudulently procured, the original decree should have been allowed to stand.

Reversed.

PEARSON *v.* PONDER, JUDGE.

5-736 283 S. W. 2d 343

Opinion delivered October 17, 1955.

[Rehearing denied November 28, 1955.]

*Ivan Williamson* and *Ben B. Williamson,* for petitioner.

*J. L. Bittle* and *W. J. Arnold,* for respondent.

PAUL WARD, Associate Justice. Truman T. Foster is a resident of Stone County, Arkansas, and is the owner of 160 acres of land situated in that county. On June 11, 1953, he filed a complaint in the Stone County Circuit Court against Mr. and Mrs. J. C. Pearson stating that

Mr. and Mrs. Pearson resided in Cleburne County, Arkansas, but operated a sawmill in Stone County during the year 1951 and perhaps at later dates; that said Pearsons wrongfully and unlawfully entered upon complainant's lands and cut and removed therefrom over 879 virgin pine trees reasonably worth $800, and; that they also cut and removed from said land 131 white oak trees and converted same to their own use, valued at $300. The prayer was for the market value and also, because of the wrongful and unlawful cutting, for triple damages.

Summons was issued by the Clerk of Stone County directed to the Sheriff of Cleburne County and there served upon Mr. and Mrs. Pearson.

On November 16, 1953, Pearsons filed a motion in the Circuit Court of Stone County to quash said summons and service, contending that the action instituted by Foster was transitory, and that they could be sued only in the county where they were served. This motion to quash was, on the same day, granted by the trial judge.

On February 2, 1954, Foster filed an amended and substituted complaint in which was reiterated substantially the same allegations contained in the original complaint but which contained two general additional allegations. In the first part of the amended complaint which deal with the pine and oak trees it was alleged that Pearsons "unlawfully trespassed upon said lands . . . cut roads through and upon said lands, cut and otherwise damaged young trees growing on said lands, and by these and other things and matters greatly injured and damaged said lands." Following the above appears this additional allegation: "That in addition to the damages above described and prayed for, the aforedescribed lands have been damaged by having young growing trees bruised, cut, skinned, and otherwise ruined for future growth by having roads cut through said lands, by having ruts and resulting ditches erode in said lands, from which said lands have been damaged in the amount of $200.00."

The prayer was for judgment in the amount of $4,245 with interest at 6 per cent from date of trespass and for costs.

Again summons was issued and served in the same way as the first summons as heretofore stated, and again Pearsons, without entering their appearance for any other purpose, filed a motion to quash the service of summons. In this motion it was stated ". . . the plaintiff cannot maintain an action against them [Pearsons] both for damages to plaintiff's land by reason of any alleged trespass thereon by defendants, and for treble, or other value of the timber alleged to have been cut, removed and converted by the defendants; that the two actions are separate and distinct, cannot be joined in the same suit as plaintiff has sought to do and that either of said actions when instituted, is a bar to the bringing of the other."

The above motion to quash was overruled by the trial court, and by this petition Pearsons ask this court to prohibit the Circuit Judge of Stone County "from proceeding in any wise or manner against petitioners in said cause, except on that count and allegation in said amended and substituted complaint asking damages to plaintiff's lands, . . ." From this we take it that the petitioners are asking us to restrain the Circuit Judge of Stone County from proceeding further in this cause of action except as to the last portion of the amended complaint referred to above wherein $200 damage to the lands is alleged.

It is conceded by all the parties that if a cause of action similar to this one is based solely upon damage or injury to real property that the cause must be tried in the county where the land is situated, and that service may be had on the defendants in any county of the state; and further that if the complaint states only an action for conversion of timber then the cause must be tried in the county where the defendants reside or in the county where they are served with summons.

The petitioners here make an ingenuous and forceful contention that, except for the last portion of the amended complaint relating to $200 damage to the land, only an action for conversion is stated. The result therefore, petitioners say, is that there is no proper service upon which an action for conversion can be tried in Stone County. The argument then is, citing *Southeast Construction Company* v. *Wood, Judge,* 223 Ark. 325, 265 S. W. 2d 720, and the same style case in 223 Ark. 328, 265 S. W. 2d 722 that Foster cannot pursue both an action for damages to land and for conversion of timber in the same suit, that he must choose between them and that the choice of one excludes the other. From this argument it would seem to necessarily follow that Foster in this instance could only choose to sue for damage to his land since that is the only cause of action in which he has proper service, and that consequently this court should enjoin the trial court from trying the action in conversion.

It is our conclusion that petitioners' position and argument are untenable and that they are based on a false premise. It appears to us that petitioners are assuming that the first portion of the amended complaint states only a cause of action for conversion of timber. In this they are in error. A careful reading of the amended complaint shows, and it is revealed by the portions heretofore set out, that a cause of action for injury to land is clearly stated. Since the trial court ruled that the original complaint stated an action for conversion only it is reasonable to assume that the very purpose of the amended complaint was to change it to an action for injury to land.

It seems to us that petitioners have also fallen into error in their interpretation of the holding in the *Southeast Construction* cases cited above. Those cases did not deal with the duty of a complainant to choose between a cause of action for conversion and a cause of action for injury to land where they are both stated in the same complaint. In fact, as we have just stated, we are here dealing with a complaint [the amended complaint] which

states only a cause of action for damage or injury to land. The cases referred to above merely hold that, before the complaint is filed, the complaining party, in many instances, has an option to file a complaint for conversion or a complaint for injury to land and that he must choose between them. It has been many times recognized by this court that two different causes of action may arise out of the same set of facts in cases of this kind. In the case of *Western Union Telegraph Company* v. *Bush,* 191 Ark. 1085, 89 S. W. 2d 723, 103 A. L. R. 367, this fact was stated in these words: "It does not follow that, because articles may be severed from the soil, the action therefor must be one for damages to real property nor does it follow that because severed articles may be converted a suit for conversion is the only remedy."

Therefore it is clear to us that since Foster, in his amended complaint, stated a cause of action for injury or damage to his lands situated in Stone County the suit could be tried only in Stone County and that consequently proper service was had on the petitioners in Cleburne County. This being true the Circuit Court of Stone County acquired jurisdiction and this court is without authority to restrain him from proceeding in the trial of the case.

Petitioners apparently are disturbed by the prospects of Foster suing for injury to his land and at the same time recovering treble damages for the timber cut and removed therefrom under the provisions of Ark. Stats., § 50-105. Any questions that may rise because of this anticipated procedure are not ones which we are called on to pass upon at this time, nor have they been briefed. Such questions, if they arise, may be properly presented to the trial court.

Writ denied.

WILSON *v.* MORSE MILL COMPANY.

5-696 282 S. W. 2d 803

Opinion delivered October 17, 1955.

*Rex W. Perkins* and *E. J. Ball,* for appellant.

*Price Dickson* and *W. B. Putman,* for appellee.

SAM ROBINSON, Associate Justice. The principal issues here are whether one D. F. Keepers was an agent of appellant, G. W. Wilson, or an independent contractor, and whether a credit once applied to an open account can be changed to the detriment of a third party when such party is not consulted.

Appellant, Dr. G. W. Wilson, is a member of the School Board of the Greenland School District. At his own expense he had three buildings constructed for the school. The first structure was built in 1949 at a cost of $9,815.83; the second in 1950 at a cost of $7,596.93; and the third building was completed in 1952 at the cost of $45,170.41. Dr. Wilson employed D. F. Keepers to construct these buildings. After the last building was completed, there was owed to appellee, Morse Mill Company, $2,591.54 for material furnished on the job. Morse filed this suit for that amount against Dr. Wilson. Wilson contends that he is not liable because Keepers was an independent contractor, and further that, in any event, Morse cannot recover more than $1,197.28 because the account had been credited with $1,394.26 paid by Keepers

which was later canceled without the consent of Wilson. It is the contention of Morse that Keepers was Wilson's agent and that Wilson is liable for the entire amount. The cause was submitted to the court sitting as a jury and there was judgment for Morse Mill Company in the sum of $2,591.54. Dr. Wilson has appealed.

Whether Keepers was an independent contractor or an agent of Dr. Wilson's is a question of fact. A finding of fact by the trial court has the same force and effect as a jury verdict. *Gray* v. *Ford, Bacon & Davis, Inc.,* 210 Ark. 995, 198 S. W. 2d 508; *Harvell* v. *Matthews,* 189 Ark. 356, 72 S. W. 2d 214. The trial court's finding of fact when a jury is waived is considered conclusive and will not be reviewed if supported by any substantial evidence. *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322. This court gives evidence adduced on behalf of the prevailing party the strongest probative force it will reasonably bear. *Wall* v. *Robling,* 207 Ark. 987, 183 S. W. 2d 605. Here, there is substantial evidence to support the finding that Keepers was Wilson's agent. At the time of the trial of this cause Keepers had died, but by agreement of counsel the testimony he had given in a cause in the federal court, in which the government was seeking to recover social security taxes from Dr. Wilson, was admitted as evidence. According to this testimony, Keepers was acting in the capacity of Wilson's agent and not as an independent contractor. He testified that there was no contract between him and Wilson:

"Q. And you had no contract with him to build the building? A. No contract whatever. Q. How were you to be paid? A. Just as he paid me. Q. Did you draw a salary there, too? A. That's what I worked on all the way through—a salary. Q. By the hour? A. By the hour. Q. How much an hour? A. A dollar and a quarter an hour."

This is substantial testimony to the effect that Keepers was not an independent contractor and, even though we should find that the judgment is contrary to a pre-

ponderance of the evidence, we must affirm where there is substantial evidence to support the judgment.

Subsequent to the completion of the third building in 1952, Morse Mill Company rendered a statement to Dr. Wilson in the sum of $1,197.28, but later claimed that Wilson owed them $2,591.54. The change came about in this manner: Morse Mill Company was indebted to Keepers in the sum of $2,379.00. They paid this account by giving Keepers credit for that amount on the school job, but later they were directed by Keepers to credit $1,394.26 to another account Keepers owed to Morse. Morse then withdrew the credit from the school job and applied it to the other account. The question is, in these circumstances, could Morse legally void the credit given on the school job without the consent of Wilson.

In *National Surety Company* v. *Southern Lumber & Supply Company,* 181 Ark. 105, 24 S. W. 2d 964, the court said: "The exercise of the right of appropriation of payments belongs exclusively to the debtor and creditor, and no third person can control or be heard for the purpose of compelling a different appropriation from that agreed upon by them. But an appropriation by either party cannot afterward be changed so as to injuriously affect the rights of third persons." The account was carried on the books of the Morse Mill Company in the name of Keepers, but it is their contention that Wilson is primarily liable. There is evidence in this case to the effect that Keepers had not applied to the school building account all of the money furnished to him by Dr. Wilson for that purpose, and it is not beyond the range of possibility that Wilson could have compelled the application to the school account of all the money owed to Keepers by the Morse Company.

In *Smart, Administratrix,* v. *Owen,* 208 Ark. 662, 187 S. W. 2d 312, this court quoted with approval from 41 C. J. S. 792 as follows: "The parties may agree as to the application of a payment, and may, by agreement withdraw a payment once credited on the mortgage and apply it otherwise, provided no third person is prej-

udiced thereby." In this case, Dr. Wilson was certainly prejudiced when the credit of $1,394.26 on the school account was withdrawn, and this credit should be restored. Since the cause appears to have been fully developed, the judgment is reduced to $1,197.28 and, as modified, is affirmed.

Justices MILLWEE and GEORGE ROSE SMITH dissent.

GEORGE ROSE SMITH, J., dissenting. It seems to me that the majority's action in reducing Morse's judgment, by the amount of $1,394.26, is contrary to settled principles of law. A somewhat more detailed statement of the facts will make my position clear.

In 1952 Keepers did certain construction work for Morse, under an agreement by which Keepers was to furnish the labor and Morse was to furnish the material. Upon the completion of that project Morse owed Keepers $2,379 for the labor he had supplied. Needless to say, that money was owed to Keepers personally and was of no concern whatever to Dr. Wilson.

Instead of paying Keepers in cash Morse undertook to apply the $2,379 as a credit upon its books. At that time Keepers owed Morse about $1,400 upon a personal account of his own, and in addition there was a large unpaid balance for the construction of the third school building, the latter being referred to as the Greenland Gym job. In applying the credit of $2,379 Morse credited the entire amount to the Greenland Gym job. The trial court was warranted in believing from the evidence that Keepers knew nothing of this bookkeeping entry when it was made.

Upon the basis of this credit Morse sent Dr. Wilson a statement in the sum of $1,197.28. Wilson discussed the matter with Keepers; the trial court, as the trier of the facts, was at liberty to infer that Keepers then learned for the first time that the money due to him personally had been credited to the Greenland Gym job. Keepers got in touch with Morse and directed that part of the $2,379 be used to extinguish his personal indebted-

ness to Morse. Keepers undoubtedly was entitled to take this action, as it is familiar law that the debtor has the primary right to direct the application of payments. *Harrison* v. *First Nat. Bk. of Huntsville,* 117 Ark. 260, 174 S. W. 553. Conversely, Morse had no choice in the matter except to obey Keepers' instructions in the matter. All that happened was that Dr. Wilson, who is now found to have actually owed the Greenland Gym account, was temporarily given credit for money that belonged to some one else. This mere bookkeeping entry was promptly corrected, and it is not contended that Dr. Wilson in any way relied upon the error to his detriment.

For their conclusion the majority cite only the *National Surety Company* case and the *Smart* case. Neither case is relevant to this one except for the general statement that an appropriation of a payment, when made, cannot be changed to the prejudice of a third person. This rule has not the slightest application to the case at bar. To begin with, there was no appropriation until Keepers acted, as the right of appropriation belonged to him. In the second place, Dr. Wilson has not been prejudiced in any proper sense of the term. He was temporarily credited with money that belonged to Keepers alone—money to which Dr. Wilson had no present claim. Before Dr. Wilson changed his position in any respect the erroneous credit was properly withdrawn at Keepers' direction. If prejudice results from the deletion of a credit to which the debtor was never entitled, it obviously follows that in no instance can a mistake in a creditor's statement of account ever be corrected. Of course that is not the law, notwithstanding the majority opinion in this case.

5-732 283 S. W. 2d 351

Opinion delivered October 24, 1955.

[Rehearing denied November 28, 1955.]

[redacted]

*Marcus Evrard* and *Collins, Core & Collins,* for appellant.

*Shaw & Spencer* and *Shaver, Tackett & Jones,* for appellee.

LEE SEAMSTER, Chief Justice. Dr. L. B. Gunnels died a resident of Mena, Polk County, Arkansas, at the age of 88 years, on the 7th day of March, 1954. He was unmarried and without descendants. Dr. Gunnels was survived by one brother, J. B. Gunnels; two sisters, Lucy Jane Halfacre and Bettie Pennington; one niece, Gertrude Gunnels Bradshaw, daughter of a deceased brother;

and two grandnephews, James and Robert Anderson, brothers, who are grandsons of a deceased sister, all constituting the heirs at law of Dr. L. B. Gunnels.

On March 12, 1954, the petition to probate six sheets of holographic writings as the last will and testament of the deceased was filed in the Probate Court of Polk County, Arkansas. Five of these sheets were in identical form, with the exceptions that each contained a different beneficiary and a different list of enumerated property. Each of the five sheets contained in form the following:

"4/2/37 Mena Ark.

this is my last will.

I give, bequeath and devise to (here appears in each the beneficiary name. In one it is "my brother J. B. Gunnels"; in another, "my Niece, Gertrude Gunnels, Calvin's Daughter"; in another, "Esther Ruth"; in another, "my sister Jane Halfacre"; in another, "my sister Bettie Pennington") "in complete and perfect ownership all my right and property of every claim and Nature whether real Personal or mixed wherever situated as written below." (Then in each of these five sheets of holographic writings there follows a list of real and personal property, each list setting forth specific property and not duplicating any items set out in the other lists.)

/s/ L. B. Gunnels"

The sixth sheet of holographic writing contains the following:

"4/2/37 Mena Ark.

this is my last will.

I Give, bequeath and devise to my Nephews and Neices, that I havent given any property to all the Rest of my property (Then follows a list of real and personal items, still not duplicating any items set out in the other five sheets.)

Rest money after any Funeral expenses is Paid

/s/ L. B. Gunnels"

Each of the six sheets of holographic writings was complete in itself; that is, no portion of one sheet was carried over to the next sheet and each was separately headed, dated and signed by L. B. Gunnels. The six sheets were found together in an envelope marked "Last Will of L. B. Gunnels, In case of death to be opened and read by Fred C. Embry."

These six sheets of holographic writings constituted the entire proffered will of Dr. L. B. Gunnels. They were offered for probate by Olen Pennington, nephew of the deceased, and certain other relatives and heirs of the deceased. On March 13, 1954, the will was probated in common form without notice and Olen Pennington was appointed administrator with the will annexed.

Following entry of the order appointing him administrator, Olen Pennington commenced with the administration of the estate and filed an inventory and appraisal. On April 1, 1954, he filed a petition requesting certain constructions by the Probate Court of some of the provisions contained in the six sheets of the will. Notice of the filing of this petition was given, and as a result of this notice, Gertrude Bradshaw contested the probation of these six sheets as Dr. Gunnel's will. She was later joined by the other appellants herein.

The cause was tried by the Polk Probate Court on September 1st and 2nd, 1954. This litigation involved two phases, (1) the contest of the will by the appellants, and (2) determination as to the construction of certain provisions of the will in the event it should be admitted to probate. The Probate Court rendered a decision, contained in an opinion composed of two parts, the second of which was rendered on November 8, 1954. By virtue of that opinion, the court found that the six sheets of holographic writings, when viewed together, constituted one complete will and ordered such writings admitted to probate as the valid holographic will of Dr. L. B. Gunnels. It was the opinion of the trial court that the first five sheets naming individual legatees, be limited to the specific property listed on each sheet, and the wording

on the last page, when read together with the other five pages, shows an intent by the testator to give what is left of the estate to the nephews and nieces not remembered elsewhere in the will, therefore, it would constitute a residuary legacy and would pass all property not listed in the first five sheets of the will.

Appellants prosecute this appeal from the judgment of the Probate Court. They contend that the trial court's decision should be reversed for the following reasons: (1) the trial court failed to consider appellant's most serious objections to the probate of these six sheets; (2) each one of the five sheets naming specifically an individual legatee is a complete will in itself, each one effective to pass the entire estate to its respective legatee; resulting in each one of the five being in irreconcilable conflict with each one of the other four, so that they mutually destroy one another and none can be admitted to probate; (3) the sheet naming "nephews and nieces I havent given any property to" is too indefinite, both as to who is to take and what property is intended to pass thereunder, to qualify for probate; (4) the findings by the Probate Judge, that these six sheets before the Court constitute all the writings left by the testator as his last will, are against the preponderance of the evidence; (5) in the interest of future testators and the probate law generally, this collection of holographic sheets should be denied probate as a will; and, (6) the testator intended to limit each sheet to the specific property listed, and the findings of the Probate Judge to the contrary are against the preponderance of the evidence.

The appellants contend that each of the sheets is a complete will in itself, each effective to pass the entire estate to its respective legatee; resulting in each one of the sheets being in irreconcilable conflict with the others, so that they mutually destroy one another and none can be admitted to probate. The law is well settled as to a testator's right to make a number of testamentary documents, each dealing with a separate portion of his prop-

erty. In 57 Am. Jur., page 190, § 228, we find the following:

"SEPARATE INSTRUMENTS — It is elementary that a will may be comprised of two or more separate documents. A man can have only one will, but that will may consist of several different testamentary papers of different dates. It is the aggregate or the net result of several testamentary writings left by a decedent that constitutes his will, or, in other words the expression of his testamentary wishes. Such is the case not only where one instrument is a codicil to the other, or is incorporated in the other by reference, but also where the instruments are executed and attested as wills independently of one another with the formalities prescribed by statute, provided the one does not revoke the other, expressly or by reason of inconsistency between the instruments, in respect of their provisions. It is undisputed that a testator may, at his volition, make a number of testamentary documents each dealing with a separate portion of his property. A testator may with propriety execute one testamentary instrument disposing of his property at his domicil and another disposing of property located elsewhere."

Two or more wills may be probated and effectuated in the same way that a will and one or more codicils are construed together. The task confronting a court in construing a will is, of course, to ascertain the intent of the testator, and, in doing that, isolated words or sentences should not be considered by themselves, but the language of the whole document or documents, which taken together constitute the will, should be considered, and all parts of same, if possible, given effect. This must be done from the language used as it appears from the consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will. See *Clemenson* v. *Rebsamen,* 205 Ark. 123, 168 S. W. 2d 195; *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417.

When all of the competent and creditable testimony in the record is carefully considered together, a preponderance of the evidence sustains the six sheets of writing as the whole, valid and last unrevoked will of Dr. Gunnels. Counsel for appellants argue that there "may" have been other sheets, but there is no evidence of any other, and there is evidence that these six sheets compose the whole will. All six sheets are dated the same day; each follows a "will form" which Dr. Gunnels possessed; each page or sheet was signed by Dr. Gunnels; and, all six sheets were found pinned together. When all of the sheets are read together, they show an intent of the testator to leave separate portions of his estate to specific legatees. Therefore, after giving careful consideration to the first five points raised by the appellant for reversal, it is our opinion that the trial court's decision should be affirmed, as to that portion of the judgment that admitted the six holographic sheets to probate as the last will of Dr. Gunnels.

The sixth point raised by the appellants, "That the testator intended to limit each sheet to the specific property listed," calls for a more meticulous examination of the will from its four corners and a view of all of its terms.

The courts have, in a long list of cases, given recognition to certain general rules to be observed in the construing of a will. *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, is one of the leading cases which announced the general rule, that a will should be, if possible, construed so as to avoid intestacy. This case stated: "A testator is presumed to intend to dispose of his entire estate, and it is to be borne in mind in the construction of wills that they are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction." In this case, considerable weight was given to the introductory portion of the will, in which the testator said, among other things: "As to my worldly estate and all property, real, personal or mixed, of which

I shall die seized and possessed or to which I shall be entitled at the time of my decease, I devise . . . ''

The Galloway case was cited in *Barlow* v. *Cain,* 146 Ark. 160, 225 S. W. 228. The Barlow case reveals that Joseph Cain made a will, in which the following language appeared: ''And then after paying all my lawful debts, I give and bequeath and dispose of the residue of my estate real and personal, as follows towit:'' Here he gives specific real estate to his widow, son and daughter, as well as one dollar to each of the heirs of his two deceased daughters. In the 3rd clause of his will, he said: ''Also, it is my will that my son, T. F. Cain, take full control of all my notes and accounts that may be due or become due after my decease, and that he, my son, T. F. Cain, is to settle all of my affairs and pay all of my indebtedness against my estate.'' In construing this will, the court said: ''The language of the paragraph being insufficient to bequeath the personal estate, the testator died intestate as to the residue of the personal property, after the payment of all debts and small bequests provided in the will . . . ''

In the case of *Smith* v. *Smith,* 219 Ark. 304, 241 S. W. 2d 113, the following paragraph appeared in Dollie Smith's will: ''I give my home in Blytheville . . . to my daughter, Lorene (Smith) Smith to be used by her as a home as long as she wishes, and in case she should not use it as such and wish to sell it, then the proceeds to be divided between my son, Floyd Smith, and my daughter, Lorene (Smith) Smith in equal shares.'' In construing the above paragraph, the court said: ''The appellee relies also upon the presumption against partial intestacy to support her contention that she owns the fee. But this is merely a presumption, and it certainly does not operate to convert a life estate into a fee in every case in which the life estate might have been more accurately described. Here the presumption is materially weakened by the existence of other instances of partial intestacy in the same will. In devising her other two parcels of land Dollie Smith made no provision

for their devolution in the event that both her children died without issue, and hence the testatrix died partly intestate as to these tracts. In this situation we are more readily inclined to accept the existence of partial intestacy as to the land now in controversy."

In *Williams* v. *Norton,* 126 Ark. 503, 191 S. W. 34, we have a case where A. B. Williams died testate. He owned some 4,200 acres of land and certain personal property. He was survived by his widow, four sons and two daughters. Mr. Williams left a homestead and certain lands to the widow for life and disposed of his personal property. He appointed two of his sons executors and empowered them to collect his accounts and settle his debts, to rent or sell the rest of his real estate as in their opinion seemed best. The proceeds from the sale of real estate were to be paid ⅓ to the widow and ⅔ to his daughter, Kate Old, for the use of herself and children so long as she remained a widow.

The following paragraph appeared in his will: "If I have made any omissions in the directions about my bequests herein, my said executors are fully empowered to supply them. My son, R. B. Williams and I own some land jointly as tenants in common, which I wish disposed of as I have directed about my lands held in my own right. Any residuum not provided for herein I wish to be given to my daughter, Kate Old." In construing the will, the court stated, in part: "In the absence of any language in the will which either expressly or by necessary implication carries the idea that he intended to devise the fee simple title to anyone, the presumption against partial intestacy so far as the lands are concerned cannot be indulged.

"In the old English case of *Denn* v. *Gaskin,* 2 Cowp. 657 (1777), Lord Mansfield declared, that 'though the intention is ever so apparent, the heir at law must of course inherit unless the estate is given to somebody else.' . . .

"*Schauber* v. *Jackson,* 2 Wend., N. Y., 13, is one of the leading cases in this country. . . . The court for the correction of errors there held, 'if there is not sufficient in a will to take the case out of the rule that all of the estate which is not legally and sufficiently devised to some other person must go to the heir, the heir will take whatever may have been the intention of the testator.'

"Following this decision, the Supreme Courts of Virginia and Georgia, also in cases where there is an exhaustive review of the authorities, held that 'an heir can be disinherited only by express devise or necessary implication, so strong that a contrary intention cannot be supposed; that the heir cannot be disinherited unless the estate is given to somebody else.' *Boiseau* v. *Aldridges,* 5 Leigh's Rep. 222, 27 Am. Dec. 590; *Wright* v. *Hicks,* 12 Ga. 155, 56 Am. Dec. 451.

"In the last above case it was held (quoting syllabus): 'Intent to disinherit heir is essential to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent.' See, also, *Doe ex dem. Clendenning* v. *Lanius,* 3 Ind. 441, 56 Am. Dec. 518.

"Applying the doctrine of the above cases to the will under review, there is certainly no language in it that either expressly or by necessary implication overcomes the presumption that A. B. Williams intended that his real estate, subject to the uses to which he had subjected it under the provisions of his will, should go in the legal channel of descent. To hold otherwise would be to make a will for the testator, and one too that would create an unjust discrimination in favor of the heirs of Mrs. E. C. Old as against the other heirs of the children of A. B. Williams."

In order to discover the dominant testamentary scheme or overall intention of the testator, we must examine the manner in which Dr. Gunnels prepared his will, together with the provisions as contained in the six

sheets of the will. The apparent meaning of particular words, phrases or provisions should be harmonized, if possible, to such scheme, plan or dominant purpose that appears to be the intention of the testator.

The instant case reveals that Dr. Gunnels had evolved a plan whereby certain specific properties were to be left to specified legatees. The testator, in all probability, had before him a list of the properties to be disposed of, at the time he made his will, or at least he had said properties well in mind. He refers to the property which he bequeathed and devised as "my property." We denote that no reference is made to his estate; to property that he might own at his death (except money); to property he might die seized and possessed; or, any of the usual terms that would indicate that he meant to dispose of after-acquired property in the will.

Each of the first five sheets contain the language "I give, bequeath and devise (to a named beneficiary) in complete and perfect ownership all my right and property of every claim and nature whether real Personal or mixed wherever situated as written below," then he describes certain specific properties. In the sixth sheet, he devised to his nephews and nieces "all the rest of my property," then without punctuation or further stating as written below, he described six separate tracts of real estate, $2,000 in government bonds, bank stock, a mule, two cattles and "rest money after funeral expenses is paid." The language used by the testator in disposing of his money in this manner indicates that he knew the proper language to use in disposing of after-acquired property. The failure to use such language indicates that he intended to devise only the property he specifically set out in his will.

In view of the unusual manner in which Dr. Gunnels prepared his will and after examining the provisions of the will, we are unable to say that he intended to leave the nephews and nieces his after-acquired property, since he limited them to specific property in his will. The testator disposed of "all my right and property" in the

first five sheets of his will; the sixth sheet disposes of "all the rest of my property." In each sheet of the will he specifically sets out with particularity, each item of property that he wishes each beneficiary to have at the time of his death. We find that the testator died intestate as to all of the property that he owned at the time of his death, with the exception of that property which was specifically described in his will.

In regard to partial intestacy, the Ark. Stats., Section 60-411, provides as follows:

"PARTIAL INTESTACY — If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided by law with respect to the estate of intestates." See also *Wyatt* v. *Henry,* 121 Ark. 479, 181 S. W. 297.

That portion of the judgment of the Probate Court, construing the will to give the nephews and nieces all the balance of the property belonging to the estate, is reversed and remanded, with instructions to proceed with the administration of the estate according to law and not inconsistent with this opinion.

WELLS *v.* HILL.

5-687 283 S. W. 2d 116

Opinion delivered October 24, 1955.

*Thorp Thomas, James L. Sloan* and *Roy Finch, Jr.,* for appellant.

*Spitzberg, Mitchell & Hays,* for appellee.

J. Seaborn Holt, Associate Justice. March 2, 1953 Appellant Wells (Seller) and Appellee Hill (Purchaser) entered into the following "Sales Agreement and Note": "L. L. Wells does hereby sell and convey to James R. Hill the Dairy Bar store interest he now holds, and known as Jim's Dairy Bar, located at 3601 Conway Pike, North Little Rock, Arkansas, including all equipment, prepaid insurance, meter deposits and does hereby sublease said property as follows: Total price $5,647.00 to be paid as follows: Down payment of $1,400.00 is hereby acknowledged. Purchaser is to assume 14 monthly payments of $171.71 per month and will make these payments to L. L. Wells on the first day of each month commencing April 1, 1953 and terminating when paid in full for a total of payments amounting to $2,403.94 which leaves a balance of $1,843.06 plus $110.04 interest for a total amount of $1,953.10 owed to L. L. Wells to be paid as follows: $108.50 per month commencing April 1, 1953 and each month to and including November 1, 1953 and said $108.50 payments to commence again March 1, 1954 to and including November 1, 1954, making a total of eighteen (18) months at $108.50 and a grand total of $1,953.00.

"Rental on said building will be paid direct to M. E. Witkowski, (the owner) as follows, $100.00 per month commencing March 1, 1953 to and including November 1, 1953 and same each and every year so long as lease on said building is in effect or until March 1, 1963 if purchaser so desires."

Operations under this instrument began March 1953 and continued until November 1953. Hill made the initial payment of $1,400.00 and in addition, seven (7) of the $171.71 installments. None of the $108.50 installments were paid. In December 1953 Hill ceased operations and Wells took charge of the business and shortly thereafter, in March 1954, Wells entered into a contract with Andrew Nahlen to sell to Nahlen the business for $5,500.00, payable $2,000.00 down and the balance at the rate of 50¢ on each gallon of ice cream mix sold by Nah-

len, with a monthly accounting to Wells of the sales. Rent of $100.00 per month on the building, to Witkowski (owner), was to be paid direct to Wells. Subsequent to this sales contract of Wells to Nahlen, Hill brought the present suit against Wells for his equity in the business and for an accounting. Hill alleged that he had paid Wells a total of $2,953.43 under the terms of his agreement above with Wells, and further, "During the month of March, 1954, the defendant (Wells) arranged for a sale of the business referred to in the attached contract for a consideration represented by him to be $5,500.00. This sale was made under an agreement with the plaintiff (Hill) whereby the business would be sold and the plaintiff and the defendant would share in the proceeds of the sale in proportion to the amount that each had invested in the business. The defendant had paid the plaintiff the sum of $300.00 as a part payment of the latter's share in the proceeds from the sale of this business. The defendant has promised to account to the plaintiff for the latter's share of the proceeds from this sale, but he has failed and refused to do so." Appellant's answer was in effect a denial of every allegation in the complaint.

Trial resulted in a finding by the Court that Wells was acting as the agent of Hill when he (Wells) sold the business to Nahlen and that Hill had never surrendered any equity he might have in the business and was entitled to an accounting. Wells was credited with the purchase price stipulated in the sales contract between him and Hill and the remaining balance of the sales contract between Wells and Nahlen was ordered paid to Hill. From the decree is this Appeal.

For reversal, Appellant says: "The decision of the Trial Court is contrary to the evidence and the law." We do not agree with either contention.

The finding of the Court that Wells was acting as Hill's agent when he sold the business involved to Nahlen is, we hold, not against the preponderance of the evidence. Hill testified in effect that he decided to sell

the business in January 1955. When he told Wells that he wanted to sell, Wells tried to dissuade him, but when Wells saw that he (Hill) was determined to sell, Wells said: " 'We will go ahead and sell the store and get your equity out of it.' It was approximately the latter part of February or a few days after we made this agreement I went out to the store and cleaned it up and painted it and gave Mr. Wells one key to the store. The latter part of February Mr. Wells sold the store to Andy Nahlen. The 5th of March I went out to the store to teach Mr. Nahlen to operate the machine and draw the product out of the syrup and the next day I went back to help Mr. Nahlen get one of the machines running that had broken down, and approximately a week later Mr. Wells came to Rebsamen and gave me a check for $300.00 and said, 'We will get together next week and settle out the rest of your equity,' . . . I never did make an agreement to terminate the first contract, (Wells-Hill)." The record reflects that Wells, in response to request for admission of facts by Hill, stated: "Defendant admits that he made a statement to the plaintiff subsequent to the sale of the business to Mr. Nahlen that defendant did not know the plaintiff's share of the proceeds from this sale but that defendant would have his accountant determine plaintiff's share."

There was other evidence tending to corroborate Hill. While Wells' testimony tended to contradict that offered by Hill, after a careful review of it all, without detailing it, we are unable to say, on trial de novo here, that the Court's findings were against the preponderance thereof. *Little* v. *Farm Bureau Co-Operative Mill & Supply,* 224 Ark. 289, 272 S. W. 2d 818, and *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686.

Having concluded that the Trial Court correctly found that Wells acted as Hill's agent in selling the business, then certainly as such agent the law required him (Wells) to account to his principal (Hill) for any funds which he received for Hill. Affirmed.

ASSOCIATED MECHANICAL CONTRACTORS OF ARKANSAS, ETC.
*v.* ARKANSAS LOUISIANA GAS COMPANY.

5-734 283 S. W. 2d 123

Opinion delivered October 24, 1955.

[redacted]

*Bailey, Warren & Bullion,* for appellant.

*Lasley, Spitzberg, Mitchell & Hays* and *Moore, Burrow, Chowning & Mitchell,* for appellee.

ED. F. MCFADDIN, Associate Justice. The question to be decided is whether the Arkansas Public Service Commission (hereinafter called "Commission") has the power to prohibit the Arkansas Louisiana Gas Company (hereinafter called "Appellee") from selling and installing air-conditioning equipment in competition with appellants. The Commission held itself to be without power to make such order; the Circuit Court agreed with the Commission; and the case is here on appeal.

In May 1954 the Associated Mechanical Contractors of Arkansas, Refrigeration and Air-Conditioning Division (hereinafter called "appellants"), filed before the Commission a complaint against appellee. The complaint

alleged: that the appellants constituted a mercantile association in the State of Arkansas; that § 73-216, Ark. Stats., allowed any "mercantile association" to file a complaint before the Commission against any public utility involving the "furnishing of service"; that appellee, as a public utility engaged in the sale of gas, was under the jurisdiction of the Commission (§ 73-218, Ark. Stats.); and that the Commission had the power to ascertain and fix the "service to be . . . furnished" by any utility. The complaint (therein referring to appellants as "complainants" and appellee as "defendant") contained the following allegations:

"The defendant for a number of years has established and followed a practice of dealing in the retail sale and installation of appliances, including air-conditioning units and equipment. . . . Complainants assert that the merchandising of fixtures and appliances is properly a non-public utility operation. Defendant occupies the favored position of a protected monopoly in its public utility operations with an assured profit, part of which profit it is using in a destructive competition with private enterprise. It has sustained a loss of approximately seventy thousand dollars for each of the years 1952 and 1953 in said non-public utility operations through its practices of underbidding its business competitors. . . ."

The prayer of the complaint was that appellee be prohibited from engaging in private business. Appellee filed before the Commission a motion to dismiss, which said:

"(1) This Commission has no jurisdiction of the subject matter of the complaint.

"(2) This Commission has no jurisdiction or power to issue cease and desist order as prayed for by complainants."

As aforesaid, the Commission sustained the motion to dismiss.

I. *Jurisdiction of the Commission.* The threshold question is whether the Commission has jurisdiction to grant relief in a case like this one. In the case of *City of Ft. Smith* v. *Dept. of Pub. Utilities,* 195 Ark. 513, 113 S. W. 2d 100, we said of the extent of jurisdiction of the Commission:

"The Department is an administrative body, created by the Legislature, and, as such, it may perform only such duties and exercise such jurisdiction *delegated to it by the Legislature* as the law-making body itself could constitutionally exercise."[1] (Italics our own.)

Therefore we search our Statutes to see the power of the Commission. Over the years we have had a series of Legislative enactments which have been designed to regulate public utilities. Without going too far back into history or attempting to give all the Acts and amendments, we begin with Act No. 571 of 1919, which created the Arkansas Corporation Commission; Act No. 124 of 1921 amended the 1919 Act; Act No. 72 of 1933 created the Fact Finding Commission; Act No. 324 of 1935 was a comprehensive Act[2] that created the Department of Public Utilities; and Act No. 40 of 1945 consolidated the Arkansas Corporation Commission and the Department of Public Utilities into the "Arkansas Public Service Commission," which is the present name of the agency.

We give the foregoing list of some of the Acts for the purpose of pointing out that in Section 11 of Act 571 of 1919 there was a paragraph which said:

"The Commission shall have general supervision of all persons, firms or corporations having authority . . . to lay . . . pipes . . . for the purpose of furnishing and distributing gas. . . ."

[1] The quoted language is in accord with the holdings of other courts on the same question, some of which are: *West* v. *Sun Cab Co.* (Md.), 154 Atl. 100; *State ex rel. Utility Dist.* v. *Dept. of Pub. Serv.* (Wash.), 150 Pac. 2d 709; and *Taylor* v. *Mich. Pub. Util. Comm.* (Mich.), 186 N. W. 485.

[2] Sec. 19 (6) of the Act No. 324 of 1935 transferred to the Department of Public Utilities the powers of the Arkansas Corporation Commission over utilities.

The quoted "general supervision" paragraph in the 1919 Act was *eliminated* by § 8 of the Act No. 123 of 1921;[3] and we do not find any such "general supervision" language in any of our subsequent legislation. Therefore, it seems clear that the Arkansas Public Service Commission does not have "general supervision" over *all* of the dealings of a corporation that is a public utility, but only has *supervision* within the Legislative grant of those dealings wherein the corporation, in fact, acts as a *public utility.*

Just as a municipal corporation may act in either a governmental capacity or a proprietary capacity,[4] so also a public service corporation may act in some matters of business as a private corporation. In 73 C. J. S. 1003 cases are cited to sustain this rule:

"A public utility may act in a private capacity as distinguished from its public capacity, and in so doing is subject to the same rules as a private person. The fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by it a public service, with the consequent duties and burdens, but it may act in a private capacity as distinguished from its public capacity, and in so doing is subject to the same rules as a private person."

Appellee's charter gives it the power to sell equipment, so it is not claimed that appellee is acting *ultra vires;* besides, injunction against *ultra vires* acts of a corporation is a matter for a court and not a point on which the Commission might bottom its jurisdiction.[5] Whether the Legislature has the power to prohibit a public utility from acting in a private capacity is a question not before us; so we need not consider the arguments contained in the case of *Capitol Gas & Elec. Co.* v. *Boynton,* 137 Kan. 717, 22 Pac. 2d 958. The basis for our con-

[3] The fact of this elimination is mentioned in the annotation following § 73-123, Ark. Stats.

[4] See *Town of Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319; and *Arkansas Valley Compress* v. *Morgan,* 217 Ark. 161, 229 S. W. 2d 133.

[5] As to injunction against *ultra vires* acts, see generally 32 C. J. 234 and 43 C. J. S. 605.

clusion is that our present Statutes do not give the Commission authority to act in a case like this one [6] involving the non-public utility business of a corporation.

II. *Losses in Private Business Matters.* Finally, appellants urge that the appellee is sustaining an annual loss in this private business of selling air-conditioning equipment, and that this loss is carried into the rate base for the public utility charges that the appellee makes. Such an argument is a matter that addresses itself to the Public Service Commission in fixing a rate base; but such argument cannot be used to confer jurisdiction on the Commission in a case like the appellants now have before us.

Affirmed.

---

[6] Cases from other Public Service Commissions are in accord with the holding of the Arkansas Public Service Commission on this point. See *City Ice & Fuel Co.* v. *Consolidated Edison Co. (N. Y. Dept. of Public Service 1939)*, 29 P. U. R. (N. S.) 193; *Master Plbrs. Assn.* v. *Brockton Gas Lt. Co. (Mass. Dept. of Public Utilities 1935)*, 36 P. U. R. (N. S.) 364; *In Re Milwaukee Gas Lt. Co. (Wis. P. S. Com. 1942)*, 44 P. U. R. (N. S.) 194; and see also *In Re City Ice & Fuel Co. (N. Y. Sup. Ct. App. Div. 1940)*, 37 P. U. R. (N. S.) 218 and 23 N. Y. S. (2) 376.

NELMS *v.* STEELHAMMER.

5-737 283 S. W. 2d 118

Opinion delivered October 24, 1955.

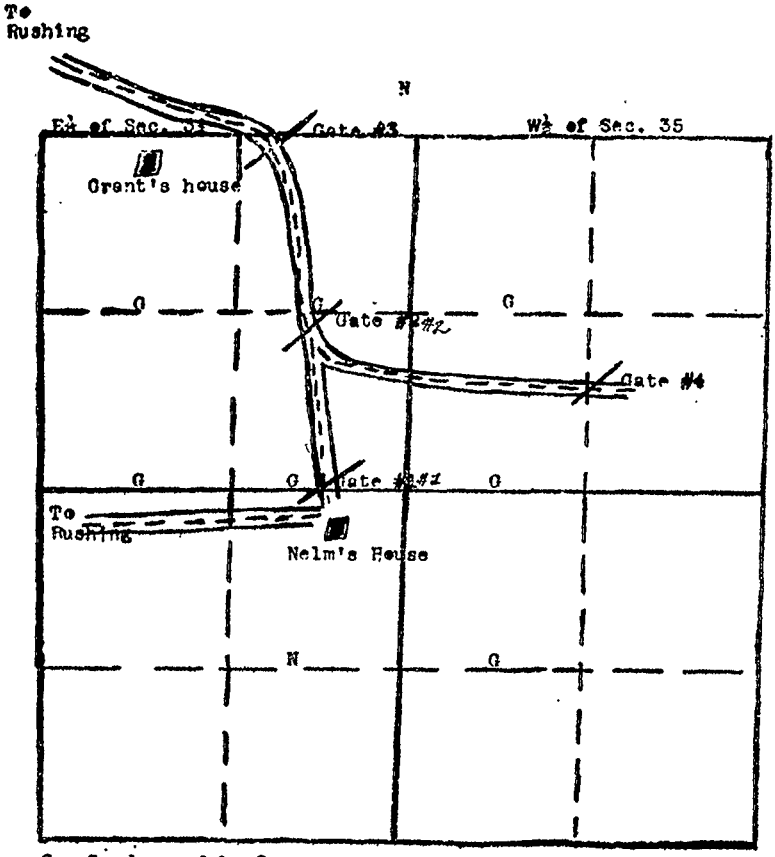
*Ivan Williamson* and *Ben Williamson,* for appellant.

*W. J. Arnold,* for appellee.

MINOR W. MILLWEE, Associate Justice. This appeal is from a decree denying the petition of appellant, Joe Nelms, for a permanent injunction to restrain appellees from interfering with appellant's use of a certain road which he claimed had become a public highway by prescription.

Appellees, James E. Grant and wife, purchased 400 acres in Stone County in December, 1949, which included

lands joining appellant's 40-acre tract on the north and east as shown by the following sketch introduced by appellees:




G---Land owned by Grants
N---Land owned by Nelms

Appellant and his witnesses testified that the roadway shown on the sketch had been used by two or three local landowners and the public generally over a period of 35 to 50 years as an outlet to the village of Rushing and other points on State Highway No. 9. When the Grants purchased their lands in 1949, appellant was living near Gate 4 in a house that was torn down shortly thereafter when he moved to the residence which he built near Gate 1. At one time he had lived in his father's home, which was also located near Gate 1, but this house

was torn down 8 or 10 years prior to the trial. Appellant also lived in Indiana for 1½ years, beginning in 1948. He admitted that the road in question had been moved from time to time and that there were three different roads over the lands. He assisted appellees in building a fence on the north line of his property in 1950 when Gate 1 was put in, but he could not remember the location or date of installation of the other gates.

A good portion of the lands in question had been open and unenclosed for long periods prior to 1949. However, small portions of the land had been cultivated at different times. John Moore, appellees' predecessor in title, was cultivating a small acreage and maintaining Gates 2 and 3 in 1950. A witness for appellees testified that these were old gates when he first noticed them about 7 years prior to the trial and there was other evidence that the gates had been in existence and use for 8 or 10 years in 1950 when appellees completely fenced their lands as a stock farm and installed Gates 1 and 4. Gates 1, 3 and 4 were necessary to keep livestock off the outside range and Gate 2 was used to protect a cultivated field which was separated from the pasture lands.

In 1952, Mrs. Grant closed Gate 1 because the gates were continually being left open and torn down. A suit then filed by appellant was dismissed under an arrangement whereby appellees installed cattle guards at Gates 2 and 3, which proved inadequate or unsatisfactory, and the gates were restored. When someone, identified by Mrs. Grant as the appellant, persisted in leaving open and tearing down the gates, Mrs. Grant again closed Gate 1 by locking it and the instant suit was filed.

Evidence introduced by both sides tended to show that the portion of the road from Gate 1 to Gate 2 had not been used for a period estimated at 8 to 12 years prior to 1949. Mrs. Grant was positive that there was no road there in 1949 nor any visible evidence that a road had ever been there. Much of the road traversed lands which were unenclosed and unoccupied for a considerable portion of the time in which adverse use was claimed. The land in the vicinity of Gates 1 and 4 was first fenced

in 1950 and the land between Gates 2 and 3 was allowed to "lay out" much of the time. Different ways were used over the lands at different times. Evidence offered by appellant in an effort to show that the road extending west from his house near Gate 1 was inadequate for vehicular travel was first admitted, but appellees' offer to show that said road furnished an adequate outlet to the highway without crossing their property was rejected on the ground that it was immaterial to the issue involved.

The rule applicable to the establishment of a public highway by prescription over private lands was announced in *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331, where this court held: "A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it." Another well-settled rule is that where a road is used by the public across unoccupied and unenclosed lands, such use is presumed to be permissive. *Brumley* v. *State,* 83 Ark. 236, 103 S. W. 615. We have also held that if the public acquiesces for more than seven years in the existence of a gate across a road established by prescription, its conduct amounts to an abandonment of the prescriptive right, entitling the owner to close the gate permanently. *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393; *Kennedy* v. *Crouse,* 214 Ark. 830, 218 S. W. 2d 375.

In denying the prayer for a permanent injunction, the chancellor pointed out the changing routes of the road over the years and the fact that much of the land was open and unenclosed while part of it was fenced with gates across the road. There was a finding that the evidence was insufficient to establish a public way by prescription because the use of the road over the years was permissive and not adverse. We cannot say this

finding is against the preponderance of the evidence. Even if it be held that a public highway was at one time established by prescription, the evidence also tends to show that appellant, and the public generally, acquiesced in the use of Gates 2 and 3 for a period of 8 to 10 years prior to 1950, thereby losing any prescriptive right previously acquired. The facts here are similar to those in *Porter* v. *Huff, supra,* where the court said: "When appellee enclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right."

Affirmed.

CRAIG *v.* BARRON.

5-753 283 S. W. 2d 127

Opinion delivered October 24, 1955.

*Dean R. Morley, Ike Murry* and *Frank H. Cox,* for appellant.

*Ed E. Ashbaugh* and *Alonzo Camp,* for appellee.

GEORGE ROSE SMITH, J. This is a contest of a local option election that was held in Fourche Township, Pulaski County, on June 1, 1954. As originally certified the vote was in favor of the manufacture and sale of intoxicants. A petition to contest the election was then filed by the appellees. The county court dismissed the proceeding, but on appeal the circuit court reinstated the petition and tried the cause. The court found that a total of fifty-four votes had been illegally cast in favor of the continued sale of intoxicants; the elimination of these votes changed the election result from wet to dry.

The appellants urge two principal points for reversal, both of which are well taken. First, it is contended that the contestants' petition was not filed in the county court within the time allowed by law. The result of the election was declared by the county court on June 4. The statute requires that a contest be filed within ten days and invests the county court with original jurisdiction of the proceeding. Ark. Stats. 1947, §§ 48-820 and 3-1205; *Hubbard* v. *Watson,* 218 Ark. 737, 238 S. W. 2d 656. Thus the appellees' petition should have been filed in the county court by June 14, 1954.

The petition was in fact filed with the county clerk on June 9, but it was addressed to the County Board of Election Commissioners. That body is charged, among other things, with the safekeeping of original ballot boxes. Ark. Stats., §§ 3-1008, 3-1013. This petition asks that the board impound the absentee ballot box, that the petitioners be permitted to examine the ballots, and that proof be taken to determine which ballots were irregular. In publishing the statutory notice of the filing of the petition (Ark. Stats., § 48-820), the contestants stated that "a petition has been filed with the County Board of Election Commissioners."

It was not until July 2 that the contestants filed a supplemental petition asking the county court to take jurisdiction of the case. That court correctly dismissed the proceeding as being out of time. The only petition filed within the statutory time limit was addressed to

the County Board of Election Commissioners and sought relief from that body alone. Had the law directed that the petition be filed with the board in question it is plain enough that this pleading would have been lodged in the proper forum. But the tribunal having jurisdiction is the county court, and it cannot very well be said that this petition was pending before the board and the court at the same time.

In defending their position the appellees put much stress on the fact that the petition was filed in the office of the county clerk. It does not follow, however, that the petition was therefore pending in the county court. The county clerk, in addition to being the clerk of the county court, is the clerk of the probate court, the juvenile court, and the quorum court; he is also the designated custodian of many public records. It is quite apparent that the mere deposit of a paper with the county clerk does not convert it into a pleading addressed to the county court. We must conclude that the appellees' petition was originally filed with the County Board of Election Commissioners, which was the wrong forum. The case of *Casey* v. *Burdine,* 214 Ark. 680, 217 S. W. 2d 613, is controlling as to the lack of statutory authority for a belated transfer of the cause in such a situation.

Second, it is insisted that the appellants' demurrer to the contestants' petition should have been sustained when the case reached the circuit court. We agree with this alternative contention, but it need not be discussed at length. The contestants' statutory notice pretty well described the petition by stating that it asked that the ballots "be re-examined for irregularities and that if said irregularities be found, said irregular ballots be stricken from the rolls." The petition does not charge that any specified vote was illegally cast; instead, it asks that the contestants be permitted to examine the ballots "in order that proof may be taken to determine which ballots are irregular." It is true that the petition contains conclusions of law to the effect that illegal votes were cast by the wets, but the petition contains no information that would identify any allegedly illegal voter.

We are not convinced that the legislature, in requiring the contestants to file within ten days "a written statement of the grounds of contest" (Ark. Stats., § 48-820), meant to sanction a petition that might conceivably consist of a mere recitation, in general language, of every election irregularity to be found in the books. Yet the statute would have to be so interpreted if this petition is to be held sufficient.

Reversed and dismissed.

HARRIS *v.* BROOKS.

5-711 283 S. W. 2d 129

Opinion delivered October 24, 1955.

*William H. Donham,* for appellant.

*John D. Eldridge, Jr.,* for appellee.

PAUL WARD, Associate Justice. The issues presented by this appeal relate to the relative rights of riparian landowners to the use of a privately owned non-navigable lake and the water therein.

Appellant, Theo Mashburn, lessee of riparian landowners conducts a commercial boating and fishing enterprise. In this business he rents cabins, sells fishing bait and equipment, and rents boats to members of the general public who desire to use the lake for fishing and other recreational purposes. He and his lessors filed a complaint in chancery court on July 10, 1954, to enjoin appellees from pumping water from the lake to irrigate a rice crop, alleging that, as of that date, appellees had reduced the water level of the lake to such an extent as to make the lake unsuitable "for fishing, recreation, or

other lawful purposes." After a lengthy hearing, the Chancellor denied injunctive relief, and this appeal is prosecuted to reverse the Chancellor's decision.

*FACTUAL BACKGROUND.* Horseshoe Lake, located about 3 miles south of Augusta, is approximately 3 miles long and 300 feet wide, and, as the name implies, resembles a horseshoe in shape. Appellees, John Brooks and John Brooks, Jr., are lessees of Ector Johnson who owns a large tract of land adjacent to the lake, including three-fourths of the lake bed.

For a number of years appellees have intermittently raised rice on Johnson's land and have each year, including 1954, irrigated the rice with water pumped from the lake. They pumped no more water in 1954 than they did in 1951 and 1952, no rice being raised in 1953. Approximately 190 acres were cultivated in rice in 1954.

The rest of the lake bed and the adjoining land is divided into four parts, each part owned by a different person or group of persons. One such part is owned by Ed Harris, Jesse Harris, Alice Lynch and Dora Balkin who are also appellants. In March, 1954, Mashburn leased from the above named appellants a relatively small camp site on the bank of the lake and installed the business above mentioned at a cost of approximately $8,000, including boats, cabins, and fishing equipment. Mashburn began operating his business about the first of April, 1954, and fishing and boat rentals were satisfactory from that time until about July 1st or 4th when, he says, the fish quit biting and his income from that source and boat rentals was reduced to practically nothing.

Appellees began pumping water with an 8-inch intake on May 25, 1954, and continued pumping until this suit was filed on July 10, and then until about August 20th. They quit pumping at this time because it was discovered fish life was being endangered. The trial was had September 28, 1954, and the decree was rendered December 29, 1954.

*THE TESTIMONY.* Because of the disposition we hereafter make of this case, it would serve no useful purpose to set out the voluminous testimony in detail or attempt to evaluate all the conflicting portions thereof. The burden of appellants' testimony, given by residents who had observed the lake over a period of years and by those familiar with fish life and sea level calculations, was directed at establishing the *normal* or *medium* water level of the lake. The years 1952, 1953 and 1954 were unusually dry and the water levels in similar lakes in the same general area were unusually low in August and September of 1954. During August 1954 Horseshoe Lake was below "normal," but it is not entirely clear from the testimony that this was true on July 10 when the suit was filed. It also appears that during the stated period the water had receded from the bank where Mashburn's boats were usually docked, making it impossible for him to rent them to the public. There is strong testimony, disputed by appellees, that the *normal* level of the lake is 189.67 feet above sea level and that the water was below this level on July 10. Unquestionably the water was below normal when this suit was tried the latter part of September, 1954.

On the part of appellees it was attempted to show that; they had used the water for irrigation several years dating back to 1931 and Mashburn knew this when he rented the camp site; although they had been pumping regularly since May 25, 1954, the water did not begin to fall in the lake until July 1st or 4th; an agent of the Arkansas Game and Fish Commission examined the lake and the water about July 2nd and found no condition endangering fish life, and similar examinations after suit was filed showed the same condition, and; they stopped pumping about August 20th when they first learned that fish life was being endangered.

*ISSUES CLARIFIED.* In refusing to issue the injunction the Chancellor made no finding of facts, and did not state the ground upon which his decision rested. Appellants strongly insist that the Chancellor was forced by the testimony to conclude first that the normal level

of the lake was 189.67 feet above sea level and second that the water in the lake was at or below this level when the suit was filed on July 10th. This being true, appellants say, it was error for the Chancellor to refuse to enjoin appellees from pumping water out of the lake. If it be conceded that the testimony does show and the Chancellor should have found that the water in Horseshoe Lake was at or below the normal level when this suit was filed on July 10th, then appellants would have been entitled to an injunction provided this case was decided strictly under the uniform flow theory mentioned hereafter. However as explained later we are not bound by this theory in this state. It appears to us there might have been some confusion as to the ground upon which appellants based their contention for relief. Under the pleadings it appears that they may be asking for relief on two separate grounds: (a) The right to fish and (b) The right to conduct a commercial boating enterprise. It was incumbent upon appellants to show that one or both rights were unreasonably interfered with when the water level sank below "normal." It is difficult to tell whether the testimony establishes this fact in either instance. (a) The only testimony in the first instance is that fish quit biting somewhere about the 4th of July but there was no conclusive evidence that this was caused by the lake being below "normal" level. It is common knowledge that fish quit biting sometime for no apparent good reason. There was no testimony that fish life was endangered before July 10th but on the other hand there was positive testimony to the contrary. (b) Likewise there was no conclusive testimony showing that it was impractical to dock or run boats on the lake prior to July 10th. Moreover it would be pure conjecture to say that the same water level, whether normal or otherwise, controlled both fishing and boating. Certainly appellants made no attempt to make any distinction either in the pleadings or by the testimony between the two causes of action.

In view of the above situation it is urged by appellees that the case should therefore be affirmed, but we have concluded that the best interest of the parties hereto

and the public in general will be served by concluding this case in the light of the announcements hereafter made and the conclusions hereafter reached. Before attempting such conclusion it appears proper to make some general observations relative to the law regulating the use of water in lakes and streams.

*TWO BASIC THEORIES.* Generally speaking two separate and distinct theories or doctrines regarding the right to use water are recognized. One is commonly called the "Appropriation Doctrine" and the other is the "Riparian Doctrine."

*Appropriation Doctrine.* Since it is unnecessary to do so we make no attempt to discuss the varied implications of this doctrine. Generally speaking, under this doctrine, some governmental agency, acting under constitutional or legislative authority, apportions water to contesting claimants. It has never been adopted in this state, but has been in about 17 western states. This doctrine is inconsistent with the common law relative to water rights in force in this and many other states. One principal distinction between this doctrine and the riparian doctrine is that under the former the use is not limited to riparian landowners.[1]

*Riparian Doctrine.* This doctrine, long in force in this and many other states, is based on the old common law which gave to the owners of land bordering on streams the right to use the water therefrom for certain purposes, and this right was considered an incident to the ownership of land. Originally it apparently accorded the landowners the right to have the water maintained at its normal level, subject to use for strictly domestic purposes. Later it became evident that this strict limitation placed on the use of water was unreasonable and

[1] Wells A. Hutchins, U. S. Department of Agriculture in a paper presented before the Midwestern States Flood Control Conference, East Lansing, Michigan, on June 15, 1954, among other things, said:

"The effect of the repudiation of a common law system and its complete replacement by an appropriative system is to deny the right of an owner of land bordering a stream . . . to divert and make use of the water solely by reason of his ownership of the land; to declare all such waters to be the property of the state, and; to make all waters . . . open to appropriation for beneficial use. . . ."

unutilitarian. Consequently it was not long before the demand for a greater use of water caused a relaxation of the strict limitations placed on its use and this doctrine came to be divided into (a) the natural flow theory and (b) the reasonable use theory.

(a) *Natural Flow Theory.* Generally speaking again, under the natural flow theory, a riparian owner can take water for domestic purposes only, such as water for the family, livestock, and gardening, and he is entitled to have the water in the stream or lake upon which he borders kept at the normal level. There are some expressions in the opinions of this court indicating that we have recognized this theory, at least to a certain extent.[2]

*Reasonable Use Theory.* This theory appears to be based on the necessity and desirability of deriving greater benefits from the use of our abundant supply of water. It recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used without causing unreasonable damage to other riparian owners. The progress of civilization, particularly in regard to manufacturing, irrigation, and recreation, has forced the realization that a strict adherence to the uninterrupted flow doctrine placed an unwarranted limitation on the use of water, and consequently the courts developed what we now call the reasonable use theory. This theory is of course subject to different interpretations and limita-

[2] In *St. Louis Southwestern Railway Company* v. *Mackey,* 95 Ark. 297, 129 S. W. 78, at page 299 of Ark. Reports, it was said: "It is the right of each proprietor along a natural drain or watercourse to insist that the water shall continue to flow as it has been used and accustomed to do so; . . ."

In *Taylor* v. *Rudy,* 99 Ark. 128, 137 S. W. 574, this language was used at page 132 of the Ark. Reports: "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course without obstruction, diversion or corruption."

In *Meriwether Sand & Gravel Company* v. *State Ex Rel. Attorney General,* 181 Ark. 216, 26 S. W. 2d 57, at page 226 of the Ark. Reports, it was said: "Every such proprietor is entitled to the usual flow of a stream in its natural channel over his land, undiminished in quantity and unimpaired in quality, subject to the reasonable use by upper proprietors, and with the right to make any reasonable use of the water necessary for his convenience or pleasure, including in non-navigable waters, the exclusive privilege of taking fish from the stream."

tions. In 56 Am. Jur., page 728, it is stated that "The rights of riparian proprietors on both navigable and unnavigable streams are to a great extent mutual, common, or correlative. The use of the stream or water by each proprietor is therefore limited to what is reasonable, having due regard for the rights of others above, below, or on the opposite shore. In general, the special rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon, qualified only by the correlative rights of other riparian owners, and by certain rights of the public, and they are to be so exercised as not to injure others in the enjoyment of their rights." It has been stated that each riparian owner has an equal right to make a reasonable use of waters subject to the equal rights of other owners to make the reasonable use (*U. S.* v. *Willow River Power Co.,* 324 U. S. 499, 65 S. C. 761, 89 L. Ed. 1101). The purpose of the law is to secure to each riparian owner equality in the use of water as near as may be by requiring each to exercise his right reasonably and with due regard to the rights of others similarly situated. (*Meng.* v. *Coffey,* 67 Neb. 500, 93 N. W. 713, 108 Am. St. Rep. 697).

This court has to some extent recognized the reasonable use theory (*Thomas* v. *LaCotts,* 222 Ark. 171, 257 S. W. 2d 936; *Ralph R. Harrell, et al.,* v. *City of Conway, et al.,* 224 Ark. 100, 271 S. W. 2d 924, but we have also said (in the *City of Conway* case) that the uniform flow theory and the reasonable use theory are inconsistent and, further that we had not yet made a choice between them. It is not clear that we made a choice in that case. The nucleus of this opinion is, therefore, a definite acceptance of the reasonable use theory. We do not understand that the two theories will necessarily clash in every case, but where there is an inconsistency, and where vested rights may not prevent, it is our conclusion that the reasonable use theory should control.

In embracing the reasonable use theory we caution, however, that we are not necessarily adopting all the interpretations given it by the decisions of other states,

and that our own interpretation will be developed in the future as occasions arise. Nor is it intended hereby that we will not in the future, under certain circumstances, possibly adhere to some phases of the uniform flow system. It is recognized that in some instances vested rights may have accrued to riparian landowners and we could not, of course, constitutionally negate those rights.[3]

It should also be made clear that nothing in this opinion is intended to or can infringe upon the powers of the Arkansas State Game and Fish Commission as invested by Amendment No. 35 to the Constitution of this State. It is recognized that said Commission has the power to propagate, preserve, and protect fish in streams and lakes. In exercising this power the Commission will undoubtedly be interested in some instances in the amount of water that may be removed from lakes or streams where injury to fish life is involved.

The result of our examination of the decisions of this court and other authorities relative to the use by riparian proprietors of water in non-navigable lakes and streams justifies the enunciation of the following general rules and principles:

(a) The right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation.[4]

(b) Other than the use mentioned above, all other lawful uses of water are equal.[5]

---

[3] In the case of *Meriwether Sand & Gravel Company* v. *State Ex Rel. Attorney General, supra,* at page 226, Ark. Reports, this court said: "Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold." This right was also recognized in the *LaCotts* case, *supra.*

[4] The use of water for domestic purposes is usually accorded a preference over the demands of irrigation and manufacturing. 56 Am. Jur. 784, § 343. *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 297 S. W. 225, 53 A. L. R. 1147.

[5] In the case of *Taylor* v. *Tampa Coal Co.* (Fla.), 46 So. 2d 392, at page 394, it is stated: "It is the rule that the rights of riparian proprietors to the use of waters in a non-navigable lake such as the one here involved are equal."

Some of the lawful uses of water recognized by this state are: fishing, swimming, recreation, and irrigation.[6]

(c) When one lawful use of water is destroyed by another lawful use the latter must yield, or it may be enjoined.

(d) When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.[7]

*Application to This Case.* Some of the questions, therefore, which must be considered are these:

(a) Had appellees on July 10, 1954, by the continued use of water from Horseshoe Lake, destroyed appellants' right to fish and conduct the boating enterprise? If so, the injunction should be granted.

(b) If it is found, however, that appellants' rights had only been impaired at the stated time, then it must be judged, under all the facts and circumstances as before mentioned, whether such impairment is unreasonable. If it is so found then the injunction should issue. If it is found that appellants' rights have not been unreasonably impaired, having due regard to all the facts and circumstances and the injury which may be caused appellees as weighed against the benefits accruing to appellants, then the injunction should be denied.

We do not minimize the difficulties attendant upon an application of the reasonable use rule to any given set of facts and circumstances and particularly those

[6] See *Meriwether Sand & Gravel Co.* v. *State Ex Rel. Attorney General, supra,* and *Barboro* v. *Boyle,* 119 Ark. 377, 178 S. W. 378, at pages 382, 383 of the Ark. Reports.

[7] In 56 Am. Jur., page 783, it is stated: "In determining whether an artificial use of the water of a stream is reasonable or not, it is necessary to consider what the use is for, its extent, duration, necessity, and application, the nature and size of the stream, and the several uses to which it is put, the extent of the injury to one proprietor and the benefit to the other, and all other facts which may bear upon the reasonableness of the use."

present in this instance. It is obvious that there are no definite guide posts provided and that necessarily much must be left to judgment and discretion. The breadth and boundaries of this area of discretion are well stated in Restatement of the Law, Torts, § 852c in these words: "The determination in a particular case of the unreasonableness of a particular use is not and should not be an unreasoned, intuitive conclusion on the part of the court or jury. It is rather an evaluating of the conflicting interests of each of the contestants before the court in accordance with the standards of society, and a weighing of those, one against the other. The law accords equal protection to the interests of all the riparian proprietors in the use of water, and seeks to promote the greatest beneficial use of the water, and seeks to promote the greatest beneficial use by each with a minimum of harm to others. But when one riparian proprietor's use of the water harmfully invades another's interest in its use there is an incompatibility of interest between the two parties to a greater or lesser extent depending on the extent of the invasion, and there is immediately a question whether such a use is legally permissible. It is axiomatic in the law that individuals in society must put up with a reasonable amount of annoyance and inconvenience resulting from the otherwise lawful activities of their neighbors in the use of their land. Hence it is only when one riparian proprietor's use of the water is unreasonable that another who is harmed by it can complain, even though the harm is intentional. Substantial intentional harm to another cannot be justified as reasonable unless the legal merit or utility of the activity which produces it outweighs the legal seriousness or gravity of the harm."

In all our consideration of the reasonable use theory as we have attempted to explain it we have accepted the view that the benefits accruing to society in general from a maximum utilization of our water resources should not be denied merely because of the difficulties that may arise in its application. In the absence of legislative directives, it appears that this rule or theory is the best that the courts can devise.

*OUR CONCLUSION.* After careful consideration, an application of the rules above announced to the complicated fact situation set forth in this record leads us to conclude that the Chancellor should have issued an order enjoining appellees from pumping water out of Horseshoe Lake when the water level reaches 189.67 feet above sea level for as long as the material facts and circumstances are substantially the same as they appear in this record. We make it clear that this conclusion is not based on the fact that 189.67 is the normal level and that appellees would have no right to reduce such level. Our conclusion is based on the fact that we think the evidence shows this level happens to be the level below which appellants would be unreasonably interfered with. This holding is, we think, in harmony with the holding in the *Tampa Coal Company* case, *supra.* That case involved a shallow privately owned lake similar to the one under consideration. Taylor was enjoined from pumping the water from the lake to irrigate his citrus grove on the ground that to do so destroyed the use of the lake by the employees of the Coal Company for recreational purposes. The court held that Taylor could not pump water from the lake after it reached the normal level. A careful reading of the case, however, shows that the decision was not based on the normal level or natural flow theory but rather on the fact that that level happened to be the one below which it would be unreasonable to reduce the water. In reaching its conclusion the court, among other things, said: ". . . each riparian owner has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners. From the evidence in the record it is plain that when the water of the lake here involved is at a normal level the lake is too small in area and content to allow water to be pumped therefrom for irrigation purposes without consequent damage to other riparian owners." The court then justified its conclusion "when conditions are such that the lake is either at or below normal water level and the use thereof for irrigation purposes will operate to the injury of other riparian owners. . . ."

We think the conclusion we have reached is not only logical but practical. Although appellees had quit using water from the lake when this case was tried yet they testified that they intended to use water therefrom in 1955. We might assume that they would want to also use water in subsequent years, so it would seem to be to the best interest of all parties concerned to have a definite level fixed at which pumping for irrigation must cease in order to avoid useless litigation.

Appellees make the point that the Chancellor should be sustained because they have acquired a prescriptive right to the unlimited use of the water in Horseshoe Lake, and, to the same effect, that appellants are estopped from asserting any rights to the contrary. We cannot sustain this contention. Although appellees, according to the record, have used this water for irrigation purposes on several occasions in previous years, dating back for more than seven years, yet it appears that appellants had not been disturbed in the exercise of their riparian rights previous to 1954. Prior to that year appellees had merely been exercising their lawful rights as riparian owners and their exercise of those rights was in no way adverse to the rights of any one. (56 Am. Jur., p. 730, § 343) in the *City of Conway* case, *supra,* where the same contention was made that appellees here make the contention was denied, the court saying: "We are unable to find any act or acts on the part of Conway of an adverse claim or nature, or such as would put appellants on notice of any adverse claim." The court then followed with citations which are applicable here.

Reversed with direction to the trial court to enter a decree in conformity with this opinion.

Justice McFaddin concurs.

5-729 283 S. W. 2d 121

Opinion delivered October 24, 1955.

*L. V. Rhine* and *John C. Watkins,* for appellant.

*Frierson, Cherry, Walker & Snellgrove,* for appellee.

PAUL WARD, Associate Justice. The City Transit Company, owner of a garage in Jonesboro, secured a jury verdict against June Staudenmayer [and her guardian, Lelia B. Staudenmayer] in the amount of $585.05, for negligently driving, or causing to be driven, an automobile through its garage door, damaging said building and some of the contents thereof. The specific allegation of negligence was:

"The collision and the resulting damage were the direct and proximate result of the negligence of the defendant in becoming drunk and engaging in a drunken party with the unknown person occupying the car with her and in driving and permitting her car to be driven in such a condition and in failing to keep her car under control or to cause the driver to keep it under control and in driving off the street and across plaintiff's lot

and into its building without controlling or stopping the car."

The answer was a general denial.

The principal question on appeal is one of law and it arises over an instruction given by the trial judge. There is practically no dispute about the pertinent facts.

June Staudenmayer is a young lady afflicted periodically with epileptic spells, but at other times she is perfectly normal. Because of this condition her mother was appointed her guardian in 1946. On the night of February 8, 1952, or the early morning of the 9th, June, who lived with her mother at Leachville, secured the keys to her mother's car, without her mother's consent, and drove the car to Monette. There she picked up two men who were strangers to her. She says one of the men drove the car while she sat between him and the other man. It appears likely June was under the influence of liquor at this time or, as she says, under the influence of medicine she had taken. She says that she remembers driving towards Jonesboro but remembers nothing else until after the accident.

An employee of the Transit Company was on duty at the garage early on the morning of February 9th when he heard the car crash through the swinging doors used by busses. He made an immediate investigation and found June sitting in the car but he did not see anyone else around the car or leaving the building. It was his opinion that June was drunk or doped. A patrolman who appeared on the scene in about five minutes did not see either of the strange men around the car or leaving the building but he did see June in the middle of the front seat. He stated she was in her pajamas and intoxicated and that she was charged with public drunkenness. It is admitted that the car belonged to June's mother and appellants do not question the extent of the damages.

At the conclusion of plaintiff's testimony appellant moved for a directed verdict on the ground that it was

not shown that June Staudenmayer owned the car or that she was driving the car at the time of the accident. The trial court denied this motion and we think correctly so. Some of the reasons for this conclusion will be set out later but it suffices to note at this time that there was evidence from which the jury might have found that June was driving the car at the time of the accident. This being true a jury question was presented and therefore the court correctly overruled the motion.

The principal ground urged by appellants for a reversal is the alleged error in appellee's Instruction No. 3 given by the court to the jury. This instruction reads:

"If you find from a preponderance of the evidence in this case that the defendant, June Staudenmayer, individually, drove or caused to be driven by another, the automobile in which she was riding in a negligent manner, and that as a proximate result of the negligent driving of the said automobile the property of the plaintiff was damaged, your verdict should be in favor of the plaintiff against the defendant, Lelia B. Staudenmayer, as guardian of the defendant, June Staudenmayer, and unless you do so find your verdict will be for the defendant."

We understand that appellants admit, first, that under the facts in this case appellee is entitled to a judgment if June Staudenmayer had been a normal, sane person, and second, that appellee would likewise be entitled to judgment even though June was an incompetent person if she had been driving the car. Therefore we assume that appellants' main objection to the instruction set out above is to that portion which allowed appellee to recover if the jury should find that June "caused the car to be driven by another." It is strongly argued that June, being adjudged an incompetent person, could not be liable in this case, if she was not actually driving the car, except on the theory that she appointed one of the strangers to drive for her as her agent. It is then argued that she had no such capacity under the law citing, among others, the following authorities: *George* v. *St.*

*Louis I. M. & S. Ry. Co.,* 34 Ark. 613; *First National Bank of Rogers* v. *Tribble,* 155 Ark. 264, 244 S. W. 33; *Reams* v. *Taylor,* 31 Utah 288, 87 Pac. 1089; *Thompson* v. *Bell,* 6 Cir., 129 Fed. 2d 211, and; Restatement of the Law of Agency, Vol. 1, Sec. 20. We have read all of the authorities cited by appellants and agree that they hold, in general, that an insane person is incapable of appointing an agent. In the *George* case, supra, appellant sought to void a release he had signed to a Railway Company on the ground that he was insane at the time he signed it. It was held that this was a question of fact for the jury to determine from the testimony. In the *Tribble* case, supra, the court made the same announcement when appellee, who had been adjudged incompetent, defended against an action for borrowed money on the ground that he was incompetent. In the *Thompson* case, supra, it was held that an incompetent person could not enter the relationship of a joint enterprise which rested upon the principle of agency.

It is our view that none of the authorities cited by appellants are decisive of or pertinent to the case under consideration. As we see it the facts in this case do not raise the question as to whether an insane person can appoint an agent. There is no substantial evidence in this record to show that June Staudenmayer was insane or incompetent during any time related to this episode. It is admitted of course that her mother was appointed her guardian in 1946 because she was subject to epileptic seizures but all of the testimony including her own shows that at all times when not so seized she was the same as any other normal intelligent person. Appellants made no attempt to show, and there is no testimony to show, that June was affected by a seizure when she left her mother's home, when she picked up the strangers or when the accident occurred. There is testimony that she might have been doped or drunk but she cannot escape liability here by bringing these conditions or either of them upon herself.

Appellants did not ask, and we think correctly, for an instruction which would have permitted the jury to pass on June's mental capacity at the time involved here. Under this situation appellants are in no position to object to the court's instruction set forth above.

The view which we have taken of this case makes it unnecessary for us to consider other questions which were raised and discussed, such as the following: Can an insane or incompetent person be held for damages done by an automobile which he owns and in which he is riding but which is driven by another person; and is it material whether the incompetent person actually owns the car at the time or has it in his lawful possession.

Finding no error, the judgment of the lower court is affirmed.

JOHNSTON *v.* JOHNSTON (WIDENER)

5-735 283 S. W. 2d 151

Opinion delivered October 31, 1955.

*Kirsch, Cathey & Brown,* for appellant.

*Foster Clarke* and *Penix & Penix,* for appellee.

LEE SEAMSTER, Chief Justice. The appellant, Shirley Johnston, and the appellee, Sylvia Johnston (Widener) were married on July 20, 1940. Three children were born to said marriage, Donna Jean, now 7 years of age; Shirley Ann, now 14 years of age; and Walter Ray, now 12 years of age. On December 31, 1949, Shirley Johnston was granted a divorce from Sylvia Johnston. The divorce decree awarded the appellant absolute custody of the three minor children. The appellee agreed in writing that the father should have absolute custody of the three children. Since that date the children have lived in the home of their paternal grandparents, also appellants herein.

On March 30, 1954, the appellee filed a petition in Craighead Chancery Court, Western Division, asking that the original divorce decree be modified to give her custody of her three minor children. Upon trial of this cause on April 16, 1955, the chancery court modified its original decree and awarded custody of Donna Jean to the appellee; leaving the custody of Shirley Ann and Walter Ray with the appellant, Shirley Johnston. Appellants have appealed from that portion of the modified decree that awarded custody of Donna Jean to the appellee. The appellee has perfected a cross-appeal from that portion of the modified decree which left custody of the two older children with the appellants.

On appeals, such as this, the case comes to us for trial de novo. The party who seeks the modification of a divorce decree, awarding custody of minor children, assumes the burden of showing such changed conditions as would justify such modification in the minor's interests.

It is well established by numerous decisions of our court that before a change in custody is justified, the moving party must show a change in conditions since the initial award and it must appear to be for the best interest of the children. In *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8, we said: "While any order as to custody of a child is subject to future modification by

the court making it, the rule, uniformly adhered to by us, is that before such modification may be made it must be shown that, after the making of the original order, there has been such a change in the situation as to require, in the interest of the minor, the change to be made, or it must be shown that material facts affecting the welfare of the child were unknown to the court when the first order was made."

We said in *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817: "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.

In the case at bar the appellee has failed to show any of the above mentioned matters. In 1949, Shirley and Sylvia Johnston were living in their home. Mr. Johnston secured a divorce from his wife, when he discovered that she had become enamored of another man. The testimony shows Mr. Johnston procured the divorce from appellee on the basis of an entry of appearance, signed by appellee, in which she agreed that absolute custody of the three children should be awarded to Mr. Johnston. Since that date, the children have lived in the home of their paternal grandparents.

The appellant, Shirley Johnston, has not remarried and works in St. Louis, Missouri. He spends about every other week end, in addition to his vacations, with his three children in the home of his parents. Mr. Johnston has made satisfactory arrangements with his parents for the support and maintenance of the children in their home. The grandparents are devoted to the three children and have given them a good home and surroundings,

with necessary schooling and proper religious training. Their general fitness to care for the children appears unquestioned. Strong ties of affection have been allowed to develop between the children and the appellants during the 5 years that have elapsed since the appellee voluntarily surrendered custody to the father. The children have developed strong ties of love and affection for each other.

Since the divorce, the appellee has married the man of whom she was enamored. She and her husband now reside in a five room apartment in Chicago, Illinois. This apartment is shared with four relatives of the appellee and her husband. Since the divorce from the appellant, the appellee has visited the children about 3 or 4 times each year. Her visits were of a short duration, most of the time for only 30 or 40 minutes. Until the present suit was filed, appellee made no formal complaint as to the care and treatment these children were receiving at the hands of their father and grandparents.

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. The facts and circumstances in the instant case do not warrant the conclusion that appellants are unfit persons to have custody of Donna Jean. The chancellor recognized this by allowing the father to retain custody of the two older children. Both appellant and the grandparents are apparently able to furnish a suitable home for the three children. Unless exceptional circumstances are involved, this court has indicated that young children should not be separated from each other by dividing their custody. See *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379. Under all the circumstances, we have concluded that the permanent welfare of the children would be best served by allowing appellants to have custody of all three children.

The appellee shall have at all times the right of reasonable visitation. She will have to win back, if she can, the affection and respect of the children. The ap-

pellants will be ordered not to interfere with the mother's efforts in this respect or in any other way, so long as appellee conducts herself in a proper manner.

We affirm that portion of the modified decree that allows the appellant to retain custody of the two older children. That part of the modified decree awarding custody of Donna Jean to the appellee is accordingly reversed and the cause remanded with directions to award such custody to the appellant, Shirley Johnston.

SHELTON *v.* GASTON.

5-746 283 S. W. 2d 154

Opinion delivered October 31, 1955.

*Oscar E. Ellis,* for appellant.

*W. E. Billingsley,* for appellee.

J. SEABORN HOLT, J. This is the second appearance of this case here. February 9, 1953 in our former opinion, *Shelton* v. *Gaston,* 221 Ark. 583, 254 S. W. 2d 679, we reversed the judgment and remanded the case for a new trial, for error of the trial court in submitting to the jury the issue whether a partnership existed between Gaston and Westall. We said in that opinion:

"This suit involves an alleged conversion of several head of cattle. . . .

"Appellant, G. P. Shelton, contends that he is the owner of certain cattle which he turned over to Antone Westall under an agreement whereby Westall would receive one-third of the increase, as consideration for look-

ing after the cattle. On the other hand, Westall contends that not only was he to get one-fourth of the increase but was to be the owner of one-fourth of the entire herd, as consideration for his services.

"Westall, without the knowledge of the appellant, sold one-third of the cattle to appellee, Carl Gaston. Soon after Shelton learned of the sale, he filed suit against Gaston for conversion. Upon trial the jury returned a verdict in favor of Gaston. . . .

"From the pleadings in the case and the testimony of the witnesses, it appears that the only dispute between the parties is that appellant, Shelton, maintains Westall was to receive only one-fourth of the increase from the cattle as a consideration for looking after them, whereas Westall claims that he was to be paid, as such consideration, one-fourth of all the cattle. . . .

"Reversed and remanded for a new trial."

The mandate from this court was filed with the Clerk of the Izard Circuit Court March 17, 1953. Thereafter, March 22, 1954, appellant filed motion in effect for judgment on the pleadings and evidence on the former trial, which motion was overruled. On March 28, 1955, more than a year later, appellant filed a second motion which was in effect a renewal of his first motion. This second motion contained this language: "Said plaintiff [Appellant] now announces to the Court that he will stand upon said motion and still insists upon the same and to his objections and exceptions to the said ruling of the Court and will now proceed no further in this case in this Court." This motion was also overruled, whereupon appellant refused to plead further and the cause was dismissed.

For reversal appellant argues that the action of the trial court was contrary to the law and the evidence. We do not agree. As indicated under our directive, this cause was reversed and remanded *for a new trial.* Appellant steadfastly refused to avail himself of the opportunity to try the case again. In this situation the case stands

as if no action had been taken, or trial had, in the trial court. Our rule is clearly announced in the situation such as is here presented in *Deason & Keith* v. *Rock,* 149 Ark. 401, 232 S. W. 583. We there said: . . . " 'when a cause is remanded broadly for a new trial, all the issues in the case are open for trial anew the same as if there had been no trial. On a reversal of a cause by this court, it seldom occurs that the same is remanded for a new trial; but when such is the direction of this court, then the case stands for trial precisely the same as if there had never been any trial.' It follows, therefore, from this expression of the court that, unless the direction for a new trial is specifically made upon a part or all of the issues involved, a direction for further proceedings according to law and not inconsistent with the opinion can mean nothing more than to render a decree in accordance with the record made."

"When on an appeal or writ of error a cause is reversed and remanded for new trial, the case stands as if no action had been taken by the lower court," *Hartford Fire Insurance Company* v. *Enoch,* 79 Ark. 475, 96 S. W. 393. See also *Sanders* v. *Walden,* 214 Ark. 523, 217 S. W. 2d 357, 9 A. L. R. 2d 1040.

Judgment affirmed.

PELLEGRINI *v.* WOLFE, JUDGE.

4812 283 S. W. 2d 162

Opinion delivered October 31, 1955.

*Heartsill Ragon,* for petitioner.

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

ED. F. MCFADDIN, Associate Justice. This is a petition for writ of *procedendo ad judicium*[1]; and necessitates consideration of a situation wherein the accused demands a trial in Arkansas even though he is presently incarcerated in another State.

Petitioner Frank E. Pellegrini filed in this Court his petition for a writ of *procedendo ad judicium* against Honorable Paul Wolfe, Judge of the Sebastian Circuit Court in the 12th Judicial Circuit of Arkansas. The duly verified petition alleged: (a) that petitioner was, and had been since November 13, 1953, confined in the Texas Prison System at Huntsville, Texas (serving a 15-year sentence for robbery by assault); (b) that on January 13, 1954 the Prosecuting Attorney of the 12th Judicial Circuit of Arkansas (Honorable Paul Gutenson of Sebastian County) sent a warrant/detainer to the Texas Prison System stating that Pellegrini was accused of robbery committed in Sebastian County, Arkansas on January 11, 1953 and should be delivered to Arkansas authorities[2]; (c) that Pellegrini is anxious for, and en-

[1] See *Rodgers* v. *Howard, Judge,* 215 Ark. 43, 219 S. W. 2d 240, wherein we had occasion to consider a writ of *procedendo ad judicium* and our authority to issue such a writ under our power of supervision.

[2] The files reflect that the Texas prison officials then replied that Pellegrini could not be delivered to the Arkansas authorities until conclusion of his sentence, unless the Chief Executive of Texas should order otherwise.

titled to have, a speedy trial in Arkansas on the charge pending against him in Sebastian County; (d) that Pellegrini asked the United States District Court for the Western District of Arkansas to have him extradited to Arkansas for trial in the Sebastian Circuit Court but such relief was refused on the ground that the Arkansas Courts had jurisdiction; (e) that Pellegrini has asked the Sebastian Circuit Court to have him brought to trial in Arkansas for the said offense alleged to have been committed in this State, but the Sebastian Circuit Court has refused his request; (f) that the effect of the warrant/detainer filed by the Arkansas Prosecuting Attorney with the Texas Prison System is to prevent Pellegrini from receiving trusty privileges or parole privileges; and (g) that petitioner is entitled to either a speedy trial on the Arkansas charge,[3] or is entitled to have the warrant/detainer recalled and the Arkansas charge dismissed. The prayer of Pellegrini's petition was for dismissal of the information, or, in the alternative, that this Court require the Judge of the Sebastian Circuit Court to have proper steps taken to bring Pellegrini to trial on the information which the Prosecuting Attorney had filed against Pellegrini in Sebastian County.

Pellegrini filed his own pleading in this Court, and along with the pleading there was a petition and affidavit praying that he be allowed to proceed in *forma pauperis*. We allowed the petititon to be filed and appointed Honorable Heartsill Ragon of the Fort Smith Bar, to represent Pellegrini in this proceeding. Mr. Ragon entered into the discharge of his duties and has filed a brief and a reply brief in this Court, and is hereby commended for the conscientious discharge of his duties. Pellegrini makes the contentions now to be discussed.

I. *Petitioner's Claim for Discharge.* Section 43-1708, Ark. Stats., comes to us from § 169 of Chapter 45 of the Revised Statutes and has been many times before this Court. The section reads:

[3] See Art. II, § 10 of the Arkansas Constitution.

"If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."[4]

Pellegrini says that if the information was in fact filed against him in Sebastian County in 1953 (as he has been advised by the Prosecuting Attorney) then more than two terms of Court have passed since such filing and Pellegrini claims he is entitled to discharge under the above quoted Statute, citing, *inter alia: Stewart* v. *State,* 13 Ark. 720; *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934; *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777; *Bishop* v. *State,* 209 Ark. 1013, 193 S. W. 2d 489; *Ponzi* v. *Fessenden,* 258 U. S. 254, 66 L. Ed. 607, 42 S. Ct. 309, 22 A. L. R. 879.

But the defect in Pellegrini's contention for discharge rests in the fact that he has never pursued the correct procedure to bring himself within that Statute. From the Texas prison he is now trying to say to Arkansas: "I am ready for trial"; yet the fact remains that ever since 1953 he has been beyond the jurisdiction of this State and incarcerated by a Sister State. Even now he is asking Arkansas to use its Sovereign Request to extradite him from Texas in order to stand trial here. In *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777, we held that a prisoner in the *Arkansas prison* could invoke the two-term-discharge Statute; but in *Lee* v. *State,* 185 Ark. 253, 47 S. W. 2d 11, we held that a prisoner in a Federal prison could not avail himself of the two-term-discharge Statute until he had first requested trial in Arkansas and until it was shown that Arkansas could have secured his extradition if request had been made. We used this language:

"Appellant made no effort to demand trial while he was imprisoned in the United States Penitentiary, which

[4] This section is sometimes referred to as the "two-term-discharge" Statute; and will be so referred to in this opinion.

he could have done; and the fact that the State could have procured his presence in her court for trial on the indictments and did not do so deprived him of no right he was entitled to; and the court did not err in denying his motion for a discharge from the indictments pending in her court."

The case at bar is governed by the Lee case: Pellegrini is not now entitled to claim relief under the two-term-discharge Statute because he is only now bringing himself within the purview of the Statute.

II. *Duty on Arkansas to Seek Extradition.*[5] In the alternative Pellegrini claims that Arkansas should now seek to extradite him from Texas for trial in this State; and with this contention we are in agreement. As pointed out in *Lee* v. *State, supra,* Pellegrini has a right to ask Arkansas to bring him here for trial; and since such demand has now been made, the Arkansas Court (in this instance the Sebastian Circuit Court) should require the Prosecuting Attorney (if he desires to try Pellegrini) to seek extradition at the Executive level and to pursue the matter with due diligence.[6]

Arkansas should request Texas to let Arkansas have Pellegrini for trial. If Texas refuses, then Arkansas has done all that is possible, and the two-year-discharge Statute will not inure to the benefit of Pellegrini. If Texas requires, as a condition for granting such extradition, that Pellegrini execute some kind of waiver, then, unless Pellegrini will accomplish such waiver, he has not brought himself within the purview of the Statutory provision

[5] Arkansas adopted the then Uniform Criminal Extradition Act in 1935 (Act 126 of 1935, see § 43-3001 Ark. Stats.). Texas adopted a later version of the Uniform Criminal Extradition Act by its Chapter 438 of 1951. See Vernon's Anno. Code of Criminal Procedure, Art. 1008(a). For an Arkansas case considering our Criminal Extradition Act see *Gulley* v. *Apple,* 213 Ark. 350, 210 S. W. 2d 514. For a case somewhat like the one at bar see *People* v. *Peters,* 101 N. Y. Supp. 2d 755, in which *certiorari* was denied by U. S. Sup. Ct., 347 U. S. 906, 98 L. Ed. 1064.

[6] Some of the Judges are in doubt as to whether the information filed by the Prosecuting Attorney in the Municipal Court of Fort Smith was ever pursued by being docketed in the Circuit Court. We leave it to the Circuit Court to exercise its power over the Prosecuting Attorney and the Municipal Court in keeping with this opinion.

relating to two-term-discharge. If Texas does agree to the extradition on conditions met, then Arkansas must extradite and try Pellegrini with due diligence or Pellegrini will be entitled to have the charges dismissed and the warrant/detainer cancelled.

The writ of *procedendo ad judicium* is granted, as herein stated.

Mr. Justice ROBINSON dissents.

SAM ROBINSON, Associate Justice, dissenting. I dissent in this case because more than two terms of court have elapsed since the warrant for Pellegrini's arrest was issued and no extradition proceeding calculated to bring him to trial has been instituted. It is my opinion that the Prosecuting Attorney should be directed to withdraw the warrant he has heretofore filed with the superintendent of the Texas Penitentiary for the arrest of Pellegrini because no attempt was made to extradite him within the two terms of court. The warrant in question was obtained from the Municipal Court of Fort Smith on January 20, 1953, and filed with the superintendent of the Texas Penitentiary. The warrant in itself may cause Pellegrini to serve as much as 10 years in the Texas prison that he would not have to serve except for the warrant. Section 12, Article 781b, Texas Criminal Code, provides that a prisoner is eligible for parole after serving one-third of his sentence. But, it is a common practice for prison officials to deny parole where the prisoner, if given clemency, would merely be turned over to another State for trial. In addition, because of the Arkansas warrant for the arrest of Pellegrini, this prisoner will not be allowed privileges he might have otherwise enjoyed. Certainly he would not be made a trusty. This denial of privileges and 10 years additional penal servitude is all brought about merely by the filing of a warrant charging the defendant with an offense for which he is not likely to be tried after 15 years have expired.

No charge has been filed against Pellegrini in the Circuit Court and there has been no indictment returned by a grand jury and no felony information filed by the

Prosecuting Attorney. An information filed in Municipal Court or a Justice of the Peace Court by the Prosecuting Attorney for the purpose of obtaining a warrant for arrest is not a felony information upon which one can be tried in the Circuit Court.

Pellegrini is serving a 15 year sentence in Texas, and due to the warrant from Sebastian County being in the hands of the superintendent of the Texas prison, he will have to serve the entire 15 years. He will not get a parole after serving 5 years — one-third of his sentence. During the 15 years he is serving his sentence in the Texas prison, several prosecuting attorneys will have been elected in Sebastian County and will have completed their terms of office. As heretofore stated, there is no case pending against Pellegrini in the Sebastian Circuit Court. At the end of the 15 years no one is likely to remember the case. At that time, when the Texas officials notify the Sebastian County officials that Pellegrini is to be released and that the Arkansas warrant can be served, then it is very probable that the warrant will be withdrawn. It will be impractical to try him. The case will be stale, witnesses not available or unable to identify the defendant after such a long lapse of years.

We have held that where a prisoner is serving a sentence in the Arkansas Penitentiary, and there is another charge pending against him in a court of this State, he must be brought to trial within two terms of court or the charge must be dismissed. *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777. Ark. Stats. § 43-1708 provides: "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

Of course, the Arkansas officials may not be able to obtain custody of a prisoner serving a sentence in a

sister State, but there is no good reason why an effort should not be made within two terms of court to bring him to trial by the institution of extradition proceedings. It is a policy of the federal government to cooperate with the States and permit federal prisoners to be tried on charges pending against them in the State courts while they are still federal prisoners. *Ponzi* v. *Fessenden,* 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607. There is no reason why the several States should not also cooperate.

Filing a warrant with a superintendent of a prison, where the prisoner for whom the warrant has been issued has not been charged by a grand jury indictment and where no felony information has been filed by the prosecuting attorney in a court of record, is a vicious practice and should not be tolerated. In many instances, men are serving sentences in penal institutions where there is a warrant from another State pending against them, and they do not even know of the existence of such a warrant. Even if they are informed of the warrant, they usually have no idea of their rights in the matter and are helpless and unable to do anything about it. Pellegrini's initiative is certainly unusual, as proven by the fact that his is the first petition of its kind to be filed in this court.

ROTH *v.* PREWITT.

5-749 283 S. W. 2d 155

Opinion delivered October 31, 1955.

*Sims & Clarke* and *James A. Ross,* for appellant.

*William K. Ball, Lamar Williamson* and *Adrian Williamson,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant, Clarence J. Roth, rented about 250 acres of land in Drew County from appellee, T. A. Prewitt, for the production of rice and soy beans in 1948 under a written rent contract executed by the parties on April 17, 1948.

On March 18, 1949, appellant brought this suit seeking damages for an alleged breach of the rent contract by appellee in failing to furnish sufficient water to make a full rice crop. Damages were also sought on account of appellee's alleged illegal seizure of certain farm equipment upon which he held a mortgage to secure certain advancements made to appellant under the rent contract. Appellee denied any breach of the contract on his part and asked for foreclosure of the chattel mortgage. Pending a long drawn out trial by depositions taken over a period of several years, the chancellor appointed a receiver who sold the mortgaged property at public sale to appellee under an order requiring retention of the sale proceeds until final determination of the suit. This appeal is from a decree dismissing appellant's complaint and entering judgment for appellee on his cross-complaint in the amount of the balance due on the mortgage indebtedness after deducting the proceeds of the foreclosure sale.

The primary issue here is whether, under the terms of the written rent contract, appellee was obligated to furnish sufficient water to make a full rice crop in any event and regardless of the source of such water supply, or, whether he was only obligated to furnish the pumps, power unit and fuel necessary to pump water from a certain brake to the extent that it was available for the purpose of irrigating the rice. The only provision of the contract bearing directly on this question is set forth under the heading "Obligations of Lessor," and reads: "B. *Water:* The Lessor will provide pump, pipe, and power unit sufficient to lift water from the Brake sur-

rounding said land to be farmed and will furnish fuel and oil to operate said power unit." Under another provision of the contract, appellant, as Lessee, agreed "to operate the pump which will furnish water for said rice lands."

An unusual and severe local drouth in the summer of 1948 caused a scarcity of water in the brake surrounding the rice lands which the parties thought would afford an ample supply for irrigation purposes. Appellee installed a second pump and power unit to get more water from the brake and built a dam to impound the water. The brake dried up, resulting in an insufficient supply of water to produce a full rice crop and a substantial loss to both parties. As the learned chancellor pointed out in his findings, it seems to be admitted that the severe drouth caused the scarcity of water in the brake and there is no contention that the damages were caused by any failure on the part of appellee to furnish sufficient pumps, pipe, power units and fuel to lift the water from the brake for irrigation purposes.

In determining the issues in favor of appellee, the chancellor held that the rent contract was clear and unambiguous concerning appellee's obligation relating to water, which was to provide pump, pipe, power and fuel sufficient to lift the water from the brake and make it available for irrigation purposes. In short, that the proviso in the contract relating to water meant exactly what it said, and did not mean that appellee guaranteed a sufficient supply of water to make a full rice crop, regardless of the source of such supply.

Appellant earnestly insists that the trial court erred in his interpretation of the contract. In making the contention that the contract obligated appellee to furnish a sufficient supply of water to make a full rice crop, appellant concedes that the contract is clear and unambiguous but he relies upon the case of *Gibson* v. *Lee Wilson & Co.,* 211 Ark. 300, 200 S. W. 2d 497. The contract in that case required the lessor to furnish "a suitable irrigation plant" with "sufficient capacity to properly irrigate" the rice acreage, which he failed to do in time to

save the rice crop according to the overwhelming evidence in the case. In affirming a judgment for the lessee, we referred to the lessor's "positive agreement to furnish sufficient irrigation" as required by the contract. In the case at bar it is undisputed that appellee furnished adequate pumping equipment and fuel in a timely manner to lift all available water from the adjacent brake for use in irrigating the rice land and this was the extent of his obligation under the plain language of the contract.

It is elementary law that courts do not make contracts for the parties but only construe them; and where parties make a 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. *St. L. S. W. Ry. Co.* v. *Cook-Bahlau Feed Co.,* 187 Ark. 106, 58 S. W. 2d 428. It is also well settled that contemporaneous oral evidence is inadmissible to vary the terms of an unambiguous written contract. *Hoffman* v. *Late,* 222 Ark. 395, 260 S. W. 2d 446. In *Stoops* v. *Bank of Brinkley,* 146 Ark. 127, 225 S. W. 593, the court said: "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. Where the language is clearly susceptible of but one meaning, parol evidence to vary the terms of a written contract is not admissible. Where the meaning of the language of the contract is doubtful, or is susceptible of more than one meaning, parol evidence may be resorted to show the real nature of the agreement. The admission of such testimony is, within the meaning of the terms employed in the written contract, to render certain that which is uncertain and to determine just what in fact the writing was intended to express." See also, *Love* v. *Couch,* 181 Ark. 994, 28 S. W. 2d 1067; *Lee Wilson & Co.* v. *Fleming,* 203 Ark. 417, 156 S. W. 2d 893.

As an alternative argument appellant contends that the rent contract is ambiguous and that parol evidence of prior negotiations, acts of the parties and custom and

usage should have been considered by the chancellor as showing an intention of the parties to require appellee to furnish a sufficient supply of water to make a full rice crop after the brake dried up. Since we have concluded that the chancellor correctly held the contract clear and unambiguous, it is unnecessary to consider the interesting arguments by counsel for both parties on these extraneous matters.

The decree is affirmed.

EUBANKS *v.* McDONALD.

5-742 283 S. W. 2d 166

Opinion delivered October 31, 1955.

*John W. Murphy* and *Hubert L. Burch,* for appellant.

*Daily & Woods,* for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by the appellee to quiet her title to a small tract of land in Washington County. The case turns upon the construction of this language in the will of W. G. Taylor, who is the parties' common source of title: "I will and bequeath to my beloved wife, Ida Taylor, all the rest and residue of my estate, both real and personal, to have and enjoy during her lifetime, and at her death I will and bequeath that all my property go to and become the absolute property of my adopted daughter, Dorothy Taylor, now Dorothy Wilson, of Fort Smith, Arkansas, and the children of her body born, to have and enjoy forever."

At Taylor's death in 1934 Dorothy Wilson, who later became Dorothy Eubanks, was the mother of three children. The testator's widow, Ida Taylor, died some years after her husband's death, and thereafter Mrs. Eubanks and her three children conveyed their interest in the property to the appellee. In 1949 there was born to Mrs. Eubanks a fourth child, the appellant in this case.

The trial court construed Taylor's will as being in substance a devise to Ida Taylor for life with remainder to Dorothy Eubanks and her bodily heirs. Upon this premise the chancellor held that Mrs. Eubanks, who is still living, received only a life estate under Taylor's will and that the appellant is a remainderman having an undivided future interest in the land. On direct appeal it is argued that Taylor's devise was simply to Dorothy Eubanks and her children and that the appellant holds a present possessory interest as a tenant in common with the appellee. On cross-appeal the appellee contends that the appellant has no estate whatever in the property.

The first step is to determine the meaning of the devise to Dorothy Eubanks "and the children of her body born." We agree with the chancellor's view that this question is controlled by the decision in *Dempsey* v. *Davis,* 98 Ark. 570, 136 S. W. 975, where the conveyance was to the grantors' daughter "and her children, the natural offspring of her body." It was held that the quoted words are synonymous with "bodily heirs." The phrases used in the two cases are so similar in fundamental meaning that to draw a somewhat artificial distinction between the two would only create needless uncertainty for the future.

Thus we have what amounts to a devise to Ida Taylor for life and at her death to Dorothy Eubanks and her bodily heirs. It is settled by five decisions of this court that the effect of this language was to vest the fee simple in Dorothy Eubanks upon the death of Ida Taylor. *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194; *Pletner* v. *Southern Lbr. Co.,* 173 Ark. 277, 292 S. W. 370; *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927; *Adams* v. *Eagle,* 194

Ark. 171, 106 S. W. 2d 192; *Cox* v. *Danehower,* 211 Ark. 696, 202 S. W. 2d 200. By the doctrine of these cases the appellant has no interest in the land now in dispute, since his mother received the fee and later conveyed it to the appellee.

The chancellor recognized the force of the precedents cited; but, aware that the case was to be appealed in any event, he explained in detail his reasons for thinking that the earlier decisions should be overruled. Other learned writers have also questioned the technical soundness of the established rule: Sadler, The Construction of the Arkansas Fee-Tail Statute, 4 Ark. L. S. Bull. 29; Meriwether, A Survey of Recent Arkansas Real Property Cases, 3 Ark. L. Rev. 62, 66; Core, Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111, 122.

We shall not restate the various persuasive arguments for and against the rule adopted in *Bell* v. *Gentry,* for the doctrine of that case and those that have followed it has become a rule of property. To repudiate the rule by judicial decision would have the effect of invalidating titles that were acquired in reliance upon the rule in question. If a change in the law is really desirable it should be brought about by legislation, which operates with prospective effect only and does not upset titles already vested.

Affirmed on direct appeal, reversed on cross-appeal.

Mr. Justice Ward dissents.

Paul Ward, Associate Justice, dissenting. I believe I can make my point of dissent more readily understood by using a series of illustrations and by substituting letters for names.

1. In the case under consideration we have a devise by T [denoting testator] to L [denoting taker of life estate] and then another devise to F [denoting here the step-daughter, or first taker] and the "heirs of her body."

2. Notes: (a) The quoted words are not the ones used in the will under consideration, but I agree with the majority that their meaning is the same. (b) I have divided the will into two distinct and separate devises as follows: first, from T to L for life; second, from T to F and the heirs of her body.

3. Thus we see that in the "second" devise we have a perfect example for the application of Ark. Stats. § 50-405. Applying this statute we then have the will conveying (a) a life estate to L, (b) a life estate to F [beginning at the death of L, as provided in the will], and; (c) a fee in the children of F.

4. It is perfectly legal and proper for T to convey a life estate to L and, at her death, a life estate to F. See *Henderson* v. *Richardson*, 213 Ark. 532, 211 S. W. 2d 436.

5. I must concede that [for all practical purposes] the language in the will under consideration is exactly like the language in *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927, one of the cases relied on by the majority. I also must concede that the *Bowlin* case is contrary to the results I reached in paragraph 3 above.

My dissent then amounts to a plea that the *Bowlin* case be overruled [as of this date]. I believe there are good reasons for my view, as I shall now attempt to show.

6. The *Bowlin* decision was based on the decisions in *Bell* v. *Gentry,* 121 Ark. 484, 218 S. W. 194, and *Pletner* v. *Southern Lumber Company,* 173 Ark. 277, 292 S. W. 370, also relied on by the majority. But a careful reading of these two cases discloses a fundamental difference between them and the *Bowlin* case relative to the essential facts or language.

In the former two cases there was only *one devise* in the wills construed, and this was considered to be the pivotal point in the case.

It is hard for me to follow the logic employed in these cases, but I do see the basis upon which the result was obtained. This is the reasoning, in effect, there used: Ark. Stats. could not apply because then there would be a life estate in L [created by the will], and a life estate in F [created by the statute], both existing at the same time—an impossible situation.

It seems that in the *Bowlin* case the court just assumed that the same *impossible situation* existed. It is perfectly obvious, however, that no such *impossible situation* did exist in the *Bowlin* case and that it does not exist in the case under consideration, where the wills specifically provide that the second life estate [created by statute] shall not begin to run until the first life estate is extinguished.

Since I feel sure that this court would like to give effect to Ark. Stats. § 50-405 in applicable situations, and since the *Bowlin* case amounts to a revocation of that statute in certain applicable situations, it appears to me advisable to use this first opportunity to set the record straight, effective as of this date.

7. In addition to the two cases cited above the majority also rely on *Adams* v. *Eagle,* 194 Ark. 171, 106 S. W. 2d 192, and *Cox* v. *Danehower,* 211 Ark. 696, 202 S. W. 2d 200. I purposely refrained from discussing these two cases for the following reasons: In the *Adams* case apparently, though it is not clear, there was only one devise by the testator which puts it in the same classification with the *Pletner* case. If this be true then the *Pletner* case which was cited in the opinion was properly cited. In that event however the *Bowlin* case which was cited in the opinion was, I submit, improperly cited. In the *Cox* case somewhat the same situation appears. Apparently there were two devises under the will although this does not appear as clearly as it does in the case under consideration. If we assume this to be true then the *Pletner* case which is cited in the opinion is improperly cited, but the *Bowlin* case which was cited in

the opinion was properly cited causing the court to repeat the same error that has heretofore been pointed out in the *Bowlin* case and it should likewise be overruled as of this date.

MILLER *v.* MISSOURI PACIFIC TRANSPORTATION CO.

5-740 283 S. W. 2d 158

Opinion delivered October 31, 1955.

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

*Pat Mehaffy* and *Herschel H. Friday, Jr.,* for appellee.

PAUL WARD, Associate Justice. Appellant, J. T. Miller, instituted this suit to enforce the terms of an alleged contract under which, it is contended, appellee, the Missouri Pacific Transportation Company, was obligated to give him permanent employment. The prayer was for specific performance of the alleged contract and for damages for the breach thereof for a period of one year. From an adverse ruling appellant prosecutes this appeal.

The alleged contract relied on by appellant consists principally of a memorandum from District Lodge 158, of which appellant was a member, to appellee, of a letter from appellee to said Lodge and of certain oral testimony. It is appellant's contention that the alleged contract was entered into for his benefit and that he has a right to sue thereon.

J. T. Miller at the age of approximately 55 years first entered appellee's employment in Little Rock as a laborer. On August 8, 1946, while in said employment, he was injured and as a result was confined to the hospital for 11 weeks and 3 days. After discharge he stayed at home and went back to the doctor every day for some time and then went back to work on February 1, 1947, but he was unable to stand on his feet for long periods of time or to do the heavy work to which he had been accustomed. At about the same time he filed a claim for compensation and received $20 per week for the time he had been unemployed or a total of $502.88 and his hospital bill for $735.13 was paid. He has never at any time since filed any further claim for compensation under the Workmen's Compensation Act. When he was discharged from the hospital he was told to return if his injured leg or arm "broke down." After appellant served as a laborer for a short while he was promoted to the status of an apprentice, and by combining his hours as a laborer and an apprentice he accumulated sufficient hours, under existing rules, to be again promoted. Consequently on December 3, 1949, he was made a mechanic, and he worked in this category at labor he was physically able to perform until November 29, 1951, when he was furloughed along with others because of a forced reduction in employment.

In September, 1949 [while appellant was still an apprentice] negotiations began between District Lodge 158 and appellee, as apparently was usual each year, relative to working relations between the two. These negotiations terminated in an agreement on October 15, 1949, in St. Louis. At this time there was present, representing appellee, R. J. McDermott, vice president; G. W. Mar-

riott, general manager; J. N. Henase; and R. C. Cheatham, superintendent of automotive equipment. Representing District Lodge 158 was H. I. Hahn, general chairman; D. C. Brown, grand lodge representative for the International Association of Machinists; G. J. Ferguson, committeeman; and J. I. Sharp, local chairman from Kansas City—now deceased.

During the last minutes of the final negotiations on October 15, as referred to above, Mr. Cheatham brought up the matter of Mr. Miller's status as an employee. It appears that at that time appellant was the only apprentice employee and that if he was immediately promoted to a mechanic he would be unable to hold his job because, at the time, there were unemployed mechanics in the Little Rock area who had more seniority than he had. It was then that Mr. Cheatham, who knew appellant and said he wanted to help him, suggested to the Union representatives that if they were willing for the company to promote appellant to a mechanic that appellee would try to work out some sort of a job that he could handle. Mr. Hahn stated: "Well, if the company is willing, it is a nice gesture on the company's part, and if they want to try to help the man, as far as we are concerned, if the management and the local people at Little Rock can work out an arrangement whereby it will be satisfactory to them, of course, we will have no objection." Mr. Cheatham stated that he would contact Mr. Woodyard, the shop superintendent at Little Rock, and see if appellee had enough work to make a job for appellant.

In accordance with the above arrangement representatives of Local Lodge 158 had a conference with Mr. Woodyard relative to appellant's status as an employee. This meeting resulted in a memorandum prepared by representatives of the Local Lodge, which reads as follows:

"With reference to Mr. J. T. Miller being set up to journeyman mechanic and being placed on light work that he is able to handle, we wish to state that if the company is willing to keep this man on such light work that he is able to do. Due to the fact that this man is disabled

to do heavy work, we will agree to protect this man's job so far as our seniority right will allow us.

"What we mean by this seniority right is that by using Rule XVI in our agreement no one would have the right to disturb this man, other than men that come under the same rule.

"This is subject to approval by H. I. Hahn and D. C. Brown."

The above memorandum was mailed to Mr. Cheatham in St. Louis. Mr. Cheatham's reply dated December 3, 1949, is as follows:

"In compliance with the attached as submitted by the local shop committee, Little Rock garage, concerning apprentice mechanic, Mr. J. T. Miller, if the proposal is accepted, it is understood that Mr. Miller will not be disturbed by the exercising of seniority and bidding, we will place him on a mechanic's hourly rate with the following duties, hours and days of rest:

"[Here is set in detail the hours and nature of employment.]

"Will you kindly advise with return of attached copies of this letter, affix your signature on each and retain one copy for your records."

A copy of the above letter was returned to Mr. Cheatham indorsed as follows:

"ACCEPTED & AGREE:
"For MISSOURI PACIFIC TRANSPN. CO.
"By /s/ R. J. McDermott
"Vice President
"For DISTRICT LODGE No. 158
INTERNATIONAL ASSOCIATION OF MACHINISTS.
"By /s/ D. C. Brown
"Grand Lodge Representative
"By /s/ H. I. Hahn
"General Chairman."

Appellant's employment was terminated by a letter dated November 23, 1951, from Mr. Cheatham to D. C. Brown and H. I. Hahn, in their representative capacities, which reads as follows:

"With reference to the attached.

"I regret very much to advise that we find it necessary to abolish the position of Mr. J. T. Miller at Little Rock, Ark., which was set up on December 3, 1949, which by reason of a number of changes at that point can no longer be maintained. As you no doubt are aware, our revenues have dropped to such a low level that the pressure is on me from all angles and it becomes necessary for me to take every step possible to effect reduction in our maintenance costs."

In accordance with the above appellant was furloughed on November 29, 1951. It appears that a few weeks later appellant had the opportunity, in compliance with company rules, to retain his seniority rating but he chose not to do so. Although appellant has made an effort to obtain employment since he was furloughed he has not been able to do so to any considerable extent due apparently to his disabled condition.

After a careful review of the record and after careful consideration of all of the contentions and arguments set forth by appellant in his able brief, we are led to the conclusion that the decree of the trial court must be sustained. Conceding, for the purpose of this opinion, that appellant has a right, as a third party beneficiary, to maintain an action for relief under the alleged agreement, yet we are unable to find in the memorandum and letters set forth above or in the testimony relative thereto any promise or obligation on the part of appellee to provide lifetime employment for appellant. We gather from the record that appellant would have been without employment in December, 1949, if it had not been for the proposal made by Mr. Cheatham. It appears that his proposal was made and agreed to by the Local Lodge in an effort to avoid appellant's immediate removal from employment. The arrangement resulted in a benefit to

appellant in that he retained employment until the company was forced to furlough him the latter part of November, 1951. We are forced to conclude that appellee discharged all obligations it owed to appellant when it made special provisions for a job that he could handle and retained him therein as long as the job existed. The only thing said by any of appellee's officers that tends in any way to show that appellant was to have a permanent job was a statement attributed to Mr. Woodyard, the Little Rock shop superintendent. Fred Francis, a witness for appellant, stated that he had a conversation with Mr. Woodyard in which Mr. Woodyard said that some of the boys who had been laid off thought they could "bump" appellant, but Woodyard told him, Mr. Ferguson and Mr. A. J. Pope that there was no way anybody could "bump" appellant as he had a lifetime job because of his injuries. This alleged statement, however, was made by Mr. Woodyard subsequent to the time that the agreement sued on was entered into. At most this amounted to Mr. Woodyard's interpretation of the agreement and he, of course, had no authority to bind appellee. It must also be borne in mind that appellant at no time claimed that he was obligated to work any definite length of time for appellee.

The duration of a contract of employment has been heretofore considered by this court. In the case of *Ashley, Drew & Northern Ry. Co.* v. *Cunningham,* 129 Ark. 346, 196 S. W. 798, Cunningham gave the railway company a right of way deed in which it was provided that the latter would give him a job as brakeman at salary of not less than $50 per month. After a year and a half the road was sold to another corporation which a short time later discharged Cunningham. In holding that there was no breach of contract the court stated:

"The contract in the present case can only be construed to provide for hiring, not at the will of one of the parties, but at the will of both, and in this respect it differs from contracts which provide for service as long as the persons to be hired are willing to serve. It being for

an indefinite period, it must be construed as being terminable at the will of either party."

Our holding in the case of *Moline Lumber Company* v. *Harrison,* 128 Ark. 260, 194 S. W. 25, 11 A. L. R. 466, was to this effect: ". . . where the matter of duration of a contract of employment is not specified in so many words, a hiring being at a specified rate per year, month or week imports a hiring for the full period named," but that where no definite term of employment is specified the employment may be terminated at the will of either party in the absence of other circumstances controlling the duration of employment.

If the agreement here had specified that appellee would give employment to appellant as long as he desired to work, a question would be presented which we need not at this time decide, but the record does not show that such duration of employment was agreed upon.

It is earnestly insisted by appellant that this case should not be decided in accordance with the rules above announced for the reason that appellant had a valid claim which he could have asserted before the Workmen's Compensation Commission but that he was led and induced by appellee not to file such a claim until after the time for filing had expired. We cannot, however, agree with appellant in this contention. In the first place, if appellant has allowed the time to elapse for filing a claim before the Workmen's Compensation Commission he may have been willing to do so in order to retain employment with appellee for an indefinite period or as long as appellee was able to provide him with a job. In the second place, there is no testimony in the record to substantiate appellant's contention that appellee in any way induced him not to file such a claim, and there is certainly nothing in the memorandum and letters from which such conduct on the part of appellee can be inferred.

Accordingly the decree of the trial court is sustained.

Affirmed.

5-761 283 S. W. 2d 337

Opinion delivered November 7, 1955.

[redacted]

*R. D. Rouse,* for appellant.

*McMillan & McMillan,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal, by appellant, from that portion of the trial court's decree that denied him the return of $2,500; the sum that he had deposited in the Clark County Bank to the savings accounts of his three minor step children. The appellees have cross-appealed from that portion of the decree that allowed the appellant recovery of $500 from Ivory Littrell.

Eva B. Hopson died intestate on March 18, 1953. She was survived by a husband, appellant herein, and three children, all appellees herein, are, James H. Buford, age 18; Ivory Jean Buford, age 16; and, Carrie Faye Buford, age 14. The maternal grandmother of the children, Ivory Gatlin Littrell, has been appointed guardian of the two girls and appears as an appellee in the instant case. The older boys custody is vested with his father.

Subsequent to Eva's death, the appellant, Dale Hopson, received three (3) checks from an insurance com-

pany in the total sum of $4,000. This amount represented the face value of two life insurance policies that Eva had carried on her life. The appellant was designated the sole beneficiary under both of these life insurance policies.

On May 2, 1953, the appellant deposited $2,500 of the life insurance proceeds to the savings accounts of his three minor step children, which he established at the Clark County Bank. Two Thousand Dollars of this amount was deposited in the name of Ivory Gatlin Littrell, as guardian of Ivory Jean Buford and Carrie Faye Buford. Five Hundred Dollars was deposited in the name of Ivory Gatlin Littrell for James H. Buford. On the same date, the appellant delivered to Ivory Littrell an additional sum of $500.

Thereafter, the appellant spent nearly every week end in the home of his mother-in-law, Ivory Gatlin Littrell. There was no discussion between the parties as to the money deposited to the minor childrens accounts, until July 9, 1954. At this time, the appellant told his mother-in-law that he had secured information to the effect that his step children had no interest in the insurance money he deposited to their savings accounts and requested the return of the money. When Ivory Littrell refused the return of the money, the appellant filed the instant suit in the Clark Chancery Court.

The chancellor found that the appellant was entitled to recover the $500 sum of money that he had delivered to Ivory Littrel; but, the appellant was not entitled to the return of the $2,500 sum of money that he had deposited to the accounts of his step children, since this amount was a voluntary gift to the step children.

On appeal to this court, the appellant contends that fraud, misrepresentation and undue influence were utilized by the appellees, especially Ivory Littrell, to induce him to deposit $2,500 to the savings accounts of his three minor step children. It is his contention that the morning after his wife's funeral, Ivory Littrell brought up the subject of Eva's property, including the life in-

surance proceeds. She told him that under the law he was entitled to only one-fourth of the proceeds from the insurance policies; with the remaining three-fourths to be divided equally among his three step children. The appellant earnestly contends that none of this money would have been deposited to the savings accounts of the three children, if it had not been for the false representations of Ivory Littrell. He further contends that his request for return of the money was met with a refusal by Ivory Littrell.

The appellees contend that appellant made a voluntary gift of $2,500 to his three step children, with full knowledge of all of the facts incidental to and surrounding said transaction. On cross-appeal, it is also the contention of the appellees that at this time, the appellant made a gift of $500 to Ivory Littrell, the maternal grandmother of the children. They submit that a preponderance of the evidence shows that the appellant gave the $500 to Ivory Littrell to be used by her for the maintenance and support of the two girls.

After a careful review of the record, we find the preponderance of the evidence supports the chancellor's findings, that the appellant made a voluntary gift of $2,500 to his three minor step children; and, that the appellant did not make a voluntary gift of $500 to Ivory Littrell.

Fraud is never presumed and the burden of showing the existence of facts which establish fraud is upon the one who asserts fraud as a ground of relief. See, *Bush* v. *Bourland,* 206 Ark. 275, 174 S. W. 2d 936. The burden of proof was on the appellant to show that fraud, undue influence or misrepresentation, were utilized by the appellees to induce him to deposit $2,500 to his step children's savings accounts. Under the facts here presented, we conclude that the appellant has failed to prove his allegations.

We think that there was sufficient testimony adduced on the trial of this case, relative to the acts, conduct and declarations of Dale Hopson, to sustain the

finding of the trial court that he made a voluntary gift of $2,500 to his step children. Mrs. Lillian Edwards, a teller in the Clark County Bank, testified to the following:

"Q. What did he (Dale Hopson) tell you he wanted to do with the checks?

"A. He wanted to leave $2,000 for the two Buford girls with Ivory Littrell, their grandmother, for to take care of for them, and $500 to the Buford boy.

"Q. I see. Now did you undertake to question him about his desires?

"A. Yes, sir.

"Q. Why?

"A. Well, the two checks were made out to him and these were his step children, and I asked him was he sure he wanted to place it in their names.

"Q. What did he say?

"A. He said he did.

"Q. Then, did you undertake to explain the matter to him?

"A. Yes, sir. I told him he was a very generous step father. Then, when he got through with the transaction, I gave up and said, 'You don't want your name anywhere on this book?' He said, 'I don't want anything to do with it. I want the grandmother to have it to see to their schooling or clothes or, if there is anything left, I want them to have it when they become of age.'

"Q. How long did you take in explaining to him?

"A. I told him to begin with, and I told him at the end of the transaction again.

"Q. You told him what?

"A. That the checks were his; made out to Dale Hopson. I said, 'Now these checks are yours and you don't have to do that.' He said, 'Yes, but I want to.'"

We have held in the case of *Williams* v. *Smith,* 66 Ark. 299, 50 S. W. 513, that, "If the gift be intended *in presenti,* and be accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once, and, as between the parties, becomes irrevocable."

On cross-appeal, there is insufficient testimony to show that appellant intended to make a gift of $500 to Ivory Littrell.

No error appearing, the decree of the trial court is affirmed on appeal and cross-appeal.

Justices GEORGE ROSE SMITH and WARD dissent in part.

GEORGE ROSE SMITH, J., dissenting. I am unable to agree with the majority's conclusion that "there is insufficient testimony to show that appellant intended to make a gift of $500 to Ivory Littrell." On the record there is no sound reason for drawing any distinction among the various gifts.

All the transfers were made at the same time, in the Clark County Bank. In addition to depositing $2,500 in savings accounts for the children the appellant handed Ivory Littrell $300 and deposited $200 in a savings account in her name. The appellant kept the rest of the insurance money for himself; so the transactions in the bank resulted in a complete division of the funds.

The fact of delivery is unquestionably the strongest indication of a gift, since the requirement that a gift be delivered brings home to the donor the realization that he has parted with his property. Here the proof is undisputed that the appellant delivered $500 to his mother-in-law and that she retained the money for more than a year. The majority opinion leaves unanswered the obvious question: If the transfer to Ivory Littrell was not a gift, what was it? It was certainly not a loan

or a payment under mistake, and the charge of fraud has rightly been rejected. In my opinion the only alternative is to uphold the validity of the gift.

WARD, J., joins in this dissent.

GRIFFITH *v.* GRIFFITH.

5-762 283 S. W. 2d 340

Opinion delivered November 7, 1955.

*Wood & Smith,* for appellant.

*O. W. Pete Wiggins,* for appellee.

J. SEABORN HOLT, J. The parties here were divorced March 20, 1952 and under the decree appellant, E. H. Griffith, was ordered to pay appellee $150.00 per month alimony. He made these payments as ordered until March 20, 1953 but has paid nothing since June 30, 1954, when he paid $75.00 to appellee. The alimony payments had been reduced to this amount by a previous court order. Appellant married again March 3, 1953. In February 1955 appellant was cited to appear and show

cause why he should not be held in contempt for failure to comply with the court's order to pay $75.00 per month alimony. On a hearing April 19, 1955 appellant was adjudged to be in contempt. A jail sentence of ten days, and a fine of $50.00, were imposed. The court found him to be delinquent in his payments in the sum of $570.00 and entered judgment against appellant for this amount "for the collection of which immediate execution or garnishment may issue as upon a judgment at law." In addition appellant was ordered to pay appellee's attorney $100.00, all costs, and $50.00 per month future alimony to appellee until further orders of the court. This appeal followed.

For reversal appellant says: "It is our position that while appellee was entitled to a judgment for arrearages it was not within the power of the court to imprison appellant for contempt because performance of the court's order at the time of the hearing was a physical and financial impossibility. It is our further position that while appellee's attorney rendered valuable services it was an abuse of discretion to impose an attorney's fee against appellant because there is no evidence of financial ability to pay any amount. The same is true of the $50.00 award of alimony."

Appellant was a conductor on the Missouri Pacific Railroad. July 5, 1954, he became disabled and on the same day hospitalized because of a coronary occlusion. He has not been able to work since. He remained in the hospital for a period of forty days and has been back several times since. These returns to the hospital are recited in the following summary by Dr. S. C. Fulmer, heart specialist, who had him in charge.

"He was admitted July 5, 1954 and discharged August 14, 1954. The diagnosis was acute coronary occlusion. This attack had occurred on the morning of July 5, 1954 while walking from his train to his room about 4:30 a.m.

"He was admitted to the hospital on October 3, 1954 for a follow-up examination of his coronary occlusion and was discharged October 5, 1954.

"He was readmitted November 28, 1954 and discharged December 2, 1954. The diagnosis was old coronary occlusion with mild congestive heart failure.

"He was again admitted for further heart study on January 16, 1955 and discharged on January 18, 1955. Diagnosis: old coronary occlusion.

"He was admitted February 1, 1955 and discharged February 7, 1955. Diagnosis: osteoarthritis of the spine, old coronary occlusion.

"He was admitted February 15, 1955 and was discharged February 17, 1955. During this examination his whole case was reviewed and it was my opinion that Mr. Griffith was totally disabled to do the work of a railroad conductor and I recommended that he be retired from service as of February 17, 1955. This opinion was concurred in by Dr. Peter O. Thomas, District Surgeon for Little Rock Missouri Pacific Hospital."

His pay from the railroad has stopped and he is now on the retired list, and he received sick benefits of $73.80 every two weeks for a period of six months until January 1955. He has 29 years service with the railroad and has applied for retirement pay ("or sick benefits") to which he is entitled and should receive in due course. The amount of such benefits is not disclosed. Appellee at the time of trial and for sometime prior thereto was receiving $25.00 per week as a clerk in a New Orleans department store.

Appellant's contention that the court erred in assessing a fine and jail sentence in the circumstances is correct. Imprisonment for contempt for failure to pay alimony may be imposed only in those cases where it appears that the defendant was able to pay but willfully and stubbornly refused to do so. We hold, on trial de novo here that the findings of the court, that appellant was able to pay during the six months' period and that he willfully refused to do so, were against the preponderance of the evidence.

On the record presented this is clearly not a criminal contempt proceedings but one of civil contempt, the object of which is not to punish appellant but to coerce him to pay the money due for alimony under the divorce decree. The prevailing rule appears to be as announced in *Snook* v. *Snook,* 110 Wash. 310, 188 P. 502, 9 A. L. R. 262, where it is said: "In a contempt proceeding . . . the object of which is to coerce the payment of money, the lack of ability to pay on the part of the defendant is always a complete defense against enforcing payment from the defendant by imprisonment. In harmony with the law on that subject in most of the jurisdictions of this country, this court has repeatedly so held."

The above rule appears to be in accord with our own in *Ex parte Caple,* 81 Ark. 504, 99 S. W. 830, where we said:

"Our statute expressly provides that the court in actions for divorce 'may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and in proceedings as in cases for contempt.' Kirby's Digest, § 2679 (now § 34-1210, Ark. Stats. 1947). It further provides in another section that such orders may be enforced by sequestration and such other lawful ways and means as are in accordance to the rules and practice of the court. Kirby's Digest, § 2682 (now § 34-1212, Ark. Stats. 1947). Imprisonment in such a case is only justified on the ground of willful disobedience to the orders of the court; and, so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged." And, in *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096, we said: "Imprisonment of a divorced husband for a failure to pay alimony is justified only on the ground of willful disobedience to the orders of the court, and as soon as it is made to appear that he is unable to comply with such orders, he should be discharged. *East* v. *East,* 148 Ark. 143, 229 S. W. 5; *Webb* v. *Webb,* 140 Ala. 262, 37 So. 96, 103 Am. St. Repts., 30, and *Messervy* v. *Messervy,* 85 S. C. 189, 67 S. E. 130, 137 Am. St. Repts. 873, and case note at 883.

"It does not appear that the defendant made a fraudulent disposition of his property after the award of alimony against him; or that he failed or refused to perform the decree from mere contumacy. It appears that his neglect was the result of misfortune from want of means and ill health. The court is empowered to punish the defendant by imprisonment for willful obstinacy where it shall appear that he had the means with which to comply with the decree, but it should not imprison him where he shows that he has not the pecuniary ability to comply with the decree and is in such ill health that he cannot earn enough money to do so." Reaffirmed in *Hemby* v. *State,* 188 Ark. 586, 67 S. W. 2d 182. As indicated, there was no showing here that appellant was able to pay and refused from mere contumacy.

The judgment against appellant for arrearages, attorney's fee, costs, and future alimony payments of $50.00 per month will be allowed to stand, and as we said in the *Harmon case* above, 152 Ark. 129, 237 S. W. 1096, . . . "under our practice the defendant may be again cited for contempt if it should be shown that his disobedience to the order of the court continues and is willful or the result of fraudulent conduct in the premises on his part." So much of the decree adjudging the appellant guilty of contempt and assessing the $50.00 fine and a ten day jail sentence is reversed and dismissed; in all other respects the decree is affirmed.

HARRIS *v.* SIMON.

5-741 283 S. W. 2d 349

Opinion delivered November 7, 1955.

*Roger L. Murrel* and *Arthur G. Frankel,* for appellant.

*Bailey, Warren & Bullion,* for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant brought this suit to have his warranty deed to appellee declared to be a mortgage. The Chancery Court refused the prayed relief; and there is this appeal.

In 1949 appellant's wife obtained a divorce, and appellant was required to pay her $800.00 plus court costs. He obtained the money from appellee (acting at all times by her husband, C. M. Simon, Jr.). The payment, by appellee's check, was made in the office of the late Honorable Fred Isgrig, who had represented the wife, Bertie Harris, in the divorce proceedings. The Notary Public, who took the acknowledgment of the warranty deed to appellee from appellant and his divorced wife, testified:

"When they gave me a deed to have signed and have notarized I said, 'Will, this isn't a mortgage; this is a deed'; and Mr. Simon said, 'That is all right,'; and Will said, 'I have confidence in Mr. Simon'; and I thought it was strange at the time they would do that."

At all events, the deed was signed and acknowledged on September 16, 1949 by both Will Harris and his divorced wife, Bertie[1] Harris; and Mr. Simon delivered the checks at the same time. The appellant, by monthly payments—claimed by him to be repayments and by appellee to be rent—continued to live on the conveyed prem-

[1] In some places the name is spelled "Birdie"; but when she signed the deed she signed it "Bertie Harris."

ises until 1950 or 1951 when he moved because—as he says—of the threats of Mr. Simon. Appellant then consulted an attorney, who died before instituting this suit; and thereafter appellant employed his present counsel and this suit was filed in August, 1954, in which appellant claimed that all he ever borrowed from appellee was $800.00 and that the entire transaction was a mortgage instead of a deed.

But appellee established, by cancelled checks, documentary evidence, and the testimony of entirely disinterested witnesses: that on September 6, 1949 appellant listed the property in dispute with a local real estate agent for sale at a price of $2,300.00; that the real estate agent went to Mr. Simon and showed him the property and Simon made an offer of $1,700.00 to purchase the property with an abstract to be furnished; that such offer was transmitted by the real estate agent to the appellant; and that the offer was accepted by the appellant in writing. The originals of the instruments were introduced in evidence, as well as the original settlement statement of the real estate agency, as follows:

"Sept. 16th, 1949

SETTLEMENT STATEMENT

For Will Harris and Birdie Harris

Account sale of 1704 So. Cedar (All Lots 16 and 17, except N 20 ft Lot 17 in Block 62 Braddock's Addition) to M. W. Simon, Trustee

| | | |
|---|---|---|
| Agreed sale price | Cash | $1,700.00 |

DISBURSEMENTS AND ADJUSTMENTS

| | |
|---|---|
| Abstract fee | $ 44.00 |
| Revenue stamps on deed | 2.20 |
| Balance of Court Costs Circuit Court case Birdie Harris v. H. C. West | 11.00 |
| Balance due, Universal CIT Corpn (new roof) | 251.90 |

| | |
|---|---|
| Sales commission (agreed) | 100.00 |
| Total | $ 409.10 |
| Cash received | 1,700.00 |
| Expended | 409.10 |
| Balance due Will Harris and Birdie Harris | $1,290.90'' |

Appellee introduced the cancelled checks totalling $1,700.00, corroborating the settlement statement, and including the checks for $1,290.90 balance due Will and Bertie Harris. The real estate agent testified that, at the time of the conveyance, the property was worth about $2,000.00, so there was no great disparity between the value of the property and the $1,700.00. Appellee has made substantial improvements to the property.

As to the significance of the conversation before the Notary Public, as previously copied, the appellee's evidence disclosed that, either at the time of the deed or some six months thereafter, appellee gave appellant some sort of option to repurchase the property; and that when appellant defaulted on the payments due on that contract, appellee caused appellant to vacate the premises. But *appellant denied* any such repurchase option and did not ask that any repurchase instrument be considered as constituting the entire transaction to be a mortgage. In the light of appellant's denial of the repurchase agreement, we do not have before us a situation where a deed was made with an option to repurchase, as existed in such cases as *Oliver* v. *Watts*, 194 Ark. 644, 109 S. W. 2d 111; *Avera* v. *Reynolds*, 203 Ark. 1060, 160 S. W. 2d 48; *Sturgis* v. *Hughes*, 206 Ark. 946, 178 S. W. 2d 236; or *Newport* v. *Chandler*, 206 Ark. 974, 178 S. W. 2d 240, 155 A. L. R. 1096, where there is also an annotation.

In the light of all the evidence, we cannot say that the Chancellor was in error in dismissing appellant's complaint. The burden was on the appellant to prove, by evidence that was clear, unequivocal and convincing,

that the deed was a mortgage. *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Henry* v. *Henry,* 143 Ark. 607, 221 S. W. 481; *Hudgens* v. *Taylor,* 206 Ark. 507, 176 S. W. 2d 244; *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240; and *Landers* v. *Denton,* 213 Ark. 86, 209 S. W. 2d 300. Appellant failed to discharge that burden.

Affirmed.

Justice ROBINSON not participating.

Justices HOLT and WARD dissent.

NAIL *v.* STATE.

4822 283 S. W. 2d 683

Opinion delivered November 7, 1955.

[Rehearing denied December 5, 1955.]

*Jeff Duty,* for petitioner.

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

MINOR W. MILLWEE, Associate Justice. On January 26, 1955, appellant was convicted in the Municipal Court of Rogers, Arkansas, as a second offender, of driving an automobile while under the influence of intoxicating liquor in violation of Ark. Stats., Secs. 75-1027 and 75-1029, and his punishment was fixed at a fine of $250 and a jail sentence of 90 days. On appeal to the Benton Circuit Court, there was a jury trial on March 25, 1955 resulting in the same judgment as in municipal court. There was no appeal from this judgment.

On August 5, 1955, appellant filed in this court the instant petition to quash on *certiorari* the circuit court judgment on the ground that the information failed to charge a previous conviction thereby rendering said judgment void.

The information, omitting its formal parts, alleges: "The said Ray Nail, in the said County of Benton, State of Arkansas, on or about the 8th day of October 1954, did wilfully and unlawfully operate a motor vehicle upon a public highway, while, he, the said Ray Nail, was under the influence of intoxicating liquor, this offense being the second offense of driving while under the influence of intoxicating liquor committed by the said Ray Nail within one year of the first offense of driving while under the influence of intoxicating liquor committed by the defendant."

Ark. Stats., Sec. 75-1029, supra, is section 3 of Act 208 of 1953. After providing the punishment for a first conviction of driving an automobile while under the influence of intoxicating liquor, or drugs, as set forth in sections 1 and 2 of the act, the statute provides: "On a second or subsequent conviction for an offense committed within one [1] year of the first offense of a violation of this Act, he shall be punished by imprisonment for not less than ten days (10), nor more than one year, and a fine of not less than two hundred and fifty dollars ($250.00) nor more than one thousand dollars ($1,000.00) and his privilege to operate a motor vehicle shall be revoked for one [1] year. . . ."

Since such issues are not raised, we will assume, without deciding, that *certiorari* is available to appellant as a remedy, and that the contents of the information alleged to be defective are apparent from the face of the record. When so considered, we hold the information sufficient, in the absence of a motion for bill of particulars, to charge a prior conviction and to clearly apprise appellant that the state was claiming the particular offense charged to be his "second offense" within the meaning of the statute.

Appellant relies upon the general rule followed in *Robbins* v. *State,* 219 Ark. 376, 242 S. W. 2d. 640, to the effect that, in order to subject an accused to the enhanced punishment for a second or subsequent offense as a habitual criminal, it is necessary to allege in the information or indictment the fact of a prior conviction or convictions. In that case, we held an information insufficient to sustain the defendant's conviction of a felony for a third offense of selling liquor where the information only alleged a misdemeanor and one offense under a statute that provided increased punishments for second and third "convictions." It is appellant's contention that the information here was fatally defective because the words "convicted" or "conviction" were not used in reference to the first, or prior, offense. It should be noted that the prosecuting attorney, in drafting the instant information, simply followed the language of the statute by charging appellant with a second offense committed within one year of the "first offense," which latter term the Legislature clearly meant to be synonymous with first, or prior, "conviction."

In the *Robbins* case, we said: "If the information in the case at bar had charged the prior convictions of appellant only in general terms, then it might have been sufficient under our liberal rules of procedure, at least in the absence of a motion for bill of particulars. But the information here embraces no charge of a prior conviction nor any other allegation calculated to put appellant on notice that he was charged with a felony." What

was lacking there is clearly present in the instant case. Here a prior conviction was sufficiently alleged in the absence of a motion for bill of particulars.

While the fact of conviction should be sufficiently averred in an information or indictment seeking to charge accused as a second or subsequent offender, it is not essential to use the word "convicted" if its equivalent is otherwise sufficiently alleged. 42 C. J. S., Indictments and Informations, Sec. 145 b(b). The term "second offense," as it is used in habitual criminal statutes, has been generally defined by the courts as, "one committed after conviction for a first offense." See, Black's Law Dictionary (4th Ed.) p. 1233, and cases there cited. As the court said in *Holst* v. *Owens,* (C. C. A. Fla.) 24 Fed. 2d. 100: "It cannot be legally known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense." See also, *Carey* v. *State,* 70 Ohio St. 121, 70 N. E. 955; *State* v. *Gielen,* 54 N. D. 768, 210 N. W. 971. While the holding in these cases is contrary to that of the Michigan court in *People* v. *Buck,* 109 Mich. 687, 67 N. W. 982, upon which appellant relies, we think it represents the more reasonable view and one that is in keeping with the liberal rules relating to the form, sufficiency and construction of words used in indictments and informations as set forth in Ark. Stats. Secs. 43-1007 to 43-1024.

The petition for writ of *certiorari* is denied.

ALEXANDER *v.* LAMAN.

5-760 283 S. W. 2d 345

Opinion delivered November 7, 1955.

*Kenneth C. Coffelt* and *Tilghman E. Dixon,* for appellant.

*Edwin E. Dunaway,* for appellee.

George Rose Smith, Associate Justice. This is a suit by the appellant for damages for malicious prosecution. The only question at issue is whether the trial court acted correctly in directing a verdict for the defendant.

The relevant facts, stated most favorably to the appellant, are these: In 1951 the appellant bought a cedar chest at the appellee's furniture store and signed a purchase contract by which the appellee retained title to the property until it was paid for. In making the purchase the appellant informed the appellee that she intended to give the chest to her daughter as a graduation present. The gift was made immediately after delivery of the chattel. Some months later the daughter married and took the cedar chest to Arizona.

Upon the appellant's becoming delinquent in her payments on the debt the appellee had her arrested on a charge of wrongful disposal of title-retained property. Ark. Stats. 1947, § 41-1928. At a trial in the North Little Rock municipal court the appellant was convicted and sentenced to a fine and imprisonment. Upon appeal to the circuit court, however, the charge was dismissed on a point of law—apparently on account of the appellee's knowledge that the chest was to be given away.

Upon this proof the court was right in instructing a verdict for the defendant. It was incumbent on the

plaintiff to show, as an essential element of her cause of action, that the defendant acted without probable cause in having her arrested. *Price* v. *Morris,* 122 Ark. 382, 183 S. W. 180. That element of the appellant's case is necessarily lacking, for it is settled that a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment is later reversed. *Freeman* v. *Allen,* 193 Ark. 432, 100 S. W. 2d 679. In the case at bar the appellant, in an effort to escape the legal effect of her conviction, sought to introduce a transcript of the testimony taken before the municipal court, for the purpose of showing that the evidence did not support that court's finding of guilt. This offer of proof was properly rejected. Since the municipal court's judgment, in the absence of fraud in its procurement, was *conclusive* evidence of the existence of probable cause, the appellant was not entitled to retry an issue already determined.

Affirmed.

LAWRENCE *v.* LAWRENCE.

5-754 283 S. W. 2d 697

Opinion delivered November 7, 1955.

*Pat H. Mullis* and *Lloyd B. McCain,* for appellant.

*J. F. Wallace, Jr.,* for appellee.

PAUL WARD, Associate Justice. This appeal calls for an interpretation of a portion of the will of Josiah W. Lawrence. It was appellant's contention below that said will created a trust relationship, that trial court decreed otherwise, and this appeal is prosecuted for a reversal. Josiah W. Lawrence, being the owner in fee of three lots in McGehee, Arkansas, of the value of approximately $10,000 [together with other real and personal property], executed his will on May 14, 1945 the material portions of which were as follows:

"3rd"

"I direct that my wife or my executrix, hold my estate intac and that she hold, Sell or dispose of my property at her will, and the same shall be use for the Benefit of her and my two children, Charles D. and Jay D. Lawrence, and all her actions is hereby ratified and confirmed, and she is hereby authorized and empower to sell, or dispose of my estate in the same manner as if done by me during my life time, and her own signature shall convey all rights and titles held *my* me at my death.

4th

I further direct at the death of my executrix, that my estate, both real and personal, of whatever so kind, and wheresoever found, shall pass to my two said children, and unto their *airs* to *shear* alike between the two, and to theirs *shear* alike."

At the time of his death on November 28, 1946 Josiah W. Lawrence left surviving him his widow, Annie Lawrence, a son Charles D. Lawrence, and a son Jay D. Lawrence, single. Charles D. Lawrence died on Jan-

uary 25, 1950 leaving his widow, appellant, but no children. On May 9, 1950 Annie Lawrence, for $1.00, other good and valuable considerations, and love and affection, executed a warranty deed to Jay D. Lawrence conveying the aforementioned three lots. Annie Lawrence died on April 15, 1952. The record contains a will, recorded in Book "D" at page 423 of Will Records in Desha County, executed by Charles D. Lawrence October 24, 1949 in which he gave all of his estate real and personal to his wife, the appellant.

This suit was instituted by appellant, the widow of Charles D. Lawrence, to cancel the aforementioned deed from Annie Lawrence to Jay D. Lawrence and to have the will of Josiah W. Lawrence so construed as to give her a one-half interest in the property mentioned, and for other relief.

The trial judge, in an exhaustive and able statement, concluded that the will of Josiah W. Lawrence created no trust relationship. We do not agree with the conclusion reached by the chancellor, but we do think he correctly stated the fundamental issue presented by this appeal when he stated: "The only question presented here is for a construction of this will with reference to the validity of the deed from Annie Lawrence to Jay D. Lawrence."

The cardinal rule for the interpretation of a will, announced many times in our decisions, is very well stated in *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417. This rule is that the intent of the testator should be ascertained and effect given to that intent. In this connection it was also stated that the testator's intent must be ascertained from the language expressed in the will after a consideration of all the provisions of the instrument rather than from any particular form of words. Where the question arises as to whether the will creates a trust relationship it is said that a liberal construction should be applied to effectuate that relationship. In 56 Am. Jur. (Trusts) page 36, § 18, it is stated: "Liberal construction, within bounds of purpose and natural and uncontaminated import, in view of the existence and

scope of the trust, is the rule" (citing cases). The same cited authority, § 17, says: "In construction of a trust instrument the expressed intent will not be varied under the guise of correction because the trustor misapprehended its legal effect. The trustor is presumed to know the law." It is said in Restatement of the Law (Trusts) page 72, § 23, that: "No particular form of words or conduct is necessary for the manifestation of the intent to create a trust." In the "illustrations" given at page 74, that the words "for the use of B" or "for the benefit of B" are sufficient to denote a trust.

Measured by the announced rules, a careful consideration of that portion of Josiah W. Lawrence's will set forth above forces us to the conclusion that the will did not convey to Annie Lawrence a fee simple title to the described property, but that a trust relationship was created under which she held the property for the use and benefit of herself and the two sons.

To our minds the plain unambiguous wording of the will is susceptible to no other reasonable interpretation. Some of the wording is: "and the same," speaking of the testator's estate, "shall be used for the benefit of her [Annie Lawrence] and my two children." And in the 4th paragraph the testator directed that at her death his estate should "pass to my two said children . . ."

All the above language is repugnant to the testator's intent to give his wife a fee simple title.

There is other language in the will which appellee relies on to show a different intent of the testator—an intent to give his wife a fee. Some of such language relied on is: "and she (the wife) is hereby authorized and empower to sell or dispose of my estate," etc., but this language, we think, is not all inconsistent with our stated view. In the first place the language might be said to be inconsistent with appellee's view because, if in fact the wife was given a fee, the language was unnecessary, as stated in *Owen* v. *Dumas,* 200 Ark. 601, 140 S. W. 2d 101. If the wife received a fee she, of course, had full power

to sell anyway. In the second place the language in the will giving the wife the power to sell, is the language necessary and usual where a trust is created with power in the trustee to sell for the benefit of others. In the third place the will states, in the first three lines of paragraph "3rd," that "she hold, sell or dispose" of the property "and the same shall be used for the benefit" of her and her two sons.

Consequently we conclude that Annie Lawrence could only dispose of the property for the purpose expressed in the will, and, further, that the deed she made to her son Jay D. Lawrence on May 9, 1950 was not for such a purpose. In fact it is not contended said deed was made for any such purpose—no testimony being introduced. In the *Owen* case, *supra,* it was said: "In the case at bar, the power to dispose of the property is expressly limited to certain purposes, and the widow could not dispose of the property for any other purpose than those mentioned in the will."

Having construed the will to impose a trust upon the widow, it follows that she only had (not more than) a life estate in the property in litigation, and that the fee in the property went to the two children. The facts and issues in this case are similar to those considered in *Patty* v. *Goolsby,* 51 Ark. 61, 9 S. W. 846, where we said: "As to the construction of the will we see no difficulty whatever. The testator has given, and no doubt intended to give to his wife Elizabeth, a life estate in both his personal and real property or his whole estate. It is equally clear that he gave and intended to give the remainder in fee to his children." In speaking of the interest which the children received the court said: "It was therefore not a contingent but vested remainder—vested at the same time the life estate vested."

It follows that Charles D. Lawrence during his lifetime had a vested interest in the property in litigation, which was such an interest as he could convey by will to his wife.

Since no testimony was taken before the trial court it appears likely that there will be further litigation relative to certain issues raised in the pleadings, therefore the cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Justice McFaddin dissents.

Orr *v.* Love.

5-718 283 S. W. 2d 667

Opinion delivered November 7, 1955.

[Rehearing denied December 5, 1955.]

*Claude M. Williams, Duty & Duty* and *Bernal Seamster,* for appellant.

*Fairchild, Foley & Sammond; Rose, Meek, House, Nash & Barron; Vernon W. Thompson,* Attorney General of Wisconsin, *Roy G. Tulane,* Asst. Atty. General of Wisconsin, for appellee.

SAM ROBINSON, Associate Justice. This is a contest of a will of Alice A. Love executed on June 27, 1953, and a proceeding to establish the validity of a will executed by her on May 30, 1953. Appellants, Nellie Orr and other collateral heirs of Dr. George M. Love and Alice Love, are the contestants of the June 27 will and the proponents of the May 30 will; Elaine Love and the Board of Regents of the University of Wisconsin are the proponents of the June 27 will. Alice Love wrote five purported wills. The first was written in 1949, the second on May 30, 1953, the third on June 1, 1953, the fourth on June 24, 1953, and the fifth and last was executed on June 27, 1953. The last alleged will of June 27 was sustained by the Probate Court. In contesting this will, appellants claim that it was the result of undue influence and fraud, and ask that the May 30 will be probated instead.

George M. Love was a doctor and lived with his wife Alice in Rogers, Arkansas for many years. They had one child, George R. Love, who was also a doctor. In 1923, soon after the son's graduation from medical school, he married and located in Oconomowoc, Wisconsin, a small city near Milwaukee. George M. Love had made a will years before his death leaving all of his estate, with

the exception of $500.00 for his son, to his wife Alice. In 1949, acting on the advice of her son, George R. Love, Alice Love made a will leaving all of her property to her son, or to his estate in the event he predeceased her.

On May 26, 1953, the son, George R. Love, died leaving an estate valued at more than half a million dollars. Four days later, the father, George M. Love who lived in Rogers, died leaving an estate valued at about $125,000. The son, George R. Love, left a will setting up two trusts, one known as the Elaine Love Trust and the other known as the George R. Love Trust. His widow Elaine Love, the appellee herein, is the principal beneficiary. In addition to her rights under the Elaine Love Trust, she is to receive the income from the George R. Love Trust for life. After Elaine Love's death, the income from the George R. Love Trust goes to her parents for their lifetime; the corpus of the George R. Love Trust then goes to the Board of Regents of the University of Wisconsin to be used to assist athletically minded students in obtaining an education. Elaine Love and Mr. Lynford Lardner, attorney for George R. Love who is now representing his widow, were named as trustees. Under the terms of the will, the trustees have almost unlimited powers; they may move the situs of the trust to any State or foreign country, and are not required to account to anyone for their actions. The George R. Love will setting up these two trusts is very long and involved and consists of over fourteen typewritten pages. For a thorough understanding of its terms considerable study is required.

Mr. Claud Williams, an attorney in Rogers, Arkansas, had represented Mrs. Alice Love for many years. His secretary, Mrs. Jeffa Scott, had looked after business matters for Alice Love and prepared her income tax statements for several years. Elaine Love knew of the close professional relationship between Mr. Williams and Mrs. Alice Love. When George R. Love died on May 26, 1953, Elaine thought it better to let Mr. Williams notify Alice of her son's death; Elaine therefore had her attorney, Mr. Lardner, telephone Mr. Williams. Four

days later on May 30, at about 3 o'clock in the morning, Alice Love's husband, Dr. George M. Love, died; Elaine was promptly informed of his death. About 10 o'clock that same morning, Alice Love went with Jeffa Scott to Claud Williams' office where she made a new will leaving the bulk of her estate to her two sisters and to the brother and sister of her late husband. She also left $500.00 to the Rogers Public Library, $500.00 to Cecil Miller, $100.00 to Elaine Love, as well as other bequests of $100.00 each to several nieces and nephews. After Mrs. Love signed this will, she left it in Mr. Williams' office.

Elaine Love arrived at Joplin, Missouri by plane on May 31 and was met there by Cecil Miller, longtime friend of Dr. Love and his wife Alice. During the trip from Joplin to Rogers by automobile, Miller told Elaine about Alice Love having made a new will. Elaine was extremely displeased upon learning this. She did not go directly to the Love home in Rogers but stopped at a hotel, obtained a room and while there put in a long distance call to Mr. Lardner, her attorney in Milwaukee, to discuss with him the fact that Mrs. Love had made another will. She apparently discussed with Lardner the advisability of having Mrs. Alice Love execute still another will and also talked about obtaining a power of attorney from Alice. Following this conversation Elaine went to the Love home, and the next morning took Alice Love to the office of Mr. Williams where Alice obtained the will she had executed two days before. Although there is some confusion in the testimony as to just exactly what happened next, it appears that Alice Love took the will and put it in her lock box at the bank. Elaine then took Alice to Bentonville to the office of Mr. Vol Lindsey, an attorney of that city. There Alice made a new will leaving her entire estate to Elaine. This will was executed on June 1, only two days after Alice had executed the will drawn by Mr. Williams at her request. Mr. Lindsey was not told about the May 30 will.

In the meantime, Elaine had again called Mr. Lardner and had instructed him to prepare a power of attor-

ney. Mr. Lardner drafted a general power of attorney and sent it to Elaine in Rogers. This document gave Elaine authority to do anything she might wish with any and all property belonging to Alice, and it was signed by Alice on June 3. On the same day, Alice also changed her bank account, consisting of about $12,000, from a personal account to a joint one with Elaine. On June 4, Elaine returned to Milwaukee. On the 10th day of June she again came to Rogers and returned to Milwaukee on the 13th. A few days later, Alice wrote to Elaine requesting that she return the power of attorney. In the meantime, Alice destroyed the June 1 will which she had executed in Bentonville leaving everything to Elaine, and changed her bank account back into her own name only. On June 24, Alice wrote what purports to be her fourth will, in which she made $1,000 bequests to each of her sisters and to the brother and sister of her late husband, and left Elaine corporate stock apparently valued at about $47,000. This June 24 will then provides: "If any of estate is left then it shall be used to promote my sons education proposition." As a matter of fact, there would have been under the terms of this document a residuary estate valued at more than $50,000 after the special bequests. Elaine says that on June 25 Alice called her and asked her to have Mr. Lardner prepare another will. Elaine did this and left Milwaukee on the 27th day of June, taking the new will with her to Rogers. On that same day, while Elaine was present, Alice signed the will. This was the fifth purported will of Alice Love. On June 29, while Elaine was still in Rogers, Alice's personal bank account of about $12,000 was again made into a joint one with Elaine.

This will of June 27 left the entire estate of Alice Love to the George R. Love Trust. Since Elaine receives the income from this trust for life, she will benefit by approximately $48,000 under the terms of Alice Love's June 27 will. Elaine was also named executrix to serve without bond.

After Alice signed the June 27 will, Elaine stayed in Rogers for about a week and then returned to Mil-

waukee. On September 12, Mrs. Alice Love's health had become such that it was necessary to move her to a hospital. Elaine returned to Rogers on September 22 and stayed at the Love home until October 10. Mrs. Alice Love died on October 16. The June 27 will was offered for probate and this action contesting it was filed.

We now mention some of the rules of law by which we must be guided in reaching a conclusion as to the validity of the will. In a leading case this court said: "The fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them in confidential relations with them at the time of its execution." *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590. The burden of proving undue influence is on the contestants. *Werbe* v. *Holt,* 218 Ark. 476, 237 S. W. 2d. 478; *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d. 433; *McWilliams* v. *Neill,* 202 Ark. 1087, 155 S. W. 2d 344; *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264. But, when it is shown that the will is drawn or procured by a beneficiary, there is a presumption of undue influence. Page on Wills, Vol. 2, p. 636. Where the beneficiary plans the will and causes it to be executed, the same rule applies as where he drew the will. *Ibid.,* p. 638. This court has said: "When a will is written, or proved to be written by a person benefiting by it, or by one standing in the relation of attorney or counsel, and who is also benefited by it,—these are circumstances to excite stricter scrutiny and require stricter proof of volition and agency." The court then quotes with approval from *Breed* v. *Pratt,* 18 Pick. R. 115, as follows: "It is incumbent on those, who, in such a case,

seek to establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid." *McDaniel ad.* v. *Crosby et al,* 19 Ark. 533. The presumption of undue influence is not one of law but is a presumption of fact and subject to rebuttal. *Zeigler* v. *Coffin,* 219 Ala. 586, 123 So. 22, 63 A. L. R. 942. There is also a similar presumption where one who draws a will is named a trustee therein and is to receive large compensation for his services. Page on Wills, Vol. 2, p. 644; *Zeigler* v. *Coffin,* 219 Ala. 536. The cause is tried *de novo* here and the preponderance of the evidence rule prevails. *Brown* v. *Emerson,* 205 Ark. 735, 170 S. W. 2d. 1019. The question of undue influence and mental capacity are so closely interwoven that they are considered together. *Phillips* v. *Jones,* 179 Ark. 877, 18 S. W. 2d. 352. It is necessary to the validity of a will that the testator know its contents. In *Meek* v. *Bledsoe,* 221 Ark. 395, 253 S. W. 2d. 369, this court quoted with approval from 68 C. J. S. 606: "It is indispensable to the validity of a will that the testator should know its contents at the time of its execution, knowledge after the execution being insufficient. However, as elsewhere shown, knowledge will ordinarily be presumed from the execution of the instrument, although the presumption is only a *prima facie* one and may be rebutted. If it appears affirmatively that he did not read the will and that it was not read to him, it must be shown that the contents were in some way known to him."

We must bear in mind that Elaine is one of the principal beneficiaries named in Alice Love's June 27 will, and that the will was prepared by this beneficiary's lawyer at her request and according to her instructions. Moreover, Mr. Lardner is one of the trustees named in the George R. Love Trust which is incorporated by reference in Alice Love's June 27 will. In the event of Elaine Love's death, Mr. Lardner would be the sole trustee. With the broad powers given to him as trustee, he could benefit considerably from the George R. Love Trust and hence from the June 27 will of Alice Love. Since both Elaine and Mr. Lardner would benefit under the

terms of the June 27 will, and since Lardner was acting on instruction from Elaine when he prepared the will, it is the proponents' burden to prove not only that Alice Love had the mental capacity to execute a valid will but that she was free from undue influence and understood the terms of the will. The proponents of the will have not met this burden.

Elaine attempts to make a reasonable explanation of everything that was done and to show that the will was not made because of any undue influence on her part, and that there was no fraud in failing to fully inform Alice Love about the George R. Love Trust. Both sides offer expert and lay testimony as to the mental capacity of Alice Love. But this is a case where actions speak louder than words. Undue influence may be inferred from facts and circumstances. *Alford* v. *Johnson,* 103 Ark. 236, 146 S. W. 516. "Undue influence is generally exercised in secret, not openly, . . . its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes." *Hyatt* v. *Wroten,* 184 Ark. 847, 43 S. W. 2d. 726. The undisputed facts and the reasonable inferences to be deduced from such facts inevitably lead to the conclusion that Alice Love was not acting according to her own free choice in executing wills at any time after Elaine's arrival in Rogers on May 31, 1953. In the first place, on May 30 Alice Love had gone to her lawyer's office and made a will. She had gone to a man she had known and trusted for many long years, the same man who had been selected by Elaine to notify Alice of her son's death. This lawyer's secretary had also been Alice's longtime friend and business advisor. It is argued that Jeffa Scott, the secretary, wrongfully induced Alice to go to Mr. Williams' office and execute the May 30 will, wherein Jeffa was named executrix. But we are not convinced at all that Alice went to Mr. Williams' office due to importunities on the part of Jeffa Scott. On May 27, the day after the son, George R. Love, died, a Mrs.

Chandler was present in the Love home in Rogers and heard Alice say to Jeffa Scott: "Now, Jeffa, I want to get that will [the 1949 will] changed and I want to get it right." And Jeffa replied: "Now, Mrs. Love, there's plenty of time to do that. You don't need to rush anything like that." We are convinced that Alice went to Mr. Williams' office because she wanted to dispose of the business of making a will as quickly as possible. By the recent death of her husband, she had acquired a large estate and the unexpected death of her only son had changed the situation considerably. In her May 30 will she did the natural thing, the thing that anyone would expect her to do; the large bulk of her estate was left to her two sisters and to the brother and sister of her late husband. The evidence is convincing that the May 30 will was the free and voluntary act of the testator.

It is argued that Alice Love had not been in contact with her two sisters for a long time and was hardly acquainted with the brother and sister of her husband; but she was certainly better acquainted with them than with the parents of Elaine to whom she left a contingent life estate under the terms of her June 27 will. Furthermore, the record indicates that the relationship between Alice and Elaine was not a close one. Alice lived in Rogers, Arkansas, and Elaine in Wisconsin. They had only seen each other on a few visits during their entire lives. There is no evidence of any correspondence written prior to June, 1953, that shows any affection whatever between them, and yet, the day after Elaine's arrival in Rogers on May 31, she took Alice to an attorney's office in Bentonville where Alice made a will leaving her entire estate to Elaine. Elaine tries to explain taking Alice to an out-of-town lawyer's office by saying that she was mad at Mr. Williams, claiming that he had wrongfully prevailed on Alice to make a new will so soon after the death of her husband. The record does not justify a conclusion that Mr. Williams induced Alice to make a new will or any will at all. Actually, May 30 was a holiday, and Williams did not want to come to the office, only doing so after he was called twice. He charged

only a nominal fee of $25.00 for drawing the will, and received no other benefits from it. The fact that Elaine took Alice to an out-of-town lawyer on June 1, and not to Mr. Williams, the lawyer who had been Alice Love's legal advisor for many years and who had written wills for her on previous occasions, is in itself a suspicious circumstance; especially so in view of the fact that Elaine, upon her arrival in Joplin and being told by Cecil Miller about the May 30 will, called Mr. Lardner, her attorney in Milwaukee, with reference to the will and the advisability of obtaining a power of attorney from Alice.

We do not believe there is a shadow of a doubt but that Elaine called Mr. Lardner seeking advice with reference to avoiding in some manner the May 30 will. Elaine attempts to show that the June 1 will, in which Alice left to her the entire estate, was not due to any conniving on her part, and tries to explain that the June 1 will was only a stop-gap to serve until such time as another will could be prepared in which Alice would leave the bulk of her estate to the George R. Love Trust. It is explained that Mr. Lindsey, the lawyer who prepared the June 1 will, did not have sufficient information about the trust to make a will whereby Alice would leave her estate to that trust. Mr. Lindsey is an able lawyer. He lives in Bentonville, a town very near Rogers, and yet, at no time subsequent to June 1, was he furnished with the necessary information about the George R. Love Trust so that he could prepare another will for Alice Love. Also, when Elaine was in Rogers from the 10th to the 13th of June, she did not mention the will business to Alice, or bring with her from Milwaukee a copy of the George R. Love will.

Another circumstance which carries great weight in establishing the fact that Alice Love was unduly influenced by Elaine is that Alice signed the power of attorney. This power of attorney is very broad. It was prepared by Elaine's lawyer in Milwaukee and signed by Alice on June 3, just four days after the death of Dr. Love, Sr., and only four days after she had executed the

May 30 will, of her own volition, leaving Elaine only a token $100.00. But that is not all. On June 3, Alice's bank account, consisting of about $12,000, was changed to a joint account for herself and Elaine. From the record, we can conclude that Alice Love was very frugal and careful about any expenditure of money, and the evidence in this case is far from convincing that Alice would, of her own free will, give power of attorney or joint account privileges to Elaine. Subsequently, Alice revoked the power of attorney and changed the bank account back to her own name. But the bank account was again changed to a joint one when Elaine next came to Rogers.

Moreover, the record is replete with evidence to the effect that at all times following May 30, Alice Love was using habit-forming drugs that produced both a sedative and hypnotic effect. She was weak physically and mentally. She was worn out from caring for her husband who had been bedfast for several years prior to his death. She was 77 years of age, and lived only three and a half months after the deaths of her husband and only son.

Although there is a rebuttable presumption that Alice knew the effect of her will when she left all of the estate to the George R. Love Trust, 57 Am. Jur. 573, this presumption is overcome by a preponderance of the evidence. For one thing, Elaine never told Alice about her life estate in the George R. Love Trust or the interest of her mother and father in the trust. Elaine testified that Alice understood her money was to go to the George R. Love Educational Fund and not to Elaine in any way. Elaine even states in the petition for probate of the June 27 will that she has no interest in Alice Love's estate, when as a matter of fact, under the terms of this will she has a very large interest amounting to about $48,000. Also, Alice never saw a copy of the George R. Love will setting up the trusts, although it is claimed that she read newspaper articles explaining the will. However, the only article that described the terms of the George R. Love will was not published until June 18,

and it appears that all the clippings referred to by witnesses which Alice Love saw were published prior to that date.

The record does not lead one to believe that Alice had any idea that she was leaving a life estate to Elaine and then to Elaine's parents before her money would ever go to an educational fund. There is nothing in Alice's June 27 will to indicate that she herself had any knowledge of the actual results of the terms of that will. Elaine testified that both she and Alice thought that, under the terms of the June 27 will, Alice's estate would go directly to the educational fund and that none of it would go to Elaine. This shows conclusively that Alice did not understand the contents of the will.

We have concluded that the May 30 will was the free and voluntary act of Alice Love. Due execution of this will was established. The same evidence which is convincing that subsequent wills grew out of undue influence persuades us that the May 30 will was destroyed as a result of that same undue influence. The making of one and the destruction of the other were parts of one transaction.

In 57 Am. Jur. 323, it is said: "When a testator in destroying his will acts under fraudulent and undue influence, the will is considered not to have been revoked, and may be admitted to probate on establishing facts showing the existence and due execution of the will and its destruction by reason of such improper influence. The execution of a will and the destruction of a former will may be so closely connected in point of time as to constitute one transaction, indivisible as to inducement and purpose, so as to render inescapable the conclusion that undue influence sufficient to invalidate the later will rendered the destruction of the former will ineffective as a revocation." In support of the text there is cited *In re Simmons' Estate,* 166 Minn. 65, 207 N. W. 189, and *Neal* v. *Caldwell,* 326 Mo. 1146, 34 S. W. 2d 104, 109. In the *Simmons* case, 28 R. C. L. 168 is quoted with approval as follows: "A will destroyed by the testator himself in his lifetime, acting under fraudulent or undue influ-

ence, is not considered as having been revoked, and may be admitted to probate on establishing facts showing the existence and due execution of the will, and its destruction by such improper influence."

It appears that when Mrs. Elaine Love took Alice to Mr. Williams' office on June 1 to get the will Alice had executed May 30, Alice had not been completely influenced to revoke that will. This is indicated by the fact that the will was not destroyed immediately, but was taken to the bank in Rogers and placed in Alice's lock box. Later, when Elaine and Alice returned from Bentonville where Alice had executed the June 1 will, they again went to the bank and obtained the May 30 will. There Elaine says that Alice tore it into pieces; but Elaine kept the pieces and delivered them to her lawyer, Mr. Lardner, in Milwaukee. Mr. Lardner kept the torn pieces in his files. They were put back together and later introduced as evidence in this case. The May 30 will is not so badly mutilated that its terms are not clear. Moreover, the notebook of Mr. Williams' secretary containing the terms of the May 30 will was available as evidence.

Proponents of the will further contend that even if the June 27 will was the result of undue influence, the testator ratified it by not changing the will between the time it was made and the time of her death some three months later. In support of this contention there is cited *Cude* v. *Culberson,* 30 Tenn. App. 628, 209 S. W. 2d 506. However, in the *Cude* case there was a republication of the will in the nature of a codicil executed some fifteen years after the making of the original will. In Page on Wills, Vol. 1, p. 392, it is said: "Since a will must be either valid or void and cannot be voidable, the doctrine of ratification has no application. If the will is invalid when made, the only method by which it can be made valid, in accordance with the statutes of wills, is by re-execution or republication." In 57 Am. Jur. 257, it is said: "Undue influence, fraud and mistake are recognized grounds for contesting the probate of a will or setting aside probate, except where there has been a valid

re-execution or republication of the will." In the case at bar, there was no republication.

The judgment is reversed with directions to set aside probate of the June 27 will and to admit to probate the will of May 30.

The Chief Justice and Mr. Justice GEORGE ROSE SMITH not participating.

Mr. Justice MCFADDIN concurs.

Mr. Justice WARD dissents.

ED. F. MCFADDIN, Associate Justice (concurring). By an entirely different process of reasoning I have finally reached the same conclusion as that stated by Mr. Justice ROBINSON, who is joined by Justices HOLT and MILLWEE. Since my vote is necessary to make the Constitutional requirement of four Justices voting for the same result, I think it incumbent on me to state my course of reasoning.

I. *Mental Capacity Of Mrs. Alice Love.* The evidence convinces me that — absent any fraud or undue influence — Mrs. Alice Love was mentally capable of executing a will at any time from May 30th to June 27th. Neither her grief, use of drugs, age, or anything of that kind, impaired her mental faculties so as to prevent her from executing a will if she was at such time free from fraud and undue influence. The evidence convinces me: (a) that Mrs. Alice Love's will of May 30th was her free and voluntary act without any undue influence or fraud of any kind; (b) that when she executed the instrument of June 1, 1953, she was under the undue influence of her daughter-in-law; and (c) that Mrs. Alice Love was a victim of fraud when she executed the will of June 27th.

II. *The Fraud In The Will Of June 27th.* This is a most serious charge, but I am convinced of the correctness of my position. After the death of her only son, George, Mrs. Alice Love was anxious to let her estate go to the educational enterprise that he favored.

In her attempted will of June 24th she said: "If any of estate is left then it shall be used to promote my son's education proposition. . . ." Mrs. Elaine Love knew of Mrs. Alice Love's desire that her estate go to the "education proposition." On June 8th Mrs. Alice Love wrote Mrs. Elaine Love: "When you come bring me lots of data of George's instructional. . . . I thought Vol Lindsey would be interested and I would like to know more myself." Again Mrs. Love wrote her daughter-in-law: "I don't remember much of will either — only he didn't put in that trust clause".[1] In another letter, Mrs. Love wrote her daughter-in-law: "I wonder if that will is good even if William scratched some of the school trust;" and in another letter Mrs. Alice Love wrote her daughter-in-law: "Have your lawyer make us a will . . . and give name and object of George's project." The foregoing excerpts—and there is much other testimony to like effect—show that Mrs. Alice Love was interested in the *"education proposition"* that her son George had started.

But does the will of June 27th accomplish what Mrs. Alice Love wanted? Does it give her estate to the "educational proposition?" The answer to these questions is in the negative. The June 27th will leaves her estate to the *George R. Love Trust* instead of to the *George R. Love Educational Fund;* and the fraud consists in making Mrs. Alice Love believe that the *George R. Love Trust* was in fact the *George R. Love Educational Fund.* The George R. Love will was never shown to Mrs. Alice Love.[2] She was led to believe that the "George R. Love Trust," as mentioned in her will of June 27th, was the

[1] This evidently referred to the fact that Mr. Vol Lindsey had stated that he didn't know enough about the George R. Love Educational Fund to incorporate its provisions in the will.

[2] In the oral argument before this Court one of the three attorneys who spoke for the appellees said that Mrs. Alice Love never saw her son's will and that she would not have understood it if she had seen it. Furthermore, Mrs. Elaine Love testified on Tr. 931: "Q. Now, Mrs. Love, didn't you feel that sometime, even when you came down here on the 27th of June that it would be a most nice favor, an expression of love and affection, for you to take the will of her only son and read it to her, paragraph by paragraph, didn't you feel that you should have done that? Didn't you? A. No, sir, I didn't, Mr. Duty. Q. She never saw a copy of it, did she? A. No, sir."

*Education Fund* which her son had established in his will. In truth and in fact, the "George R. Love Trust" was vastly different.

The George R. Love will introduced in evidence in this case shows that he set up two trust funds. The first was the "Elaine Love Trust," which consisted of a large portion of his estate. The second was the "George R. Love Trust" and it provided: (a) that Elaine Love should receive the entire annual net income of the George R. Love Trust as long as she lived; (b) that after her death the net income of the George R. Love Trust would go to Mrs. Alice Love and to Mrs. Elaine Love's mother, Christiana Lundblad, and to Mrs. Elaine Love's father, Oscar Lundblad, as long as any of them lived; and (c) that, upon the death of Mrs. Elaine Love and the parents of George R. Love and the parents of Mrs. Elaine Love, the Trustees would transfer the residue of the "George R. Love Trust" to the "George R. Love Educational Fund," which was to be administered by the Board of Regents of the State of Wisconsin. In short, the will that was drawn and presented to Mrs. Alice Love on June 27th gave all the income of her estate to Elaine Love and Elaine Love's parents as long as any of them lived and then the residue of Mrs. Alice Love's estate would go to the George R. Love Educational Fund.

Mrs. Alice Love was led to believe that when she executed her attempted will of June 27th her estate was going to the *George R. Love Educational Fund* and certainly not to Mrs. Elaine Love's parents. The actual information was withheld from her, and so she executed an instrument on representations which amounted to fraud. Fraud vitiates everything it touches. In 57 Am. Jur. 267, in discussing fraud as an independent ground of will contest, the holdings of the many cases are summarized in this language:

"A will procured by fraud or deceit *is void,* except where there has been a valid re-execution or republication of the will. Fraud in the sense of deceit is a ground of contest separate and distinct from that of undue in-

fluence. To make a case of undue influence, the free agency of the testator must be shown to have been destroyed; but to establish a ground of contest based on fraud, the free agency of the testator need not be shown to have been destroyed. Fraud is present to invalidate the will if by misrepresentations and deception the testator is led into making a will different from what he would have made but for the misrepresentation and deception."[3]

So I conclude that the will of June 27th was void because of fraud, even if the language in the instrument was sufficient to incorporate by reference the provisions of the will of George R. Love. It is unnecessary for me to dwell on this matter of incorporation by reference.

III. *Directive On Remand.* This is the point that has given me most serious concern. Justice Robinson's opinion concludes with this directive:

"The judgment is reversed with directions to set aside probate of the June 27th will and to admit to probate the will of May 30th."

I have wondered if the May 30th will was not destroyed sufficiently to constitute revocation; but I have concluded that the appellees have nothing to gain on that score, so this question can be answered in the negative. The will of May 30th was proved as validly executed. The will of June 1st fails because it was executed under the undue influence of Mrs. Elaine Love. The will of June 24th was never proved by the attesting witnesses. In the oral argument before this Court I repeatedly questioned counsel for appellees as to why no effort was made to prove this June 24th will as an alternative to the June 27th will. I received no satisfactory answers. The fact remains that one of the attesting witnesses of the June 24th will never testified in the case and the other attesting witness was not interrogated

[3] There are annotations in 28 A. L. R. 787 and 92 A. L. R. 790 containing the cases from which the quoted rules above have been formulated.

as to the facts surrounding the attestation of the June 24th will. The will of June 27th fails because of fraud.

In the light of all the above, the will of May 30th remains as the last valid will of Mrs. Alice Love. In the Trial Court the issue was sharply drawn between the May 30th will and the June 27th will; and a transcript containing over 1,000 pages is before us in this case. The printed abstracts and briefs in this Court contain 1131 pages, besides typewritten briefs agreed to be furnished at the time of the argument here. To remand the case "for further development" would be wrong, in view of the full development that has already been made. Therefore I concur with the directive on remand, as contained in Mr. Justice ROBINSON's opinion.

PAUL WARD, J., dissenting. A careful consideration of this case forces me to a different conclusion from that of the majority.

Mrs. Alice Love made a will in 1949 leaving her estate to her only son. On May 30, 1953, four days after the death of her son and seven hours after the death of her husband Mrs. Alice Love made a will [revoking her 1949 will] leaving the bulk of her estate to her two sisters and the brother and sister of her husband, some of whom she had not seen in years and one of whom she said she would not know if she met her on the street. This last will Mrs. Love destroyed with her own hands, and on June 27, 1953 she executed another will—the one here contested.

The majority opinion voids the June 27th will and reinstates the May 30th will—just the opposite of what the Chancellor did. To justify such action on the part of the majority compelling reasons should appear.

I submit that no such reasons are set forth in the majority opinion and that none appear in the record.

Under the record in this case it is obvious that the June 27th will can only be set aside by establishing at least one of these things; (a) Mental incapacity, (b) Un-

due influence, or (c) Fraud. These will be discussed in that order.

(a) *Mental Capacity.* We do not understand that the majority or the appellants lay much, if any, stress on the lack of mental capacity of Mrs. Love to execute the June 27th will. At the end of the first paragraph in the majority opinion appears this sentence: "In contesting this will appellants claim that it was the result of *undue influence* and *fraud.* . . ." Nothing is said of lack of mental capacity. The only allegation in the complaint relating to lack of mental capacity is a statement to the effect that Mrs. Love, "on account of her advanced age, her failing health and the grief" [recent loss of husband and son] was on June 2nd, 1953, in the hands of Elaine Love . . . "as clay in the hands of the potter." This statement by appellants must be weighed in the light of the following facts: Appellants claim [and the majority hold] that on May 30, 1953 Mrs. Love had mental capacity to execute a will, but now contend that three days later she had advanced in age and deteriorated in health to such an extent that her mind had deteriorated. Nor can we understand why her grief would be less on the day her husband died than it was three days later.

In an attempt to show that Mrs. Love lacked mental capacity shortly before and on June 27, 1953 appellants showed that Mrs. Love had been taking sedative tablets. It was claimed that the continued use of these tablets rendered her incompetent and that, if she left them off, she would be worse off mentally. Again this contention is wholly lacking in force. The record is that Mrs. Love did take such tablets, but she had been doing so long before the May 30th will was executed, and they were given to her by her family doctor and her doctor son. Appellants must concede Mrs. Love's mental capacity was not impaired on May 30, 1953 just 29 days before the contested will was executed. Moreover I for one would not like to intimate that Mrs. Love's son and her family doctor either ignorantly or intentionally de-

stroyed her mind by giving her drugs which would do so if she took them or if she quit taking them.

There can be, I think, no question about Mrs. Love's mental capacity on June 27, 1953. The record is replete with evidence that she transacted business as usual from the death of her husband until June 25, 1953.

(b) *Undue Influence.* Much of what has already been said refutes the charge that Elaine unduly influenced Mrs. Alice A. Love to make the will in contest. To my mind the entire record refutes such a charge under the rules announced in the majority opinion.

1. The foundation of appellants' contentions and the majority opinion, it seems to me, must rest on the assumption that Elaine is a strong willed, unprincipled, and selfish woman. In the Petition it is alleged that Mrs. Alice Love knew her to be "strong and forceful and to be selfish and greedy," and that Mrs. Love feared Elaine. The record does not justify this appraisal of Elaine's character, but, on the contrary, it shows the exact opposite. The only testimony in the record about Elaine's character is that given by Attorney Lardner who had known her intimately from her childhood. According to him Elaine, a woman 50 years old, is friendly and likeable. He said of her: "She is sensitive and I believe a very gentle person, so gentle she is almost fragile, . . . nor can I picture her coercing anyone nor exercising the slightest degree of influence over anyone in a business or financial matter." Of course this could possibly be the picture of a biased friend, but it is the only picture we have based on the record, and it is not unlike the woman you would expect a man of George R. Love's character to select for a wife.

2. Did Mrs. Alice A. Love "fear" or did she love and respect her daughter-in-law, Elaine? Though it is true she had not had the opportunity to know Elaine well prior to May, 1953 due to the fact they were both wives of busy doctors in different states, yet the record reflects nothing but love and respect after that time.

The record contains six letters written by Mrs. Alice Love to Elaine, between June 6 and June 24, 1953, which show only love and respect for Elaine. The record also contains nine such letters after the will was made.

3. The Power of Attorney, the joint bank account, and numerous will. Somehow, appellants profess to believe, all these things indicate a weak mind on the part of Mrs. Alice A. Love and undue influence on the part of Elaine. The record explains these things and disputes the justification for any such belief. The Power of Attorney and joint bank account were executed by Mrs. Alice A. Love, with her full knowledge and consent, at a time when she was sick and grief stricken, with the idea that Elaine could help her better manage her extensive business activities and especially in the event she should become incapacitated. It soon developed that she got better and was able to transact her own business, and so, using good business judgment, she revoked them. The salient point is, Elaine never tried to exercise any authority under them although she had the time and opportunity to do so.

The record gives a rational explanation for the different wills. The first was executed in 1949 [estate to son] before her husband and son died. The second one was executed May 30, 1953 seven hours after her husband died, in which she gave her estate to her and her husband's sisters and brothers, some of whom she had not seen in years. Later she went to the bank, got this will and tore it in pieces. After two days reflection she executed the third will to Elaine. It was explained that this was a "stop gap" will until a proper one could be made to give the bulk of her estate to her son's Educational Fund. The fourth will was made, in her own handwriting, as her own effort when, according to her letters, she could not hear from Elaine who was in Wisconsin. The fifth and last will was prepared, at her request, by the Wisconsin Attorney who wrote her son's will. This series of events, I submit, reveal a course of meditation and judgment much more than it shows

fraud, undue influence or mental incapacity. The last will was witnessed by Mr. and Mrs. Mackey, who said she read it, and that she was mentally alert at the time—facts not denied. After this will was executed she had 110 days [before her death] to reflect on what she had done and change her mind [in the absence of Elaine] if she desired to do so. She never did.

(c) *Fraud.* Before discussing this last ground for setting aside the June 27th will it is pertinent to observe that we have the following situation. Three of the judges helping make the opinion base the same on three grounds, viz; lack of mental capacity, undue influence and fraud. The concurring opinion specifically rules out lack of mental capacity and undue influence and rests solely upon the ground of fraud. Since it takes a majority of this court, or four in number, to make an opinion I conclude that now we have an opinion in this case which sets aside Mrs. Love's June 27th will solely on the ground of fraud. Hereafter I shall refer to the majority opinion as the combined opinion of the four judges.

As I read the record and the majority opinion only one incident is relied on to show a "fraudulent representation" on the part of Elaine. I shall now discuss this question of fraud.

In the second paragraph of Mrs. Alice A. Love's will [being contested] she stated: "My only son, George R. Love, having preceded me leaving one-half his estate to an educational trust fund and to aid and assist worthy, ambitious and needy young men . . . it is my desire to further his wishes and intentions in this regard by adding my own estate to the funds which his worthy objects are to be fulfilled." Following this she gave her estate to the "George R. Love Trust which is created under the last will and testament of George R. Love dated May 26, 1953. . . ."

The George R. Love will gave one-half his estate to his wife, Elaine, and the other half to the "George R.

Love Trust''—the fund to which Mrs. Alice A. Love's estate was added by her will. The ''fraudulent representation'' relied on by appellants is that Elaine did not tell Mrs. Alice A. Love that she, Elaine, would, under the terms of George R. Love's will, get the *income* during her life time from this Trust.

It will be noted that Elaine is not charged with any fraudulent misrepresentation, but, in effect, she is charged with fraudulently concealing vital information which she, Mrs. Alice A. Love, did not have or know.

The charge against Elaine of concealing valuable information from Mrs. Love at the time she made her June 27th will really consists of two parts which are: (a) The motive of self gain and (b) The act of concealment. The majority profess to believe that Elaine unjustly profited to the extent of, as they say, approximately $48,000 which she would receive during her life time or expectancy. I take it this would amount to a cash value of not more than $25,000.00. The alleged act of concealment consists of this: Mrs. Love, it is charged, wanted her estate to go directly to the educational fund created by her son and not the George R. Love Trust Fund, and that Elaine Love fraudulently concealed from Mrs. Love the fact that she [Elaine] would [under George R. Love's will] for her life receive the income from the George R. Love Trust Fund and also that Elaine's parents and her husband's parents would likewise share for life in the income from the same Trust Fund. The only logical deducible conclusion is that the majority believe Elaine was motivated by the desire for financial gain in committing the alleged fraud.

I respectfully submit that the record conclusively refutes (a) the motive and (b) the fraudulent act of concealment.

(a) There was no such motive. It is not disputed that Mrs. Love on June 24th [three days before the questioned will was executed] executed a will in her own handwriting. It is not and can not be contended

that this will of the 24th was the result of undue influence or fraud on the part of Elaine, because Mrs. Love, at that time, was in Rogers, Arkansas and Elaine was in Wisconsin. It is pointed out by the majority the June 24th will left Elaine more money [approximately twice the cash value] than she gets under the June 27th will.

(b) There was no fraudulent concealment by Elaine. In the case of *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458, at page 887 of the Arkansas Reports, this court said: "This is a suit to cancel a deed upon the ground that its execution was procured by fraud; which is never presumed, but must be affirmatively proved by testimony which is clear and convincing." I propose to now show by the record that it not only does not reveal any "clear and convincing" evidence of fraud on the part of Elaine, but that it shows conclusively that she did not commit any fraud.

Contained in the record is a copy of a Wisconsin newspaper, properly introduced in evidence, under date of June 18th, 1953. This paper contains an article on the front page entitled "Dr. Love's Will Provides U. W. Educational Fund." Under this heading, on the front page, is a paragraph about the George R. Love Trust explaining its provisions, from which I shall presently quote. One witness, Mrs. Mackey, testified positively and without contradiction that Mrs. Love had in her possession a clipping of this same article before she executed the will on June 27, that she knew its contents, that she was proud of what her son had done, "and she intended putting her money to the same purpose. [Record pages 647 and 649.]

This same newspaper article referred to above, after explaining that Dr. George R. Love had given approximately one-half of his estate to the Elaine Love Trust, reads: "Income from the other half, *the George R. Love Trust, will be paid to the widow* [*Elaine*] *during her life,* and upon her death, to any of the *couples' parents still living* at that time." [Emphasis supplied].

Thus it conclusively appears from the uncontradicted record that every item of information which the majority hold Elaine fraudulently withheld from Mrs. Love [inducing her to execute the June 27 will] was in the possession and knowledge of Mrs. Love when said will was executed by her.

With both the motive and the act of concealment being thus refuted by the record, it is beyond my comprehension to understand how the majority opinion can be justified.

HEALTH BETTERMENT FOUNDATION
*v.* THOMAS, ADMINISTRATOR.

5-743 283 S. W. 2d 863

Opinion delivered November 14, 1955.

[Rehearing denied December 12, 1955.]

*Campbell* and *Campbell,* for appellant.

*P. E. Dobbs* and *M. C. Lewis, Jr.,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellants, from a decree of the Garland Chancery Court, whereby appellee, B. W. Thomas, Administrator of the Estate of A. W. Petersohn, deceased, recovered a judgment against appellants in the sum of $27,000. This judgment was declared a specific lien against the property of the Health Betterment Foundation, appellants herein, and based on a lis pendens filed by the appellee on March 31, 1953.

In early September of 1951, A. W. Petersohn and certain of the appellants became acquainted while attending a medical institute meeting in Michigan. A. W. Petersohn, a man 77 years old, subsequently came to Hot Springs, Arkansas, for a three week visit. Immediately thereafter, he went to Kansas for a two week visit. He returned to Hot Springs on or about October 4, 1951, and entered the New Park Hospital for treatment of an asthmatic heart condition. Dr. Petersohn remained a patient in the New Park Hospital until the date of his death, October 16, 1951. He reportedly signed two deeds on October 12, 1951, in which he conveyed certain properties in Michigan and Kansas, to the appellants. The appellants operated the New Park Hospital. These deeds were recorded on the day of the decedent's death, and shortly thereafter, the appellants sold the property.

B. W. Thomas was appointed as Administrator of the Estate of Dr. A. W. Petersohn, by the Garland Probate Court on May 14, 1952. On the same day, the court ordered and directed the administrator to prosecute the instant suit against the appellants, for the benefit of the estate.

The appellee instituted this suit in the Garland Chancery Court on May 17, 1952, alleging that the appellants entered into a conspiracy to induce Dr. Petersohn to deed his property to the Health Betterment Foundation, a mutual benevolent corporation, domiciled in Hot Springs, Arkansas. It was further alleged that Dr. Petersohn executed and delivered to the appellants,

deeds to properties he owned in the States of Kansas and Michigan; that said deeds were procured by means of confidential relationship, undue influence, coercion, duress, misrepresentation, fraud, and while the decedent was mentally incompetent. The appellants, all directors and officers of the Health Betterment Foundation, are: Cora Thomson, J. Clay Holmes, Verna Noble Pape, Campbell E. Holmes and M. Charlotte Holmes.

Evidence was presented by way of depositions, oral testimony and exhibits; the case being continued from time to time for the purpose of procuring further testimony.

On October 20, 1954, the trial court entered judgment upon the complaint for the appellee, and decreed that appellee, as administrator of the estate, was entitled to have judgment against the appellants, jointly and severally, for the sum of $27,000. This sum represented the proceeds derived by the appellants, from the sale, conveyance and transfer of the decedent's property. This judgment was declared a specific lien against the property of the Health Betterment Foundation.

The appellants list four points on appeal, for reversal of the trial court's decree, they are: (1) the decree is against the weight of the testimony, there being little substantial evidence upon which to predicate a finding of duress, lack of consideration, or fraud; (2) the Chancery Court erred in not sustaining appellant's motion to dismiss; the heirs of Petersohn, deceased, being the real parties in interest; (3) Petersohn's mental capacity to dispose of his property as he saw fit was established by the great weight of the testimony; and, (4) the Chancery Court erred in impressing a specific lien against appellant's property in Garland County, Arkansas.

Initially, we will take up point 2 of appellant's contentions for reversal of the trial court's decree, which involves the question of whether the administrator had a right to institute this suit. The instant case does not come within the previous holdings of this court, as

handed down in the cases of *Jones* v. *Jones,* 107 Ark. 402, 115 S. W. 117, and *Cranna, Administrator* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828.

We find the probate court was empowered to order and direct the administrator to prosecute the instant suit, for the benefit of the estate. Full authority for the court's action is found in Section 94 of Act 140, Acts of 1949; Ark. Stats., 1947, Section 62-2401, pocket supplement. Under the direction of the probate court, the administrator has the right to maintain the suit, whether its object is to recover real estate or the proceeds derived from the sale of real estate, when it has been ascertained that said property has been wrongfully obtained from the decedent. We cannot agree with appellant's contention, that the probate court had no right to direct the administrator to bring the instant suit.

The appellants have insisted that the chancellor's decree is against the weight of the testimony, there being little substantial evidence upon which to predicate a finding of duress, lack of consideration or fraud. They earnestly insist that at the time of the conveyance, Dr. Petersohn possessed sufficient mental capacity to dispose of his property as he saw fit. We cannot say that this finding of the chancellor is against the preponderance of the evidence.

In *Hightower* v. *Nuber,* 26 Ark. 604, 611, 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 advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity." See, also, *West* v.

*Whittle,* 84 Ark. 490, 106 S. W. 955; *Thiel, Special Adm'r.* v. *Mobley,* 223 Ark. 167, 265 S. W. 2d 507.

This court has said: "When a will is written, or proved to be written by a person benefiting by it, or by one standing in the relation of attorney or counsel, and who is also benefited by it,—these are circumstances to excite stricter scrutiny and require stricter proof of volition and agency." The court then quotes with approval from *Breed* v. *Pratt,* 18 Pick. R. 115, as follows: "It is incumbent on those, who, in such a case, seek to establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid." *McDaniel* v. *Crosby et al.,* 19 Ark. 533.

The record reveals that the deceased was in a dying condition at the time he signed the deeds to convey his property to the appellants. The medical records show that appellants administered drugs and narcotics to the deceased, in order to ease his pain, during the last few days of his life. The medical records also reveal that deceased was irrational, complained of weakness, refused to sign checks and expressed a desire to leave the hospital and return to Battle Creek, Michigan. There was strong indication of physical and mental deterioration.

The deeds were prepared by the secretary of the appellant corporation and were kept readily available at all times, in Dr. Petersohn's hospital room. The decedent consistently refused to sign these deeds. Testimony of record shows several attempts by appellants to obtain Dr. Petersohn's signature to the deeds; on the pretense that he was signing a check or giving them his name. After considerable deception and relentless pressure, the appellants were finally successful in getting Dr. Petersohn's signature to the two deeds; which conveyed to the appellants certain properties located in Kansas and Michigan. Elizabeth Hollenbeck, a niece of the deceased, was instrumental in procuring Dr. Petersohn's signature to these two deeds; and, on the

same date, she obtained his signature to another deed which conveyed to her certain properties located in Battle Creek, Michigan. Shortly thereafter, the appellants disposed of the properties that they had obtained from Dr. Petersohn. The appellants gave Elizabeth Hollenbeck the sum of $2,500, in addition to a deed to 18 acres of land that had been obtained from Dr. Petersohn.

We think the preponderance of the evidence shows the chancellor reached the correct decision on these points.

Finally, we think the chancellor erred in declaring a specific lien on the property of appellants, as described in the lis pendens. Our lis pendens statute (Ark. Stats. Sec. 27-501) is not applicable to an action seeking only a money judgment, since, by its terms, it applies only to actions affecting "title or any lien on real estate or personal property." *Tolley* v. *Wilson,* 212 Ark. 163, 205 S. W. 2d 177. The filing of the lis pendens notice in this action, seeking a money judgment, did not constitute any lien on appellant's property, since, the appellee has failed to show that appellants have applied the proceeds derived from the sale of Dr. Petersohn's property, to the acquisition of the property set out in the lis pendens notice.

That portion of the trial court's decree, assessing judgment against appellants in the sum of $27,000, is affirmed. The portion of the decree declaring a specific lien on appellant's property, as set out in the lis pendens notice, is reversed.

HOWELL *v.* ARK. POWER & LIGHT CO.

5-756 283 S. W. 2d 680

Opinion delivered November 14, 1955.

[Rehearing denied December 5, 1955.]

*Kenneth Coffelt,* for appellant.

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

J. SEABORN HOLT, Associate Justice. Appellant, Howell, sued Appellee, Simon, and the Arkansas Power and Light Company for substantial damages for practicing an alleged fraud on Appellant. Appellee, Company, filed a separate demurrer alleging that the complaint did not state facts sufficient to constitute an action against it. The trial court sustained this demurrer, Howell refused to plead further and elected to stand on his complaint. Whereupon the court dismissed his complaint and this appeal followed.

The case is still pending as to Appellee, Simon. In testing a complaint on demurrer we must assume that

all allegations that are well pleaded, are true. Also our rule is well established that pleadings are to be liberally construed and every reasonable intendment is to be indulged on behalf of the pleader in determining whether a cause of action is stated. *Rice* v. *King,* 214 Ark. 813, 218 S. W. 2d 91; *Story* v. *Cheatham,* 217 Ark. 193, 229 S. W. 2d 121.

Omitting formal parts material allegations in the complaint were in effect that Howell is a licensed real estate broker in Pulaski County. "In February, 1954, the Real Estate Board cancelled his (Howell's) license, for the reason that plaintiff had split a real estate commission with the defendant, Simon, in connection with the transfer of a block of ground at 9th and Louisiana Streets in Little Rock, Arkansas, to the defendant, Arkansas Power and Light Company.

"In November, 1952, the defendant, Simon, called the plaintiff (Howell) to his office in the Arcade Building, in the City of Little Rock, and held himself out to the plaintiff as a real estate broker, and as a spokesman, with authority, for the defendant, Arkansas Power and Light Company, and advised the plaintiff that they, by working together, could bring about the purchase by the defendant, Arkansas Power and Light Company, of the above described property; that the Arkansas Power and Light Company was interested in the purchasing of said block of ground; that they would buy said block of ground, if the said defendant, Simon, and this plaintiff could arrange for the transfer of good title from each of the individual owners of the various subdivisions of said block of property; that at the time, the plaintiff had listed with him as a real estate broker, for sale a certain portion of said block of ground; that to verify the said statements of the defendant, Simon, to the plaintiff, the defendant, Simon, took the plaintiff to one of the officials of the defendant, Arkansas Power and Light Company, at his office in Little Rock, Mr. C. Hamilton Moses, and said statements of the defendant, Simon, were, in the presence of the defendant, Simon, and Mr. Moses, and

the plaintiff, then and there verified by Mr. Moses, as an official authorized to speak for the defendant, Arkansas Power and Light Company; that pursuant to the said statements of the defendant, Simon, to the plaintiff, and the verification thereof by Mr. Moses . . . The defendant, Simon, and the plaintiff acquired several written contracts in their names, with the various property owners within the block for the sale of their property at certain prices; that all transactions in connection with the acquiring of the block of ground and the subdivisions thereof for the Power Company, were made with the defendant, Simon, and this plaintiff, jointly; . . . was at all times known to the officials of the Arkansas Power and Light Company, and approved by them . . .

"On or about February 5, 1953, by the procedure followed, as hereinabove set forth, the defendant, Arkansas Power and Light Company, acquired title to said block of ground. At that time the defendant, Simon, and the plaintiff were paid a real estate commission fee by the property owners, who conveyed to the defendant, Arkansas Power and Light Company, the sum of approximately $12,500 as brokerage fees, under the real estate brokerage listing contracts made by and between the said property owners and the defendant, Simon, and this plaintiff. The plaintiff and the defendant, Simon, split brokerage fees, dividing approximately on a fifty-fifty basis . . . It was because of the fact that this plaintiff consented to the defendant, Simon, receiving said money that plaintiff's real estate license was cancelled, for the reason that it was discovered thereafter that the defendant, Simon, was not a licensed real estate broker, and thereafter not legally entitled to receive said monies as a real estate brokerage fee, and thereby making the plaintiff's act in consenting thereto an illegal one.

The plaintiff did not know the defendant, Simon, . . . was not a licensed real estate broker until a considerable length of time after the said real estate commissions had been collected, and the money therefrom distributed and divided, as hereinabove set forth, between this plaintiff and the defendant, Simon.

"The plaintiff alleges that the defendant, Simon, practiced fraud on this plaintiff when he held himself out to this plaintiff to be a licensed real estate broker at the time of their first meeting, as hereinabove set forth, and at all times during their associations, as herein alleged, in connection with the herein described real estate operations and transactions. The defendant, Simon, at all times mentioned in this complaint, fraudulently held himself out to be a licensed real estate broker to this plaintiff. The defendant, Simon, was never, at any time, a licensed real estate broker. At all times mentioned in this complaint, and at all times the defendant, Simon, practiced and continued to practice such fraud on this plaintiff, as alleged, he, the defendant, Simon, was acting as an agent for the defendant, Arkansas Power and Light Company. . . . The fraud therefore practiced on this plaintiff, as herein alleged, because of the agency relationship between the defendant, Simon, and the defendant, Arkansas Power and Light Company, as herein set forth, is therefore, and by reason thereof the joint and concurring fraud of both the defendant, Simon, and the defendant, Arkansas Power and Light Company, for which the plaintiff herein is entitled to recover from both of the defendants herein."

We hold that the trial court properly sustained appellee's demurrer. Giving every reasonable intendment to the pleader's allegations in his complaint, we hold that he has failed to allege any facts that would justify an inference that Simon was the agent of the power company with authority to bind it by a misrepresentation to the effect that he, Simon, was a licensed real estate broker. While it is alleged that Simon was acting as a real estate broker it is also alleged that $12,500 in commissions was paid by the property owners (not the power company) to appellant and Simon (one-half to each) "under the real estate brokerage listing contracts made by and between the said property owners and the defendant, Simon, and this plaintiff (Howell)." This statement negatives the existence of a general agency of Simon for the power company and places the burden on

the pleader to allege facts — not conclusions, — sufficient to show that Simon was such an agent that would bind the power company. As indicated, the only allegations of fact are that Simon was acting as a broker to be paid by the property owners, that "he was acting in the scope of his authority given him by the company, for him to try and bring about the transfer of said block of ground from the owners . . . to the Arkansas Power and Light Company, and his said delegated and authorized mission was accomplished as herein alleged." The principles of law in *J. I. Porter Lumber Company* v. *Hill,* 72 Ark. 62, 77 S. W. 905, apply here. We there said: [Headnote 1] "In trespass for cutting timber, an answer to the effect that plaintiff was estopped to recover because his agent stood by and failed to object to the cutting and conversion of the timber is insufficient in failing to allege that such agent had authority to act in the matter." In holding the answer demurrable this court said in *J. I. Porter Lumber Co.* v. *Hill,* 72 Ark. 62, 64, "It is alleged in the answer that one Atwood was an agent of plaintiff, but the answer does not show what kind of an agent he was, nor what his powers were. The mere failure of an agent employed to pay taxes and prevent trespassing upon land to perform his duty could not affect the rights of plaintiff in this action, for an agent with such limited powers has no authority to give the timber of his principal away; and if he could not do so directly by permission or agreement, he certainly could not do so indirectly by acts constituting an estoppel."

The allegation that Simon was acting in the scope of his employment is a conclusion of law, only, and must fall because of lack of factual allegations to support it. It was incumbent on the pleader to allege specifically (which he did not do) that Simon had been authorized by the power company to make the misrepresentation about his license. The judgment is affirmed.

Justices McFaddin and Millwee dissent.

HORN *v.* WHITE.

5-750 284 S. W. 2d 122

Opinion delivered November 14, 1955.

[Rehearing denied December 19, 1955.]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

*Richard W. Hobbs,* for appellant.

*R. Julian Glover,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an election contest; and after disposing of the issues between the parties we will consider which Act is governing as between Act 211 of 1953 and Act 241 of 1953.

Appellant, Amos Horn, and appellee, S. D. White, were rival candidates for the office of County Judge of Montgomery County in the General Election on November 2, 1954. On the face of the official returns White received a majority of the votes cast; and thereafter Horn instituted this action as an election contest under § 3-1201 *et seq.* Ark. Stats. White moved to have the contest dismissed, claiming that Horn had not complied with the law in having his name placed on the ticket as an independent candidate at the General Election. White showed that Horn had filed his certificate of nomination *only 20 days* before the General Election. That was the minimum time, as provided by § 3-264 Ark. Stats.; but Act 211 of 1953 made the minimum time for such filing to be *45 days,* and Act 241 of 1953 made the minimum time for such filing to be *30 days.* White claimed that under either of the 1953 Acts Horn's filing was too late. The Trial Court sustained White's motion to dismiss; and Horn has appealed.

I. *Appellant's Nominating Petition Was Filed Too Late.* Horn's only argued[1] grounds for reversal are: (a) that said Acts 211 and 241 are so conflicting that they cancel out each other and both are void; and (b)

[1] For reasons best known to themselves, neither party has mentioned the possible application of the well-known rule that certain provisions of election laws are *mandatory* before the election and merely *directory* after the election. See *Orr* v. *Carpenter,* 222 Ark. 716, 262 S. W. 2d 280. It might be that the rule stated in 18 Am. Jur. 263 could have been invoked by the appellant. That rule states: "It is a firmly established general rule that objections to irregularities in the nomination of a candidate should be taken prior to election." But the fact remains that no such suggestion of the *mandatory-directory* rule has been made by the parties herein: so we decide the case on the issues as briefed. This opinion, however, does not prevent the possible application of the *mandatory-directory* rule if it should ever be urged in a case like this one.

that the law still remains as it appears in § 3-264 Ark. Stats. We find ourselves unable to agree with this argument. Under either of the 1953 Acts Horn's nominating petition was filed too late; and at all events one or the other of the 1953 Acts is governing. It is true that there is some conflict between the two Acts of 1953 but we hold—as hereinafter developed—that Act 211 of 1953 is the governing law and that Horn failed to file his petition within the 45-day minimum time limit fixed in that Act.

II. *Election Law Question.* Ordinarily an opinion of this Court need go no further than has been above stated; but we are now constrained to go further because the question posed by the parties (that is, whether Act 211 of 1953 or Act 241 of 1953 is the governing law) relates to an interpretation of certain provisions in our election laws; and it is the policy of this Court to settle such questions for the future guidance of the public. In *Carroll* v. *Schneider,* 211 Ark. 538, 201 S. W. 2d 221, after holding that the question raised in the particular case was moot, the late and beloved Justice Frank G. Smith, in declaring what was the election law, said:

"There is here a question of practical importance and of great public interest, and if not now decided, some other candidate may be deprived of the right to run for a public office and his right to do so may become a moot question before it could be decided, on account of unavoidable delay in the law."

So here, with an election to be held before the next regular convening of the Legislature, there will remain the confusion as to which of the Acts of the 1953 Legislature is to govern; and substantial rights of other parties may be lost unless we go further and here decide the question. We recognize that there is a conflict be-

tween Act 211 of 1953 and Act 241 of 1953;[2] and we first give the germane laws prior to 1953 and then the changes sought to be accomplished by each of the 1953 Acts.

*Law Prior to 1953*

(a) Section 3-264 Ark. Stats. provided: "... certificates of nomination herein directed to be filed with the County Election Commissioners shall be filed not more than sixty (60) days and not less than fifteen (15) days before the election."

(b) Section 3-806 Ark. Stats. provided that not less than *18* days before each election the Secretary of State shall certify to all the Election Commissioners full lists of all candidates to be voted for in their Counties as the nomination had been certified to him.

(c) Section 3-807 Ark. Stats. made the same time limit of 18 days for certification of constitutional amendments.

(d) Section 3-824 Ark. Stats. (being Sec. 7 of Act 353 of 1949) provided that the order of the names of the candidates on the ballot would be determined by lot at a public meeting of the County Board of Election Commissioners, but gave no minimum time for the holding of such public meeting.

*Changes by Act 211 of 1953.*

The Act 211 of 1953 changed each of the aforementioned provisions in the following regards:

(a) Section 3-264 was changed to read, in part: ". . . certificates of nomination herein directed to be filed with the County Election Commissioners shall be filed not more than sixty (60) days and not less than forty-five (45) days before the election."

---

[2] Here is the Legislative history of the two Acts:

| | Act. 211 (S.B. 26) | Act 241 (S.B. 7) |
|---|---|---|
| Introduced: | Jan. 14 | Jan. 12 |
| Passed Senate: | Feb. 5 | Feb. 23 |
| Passed House: | Feb. 20 | Feb. 24 |
| Enrolled: | Feb. 26 | Mch. 2 |
| Delivered to Approved by Governor: | Feb. 26 | Mch. 2 |
| Governor: | Mch. 4 | Mch. 6 |

(b) Section 3-806 was changed to provide that not less than 42 days before the election the Secretary of State was to certify to the County Election Commissioners the full lists of all candidates to be voted for in their respective Counties.

(c) Section 3-807 was changed to make the minimum requirement for certification on constitutional amendments and other questions to be 42 days.

(d) Section 3-824 was changed to provide that the meeting of the County Board of Election Commissioners to determine the order of the names of the candidates on the ballot should be held ". . . . not less than forty (40) days prior to such General Election."

In short, Act 211 of 1953 was a fairly comprehensive Act affecting four different sections of the law and fixing a definite uniform minimum time limit for certain acts to be done.

*Changes by Act 211 of 1953.*

Act 241 did not purport to amend Act 211, but rather to amend only § 3-264 Ark. Stats., and related only to the time for filing certificates of nomination. The portion of said Act 241 here germane reads, in part:

"Certificates of nomination herein directed to be filed with the County Election Commissioners shall be filed not more than sixty (60) days and not less than thirty (30) days before the election."

*Resolving The Conflict Between The 1953 Acts.*

The conflict between Act 211 and Act 241 is that Act 211 makes the minimum time for filing certificate of nomination to be 45 days, and Act 241 makes the minimum time to be 30 days. Our problem is to resolve the conflict. The books are filled with cases giving rules for the construction of conflicting statutes, but the *primary rule* of statutory construction is for the Court to ascertain the Legislative intent;[3] and in ascertaining

[3] See *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646; and the many other cases collected in West's Ark. Digest "Statutes," Key No. 180.

the Legislative intent, the Courts resort to secondary rules of construction. Some of these are the "public policy" rule and the "harmony" rule. Illustrative of these, we quote from the early case of *Hill* v. *Mitchell,* 5 Ark. 608:

"We lay down this general principle upon the subject: if two statutes passed at the same time, *in pari materia,* are opposed to each other, and one of them relates to a primary interest of public policy, and the other, to a secondary consideration, that which is greater in principle must govern."

And in *Hackett City* v. *State,* 56 Ark. 133, 19 S. W. 426, Chief Justice Cockrill quoted the language of Judge Brewer:

" 'Where there is no way of reconciling conflicting clauses of a statute, and nothing indicating which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with other legislation on the same subject.' "

There is another rule of statutory construction which is that, as between two conflicting statutes passed at the same session, ordinarily the statute last passed is to govern;[4] but this "last passed" rule is admitted to be merely a rule of statutory construction and must and does yield when it is clear that the Legislature intended the earlier Act passed at the same session, to be the governing Act.[5] In 82 C. J. S. 836, in discussing conflicting or inconsistent statutes and, after recognizing the rule of construction that generally "the last Act passed" is the governing Act, the holdings of the various cases are, however, summarized in this language:

"Where Acts passed at the same session contain conflicting clauses, the whole record of legislation will be examined to ascertain the Legislative intent, and such

[4] See *Roberts* v. *Tice,* 198 Ark. 397, 129 S. W. 2d 258, 122 A. L. R. 1177.

[5] This is particularly true when, as here, neither Act contained an emergency clause and both Acts went into effect the same day—that is, 90 days after the adjournment of the Legislature.

intent, if ascertained, will be given effect, regardless of priority of enactment.'"[6]

With these rules of construction in mind, we turn to a study of the Acts 211 and 241 to ascertain the *Legislative intention.* As aforesaid, the only conflict between Act 211 and Act 241 is that Act 211 makes the minimum time—for filing certificate of nomination—to be 45 days and Act 241 makes the minimum time to be 30 days. Thus the Act 241 affected only one part of the law. But if we give effect to Act 241 and fix 30 days as the minimum time for filing the certificate of nomination, then under Act 211 the Secretary of State must make the certification to the County Election Commissioners 42 days before the election, which would be 12 days before the last day for filing the certificate of nomination. Likewise, under Act 211, the drawing for places on the ticket would be 40 days before the election, which would be 10 days before the last day the candidate's name could be certified by the Secretary of State under Act 241. Furthermore, under Sec. 5 of Act 211, the absentee ballots for electors in the armed forces might be circulated *before* the Secretary of State had ever certified out the full list of candidates, if the 30-day minimum in Act 241 of 1953 should be followed.

It is therefore clear that Act 241 of 1953 presents an unworkable Act because it does not attempt to cover all of the matters in Act 211 and leaves the time table in confusion, as hereinbefore stated.

---

[6] The Illinois Court in *Potosi* v. *Metropolitan,* 95 N. E. 2d 529, quoted this language: "The rule that where two conflicting enactments are passed at the same session, the latest enactment in point of time will prevail, as well as all other rules of construction dealing with repeals by implication, are mere canons of construction. Such canons are only aids to the ascertainment of the legislative intent and must yield to such intent if the same be otherwise. They should never be followed to the extent of defeating or overriding the definite intent of the legislature."

In the case of *Bowles* v. *Crew,* 59 Fed. Supp. 809, the U. S. Dist. Court of California used this clear language: "In resolving claimed conflict between Legislative enactments, it should be our aim to envisage the completeness of the Legislative scheme and to avoid an interpretation which would destroy it as a harmonious whole."

To the same effect, see also *Southwark Bank* v. *Commonwealth,* 26 Pa. 446.

In the light of all of the foregoing, it is clear that the *intent* of the Legislature was to fix a definite time table schedule. The Act 211 considered not only the certificates of nominations, but also the certification of constitutional amendments, the drawing of places on the ticket, and the sending out of absentee ballots; whereas the Act 241 merely affected the time for filing certificate of nomination. It would be putting form above substance and the letter above the spirit of the law to hold that Act 241 changed Act 211. We therefore find and declare that the *Legislative intent* was that Act 211 be the governing Act; and we so declare and hold Act 241 to be nullified by Act 211. See *Jackson* v. *State,* 45 Ark. 158; *Snow* v. *Riggs,* 172 Ark. 835, 290 S. W. 591; and 50 Am. Jur., p. 484 *et seq.* This disposes of the election question and provides a guide for the action of officials.

Affirmed.

CALLAHAN *v.* FARM EQUIPMENT, INC.

5-767 283 S. W. 2d 692

Opinion delivered November 14, 1955.

*Frierson, Cherry, Walker & Snellgrove,* for appellant.

*Ponder & Lingo,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant, Melvin Callahan, was the owner and operator of Callahan Tractor Company in Lawrence County, Arkansas, in November, 1950, when that company became a retail dealer for the sale of farm machinery manufactured by Harry Ferguson, Inc., hereinafter called Ferguson. The

dealership was established under a plan customarily employed by Ferguson which enabled the retailer to "floor plan" his merchandise and to immediately receive the price of equipment sold by transferring the conditional sales contracts either to Ferguson or its assignees. Under this arrangement, Ferguson and the appellant, as "Owner" of the Callahan Tractor Company, executed a "Dealer Underlying Agreement" on November 20, 1950. In this agreement the Callahan Tractor Company in effect guaranteed the payment of all notes and conditional sales contracts which it transferred to Ferguson, or its assignees, although the assignment of such instruments was under a non-recourse endorsement. The agreement was by its terms effective until terminated by either party by 60 days written notice. Appellant also furnished a financial statement to Ferguson prior to issuance of the retail franchise.

On the dates of September 17, 1951, and October 18, 1951, respectively, the Callahan Tractor Company sold certain farm machinery to Bill Kissee and Lester Bilbrey under conditional sales contracts signed by each purchaser and by Harold Callahan, appellant's brother, for Callahan Tractor Company without any indication as to official title or the capacity in which he acted for the company. Each sales contract, upon issuance, was immediately assigned by Callahan Tractor Company to Ferguson and the assignment was likewise executed by Harold Callahan. Subsequently Ferguson assigned said sales contracts and the "Dealer Underlying Agreement" to Universal C. I. T. Credit Corporation which in turn assigned said instruments to appellee, Farm Equipment, Inc., on December 30, 1953. Appellee is engaged in handling negotiable paper issued in the sale of farm equipment, with its principal office at Memphis, Tenn. Its officers are also the officers of Southland Tractors, Inc., hereinafter called Southland, which was the general agent and distributor for Ferguson in negotiating the dealership with Callahan Tractor Company.

Both Kissee and Bilbrey defaulted in the payments due under the conditional sales contracts. On May 29,

1954, appellee brought this action against Melvin Callahan and Harold Callahan for the balance of $2,710.17 due on the two contracts under the terms of the "Dealer Underlying Agreement" executed on November 20, 1950. The complaint alleged the two brothers were doing business as a partnership under the name of Callahan Tractor Company at the time of the execution of the conditional sales contracts and the underlying agreement sued upon. Each defendant filed separate amended answers. Appellant defended on the grounds that he was not a proper party, alleging he was sole owner of the business until about June 25, 1951, when he sold to his brother and that such facts were known to Ferguson and its assignees; and that the business was never operated as a partnership. Similar allegations were made by Harold Callahan who admitted execution of the sales contracts and the assignments to Ferguson but denied any indebtedness to appellee.

At the conclusion of the testimony offered by appellee, the court indicated that a motion for a directed verdict would be granted as to the defendant, Harold Callahan. Counsel for appellee stated that the action was against the defendants both individually and as a partnership; that the pleadings should be amended to conform to the proof and the cause allowed to proceed against appellant individually and as owner of the Callahan Tractor Company. At the conclusion of appellant's evidence, the court instructed the jury that appellee had been permitted to take a voluntary nonsuit as to Harold Callahan. In requesting an instructed verdict against appellant, counsel for appellee insisted that under the undisputed proof appellant was either still the actual owner of the Callahan Tractor Company or had so conducted himself that he was estopped to deny such ownership and his liability for the debts sued upon. Appellant also requested an instructed verdict on the ground that the undisputed proof showed his brother owned the company when the two contracts were negotiated. Both requests were denied and the cause was submitted to the jury which returned a verdict against appellant for the balance due under the two conditional sales contracts.

Able counsel for appellant, who were employed after the trial, first contend the trial court erred in refusing to direct a verdict for appellant. It is argued that the undisputed evidence showed appellant was not the owner of the business when the two contracts in question were negotiated, and that appellee and its assignors all knew of, and acquiesced in, such transfer. While we are of the opinion that a jury question was made as to whether appellant was still the owner of the business when the sales contracts were executed, this question was not submitted to the jury nor was it the basis for the jury's verdict against appellant. Since neither party requested an instruction on this particular issue, neither is in position to complain now of the trial court's failure to present it to the jury. *Jones* v. *Seymour,* 95 Ark. 593, 130 S. W. 560.

Appellant next argues that a verdict should have been directed in his favor because the evidence was insufficient to warrant the submission of the issue of estoppel to the jury. While this point was not urged at the trial, we hold that a jury question was also made on the issue of estoppel upon which the verdict rests. Appellant was in ill health in June, 1951, when Harold took over the operation and management of the business. According to the two brothers the business was then sold to Harold but there is no proof as to the terms or conditions of such a sale. There were other circumstances which tend to refute the sale theory. After Harold took charge of the business, he made periodic financial statements of the Callahan Tractor Company to Southland as required by Ferguson. In none of these did he sign as owner of the business and all were made by him in the name of Callahan Tractor Company as were the two conditional sales contracts sued upon. In each of these several financial statements the individual lands of appellant, valued at $28,000.00, were listed as assets of the Callahan Tractor Company just as in the original statement submitted by appellant in November, 1950. These lands constituted more than 50% of the total listed assets of the business at any time.

Although appellant testified that Southland knew he reserved no interest in the business after June 25, 1951, he admitted he knew that his lands were still being listed as assets of the Callahan Tractor Company by his brother. He understood this was done "to aid in the financing and floor planning of new equipment" and also stated that Southland knew it was being done for that purpose. Harold gave similar testimony and, in addition, stated that the false statement as to ownership of the lands was made to both Southland and Universal C. I. T., "to satisfy the higher ups" in these corporations. T. D. Warner, who was secretary-treasurer of both the appellee and Southland, testified that Ferguson relied on the financial statements in handling the instruments sued upon and other paper of Callahan Tractor Company. Appellant admitted his signature to an underlying agreement with Universal C. I. T. dated December 31, 1951, as "owner" of the Callahan Tractor Company. There was no showing that Harold Callahan ever executed a dealer underlying agreement and the one signed by appellant on November 20, 1950, was terminated by written notice of Southland received by appellant and his brother on April 11, 1953.

Under the foregoing evidence, appellant insists that it is undisputed that appellee and its assignors were not only aware of the falsity of the representations in the financial statements but that some of the officers in these corporations actually induced such misrepresentations for the purpose of increasing their business and misleading some of the other officers of such corporations. Since appellant and his brother were interested parties to the litigation, it cannot be said that their testimony to this effect is undisputed. Besides, the testimony of Warner and other circumstances in the case tend to contradict the strange theory advanced to the effect that some of the officers of the various agencies conspired with appellant and his brother in order to mislead certain other officers and thereby defraud said companies. On the whole case, we hold it was for the jury to determine, from the conflicting testimony, whether credit was ex-

tended to the Callahan Tractor Company by appellee and its assignors due to the admittedly false representations in said financial statements. The jury resolved this issue in appellee's favor upon evidence that is substantial and sufficient to support the verdict.

It is next contended that the trial court erred in permitting the issue of estoppel to be raised by oral amendment of the pleadings either at the conclusion of the evidence on behalf of appellee or that introduced by appellant. Appellant says the court's action in permitting the pleadings to be amended to conform to the proof on the issue of estoppel amounted to the allowance of an amendment which introduced a new cause of action after commencement of the trial in violation of Ark. Stats., § 27-1160. Appellant relies on the general rule to the effect that estoppel must be pleaded to be available as a defense. However, we have held that it is within the sound discretion of the trial court to treat the pleadings as amended to conform to the proof on the issue of estoppel where no objection was made to such proof on the ground that it was not responsive to the pleadings. *Brotherhood of Railroad Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. 2d 433; *Williams* v. *Davis,* 211 Ark. 725, 202 S. W. 2d 205. The financial statements of Callahan Tractor Company, upon which the issue of estoppel was primarily based here, were introduced without objection. Other evidence relating to the issue was also admitted without any objection on the ground that estoppel had not been pleaded, and there was no plea of surprise. Under these circumstances, the trial judge did not abuse his discretion in treating the pleadings as amended to conform to the proof.

Appellant says the trial court erred in permitting the witness Warner to testify as follows: "Q. Do you know whether in handling paper from Callahan Tractor Company, and in particular the two contracts here of Bilbrey and Kissee, Harry Ferguson relied on the financial statements and on the financial worth of Melvin Callahan: A. Yes, sir; they did." The objection at the trial was that proper foundation had not been laid for

the question, but it is now argued that the question was leading. Warner was an officer of both appellees and Southland and testified that he was "the internal operations man" of the corporations. Since there was nothing in the question to suggest the answer, which might have been yes or no, it can hardly be classed as leading. *Jim Fork Coal Company* v. *Rhotenberry,* 183 Ark. 319, 35 S. W. 2d 590. It is true that the probable effectiveness of the positive answer of the witness was somewhat weakened by further questioning which tended to show that it was based more upon general business practices than actual personal knowledge of particular transactions. But this did not render the previous testimony incompetent in the absence of a renewal of the objection.

It is next argued the court erred in giving Instruction No. 3 which reads: "You are also instructed that if you find by a preponderance of the evidence that credit was extended to the Callahan Tractor Company due to representations made by Melvin Callahan, or his agents, if any, or by any other person with his knowledge and consent, then your verdict should be for the plaintiff. Unless you so find, your verdict should be for the defendant, Melvin Callahan."

All the instructions were given by the court on his own motion and there was only a general objection to Instruction No. 3. The jury were given the usual admonition to consider the instructions together and there was no objection to any other instruction by either party. If appellant felt at the trial, as he now contends, that the instruction was abstract and the issue of estoppel was inadequately defined therein and that the instruction was too general in not confining the "credit" extended to that involved in the suit, his duty to the trial court was to point out such alleged defects by specific objection or offer instructions that more clearly defined these issues. *American Realty Company* v. *Hisey,* 113 Ark. 78, 167 S. W. 488; *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402. A party is in no position to complain because instructions given by the court are too general where he fails

to request correct instructions on the subject. *Queen of Arkansas Ins. Co.* v. *Malone,* 111 Ark. 229, 163 S. W. 771.

The only question now is whether the instruction is inherently erroneous. When considered with the other instructions, we hold that Instruction No. 3 embodied the principle announced in such cases as *Graham* v. *Thompson,* 55 Ark. 296, 18 S. W. 58, and *Jett* v. *O. B. Crittenden & Co.,* 89 Ark. 349, 116 S. W. 665. In the last case cited, the court said : "The rule broadly stated is that a person, who intentionally or by culpable negligence induces another to act on his representations will be estopped from denying their truth." In the *Graham* case it was held (Headnote 1): "One who induces another to credit a third person by representing him to be the owner of certain property will be estopped, as to the creditor, to deny such ownership." From the appellant's own viewpoint, it is undisputed that the representations here were known by him to be false and for the purpose of obtaining credit by misleading someone. It was for the jury to determine whether this was done by appellant and his brother in collusion with certain officers of the lending agencies as they contend, or without such collusion as appellee maintains. In these circumstances, we cannot say the instruction is inherently erroneous.

It is finally argued that error was committed in permitting appellee to introduce a second underlying agreement executed by appellant to Universal C. I. T. on December 31, 1951, in which he signed as "owner" of the Callahan Tractor Company. It was, of course, appellant's theory throughout the trial that he had no proprietary interest in the Callahan Tractor Company after June 25, 1951. On the other hand, it was appellee's theory that appellant never disposed of his interest in the business. After appellant had fully testified in support of his theory, he was presented with the second agreement and admitted his signature thereto. It was then offered in evidence to impeach his previous testi-

mony. The instrument was clearly admissible for this purpose under Ark. Stats., §§ 28-707 and 28-708.

We find no prejudicial error, and the judgment is affirmed.

KEENAN *v.* WILLIAMS, CHANCELLOR.

5-768 283 S. W. 2d 688

Opinion delivered November 14, 1955.

*Richard Mobley,* for petitioner.

*Robt. J. White,* for respondent.

GEORGE ROSE SMITH, J. This is an application by the petitioners for a writ of prohibition to prevent the respondent from proceeding with a chancery case in which these petitioners are the defendants. It is the petitioners' contention that the complaint in the court below fails to state a cause of action cognizable in equity.

The complaint was filed by three taxpaying landowners and a judgment creditor of Carden's Bottom Drainage District No. 2. The plaintiffs allege that the defendants, who are the commissioners of the district, have been guilty of mismanagement in conducting the affairs of the district. Specifically, it is charged that the defendants have failed to select a depository for the funds of the district, have failed to require the district's treasurer to give bond, have not kept account books, have refused to report annually the district's financial status, have received $2,148.60 in tax collections without account-

ing therefor, have illegally spent $9,104.70 of the district's funds, and, after the expiration of the time allowed for the assessment of damages resulting from the construction of the improvement, have unlawfully issued certificates of indebtedness for such damages in the amount of about $16,000. It is asserted that the commissioners are refusing to collect taxes from landowners holding such certificates and are permitting the purported damages to be offset against the assessment of benefits. The prayer is that the defendants be ordered to select a depository, to account for the money wrongfully spent, and to submit to a complete audit of the district's affairs; that the defendants be enjoined from paying any sums upon the certificates of indebtedness; and that they be deemed officers of the court for the purpose of being compelled to comply with the court's decree.

The petitioners rely primarily upon Ark. Stats. 1947, § 21-556, which requires the commissioners of drainage districts to file annual financial statements in the office of the county clerk. It is insisted that the statute provides an exclusive remedy in the county court and by implication divests the chancery court of any jurisdiction over such charges of mismanagement as are made in this complaint.

We do not attribute to the statute the comprehensive effect that the petitioners are able to discern in it. It merely requires the commissioners to file an annual statement of the financial condition of the district, to the end that the information may be a matter of public record, open to public inspection. The statute does not direct that any notice be given of the filing of the yearly report, nor does it require that any court take jurisdiction in the matter. In short, the statutory procedure is administrative rather than judicial. There is, it is true, a clause providing for an auditorial examination of the annual statement, but in a similar situation it was held that an act investing the state comptroller with authority to audit county records did not keep a taxpayer from suing in equity to restrain the misuse of county funds. *Ward* v. *Farrell,* 221 Ark. 363, 253 S. W. 2d 353.

This complaint asserts that the defendants have misspent funds of the district, have failed to account for specific tax monies, and have undertaken to pay certificates of indebtedness that are invalid. The plaintiffs ask that the misuse of public money be enjoined and that the commissioners be treated in effect as receivers. See *Dickinson* v. *Mingea,* 191 Ark. 946, 88 S. W. 2d 807.

It cannot be doubted that these matters are within the jurisdiction of equity. The state's policy is declared by the constitution, which authorizes any citizen of a county, city, or town to institute suit to prevent the enforcement of illegal exactions. Art. 16, § 13. Even though the constitution does not expressly refer to improvement districts it has been repeatedly held that, in harmony with the constitutional policy, equity has jurisdiction of suits to prevent the misapplication of improvement district funds. *Huddleston* v. *Coffman,* 90 Ark. 219, 118 S. W. 1010; *City of Bentonville* v. *Browne,* 108 Ark. 306, 158 S. W. 161; *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175. Whether equity has jurisdiction of every count in this complaint need not be decided on the pleadings alone; doubtless many of the issues will be clarified by the proof. It is enough to say at this stage that the petitioners' request for a writ of prohibition should be granted only if the complaint states no ground at all for the intervention of equity. That broad assertion cannot be made.

Writ denied.

4818 283 S. W. 2d 685

Opinion delivered November 14, 1955.

*Ivan Williamson* and *Ben B. Williamson,* for appellant.

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

PAUL WARD, Associate Justice. This appeal involves the interpretation of Act 44 of 1953 [Ark. Stats., § 43-2324, Supplement] and its application to a situation where a person, upon a plea of guilty, is given a suspended sentence for one year in the penitentiary and the suspension is revoked by the trial judge more than a year later.

Appellant, Johnny Canard, on December 3, 1953, pled guilty to the crime of grand larceny in the Circuit Court of Stone County. At the same time the presiding judge signed this order ". . . Johnny Canard is hereby sentenced to serve one year in the state peniten-

tiary at hard labor, which sentence is hereby suspended on recommendation of all the parties hereto, upon the good behavior of the defendant for said period of time, and upon the payment of all the costs of this action." On the original criminal docket sheet, which is a part of the record, in the case styled "State of Arkansas v. **Johnny Canard,**" appears the following notation: "12/3/53 D. waives arraignment—plea of guilty—suspended sentence of one year . . ."

On May 2, 1955 the presiding judge of the Stone Circuit Court, upon a showing by the prosecuting attorney that Canard had violated the conditions of his suspended sentence by law violations in February 1954 and by failing to pay the costs, revoked Canard's suspended sentence and ordered him to begin serving the sentence formerly announced. From this order of revocation Canard has appealed to this court.

We have reached the conclusion that, under the above factual situation, the trial court had no authority on May 2, 1955 to revoke the suspended sentence given appellant on December 3, 1953. This conclusion has been reached after a careful analysis of the various Acts of the Legislature relative to this situation and the interpretations placed thereon in our former decisions.

The first announcement of the Legislature relative to this matter was Act 76 of 1923. Section 1 of this Act gave *Circuit Courts* in criminal cases, upon a plea of guilty or a verdict of guilty, the authority "to postpone the pronouncement of final sentence and judgment" (emphasis supplied). Section 2 gave the trial judge the power to revoke the suspension and postponement mentioned in Section 1.

Act 158 of 1945 [Ark. Stats., § 43-2326] gave *all courts* of record authority "to suspend the execution of jail sentences or the imposition of fines, or both in all criminal cases pending before said courts" (emphasis supplied).

Act 262 of 1945 [Ark. Stats., § 43-2324] reënacted Section 1 of the 1923 Act above mentioned and added the following: "Such postponement shall be *in the form of a suspended sentence* for a *definite* number of years, running from the date of the plea or verdict of guilty and shall expire in like manner as if sentence had been pronounced; provided however, the Court having jurisdiction may at any time during the period of suspension revoke the same and order execution of the full sentence" (emphasis supplied).

Act 358 of 1949 purported to amend Act 76 of 1923. The Act referred to Pope's Digest, § 4035, but evidently meant to refer to § 4053 which is the same as the 1923 Act. It provides that "all postponements of final sentences . . . shall run from the date of the plea or verdict of guilty and for the period of the statute of limitation for each offense and at the expiration of said period of limitation shall expire in like manner as if sentence had been pronounced."

In 1953 Act 44 was passed which is exactly like Act 262 of 1945 except that it applies to "criminal trials in *all courts* of record" while said Act 262 applied to "criminal trials in *Circuit Court*(s)" (emphasis supplied).

This court in the cases of *Davis* v. *State,* 169 Ark. 932, 277 S. W. 5, and *Ketchum* v. *Vansickle,* 171 Ark. 784, 286 S. W. 948 [both decided after the 1923 Act but before the 1945 Acts] made a clear cut distinction between (a) the act of postponing the date of pronouncing sentence and (b) the act of postponing the execution of a sentence already pronounced. The 1923 Act dealt with situation (a) while Act 158 of 1945 dealt with situation (b). Therefore it was held in the *Davis* case, supra, that where the trial court first pronounced sentence and then attempted to postpone the execution thereof the action was void and the defendant could later be made to serve out his sentence. In speaking of the 1923 Act the court there said: "Indeed, the Act only gives the circuit court authority to postpone the pronouncement of final sentence and does not give it authority to stay the execution of a sentence

already pronounced." In the *Ketchum* case, supra, the same factual situation obtained and the decision there was rested on the decision of the *Davis* case, supra. It is noted that in both of these cases the suspension was for an indefinite period of time.

In the case of *Calloway* v. *State,* 201 Ark. 542, 145 S. W. 2d 353, decided in 1940, the factual situation is not entirely clear. Apparently Calloway pled guilty and was sentenced to 10 years in the penitentiary with a provision that the *sentence* should be suspended during good behavior. This is much the same factual situation as that of the case under consideration. However when the court, within the 10 year period, revoked the suspended sentence the trial court apparently considered that it had only postponed the pronouncement of sentence because in referring to the same the order states: "That pronouncement of such sentence should be suspended during the good behavior of defendant." This court treated the case as coming under the provisions of the 1923 Act and held that the trial judge had a right to revoke the suspension of sentence [before the 10 year period expired].

In the case of *Bodner* v. *State,* 221 Ark. 545, 254 S. W. 463, where apparently the sentence was pronounced and execution thereof suspended this court treated the case as coming under the provisions of Act 262 of 1945 [Ark. Stats., § 43-2324] and applied that statute.

A careful reading of some of the above mentioned decisions leaves the impression that a clear distinction has not at all times been made between (a) the act of postponing the pronouncement of the sentence and (b) the act of postponing the execution of a sentence already pronounced. However we are convinced, after a careful analysis of Act 44 of 1953 in its relation to all the previous Acts mentioned above, that no distinction need now be made, and that it is immaterial whether the trial court actually (a) postpones the pronouncement of the sentence or (b) postpones the execution of the sentence already pronounced. It is obvious that a great deal of confusion and hardship was inherent in the practice of

trial courts in giving *indefinite* suspensions, and that the Legislature, by enacting the several statutes set forth above, intended to remedy this situation. They accomplished this by providing [in the 1953 Act] that the suspended sentence should begin to run on the day of the plea or verdict of guilty and that it should terminate on a definite date fixed by the trial judge in the order of suspension. It is also provided in the last paragraph of Section 1 of the 1953 Act just how the suspension may be revoked. This paragraph reads: "Provided however, the court having jurisdiction may at any time *during the period of suspension* revoke the same and order execution of the full sentence" (emphasis supplied).

We think the facts in the case under consideration fall squarely within the provisions of Act 44 of 1953 as we have interpreted it above. Appellant's plea of guilty was received by the court on December 3, 1953 and on that day he was given a "suspended sentence of one year." The trial court had the authority to revoke that sentence, either for bad behavior or for failure to pay costs, at any time previous ot December 3, 1954, but we think he had no authority to revoke it on May 2, 1955.

It is also argued by the State that the payment of costs was a condition precedent and that the suspended sentence did not start to run until the costs were paid. This contention of course cannot stand in the face of the statute which specifically says that the suspended sentence shall begin "running from the date of the plea or verdict of guilty."

The above views call for a reversal and dismissal of the judgment of the trial court, and it is so ordered.

5-765 283 S. W. 2d 689

Opinion delivered November 14, 1955.

[redacted]

*Wright, Harrison, Lindsey & Upton,* for appellant.

*H. B. Stubblefield,* for appellee.

SAM ROBINSON, Associate Justice. In this case appellants contend that the grantor and grantee made a mutual mistake in the description of property intended to be conveyed, and that such a mistake is one of fact. They seek to have the deed reformed. Appellee maintains that the mistake, if any, is one of law and that under our prior decisions the deed cannot be reformed.

Appellants are devisees under the will of Lula Dubisson; appellee is the only child of D. J. Dubisson and the residuary devisee under his will. On December 18, 1939, D. J. Dubisson and his wife Lula acquired as an estate by the entirety the east ½ of Lots 1, 2 and 3, Block 281 of the city of Little Rock. On June 23, 1949, Dubisson deeded to his wife Lula "½ of E ½ of Lots 1, 2 & 3 in Block No. 281." In February, 1950, Lula died. Later D. J. Dubisson died, and appellee Geraldine Dubisson Lee, being the residuary devisee under his will, acquired whatever interest if any Dubisson owned in the property under consideration at the time of his death. Evi-

dence was introduced at the trial going to show that it was Dubisson's intention to deed all of his interest in the property to his wife Lula, and that he thought he had done so. It makes no difference here about the admissibility of such evidence, because assuming that it was Dubisson's intention to deed all of his interest to his wife, the deed fails to accomplish that purpose, and this was a mistake of law.

Undoubtedly, Dubisson thought that by owning the property with his wife as an estate by the entirety, they each owned an undivided one-half interest, and that by conveying to his wife one-half interest in the entire property he was conveying all of his interest. If he had owned an undivided one-half interest of course the deed would have carried out his intention, but such was not the nature of the estate he owned. It was an estate by the entirety. His mistake was not as to the description of the property. He thought he owned an undivided one-half interest and he executed a deed accordingly. He did what he intended to do, but by operation of law the deed did not effect the result intended. This was a mistake of law.

In support of their contentions in the matter, appellants cite *Spaulding Manufacturing Company* v. *Godbold,* 92 Ark. 63, 121 S. W. 1063, 135 Am. St. Rep. 168. There, reformation was allowed. It was proved that the property was purchased by individual partners instead of by the partnership. By mistake the partnership was named as grantee in the deed. But that case is not analogous to the situation here. If Dubisson had employed a scrivener to prepare the deed and by mistake the wrong person had been named as grantee, the *Spaulding* case would then apply.

Appellants also rely on *Wood* v. *Wood,* 207 Ark. 518, 181 S. W. 2d 481. There this court said: "The lower court's decree was necessarily based on a finding that there was a mutual mistake when the appellees executed and the appellant accepted from them a deed conveying an interest in the land—the dower and homestead inter-

est of the widow—which they did not own." Obviously a mistake of fact was involved in the *Wood* case. Other cases cited by appellants are equally inapplicable.

In *Rector* v. *Collins, et al.,* 46 Ark. 167, this court said: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal results of an act which he performs, is no ground for either defensive or offensive relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knows, or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole, or of any of its provisions. Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement, or other instrument, as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission, although one of the parties, and—as many of the cases hold—both of them, may have mistaken or misconceived its legal meaning, scope, and effect. The principle underlying this rule is that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might, or even would, have had if they had been more correctly informed as to the law; if they had not been mistaken as to the legal scope and effect of their transaction."

*Crews* v. *Crews,* 212 Ark. 734, 207 S. W. 2d 606, is controlling. There, Mrs. Crews executed to her husband a deed for one-half interest in the property involved. Later Mr. Crews died, and Mrs. Crews in an attempt to show that the property was an estate by the entirety testified that it was her intention to create such an estate. The court said: "The effect of her deed was not to cre-

ate an estate by the entirety, but to vest in Crews an undivided one-half interest in the property. . . . While appellee testified that she thought the deed she was executing to Crews would create an estate by the entirety as to the 'home place,' it was not shown that any fraud or deception, as to the contents of the deed, was practiced on her. Mere mistake of a party as to the legal effect of an instrument does not vitiate the instrument or afford ground for reformation."

Appellants further contend that appellee is estopped to claim title to the property because her predecessor in title accepted benefits under the will of his wife Lula which were inconsistent with his ownership of the property. It is true Dubisson did accept such benefits under the will of his wife, but the benefits he accepted were less than he was entitled to and such acceptance on his part gives rise to no principle of estoppel. Appellants rely on *Hudson* v. *Union & Mercantile Trust Company,* 155 Ark. 605, 245 S. W. 9. But, in that case Mrs. Hudson claimed a dower interest in a certain fund. Relying on her election to take dower, the administrator on order of the probate court paid the balance of the fund on preferred claims. Later Mrs. Hudson claimed the entire fund. In these circumstances, the court held that she was estopped. It can readily be seen that the principle of estoppel involved in the *Hudson* case is not present in the case at bar.

The decree is affirmed.

HIXSON COAL CO. *v.* FURSTENBERG, ADMX.

5-752 284 S. W. 2d 120

Opinion delivered November 21, 1955.

[Rehearing denied December 19, 1955.]

*Rose, Holland & Holland,* for appellant.

*G. L. Grant* and *Luke Arnett,* for appellee.

LEE SEAMSTER, Chief Justice. The Arkansas Workmen's Compensation Commission rendered an opinion, whereby Frank H. Furstenberg, was awarded benefits under the provisions of the Arkansas Workmen's Compensation Act. The award of benefits was predicated upon a finding that Furstenberg contracted silicosis, an occupational disease, while in the employment of the Hixson Coal Company, appellant herein. On appeal to the Logan Circuit Court, Northern District, the action of the Commission was affirmed. Upon appeal to this court, it is the contention of the appellants that Frank H. Furstenberg did not contract silicosis while working in the Hixson Mine, nor was he subjected to his last injurious exposure to the hazards of such occupational disease, while working in the Hixson Mine. The appellants also earnestly insist that Furstenberg's claim is barred by the statute of limitations, since Furstenberg did not give notice of the injury to Hixson, as required by law.

Shortly after this cause was appealed to this court, Frank H. Furstenberg died. This cause is revived

against Theodora Furstenberg, administratrix of the estate of Frank H. Furstenberg, appearing as appellee herein.

The record reveals that Frank H. Furstenberg had worked in coal mines since 1905. He was employed by the Watson Coal Company from 1936 to 1946, at which time the Hixson Coal Company took over the operation of the Watson Coal Company. Furstenberg continued to work for the Hixson Coal Company until December of 1949; when he terminated his employment with Hixson and went to work for the Sims Coal Company, as a pumper. On November 7, 1950, he terminated his employment with the Sims Coal Company, where he was employed as a pumper and was subjected to little, if any, dust. Shortly thereafter, he went to work for the Jewel Mining Company, in the capacity of a wall boss. He was compelled to terminate this employment on March 15, 1951, when the disabling effects of silicosis rendered him totally disabled.

It is generally conceded that Furstenberg became afflicted with silicosis while engaged in his occupation as a coal miner. The question before the Commission was not whether Furstenberg had silicosis, but where he received his last *injurious exposure* to the disease. In silicosis, the injury may occur many years before the disease becomes manifest, as the accumulated effects of the deleterious substance are of a slow, insidious nature.

After a careful review of the record, it is apparent that Furstenberg became afflicted with his silicotic condition, prior to the time of his employment with the Jewel Mining Company. There is ample competent evidence in the record to show that the disease was actually incurred in his employment with the Hixson Coal Company, even though disablement did not occur until March 15, 1951. Furstenberg had acquired enough *harmful quantities* of the silica dust by December, 1949, so as to produce or cause the disease for which claim is made in this case. There is evidence that he was last *injuriously exposed* to

the hazards of such disease, in December of 1949, while in the employment of the Hixson Coal Company.

Furstenberg testified that for approximately two years prior to his termination of employment with appellant, Hixson Coal Company, he was bothered with breathlessness; it progressed to such an extent that he could not walk out of the Hixson Mine without resting, and finally got to the point that it became necessary to ride out, being unable to walk. This testimony was corroborated by the statements that Furstenberg made in 1949, to the Veterans Administration, in his application for non-service connected disability benefits. These statements were to the effect that he was compelled to terminate his employment with the Hixson Coal Company, due to the fact that his physical condition had progressed to a point that he was unable to perform his work in the Hixson Mine. Furstenberg, at this time, was of the opinion that his breathlessness was caused by asthma.

Furstenberg was admitted to the Arkansas Tuberculosis Sanatorium on March 26, 1951. After an examination, he was classified as a case of far advanced tuberculosis and silicosis. In the doctor's opinion, Furstenberg was totally and permanently disabled. Subsequent examinations were made by other qualified doctors, and in each instance he was diagnosed as being totally disabled by reason of silicosis. Competent medical reports disclose the beginning of the silicotic condition in 1943; which, at that time, was not disabling. Continued exposure and inhalation of the silica dust brought on the progression of the disease.

From a review of the record, we are unable to say that there was no substantial evidence to support the findings and action of the Arkansas Workmen's Compensation Commission. 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. The rule is firmly established that the findings of the Commission, which

is the trier of the facts, will not be disturbed on appeal if supported by substantial evidence. *Meyer* v. *Seismograph Service Corp.,* 209 Ark. 168, 189 S. W. 2d 794; *Harris Motor Company* v. *Pitts,* 212 Ark. 145, 205 S. W. 2d 21; *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26.

The claim was filed within the time prescribed by statute, therefore, the appellants' last contention that the claim is barred by statute is without force and cannot be sustained.

Affirmed.

BURNS *v.* FORD, ADMX.

5-769 283 S. W. 2d 866

Opinion delivered November 21, 1955.

*Wayne Foster,* for appellant.

*Gordon Sullivan, John Bailey* and *Harry C. Robinson,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellee as administratrix in succession, on October 4, 1954, obtained a judgment for $3,500 in a tort action against appellant, Catherine Burns, and caused execution to issue. A levy was made on Lots 5 and 6, Block 21, Brack's Addition to the City of Little Rock, which property appellant scheduled as exempt claiming it to be her homestead. A traverse was entered by appellee and on a hearing the trial court, March 16, 1955, denied appellant's schedule on the

ground that at the time she purchased the property levied on, she was not the head of a family and that the homestead that she had held in other property,—Lot 6, Block 28, Brack's Addition to Little Rock,—she had voluntarily sold and had been abandoned by her. From the judgment is this appeal.

For reversal appellant relies on two points: "(1) Under Arkansas law one possessing a homestead may sell the same and acquire a valid homestead in another tract with the proceeds thereof, provided the sale of the original homestead is not accompanied by circumstances constituting abandonment. (2) There was no evidence before the court in this cause upon which the court could predicate a finding that the sale of appellant's original homestead was accompanied by circumstances constituting an abandonment of same."

These points will be considered together. The material facts appear not to be in dispute and are to the following effect. Catherine Burns, acquired a homestead in Lot 6, Block 28, Brack's Addition to the City of Little Rock in 1914, which property is not involved in this action, and continued to live on said property until about August 9, 1943, when she voluntarily sold said property. On September 27, 1943, appellant purchased Lots 5, 6, 7 and 8, Block 21, Brack's Addition to the City of Little Rock and constructed a residence on the property, which she has occupied for several years. At the time appellant purchased this property, which is the property involved here, she was divorced from her husband (said divorce having been granted in 1930) and both of her children were of age, married and lived separate and apart from her.

We hold that the finding of the trial court was correct in the circumstances. At the time appellant sold Lot 6 in Block 28 above, she was unmarried, her children were of age, married and had moved away. She was then not the head of a family. The property involved here and levied on was acquired by her September 27, 1943, when she was neither married nor head of a family,

and after she had voluntarily abandoned her homestead. The principles of law announced in the case of *Beeson* v. *Byars,* 187 Ark. 966, 63 S. W. 2d 540, control here. In that case the facts were that: "The land in question had been for many years the homestead of John Beeson, but his son had moved away and his wife had died, and for some years John Beeson had lived alone on the land. It is insisted—and correctly so—that John Beeson's homestead right was not lost by the removal of his son from the homestead and the death of Mrs. Beeson. . . .

"The land ceased to be the homestead of John Beeson on November 19, 1929, at which time he sold and conveyed it to D. C. Cathey. Notes given by Cathey for the purchase money were not paid, and in January, 1931, Cathey reconveyed the land to John Beeson. The testimony established the fact very clearly that, when Beeson sold the land to Cathey, he surrendered possession thereof and removed therefrom, and went to the home of D. C. Cathey about 2½ miles away, in fact he had removed from the farm upon the death of his wife and after living with D. C. and Jack Cathey for something over two years he returned to live with Arthur Clements on the land in suit. . . .

"While, as we have said, John Beeson did not lose his right of homestead because he had been left without family, he did lose his homestead right when he sold and surrendered possession thereof. *Wooten* v. *Farmers' & Merchants' Bank,* 158 Ark. 179, 249 S. W. 569; *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302.

"Having abandoned the homestead, that right was not reacquired when Beeson returned to the land to live in the home of his tenant. To reimpress the homestead right upon the land it was essential that Beeson be then a married man or the head of a family. Section 3, article 9, Constitution.

"In other words, while Beeson might have retained his homestead right, even after he had ceased to be a married man or the head of a family, yet, when he aban-

doned his homestead right by the sale thereof and the removal therefrom, he could not thereafter, without being a married man or the head of a family, reacquire that right." See also *Stone* v. *Bowling,* 191 Ark. 671, 87 S. W. 2d 49.

Affirmed.

Mr. Justice ROBINSON not participating.

METCALFE *v.* NICHOL.

5-766 283 S. W. 2d 853

Opinion delivered November 21, 1955.

*Sam Rorex,* for appellant.

*Clayton Farrar* and *Ray S. Smith, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves the guardianship of General Metcalfe. The in-

herent question is what is for the best interest of the ward: the questions actually posed relate to (a) the qualifications of the guardian, (b) requirements as to notice of annual reports, and (c) correctness of fees allowed the guardian and her attorney.

General Metcalfe is a retired officer of the United States Army; and the appellee, Mrs. Marjorie Nichol, is his step-daughter. General Metcalfe has no children or descendants; and the appellant, who lives in Seattle, Washington, is his only brother and nearest blood relative. General and Mrs. Metcalfe were married when Mrs. Marjorie Nichol was a small child, and the General has stood *in loco parentis* to her and she *in loco filiae* to him. Colonel Nichol was an officer under General Metcalfe when the Colonel and Mrs. Nichol were married. In 1950, Colonel Nichol was stationed at the Army-Navy Hospital in Hot Springs when General Metcalfe retired; and the General and Mrs. Metcalfe moved to Hot Springs to live with Colonel and Mrs. Nichol. Both General and Mrs. Metcalfe became victims of senility and, with their consents — in apparently lucid intervals — the Probate Court of Garland County in March, 1951, appointed Mrs. Nichol guardian of the persons and estates of Mrs. Metcalfe and General Metcalfe. Mrs. Metcalfe is now deceased; and this case relates only to the guardianship of General Metcalfe, who has been in Fort Roots Hospital in Little Rock from 1951 until and after the time of the hearing from which comes this appeal.

At the inception of the guardianship, General Metcalfe's estate, largely in stocks and bonds, was inventoried and valued at $90,235.96. Mrs. Nichol filed her first annual account in March, 1952, and it was approved by the Court. She filed her second annual account in March, 1953, which was likewise approved by the Court. In March, 1954, she filed her third annual account; and thereupon the appellant resisted the account and claimed: (a) that Mrs. Nichol was never qualified to be guardian of General Metcalfe; (b) that the approvals of the first and second annual accounts were void because no notice

had been given to the appellant; and (c) that the allowances to the guardian and her attorney were excessive. The Probate Court held against the appellant on all points; and this appeal has resulted.

I. *Mrs. Nichol's Qualifications as Guardian.* Colonel and Mrs. Nichol were living in Hot Springs on the grounds of the Army-Navy Hospital, and General and Mrs. Metcalfe were living with them at the time Mrs. Nichol was appointed guardian of General Metcalfe, as heretofore stated. The appellant says that the domicile of Colonel Nichol is the domicile of Mrs. Nichol (*Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993); and that Colonel Nichol was here in Arkansas as an Army Officer and therefore not domiciled in the State within the purview of our holdings in such cases as *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876, and *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502. These cases relate to *domicile for divorce purposes* and not to mere residency for guardianship purposes. In § 57-606, Ark. Stats., in discussing venue for the appointment of a guardian, the Statute says that the venue shall be ". . . (1) in the County of this State which is the domicile of the incompetent; or (2) if the incompetent is not domiciled in this State but resides in this State, then the County of his residence; . . ." The quoted language shows that the framers of our Probate Code (Act 140 of 1949) recognized the clear distinction between *domicile* and *residence.* Then in the next section of the Probate Code (§ 57-607, Ark. Stats.), in stating the qualifications of a guardian, the language is: "A natural person, a resident of this State . . . is qualified to be appointed guardian of the person and of the estate of an incompetent. . . ." The use of "resident"—in the section immediately following the one using the word "domicile"—shows that the Legislature knew and appreciated the difference between domicile and residence in prescribing the qualifications of a guardian to be merely a resident. Sub-section (e) of § 57-607, Ark. Stats., further emphasizes this distinction by stating that a nonresident natural person ". . . possessing the qualifi-

cations hereinbefore enumerated (except as to residence) who has appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and caused such appointment to be filed with the Court . . . is qualified for such appointment."[1]

We hold that Mrs. Nichol was legally qualified as a resident to become guardian of her step-father, General Metcalfe. Furthermore appellant's attack on Mrs. Nichol's qualifications may be a collateral attack at the present stage of the proceedings (see *Sharp* v. *Himes,* 129 Ark. 327, 196 S. W. 131; and *Swindle* v. *Rogers,* 188 Ark. 503, 66 S. W. 2d 630); but we do not rest our opinion on that point.

II. *Approval of the First and Second Annual Reports.* Appellant complains that no formal copies of these reports were ever served on him, and claims such service was required by § 57-611(5), Ark. Stats. The Veterans Administration of the United States received and approved each of the accountings; and there was no effort at concealment. Appellant does not claim that he would have suggested any changes if he had been served with a legal summons. His only complaint is that he dislikes to think of his brother being confined in the Hospital at Fort Roots.

Assuming, without deciding, that appellant was entitled to receive notice of such reports, the facts show that he had *knowledge* by having written for and received copies of the reports from the Clerk of the Probate Court. Furthermore, there are in the evidence numerous friendly letters from Colonel Nichol to appellant, telling him of General Metcalfe's condition and of visits made by the Nichols to Fort Roots to see the General, and of auto rides, shopping trips and dinners to which the Nichols had General Metcalfe, with the approval of the staff of the Fort Roots Hospital. General Metcalfe stood *in loco parentis* to Mrs. Nichol, and she

[1] Later when Colonel Nichol was transferred to an Army Post in Texas, Mrs. Nichol attempted to comply with Subsection (e) by appointing her attorney, Honorable Clayton Farrar, as attorney for process.

certainly stood *in loco filiae* to him, because he was living in her home as her step-father at the time of the guardianship. Her love for him is attested by the letters and other matters in the file. On the other hand, until this guardianship, the appellant had seen General Metcalfe only at rare intervals and his visits were years apart. We conclude that the Trial Court was correct in refusing appellant's contention as regards the first and second annual reports.

III. *Third Annual Report.* When Mrs. Nichol and her attorney filed this report, they caused a copy to be sent to the appellant; and he complains that the fees allowed Mrs. Nichol and her attorney are too large. These were $1,200.00 to Mrs. Nichol and $1,200.00 to her attorney. As we stated heretofore, the estate was valued at $90,235.96 in 1951. In this third annual report filed in March, 1954, the net worth of the estate, after paying the guardian and attorney fees here attacked and after paying all other expenses, had increased to $119,405.40. It is, therefore, evident that there has been prudent handling of the estate. Mrs. Nichol had her attorney spend one day a month with General Metcalfe to personally see that he was well and happy, and we have previously commented on the visits that the Nichols made to General Metcalfe. We get the picture that this fine old soldier is being as well cared for as possible; that his guardian and her attorney are faithfully performing their duties; and that the Probate Court was correct in making the allowances.

Affirmed.

H. B. DEAL & Co. *v.* BOLDING.

5-774 283 S. W. 2d 855

Opinion delivered November 21, 1955.

*Jabe Hoggard, Leo F. Laughren* and *Elliott D. Levey,* for appellant.

*Melvin E. Mayfield, Stein & Stein* and *Surrey E. Gilliam,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellees, hereinafter called plaintiffs, are 15 laborers and mechanics who were employed by either or both the appellants, H. B. Deal & Company, Inc., and McGraw Construction Company, Inc., hereinafter designated as defendants, in the construction of the Ozark Ordnance Works at El Dorado, Arkansas, at various times in the years 1942 and 1943. The construction was under a fixed-fee written contract between the H. B. Deal & Company as principal contractor and the United States of America, which required said company and its subcontractors to pay all laborers and mechanics on the job at a rate of not less than one and one-half times the basic rate of pay for all hours worked by them in excess of eight hours in any one calendar day. The defendant, McGraw Construction Co., operated under a written subcontract with H. B. Deal & Company in the construction of the government facility.

On April 12, 1943, part of the plaintiffs brought an action against the McGraw Company to recover overtime pay for work done at various times in the construction project over the period in question. A similar action was brought by the other plaintiffs against both defendants on December 16, 1946. The two cases were eventually consolidated for trial before the circuit judge sitting as a jury. In response to certain interrogatories filed by plaintiffs the court required defendants to set out the number of hours each plaintiff worked each day

and the amount of money paid each plaintiff at each weekly pay period as disclosed by the original time records. The information so furnished was accepted as true by most of the plaintiffs and formed the basis for the judgments rendered in their favor. Other plaintiffs offered independent proof of the number of hours worked each day in conflict with the time records. After taking the cases under advisement the court rendered separate judgments in each case for the several plaintiffs in varying amounts on November 16, 1954.

The first assignment of error relates to the applicable statute of limitations. It is urged that the trial court erred in sustaining plaintiffs' demurrer to that part of the defendants' answers which pleaded the three-year statute of limitations [Ark. Stats., § 37-206] as a bar to the actions. Both actions were filed within five years, but not within three years, of the last work performed by the plaintiffs. Thus, the effect of the court's action was to sustain plaintiffs' plea that the actions were based on a written contract and controlled by Ark. Stats., § 37-209, which provides that all actions on written contracts shall be instituted within five years after the cause of action accrues.

The actions by plaintiffs are on the written contract between the United States Government and H. B. Deal & Company for the construction of the ordnance plant, and particularly Art. 10, Sec. 2, thereof which reads: "The Constructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day." A copy of this contract was made a part of the subcontract between the defendants under which the McGraw Company, as subcontractor, assumed all the obligations placed on the

Deal Company by the principal contract with reference to hours and rate of pay of the workmen. In *H. B. Deal & Co., Inc.* v. *Marlin, Judge,* 209 Ark. 967, 193 S. W. 2d 315, we held that the foregoing provision was placed in the contract for the benefit of the laborers who were entitled to maintain an action thereon as third party beneficiaries. Again in *H. B. Deal & Co., Inc.* v. *Head,* 221 Ark. 47, 251 S. W. 2d 1017, we affirmed a judgment in favor of plaintiff laborers for overtime pay in an identical action based on this provision of the written contract.

Defendants argue that the instant actions are either founded on separate oral contracts of employment, or, that said written contract was in legal effect oral because it was necessary to introduce parol evidence to identify the parties and maintain the action. The case of *Kordewick* v. *Indiana Harbor Belt R. Co.,* 7 Cir., 150 Fed. 2d 753, supports this contention although it was based upon a different type labor contract between a union and a management committee. The court held that under Illinois law there was no written contract within the meaning of a ten-year statute of limitations unless the parties thereto could be ascertained from the instrument itself. This holding is in conflict with the rule generally followed in those jurisdictions where the question has arisen. Actions by third persons based on written contracts which are made for their benefit are generally held to be within the statute of limitations governing actions on written contracts. 53 C. J. S., Limitation of Actions, § 60; 34 Am. Jur., Limitation of Actions, § 91.

In *Stover* v. *Winston Bros. Co.,* 185 Wash. 416, 55 P. 2d 821, there was involved a written contract between a city and a contractor for the construction of a dam at a fixed wage scale. In a laborer's action against the contractor for the difference in wages actually paid and wages specified in the third party written contract, the court held that it was not essential that the plaintiff be named in the contract or that his identity be ascertained at the time the contract is made so long as he is one of the class for whose benefit the contract is made. This is

the effect of our own holding in the previous Deal cases, *supra.* See also, *Moore* v. *Illinois Central R. Co.,* 180 Miss. 276, 176 So. 593; *Union Pac. R. Co.* v. *Olive,* 9 Cir., 156 Fed. 2d 737; *Bogart* v. *George K. Porter Co.,* 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045. These cases are in line with the general rule to the effect that the necessity of introducing evidence extrinsic to a written contract to identify a party named therein, to show performance, or to establish the amount of money to which plaintiff is entitled under such contract where there is an obligation to pay some amount, does not render inapplicable a statute of limitations pertaining to written contracts. See Anno: 129 A. L. R. 603 and cases there cited. The fact that oral proof was required to identify plaintiffs as third party beneficiaries under the written contract and to establish the amount due each thereunder does not prevent the five-year statute of limitations [Ark. Stats., § 37-209] from applying here. It follows that the trial court correctly sustained plaintiffs' demurrer to defendants' plea of the three-year statute as a bar to the actions.

Defendants next say there was an accord and satisfaction of the claims sued upon by reason of plaintiffs' endorsement of weekly pay checks upon the back of which was printed: "Endorsement of this check by payee constitutes receipt in full of the sum appearing under the heading of 'net amount due' for wages covering the period and the class of work performed on the face of this check." It should first be noted that the endorsement in question does not provide that it is in full satisfaction of all claims of the payee, as is usually the situation in those cases upon which defendants rely. Moreover, it is also undisputed that defendants did not purport to make the payments represented by said checks in full satisfaction of their claims for overtime pay under the written contract. According to the pleadings and proof, plaintiffs accepted the checks without any knowledge of the provisions of the written contract relating to overtime pay while such provision was at all times well known to defendants, who failed to apprise plaintiffs thereof or to post a copy of said contract at

the work site as required under its terms. According to the endorsement recital, it is a receipt for certain sums appearing on the faces of the checks. None of the checks were introduced but it is undisputed that the sums stated on the face thereof did not purport to cover overtime pay and that plaintiffs did not accept them in satisfaction of their claims for overtime labor under the provisions of the written contract. Since there was no controversy as to the sums appearing on the face of the checks which were not received in satisfaction of the claims for overtime pay, the trial court correctly refused to hold there had been an accord and satisfaction by reason of the endorsement. *McGehee* v. *Cunningham,* 181 Ark. 148, 25 S. W. 2d 449.

Defendant, H. B. Deal & Co., next insists that the court erred in rendering judgment against it in favor of the plaintiffs, Bolding and Purifoy, for overtime wages earned during a period when each was employed by defendant, McGraw Construction Co. Aside from the fact that this question was not raised below, it appears that defendant, H. B. Deal & Co., failed to include a provision for overtime pay in the subcontract with McGraw Construction Co. as required by the principal contract with the U. S. Government. H. B. Deal & Co. will be reimbursed by the U. S. Government for any judgments against it herein. Of course, plaintiffs can have only one satisfaction of their respective judgments and, under all the circumstances, we cannot say the court erred in rendering judgment against both defendants for overtime wages earned during the periods in question.

It is next argued that the trial court did not have jurisdiction of the person of the intervenor, Glendel Cloud. The record reflects that Oliver L. Cloud was a plaintiff in the original action against H. B. Deal & Co. and that summons was duly served on said defendant. Thereafter, Cloud made an oral assignment of said claim to his wife, Glendel, prior to his death in February, 1951. Mrs. Cloud then intervened in the action as assignee of

her deceased husband's claim and counsel for defendant was notified by registered letter of such intervention and received a copy thereof. There was no dispute as to the amount of the claim and the only purpose of the intervention was to substitute the widow as plaintiff instead of her deceased husband. H. B. Deal & Co. is a non-resident corporation and contends that it was necessary that a copy of a summons upon the intervention be served upon the Secretary of State in compliance with Ark. Stats. § 27-340 in order to acquire jurisdiction over the person or intervenor. Counsel overlook the fact that the intervention did not involve a new cause of action or an independent proceeding. It is only where a supplemental pleading asserts a new cause of action that it is incumbent upon a plaintiff to obtain a new service of process. *Nance* v. *Flaugh,* 221 Ark. 352, 253 S. W. 2d 207. No new cause of action resulted from the filing of the instant intervention.

Defendant Deal & Company also contends the court erred in rendering judgment in favor of plaintiff Hawk because of insufficient evidence to show that he worked more than eight hours a day. While Hawk accepted the time record as showing the dates he worked, he denied that it correctly showed the number of hours worked. He repeatedly testified that he worked at least 10 hours every day during the periods in question. This was substantial evidence and sufficient to support the judgment of the trial court sitting as a jury.

There was no error in allowing 6% interest on the amount found owing to each plaintiff from the date of his last work to the date of judgment. In their argument to the contrary, defendants say the long delay in the trail of the case was due to the fault of the plaintiffs. The record clearly reflects that the delay was occasioned by a number of circumstances, including the filing of numerous motions and other pleadings over a long period by both sides. Defendants did not file their answers until January, 1954, and the cases were tried at the next term of court five months later. It also appears that

counsel on both sides and the court deemed it advisable to await the outcome of some cases pending in other appellate courts which involved some questions also raised in the instant cases before proceeding with the trial. Defendants did not request an earlier hearing and stipulated that no objection was ever made to the trial court's method of handling the cases. In *Lyle* v. *Latourette,* 209 Ark. 721, 192 S. W. 2d 521, relied on by defendants, we held that when interest once begins to run on a claim, it continues to run pending decision by the courts, if the delay is not the fault of either party. The record here does not warrant a finding that the delay was due to plaintiffs' fault.

Defendant, McGraw Construction Co., contends the court erred in rendering judgment in favor of intervenor, Lora Hodnett, because a written assignment of the claim of her deceased husband showed it was against H. B. Deal & Co. There is no dispute in the amount of said claim nor that the work was done for the McGraw Company. Mrs. Hodnett testified that her husband made an oral gift of his claim to her prior to his death in June, 1951. In drafting a written assignment of the claim as previously directed by the husband, counsel inadvertently and erroneously described the claim as one "against H. B. Deal & Co., Inc." Even if the written assignment was ineffective to bind the McGraw Company in the circumstances, there was substantial evidence to support a finding that intervenor was the lawful owner of her deceased husband's claim under an oral gift.

The judgments are affirmed.

KANSAS CITY SO. RY. CO. *v.* SMITH.

5-775 283 S. W. 2d 860

Opinion delivered November 21, 1955.

*Hardin, Barton, Hardin & Garner,* for appellant.

*Shaver, Tackett & Jones,* for appellee.

GEORGE ROSE SMITH, J. The appellee recovered judgment for $1,205 as the value of nine head of cattle killed by the appellant's trains. The case involves eight distinct incidents, two cows having been killed upon one

occasion by the same train, and resulted in nine separate verdicts for the plaintiff. The appellant admits that its trains killed eight of the nine animals but contends that it was entitled to an instructed verdict upon each count of the complaint. For convenience of discussion the eight counts may be divided into three subdivisions.

I. Upon five of the occasions—those of April 20, May 14, August 4, August 29, and September 25, 1954—the railway engineer made no effort either to stop the train or to slacken its speed after discovering cattle on or near the railroad track. Although there is evidence that a cow may be seen for as much as half a mile away, the jury were justified in believing that no attempt is made to reduce the train's speed when an animal is sighted at a distance. The engineers and firemen explain that the sounding of the whistle may startle a grazing beast and cause it to run across the track in fright. Hence the trainmen think it best to try to slip past the animal without disturbing it unnecessarily. If, however, the cow shows any indication of getting upon the tracks the whistle is blown in repeated short blasts in an effort to scare the animal back. There is much testimony from which the jury might have concluded that even when a beast is seen to be approaching the track no attempt is made to slacken speed unless the distance is so great that the train can actually be brought to a standstill in time to avoid a collision.

This practice of continuing at full speed unless a complete stop can be made does not as a matter of law absolve the railroad company from the presumption of negligence that arises from the statute, Ark. Stats. 1947, § 73-1001. In several cases the failure to moderate the train's speed has been a basis for, or a factor supporting, the view that the statutory presumption has not been indisputably overcome. *St. Louis, I. M. & S. R. R. Co.* v. *Hagan,* 42 Ark. 122; *St. Louis & S. F. R. Co.* v. *Carlisle,* 75 Ark. 560, 88 S. W. 584; *Chicago, R. I. & P. R. Co.* v. *Williams,* 221 Ark. 404, 253 S. W. 2d 349.

Varied situations are presented by the case at bar. The cow killed on August 29 was sighted half a mile away. When the train was "a thousand feet or less" from the animal the engineer first observed an indication that the cow would come upon the track. He blew the whistle—"that's all I could do"—but the cow "made a sudden dash on the railroad track to get across and almost made it." From other testimony it is reasonable to believe that by a routine application of the service brakes the train's speed could have been materially reduced over a distance of 1,000 feet, and still more so at half a mile. It cannot be said as a matter of law that the jury were wrong in thinking the animal would have escaped had any effort at all been made to slow the train.

The other four incidents in this first group all involve the railway's practice of making no attempt to slacken speed when an animal is first observed. In the instance that is perhaps most favorable to the appellant, that of August 4, the engineer testified that the cow was 200 feet away when he discovered her on the tracks. This testimony is to some extent contradicted by the fireman, who said that the animal was grazing on the side of the track when he first saw her at a distance of only seventy-five feet. In passing it may be remarked that such inconsistencies in the testimony have been held to justify the jury's conclusion that the witnesses are discredited. *Little Rock & F. S. Ry. Co.* v. *Jones,* 41 Ark. 157; *St. Louis S. W. Ry. Co.* v. *Hutchison,* 79 Ark. 247, 96 S. W. 374; *Missouri Pac. R. Co.* v. *Bain,* 170 Ark. 594, 280 S. W. 625. But, apart from these discrepancies in the proof, the jury had all along the problem of deciding whether a slackening of the train's speed would have avoided the accident. To what extent a moving train may be slowed over a given distance is not a matter which the jury may be taken to know from everyday knowledge; proof is needed. Since the appellant offered no evidence on this point, taking the position that no reduction in speed is called for unless a full stop is possible, it cannot be said that the presumption of negli-

gence was incontrovertibly overcome in any of these instances.

II. On two occasions—those of April 26 and May 4—the engineer did apply the brakes in an attempt to stop his train. In the latter instance the testimony is so contradictory that the jury, under the cases last cited, was not required to believe either eyewitness. The engineer says that the accident occurred at 9:50 a.m.; that he sighted a herd of cattle crossing the tracks; and that he applied first the service brakes and then the emergency brakes in his attempt to stop. The fireman, in testimony that we cannot bring into harmony even by a careful study of the record, stated on direct examination that he observed fifteen or twenty cattle crossing the tracks, but he says the incident happened at night—"I distinctly remember because it was dark." He could not then be sure that one cow had been fatally injured, but on the return trip the next morning he saw the animal's dead body. Yet on cross-examination this witness stated, without explanation, that the occurrence was in the daytime. If the testimony cannot be reconciled by a study of the record it could hardly be harmonized by the jury upon a single hearing.

In the other instance, that of April 26, the statutory presumption was clearly overcome by the defendant. The engineer testified that he saw from 50 to 100 cattle on the track at night, that he began sounding the whistle, and that he immediately applied the emergency brakes but was unable to stop in time. Many cases hold that such uncontradicted proof rebuts the presumption of negligence. *Kansas City, F. S. & M. Ry. Co.* v. *King,* 66 Ark. 439, 51 S. W. 319; *St. Louis, I. M. & S. R. Co.* v. *Landers,* 67 Ark. 514, 55 S. W. 940; *Chicago, R. I. & P. Ry. Co.* v. *Fowler,* 186 Ark. 682, 55 S. W. 2d 75. Indeed, the appellee's only argument on this count is that the headlight might have been defective. This contention is based solely on the engineer's statement that all headlights are not of exactly the same brilliance, which obviously falls short of proof that the light in question was inferior.

III. The appellant denies that a train struck the appellee's bull on September 19 and contends that the evidence is insufficient to show that the animal was killed by a train. We think the evidence supports the verdict. The bull was found, seriously injured, about 200 yards from the track. A witness, searching for the animal, was able to find it by starting at the track and following the trail left by the beast as it dragged itself to a mudhole. A section foreman told the plaintiff's son that the bull had been killed by a train and might be destroyed. It is argued principally that no witness described any marks on the bull that might have resulted from the impact with the train. The quick answer to this contention is that, with the exception of the section foreman, no witness was asked about such wounds, although there was every opportunity for the question to be put. When the section foreman saw the animal it was mired down with only its back showing; so his failure to see any marks falls short of proof that there were none.

The judgment is affirmed except as it relates to the cow killed on April 26; that part of the judgment, in the sum of $120, is set aside and the cause dismissed.

WENTWORTH MILITARY ACADEMY *v.* MARSHALL.

5-777 283 S. W. 2d 868

Opinion delivered November 21, 1955.

*Jameson & Jameson,* for appellant.

*J. E. Simpson,* for appellee.

PAUL WARD, Associate Justice. Appellees, Mr. and Mrs. B. O. Marshall, enrolled their son, Edwin, in the Wentworth Military Academy about the first of September, 1953, agreeing to pay the Academy the total sum of $1,770.50 for a full school term of approximately nine months. Edwin attended the Academy until the Christmas vacation period and voluntarily failed to return. At that time appellees owed the Academy a balance of approximately $875.50 based on the charges for a full term.

The Academy filed suit against appellees for the said balance due and after a hearing the trial court directed a verdict for the Academy, appellant, in the sum of $884.24, being the balance due plus interest. On appellees' motion the trial court then set the verdict aside and granted a new trial, from which order appellant prosecutes this appeal.

We have reached the conclusion that the trial court was right in the first instance and that it was error to set aside the first judgment and grant a new trial.

On September 1, 1953 Mrs. Marshall signed an application for the admission of her son to the Academy in which it was stated that said application was "subject to provisions and regulations published in your current catalogue." A copy of the catalogue referred to had previously been mailed to appellees and a copy is made a part of the record. On page 61 of said catalogue under the heading of Refunds and Reductions there appears the following paragraph:

"Students are admitted to the Academy only on condition that they remain the entire year, unless suspended, dismissed, forced to withdraw on account of sickness or graduated from Junior College. In case of suspension, dismissal, or voluntary withdrawal, no money paid on tuition or other fees will be refunded and any unpaid balance shall become immediately due and payable. The terms set forth in this catalogue constitute the Academy contract and entrance in the Academy constitutes acceptance of this contract for the full year."

On September 7, 1953, at the time Edwin entered the Academy his father signed an Agreement with the Academy showing in detail the expenses of his son "at the Academy for the entire school year from Sept. 7, 1953, to May 31, 1954." This Agreement shows the total expenses for the school term to be $1,770.50. It further shows receipt of payment as of that date in the sum of $370.50 with $175 due October 1, 1953 and the same amount due on the first of each month thereafter up to and including May 1, 1954.

It is not disputed that Edwin quit the Academy voluntarily the latter part of December 1953 and did not return or offer to do so. He did however finish out the school term at Berryville.

Under the above factual situation appellees were obligated to pay the full amount for one full term of school.

The trial court, in setting aside the first judgment, gave as his reason the fact that the contract on which "plaintiff's cause of action was based is unenforcible because of lack of mutuality." In reply to this appellant takes the position that the contractual relationship existing between appellant and appellees was what is termed a unilateral contract, citing 12 Am. Jur., page 512, § 14, where it is stated that: "The doctrine of mutuality is inapplicable to unilateral contracts." We, however, do not think this contention on the part of appellant is a complete answer to the reason given by the trial court for its action. It is true of course that

appellant has signed no paper or agreement obligating it to keep Edwin Marshall in school for the full term and provide him while there with board and free tuition, but the fact remains that when they accepted Edwin as a student they thereby became obligated to fulfill all the provisions set forth in the catalogue and they were thereafter bound just as they would have been had they signed a written contract.

We surmise that the trial judge felt there was no "mutuality" because he was under the impression that the Academy was not obligated to keep Edwin in school for the full term and that it could discharge him at its own volition and without cause. We do not think this is a fair interpretation of the contractual obligation imposed on the Academy by the terms of the contract. At page 48 of said catalogue under the heading "Regulations" there is this paragraph:

"The Academy reserves the right to demand the withdrawal of any student without the making of specific charges. If a boy's presence is felt to be unwholesome, or if he has a degrading influence on those around him, or has been guilty of conduct unbecoming a gentleman, he will be asked to leave."

In our opinion the above quoted paragraph imposes on the Academy the obligation to keep a student for the entire school year and that it would have no right "to demand the withdrawal" of such student except for one of the reasons therein stated. We can understand the wisdom of the Academy not being obligated to prefer "specific charges." To have to do so would compel the Academy unnecessarily to embarrass the student or his parents.

Although the exact issue presented here has never been directly passed on by our court, it has been considered by many text writers and by other courts. In Williston on Contracts, § 1352 the rule applicable here is stated this way:

"In several cases the right of a school to recover the full annual tuition charge when the pupil was expelled for proper cause, or left without reason before the close of the year has been allowed. The only justification for this can be the fact, if it is a fact, that one less pupil involves no saving of expense to the school."

In American Law Reports, Annotated Volume 69 at page 712 we find this statement:

"Although a few cases assert different views, it has been held generally that, where a contract for schooling is for a specified period, for which a definite payment is to be made, even where it covers board as well as tuition, and there is no general stipulation for a deduction or refund in the event of inability to attend (and particularly if the contract provides that no deduction will be made for absence) the entire contract price becomes payable, regardless of nonattendance by the pupil or student for part or all of the time. . . ."

In the case of *Hall* v. *Mt. Ida School for Girls, Inc.,* 258 Mass. 464, 155 N. E. 418, 50 A. L. R. 1495, appellant paid a full year's tuition for her granddaughter to attend appellee school. The granddaughter married within two or three months after the school term began and was expelled, and appellant sued. The trial court permitted recovery, but the Supreme Court reversed that judgment. It was stated in the opinion that it was agreed "that contracts for board, lodging and instruction at a private school for a specified time have always been held to be entire contracts and not divisible."

In *Peirce* v. *Peacock Military College,* (Tex.) 220 S. W. 191, where the same issue as here was presented the court in holding that the school was entitled to recover for a full term, among other things, said:

"We find that contracts made with schools for board, lodging, and tuition, which contain provisions clearly showing that the contract is for an entire session and that no deduction is to be made if the student leaves

before the expiration of the session, have been held to authorize a recovery of the price stipulated to be paid for the entire session."

Somewhat the same reasoning used and the same conclusion reached in the above cited cases will be found in *William* v. *Stein, et al.,* 166 N. Y. S., 836 and *Hitchcock Military Academy* v. *Myers,* 76 Cal. App. 473, 245 Pac. 219.

The case of *M. F. Teeter* v. *Horner Military School,* 165 N. C. 564, 81 S. E. 767 [annotated in 51 L. R. A. at page 975, et seq.] holds that the school could collect the full amount designated for a full term of school where the student was expelled and where the catalogue contained rules for discipline similar to the ones in the case under consideration. In that case the catalogue provided that "applicants are accepted with the express understanding that they will submit to our authority in every respect. A boy whose conduct is hurtful to the scholarship and morals of his associates will be expelled."

This court held in the case of *Kentucky Military Institute* v. *Cohen,* 131 Ark. 121, 198 S. W. 874, that the school could not recover the full amount where the student was expelled without good reason. Of course this question need not be considered here because Edwin was not expelled but voluntarily quit school.

Appellees for an affirmance rely on *Holton* v. *Cook,* 181 Ark. 806, 27 S. W. 2d 1017, 69 A. L. R. 709, but that case is easily distinguishable on the facts from the case under consideration. There the student became physically unable because of defective eyesight to continue in the school until the end of the term. This fact was recognized by the court and made the basis of the conclusion there reached. The court there distinguished its holding from the *Hall* case and the *Peirce* case above cited.

Since there is no dispute about the amount involved here and since it is not denied that Edwin left the school voluntarily, it is our conclusion that the contractual relationship created by the instruments above mentioned

imposed the liability on appellees to pay the balance due for a full term. Therefore the cause is reversed with directions to the trial court to enter judgment in accordance with this opinion.

Justice MILLWEE dissents.

HALL *v.* MILHAM.

5-779 284 S. W. 2d 108

Opinion delivered November 28, 1955.

*Kenneth C. Coffelt,* for appellant.

*McDaniel & Crow,* for appellee.

LEE SEAMSTER, Chief Justice. Appellee, S. P. Milham, instituted ejectment proceedings in Saline Circuit Court against appellants, Dewey Hall and wife, Ocie

Hall, for possession of a house and about 20 acres of land in Saline County, Arkansas. Further, the appellee sought judgment against appellants in the sum of $3,500, for an alleged indebtedness. The appellee later amended the original complaint and sought judgment for rent of said property at the rate of $75 per month, from the date of notice to appellants to vacate the property, until possession is restored to appellee.

Appellants answered with a general denial and filed a cross-complaint, seeking specific performance on an alleged oral contract with appellee, whereby, the appellee purportedly agreed to execute and deliver to appellants, a deed to the 20 acres of land, in return for appellants' promise to live with him and care for him the rest of his life. In the alternative, appellants sought judgment against appellee, in the sum of $5,000, which represented the sum expended by them to repair and remodel the appellee's home. Thereafter, on appellants' motion, the cause was transferred to equity.

The cause was tried on October 7, 1954, at which time the Chancellor took the matter under advisement and rendered a decree on December 31, 1954. The trial court dismissed the appellants' cross-complaint for want of equity and because appellants did not pay certain court costs. The court decreed that appellee should receive judgment against appellants in the sum of $50 a month, for the occupancy and use of the dwelling house by the appellants, from the date of notice to appellants to vacate the property, until possession is restored to appellee. Judgment was also rendered against appellants, in the sum of $15 per month, for rental of a block house which is located on appellee's property. This appeal follows.

The appellants have listed three points for reversal, they are: (1) the Chancellor's decree is against the preponderance of the evidence, in his holding that appellee did not agree to deed his property to appellants for valid consideration, and in his holding that appellee should not be required to perform the agreement; (2) the Chancellor erred in his failing in the alternative to award judgment against appellee and in favor of appellants for the

amount of money appellants spent in repairing the appellee's property; and, (3) the Chancellor erred in directing that appellee recover rental on the property, for the reasons set forth in Nos. 1 and 2 of these points, and for the further reason that the care the appellants gave appellee would more than offset any rental for their use of the property.

Appellee, S. P. Milham, is a 78-year-old, unmarried bachelor, who has resided near Benton, Arkansas, all of his life. He is the uncle of Dewey Hall, one of the appellants herein. For a number of years, the appellants lived in Homer, Louisiana, where Dewey Hall carried on the trade of a master plumber. According to the testimony of the appellants, the appellee had lived alone most of his life and since he was getting old he felt the need of someone to live with him and care for him the remainder of his life. Consequently, in the early part of 1952, the appellants sold their home in Homer, Louisiana, and went to live with appellee under an oral agreement that the latter was to deed to the appellants the house and 20 acres of land in consideration of the care and attention to be bestowed upon the appellee during his lifetime. Further, the appellants contend that appellee also agreed to will them all of his real estate holdings, as well as personal effects. The appellants contend that they occupied the appellee's premises pursuant to that agreement; spent about $5,000 of their own money in repairing and remodeling the house; fed appellee and took care of him until June, 1953, at which time appellee instituted this suit and moved out of his house. There was other testimony from disinterested witnesses that tended to corroborate the testimony of the appellants.

This testimony was stoutly denied by the appellee, who testified that he allowed appellants to move into his house, under an agreement that they could remain there until they built their own house. He maintained that this arrangement was only temporary and appellants agreed to board him, do his laundry, and pay the utility bills in lieu of rent. Appellee testified that he did not obligate himself or promise to convey the lands in question to the

appellants in consideration for appellants' promise to live with him and care for him, but rather, he told them that he would will them his property at his death, and thereafter did make a will to that effect. He contends that appellants are indebted to him in the sum of $3,500, less any sums expended by appellants for repairs to his house.

There is a decided conflict in the testimony as to whether appellee was forced to leave his home on account of intolerable treatment by the appellants, Dewey and Ocie Hall. It is true that appellants testified that an oral contract was entered into for their personal services in consideration for an immediate delivery, by appellee, of a deed to the 20 acres of land; but the evidence reveals that this purported agreement was never carried out since appellee has never delivered a deed to the appellants. There were no witnesses to his purported agreement. However, there is sufficient evidence to show that appellee agreed to will the appellants all of his property, in return for their promise to live with him and care for him the rest of his life.

The validity of an oral contract to make a will has long been recognized and such contracts have often been enforced by the courts. As in other contracts, a promise to make a will cannot be enforced without consideration. In the instant case, the appellants, in consideration for the promise of the appellee to will them his property, have agreed to render personal 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. We have often held that equity will not decree specific performance of an executory contract to perform personal services, for the obvious reason that there is no method by which its decree could be enforced. The jurisdiction of equity will not be exercised to decree a specific performance, however inadequate may be the remedy for damages, where the contract is of such a nature that obedience to the decree could not be compelled by the ordinary processes of the court. See *Leonard* v. *Board of Directors of Plum Bayou Levee District*, 79 Ark. 42, 94 S. W. 922; *Nakdimen* v. *Atkinson Imp. Co.*,

149 Ark. 448, 233 S. W. 694. The trial court was correct in refusing specific performance in this instance.

We think the trial court erred in dismissing the cross-complaint of the appellants and in rendering judgment against them for $65 a month rent. By reason of the agreement between the parties, the appellants sold their home in Homer, Louisiana, and moved into the home of appellee; fed and carried forth their part of the agreement for 14 months; expended considerable money and labor in improving the appellee's property, with the expectation that the property would eventually be theirs. The appellee voluntarily left his home, at the end of 14 months and made it impossible for the appellants to care for him. At this time, he changed his will leaving the property to other persons and instituted this suit.

The appellants have expended the sum of $2,800, in material and labor for improvement of appellee's property, for which they have not been reimbursed. They are entitled to a judgment against appellee for this amount. *Ross* v. *Springstun,* 219 Ark. 228, 242 S. W. 2d 116; *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. 2d 14.

Judgment is rendered in favor of appellants against the appellee, in the sum of $2,800. The appellee will have 60 days after the filing and recording of the mandate in which to pay said amount. The appellants will be required to vacate the premises within 10 days, after payment of the judgment by the appellee. Should appellee fail to pay said judgment within the time allowed, the premises will be ordered sold to satisfy the judgment.

The decree dismissing appellant's cross-complaint and the judgment for rent against appellants, are reversed and the case is remanded with direction to enter a decree not inconsistent with this opinion. The cost of both courts shall be borne by the appellee.

Reversed and remanded.

4814 284 S. W. 2d 111

Opinion delivered November 28, 1955.

[redacted]

*George F. Edwardes,* for appellant.

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

J. SEABORN HOLT, Associate Justice. A jury found Joe Hardin (appellant) guilty of second degree murder for killing Charles Brittain, but did not fix the penalty. Thereupon the court assessed his punishment as fifteen

(15) years in the State Penitentiary. This appeal followed.

I.

For reversal appellant assigned sixteen alleged errors. Assignments 1, 2, 3, 4, 8 and Supplemental Assignments 2 and 4 cover the sufficiency of the evidence. We think, however, after reviewing the record that there was ample substantial testimony to support the jury's verdict. The facts were to the following effect: Willie Pearl Walker (an eye witness) testified in substance that August 26, 1954, she asked appellant if he had any whiskey and he said he did not. Later that same day, about 7 or 8 p.m., she along with Isaac Penny, Virgie Reed, Charles Brittain and two others (not identified) went to Hardin's home for whiskey. They found him there alone and remained for about an hour or two. Hardin produced some whiskey and they began drinking. During this time Hardin went into another room and on his return announced that someone had stolen his gun, whereupon, she and the victim, Brittain, went with Hardin to search for the gun. When they could not find it, Hardin directed her to call Isaac Penny and when she did so Isaac ran. Hardin then closed the door and told them they were not going to get out. Hardin then went into a back room, returned with a gun which he pointed at Brittain and said, "Your friend got out but you ain't going to get away." Brittain said, "I haven't got your gun." Hardin then fired and Brittain fell in a chair in the middle of the room. Brittain got up in a few minutes, stumbled, started into another room when Hardin fired again and hit him in the back. Before the last shot, Hardin struck Brittain on the side of the head with a whiskey jug, breaking the jug. When Hardin shot the second time Brittain fell.

Dr. C. H. Smith testified that the victim was brought to the emergency room of the hospital where he treated him for a gunshot wound in his back just left of the spine. "Q. Could you tell from the wound as to what type of instrument had made the wound? A. It appeared to be a shotgun. Q. What condition was he in at the time you examined him, or treated him? A. When I first saw

him, he was conscious and rational, but he lapsed into unconsciousness in just a few minutes. Q. What time of the night did you last attend him? A. I imagine it was around 9 or 10. Q. Was he still living at that time? A. He was. Q. Was his condition caused by the wound which you have just described? A. It was."

His condition continued to "deteriorate" which was caused "from the hemorrhaging of the wound." Brittain was so nearly dead that any attempt to do anything rather than try to improve his condition would have resulted in immediate death. He died that night.

Other witnesses tended to corroborate Willie Pearl Walker's testimony and also the fact that Brittain exhibited no weapon and they saw none. We find no evidence that Brittain was armed. The jury was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351. It is also the jury's province to weigh the evidence on the issue of self-defense, relied upon by appellant, and accept what they believed to be true and reject any that they thought to be false. *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621. There was no error in the trial court's refusal to direct a verdict for appellant at the conclusion of the State's case, and again refusing his request to direct a verdict at the conclusion of all the testimony. The rule is well established that when the evidence is sufficient, as here, to support a conviction a refusal to direct a not guilty verdict was not error. *Graham and Seaman* v. *State,* 197 Ark. 50, 121 S. W. 2d 892; *Ruffin* v. *State,* 207 Ark. 672, 182 S. W. 2d 673. As indicated we find ample substantial evidence that the victim's death was caused by the gunshot wound inflicted on him by appellant.

II.

Appellant next contends (Assignments 5, 6 and 7) that the court erred in allowing the State's counsel to interrogate him as to his activities in the liquor business. "Q. Does Joe Hardin sell whiskey there? A. No, he gave us some. By Mr. Edwardes: We object to that

. . . By Mr. Mathis: He is claiming this man was shot in a defense of his home. I want to show that it was a place of business where he regularly sold whiskey." We think there was no error. The court firmly admonished the jury not to consider the question propounded for any purpose. The question was answered in the negative. We think the court's admonition to the jury removed any possible prejudices to appellant in the circumstances.

III.

Next appellant argues (Assignment 9 and Supplemental Assignment 6) that the court erred in instructing the jury that appellant assumed the burden of proof to sustain his plea of self-defense. On this point the trial court in conformity with § 41-2246, Ark. Stats. 1947 (C. & M. Dig., § 2342, and Pope's Dig. § 2968) instructed the jury in this language: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless the proof on the part of the state is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing homicide," and "again, it is the duty of the court to admonish you that the defendant starts out in the beginning of the trial with the presumption of innocence in his favor. This is a presumption that begins with the trial of the case and continues throughout the trial, or until the evidence convinces you of his guilt beyond a reasonable doubt."

This identical question was answered contrary to appellant's contention in the case of *Hogue* v. *State,* 194 Ark. 1089, 110 S. W. 2d 11, wherein we said.

"The court gave an instruction conforming to § 2968, Pope's Digest, which reads: 'The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.' It is

argued that this instruction cast upon the defendant the burden of proving his innocence, inasmuch as he admitted the killing. Such, however, is not the effect of the instruction when read in connection with instruction No. 11, given by the court, reading as follows: 'Under the law the defendant is presumed to be innocent. This presumption is evidence in his behalf and protects him from a conviction at your hands until his guilt is established to your satisfaction beyond a reasonable doubt.'

"This assignment of error is disposed of by the opinion in the case of *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96. A headnote in that case reads as follows: 'Where the jury are instructed, in a murder case, that the killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves upon the accused, as provided by Kirby's Digest, § 1765, they should be further instructed that on the whole case the guilt of the accused must be proved beyond a reasonable doubt.'

"The judgment in that case was reversed because, after giving § 1765 of Kirby's Digest (which appears as § 2968, Pope's Digest) as an instruction, the court did not further charge the jury that on the whole case the guilt of the accused must be proved beyond a reasonable doubt. Here, however, the instruction numbered 11 copied above, does what the court there said should have been done."

We find no error in the giving of the above instructions in the circumstances.

IV.

Appellant argues (Assignment 10 and Supplemental Assignments 3 and 5) that there was error committed by the court by calling the jury in after they had been out approximately two hours and inquiring: "The Court: Without telling the Court how you stand, do you know numerically about how you are divided. A. Yes. Q. Will you give me just that information—how you are divided numerically? A. It is two to ten; that's right, it's two to ten. The Court: Gentlemen, the Court would be very reluctant to keep you unless you think there is a

possibility of reaching some agreement. At the same time, the Court would say to you that it is to the interest of the State of Arkansas and to the defendant for you to reach an agreement in this case, if at all possible, and of course without any individual juror waiving any conscientious conviction he has. I have another jury out, and I would like to ask you to bear with the Court another ten minutes and see if you can come to some agreement in this case. All right, you may retire, and if you are not in by the time the other jury comes in, I will check with you."

It further appears that the jury at 5:20 p.m. returned into open court and the record reflects: "By the Court: Gentlemen, have you made any progress since you last reported? Member of the Jury: Yes, sir, your Honor, we have made a little progress. The Court: That is fine; would you like to try to finish up this afternoon, or would you like to recess and resume deliberations at 9:00 o'clock in the morning? Member: Let me ask you this; it has been put to me by some of the jurors. If we can agree on the charge, is it permissible for the Court to set the sentence? The Court: That is correct. However, that applies only to some degree less than first degree. The court can set the punishment on any degree less than first degree. Now, does that answer the question? Member: That answers the question."

We find no error in the court's action in this connection. What we said in *Jackson* v. *State,* 94 Ark. 169, 126 S. W. 843, where a similar instruction or admonition was given to the jury, applies with equal force here. "It will be observed that the court did not express any opinion as to the weight of the evidence, nor change in any manner the instructions already given; nor did the court urge the jurors to yield their individual convictions as to the result of the case. The statement amounted to no more than an admonition to the jury as to their duty to return a verdict, and this was guarded by the concluding remark that nothing that was said should influence the verdict. We find no prejudice in the remarks. *Johnson* v. *State,* 60 Ark. 45." So here the court did not even suggest,

much less instruct the jurors to yield their individual convictions in reaching their verdict, but, in effect, did no more than admonish them to do their duty.

Appellant's further contention that the court erred in refusing to allow him time for additional argument after the above instruction or admonition to the jury, we hold to be without merit. Here the court's admonition was not, in effect, a new instruction on some new issue, such as would entitle appellant to reargue the case, what he did in the circumstances was within the sound discretion of the court, and we find no abuse. "The subjects and range, as well as the length, of the argument of counsel, must necessarily be left to the sound discretion of a presiding judge. And, unless grossly abused to the prejudice of a party, is not the subject of review here." *Reynolds* v. *State,* 220 Ark. 188, 246 S. W. 2d 724.

V.

Finally, appellant stoutly insists that the trial court erred in limiting the time to argue this murder case to twenty minutes on each side over his objections and exceptions. An answer to this contention is that this assignment of alleged error was not preserved or brought forward in appellant's motion for a new trial and may not now be considered by us. In the very recent case of *Watkins, Broomfield and Matlock* v. *State,* 222 Ark. 444, 261 S. W. 2d 274, we reaffirmed this rule in this language: "Under our long established rule, an error not preserved in the motion for a new trial cannot be considered by us on appeal, (. . . *State* v. *Neil,* 189 Ark. 324, 71 S. W. 2d 700; *Suit* v. *State,* 212 Ark. 584, 207 S. W. 2d 315)."

Finding no error, the judgment is affirmed.

SIMMONS *v.* HANCOCK.

5-773 284 S. W. 2d 116

Opinion delivered November 28, 1955.

*Bruce Bennett* and *William I. Prewett,* for appellant.

*T. O. Abbott,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant claims that someone forged her name to a warranty deed which has been of record since 1937. The Chancery Court held that the signature was that of the appellant; and this appeal has ensued.

In 1954 appellees (J. A. Hancock and wife) filed this suit to have their title quieted against the appellant (Mrs. Annie Mae Simmons). The complaint alleged that the appellant executed a warranty deed to Mrs. Hancock [1] in 1937, but was now claiming that the deed was a forgery. Appellant, by answer and cross-complaint, alleged that the 1937 deed was a forgery, and that the Hancocks had all the time been the tenants of appellant.

Only a factual question is presented; and the evidence is in sharp dispute. Mrs. Simmons testified that in 1937 the property was worth in excess of $3,000.00; that she rented it to Mr. Hancock for $15.00 a month; that he executed to her four rental notes totalling $360.00 as evidence of rents to mature; that from 1937 to 1950 Mrs. Simmons was a nurse in New York and other places outside Arkansas; that the Hancocks paid the monthly rental to Mrs. Simmons' mother until her death in 1948; and that in 1950 Mrs. Simmons learned that no rents were then being paid. Other witnesses testified as to

[1] The deed was to the former wife of J. A. Hancock. After her death her heir conveyed the property to J. A. Hancock, who is the appellee. He has since remarried.

payments by Mr. Hancock to appellant's mother. The original deed in question was dated and acknowledged on November 26, 1937. Mrs. Simmons testified—and she was corroborated by a number of witnesses—that she was not in Arkansas on that date. She also testified that she did not know the man who, as Notary Public, claimed to have taken her acknowledgment.

On behalf of the appellees, the Notary Public who took Mrs. Simmons' acknowledgment to the deed on November 26, 1937, testified that his certificate of acknowledgment was true and correct. J. A. Hancock testified that he and his wife purchased the property from Mrs. Simmons just as recited in the deed—i.e., the assumption of an outstanding mortgage and the execution of the four vendor's lien notes totalling $360.00. The four notes —marked paid—were introduced in evidence; and on the back of one of the notes was the admittedly genuine and contemporaneous signature of Mrs. Simmons.[2] This signature was compared with the questioned signature of Mrs. Simmons on the deed. An employee of an El Dorado Bank—whose duties for almost fifteen years had been to pass on the genuineness of signatures—testified that, in his opinion, the admitted and the questioned signatures were both made by the same person.

We mention also one other significant matter. Each of the four notes had typewritten in it the description of the property here involved. Mrs. Simmons testified that none of this typewritten matter was in any of the notes when she received them or endorsed the one note as aforesaid. But even so the *printed* portion of each note said: "This note is given as part of the purchase price on the following described lands in Union County, Arkansas, to-wit: (lines for description). A lien is reserved on said property as security for the payment of this note, . . ." Thus Mrs. Simmons admittedly endorsed her name on the back of a note which said it was for the purchase price of property and that a lien was retained for the purchase price.

[2] Mrs. Simmons explained this by stating that she endorsed the note to hypothecate it for a loan, which she later repaid, and thereupon the note was redelivered to her.

From the evidence herein recited, and other in the record, the Chancery Court found that the questioned deed was genuine. We have examined the original instruments and we cannot say that the Chancellor was in error.

Affirmed.

FEAZELL *v.* FEAZELL.

5-782 284 S. W. 2d 117

Opinion delivered November 28, 1955.

*Roy E. Danuser,* for appellant.

*Nell Powell Wright,* for appellee.

MINOR W. MILLWEE, Associate Justice. This suit arose in January, 1955, when appellee caused a citation

to be issued against appellant, her former husband, charging him with contempt of court for failing and refusing to comply with an order made on March 7, 1950, directing him to pay $50.00 monthly for the support of their son, who is now 9 years old. In response to the petition, appellant pleaded his inability to make certain payments because of his diminished income and consented that judgment be rendered against him for delinquent payments of approximately $110.00 then due. He also asked that the monthly payments be reduced to $10.00 until an increase in income enabled him to pay more. It was agreed that appellant should be required to pay monthly support payments of only $25.00 pending a hearing which was set for March 14, 1955.

The chancellor on exchange found appellant guilty of contempt of court and fixed his punishment at 30 days in jail but the sentence was suspended for six months to give him time to pay an arrearage of $152.00 for which judgment was rendered. The court denied any reduction in the amount of the monthly support payments and appellee was allowed an attorney's fee of $50.00.

According to the pleadings and proof, the parties were married in 1941 and entered into a separation agreement in 1946 which gave custody of the child to appellee and provided that appellant pay appellee $50 monthly for the child's support, "until the circumstances of the parties change to an extent warranting a change." The payments were to be made in semi-monthly installments. The terms of this agreement were made a part of a decree rendered March 7, 1950, in appellee's suit for separate maintenance of the child.

On March 18, 1950, appellee filed suit for divorce on the ground of general indignities in which she alleged that the right of custody and the amount of support money for the child had previously been fixed by order of the court. A divorce decree was granted in said suit on April 20, 1950. Separate petitions for contempt citations were filed by appellee on the dates of September 5, 1950, June 19, 1953, and August 25, 1954, prior to the filing of the instant petition on January 17, 1953. There

were no hearings on any of these except the 1953 petition which resulted in the assessment of a ten-day suspended jail sentence.

In March, 1950, appellant was earning $265.00 monthly, after deduction of withholding taxes, as a core driller for Ozark Dam Constructors in building Bull Shoals Dam. In addition he received a disability allowance of $50 per month from the U. S. Government on account of shrapnel wounds suffered in World War II. On completion of the Bull Shoals work in 1951, appellant worked for U. S. Engineers for 15 months at approximately the same rate of pay. When his disability prevented him from continuing this work in the latter part of 1952, he worked in Colorado for 2 months receiving $88.00 per week. On completion of the Colorado job he returned to Arkansas and started working with his uncle in the well drilling business in and around Mountain Home and was still so engaged at the time of the trial. He is an experienced driller and is paid 65 cents per foot on all wells he drills but the work is seasonal. During 1954, his net earnings from this work amounted to $784.00 and he received $147.00 from January 1, 1955, until the date of trial on March 14, 1955.

Appellant has remarried and his present wife earned $240.00 in 1954. They rent their home for $35.00 per month and own no property except a 1951 automobile which is mortgaged for $575.00 and is not being operated because of inability to pay personal taxes and a license to operate. Appellant sold his household furniture in January, 1954, to pay the support money and part of the proceeds from the car mortgage were also used for that purpose. Appellant is in debt to his uncle for moneys borrowed to make support payments and owes other accounts which he is unable to pay, and groceries and other household expenses run from $75.00 to $90.00 per month.

According to the record of semi-monthly payments made by appellant since March, 1950, he was $65.00 in arrears for the year 1950 and overpaid by $50.00 in 1951. He was also in arrears $35.00 in 1952 and $157.35 in 1953 but overpaid in the amount of $66.35 in 1954. Thus ap-

pellant actually paid more than $50.00 per month for the calendar year immediately prior to the filing of the instant petition despite the fact that his net income had been reduced from $315 monthly in 1950 to $120 in 1954. He stoutly denied any intentional or willful violation of the court's order in failing to pay the overall arrearage of $91.00 accumulated by January 1, 1955, and stated that his decreased income had rendered it impossible for him to do so, or to continue such payments at the rate of $50.00 per month. He denied that he had made any recent purchases of intoxicants or that he had stated that he would pay nothing for his son's support unless he was made to do so, as appellee testified.

Appellee still owns the former home of the parties in Mountain Home but she and her son live in a rented home in Springfield, Mo. She has never sought alimony from appellant, is unemployed and is supported by her mother. Although she stated that she was physically unable to work she could not remember when she had last seen a doctor and was evasive as to the amount of support received from her mother.

It is well settled by our cases that imprisonment of a divorced husband for a failure to pay alimony or support money is justified only on the ground of willful disobedience to the orders of the court. *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *Hervey* v. *Hervey,* 186 Ark. 179, 52 S. W. 2d 963. In the recent case of *Griffith* v. *Griffith,* 225 Ark. 487, 283 S. W. 2d 340, we held that inability to pay on the part of the defendant is always a complete defense against enforcing payment from him by imprisonment in a civil contempt proceeding. In our opinion a preponderance of the evidence shows that appellant's failure to pay the arrearage here arose from his financial inability and that it was not in willful disobedience of the court's orders.

We are also of the opinion that, from the date of trial, the monthly support payments should be modified and reduced to $25.00 per month until such time as appellant's income will warrant a further change in the amount of such payments.

Appellant also contends that the court was without authority to allow a fee to appellee's attorney. Appellant points to Ark. Stats., § 34-1210 [§ 1 of Act 274 of 1945] which, in amending Pope's Digest, § 4388, failed to specifically authorize attorney fees in separate maintenance suits as did a previous amendment of the same statute by Act 25 of 1941. It is true that prior to the adoption of either amendment we held that a divorced wife who petitioned for a change in the custody of children after rendition of a final divorce decree was not entitled to attorney's fees. *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619. However, in that case, the wife was held to be a mere volunteer in supporting the children whose custody had been awarded to the husband. It was also held that the divorce decree was, in the peculiar circumstances, a final adjudication of his liability for her attorney's fees.

In *Tilley* v. *Tilley,* 210 Ark. 850, 198 S. W. 2d 168, we held that the allowance of attorney's fee to the wife in her separate suit for maintenance of herself and child was a matter within the sound discretion of the chancellor under § 34-1210, *supra.* Also, in *Waller* v. *Waller,* 220 Ark. 19, 235 S. W. 2d 814, we approved an allowance of an attorney's fee to a divorced wife in her separate action for the support of the child of the parties in a *habeas corpus* proceeding. In contempt proceedings for failure to comply with an allowance for child support it is held generally to rest within the sound discretion of the trial court as to whether attorney fees of the injured party should be assessed against the defendant. 27 C. J. S., Divorce, § 325. Regardless of the effect of the amended statute, we think it is within the inherent jurisdiction of equity to allow an attorney's fee in cases of this kind and that the court did not abuse its sound discretion in doing so. As a matter of practice we have repeatedly made such allowances in this court.

That part of the decree finding appellant guilty of contempt of court and refusing to modify the monthly support payments is accordingly reversed. In all other respects the decree is affirmed.

5-783 284 S. W. 2d 105

Opinion delivered November 28, 1955.

[redacted]

*James R. Hale,* for appellant.

GEORGE ROSE SMITH, J. This was originally a suit by Kelley Brothers Lumber Company to foreclose a materialman's lien upon the house and lot in dispute. There being no question as to the validity of that lien, the real controversy is between the appellant Orr and the appellees Harold and Anita Bergemann. Orr seeks to enforce an oral contract with both the Bergemanns and a written contract with Harold Bergemann only. The chancellor awarded Orr a money judgment upon the written contract but refused to grant any relief upon the oral agreement. Orr contends that he is entitled to specific performance of the parol contract.

In 1951 Orr, having retired from newspaper work in Kansas City, came with his wife to Arkansas in search of a place to live. Harold Bergemann, who is a son of Mrs. Orr by a prior marriage, was then living with his wife Anita near Fayetteville in a home owned by Mrs. Bergemann. The Orrs visited the Bergemanns, and it

was agreed between the two couples that the Orrs would build a house next door to the Bergemanns on another part of Mrs. Bergemann's land, that the Orrs would receive a life estate in this property, and that upon the death of Mr. and Mrs. Orr the house and lot would revert to Mrs. Bergemann.

Pursuant to this oral agreement Orr constructed a modern four-room house on Anita's land. The Orrs, however, were unable to obtain from her the promised conveyance of a life estate; Mrs. Bergemann kept putting the matter off and finally resisted Orr's present plea for specific performance. When the house was completed Orr still owed $663.95 to Kelley Brothers for materials used in the construction.

In April, 1953, Mrs. Orr became so seriously ill that her husband thought it best to take her back to Kansas City for treatment. Before he left Orr made a written contract with Harold Bergemann by which Bergemann agreed to pay Orr $2,500, at the rate of $25 a month, for the labor and materials furnished by Orr in the construction of the house. Orr testified that Bergemann also agreed to pay the Kelley Brothers claim in monthly installments of $25. This testimony is undenied; Harold did not take the witness stand at the trial.

After the Orrs' departure the Bergemanns moved into the new house and were still occupying it when the case was tried. Mrs. Orr died in December, 1953; this litigation was begun by Kelley Brothers the following July. It is shown without dispute that Harold Bergemann has paid nothing upon his debt to Orr, that nothing has been paid by anyone upon the Kelley Brothers claim, and that Anita Bergemann refuses either to execute a deed to Orr or to permit him to remove the house from her land. The chancellor's decree granted foreclosure of the materialman's lien, reformed Orr's contract with Harold by inserting an acceleration clause that had been omitted by mistake, and awarded Orr a judgment against Harold for $2,500. Orr's cross-complaint for specific performance of the oral agreement was dismissed for want of equity.

Upon trial *de novo* it is clear enough that the Orrs had a cause of action against Mrs. Bergemann for specific performance of the oral contract. The statute of frauds does not supply a defense, for the promisees' possession and improvements took the agreement out of the statute. *Dillard* v. *Kelley,* 205 Ark. 848, 171 S. W. 2d 53.

It is equally clear that this cause of action was not extinguished by, or merged into, Orr's written contract with Harold. Since the duty of specific performance rested only on Anita, who was the sole owner of the land, it would be necessary to find a novation in order to hold that Anita's promise had been superseded by her husband's subsequent obligation. It is essential to a novation, however, that there be a mutual agreement by which the new obligor is substituted for the old. *Riddick* v. *White,* 194 Ark. 1010, 110 S. W. 2d 9. Here Anita refused to join in the contract between her husband and Orr, and without her joinder it is evident that a novation was not intended. This is so because Orr's agreement with Harold necessarily recognized that Orr had an interest in the property, which Orr undertook to sell for $2,500. Since Orr's interest could only have been his cause of action against Anita for specific performance, the written contract was manifestly an affirmation of Anita's obligation rather than a discharge thereof.

With respect to the account of Kelley Brothers, the preponderance of the evidence shows that primary liability for the debt has been assumed by the Bergemanns. Harold Bergemann, in purchasing Orr's interest for $2,500—a sum substantially smaller than Orr's investment in the house—agreed to pay the Kelley Brothers claim. There is convincing proof that Anita Bergemann also assumed this obligation after Orr went to Kansas City. An officer of the lumber company states positively that Mrs. Bergemann came to the company's office and assumed the debt, explaining that as a result of family difficulties the Bergemanns had taken over the property. According to this witness Mrs. Bergemann applied for a federal loan to pay the account. Mrs. Bergemann's testimony is so contradictory within itself that it fails to over-

come the adverse proof. Indeed, when it is observed (a) that Harold had already obligated himself to pay the account, (b) that the claim was a lien against the title that Anita was asserting, and (c) that the Bergemanns had moved into the house and were still occupying it rent-free when the case was tried some eighteen months later, there are good reasons for believing that the Bergemanns voluntarily accepted primary responsibility for the debt.

To summarize: The lumber company is entitled to judgment against Orr and the Bergemanns and to a first lien against the property. Orr is entitled to have a life estate vested in him by the decree (Ark. Stats. 1947, § 29-126), to have judgment against Harold Bergemann for the unpaid purchase price due under their contract, and to an equitable lien upon the life estate to secure the payment of his judgment against Harold. In foreclosing the liens the court should marshal the assets by making Mrs. Bergemann's reversion primarily liable for the materialman's lien. The proportionate value of the life estate and the reversion may be readily determined by offering those interests for sale separately, although the property should also be offered in gross so that the better bid may be accepted. The proceeds from the sale of the reversion will stand primarily liable for the lumber company's judgment, with any surplus going to Mrs. Bergemann; the proceeds from the sale of the life estate, to the extent that they are not needed to complete payment of the Kelley Brothers judgment, will be applied in satisfaction of Orr's judgment against Harold Bergemann, with any surplus going to Bergemann.

Reversed and remanded for further proceedings.

ARK. INDEPENDENT OIL MARKETERS ASS'N, INC. *v.* MONSANTO CHEMICAL CO.

5-784 284 S. W. 2d 127

Opinion delivered November 28, 1955.

[redacted]

*Tom Gentry,* for appellant.

*Davis & Allen* and *H. D. Dickens,* for appellee.

PAUL WARD, Associate Justice. Appellant, Arkansas Independent Oil Marketers Association, Inc., instituted this action in the Sebastian Chancery Court, Fort Smith District, against the Lion Oil Company, seeking to enjoin said company from allegedly selling gasoline at tank wagon prices which are below the cost price of such gasoline. Summons was served on the Lion Oil Company by delivery of same to J. Aubrey Yates whose residence was in Sebastian County. Service was had on Yates on the assumption that Lion Oil Company maintained a place of business in Fort Smith and that Yates was in charge of this business as agent of the company, and that the service was proper under Ark. Stats., § 27-347.

Lion Oil Company filed a motion to quash the above described service of summons on the ground that Yates was not its agent. The trial court sustained said motion and the Association has appealed. Before submission of the cause in this court and on motion of the Lion Oil Company, the Monsanto Chemical Company was substituted as appellee.

Briefly stated, it is the contention of appellant that Yates is an agent of appellee, and it is the contention of appellee that Yates is an independent contractor, and

therefore not a proper person for service under the above mentioned statute.

In order to intelligently discuss the issue here presented it is necessary to set out in somewhat detail the terms of the written contract existing between the Lion Oil Company and Yates, and also the testimony introduced at the hearing on the motion. Hereafter when we use the term "appellee" it will include the Lion Oil Company.

Appellee manufactures gasoline and allied products in El Dorado, Arkansas, and distributes the same in the Fort Smith area through a warehouse or bulk station operated by Yates. The products are received by Yates on consignment, with the title remaining in appellee. The gasoline is stored in six large tanks and the other products in a warehouse, all located on a parcel of land in Fort Smith, and all of which are owned by appellee. Among other things the "Distributor's Contract" provides: (5) The distributor [Yates] shall maintain records of all products received at the bulk plant and thereafter sold by him, and shall at the request of appellee furnish detailed reports concerning receipts, sales and inventories; (6) The distributor shall sell said products only at prices fixed by appellee from time to time; all sales shall be for cash but distributor may make authorized credit sales in the name of appellee, and; the distributor shall immediately remit to appellee the full proceeds of all sales; (7) The distributor shall be paid a commission on all sales as per the schedule therein set forth; (8) The distributor shall furnish at his expense all trucks, tanks and other equipment necessary for selling and delivering said products, and shall employ at his expense all persons who may be required to assist him; (9) The distributor shall maintain at the bulk plant a telephone listed in the name of appellee, and he shall at his expense, when requested (but at least once a year), paint all motor vhicles used in distributing said products, the paint to be furnished by appellee; (13) Appellee has the right to make a complete audit of the distributor's inventories, records and accounts from time to time with-

out notice, and; (15) The agreement shall continue at the will of the parties and either party may cancel at any time without notice. There are some other provisions in the contract which we shall note later.

Testimony introduced by appellee to sustain its motion in the trial court shows that on occasions Yates receives gasoline pumped from Oklahoma to a station near Fort Smith, places the same in storage tanks and receipts for it in the name of appellee; that he collects for all gasoline and all products sold and places the money in a local bank in appellee's name; that he looks after appellee's warehouse located on the same plot of ground with the tanks, and; that he makes reports of all sales and inventories on blanks furnished by appellee.

Appellant relies most strongly on the case of *Arkansas Power and Light Company* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464, quoting therefrom the following:

"In the instant case the agent was entrusted with the money collected, his duty being to receive and receipt for it, and transmit it to the company, a business as important, if not more so, than any other business it had in the county, and if he were competent to conduct such a business, he could be depended upon to notify the corporation of service upon him. The important thing in determining this question is that the corporation itself established a place of business where its bills could be paid and receipted for, and when a corporation establishes such a place and receipts for money paid for its service through an agent, it has for all reasonable and practical purposes established such a place of business as mentioned in the statute."

The pertinent facts in that case were these: L. A. Atkins was the manager of a drug store at Waterloo, Arkansas, in which store the Power Company had no interest and paid no rent. Atkins merely collected and receipted for light bills as people would come in the store to pay him, and none of his duties required him to go outside the store. As the bills were collected Atkins transmitted the money to the Power Company. The bills

which Atkins collected were made out by the Power Company and by it mailed to him, and for his services he was paid a flat salary of $10 per month. Appellee considers this case inapplicable to the situation here principally because, it says, "the customers involved were customers of Arkansas Power and Light Company and not his customers."

Appellee for an affirmance of this case relies principally, if not entirely, upon the proposition that the testimony and the contract in this case show that Yates was an independent contractor as that term is defined in the case of *Moore and Chicago Mill & Lumber Company* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, quoting the last paragraph on page 137 of the Arkansas Reports. We agree that this decision gives a correct and lucid enunciation of the elements creating an independent contractor. We must also agree that there are many indications disclosed by the testimony and contained in the contract that Yates occupies the relationship to appellee of an independent contractor. There are, however, certain other incidents of relationship disclosed by the contract and testimony which force us to the conclusion that Yates was, at least in some respects, an agent of appellee. This conclusion is sustained by the weight of the authorities which we have been able to examine.

Before proceeding further, however, we desire to point out three things that should be kept in mind in resolving the issue here presented: (a) In considering the written contract between Yates and appellee we must be guided by what control appellee was empowered to exercise over Yates rather than what power it actually did exercise. See 19 A. L. R. 20 and *Magnolia Petroleum Company* v. *Johnson,* 149 Ark. 553, 233 S. W. 680; (b) It is of no significance that Yates was paid a commission in this case rather than a salary as was the case of Atkins in the *Hoover* case, *supra.* See 116 A. L. R. 459, and; (c) We know of no logical or legal reason why Yates might not be an independent contractor in certain respects and at the same time, in other respects, be an agent

of appellee. See *City of Detroit* v. *Corey,* 9 Mich. 165, 80 Am. Dec. 78, and 19 A. L. R. 270, § 20.

As heretofore stated we think there are portions of the testimony and parts of the contract which strongly indicate that Yates was, in some respects, acting as an agent for appellee. It is not denied that Yates collected the money for all products sold and placed the same in a Fort Smith bank in the name of appellee, and Yates stated that he had no authority to check on the account. Appellee owned a warehouse located on the same ground as the bulk station in which, among other things, were stored tires, tubes, oil and case oil. After making this statement Yates was asked: "Q. Now, that property that is in the warehouse that belongs to Lion Oil—you have charge of the custody of that, don't you? A. Yes, sir. Q. It's up to you to look after it and see that nobody steals it? A. That's right." And again "Q. And you are charged by Lion Oil Company with looking after their property? A. Yes, sir." It appears that not all of the gasoline sold by Yates at the bulk station in Fort Smith is shipped to him from appellee's refinery in El Dorado. On occasions gasoline is piped from Oklahoma to a station near Fort Smith and then put in the storage tanks at the bulk station. On these occasions the gasoline is received and receipted for in the name of appellee.

There are portions of the contract itself which seem to us to indicate that appellee retained and could have exercised to some extent control over Yates. Subsection (B) provides that Yates may, at the request of appellee, secure and store products from a neighboring Lion Distributor and receive additional commission therefor. Section (10) provides that Yates shall receive and store certain equipment from appellee to be loaned by appellee to persons to whom Yates made sales, and that Yates would comply with the policy of appellee in effect from time to time with respect to handling drums. Section (11) provides that Yates will, at the request of Lion, move equipment from one station in his territory to another in event appellee desires that to be done, and for such service appellee will reimburse Yates his costs in handling. Likewise appellee has the right to direct Yates

to move equipment from a location in his territory and transport it to his bulk plant for storage, appellee paying expenses. Section (12) provides for Yates to inspect tank cars shipped to his plant to ascertain if they are "filled to within 3 inches of the top of the shell," and if not Yates is to notify appellee's division manager. It is further provided that the cars shall not be unloaded until ordered by the division manager. Section (17) gives appellee the right, in certain circumstances, to insist upon "strict, full and punctual performance of distributor's obligations hereunder."

Without laying particular stress on any one of the items mentioned above to show the relationship of agency, it is our opinion that all of them together, including the entire contract and the testimony, show conclusively that such a relationship does exist between appellee and Yates. This view conforms with the statement in 116 A. L. R. at page 462 and 463 where this question is discussed under the heading "Tank Wagon or Wholesale Station." In referring to numerous cases dealing with this question it is there stated:

". . . and in the majority of such cases it has been held that such operator is a 'servant' or 'employee' of the oil company, rather than an 'independent contractor' as is commonly contended by the company, generally on the theory that although the terms of the written contract might indicate that the operator had the status of an 'independent contractor,' the company in actual practice retained such power to subject him and his employees to its will and direction that he was in fact a 'servant,' 'employee,' or 'agent,' . . ."

Numerous cases are then cited to support that statement. In point also is the case of *McDaniel* v. *Gulf Oil Corporation,* 204 S. C. 186, 28 S. E. 2d 815.

The case of *Magnolia Petroleum Company* v. *Johnson, supra,* in dealing with this same question, had a factual situation very similar to the one here, as shown by reference to page 555 of the Arkansas Reports. In that case there was a jury trial and the Petroleum Company

insisted that the undisputed evidence showed the relationship of an independent contractor. In affirming the case the court said:

"And the majority are of the opinion that the contract between the company and Smith, as interpreted by the conduct of the parties under it, shows that it was the purpose of the company to retain complete control of everything done in connection with the sale and delivery of the oil, and that the testimony, in its entirety, warranted the finding that the drivers of the wagon were themselves the servants of the company."

It follows from what we have said that the decree of the trial court should be and it is hereby reversed, with directions to overrule appellee's motion to quash service.

COOPER *v.* COOPER.

5-778 284 S. W. 2d 617

Opinion delivered November 28, 1955.

*Henry B. Whitley* and *Wendell Utley,* for appellant.

*A. A. Thomason,* for appellee.

SAM ROBINSON, Associate Justice. The principal issues here are the validity of a divorce granted by a court in the State of Nevada, and the wife's interest in funds received on a fire insurance policy for the loss of a house owned as an estate by the entirety. Appellant and appellee were married on August 29, 1950, in Columbia County, Arkansas, where they had lived all their lives. A son was born in January, 1952. On May 24, 1951, they purchased two acres of land as an estate by the entirety and built a house on the property. The house was insured for $2,500.00 against fire; later it burned and the loss was settled for $2,250.00 which was paid to appellant, J. W. Cooper. The parties also purchased an automobile on which appellee, Dorothy Cooper, paid $30.00 a month for several months.

On April 10, 1952, appellant, J. W. Cooper, filed suit for divorce in the Columbia Chancery Court. Dorothy appeared in the case and the plaintiff took a nonsuit on June 29, 1952. A few days later, on July 2, he filed a suit for divorce in the Pulaski Chancery Court and after Dorothy appeared in that case he again took a nonsuit. On August 18, 1952, he again filed a divorce suit in the Columbia Chancery Court and, after Dorothy appeared, he took his third nonsuit on January 26, 1953. A short time later, he departed for the State of Nevada where it appears that he again filed suit for divorce. Dorothy was not notified, and he obtained a decree of divorce on March 26, 1953. Two days after this divorce was granted he returned to Arkansas and immediately married another person.

Appellee, Dorothy Cooper, then filed this suit in which she alleges that she is the wife of appellant and

asks for maintenance for herself and support for the child. She further asks that appellant be required to account to her for one-half of the proceeds from the insurance policy, and that he also be required to account to her as to her interest in the automobile. Cooper answered, alleging that he had been granted a valid divorce in the State of Nevada. Dorothy replied, denying the validity of the Nevada divorce and stating that it was invalid because proper service was not obtained and further alleging that the Nevada court did not have jurisdiction to grant a divorce because the plaintiff, Cooper, was not domiciled there.

The Chancellor made a finding that the Nevada court was without jurisdiction to grant a divorce to Cooper, and ordered appellant to pay $12.50 a week for support of his child. The court also rendered a judgment against appellant for one-half of the proceeds of the insurance policy and for the amount that Dorothy had paid on the car, making a total of $1,432.46.

If Cooper did not have a *bona fide* domicile in Nevada, a court of that State had no jurisdiction to grant a valid divorce. And, the jurisdiction of the Nevada court may be impeached in a court of Arkansas. *Williams, et al.* v. *North Carolina,* 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, 157 A. L. R. 1366; *Esenwein* v. *Commonwealth ex rel. Esenwein,* 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608. But, if the defendant appears in the cause and thus has an opportunity to contest the issue of domicile, the decision of the court of the State where the trial is held is controlling. *Sherrer* v. *Sherrer,* 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A. L. R. 2d 1355; *Anderson* v. *Anderson,* 223 Ark. 571, 267 S. W. 2d 316. Here, Mrs. Cooper had no knowledge of the pendency of the suit in Nevada and of course did not appear therein.

The evidence that Cooper did not have a *bona fide* domicile in the State of Nevada is overwhelming. It is clear that he went to that State merely to get a divorce and not to establish a domicile there. He intended to stay there just long enough to meet the technical residential requirements of the divorce laws of Nevada. In

the first place, he filed three suits in the State of Arkansas within a comparatively short time before leaving for Nevada. He was teaching school in this State and had another person to substitute for him until his return, which he stated would be in about six weeks. (Nevada requires a six weeks' residence in divorce cases.) Two days after the decree of divorce was rendered in Nevada, he came back to Arkansas, immediately married another person and returned to his old job as teacher. In these circumstances, it is hard to see how it could be seriously contended that Cooper ever had a *bona fide* domicile in Nevada.

Next is the question of the ownership of the proceeds of a policy of fire insurance. The house owned by the parties was destroyed by fire and Cooper collected and kept the insurance money. He had taken out the policy of insurance in his own name, but in doing so he was acting as agent for his wife as well as for himself.

The husband is not an agent for the wife solely by reason of the marital relationship. "But slight evidence of actual authority is sufficient proof of the agency of the husband for the wife in matters of domestic nature." 41 C. J. S. 549. Agency may be established by circumstantial evidence. *Williams* v. *O'Dwyer & Ahern Company,* 127 Ark. 530, 192 S. W. 899; *Sidle* v. *Kaufman,* 345 Pa. 549, 29 A. 2d 77. In the *Sidle* case, the court said: " 'The relationship of agency cannot be inferred from mere relationship or family ties unattended by conditions, acts, or conduct clearly implying an agency' . . .; but such relation is competent evidence when considered with other circumstances as tending to establish the facts of agency and where there has been other competent evidence tending to the same end." And, it is said in Restatement of Agency, § 22: "Neither husband nor wife by virtue of the relationship has power to act as agent for the other. The relationship is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife." In the case at bar, the husband secured a policy of fire

insurance in his name only on property which is an estate by the entirety. In these circumstances, the fact that the husband was acting as agent for his wife in addition to acting for himself is established if any reasonable inference to be deduced from the evidence leads to that conclusion.

In the case at bar, the circumstantial evidence proves that at the time Cooper obtained the policy of insurance not only was he acting for himself but he was also acting as an agent for his wife. At the trial, instead of standing on the proposition that the policy of insurance was personal as between him and the insurance company and that his wife had no interest in the proceeds of the policy, he undertook to justify his failure to divide the insurance money with his wife on the ground that he had used the money to pay debts owed by both of them. But it appears that of the debts he claims to have paid, his wife was liable only on one $200.00 note. His attempt to explain his conduct in failing to divide the money with his wife on the ground that her part was used in the payment of her debts is somewhat of an admission that she was entitled to part of the proceeds from the fire insurance policy.

As evidence of the fact that Cooper was acting as agent for his wife, she testified that she knew he had taken out the fire insurance policy, but she did not know that he had taken it out in his name only. She was present in the insurance company office, along with Cooper, when the settlement was agreed on, but she was not present when the check was delivered to him. In fact, she did not know that he had received the check. She testified: "And I asked him several times about the check and he said they hadn't paid it off because they said they had to do some more checking before they could pay it." She further testified on cross-examination: "Q: You knew it was settled in November? A: I didn't know it was settled in November. Q: You said a while ago it was in November? A: Sometime later I went to the insurance office to find out about the check. I found out that it was paid in November. Q: When were you in Mr. Lindsey's

[the insurance agent's] office? A: It was—I don't know actually when it was. It was in April. Q: You mean to say he didn't get the check until April? A: I don't know when he got it. I still don't know. Q: You say you were in the insurance office in April? A: That's right. Q: Is that when the discussion was about the check? A: That's when I inquired about the insurance check."

Cooper testified that the insurance company paid him $2,750.00. (This figure included $500.00 for personal property.) He further said: "I told her, I says, 'Well, I have the money now; I might as well get started paying on bills; *we* won't have any money, as I want to pay the bills.' And that's what I did." On direct examination he was asked this question: "How much did you pay out of that on indebtedness you and Dorothy already owed?" Cooper then testified as to a long list of items which he claims that both owed and which he paid from the insurance money. He also said that he paid an old account of Dorothy's on which he personally was not liable at all. From the above testimony, it can be inferred that Cooper was acting as agent for his wife when he secured the policy of fire insurance.

The house that was destroyed by fire, and on which Cooper collected and kept the insurance money, was part of an estate by the entirety. It is said in 26 Am. Jur. 702: "In jurisdictions which recognize a tenancy by entirety in personal property, there is no question that an estate by the entireties exists in the proceeds or derivatives of real property held by entirety." Undoubtedly in this State an estate by the entirety can exist in personal property. *Chicago, Rock Island & Pacific Railroad Company* v. *Reeves,* 217 Ark. 33, 231 S. W. 2d 103. The question of ownership of personal property as an estate by the entirety is thoroughly discussed in *Union & Mercantile Trust Company* v. *Hudson,* 147 Ark. 7, 227 S. W. 1. There it was held that where a man and wife owning realty as tenants by the entireties mortgaged it, and where the husband deposited the proceeds in his own name without his wife's knowledge, the nature of the wife's interest in

the deposit is the same as her interest in the real property from which the monies on deposit were derived; that according to the great weight of authority tenancies by the entireties exist in all kinds of personal estates. It was further held in the *Hudson* case that the husband and the bank where the proceeds of the mortgage were deposited held the funds as trustees of Mrs. Hudson's interest.

In the case at bar the evidence is convincing that Mrs. Cooper did not know that her husband had collected the insurance money, although there is some evidence to the contrary. Cooper held his wife's interest in the funds as trustee, and the court correctly found that he was indebted to Mrs. Cooper for one-half of the amount of the insurance he had collected on the house, plus Mrs. Cooper's interest in the automobile.

If there was a misjoinder of causes of action, it was waived by the appellant in failing to file a motion to strike out of the complaint any causes of action improperly joined. Ark. Stats., §§ 27-1302, 27-1303.

The decree is affirmed.

[redacted]

JOHNSON *v.* JOHNSON.

5-791 284 S. W. 2d 846

Opinion delivered December 5, 1955.

[Rehearing denied January 9, 1956.]

[redacted]

*G. W. Lookadoo,* for appellant.

*McMillan & McMillan,* for appellee.

LEE SEAMSTER, Chief Justice. During the pendency of a divorce action by appellant, Holman Johnson, against appellee, Aline Johnson, the appellee petitioned the Clark Chancery Court for temporary attorney fees, costs, custody of the couples nineteen-month-old daughter, Ruby Jene, and, the sum of $25 per month for the support of said child. On November 2, 1953, the chancellor issued an order awarding temporary custody of the child to appellee and directed the appellant to pay $25 per month for the support of said minor child.

On December 8, 1954, a final decree was rendered granting appellant a divorce and awarding custody of the minor child to the appellee. The decree ordered and directed the appellant to pay $25 per month to the appellee for the support of the minor child.

A petition was filed by appellee in January of 1955, for the purpose of citing appellant into court for failure to pay maintenance and support as directed by the decree. The court granted this petition on January 10, 1955, and the appellant was ordered cited to appear before the court on February 14, 1955. On this date a hearing was held and the chancellor found that appellant was in arrears for two monthly payments (January and February of 1955), and ordered the appellant to pay the appellee the sum of $50. On February 24, 1955, the appellant filed a motion to vacate and modify the judgment and decree. The court, after hearing the additional testimony, overruled the appellants' motion on April 4, 1955. This appeal follows.

The appellant contends that he has made all payments that are due the appellee. He admits that no payments were made direct to the appellee, but earnestly insists that all payments were delivered to the office of his attorney, to deliver to the attorney for the appellee. The appellant testified that he could account for sixteen payments that he had delivered to the office of his attorney. The attorney for the appellant admitted that his office had received all sixteen payments and insisted that his secretary, in turn, delivered these payments to the attorney for the appellee. The secretary testified

that she did not recall any specific payments in which she did not procure a receipt at the time of delivery. The record reveals that there should have been sixteen payments to appellee, but appellant was able to establish only fourteen receipts from the attorney for the appellee.

The trial court did not attempt to blame anyone for the failure to deliver these two payments, but merely said "This boils down to a bookkeeping transaction. This money passed through several hands and through two law offices. Somewhere along the line it looks like either the girl got the money and did not give a receipt or either the money is in transit somewhere. Any way you figure it I doubt that Holman is responsible for it. . . . He (appellant) has been under the $25 payment since 1953, he should have made sixteen payments and he can account for fourteen, but has been unable to account for the other two, and the burden is on him to show those payments, and I couldn't do anything under this record but to render judgment against him (appellant) for $50 and direct that henceforth he make these payments to the clerk (Clark Chancery) and let the clerk keep up with them."

Finding no error, the decree is affirmed.

FLEMING *v.* COOPER.

5-790 284 S. W. 2d 857

Opinion delivered December 5, 1955.

[Rehearing denied January 9, 1956.]

*Jeff Duty* and *Claude Duty,* for appellant.

*Lovell & Evans,* for appellee.

J. Seaborn Holt, Associate Justice. Francis W. Fleming, appellant, is the wife of Joe W. Fleming and has, for the past 15 years, owned a small farm in Washington County. Appellee Cooper in 1939, under an oral lease agreement with Joe W. Fleming, became Fleming's tenant from year to year on a fifty-fifty basis and so continued until January 22, 1952, when he left the premises to avoid eviction by the Sheriff. On August 4, 1952, Cooper sued Joe W. Fleming, as the owner of the leased premises (In Case 12872), for his share of the profits alleged due under his lease. Fleming answered, admitting that Cooper was his tenant, and in a cross-complaint alleged, in effect, that under the tenancy agreement, Cooper owed him a substantial amount for expenses incurred in 1949, 1950 and 1951. Cooper filed a reply and also a cross-complaint. Upon trial the court, on September 30, 1953, rendered a decree in favor of Cooper. On appeal here that decree was affirmed. Reference is made to that opinion—*Fleming* v. *Cooper,* 224 Ark. 10, 271 S. W. 2d 772, for the complete decree which appears embodied therein.

Pending execution on the mandate from this court in the above decree, appellant, wife of Joe W. Fleming, on November 12, 1954, filed the present suit alleging, in effect, that Cooper became her tenant in October, 1939, on the same land involved in the first suit above (12872)

and continued as her tenant until the close of 1951: that during 1951 and 1952 she spent substantial sums of money on the land, that her husband, Joe W. Fleming, was her manager and that Cooper had orally agreed to pay her the money she had expended; that in November, 1951, she and Cooper became involved in a disagreement or controversy as to the correct amounts owed to each party, and as to further occupancy of the real estate, and that she had served notice on him to vacate; that on January 15, 1952, Cooper, through his attorney, proposed an accord and satisfaction based on two letters attached to her complaint, and that she agreed to his proposal. She sought to enforce this accord and satisfaction agreement. She further alleged that Cooper had a judgment against her husband, Joe W. Fleming, in the amount of $828.80, proceeds from the 1952 crop on the above land, which she alleged to be her property, and further prayed for judgment for this amount. Her husband, as garnishee, answered that he had paid this money to his wife, Francis W. Fleming, November 18, 1954, and asked to be discharged. Joe W. Fleming on December 6, 1954, paid into the registry of the court $917.43 which amount he had paid to his wife on November 18, 1954. A demurrer to Francis W. Fleming's complaint was overruled and on February 5, 1955, Cooper filed a combined motion to dismiss and an answer. His answer was a general denial and he specifically pleaded that Francis W. Fleming was barred, in the present suit, by the statute of limitations, and by the former suit (12872) on the ground of *res judicata* and estoppel.

On a trial the court, February 26, 1955, sustained Cooper's plea of *res judicata* and estoppel, dismissed appellant's complaint for want of equity, and awarded Cooper $941.10 plus interest and costs. From that decree is this appeal.

Appellant relies on two points: "I. The court erred in sustaining the motion to dismiss filed by the appellee in that the defense of *res judicata* and estoppel does not apply under the facts in this case and was not established by the appellee. II. The appellee did not discharge the

burden of proof necessary to establish the defense of *res judicata* and estoppel." In the decree of February 26, 1955, the trial court found in part—". . . the examination and study I have made of the instant case and prior case No. 12872 convinces me in truth and in fact that the two cases were identical in that the plaintiff (appellant) having set up and pleaded a contract, proceeds to plead and set up in almost precisely the same language, the earlier accounts of debit and credit and the same basis for debit and credit and the same prayer for relief as was embodied in the complaint in the first suit; . . . It is my belief that the pleader in this case had asked for the specific relief that the plaintiff in the former complaint had asked for in his prayer of relief and that the relief in both cases was based on the same set of facts; that there was the same previously pleaded owner-tenant farm arrangement; that the court does not pass on whether or not the newly alleged contract was a proper contract but it is clear to me that the two cases are the same; that the first case was tried in my court and appealed to the Supreme Court and decided by the Supreme Court; that *res judicata* is simply the basic proposition of estoppel; . . . It is, therefore, on particular facts involved in the case concerned, its pleadings and the particular circumstances existing, that sometimes a wife may be collaterally estopped by reason of her husband's act or acts as in the instant suit by reason of the relationship of husband and wife where the wife has knowledge of such acts. . . . She knew about the other suit because she stated in the notice to vacate " 'You are hereby notified to quit and vacate *our* property' and that such notice was signed by Joe W. and Francis W. Fleming, owners.

"In the original suit I do not recall that it was alleged or admitted in specific terms that Joe W. Fleming was the owner of the land but it is certainly clear to me from the pleadings and the testimony all the way through that Joe Fleming asserted himself to be the owner; that in this action the plaintiff says: 'I am the owner and Joe Fleming was my manager, under my immediate supervision, and that certain things were done.' The plain-

tiff *then* knowledgeably acquiesced in her husband's assertion of rights on his own account, and now she seeks to assert those same rights on her own account relegating her husband to the role of farm manager, or owner's agent. I think it boils down to the fact that the Flemings were husband and wife. In the second suit in which Francis Fleming is plaintiff, she is trying the second time to cover the same ground that her husband covered in the original suit."

We agree that the preponderance of the evidence supports the above findings. These two cases covered the same subject-matter, the same evidence, and involve, in effect, the same issues sought to be raised in the present suit. The only difference is that Francis W. Fleming, the wife of Joe W. Fleming, was not made a party in the first suit. We are convinced, however, that in that first suit her husband with her knowledge and consent and within the scope of his authority was acting as her agent and manager; that all the while she stood idly by with full knowledge of what was going on, the pendency and progress of the suit, and the final result thereof. In fact, appellant seems to concede that her husband was her agent until the alleged contract of January 19 (based on the letters). She says: "In this case, the appellant alleged that Joe W. Fleming was her agent during the rental of the farm and in the negotiation of the contract with the appellee, but nowhere does she allege that he was her agent after the contract of January 19th was entered into." It appears conclusive that she must have known about the suit because she and her husband had the following Notice to Vacate served on Cooper.

"TO ELLIS COOPER, Route 2, Springdale, Arkansas.

"You are hereby notified to quit and vacate our property, more particularly described as follows: [describing it]. You are to vacate said property within ten (10) days after the service of this notice upon you. Witness our hands this 9th day of January, 1952.

/s/ Joe Fleming

/s/ Francis Whitlow Fleming, Owners."

In this notice it will be observed that they both claim to be owners of the property involved. It further appears that Francis W. Fleming, following the above notice, called the court reporter several times inquiring about the progress of the suit, and in the circumstances, we hold that she was in privity with him and being his wife was equally bound and concluded by the first suit above. The general and applicable rule is stated in 50 C. J. S., Page 342, § 798 (Judgments). "There is no legal privity between a husband and wife in such a sense that a judgment for or against the one will conclude the other, where the action concerns their separate property, rights, or interests not derived from each other. . . .

"Under some circumstances, however, a judgment against one spouse is binding on the other spouse. A wife will be concluded by a judgment in an action for or against her husband with respect to any right or interest which she claims through or under him; and so likewise will a husband be concluded by a judgment for or against the wife in respect of a right or interest which he claims through or under her. Also either spouse may be concluded where he or she was joined as a party with the other and such joinder was not improper, or where, although not a formal or nominal party, he or she was the real party in interest, or sanctioned the suit, or assumed a right to control or actively to participate in the trial or its management. Where the husband acts as agent for the wife, not only in the litigation but in the transaction out of which it arises, she is bound by the judgment where the litigation is conducted in his name, or originally in the names of both of them and, on appeal, in his name alone, and he is bound, where the litigation is in her name."

In a somewhat similar situation, in effect, this court in *Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993, reversed the lower court's judgment in which it had refused the plea of *res judicata* offered by defendant. The plea of *res judicata* seemed to be based upon a chancery decree involving title to real estate in which action the wife had not been made a party. We there said: "It is

the opinion of the majority of the judges, that Senie Hervey being the wife of Isom Hervey, living with him at the time, she was represented by the husband in the suit, was in privity with him, and equally concluded by the proceedings.

"A judgment in favor of or against the husband in an action involving a debt due the community will bind the wife regardless of her nonjoinder. . . . And even in jurisdictions where both husband and wife are necessary parties in actions affecting community real property, a judgment either for or against the husband in an action to which the wife is not a party is not necessarily void on collateral attack; where the action was brought by the husband alone, the judgment is binding on the wife, unless she avoids it by showing that it was commenced and prosecuted without her knowledge or consent. 31 C. J. 160." See also *Haffke* v. *Hempstead Co. Bank & Trust Co.,* 165 Ark. 158, 263 S. W. 395.

In the circumstances Cooper's plea of *res adjudicata* against the present suit is well founded and must be sustained. In our recent case of *Missouri Pacific Railroad Company, Thompson Trustee,* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872, we said: "As stated in 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.'

"And in 30 Am. Jur. 957, in discussing who are privies within the rule of *res judicata,* it is stated: 'In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject-matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title.' "

Appellant's earnest contention that the present suit was based, in effect, upon a written contract evidenced by the two letters above referred to from Cooper's attorney to Joe W. Fleming, is, we hold, without merit. The first letter (January 15, 1952) was as follows: "Dear Joe: Ellis Cooper has brought to me this Notice to Vacate you had served on him. Ellis has consulted me for some time about your difficulties.

"You realize, of course, the same as I do that where a man is renting on a year to year basis, to give him a valid legal notice you have to give him a six months notice directed towards the end of the term, so legally to have required Mr. Cooper to vacate on January 1, 1952, notice would have had to have been given on or before July 1, 1951.

"But that is neither here nor there. You want your place and Ellis wants to give you the place. He has been talking to me about several of the things for which you owe him; the repairs on the pump and the sprayer, the tractor, and putting in the fall cover crop after harvesting the grapes, and I have long since learned that every difference has two sides so I am quite sure you have things that you feel he owes you for.

"Let's do this. You give him a receipt in full setting up that he doesn't owe you any further; that every debt he owes you is paid in full and then I will have him give you a similar receipt in full; then when that is done he tells me that he can move off the place probably within the time you have specified and certainly by February 1."

The second letter (January 19, 1952) as follows: "Dear Joe: Ellis was in this afternoon, and I went over with him in detail our conversation of Thursday. He asks me to advise you that he will have the premises vacated entirely by 6:00 p.m., Tuesday, Jan. 22nd, 1952."

These letters evidently were efforts on the part of Cooper's attorney to adjust Cooper's controversy with the Flemings without a lawsuit and contemplated further negotiations. No meeting of the minds necessary to a contract can be gleaned from them. The most that resulted was that after Mr. Lovell imparted to his client,

Cooper, the conversation that he, Lovell, had had with Joe W. Fleming, Cooper vacated the property on January 22, 1952, without settling their differences. We think it is clear that no accord and satisfaction was had here. "A discharge of claims by way of accord and satisfaction is dependent upon a contract, express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore, the following elements are essential: (1) A proper subject-matter, (2) competent parties, (3) an assent or meeting of the minds of the parties, and (4) a consideration." 1 Am. Jur., § 5, page 217.

We think that in addition to the absence of meeting of the minds, necessary to support an accord and satisfaction, there were also lacking competent parties. Finding no error the decree is affirmed.

Justice SMITH dissents.

GEORGE ROSE SMITH, J., dissenting. It does not seem to me that the appellee's plea of res judicata has been established by a preponderance of the evidence. To sustain his burden of proof the appellee has merely shown that Mrs. Fleming took two steps that were in some way connected with the suit against her husband. First, she joined her husband in giving Cooper notice to vacate the premises. But Cooper voluntarily surrendered possession; so the notice accomplished its purpose and passed out of the picture. The subsequent suit was not brought by Fleming as landlord, pursuant to the notice; on the contrary, it was brought by the tenant and involved an accounting rather than the issue of possession. Consequently it cannot fairly be inferred from the mere giving of the notice to vacate that Mrs. Fleming even knew of the suit later brought against her husband, much less that she controlled or participated in that suit.

Second, it is shown that after the prior case had been completed in the trial court Mrs. Fleming telephoned the court reporter to inquire about the progress being made in preparing the record for appeal. This doubtless proves

that Mrs. Fleming knew that a lawsuit between her husband and Cooper had been tried and was to be appealed, but again there is no basis for an inference that she either controlled the litigation or participated in it.

Admittedly Mrs. Fleming was not a party to the former suit, nor was she in privity with her husband in the sense of having succeeded to his interest in the subject matter of the litigation. Hence she ought not to be bound by the prior decree in the absence of proof that she controlled that litigation or participated in it to such an extent as to raise an estoppel. Rest., Judgments, § 84; *Hill* v. *Village Creek Dr. Dist.,* 215 Ark. 1, 219 S. W. 2d 635. In my opinion the appellee has not met the burden of making that proof.

When we lay aside Mrs. Fleming's two inconsequential points of contact with the earlier suit, all that remains is the proof that her husband claimed ownership of the land in the first suit and that she now claims ownership in an effort to relitigate the same issues. In a similar situation, in which the wife asserted ownership after her husband had already lost a case that had been appealed to this court, we held that the wife's complaint stated a cause of action. *Dodson* v. *Abercrombie,* 218 Ark. 50, 234 S. W. 2d 30. It seems to me that the *Dodson* case should control our decision in the case at bar.

REDDELL *v.* NORTON.

5-781 285 S. W. 2d 328

Opinion delivered December 5, 1955.

[Rehearing denied January 23, 1956.]

*Moore & Villines* and *Fitton & Adams,* for appellant.

*A. B. Arbaugh* and *Willis & Walker,* for appellee.

ED. F. MCFADDIN, Associate Justice. This case stems from a most unfortunate traffic mishap in which two young men were killed and a third was seriously injured.

On the night of May 1, 1954, Joe Holt, Paul Norton and Cecil Smith attended the picture show in Jasper and started home on the Mt. Judea gravel road in a 1½-ton truck, driven by Joe Holt and owned by Otis Holt, his father. On the same night appellant, Walter Reddell, and his sister attended the picture show in Jasper and started home on the Mt. Judea gravel road in a ½-ton pick-up truck driven by Walter Reddell. When several miles from Jasper the Holt truck was overtaken and passed by the Reddell truck and the occupants of the two

trucks recognized each other. Then, in less than a mile, the Holt truck attempted to pass the Reddell truck; and in so doing the Holt truck went off the road at a curve: the three occupants were thrown out; Paul Norton and Cecil Smith were both killed; Joe Holt was injured; and the Holt truck was demolished. The Reddell truck remained on the road and later returned to the scene of the catastrophe where Walter Reddell attempted to assist in rendering aid.

This action was filed against Walter Reddell[1] by (a) the parents of Paul Norton for damages for the death of their son; (b) the parents of Cecil Smith for damages for the death of their son; (c) Joe Holt[2] for his own personal injuries; and (d) Otis Holt for damages to his truck. The plaintiffs (Norton, *et al*) alleged that the negligence of Walter Reddell caused the plaintiffs' damages. The defendant, Walter Reddell, denied liability, alleged the driver of the Holt truck was negligent and claimed that such negligence was legally imputable to the other occupants of the Holt truck and to the owner thereof. The case was tried to a Jury which rendered these verdicts: (a) $3,700.00 to the parents of Paul Norton; (b) $3,700.00 to the parents of Cecil Smith; (c) $500.00 to Otis Holt for damages to his truck; and (d) no damages to Joe Holt for his personal injuries. From a judgment on the verdicts Walter Reddell brings this appeal; and Joe Holt has cross-appealed.

I. *Sufficiency of the Evidence.* This assignment, made by Walter Reddell, necessitates a brief review of other salient testimony in addition to the facts already recited. Joe Holt testified: that he and Paul Norton went to Jasper in Otis Holt's truck; that after the picture show they were joined by Cecil Smith; that the three boys started home on the Mt. Judea gravel road; that when they were about 2½ miles from Jasper they were

[1] Walter Reddell is a minor, and has been duly represented by a *guardian ad litem* at all stages of the proceedings. George Reddell, father of Walter Reddell, was also sued on the theory that the son was the agent of the father; but evidence failed to establish any liability against George Reddell and the Court instructed a verdict in his favor, and that issue has passed out of the case.

[2] Joe Holt is a minor and has at all times appeared by his father as his next friend.

passed by the Reddell truck; that about ¾ths of a mile farther down the road the Holt truck attempted to pass the Reddell truck; that Holt blinked his lights as a proper passing signal; that Reddell moved over to the extreme right in response to the signal; that the gravel road was wide enough at that point for the Holt truck to pass on the left; that as the Holt truck was alongside the Reddell truck, Reddell speeded up to about 40 miles per hour (same speed as the Holt truck); that the two trucks ran alongside for about 300 yards; that as the two trucks reached a curve where the roadway was somewhat narrower the Reddell truck bumped the Holt truck; that such bump caused the Holt truck to leave the road, go into a ditch and into the field with the casualty to the occupants; that the entire mishap was caused by Reddell's actions and not by a blowout on the Holt truck; and that the blue paint of the Reddell truck was visible several days later on the Holt truck.

The effect of Joe Holt's testimony was, that he was all the time driving with due care and in a lawful manner and attempted to pass the Reddell truck only after the blinking of the lights by Holt and the moving over by Reddell, and that Reddell then speeded up and caused the catastrophe by hitting the Holt truck and forcing it from the highway. There is no need for us to recite all the testimony: there were contradictions as to speed, evidence as to racing, and evidence as to a tire blowout being the cause of the Holt truck leaving the highway. All these matters were questions for the Jury. The case was submitted on instructions covering highway rules and regulations as to driving and passing, negligence, contributory negligence, imputed negligence and duty of guests to protest against unsafe driving. No complaint is here made as to any of the instructions.

As to the parents of Paul Norton and Cecil Smith, the Jury could have found from the evidence that these boys were guests and were in no way negligent, nor liable for any negligence of Joe Holt. The negligence of a driver cannot be imputed to the guests unless the guests failed to use ordinary care for their own safety. *Mo. Pac.*

*R. Co.* v. *Johnson,* 204 Ark. 604, 164 S. W. 2d 425; *Crossett Lbr. Co.* v. *Cater,* 201 Ark. 432, 144 S. W. 2d 1074; *Mo. Pac. R. Co.* v. *Henderson,* 194 Ark. 884, 110 S. W. 2d 516. As to Otis Holt, the evidence was sufficient to support the Jury's conclusion that he was a bailor and that his son, Joe Holt, was bailee of the truck. We have repeatedly held that the negligence of the bailee is not imputable to the bailor when the subject of the bailment is damaged by a third party. *Mo. Pac. R. Co.* v. *Boyce,* 168 Ark. 440, 270 S. W. 519; *Featherston* v. *Jackson,* 183 Ark. 373, 36 S. W. 2d 405; and *Sanders* v. *Walden,* 212 Ark. 773, 207 S. W. 2d 609.

This rule is well established:

"In determining the sufficiency of the evidence to sustain a verdict, the Supreme Court views the evidence in the light most favorable to the appellee, and will not set aside a verdict if supported by substantial evidence."

See *Albert* v. *Morris,* 208 Ark. 808, 187 S. W. 2d 909, and cases there cited. In keeping with the foregoing rule, we reach the conclusion that the evidence is sufficient to sustain each of the verdicts against Walter Reddell.

II. *Motion for Judgment Non Obstante Veredicto.*[3] Walter Reddell moved for such judgment against Otis Holt claiming that the verdict refusing Joe Holt any recovery was tantamount to a finding that Joe Holt was negligent and that since Joe Holt was the driver of Otis Holt's truck, Otis Holt should also be barred from recovery. The Trial Court was correct in refusing the motion because of the bailor-bailee relationship previously discussed. Joe Holt's contributory negligence would bar him from a recovery; but would not bar the owner of the Holt truck.

Walter Reddell also moved for judgment *non obstante veredicto* against the other defendants on various grounds. It was claimed, *inter alia,* that Paul Norton had urged Joe Holt to "pass him" (referring to Holt's

[3] In *Larimore* v. *Howell,* 211 Ark. 63, 199 S. W. 2d 320, we listed some of our cases involving motion for judgment *non obstante veredicto.*

effort to pass the Reddell truck); but there was some evidence that Paul Norton said "pull around him," which could have been interpreted by the Jury as an admonition for safe driving rather than one for increased speed. At all events, the motion for judgment *non obstante veredicto* was correctly refused, because the evidence was disputed. See *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141.

III. *Court Ruling in Regard to Addresses to Jury.* After all the evidence and after the instructions, the attorneys made their addresses to the Jury; and the transcript contains what purports to be the content of these addresses. Mr. Arbaugh opened for the plaintiffs; Mr. Adams, Mr. Vallines and Mr. Moore spoke in that order for the defendant; and Mr. Willis closed for the plaintiff. Appellant claims that the Trial Court should have refused to allow Mr. Willis in his argument to comment on the amount of damages, since such amount was not discussed in Mr. Arbaugh's opening argument.

There are several answers to this contention. One answer is found in the Statute. Section 27-1727, Ark. Stats., in stating the order of trial, says:

"The parties may then submit or argue the case to the jury. In the argument the party having the burden of proof shall have the opening and conclusion; and if, upon the demand of his adversary, he shall refuse to open and fully state the grounds upon which he claims a verdict, he shall be refused the conclusion."

Under the quoted language, the defendant's attorneys should have demanded that the plaintiff's attorneys make a full and complete opening statement if defendant's attorneys desired to make the subsequent claim—now urged—that new matter was injected into the closing argument. Defendant's attorneys made no such demand. See *Dickinson* v. *McBride,* 127 Ark. 555, 193 S. W. 89; and see also Annotation in 38 A. L. R. 2d 1396.

Another answer to the contention now urged is in the matter of the discretion of the Trial Court. We have

many times held that the Trial Court is clothed with considerable discretion in controlling the argument of counsel to the Jury. The case of *Mo. Pac. R. Co.* v. *Hood,* 198 Ark. 792, 131 S. W. 2d 615, reviews many of our holdings and states the general rule. See also *Jackson* v. *State,* 216 Ark. 341, 225 S. W. 2d 522, 15 A. L. R. 2d 484.

We have carefully read the transcript containing the argument here challenged, and we find no abuse of discretion to have been committed by the Trial Court. In each of the addresses of the defense counsel the Jury was urged to be strong against the anticipated address of Mr. Willis: so the defense counsel thoroughly anticipated any argument that was to come. Furthermore, after Mr. Willis discussed the damages in terms of dollars and cents, the defense never asked for an opportunity to answer him on that point. If the amount of damages was thought to be a new matter, the defense attorneys should have requested an opportunity to reply to such new argument. See 88 C. J. S. 339. In the absence of any such request, the appellant cannot claim that the Trial Court committed reversible error.

IV. *Excessiveness of the Verdicts.* Finally, the appellant, Walter Reddell, claims that each of the verdicts against him is excessive; but we find no merit in such contention. As to the $500.00 awarded for damages to the truck, there was competent evidence to sustain the verdict, because Otis Holt testified without objection that the difference between the value of the truck immediately before and immediately after the accident was $650.00.

As to the verdict of $3,700.00 to the parents of Paul Norton: the evidence showed that the parents paid the funeral expenses in the amount of $760.85; that at the time of his death Paul was 19 years of age; that he had always worked at home on the farm just as a hired hand would have worked, and was capable of earning $2,000.00 per year; that he lived with his parents and contributed all of his earning capacity to them; and that there was nothing to indicate that his contributions would not con-

tinue. As to the verdict of $3,700.00 to the parents of Cecil Smith: the evidence showed that his parents paid his funeral expenses in the amount of $718.00; that Cecil was only a few months over 18 years of age at the time of his death; that he was capable of earning $2,000.00 per year; that he lived with his parents and contributed all of his earning capacity to them; and that there was nothing to indicate that this would not continue.

Some of our cases involving the elements of recovery and amount of verdicts allowed parents for loss of a child are: *St. L. S. F. Ry.* v. *McCarn,* 212 Ark. 287, 205 S. W. 2d 704; *Mo. Pac. Ry.* v. *McKinney,* 189 Ark. 69, 71 S. W. 2d 180; *Mooney* v. *Tillery,* 185 Ark. 457, 47 S. W. 2d 1087; and *Eureka Oil Co.* v. *Mooney,* 168 Ark. 479, 271 S. W. 321. Tested by the holdings of the above cited cases, we cannot say that the verdicts are excessive in favor of the parents of Paul Norton and Cecil Smith.

V. *The Cross Appeal.* Joe Holt urges in his cross appeal that the Jury should have awarded him a verdict for his personal injuries, since there was a verdict for Otis Holt for the truck; but we find this cross appeal to be without merit. As previously mentioned, the Jury could have returned a verdict for Otis Holt for the damages to his truck and still have consistently found that Joe Holt was guilty of some degree of contributory negligence. The cause of action herein arose on May 1, 1954 and was tried on March 24, 1955. The 1955 Comparative Negligence Statute (Act No. 191 of 1955) has no application to this case since such Act did not go into effect until June 1955.

The judgment is affirmed, both on direct appeal and cross appeal.

5-787 284 S. W. 2d 319

Opinion delivered December 5, 1955.

*Cole & Epperson,* for appellant.

*Wood, Chesnutt & Smith,* for appellee.

MINOR W. MILLWEE, Associate Justice. The issue here is whether a nonresident motorist is amenable to substituted service of process in this state under our nonresident motorist statute where the alleged cause of action arises out of an accident involving the nonresident's automobile which occurred on private property adjacent to a public highway.

Appellant is an attendant at a service station located on private property adjacent to U. S. Highway No. 67 in Malvern, Arkansas. He brought this action for scalds and burns which he allegedly suffered while servicing the automobile of appellee, a nonresident motorist, at said service station. Substituted service was obtained on the Secretary of State as agent for appellee under our nonresident motorist statute [Act 199 of 1949] which now appears as Ark. Stats., Secs. 27-342.1 to 27-342.3. By special appearance, appellee moved to quash the service because the complaint showed on its face that the alleged cause of action did not occur upon the public highways; and that appellee was neither authorized to nor doing business in Arkansas. This appeal is from the order of the Circuit Court sustaining the motion to quash.

In reference to the point at issue Sec. 27-342.1, supra, provides: ". . . the acceptance by a nonresident owner . . . of the rights and privileges . . . to drive or operate . . . a motor vehicle upon the pub-

lic highway of [this] state . . . shall be deemed equivalent to the appointment . . . of the Secretary of the State of Arkansas . . . to be the true and lawful attorney and agent of such nonresident . . . upon whom may be served all lawful process in any action . . . growing out of any accident or collision in which said nonresident . . . may be involved while operating a motor vehicle on such highway . . . ." By Sec. 27-341.1 the term "Public Highways," as used in the service statute, is defined to mean ". . . any public highway within the borders of the State of Arkansas including byways, county highways, highways in military reservations, whether used conditionally or unconditionally by the public." This is Section 1 of Act 417 of 1953, enacted following the decision in *Camden* v. *Harris,* 109 Fed. Supp. 311, which held the service statute did not apply to roads on U. S. Army posts or reservations.

In *Kerr, Administrator* v. *Greenstein,* 213 Ark. 447, 212 S. W. 2d 1, we held that our nonresident motorist service statute is to be strictly construed because it is in derogation of the common law. When the above mentioned statutes are so construed together, it is apparent that the Legislature intended that effective service of process may be had under the nonresident motorist statute when the nonresident is involved in an accident or collision while operating a motor vehicle on any public highway or byway in this state whether same be maintained by the county, state or United States, and whether used conditionally or unconditionally by the public. This has been the interpretation placed on similar statutes by the courts of other states.

In those jurisdictions with statutes like our own, the courts have uniformly held that valid service thereunder is limited to actions involving accidents or collisions which occur on the public highways and does not apply to accidents occurring on private property or growing out of the operation of the motor vehicle thereon. *Pawloski* v. *Hess,* 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945;

*Brauer Machine & Supply Co.* v. *Parkhill Truck Co.,* 383 Ill. 569, 50 N. E. 2d 836, 148 A. L. R. 1208; *Kelley* v. *Koetting,* 164 Kan. 542, 190 P. 2d 361; *Harris* v. *Hanson,* (Idaho) 75 Fed. Supp. 481; *Finn* v. *Schreiber,* 35 Fed. Supp. 638.

The service statutes of some states are by their terms made applicable to any accident or collision in which the nonresident may be involved while operating a motor vehicle *within the state.* The courts of these states have held that service on the nonresident motorist under such statutes is valid even though the action involving the nonresident occurs on, or arises out of operation of the motor vehicle on, private property. *Sipe* v. *Moyers,* 353 Pa. 75, 44 A. 2d 263; *Paduchik* v. *Mikoff,* 158 Ohio St. 533, 110 N. E. 2d 562.

The New York statute originally read like our own and was construed in *Finn* v. *Schreiber,* supra, as not applicable to an action for injuries sustained by a filling station operator while inflating a tire on the truck of a nonresident defendant which was parked on the filling station lot, because such vehicle was not being operated on a "public highway" within the meaning of the service statute. This case was decided in 1940. But the New York Legislature in 1942 amended the statute by substituting the words, "in this state," for the words, "on such a public highway," previously contained in the statute. The amended statute was held constitutional as a valid exercise of the police power in *Leighton* v. *Roper, Admr.,* 300 N. Y. 434, 91 N. E. 2d 876, 18 A. L. R. 2d 537, where the court said: "When decedent came upon the highways of this State with his automobile, he subjected himself to our jurisdiction, and consented, while here, irrevocably to bind his legal representatives in an action arising out of any accident in this State in which his automobile was involved."

It is clear that our statute is like the earlier New York statute and those involved in such cases as *Brauer Machine & Supply Co.* v. *Parkhill Truck Co.* and *Harris* v. *Hanson,* supra, and applies only to accidents or colli-

sions on a public highway, or arising out of the operation of a motor vehicle on a public highway. Until the Legislature sees fit to broaden its terms, our statute does not apply to accidents like that involved here, which occur upon, or arise out of the operation of a motor vehicle on, private property. The circuit judge correctly so held, and the judgment is affirmed.

WALKER *v.* BIDDLE.

5-792 284 S. W. 2d 840

Opinion delivered December 5, 1955.

[Rehearing denied January 9, 1956.]

*McKay, Anderson & Crumpler,* for appellant.

*Spencer & Spencer,* for appellee.

GEORGE ROSE SMITH, J. In 1943 and 1944 the appellant, Dee Walker, obtained from his sisters, Addie Biddle and Mary Walker, quitclaim deeds to 320 acres of land

that had been held by the Walker family for many years. This suit to cancel those deeds was brought by Addie Biddle and by some of Mary Walker's heirs, the others being named as defendants. The plaintiffs successfully contended below that when the deeds were executed the two sisters were tenants in common with their brother and placed the title in his name merely to enable him to act for all three in the execution of oil-and-gas leases and deeds. Dee contends that the land was already his, that he had put the title in the names of his wife and two sisters for the purpose of defrauding a judgment creditor, and that after the judgment claim had been settled the sisters simply reconveyed the title to him.

Since we have concluded that all issues of fact must be determined adversely to the appellant by reason of a letter he wrote to Addie Biddle a few months before this suit was filed, we pass quickly over the background facts. The Walker children inherited the land from their father in 1907 but lost it by foreclosure in 1927. Title was regained in 1931 when Henry Stevens executed a deed to Dee's wife and the two sisters. Dee says that he alone arranged to repurchase the land from Stevens in 1927, that he made payments until the debt was satisfied in 1931, and that Stevens, who was Dee's attorney, made the deed to Dee's wife and sisters in order to protect the title from an unsatisfied judgment against Dee. The testimony on the other side is that the brother and two sisters all lived on the land, worked the crops together, and by their joint efforts regained the land as tenants in common.

Title remained in the three women until Addie and Mary gave Dee a quitclaim deed to 160 acres in 1943 and a similar deed to the other 160 acres in 1944. These are the deeds now in controversy; we have mentioned the conflicting reasons that are given by the parties for the execution of these conveyances.

The brother and sisters continued to live on the property until Mary died in 1947. According to Addie's testimony, in 1950 and thereafter she tried to persuade Dee

to divide the land, but Dee wanted to postpone the division until he could "get shed" of his second wife. On June 26, 1952, Dee wrote his sister this letter, which we consider to be decisive:

"Hello Addie how are you find I hope this leave al well hope this will find you al the same I got your letter was glad to here from you But sorry that you think I am made with you for what listen Addie you is got land her just like I am dont want your land and aint trying to take it from you listen I have married the laward [lawyer] told me let that land stay like it is if I dont my wife can get a part of it that why I wont vied [divide] it if it stay like it is she can not get any thing that why I dont want to vied it yet a while that why I diden want you to talk with me before her that night listen when you come down here I will tell you al a bout it when I see you a gen I dont want you land so with love

Dee Walker"

Confronted with this letter Walker was unable to explain why he had written that his sister had land just as he had, why he had assured her that he was not trying to take it from her, or why he had thought is necessary to give a reason for not dividing the land. When this letter is considered with the other testimony we conclude that the appellees have met the burden of showing by clear and convincing proof that the deeds in question were made in reliance upon Walker's promise to hold the land for himself and his sisters.

Aside from this question of fact the appellant urges two issues of law. First, it is argued that the statute of frauds prevents the enforcement of Dee's oral promise to hold the title for his sisters. This is true, but the statute by its terms does not apply to a constructive trust. Ark. Stats. 1947, § 38-107. That type of trust is involved here. When the grantee's oral promise to hold for the grantor is fraudulently made, or when such a promise is given by a grantee who stands in a confidential relation to the grantor, equity will impose a constructive trust

upon the grantee's refusal to perform his promise. *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; Rest., Restitution, § 182; Rest., Trusts, § 44. The relation between brother and sister is, in the absence of estrangement or other unusual circumstances, one of confidence; they are not regarded as dealing with each other at arm's length. *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1; *Reeder* v. *Meredith,* 78 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22.

Second, it is contended that since the statute of limitations, in the absence of concealment, runs in favor of the trustee of a constructive trust, *Matthews* v. *Simmons,* 49 Ark. 468, 5 S. W. 797, this suit is barred by the seven-year statute. The answer is that the constructive trust did not arise at the moment the deeds were executed. It is the transferee's repudiation of his promise that brings the trust into being. The evidence indicates that Walker did not claim the land as his own until after his sister Mary's death in 1947; so the bar of the statute had not fallen when this suit was brought in 1952.

Affirmed.

THE LUMBERMEN'S MUTUAL INS. CO. OF MANSFIELD, OHIO *v.* WHEELER.

5-788 284 S. W. 2d 620

Opinion delivered December 5, 1955.

*Wood & Smith,* for appellant.

*Lookadoo, Gooch & Lookadoo,* for appellee.

PAUL WARD, Associate Justice. On March 21, 1953, appellee, Arthur Wheeler, purchased a 1940 Chevrolet automobile from W. T. Matlock [also an appellee] for the purchase price of $225 on credit, with Matlock retaining title to the automobile. Also on said date the appellant insurance company issued its policy to Wheeler covering the actual value of the car with $50 deductible. This policy contained the following clause: "Loss Payee: Any loss hereunder is payable as interest may appear to the insured and W. T. Matlock. . . ."

On April 19, 1953, while the above mentioned policy was in force and when Wheeler was still indebted to Matlock in the full amount, the automobile was damaged to the extent of $200, fixing the liability of appellant [after deducting $50] at $150. Upon notice to appellant its adjuster went to see Matlock, and Matlock in turn sent the adjuster to Wheeler. Pursuant to an agreement between Wheeler and the adjuster [the exact terms of which are in question] Wheeler agreed that he could take $75 and repair the automobile himself. Thereupon the adjuster filled out a "Proof of Loss" which Wheeler signed. After describing the car and the insurance provisions in general terms this instrument stated that the actual cash value of the car was $225; that the actual loss and damage was $125, and; the amount due Wheeler was $75. On June 4, 1953, appellant, through its general agent, issued its check for $75, made out to Arthur Wheeler and W. T. Matlock, and mailed the same to Matlock. Matlock refused to accept the check, and he and Wheeler instituted this action against appellant on the policy to collect $150.

The complaint alleges that the automobile had a cash value of $225 and that its salvage value was only $25 and the prayer was for judgment in the amount of $150.

Appellant's answer stated "that Arthur Wheeler, the named assured, agreed to accept the damaged automobile and the sum of $75 as full settlement . . ."; that an accord and satisfaction had been reached, and "that the rights of W. T. Matlock, under the open loss payable clause in the policy, are derivative and subordinate to the rights of the named assured."

After hearing all the testimony on both sides, the trial judge, sitting as a jury, found in favor of appellees. In a "Memorandum Opinion" the trial judge gave as the reason for his decision that there never was any actual meeting of the minds of Wheeler and the adjuster. He also found that Wheeler never received the check because it was made jointly to him and Matlock and mailed to Matlock, and that the check was never cashed and was eventually returned. The trial judge further found that the undisputed evidence showed that the car was worth $225 before the wreck and that it was worth only $25 after the wreck, and that appellant was therefore indebted to appellees in the sum of $150.

We are convinced that the judgment of the trial court must be affirmed. We are not called upon to decide whether there was substantial evidence to support the trial judge in the finding of fact which he made because the ground upon which we rest our decision makes it unnecessary to do so.

Under the authority of *Insurance Underwriters' Agency* v. *Pride,* 173 Ark. 1016, 294 S. W. 19, Wheeler in this instance had no right to make a settlement with appellant insurance company without the consent and approval of Matlock. In the cited case, at page 1021 of the Arkansas Reports, this court said: "We think a mortgagee or lienholder acquires a vested and enforceable right under an ordinary loss-payable clause as his interest may appear in an insurance policy which cannot be destroyed by a settlement or adjustment between the insurer and the insured." This case was cited with approval in *Cash* v. *The Home Insurance Company of New York,* 197 Ark. 670, 125 S. W. 2d 99. In Vol. 5 of Apple-

man's Insurance Law and Practice, Section 3406, at page 578, it is stated:

"The most confusing question has probably arisen where a settlement has been worked out between the insured and the company, by which they attempt to bind the mortgagee, and in which settlement he has had no opportunity to participate. The general rule has been, under both open loss payable clauses and under the standard and union clauses that this cannot be done; those courts considering that the mortgagee's rights cannot be concluded by the acts of those parties."

An annotation in 38 A. L. R., at page 383, contains this statement:

"The weight of authority is to the effect that a mortgagee entitled to the proceeds of an insurance policy by virtue of a simple loss-payable clause in the policy is not affected or bound by an adjustment of the loss, whether by arbitration or agreement, by the insured and the insurer, without his knowledge or consent."

In Vol. 46 C. J. S., at page 28, among other things, it is stated that "under a standard mortgage clause the rights of the mortgagee are not affected by any act done by the insured." In *Detroit Fire & Marine Ins. Co.* v. *Helms,* 184 Ark. 308, 42 S. W. 2d 394, the court in discussing a similar question, stated, at page 311 of the Arkansas Reports: "But the court correctly held that the association could recover to the extent of its mortgage, as it is well settled that a mortgagee, under a standard mortgage clause, is not affected by the acts or omissions of the insured that would avoid the policy as to him."

We note of course that the rule announced above presupposes that the mortgagee or lien holder does not authorize the settlement made by the insured. In this case the adjuster testified that Matlock told him "to go on and work it out with the named insured—to make the adjustment on the claim with Mr. Wheeler—that anything we worked out would be satisfactory to him." Mat-

lock emphatically denied that he made any such statement. So we are faced with the situation that this testimony raised a fact issue which the trial judge did not pass upon. We think however that this is immaterial for the reason that there was no consideration for Matlock making the statement attributed to him, if he in fact did make it. It is undenied that when the check for $75 was mailed to Matlock he refused to accept it and returned it to appellant's attorney. Under these circumstances Matlock had a right to refuse the settlement attempted by Wheeler. Matlock, as shown heretofore, had a vested right in the entire amount due under the policy. It cannot be said that appellant relied on Matlock's alleged agreement to bind itself to pay $75, because appellant had not bound itself to pay anything. No one on behalf of appellant signed the "Proof of Loss" which contained the alleged agreement with Wheeler. In fact the instrument expressly stated it "is not a waiver of any rights of the said insurer." To hold otherwise than we do would be to hold that Matlock was bound by an agreement which did not bind appellant.

It should be pointed out that we do not indicate what our holding would be if the "Proof of Loss" had not contained the non-waiver clause quoted above.

Affirmed.

HILL *v.* HILL.

5-789 284 S. W. 2d 321

Opinion delivered December 5, 1955.

*A. James Linder,* for appellant.

*Etheridge & Sawyer,* for appellee.

SAM ROBINSON, Associate Justice. Appellant Hazel Hill filed this suit asking that she be granted a divorce from the appellee, J. C. Hill. The answer was a general denial and, in addition, appellee filed a cross complaint in which he asked that he be granted a divorce. Later the defendant amended his cross complaint by withdrawing his prayer for a divorce and by making the allegation that he had an interest in certain real and personal property in the possession of the appellant. He asked for a judgment for the value of his alleged part of such property.

At the trial Hazel was granted a divorce, and there is no appeal from the decree in that respect. The Chancellor made a finding that Hill was the owner of an interest in the property in question and appointed a receiver to take charge of the property and act as a master in making a determination as to the equities of the parties, and to sell the property and divide the proceeds accordingly. Hazel has appealed from that part of the decree holding that appellee has an interest in the property involved.

The parties were married on October 23, 1950, and separated in the first part of October, 1954. Hill is about 40 years of age, and his wife a little older. There is no showing that Hill had accumulated any property, real or personal, at the time of the marriage. Subsequent to his marriage in 1950, he bought a 1937 model Chevrolet. Later, he bought a newer model car but failed to make the monthly payments and it was repossessed by the seller. He did not own a car at the time of the trial.

At the time of her marriage in 1950, Mrs. Hill owned and operated the Elite Cafe. She owned her own home and, in addition, she owned an adjoining lot on which was situated a small building that was later moved to the

front of the lot and converted into a restaurant. Subsequently, three tourist cabins were also constructed on this lot. In raising the money to do this work, Mrs. Hill sold the Elite Cafe for $1,100, borrowed $1,000 from her sister and mortgaged her home for $1,500. She later mortgaged the lot on which were situated the restaurant and cabins to get money to enlarge the restaurant.

Hill claims that some of the money he earned was used in the construction of these buildings and in furnishing them. He also says that he did some of the construction work and as a result he owns an interest in the buildings and in the furnishings. Even if some of Hill's money went into construction of the buildings and in furnishing them, he has not proved by a preponderance of the evidence any definite amount that would support a judgment. To say that he furnished any amount of money over and above the sum required to support himself and his wife would be pure speculation. And, the Chancellor could not make a determination from the evidence as to just how much Hill put into the business, if anything. During the time of the marriage, Hill earned an average of about $177.00 a month. After supporting himself and his wife he surely could not have had much left for investment purposes.

Since the Chancellor could not determine from the evidence how much money Hill had put into the business, if any, a receiver was appointed to take charge of the property and to act as a master and state an account between the parties. But the case appears to have been fully developed, and a receiver or a master would be in no better position than the court to arrive at a conclusion. The burden of proof was on Hill to prove the allegations of his cross complaint by a preponderance of the evidence. Since he failed in this respect, it cannot be said he has shown that he has any interest in the property involved. His cross-complaint should be dismissed for want of equity. The decree is accordingly reversed.

HAAG *v.* MORGAN.

5-786 284 S. W. 2d 866

Opinion delivered December 5, 1955.

[Rehearing denied January 9, 1956.]

[redacted]

*Bon McCourtney, Claude B. Brinton* and *A. C. Hervey,* for appellant.

*Barrett, Wheatley, Smith & Deacon,* for appellee.

SAM ROBINSON, Associate Justice. This is a personal injury case growing out of an automobile accident. Appellants, William Haag and his wife Patsy, filed suit for damages due to injuries sustained by Patsy while an occupant of an automobile driven by appellee Morgan. The complaint alleges that Morgan, while intoxicated and over the protests of Patsy, was driving the car at about 75 miles per hour and failed to negotiate a curve, thereby causing the car to overturn resulting in serious injuries to Patsy. In addition to a general denial, the defendant pleaded that Patsy was a guest in the car and further that she was guilty of contributory negligence. The jury returned a verdict for the defendant.

On several occasions before the accident, Morgan and Mrs. Haag had been together on drinking parties, and the evidence justifies the conclusion that on the day in question they were again on a mutual drinking spree. They had met about 10 o'clock in the morning in a place called the Brass Rail, and had some beer. Morgan purchased additional beer which they took with them when

they went riding in Morgan's car. Later, after drinking the beer, they stopped at a Mrs. Wright's and got some whiskey. Then they drove up to Missouri, returned to Arkansas, and obtained more whiskey. Patsy says she did not drink from the last bottle but only pretended to do so. The accident occurred sometime during that afternoon.

The court instructed the jury with reference to the guest statute, Ark. Stats., §§ 75-913-14-15. Appellants contend that the statute has no application here in that it only applies to self-invited guests, and that Mrs. Haag did not come within that category. Appellants further contend that there was error in the giving of certain instructions and the failure to give other instructions. No general objection was made to the giving of any of the instructions.

By Instruction No. 3 the court informed the jury as to the proof required in a guest case and defined willful negligence. Appellants requested that the instruction be changed to read "self-invited guests." However, regardless of whether Mrs. Haag was a self-invited guest or had been invited by the operator of the car, the statute applies. *Roberson* v. *Roberson,* 193 Ark. 669, 101 S. W. 2d 961. Appellants also complain of the giving of an instruction submitting the issue of a joint adventure, but there was no objection to the instruction at the trial.

Instruction No. 2 given by the court reads as follows: "In order to recover the plaintiffs must show by a preponderance of the evidence that the defendant willfully and wantonly operated the automobile at the time of the injuries and that such willful and wanton operation on his part was the cause of the injuries. The burden of proof is on the defendant to show by a preponderance or greater weight of the evidence that there was a joint enterprise or adventure or that Patsy Haag was guilty of contributory negligence." Appellants objected specifically that this instruction was a comment on the evidence, but we do not think it is subject to that construction.

We have carefully examined all of the points mentioned by appellants on appeal and find no error. The judgment is affirmed.

COLLINS *v.* HEITMAN.

5-733 284 S. W. 2d 628

Opinion delivered December 12, 1955.

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

*John L. Hughes,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellant, from a decree of the Saline Chancery Court, which quieted and confirmed title to 40 acres of Saline County real property in the appellee, H. H. Heit-

man, and cancelled a prior deed to appellant, W. H. Collins, to the same property, as a cloud upon the appellee's title. The property is described as follows: southeast quarter of the northwest quarter, section 13, township 1 south, range 14 west, Saline County, Arkansas.

On August 25, 1951, Mrs. Helen Thomas offered for sale at auction, certain lands owned by her, which were situated in Saline County, Arkansas. The auction sale was conducted by Ben Johnson, as auctioneer. Prior to the sale, Johnson had acquired a mortgage against the lands, taking over an indebtedness that had been negotiated by the firm of Rightsell, Collins, Barry & Company, Inc. In an effort to liquidate this indebtedness, Mrs. Thomas and Ben Johnson entered into an agreement, wherein, Johnson was to sell the Midland Farms, which was owned by Mrs. Thomas and consisting of 390 acres, at auction on terms of 50% cash and the balance due, with interest, six months thereafter. According to the terms of the contract, the proceeds of the sale were to be placed in escrow and applied to the liquidation of the indebtedness.

In an instrument dated August 24, 1951, Mrs. Thomas and Ben Johnson, acting through their attorneys, entered into an escrow agreement, whereby, Collins and Company, a partnership composed of John Collins and W. H. Collins, appellant herein, was designated as the escrow agent. For a fee of $500, the escrow agent was to handle all funds derived from the auction sale, and upon receipt of the purchase money, the escrow agent was to deliver to the purchasers of the lands, their deeds with title insured, and further, to pay Johnson any indebtedness owed by Mrs. Thomas on the mortgage. Any remaining money, after liquidation of the indebtedness, was to be delivered to Mrs. Thomas. Pursuant to this agreement, the auction sale was held on Saturday, August 25, 1951, at the Midland Farm premises.

At the start of the auction sale, the auctioneer announced the terms and conditions governing the sale; he also gave notice that deeds for successful bidders would be available at the office of Collins and Company and

could be procured after 2 P.M., Monday, August 27, 1951. This announcement also provided, among other things, that the owner of Midland Farms reserved the right to reject any bid or bids, on any lot, group of lots, or the entire farm. The appellee herein, H. H. Heitman, was the successful bidder at the sale for the 40-acre tract here in litigation, having submitted the highest bid in the sum of $5,910 and having that sum accepted by the auctioneer. Appellee reduced his bid to writing and delivered his check for one-half of this amount. His check was accepted for the required deposit, and he was issued a certificate of bid, showing the balance due on the purchase price.

On the following Monday morning, August 27, 1951, a meeting was held in appellant's office, for the purpose of taking care of certain business that arose out of the auction sale. Among those persons present were, the attorney for Mrs. Thomas, the attorney for Ben Johnson, the appellant, W. H. Collins, who was the escrow agent, and other persons connected with the auction sale. At this time, the attorney for Mrs. Thomas rejected four of the bids that were received at the auction sale. One of the four bids rejected was the appellee's bid of $5,910, for the purchase of the 40-acre tract in question. On the same day, pursuant to the rejection of the bids, appellee was notified by phone that his bid had been rejected by Mrs. Thomas. His check in the sum of $2,955, which had been previously delivered by him as a down payment on his bid, was personally returned to him by Walter P. Watts, an official for the Ben Johnson Auction Company. The appellee accepted the return of his check and surrendered his certificate of bid, since he thought Mrs. Thomas had personally rejected his bid on the property.

Subsequently, on the same date, the appellant, W. H. Collins, submitted a bid in the sum of $6,250, for the purchase of the 40-acre tract of land in question. The attorney for Mrs. Thomas drew up an offer and acceptance; the terms being $3,125, in cash and the balance due six months thereafter. The receipt of the earnest money was accepted by W. P. Watts, agent for Ben Johnson, and the

offer was accepted in writing by the attorney for Mrs. Thomas. Mrs. Thomas was not present, nor did she have knowledge of this business transaction.

On the same afternoon, appellee met Mrs. Thomas, and while conversing about the auction sale, she informed him that she had not rejected his bid on the 40-acre tract and it was her desire that appellee have the property for the purchase price bid at the auction. On the following day, Tuesday, August 28, 1951, Mrs. Thomas tendered to appellee a written statement to this effect. Shortly thereafter, the appellee met with appellant to discuss the matter of conflicting interests to the property.

On August 31, 1951, Mrs. Thomas signed a letter ratifying and confirming her attorneys' acts in rejecting the four bids on August 27, 1951, including the appellee's bid of $5,910, for the 40-acre tract. This letter also ratified and confirmed her attorney's act in accepting the bid of appellant, for the 40-acre tract. On September 5, 1951, Mrs. Thomas delivered to appellant a warranty deed to the property. This deed was filed for record in Saline County at 10:20 A.M. on September 10, 1951.

On September 10, 1951, at 8:18 A.M., appellee filed suit against Mrs. Helen M. Thomas in the Saline Chancery Court, for specific performance of his alleged contract of sale of the 40-acre tract of land. Upon trial of the issues, the trial court found, in its decree dated May 12, 1952, that a valid sale had been made to appellee and ordered Mrs. Thomas to execute and deliver to appellee a deed to the 40-acre tract. Upon Mrs. Thomas' failure to act, the court appointed a commissioner to make the conveyance. On September 26, 1952, the commissioner executed a commissioner's deed to appellee for the 40-acre tract in question, pursuant to said decree.

On October 1, 1952, appellee filed this action in the Saline Chancery Court against appellant, to set aside appellant's deed to the property in question, as a cloud upon his title. Appellee claimed title through his commissioner's deed of September 26, 1952. Appellant answered and filed a counter claim against appellee, inter-

posing the defense of innocent purchaser for value and without notice. The appellant claimed that his title to the property was superior to that of appellee. In a decree dated December 31, 1954, the chancellor held that appellee was the owner of the land by virtue of his purchase from Helen M. Thomas, at the auction sale conducted on August 25, 1951, and that appellee acquired title in fee by virtue of the commissioner's deed dated May 12, 1952. The chancellor further found that at the time appellant acquired his warranty deed from Mrs. Thomas, on August 27, 1951, he was acting in the capacity of escrow agent for the parties, and he had actual knowledge of the sale of such lands to appellee, therefore, appellant was not a *bona fide* or innocent purchaser without notice, at the time he acquired the deed to the lands from Mrs. Thomas. This appeal follows.

The appellant lists three points for reversal, they are: (1) the appellee failed to prove a superior title as a matter of law; (2) the appellant was a *bona fide* purchaser for value; and , (3) the appellee is estopped from denying that appellant is an innocent purchaser for value.

The evidence is undisputed that appellee submitted the highest bid for the 40-acre tract and this bid was accepted by the auctioneer and appellee delivered his check for the required down payment. The appellant contends that Mrs. Thomas had an indefinite time limit in which to reject the offers. However, the printed announcement merely stated "that the owners of the property involved reserved the right to reject a bid or bids on any lot, group of lots, or the entire farm."

Ark. Stats. (1947), § 68-1421 (2), covers sale by auction of personal property and provides as follows: "A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner: Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve."

The law that governs the sale of personal property by auction also governs the sale of real estate by auction. Such terms and conditions that may affect the rights of the parties must be announced and agreed upon before the completion of the sale. Unless otherwise provided, the sellers' right to reject any or all bids, must be exercised before the acceptance of the successful bid. The auctioneer is the agent of the seller and his act in accepting the bid is binding on the seller. The seller has no right to reject a bid after the bid has been accepted and the purchaser has delivered the required payment. The same rule applies to the purchaser, who has no right to reject the sale after he has submitted the successful bid and has delivered the required payment. In the instant case, a contract was entered into when appellee's bid was accepted at the auction sale, without rejection by the seller, and appellee delivered the required payment. The contract was binding at this time.

It is apparent from the record compiled in this case, that appellant and appellee trace their respective titles to Mrs. Thomas. The appellant contends that in a suit to quiet title, the plaintiff must prevail upon the strength of his record title, and, an equitable title is not sufficient against a subsequent purchaser with superior record title. In this statement of the law appellant is in error. The law governing this situation was clearly announced in *Eickhoff* v. *Scott,* 137 Ark. 170, 208 S. W. 421, where this court said: "It is true, in an adversary suit, that the plaintiff must recover on the strength of his own title and not the weakness of the defendant's title. *Knauff* v. *National Cooperage and Woodenware Co.,* 99 Ark. 137, 137 S. W. 823, and cases cited therein. This rule is applicable where the parties claim title from independent sources, and has no application in cases where the parties trace their respective titles to a common source. Where parties trace their title to a common source, the one must prevail who has the superior equity." Since both parties claim title through Mrs. Thomas and since appellee's title antedates and is superior to that of appellant, it necessarily follows that appellee is entitled to have same quieted.

The appellant contends, in his second point, that he was a *bona fide* purchaser of the 40-acre tract, for value. We cannot agree with appellant. From the beginning he was closely identified with this auction sale. Appellant acquired his deed from Mrs. Thomas at a time when he was acting in the capacity as escrow agent for her, in the handling and conducting of the sale of the lands in question. In this capacity as such escrow agent, appellant had actual knowledge of the sale of said lands to appellee and therefore could not be considered a *bona fide* or innocent purchaser without notice at the time he acquired said deed from Mrs. Thomas. One who purchases real estate with the knowledge that another had a contract of purchase is not a *bona fide* purchaser, and if he acquired such knowledge at any time before payment of the consideration, he will not be protected as a purchaser in good faith. *Valley Planing Mill Co.* v. *Lena Lumber Co.*, 168 Ark. 1133, 272 S. W. 860.

In Vol. 66, Corpus Juris, Section on Vendor and Purchaser, page 1060, we find the following: "A subsequent purchaser from a vendor with notice actual or constructive, of a prior contract of sale of the land takes the land subject to the contract whether he has a deed or not, and although he has paid a valuable consideration."

We have often stated that an agent, regardless of how innocent his intentions may be, cannot place himself in a situation where personal interests conflict with the duties owed his principal. In the recent case of *McHaney* v. *McHaney*, 209 Ark. 337, 190 S. W. 2d 450, 162 A. L. R. 1175, we said: "Everyone, whether designated agent, trustee, servant, or what not, who is under contract or other legal obligation to represent or act for another in any particular business or line of business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such interest or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common-sense and honesty, as well as law. The agent is not entitled to avail himself of any advantage that his position may give him to profit beyond the

agreed compensation for his services. He may not speculate for his gain in the subject-matter of the employment. He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest."

The cardinal principle of all agency is good faith. In accepting the office of depositary, appellant became the agent of both buyer and seller. This created a relation of confidence the depositary could not thereafter violate nor pervert to his own advantage or the detriment of either principal. Upon one claiming to be an innocent purchaser rests the burden of proving his good faith. *Abbott* v. *Parker,* 103 Ark. 425, 147 S. W. 70. We think the chancellor was correct in finding that appellant was not an innocent purchaser without notice, at the time he acquired a deed to the 40-acre tract from Helen M. Thomas. As escrow agent, the appellant had actual knowledge of the sale of said land to the appellee.

The appellant is in no position to plead estoppel. He was aware of the sale of the land to the appellee before he expended any money on his alleged purchase. He attempted to purchase the property from the auctioneer, at a private sale, after he had received actual knowledge that the property had been sold to the appellee. The record reveals that appellant knew that Mrs. Thomas had not rejected the appellee's bid. In fact he knew that Mrs. Thomas had prepared a written statement, whereby, she informed appellee that she had not rejected his bid and she wanted appellee to have the property for the amount of the bid. The appellant did not expend any money for the purchase of the 40-acre tract until several days after he received notice from appellee of the latter's claim. Appellant was escrow agent for the parties and was charged with the duty of carrying out the terms and conditions of the escrow agreement. As such escrow agent, he was not entitled to avail himself of any advantage that his position gave him to profit beyond the agreed compensation for his services. It is uniformly held that no one can be permitted to purchase an interest

in property where he has a duty to perform that is inconsistent with the character of a purchaser. *Culberhouse* v. *Shirey,* 42 Ark. 25; *Rogers* v. *Lockett,* 28 Ark. 290; *Ellsworth* v. *Benedict,* 214 Ark. 367, 216 S. W. 2d 392.

Upon trial of this cause, the appellant did not plead estoppel. The appellant has failed to bring himself within any of the exceptions to the general rule. Therefore, the appellant cannot raise the plea of estoppel for the first time, upon appeal to this court. *Gerard B. Lambert Co.* v. *Rogers,* 161 Ark. 307, 255 S. W. 1089; *Reeder* v. *Meredith,* 78 Ark. 111, 93 S. W. 558.

Finding no error in the trial court's decree in cancelling appellant's deed and confirming title in appellee as against appellant, the decree is affirmed.

Justice SMITH dissents.

GEORGE ROSE SMITH, J., dissenting. The majority opinion seems to rest primarily upon (a) the view that Mrs. Thomas did not reserve in advance the privilege of rejecting the bids at the auction and (b) the rule that a fiduciary cannot purchase an interest in the subject matter of his trust. My reasons for disagreeing with the conclusion reached can best be stated by taking the events in chronological sequence.

The auction sale was held during the day on Saturday, August 25. Heitman testified that he heard the auctioneer announce that Mrs. Thomas had until sometime on Monday (noon or two o'clock) to reject bids. Heitman's later conduct in surrendering his certificate of purchase and in persuading Mrs. Thomas to give him a written statement that she had not rejected his bid confirm his candid admission that he understood that the privilege of rejection had been reserved. In view of Heitman's own testimony it is readily apparent that this is not a case in which the right of rejection was not properly reserved in advance.

On Saturday night Mrs. Thomas met with her attorney, Gerland Patten, and with her son to evaluate the results of the day's proceedings. The main purpose of

the auction had been to save the home place if possible. The bids were more than enough to pay the mortgage; so Mrs. Thomas directed that the offer for the home place be rejected. All three persons present agree that no decision was reached with respect to any other bid and that Mrs. Thomas gave Patten unlimited authority to act in the matter as he thought best.

On Monday morning Patten decided to reject, in addition to the bid for the home place, the Heitman bid and two others. He testified that he refused the Heitman offer because he thought the property was worth more than the amount bid. It was only after the notice of rejection had been delivered to the escrow agent that Collins inquired what Patten would take for the property. Patten asked $7,000 for the tract, and Collins countered with an offer of $6,500, of which $250 was to be paid by a reduction in the escrow agent's fee. Patten left Collins' office, telephoned Mrs. Thomas' son, and discussed the new offer with him. The two decided that the offer should be accepted, and that afternoon Patten, who had long had authority to act for Mrs. Thomas, entered into a written contract of sale with Collins. During the same day Heitman was notified that his bid was rejected, and he surrendered his certificate of purchase and accepted the return of his earnest money. Heitman testified that he then thought the matter to be closed.

At that point in the course of events it seems plain to me that Collins had acquired the prior and superior equity. The Heitman bid had been rejected by Mrs. Thomas' agent, who undoubtedly had that authority. Collins had entered into a written contract which was unquestionably binding upon him as well as upon Mrs. Thomas. That he did not make a payment until a few days later is immaterial, as the mutual promises made the contract enforcible by either party.

Doubtless Collins was motivated by self-interest in purchasing the land, but I do not see how that interest conflicted with any fiduciary duty on his part. The Heitman offer had already been rejected; there is nothing in

the record to suggest that the rejection was a collusive maneuver having as its purpose a resale to Collins at a better price. When the Heitman bid was rejected in good faith the tract was withdrawn from the escrow arrangement, which had to do only with the sales at auction, and Mrs. Thomas was free to sell the land to anyone she chose. As far as I can see, Collins was equally free to purchase, since his fiduciary duty toward the bidder had been terminated by Mrs. Thomas' attorney. We have indicated that the prick of conscience that would be felt by a punctiliously honarable man warns a fiduciary that he is violating the high standard of conduct required of trustees. *Johnson* v. *Lion Oil Co.,* 216 Ark. 736, 227 S. W. 2d 162. It does not seem to me that even the most scrupulous person would have hesitated to act as Collins did in this case.

If I am correct at this point the later events are immaterial. Mrs. Thomas' written statement that she had not rejected Heitman's bid was contrary to the facts as the law must view them, for she had rejected the bid through her agent and had even agreed to sell the land to another. It may well be that her statement to Heitman gave him a cause of action against her, but it cannot be said that his rights relate back to the day of the auction. His rights as a bidder were completely extinguished when he acquiesced in the rejection of his offer. Those rights cannot be revived through the doctrine of relation back to the detriment of an innocent purchaser whose interest arose in the meantime.

5-772 284 S. W. 2d 647

Opinion delivered December 12, 1955.

*Sigun Rasmussen,* for appellant.

*Fietz & McAdams,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellant and appellee were married August 23, 1951. A child, Sharon Lee Martin, was born to them July 22, 1952. Mrs. Martin was about 14 years younger than her husband. The parties separated December 2, 1951, and on December 7, 1951, appellee sued his wife for divorce alleging indignities and abuse, and later, by amendment, alleged three years separation without cohabitation. January 11, 1952, Mrs.

Martin asked for temporary alimony, suit money and attorneys' fees. On motion, January 19, 1952, Mode Gregory, who had on December 14, 1951, been duly appointed guardian of appellee's person and estate, was substituted for appellee (an incompetent), and on a hearing the same day the guardian was ordered to pay into court $200 per month alimony *pendente lite.* November 28, 1952, Harry R. Martin, by order of the Probate Court, was declared competent. September 17, 1952, Mrs. Martin filed answer and cross-complaint denying all allegations, except their marriage, and prayed for a divorce alleging indignities, and desertion for more than a year without cause, for custody of the little girl, and allowance for her support, for alimony and a property settlement. February 8, 1954, judgment was entered against Harry R. Martin, appellee, for $2,800 for alleged arrearages in alimony *pendente lite.* October 14, 1954, appellee, Harry R. Martin, filed motion to set aside this judgment of February 8, 1954, for $2,800 and on the same day the trial court granted this motion and set the judgment aside. On March 14, 1955, a decree was entered granting Harry R. Martin a divorce on the grounds of three years separation without cohabitation, and holding that Mrs. Martin was not entitled to a divorce on the grounds of indignities or desertion and was not entitled to alimony or property settlement, but gave her the care and custody of the child with the right to appellee of visitation, and allowed $100 per month to appellant for its support. This appeal followed.

For reversal appellant first argues that the court erred in refusing her a divorce on the grounds of indignities and also on the ground of desertion. We do not agree to either contention. The trial court found, on conflicting evidence, that both parties were equally in fault; that they lived together in an illicit relationship prior to their marriage; that each was guilty, in effect, of indecent and reprehensible conduct, and that neither was entitled to divorce on the grounds of indignities. Section 34-1209, Ark. Stats., 1947; *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675. The court also denied Mrs. Martin a divorce on the grounds of desertion for the reason that

the evidence showed that the separation alleged was by mutual consent of the parties. "When a wife separates from her husband, and lives apart from him with his consent, this is not a wilful desertion within the meaning of the statute, nor is it necessary that such consent be expressly given. It may be implied from the words or acts of the husband which show that he consented to the separation," *Reed* v. *Reed,* 62 Ark. 611, 37 S. W. 230.

We do not attempt to detail and analyze the testimony on these issues, to do so would serve no useful purpose. It suffices to say that we have carefully considered it all and have concluded that the findings of the Chancellor were not against the preponderance thereof.

Next it is contended that the court erred in denying alimony to Mrs. Martin, and also in denying her claim for a property settlement. The Seventh Sub-division of § 34-1202, Ark. Stats., 1947, provides: "Where either husband or wife have lived separate and apart from the other for three [3] consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in the settlement of the property rights of the parties and the question of alimony." So that the trial court in determining whether the wife is entitled to alimony or a property settlement, may take into consideration the question of which spouse is the injured party or at fault. *Jones* v. *Jones,* 199 Ark. 1000, 137 S. W. 2d 238. Here the Chancellor found that the fault as between the parties appeared to be equal, that the fault of Mrs. Martin was at least equal to that of her husband, and in the exercise of the discretion accorded him, denied, as indicated, both alimony and a property settlement to Mrs. Martin. The trial court found, "At least she is as much at fault as is the plaintiff and from all the facts and circumstances, the court finds that she is not entitled to alimony or to a division of the husband's property." We cannot say that the preponderance of the testimony fails to support the findings of the chancellor on these

issues. It further appears that the day before appellant's appeal was lodged in this court she married Gustave Nichols, Jr., in Las Vegas, Nevada, and that she thereafter, with her little girl, has resided in that city. On trial *de novo* here, we hold that in the circumstances, by this remarriage, she has forfeited and precluded her right to claim alimony. In *Erwin* v. *Erwin,* 179 Ark. 192, 14 S. W. 2d 1100, in a case in which alimony had been granted prior to a remarriage, we held that, "A divorced wife's remarriage entitled the husband to apply for relief from further payment of alimony except where the allowance of alimony was in gross, or in lieu of, or as a substitute for, all of the wife's property rights." As indicated, we find no error in the court's denial of alimony and a property settlement in the circumstances here.

Appellant next contends that an allowance of $100 per month for the support of the child was insufficient. This was also a matter within the sound discretion of the trial court. In fixing the amount it was the court's duty to take into account the father's ability to pay and their station in life. On the evidence presented we are unable to say that this allowance for the support of the child, now less than 4 years of age, is inadequate at the present time. On this issue the Chancellor found, "No conduct upon the part of the defendant, however, could free the plaintiff of his obligation to support the child and he has sufficient means to provide for the child. Having denied the defendant alimony, however, it would be improper to award such an amount to her as support for the child that would indirectly amount to awarding alimony to her. The child is now but little over two and a half years of age and appears to be healthy in every respect. It is quite probable that the immediate needs of the child will increase as it grows older but that should not be taken into consideration at the present time as the court always retains jurisdiction to make proper orders concerning the support of the child."

Finally, appellant contends that, "The order of February 8, 1954, awarding judgment to the appellant,

Jacqueline Bolgard Martin, in the sum of $2,800.00 for unpaid support awarded in the order of January 19, 1952, should not have been set aside by the trial court on October 14, 1954." Appellant is correct in this contention. We hold that, in the circumstances here, it makes no difference whether this $2,800 judgment was against appellee, personally, or his guardian. The preponderance of the evidence does not show that this judgment was ever paid. It appears that on February 8, 1954, judgment was rendered in favor of Mrs. Martin against her husband, Harry R. Martin, for $2,800 for arrearages and alimony *pendente lite*. Thereafter, on October 14, 1954, the trial court granted a motion by appellee to set aside this order of February 8, 1954, which gave judgment to Mrs. Martin for $2,800. We hold that the trial court was without power to set this judgment aside after term time. Section 22-406, Ark. Stats., 1947—Supplement, provides: "Poinsett County, 12th circuit. Terms, 1st Monday in May, August and December and 2 Monday in March." This judgment had become final. Obviously the March term had expired and the regular May and August terms had intervened before the above order, of October 14, 1954, was made and could be set aside or vacated after the expiration of the term only on one or more of the grounds set out in § 29-506, Ark. Stats., 1947. It appears that no effect was made to proceed under this section. We, therefore, reverse that part of the decree denying appellant $2,800, the amount of the judgment in her favor of February 8, 1954; in all other respects the decree is affirmed. Costs in both courts to be paid by appellee and an additional attorney's fee of $500 is allowed here for Mrs. Martin's attorney, to be paid by appellee, Harry R. Martin.

Opinion delivered December 12, 1955.

[redacted]

*Goodwin & Riffel,* for appellant.

*Wright, Harrison, Lindsey & Upton,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation claim by appellee, a traveling salesman; and is resisted by appellant (employer) on the contention that the appellee's injuries did not arise "out of and in the course of the employment."[1] The Workmen's Compensation Commission made an award in favor of the claimant; the Circuit Court affirmed; and the employer has brought this appeal.

Mr. Oates was employed by Frank Lyon Company as a traveling salesman. His territory consisted of ten counties in Western Arkansas and three adjacent counties in Oklahoma. The *eastern* boundary of Mr. Oates territory was a north and south line about forty miles west of the Town of Perry and approximately ninety miles west of Little Rock. Mr. Oates worked on a commission basis, furnishing his own car and paying his own expenses. Mr. Oates, a single man, resided with his parents in the Town of Perry, which is not in his territory. He would leave Perry Monday morning, drive westerly to his territory, work in the territory until Friday eve-

[1] The quoted language is found in the definition of "Injuries," § 81-1302 (b) Ark. Stats.

ning, and then return to Perry for Friday night. On Saturday morning he was required to go to Little Rock to attend a sales meeting at 9:00 o'clock at the Frank Lyon Company. That meeting closed at noon or thereafter; and then Mr. Oates was free to return to Perry for Sunday and be ready to resume working in his territory Monday. The fact that Mr. Oates stayed with his parents in Perry and returned there after each Saturday sales meeting was known to the Frank Lyon Company.

The injuries which Mr. Oates received, as herein involved, occurred on Saturday afternoon when his car went out of control as he was returning to Perry after having attended a sales meeting. The sole question is whether the injuries were received "out of and in the course of the employment." It is conceded by appellant that Mr. Oates, after attending to some personal matters in Little Rock, was on the direct road returning from Little Rock to Perry at the time of the mishap; but appellant insists that Mr. Oates' presence at the sales meeting was required the same as was the attendance of the three other salesmen, who were residents of Little Rock; and that under the "going and coming rule" the employee is not covered by the Workmen's Compensation Law for injuries occurring en route to the place of business. In addition to the cases from our own State—hereinafter to be mentioned—appellant cites such cases as *Postal Telegraph Cable Co.* v. *Industrial Accident Comm.*, 1 Cal. 2d 730, 37 Pac. 2d 441, 96 A. L. R. 460; *Covey-Ballard Motor Co.* v. *Industrial Comm.*, 64 Utah 1, 227 Pac. 1028; *Lunde* v. *Congoleum-Nairn Co.*, 211 Minn. 487, 1 N. W. 2d 606; and *Dooley* v. *Smith Trans. Co.*, 26 N. J. Misc. 129, 57 Atl. 2d 554.

For an injury to an employee to be compensable under the Arkansas Workmen's Compensation Law the injury must, among other essentials, arise "out of and in the course of the employment"; and as regards most workers, injuries sustained in going to or returning from work are held to be non-compensable. Such injuries are

ruled out of compensability because of the "going and coming rule."[2] In 58 Am. Jur. 723 this rule is stated:

"The hazards encountered by employees while going to or returning from their regular place of work, before reaching or after leaving the employer's premises, are not ordinarily incident to the employment, and for this reason injuries resulting from such hazards are in most instances held not to be compensable as arising out of and in the course of the employment. This general rule is subject, however, in most jurisdictions, to certain well recognized exceptions which depend upon the nature, circumstances, and conditions of the particular employment, and the cause of the injury."

There are many, many well recognized exceptions to the "going and coming rule"; and employees coming within such exceptions are held to have received their injuries arising "out of and in the course of the employment." We list only a few such exceptions:

(a) Where the employer furnishes a method of transportation. See *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; and *Tinsman Mfg. Co.* v. *Sparks,* 211 Ark. 554, 201 S. W. 2d 573.

(b) When the employee is injured while in close proximity to the place of business. See *Bales* v. *Service Club,* 208 Ark. 692, 187 S. W. 2d 321.

(c) When the employee has a duty to perform for the employer while en route home.

(d) Another exception to the "going and coming rule," and involved in the present case, is the so-called "traveling salesman rule."

In 58 Am. Jur. 730, in discussing the compensability of injuries to employees, the performance of whose duties

[2] For some Arkansas cases involving application of the "going and coming rule," see *O'Mearn* v. *Beasley,* 215 Ark. 665, 221 S. W. 2d 882; *Stroud* v. *Gurdon Lbr. Co.,* 206 Ark. 490, 177 S. W. 2d 181; *Cerrato* v. *McGeorge,* 206 Ark. 1045, 178 S. W. 2d 247; *Penny* v. *Hudson,* 218 Ark. 594, 237 S. W. 2d 893; and *Thornton* v. *Texarkana,* 219 Ark. 650, 243 S. W. 2d 940.

necessitates their traveling from place to place away from the premises of the employer, the text states:

"The course of the employment of a traveling salesman, for the purposes of workmen's compensation, covers both the time and place of the traveling as well as of the selling of goods."

And under the traveling salesman exception employees have received compensation in a vast variety of situations.[3] In 71 C. J. 704 to 706 the holdings are summarized in this language:

"Outside workers, traveling salesmen or solicitors. Where the nature of an employee's work is such that it is actually, usually, or customarily performed while the employee is off the premises of the employer, harm which befalls such employee while he is engaged in his work away from the premises of the employer may be compensable as arising out of and in the course of the employment. . . . Harm sustained by a traveling representative of his employer may be compensable notwithstanding such harm is sustained while the employee is away from the premises of the employer."

Professor Larson, in his treatise on "Workmen's Compensation Law," says in Vol. 1, § 16.00:

"The most obvious application (exception to the 'going and coming rule') is, of course, to the traveling salesman. It is well established that his travels are within the course of his employment from the time he leaves home on a business trip until he returns, for the self-evident reason that the traveling itself is a large part of the job. . . ."

[3] Some of these are stated in 58 Am. Jur. 731 in the following language: "In the application of the foregoing general principles in particular instances or classes of situations, such as injuries while at hotels or other lodging or eating places, while traveling on boats or trains, while boarding or alighting from streetcars, while flying, while traveling in taxicabs, automobiles, or hired vehicles, while waiting or resting, while going toward a station, hotel, conveyance, or home, while going home for the week end, while going toward the employer's place of business, while proceeding toward the employee's working territory or area of service, while performing work, or while engaged in social or recreational activities, . . ." We quote the foregoing language as illustrative only, and without binding effect should similar situations arise in our jurisdiction.

Schneider, in his text on "Workmen's Compensation," Permanent Ed., Vol. 7, § 1665, summarized the holdings allowing traveling salesmen to recover in this language:

"Where the trip or attendance is one which the employer ordered or directed, or is for the sole benefit of the employer, or is to the mutual advantage of both the employer and his employee, compensation may be recovered."

There are numerous cases involving factual situations somewhat similar or analogous to the case at bar, and in which the employee was allowed compensation. For some such, see *Teshnor* v. *F. E. Compton & Co.,* 263 N. Y. App. Div. 263, 32 N. Y. S. 2d 266; *State ex rel. McCarthy* v. *Dist. Court,* 141 Minn. 61, 169 N. W. 274; *Harby* v. *Marwell Bros., Inc.,* 203 App. Div. 525, 196 N. Y. S. 729; *Solar-Sturges Mfg. Co.* v. *Industrial Comm.,* 315 Ill. 352, 146 N. E. 572; *Spradling* v. *International Shoe Co.* (Mo.), 270 S. W. 2d 28; *Newman* v. *Rice Stix,* 335 Mo. 572, 73 S. W. 2d 264, 94 A. L. R. 751; *Green* v. *Heard Motor Co.,* 224 La. 1078, 71 So. 2d 849; *Townsend* v. *General Aniline & Film Corp.,* 284 N. Y. App. Div. 919, 134 N. Y. S. 2d 415. *Whittemore Bros. Corp.* v. *De Grandpre,* 202 Miss. 190, 30 So. 2d 896, is an interesting case: there the Mississippi Court applied the Massachusetts Workmen's Compensation Law to a claim of a traveling man en route from his Arkansas territory to his headquarters in Vicksburg, Mississippi; and allowed a recovery. Other cases are collected in West's Decennial Digest System, "Workmen's Compensation," § 715. See Annotations in 20 A. L. R. 325; 29 A. L. R. 123; 36 A. L. R. 474; 49 A. L. R. 454; 63 A. L. R. 469; and 100 A. L. R. 1060.

Appellant insists that the case at bar is ruled by our holding in *Fox Bros.* v. *Ryland,* 206 Ark. 680, 177 S. W. 2d 44, wherein we denied compensation to Ryland for injuries he received on the sidewalk en route to the hotel where he was going to "kill a little time." The Ryland case was on the borderline, and its holding must be confined to the particular facts; but, even so, there is a big distinction between the Ryland case and the one at bar.

Ryland was a salesman in Pine Bluff with limited territory. He left the company office and started on a personal journey to the hotel, which was a deviation from his direct route; and it was while he was on such deviation that he received his injuries. That the opinion was bottomed on the idea of deviation is shown by the following language:

". . . a majority of the Court are of the opinion that there was no evidence in this case to the effect that the trip to the hotel constituted any part of his duties, and that the fact that he was willing to make a sale, in the event he had met a customer while on the trip, is not sufficient to establish that his intended visit to the hotel was to be made in the course of his employment."[4]

In the case at bar Mr. Oates was regularly required by the Frank Lyon Company to go to Little Rock for a sales meeting each Saturday morning. That trip was certainly a part of his duties. It was while he was returning from Little Rock to his assigned territory, and on no deviation whatsoever, that he received his injuries. It is true that he was en route from Little Rock to Perry; but Perry is on the direct route from Little Rock to Mr. Oates' territory.

We therefore hold that the Commission correctly allowed a recovery in this case.

Affirmed.

---

[4] In our later case of *Cagle* v. *Gladden-Driggers Co.*, 222 Ark. 517, 261 S. W. 2d 536, we affirmed the Commission which refused compensation benefits to a salesman who was injured while on a private mission.

5-795 285 S. W. 2d 100

Opinion delivered December 12, 1955.

[Rehearing denied January 16, 1956.]

[redacted]

*Tom Gentry* and *John K. Shamburger,* for appellant.

*Mehaffy, Smith & Williams,* for appellee.

MINOR W. MILLWEE, Associate Justice. This appeal is from a decree making permanent a temporary injunction against picketing, the making of threats and the commission of acts of intimidation and violence in connection with a labor dispute.

Appellee, F & C Engineering Co., hereinafter called "plaintiff," was one of approximately twenty-five prime contractors engaged in construction of the Little Rock Air Force Base, near Jacksonville, Arkansas, by the U. S. Army Engineers in the early part of 1955. Appellants, hereinafter called "defendants," include J. W. Smith, Assistant Business Agent of International Union of Operating Engineers, Local 382, and certain employees of plaintiff who were sued individually and as representatives of said union. Some of the defendants were members of the union and some were not.

As an officer of Local 382, defendant, J. W. Smith, sought to negotiate with plaintiff relative to overtime pay to its employees for hours worked in excess of 40 hours per week and for certain union recognition in the organization and hiring of operating engineers under plaintiff's two contracts with the Army Engineers. Plaintiff paid its employees overtime for hours in excess of eight per day, but it was one of very few contractors on the project who refused to pay overtime for hours in excess of 40 hours per week. As a result of plaintiff's refusal to deal with the union in these matters, Smith and other union representatives established a picket line at plaintiff's batch plant which is located just outside the air base proper on March 3, 1955. This plant is the storage and dispensing area for all concrete materials used by plaintiff, and about 135 men were normally employed there.

On March 7, 1955, plaintiff filed the instant suit for injunction. Based upon testimony then presented, the Chancellor issued a temporary order restraining defendants, their agents, employees and members from picketing plaintiff and its places of business and from threatening or committing acts of intimidation or violence against plaintiff's business, property, agents, employees and persons seeking to do business with plaintiff. After a full hearing on April 1, 1955, the case was taken under advisement and on April 22, 1955, a decree was entered making the temporary injunction permanent. Defend-

ants' subsequent motion to modify the decree was overruled on April 27, 1955.

As a basis for the decree, the Chancellor also filed an exhaustive and well considered opinion in which he made findings of fact as follows:

"1. On Thursday morning, March 3, 1955, a picket line was established at the site of a batch plant operated by the plaintiff located a short distance outside of the Little Rock Air Force Base limits, and the picket line was maintained from that time until after the issuance of the Court's temporary restraining order on Monday, March 7, 1955. The entrance and exit roads to and from the batch plant are narrow, unpaved roads, and although only four men were actually engaged in the carrying of picket signs, the total number of men in the immediate locality varied from twelve or fifteen to fifty or sixty. The signs contained language to the effect that the plaintiff was unfair to and destroying certain working standards of the Operating Engineers' Union. In addition to the men, there were a great number of cars parked up and down the road running by the batch plant. The large number of men was in no wise necessary to disseminate information or inform the public of the nature of the dispute, and the presence thereof served only to add emphasis to the threats and other acts which will be hereinafter set forth and the presence of these men undoubtedly had an adverse influence upon the employees who continued to work. On one occasion one of the roads was blocked by a pickup truck. Mr. Ray Spillers, superintendent of the plaintiff, requested of the men present at the picket line that the owner of the truck move it since it was blocking the road. Mr. Spillers was informed by one of the men in a belligerent manner that the truck would not be moved and that if Mr. Spillers didn't like it he could get out of his vehicle. Mr. Spillers left to avoid an incident and the truck was thereafter moved. This incident occurred on Friday morning, March 4, 1955. In this regard, Mr. Spillers gave instructions to all of the employ-

ees of the plaintiff to avoid any kind of an incident with the strikers and men on the picket line.

"2. On Thursday, March 3, 1955, Brady Lawhorn was stopped on one of the batch plant roads by the defendant, Wayne Sowell, and informed in a belligerent manner and with the use of curse words that Lawhorn had better not cross the picket line the following morning or he (Lawhorn) would be whipped. During the remainder of the time that the picket line was maintained, Mr. Lawhorn walked a considerable distance out of his way in order to avoid crossing the picket line, and according to his testimony in order to avoid the likelihood of being whipped. Sowell admitted that he did stop Lawhorn, but that the controversy was over a lunch which Sowell alleges that Lawhorn had taken sometime previously and had not paid for. The Court is not impressed with this explanation, which was emphatically denied by Lawhorn, in view of the fact that Lawhorn was stopped at the picket line and, the Court believes, was threatened. This conclusion is reached by the Court in view of the other incidents that occurred and this appears to have been but one of several acts in the defendants' course of conduct to achieve their objectives by intimidation and coercion.

"3. On Thursday, March 3, 1955, L. C. Rackley, at that time a crane operator for the plaintiff, was accompanied through the picket line by Warren Dixon, truck foreman for the plaintiff, and other men, and they were cursed as the vehicle moved into the batch plant site. The evidence is clear that Rackley had been frightened prior to that time and quit immediately after this occurrence. A former employee of the plaintiff, Otis Nickolas, testified for the defendants that he accompanied Rackley and Dixon and that he heard no statements made. Nickolas was subsequently discharged by the plaintiff, and although he did not take sides with the defendants until after his discharge he did appear in court to testify on their behalf. There is no dispute in the evidence that something frightened Rackley and that he quit after this

incident, and the Court is convinced that Rackley left the employ of the plaintiff because he feared for his own safety.

"4. On Friday afternoon, March 4, 1955, the defendant, W. E. Clements, and another man told plaintiff's employees, Oliver Beck and A. M. Foster, that somebody was going to get 'their head skint.'

"5. On Friday night, March 4, 1955, Frank Rogers, General Foreman of the plaintiff, was attacked without notice or provocation in Rixie's Cafe located on the highway near Jacksonville, and a blackjack was used in this attack. The persons making the attack were identified by nicknames only, one called 'Talley' and one called 'Alabam.' 'Alabam' was positively identified as a joint machine operator working for Tecon Corporation on the Little Rock Air Force Base and the proof shows that Tecon was working under a contract with the defendant Union and was running a union shop. There was no provocation on the part of Rogers or any other employee of the plaintiff in connection with this attack and the evidence disclosed no reasons for the attack other than those connected with the dispute involved herein. On the next day, Saturday, March 5, 1955, the defendant Clements and another person talked to plaintiff's employee, Henry Garrett, and other employees, urging them to join those picketing the plaintiff, and during the conversation pointed out in substance to the plaintiff's employees that they (the employees) 'had seen what happened to Frank Rogers the night before.' In view of the previous threat that someone was going to get his 'head skint'; the absence of anything to indicate a reason for anyone other than the defendants or those working on behalf of the objectives of the defendants having responsibility for the beating; the administering of the beating by a Tecon employee performing an operating engineer's job for Tecon, which was running a union shop and which had a contract with the defendant union; the fact that the defendant, J. W. Smith, was in the cafe a very few minutes after the beating; and the fact that the following day

the defendant Clements, admittedly a union member, pointed out to other employees of the plaintiff that they had seen what happened to Frank Rogers the night before, the Court can draw but one inference: Person or persons administering the beating were seeking to accomplish the objectives of the Union by acts of the same unlawful and coercive nature engaged in by other defendants, and, for purposes of responsibility, the defendants are chargeable with these acts. Clearly the same unlawful purpose was pursued and the connection is obvious. The concert of action cannot possibly be explained by sheer coincidence and the inference of a conspiracy must be and is drawn by the Court. In addition, after the beating of Frank Rogers, the plaintiff's employees found a pickup truck belonging to the plaintiff which had been driven by Rogers to the Cafe had been tampered with and damaged so that it had to be hauled away and repaired before it could be placed in operation.

"6. The evidence reflects a series of contacts with employees made by Union men which might be explainable from the standpoint of persuasion if considered as isolated incidents, but when considered in the light of the other acts of intimidation and violence are explainable only as a deliberate course of intimidation. On Friday, March 4, 1955, plaintiff's employees, Norman Lewis and Henry Garrett, were stopped by the defendant, W. E. Clements, and another person in a belligerent manner and Garrett and Lewis left in order to avoid an incident. Defendant Clements with another person came by the home of Henry Garrett looking for the latter and the defendant, M. L. Patterson, came to the home of employee, R. E. Shaver. On Thursday night, March 3, 1955, employee, W. H. Alexander, was followed from the batch plant by the defendant, J. W. Smith, both in automobiles, to the North Little Rock Police Station, at which time Alexander stopped and obtained a police escort to his home. The defendant Smith testified that he simply wanted to talk to Alexander, but admitted that he followed him, and the intimidating effect of Smith's action was the same regardless of the explanation offered. On

Saturday, March 5, 1955, one of the men present at the site of the picketing attempted to stop W. H. Alexander as the latter was driving into the batch plant, and when Alexander did not stop this man hit the automobile with a rock, the approximate size of a man's fist.

"On one occasion certain employees were stopped by the defendant, Bull, and other persons, and the person who stopped the vehicle was waving a club at the time and had been drinking. During the conversation the men in the car were advised that R. E. Shaver was the man that they wanted to get and Mr. Shaver testified that he had been materially assisting the plaintiff in obtaining replacements.

"7. The plaintiff was plagued with numerous flats on its batch trucks during the period involved and the evidence reflected that this had not been the situation prior to this time nor has it been the situation since. The plaintiff was forced to police the batch plant entrance and exit roads each morning and pick up nails, and a comparison between the numerous nails found on the entrance and exit roads to the batch plant and those in the tires causing the flats revealed that they were identical. The defendants denied that they had placed any nails in the road. The Business Agent for the Laborers' Union, who maintained a picket for some two days after Monday, March 7, 1955, testified that his Union did not place any nails in the road and that if they were placed there it was done by someone else. The facts are clear that the flats did occur and since the nails found in the tires and those on the roads were identical, the only inference that the Court can draw is that they were placed there by the only persons having a reason to place them there, the defendants.

"8. On one occasion a paving machine was found drained of oil and water and otherwise damaged and would have been substantially damaged had it been placed in operation.

"The defendants had several witnesses who gave negative testimony as to acts of violence and intimidation, several of whom were law enforcement officers. The officers testified that they were there pursuant to a request made and the Court recognizes that it would be contrary to human nature for the defendants to participate in any of the acts disclosed by the evidence while the officers were present."

In questioning the validity of the injunction, defendants argue that the Chancellor erred in permitting plaintiff's general superintendent and others to testify regarding numerous flat tires and the finding of several pounds of roofing nails scattered on the batch plant road and in permitting the pleadings to be amended to conform to such proof. Plaintiff had alleged there were "numerous instances of rock throwing and damage to plaintiff's property," which would be placed in evidence, but there was no specific allegation in reference to tire damage. Although defendants objected to the court's action in permitting the pleadings to be amended to conform to the proof on this issue, there was no plea of surprise nor request for a continuance. The amendment did not involve a new cause of action and defendants introduced testimony to rebut that offered by plaintiff on the issue. In similar circumstances, we have repeatedly held that it is within the discretion of the trial court to permit the pleadings to be amended to conform to the proof. *Duff* v. *Ayers,* 156 Ark. 17, 246 S. W. 508; *Mo. Pac. Transportation Co.* v. *Williams,* 194 Ark. 852, 109 S. W. 2d 924. There was no abuse of such discretion here.

Defendants also contend the court erred in allowing plaintiff's superintendent to give certain testimony in violation of the hearsay rule. Defendants' abstract of the record shows that the Chancellor sustained objections to most of the testimony now challenged. When asked whether he had difficulty retaining men on the job, the superintendent answered in the affirmative and stated that he had numerous calls at home at nights because men were afraid to come back on the job. The witness

was neither asked nor did he attempt to state what any individual told him. We think the trial court correctly held the testimony admissible to show the effect of the threats and other acts of intimidation proved. One of the well recognized exceptions to the hearsay rule is that relative to the admission of statements or declarations showing a presently existing state of mind, feeling or attitude such as fear or ill will in the declarant. McCormick on Evidence, § 268; Wigmore on Evidence (3rd ed.), § 1730. A pertinent and relevant issue here was whether the conduct, threats and acts of the defendants were actually intimidating, and we find no prejudicial error in the court's action in admitting this evidence. We have examined other objections made by defendants to the court's rulings on the admission of certain testimony and find them to be without merit. Even if error was committed in the admission of the evidence objected to by defendants, we are still of the opinion that a preponderance of the testimony supports the findings of the Chancellor on this trial *de novo*. *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110.

The principal contention for reversal is that the evidence here reveals a state of facts involving incidents so isolated, disconnected and disassociated as not to warrant the issuance of a permanent injunction. Pursuant to this contention, defendants make objections to certain of the trial court's findings of fact which have already been set out. Typical of these is the assertion that the court found that the pick-up truck blocked one of the roads to the batch plant in Finding No. 1 when, in fact, the truck only "partially" blocked said road. Other objections involve primarily the action of the court in accepting as credible the testimony of plaintiff's witnesses on certain issues when such evidence was to some extent contradicted by witnesses for the defendants. It would unduly prolong this opinion to set out these various conflicts in the evidence. It is sufficient to say that the Chancellor was in a more favorable position than this court to judge credibility, and after careful considera-

tion of all the evidence we think a clear preponderance thereof supports the court's findings of fact.

It is well settled by the decisions of the U. S. Supreme Court and our own cases that peaceful picketing is allowed under the constitutional guaranty of freedom of speech in order that a union may acquaint the public with the fact and nature of a labor dispute and solicit public support in any lawful manner to prevail in the controversy. *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *Local Union No. 313* v. *Stathakis,* 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894. It is equally settled that the law does not countenance the use of threats, intimidation, force, coercion, violence or other unlawful means, however laudable the motive or purpose of the strikers. *Riggs* v. *Tucker Duck & Rubber Company,* 196 Ark. 571, 119 S. W. 2d 507; 31 Am. Jur., Labor, § 240. In this connection the U. S. Supreme Court has held that the state still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." *Allen-Bradley Local, W.E.R.M.W.* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154.

Although the object of a strike may be both lawful and laudable, judicial restraint is permissible where the strike is attended with real or threatened violence, force, intimidation or conduct otherwise unlawful or oppressive, such as mass picketing or even peaceful picketing where enmeshed with violent conduct. Thus peaceful picketing may be enjoined without violating the right of free speech where previous unisolated acts of violence by members of the picketing union or their sympathizers give to continued picketing, even though peacefully carried on, a coercive effect. See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200, where the court held that picketing which in itself is peaceful may be coercive when set in a background of violence. The court said that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an

instrument of force. Such utterance was not meant to be sheltered by the Constitution."

In *Local Union No. 858 Hotel and Restaurant Employees Int'l Alliance* v. *Jiannas,* 211 Ark. 352, 200 S. W. 2d 763, we held that acts of violence and coercion were committed with such systematic persistence as to warrant a finding that they would be continued unless restrained where pickets walked very close to the door and on several occasions had to be pushed aside by customers to gain entrance to the restaurant being picketed, and on one occasion a customer was knocked down with a pair of brass knucks and severely injured. In that case the following statement from 31 Am. Jur., Labor, § 240, supra, was approved:

"Force threatened is the equivalent of force exercised. In many cases, it has been observed, it is difficult to draw the line of demarcation between intimidation and inoffensive persuasion. But even when the acts of the strikers, although unaccompanied by violence or threats, are such annoyance to others as to amount to coercion or intimidation they are unlawful."

Perhaps the rationale of the result reached in the *Meadowmoor Dairies* and *Jiannas* cases, supra, is best stated by the annotator in 132 A. L. R. 1221 as follows:

"The reason most frequently advanced by the courts in justification of the blanket injunction against all picketing, where there has been past violence or other unlawful conduct, is that an injunction of such breadth is necessary to prevent future excesses and coercion, which, in the light of the past conduct, may reasonably be anticipated."

Numerous cases are cited in support of the statement.

It is true that the threats and acts of intimidation and violence in the case at bar are not as great as those involved in the *Meadowmoor* and *Riggs* cases, supra, but they are greater in degree than those involved in the *Stathakis* and *Jiannas* cases, supra, and the cases of *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293, 64

S. Ct. 126, 88 L. Ed. 58, and *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154, upon which defendants rely. The Chancellor found that the threats and acts of intimidation, violence and property damage reflected by the proof here were not isolated and disassociated incidents, but were enmeshed in, and inseparably connected with, the picketing. A preponderance of the evidence supports this conclusion.

As to defendants' contention that the trial court erred in refusing to modify the injunction to permit peaceful picketing, what we said in the recent case of *Self* v. *Taylor,* 217 Ark. 953, 964, 235 S. W. 2d 45, is applicable here:

"One final point must be mentioned. Appellants argue that the court went too far in making the injunction 'Permanent.' In answer to a similar contention in *Milk Wagon Drivers Union* v. *Meadowmoor Co.,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, the U. S. Supreme Court said: (at p. 298) 'The injunction which we sustain is 'permanent' only for the temporary period for which it may last. . . . 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."

If and when defendants are able to show the trial court that peaceful picketing can be carried on by the union in such manner as to avoid the likelihood of a repetition of the unlawfulness disclosed in this record, they are free to do so. Such showing had not been made at the time defendants sought a modification of the instant injunction.

Affirmed.

McFaddin, J., not participating.

DAVIS *v.* ST. JOE SCHOOL DISTRICT OF SEARCY COUNTY.

5-798 284 S. W. 2d 635

Opinion delivered December 12, 1955.

[redacted]

*Willis & Walker,* for appellant.

*N. J. Henley,* for appellee.

GEORGE ROSE SMITH, J. By this suit for a declaratory judgment the appellants as plaintiffs and the appellee as defendant seek an interpretation of a warranty deed by which Joe H. Dowdle and others conveyed two acres of ground to School District No. 33 of Searcy County. The appellants have succeeded to the interest of the grantors; the appellee has acquired the grantee's interest. The chancellor held that the deed conveyed the fee simple title, subject to a reservation of minerals. It is contended by the appellants that the deed conveyed only a defeasible estate and that the title has reverted to them.

In the deed in question, which was executed in 1935, the following language appears between the granting clause and the habendum:

"This land to be used for school purposes only.

"The intention of this instrument is to convey two acres of ground, with no easement, with all mineral rights reserved and to be used for school purposes only to school district No. 33 of Searcy County, Arkansas. The grantors are to receive for and in consideration of the above two acres, the plot of ground formerly used by the school, it being of like value and like size in area. For further description see Quitclaim Deed of even date."

It is stipulated that District No. 33 built a schoolhouse on the land, that the district was consolidated with the appellee in 1948, and that the property has not been used for school purposes since the consolidation. The appellants insist that the appellee's failure to devote the property to school purposes has effected a divestiture of title.

The chancellor was correct in his interpretation of the instrument. The question is whether this deed conveyed (*a*) a fee simple defeasible, which might be either a determinable fee or a fee simple on condition subsequent, or (*b*) the fee simple absolute, with a covenant binding the grantee to the specified use of the property. In the latter case a breach of the covenant might give rise to an action for damages but would not involve the extinguishment of the grantee's title. *Bain* v. *Parker,* 77 Ark. 168, 90 S. W. 1000.

At the outset it must be noticed that the deed before us does not contain language unmistakably describing either form of defeasible fee. The language customarily used is familiar enough. A determinable fee is ordinarily created by a provision that the grantee's estate is to continue "as long as" the property is used for a certain purpose or "until" a given event occurs, or by similar words limiting the duration of the estate. A fee on condition subsequent is most effectively described by an express declaration of the condition and by the further reservation of a right of re-entry upon condition broken. Jewell, The Distinction Between a Determinable Fee and a Fee Simple upon Condition Subsequent in Arkansas, 11 Ark. L. S. Bull. 3, 12; Rest., Property, § 44, Comment *l*, and § 45, Comment *j*. In the case at bar the grantors' failure to employ language unequivocally creating a defeasible fee is a circumstance indicating that the parties did not have such an estate in mind.

This tentative view is greatly strengthened by another factor in the case. The courts, in construing language that lies in the borderland between a clearly defined defeasible fee and a plainly stated covenant, have given weight to several external circumstances that may

indicate the parties' intent. See Rest., Property, § 44, Comment *m*, and § 45, Comment *p*. In the present case one of these factors—the ratio between the worth of the consideration and the value of the property—is especially persuasive. It is a sensible rule that as the worth of the consideration approaches the full market value of the property there is a correspondingly stronger inference that a defeasible fee was not intended. If a man conveys land to a school district purely as a gift and declares that it shall be used for school purposes only, it is reasonable to believe that he means to condition his generosity upon obedience to his wishes; for his benevolence is the only motive for the conveyance. But if the land is sold to the district for its full value it is not reasonable to believe that a similar restriction is intended to carry the severe penalty of a complete loss of title. In the second instance the consideration is probably the principal inducement for the transfer. Hence in the latter case the restrictive language is more fairly regarded as a covenant, upon which the remedy in damages is deemed adequate. Here the deed recites that District No. 33 exchanged for the tract in controversy a plot of like value. The fact that the grantors received full value for their conveyance confirms the conclusion that a covenant rather than a defeasible fee was intended.

Affirmed.

BRIDGFORTH *v.* VANDIVER.

5-770 284 S. W. 2d 623

Opinion delivered December 12, 1955.

*Jack P. West* and *E. J. Butler,* for appellant.

*Mann & McCulloch,* for appellee.

PAUL WARD, Associate Justice. This action was instituted by appellants, Blanche Bridgforth and [her husband] Otto R. Bridgforth, against appellee, Francis Vandiver, to recover damages for alleged injuries to Mrs. Bridgforth resulting from an automobile collision caused, allegedly, by the negligence of appellee.

Appellee pleaded contributory negligence on the part of Mrs. Bridgforth, the driver of one of the vehicles. The cause was submitted to the jury upon instructions which are not questioned on this appeal, and a verdict was returned in favor of appellee. As recognized by appellants this court would not be justified, in the situation outlined above, in setting aside the verdict of the jury unless it is shown by the record that there is no substantial evidence to support the jury in a finding that appellee was not negligent and also that there is no substantial evidence in the record to support the jury in a finding that Mrs. Bridgforth was contributorily negligent. In other words, if we find from the record substantial evidence from which the jury might have found that appellee was not negligent or if we find substantial evidence from which the jury might have found that Mrs. Bridgforth was guilty of contributory negligence, then it is our duty, under well recognized rules, to affirm the judgment of the lower court.

The accident involved here took place on January 6, 1954, around 5:00 P. M. at the intersection of North Rosser Street and Garland Street in the City of Forrest City, Arkansas. North Rosser Street is 36 feet wide and runs north and south while Garland Street is 30 feet wide and runs east and west. There are two stop signs on

Garland Street— one at the northeast corner of the intersection and one at the southwest corner of the intersection. The location described is near the business district and there is a building at or near the corner of each block adjacent to the intersection. At the time of the accident it appears that automobiles were parked on the west side of North Rosser Street near the intersection on the north side thereof, and also cars parked on the north side of Garland Street near the intersection on the west side thereof. Mrs. Bridgforth was driving her husband's car south on North Rosser Street and appellee was driving a pickup truck east on Garland Street, each vehicle being on the proper side of the street. When the front end of appellee's pickup truck was about half way between the center line and the west line of North Rosser Street it was hit by or collided with the front end of the automobile being driven by Mrs. Bridgforth. Appellants' witness stated that the automobile traveled 20 feet into the intersection and appellee's pickup truck traveled 10 feet into the intersection when the collision occurred. After the collision appellee's pickup truck came to a stop on the east side of North Rosser Street and the automobile traveled across North Rosser Street, hit the curb at the southeast corner of the intersection and came to rest about the middle of Garland Street—a distance of approximately 90 feet from the place of the collision.

Mrs. Bridgforth and the appellee were the only eye witnesses to the accident. Mrs. Bridgforth states that she was traveling about 25 MPH when she approached the intersection, that when she was about 50 feet from the intersection she looked to the right and saw no one approaching along Garland Street from the west, and that when she was about two-thirds of the way across the intersection her car and appellee's truck collided, and; that when she did see appellee's truck coming into the intersection she tried to turn her wheel just as the pickup truck and car collided, and her car was knocked out of her control. She also stated that there was a 30 mile speed limit sign on North Rosser Street.

Appellee testified that when he came close to the intersection he slowed his truck down and shifted gears but that he did not come to a complete stop as he did not think it was necessary; that he looked both ways and couldn't see any one coming in either direction; that after he got a few feet out into the intersection the right front of the automobile struck his truck square on the front axle, turning his truck slightly to the right; that when he stopped his truck on the east side of North Rosser Street the automobile had already hit the telephone pole across the intersection. He stated that he was going about 25 MPH when he was in the middle of the block before he slowed down for the intersection and that he did not dash out in front of Mrs. Bridgforth. He also states that he thinks he got into the intersection first and that when he first saw the automobile it was only 6 or 8 feet away.

The above factual situation, we think, is sufficient to present a jury question. After a careful consideration we have concluded that there was substantial evidence from which the jury might have found that Mrs. Bridgforth was driving at a careless rate of speed commensurate with the possibilities of danger lurking at the particular intersection she was approaching. The jury might have believed that Mrs. Bridgforth could not have had a clear view of cars approaching the intersection from the west on Garland Street due to the fact that parked cars might have obstructed her view and consequently that she was under the duty of keeping her car under control better than she did. This possible view is strengthened by the fact that her car traveled some 90 feet after the collision. Likewise the jury had a right to conclude that appellee was telling the truth about the speed of his pickup truck since he brought it to a stop within such a short distance.

This court has heretofore had occasion to pass upon questions similar to the one presented here where the evidence of negligence was slight and in these cases we have announced rules which we think are applicable here. We have of course many times stated that this court will not

disturb the verdict of a jury if it is supported by substantial evidence.

In the case of *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689, a similar close question was considered, and the court said: "It may be that it is improbable that the injury occurred in the instant case as stated by the appellee but it is not physically impossible." And again it was there stated: "The fact that the appellate court would have reached a different conclusion had the judges thereof sat on the jury, or that they are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of the verdict based on conflicting evidence." In the case of *Jonesboro Coca-Cola Bottling Company* v. *Holt,* 194 Ark. 992, 110 S. W. 2d 535, it was stated that the credibility of witnesses and the weight to be given their testimony were questions for the jury. In the case of *Arkmo Lumber Company* v. *Luckett,* 201 Ark. 140, 143 S. W. 2d 1107, it was stated that: "Substantial evidence does not necessarily mean direct evidence. A fact may be proved by circumstances," and it was also there stated that if there is substantial evidence to support a verdict of the jury this court will not upset it although it may appear to us it is against the preponderance of the evidence. In the case of *Ocker* v. *Nix,* 202 Ark. 1064, 155 S. W. 2d 58, the court made an announcement, at page 1067 of the Arkansas Reports, which, in reverse, we think is applicable here. In discussing this question the court said: "In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony but this is as far as the record authorizes us to go. It cannot be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature."

And so in this case, while we might not agree with the conclusion reached by the jury, we cannot say that this conclusion is not supported by substantial evidence as we have many times defined that phrase. Here the physical facts and circumstances not only do not belie

the jury's verdict but to some extent at least they support it.

Appellants specifically call attention to Ark. Stats., § 75-623(b) which in effect provides that where a driver encounters a stop sign at an intersection he must proceed cautiously and yield to other vehicles not so obligated to stop. Violation of this statute however, if it was violated, did not constitute negligence but was only evidence of negligence to be considered by the jury. See *Rogers* v. *Stillman,* 223 Ark. 779, 268 S. W. 2d 614. Not only is this true but it would have been necessary for the jury to find such violation to be the proximate cause of the collision. See *Mays* v. *Ritchie Grocer Co.,* 177 Ark. 35, 5 S. W. 2d 728. We must of course assume that the jury did consider these features of the case if they were properly submitted by instructions, and if they were not appellants are now in no position to object.

Affirmed.

Justices George Rose Smith and Robinson concur.

George Rose Smith, J., concurring. This case, involving an appeal by the plaintiff after a verdict for the defendant, is not really one calling for an application of the substantial evidence rule. That rule is properly used as a test only for the plaintiff's evidence, either upon an appeal by the defendant after a verdict for the plaintiff or upon an appeal by the plaintiff after the trial judge has directed a verdict for the defendant. The rule is applicable to the defendant's evidence only in those instances in which by his pleading he assumes the burden of proof and thus in effect becomes the plaintiff.

Of course the reason for this difference is that the plaintiff alone has what Wigmore aptly describes as "the risk of non-persuasion." Wigmore, Evidence, § 2487. The plaintiff must introduce substantial evidence to establish his cause of action, else he is not entitled to have the matter submitted to the jury. But no similar burden rests upon the defendant. Unlike the plaintiff, the defendant is free to offer no evidence at all, and there is

still a question for the jury except in those rare cases in which the plaintiff's proof involves no question of credibility and so overwhelmingly establishes his cause of action that no fairminded man could fail to be persuaded by it—in short, when the proof is so conclusive that the court would be justified in directing a verdict for the plaintiff.

There is much support for the premise that it is never proper for the trial judge to direct a verdict for the plaintiff in a case like this one, involving an issue of negligence, since the standard of conduct to be expected of a reasonably prudent man is peculiarly a matter for the jury. But even if we accept the view that the trial judge can sometimes direct such a verdict without encroaching upon the jury's province, this is plainly not a case of that kind. The plaintiff's version of the accident depends solely upon her own testimony, which presents an issue of credibility for the jury. The defendant was not required to offer any proof whatever, much less any substantial evidence; the plaintiff's testimony itself presented a jury question.

The majority, in their search for substantial evidence, overlook the fact that this court ordinarily reviews the rulings of the trial court rather than the conclusions of the jury. Whenever the substantial evidence rule comes into play the reversible error lies in the trial court's action in submitting or refusing to submit the case to the jury. In the case at bar the trial judge allowed the case to go to the jury, which found for the defendant. Thus to prevail upon this appeal the plaintiff must show that the court was wrong in submitting the issues to the jury —in other words, that the court should have directed a verdict for the plaintiff. It is only necessary to state the facts in order to show that such a contention is without merit. I write this concurring opinion only because it seems to me that the majority opinion tends to obscure what is really a basic principle in the appellate review of jury trials.

5-859 284 S. W. 2d 681

Opinion delivered December 12, 1955.

*Robert L. Tipton,* for appellant.

*Bailey, Warren & Bullion,* for appellee.

*McMath, Leatherman & Woods,* for intervenors.

PAUL WARD, Associate Justice. This appeal raises the question of the constitutionality of Section 2 of Act 86 of 1937, said § 2 being Ark. Stats., § 81-312. This

question comes to us in the manner and upon the facts and pleadings hereinafter set out.

The real parties in interest in this litigation are the Capitol Transit Company, an Arkansas Corporation owning the bus franchise in Greater Little Rock, and 158 of its former employees [members of Division 704 of the Amalgamated Union and intervenors] who left the employment because of a strike. On September 26, 1955 said employees, through their attorneys, filed individual claims before the Arkansas Department of Labor alleging that certain wages were due them from the said Transit Company. This petition was filed pursuant to said § 81-312 of the Ark. Stats. and attached thereto was a statement containing the names of each of the claimants showing the amount alleged to be due to each. The Commissioner of Labor, the appellant herein, set Monday October 10, 1955 at 10:00 A. M. for a hearing on said petition and gave notice thereof to the attorney for the Transit Company.

On October 7, 1955 the Transit Company filed in the Second Division of the Chancery Court of Pulaski County a petition asking said court to restrain and enjoin the said Labor Commissioner from proceeding under Ark. Stats., § 81-312, to determine the claims of the said 158 former employees. On the same date the appellee herein, the Judge of the said Chancery Court, issued an order restraining appellant from proceeding further in determining the rights of said employees on their claims against the Transit Company.

Thereupon appellant filed in this court a petition for a Writ of Prohibition directed to appellee.

*Petition treated as an appeal.* Since both parties have orally expressed to this court the desire that we pass upon the constitutionality of the statute involved as above noted regardless of any procedural matters involved we have chosen to treat the petition for a Writ of Prohibition as an appeal from the order of the Chancery Court. We are also authorized to do this under the

holdings in *Boyd* v. *Dodge, Chancellor,* 217 Ark. 919, 234 S. W. 2d 204. This procedure makes it unnecessary to consider the first argument in appellee's brief that "Prohibition does not lie."

*Appellee's contentions.* Appellee's over all contention is that the statute involved violates the Constitution of the State of Arkansas. In support of this contention appellee directs our attention to different provisions of the statute and to numerous reasons for that contention. It is urged that the statute violates Article 7, § 1 and Article 7, § 40 of the Arkansas Constitution; that the Legislature cannot delegate judicial power; that the statute denies the right of trial by jury; that the statute is vague, indefinite and inoperative, and; that the statute creates a presumption and provides for free legal services.

Before we discuss the above questions it is proper to point out the well established rule of construction of legislative acts to the effect that such acts are presumed to be constitutional. This rule which has been many times announced by this court is very well stated in *Baratti* v. *Koser Gin Co.,* 206 Ark. 813, 177 S. W. 2d 750. From page 816 of the Arkansas Reports we quote: "This court has always held that, before it may strike down an act of the Legislature on the ground of unconstitutionality, it must clearly appear that the act is at variance with the constitution, and that an act of the Legislature is presumed to be constitutional, and that any doubt on the question of constitutionality must be resolved in favor of the act."

Article 7, § 1 of the constitution vests the judicial power of the State in the Supreme Court, the Circuit Court, the County and Probate Courts and in Justices of the Peace. Section 40 of the same article provides generally that the jurisdiction in matters of contract is vested in Justices of the Peace Courts where the amounts involved are limited. It is appellee's contention that the statute under consideration is an attempt by the Legislature to invest an executive officer with judicial powers. It is true that appellant, the Labor Commis-

sioner, is an executive officer functioning in the Arkansas Department of Labor. The vital question presented therefore is: Are the duties performed by the Labor Commissioner under Ark. Stats., § 81-312, the exercise of judicial functions in violation of the constitutional prohibitions above mentioned? If the answer to the above question is in the negative it must necessarily follow that the statute does not violate those portions of the constitution above mentioned and that it does not constitute a delegation of judicial powers.

After careful consideration we have concluded that Ark. Stats., § 81-312, is not an unconstitutional delegation of judicial power by the Legislature. This section of the statute reads:

"From and after the passage of this act [§§ 81-311-81-315], upon *application* of either employer or employee, the Commissioner of Labor, or any person authorized by the Commissioner, shall have authority to inquire into, hear, and decide disputes arising from wages earned, and shall allow or reject any deduction from such wages. *Upon motion of either employer or employee,* the amount found to be due may be paid in the presence of the commissioner or person designated by him, [and] after final hearing by the commissioner or person appointed by him, he shall file in the office of the Bureau of Labor and Statistics [Department of Labor] a copy of findings and facts and his award. The amount of the award of the Commissioner of Labor shall be *presumed* to be the amount of wages, if any, due and unpaid to the employee. *If either employer or employee shall fail or refuse to accept the findings of the commissioner, then either shall have the right to proceed at law as now or hereinafter provided;* or if the claim is meritorious, and if within the discretion of the Commissioner the claimant's lack of financial ability entitles him to the services of the Bureau of Labor and Statistics [Department of Labor], the Commissioner of Labor in the name of the State of Arkansas for the use of such claimant *may institute action in any court of competent jurisdiction,* without paying costs or giving bond for costs, and shall be entitled to all remedies

now or hereinafter available to litigants in the prosecution of actions, and their enforcement, if successful, without paying costs or giving bond for costs; provided that nothing herein shall be construed so as to relieve an unsuccessful defendant from paying costs.'' [emphasis supplied]

Unlike appellee we cannot see in the above statute anything that deprives either an employee or an employer of his constitutional rights. In the first place the statute is not compulsory in that one of the parties must make an application to the Commissioner of Labor before that officer has any power to act. In the second place, once the Commissioner has made a finding, the losing party has a right to refuse to accept the Commissioner's finding. After such refusal neither party is bound and each party has a right to pursue his remedy in a court of law or, as the statute says ''they shall have the right to proceed at law as now or hereafter provided.'' It appears to us that actually the statute simply provides a forum in which the employer and employee may settle their differences if they so desire. Under this interpretation of the act it has been urged that the act is meaningless and useless, but we do not think so. Through the many years that this statute has been in existence it is not unreasonable to suppose that many small claims have been adjusted to the satisfaction of all concerned without having had to resort to the trouble and expense of court procedure which would otherwise have been necessary.

It is appellee's contention, and we agree, that notwithstanding the fact the claimants here are members of a labor organization they are in fact suing on a contract of employment which they had with the Transit Company. It is then stated that a suit on a contract is a common law action in the nature of *assumpsit* and that they are therefore entitled under the constitution to a trial by jury, and that the statute in question denies them that right. This contention is fully answered by what we have heretofore said. As pointed out either side, the employee or the employer, has the right to re-

sort to a regularly constituted judicial tribunal if it is so desired. In other words both parties have every right to a trial by jury under the provisions of the questioned statute that they had before the statute was enacted.

It is urged by appellee that the statute is unconstitutional because it is vague and indefinite. The main point stressed here is that the statute sets out no clear and definite provisions for the taking of an appeal. In this connection is quoted a portion of the statute stating in effect that if either party refuses to accept the finding of the Commissioner then he shall have "the right to proceed at law as now or hereafter provided." We think appellee is in error in considering this language to purport to provide a method of appeal. As already pointed out, the statute contemplates no appeal but provides instead that in case either party does not agree with the finding of the Commissioner he has the right to institute an original action in a court of law.

It is again argued that the statute is unconstitutional because it provides that the Labor Commissioner may furnish free legal services if he finds that certain claimants are in need thereof. Article 2, § 18 of the Constitution is cited by appellee which provides that "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." It is also contended that the statute is unconstitutional because of the language stating that "the award of the Commissioner of Labor shall be presumed to be the amount of wages, if any, due and unpaid to the employee." The contention in this connection is that this language shows that the Commissioner does in fact make a judicial finding and that a finding by the Commissioner in favor of an employee places a burden upon the employer which he must overcome in a later trial of the case.

We find it unnecessary to pass upon the validity of these last two contentions on the part of appellee for the reason that no such questions have arisen so far in this

case. Since it is not necessary to pass on these questions we deem it expedient to wait until they may be properly raised in a trial court and properly presented and briefed in this court. Section 7 of said Act 86 contains a severance clause so that if any portion of the act is held unconstitutional it will not affect other provisions in the act if they constitute a reasonable and workable entity.

We find that a few other states, including California, Indiana, New Mexico, and New York, have statutes similar to the ones under consideration here, but we do not find the constitutionality of any of them has been challenged in any court. We have therefore been unable to find any legal precedent to guide us here, and none has been called to our attention by either party. In view of this, and giving effect to the presumption of constitutionality, we are unable to find anything in Ark. Stats., § 81-312, here challenged which justifies us in holding it unconstitutional.

We call attention to the fact that § 1 of Act 86 of 1937 [now Ark. Stats., § 81-311], limits the jurisdiction of the Labor Commissioner to amounts not exceeding $200.00, and also to the fact that a few of the claims presented to the Commissioner in this instance exceed that amount. It is obvious, we think, that the Commissioner has no jurisdiction over such excessive amounts and that they should be stricken if objected to by the Transit Company.

It follows from what we have said that the injunction order of the trial court was erroneously made and must be voided. To that end the cause is reversed.

Justice McFaddin concurs.

Justice Millwee dissents.

Minor W. Millwee, J., dissenting. It is with considerable reluctance that I register my disagreement with the views of the majority in this case. Unquestionably the Legislature was prompted by high motives and a commendable desire to protect and advance the interests of a

segment of society woefully in need of such assistance in the enactment of Act 86 in 1937 when this country was emerging from one of its most disastrous depressions. Also, the present Commissioner of Labor has demonstrated a more conscientious and determined effort to effectively execute the duties and responsibilities of his position than is ordinarily employed. However, we are not concerned with the wisdom and expediency of the act in question, and the sole issue here is power of the Legislature to enact it. In my humble opinion Sec. 2 of Act 86 provides for an unconstitutional delegation of judicial power to an executive officer in violation of one of the fundamental principles upon which our republican form of government rests.

By the use of italics, the majority has done a clever job of minimizing the importance of that part of Section 2 which specifically authorizes the Commissioner, or any person designated by him, "to inquire into, hear and decide [wage] disputes" and make an "award" based upon "findings and facts" made by him "after final hearing." Now it must be conceded that the power to hear and determine whether you owe me $200, or nothing at all, for wages earned is strictly a judicial function in that it involves the authority to determine purely legal and contractual rights between private parties.

Article 4 of the Arkansas Constitution declares that all governmental powers are divided among the legislative, executive and judicial departments, and each department is specifically prohibited from exercising any power belonging to either of the others except as expressly permitted in the Constitution. By Article 7 of the Constitution, judicial power is vested in the courts and the jurisdiction to hear and determine simple private contractual rights between individuals is vested exclusively in the circuit and justice of the peace courts, depending on the amount in controversy.

There are numerous situations in which it is not only necessary but entirely proper, in order that government may function, that an executive officer should be vested

with some judicial power. But it is only in those instances where such power is necessary to enable them to carry out their executive duties that this is true, unless such power is expressly granted in the Constitution. And this does not mean that an executive officer may usurp a purely judicial function which is exclusively vested by the people in the courts of this state. Nor does it lie within the power of the Legislature to change the nature of a simple judicial function by merely authorizing an executive officer to participate in its performance. Particularly should this be true where the executive agent clothed with such power is not required to be an attorney nor given the power to summon and swear witnesses or exercise other investigative power so essential to a proper performance of the judicial function.

While the precise issue presented here does not appear to have been decided, the New Hampshire Supreme Court in the famous case of *Re Opinion of the Justices,* 87 N. H. 492, 179 A. 344, 110 A. L. R. 819, held unconstitutional a very similar act which empowered an executive tribunal to hear and determine disputes arising out of motor vehicle accidents on the state's highways. After citing state constitutional provisions similar to our own, the court said: "In the connection between the departments some overlapping is permissible, and there is a region of authority, alternative and concurrent, the boundaries of which are fixed by no final rule. As a rule which meets some situations, when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto, but if the duty is primarily to decide questions of legal right between private parties, the function belongs to the judiciary. Courts of justice, in their popular sense, may not be set up and established in the executive organization. They pertain exclusively to the branch of the judiciary.

"Under this rule the grant or reservation of judicial review of the decisions of an administrative board does not change the character of the decisions. If they are of judicial nature, because performed in the exercise of the

strict judicial function, an undertaking to give authority to the courts to review them and to correct the board's errors of law does not validate the board's authority. An administrative board may proclaim only administrative judgments. If they may be judicially reviewed, the right to have them reviewed does not transform them into judicial judgments, although the review and action therein is judicial. But a valid administrative judgment has the same force of obligation and finality as a judicial one. The view sometimes adopted that the right of appeal to the courts, either in wide or limited measure, saves action of an executive board from a valid charge of judicial invasion is not considered to be sound in principle. Authority to correct its errors does not alter the character of its undertaking. 'The nature of the final act determines the nature of the previous inquiry.' *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, 29 S. Ct. 67, 70, 53 L. Ed. 150. . . .

"A public interest to set up in the executive department a court of justice does not warrant a violation of the constitutional order prohibiting it. However much the vesting of the control of private litigation in an administrative board may be thought to aid in the maintenance of some public policy, it is not permissible. It is as much forbidden as it is to require a court to take on executive functions. An administrative officer in the discharge of his duties may have occasion to interpret and apply a law in order to enforce it, but he can have no such occasion in order to determine the rights of private litigants, since he may not be constitutionally authorized to take jurisdiction in respect to them.

"The consent or willingness of the litigants to submit their disputes to the official or board is beside the point. The Constitution denying the power of the Legislature to confer jurisdiction, it may not be conferred by private authority . . ."

Under these fundamental principles so aptly stated by the New Hampshire court, it seems crystal clear that in any case where the power of an agency is one primarily

to hear and determine a simple question of contractual rights between private parties, the function is purely judicial and expressly delegated by the people to the courts. This seems to be the consensus of the authorities generally. 42 Am. Jur., Public Administrative Law, Sec. 60; 73 C. J. S., Public Administrative Bodies and Procedure, Sec. 47. See also, 36 Harvard L. Rev. 422. While the restrictive construction placed on the act by the majority renders it practically useless, still we are dealing with a basic issue of constitutional government, and if the Legislature may legally do what is done in Act 86, the encroachment on judicial power and the usurpation of authority by an executive bureaucracy might become both limitless and unbearable.

While injunctive relief ordinarily must await the exhaustion of the administrative remedy, such is not the case where the relief sought is against a statute that is unconstitutional and void on its face. 73 C. J. S., Public Administrative Bodies and Procedure, Sec. 45; *Shellnutt* v. *Ark. State Game & Fish Comm.*, 222 Ark. 25, 258 S. W. 2d 570. That is the situation here, and Sec. 2 of Act 86 is fundamentally invalid. It necessarily follows that the chancellor correctly issued the restraining order.

JOHNSON *v.* STATE.

4829 284 S. W. 2d 627

Opinion delivered December 12, 1955.

*Floyd Terral,* for appellant.

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

SAM ROBINSON, Associate Justice. This is a petition for a writ of certiorari. The petitioner was charged with the offense of possession of an unlawful amount of intoxicating liquor in a dry county. The information filed by the prosecuting attorney is as follows: "I, A. James Linder, Prosecuting Attorney within and for the Tenth Judicial Circuit of the State of Arkansas, of which Ashley County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant Clarence Johnson of the crime of possession of unlawful amount of intoxicating liquor, 5th offense, committed as follows, to-wit: The said defendant on the 30 day of April, 1955, in Ashley County, Arkansas, did unlawfully possess over the legal amount of intoxicating liquor, which was his fifth offense against the peace and dignity of the State of Arkansas." The information was filed on October 17, 1955, and three days later, on October 20, the defendant entered a plea of guilty and was sentenced by the court to serve five years in the penitentiary, two years of the sentence being suspended pending good behavior.

Ark. Stats., § 48-918, is as follows: "From and after the passage and approval of this act it shall be unlawful for any person, firm or corporation to possess in any County or part thereof in this State in which it is unlawful to manufacture, sell, barter, loan or give away intoxicating liquors, more than one [1] gallon of spirituous, vinous or malt liquors. And that such liquor or liquors so found in the possession of any person shall be confiscated by an Order of the Court of a competent

jurisdiction. The provisions of this act shall not apply to common carriers in transit through such county providing further that the provisions of this act shall not apply to licensed bonded dealers or individuals in transit, when said individuals are not residents of said dry County." Ark. Stats., § 48-919, provides: "Any person, firm, or corporation violating the provisions of this act shall be guilty of a misdemeanor and shall be fined not less than fifty dollars [$50.00], nor more than five hundred dollars [$500.00]."

It will be seen that the unlawful possession of intoxicating liquor in a dry county is a misdemeanor, and even though it may be the fifth offense, it is still not a felony. Petitioner is not charged with the offense of possessing liquor for sale. The court exceeded its jurisdiction in sentencing the defendant to the penitentiary on his plea of guilty of a misdemeanor. Certiorari is the proper remedy. *Reese* v. *Cannon,* 73 Ark. 604, 84 S. W. 793; *Ex Parte Goldsmith,* 87 Ark. 519, 113 S. W. 799; *Switzer* v. *Golden,* 224 Ark. 543, 274 S. W. 2d 769.

Since the punishment assessed by the trial court is greater than that provided by law the judgment will be quashed and a judgment entered for the maximum penalty provided by statute for the offense with which the defendant is charged. Ark. Stats., § 43-2308. The maximum penalty which may be assessed on the charge of possessing more than the legal amount of intoxicating liquor in a dry county is a fine of $500.00. Apparently the petitioner has been sent to the State Penitentiary and he should be given credit on the fine for any time he has served in prison. The mandate shall be issued immediately.

WOOLFOLK *v.* DAVIS.

5-763 285 S. W. 2d 321

Opinion delivered December 19, 1955.

[Rehearing denied January 23, 1956.]

*Moncrief & Moncrief,* for appellant.

*Botts & Botts,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellants, from a decree of the Arkansas Chancery Court, southern district. The decree was filed in the clerk's office on February 16, 1955, and the appeal has been properly filed in this court.

The chancellor, in his decree, made the following awards: to the appellee, W. H. Davis, an 8/27th interest in all moneys derived from the sale of real property, and an 8/27th interest in the real property in litigation; to the other appellees, intervenors below, an 2/27th interest in all moneys derived from the sale of real property, and a 2/27th interest in the real property in litigation; to the appellants, the widow and the only heir of R. M. Davis, deceased, a 17/27th interest in the real property in litigation. The chancellor also directed that a master be appointed by the court to determine the proportionate amount of money owed to one another by these co-tenants as rents and profits, taxes, repairs and improvements on the property and that the cause be continued for the purpose of procuring a report of the master.

The appellants contend that Jane Davis Woolfolk, the only heir of R. M. Davis, deceased, is the owner in fee of all the property involved in the instant suit by virtue of the following reasons: by reason of a decree of the Arkansas Chancery Court, Southern district, dated September 24, 1945, in a case wherein Ham Davis was plaintiff and the parties to this suit were defendants, in which the court confirmed title to the property in appellant, Jane Woolfolk; that appellee's suit is a collateral attack on the decree and that said decree is not void but is res judicata; that the appellees are barred by the seven year, the five year, and the two year statutes of limitation; that the court erred in overruling the claim of title by Jane Woolfolk, by reason of her deed from Alberta Davis, widow of T. J. Davis, Jr., deceased, and

also by reason of her deeds from Myrtle McKenzie, the commissioner of State lands and the sewer improvement district of the City of DeWitt, Arkansas; that the court erred in holding appellant liable for rents and profits and in awarding any of the property to appellees.

The facts in this case show that T. J. Davis, Sr. was the owner of the property involved in this action at the time of his death, on March 8, 1911. Davis died intestate leaving surviving him his widow, Jennie Davis, and his five children, Ham A. Davis, W. H. Davis, T. J. Davis, Jr., R. M. Davis and Myrtle Davis McKenzie, who were all of age and his sole heirs at law. There was no administration on the estate of T. J. Davis, Sr., and the family made a division of this property among themselves. W. H. Davis, Ham Davis and Myrtle Davis McKenzie were each deeded separate tracts of property as their respective shares in the estate, and on February 5, 1913, the said W. H. Davis, Ham Davis and Myrtle Davis McKenzie joined in a deed conveying the property involved in this litigation, and other property, to Jennie Davis, T. J. Davis, Jr., and R. M. Davis, in consideration for certain property which they all held as tenants in common. This deed recited the relationship of the parties and contained a warranty clause to warrant and defend the title to the land conveyed to the grantees "against the claims of all persons whomsoever claiming the same by, through, or under us, but none other."

On September 1, 1914, T. J. Davis, Jr. and R. M. Davis conveyed by deed to Jennie Davis, their two-thirds interest in said lands and on September 15, 1915, Jennie Davis, secured a decree of the proper court in which the absolute fee simple title to said lands was confirmed in her. On January 3, 1918, Jennie Davis conveyed by deed, to T. J. Davis, Jr. and R. M. Davis, a two-thirds interest in said lands. At this point, Jennie Davis, T. J. Davis, Jr. and R. M. Davis, each owned an undivided one-third interest in said lands as tenants in common. They occupied, controlled and used said lands together, until December 7, 1932, when Jennie Davis died intestate, leaving surviving her the five children, hereinabove

named, as her sole heirs. No administration was had on her estate. Thereafter, T. J. Davis, Jr. and R. M. Davis used said lands until July 6, 1935, when T. J. Davis Jr. died intestate. There was no administration of his estate and he left surviving him his widow, Alberta Davis. He left no descendants and his only heirs were his sister and three brothers, who are hereinabove named. The family had a settlement as to the property and the heirs all joined in a deed, conveying to the widow, Alberta Davis, certain common property (not here involved) as her dower interest in her husband's estate. Alberta Davis executed a deed conveying the land here involved to Jane Davis Woolfolk, one of the appellants herein and the daughter of R. M. Davis, deceased.

R. M. Davis continued to live on the old home place with his wife, daughter and brother, Ham Davis, who was unmarried. R. M. Davis continued to control the property, collected rents and made improvements thereon. On February 11, 1938, R. M. Davis made a deal with his sister Myrtle McKenzie (nee Myrtle Davis) whereby, he conveyed to her common property or the proceeds from the common property in return for her interest in the estate of Jennie Davis and T. J. Davis, Jr., both deceased. R. M. Davis had the deed made to his daughter, Jane Davis Woolfolk, one of the appellants herein. Jane Davis Woolfolk does not claim to have paid Myrtle McKenzie any consideration for this deed.

R. M. Davis continued to manage said property until January 25, 1942, when he died intestate. There was no administration of his estate. His widow, Helen Davis, has continued to collect rents, make repairs and pay taxes on the property, since her husband's death. She carried on this business through a bank account in the name of "R. M. Davis, agent." Both she and her daughter now contend that she was acting as agent for her daughter, Jane Woolfolk, and that Jane permitted her to use such of the money as she needed. In January, 1944, Ham Davis, while still living in the family house with the appellants, filed a suit against the appellants

and W. H. Davis and Myrtle McKenzie, in which he sought an accounting and a partition of the real estate herein involved.

On November 3, 1944, Myrtle McKenzie died intestate and no administration was had on her estate. She left as her only heirs, the appellees, Jean Black, Pattie Martin, Tom McKenzie, Danna Jean Pond and Paula Irene Campany, who were the intervenors in the trial of this cause. Ham Davis died intestate on April 6, 1945, while his suit for an accounting and partition of the property was still pending in the court below. The cause was never properly revived against the heirs of Myrtle McKenzie and the cause was never properly revived by the heirs of Ham Davis. Jane Woolfolk filed an answer in the Ham Davis suit and claimed the fee simple title to all the land in question, by reason of the tax deeds and other deeds, as well as being the sole and only heir of R. M. Davis, deceased. Her answer was set up as a defense to the Ham Davis complaint and she prayed that he take nothing by reason thereof. Her answer was not made a cross-complaint and no notice was served on any of the other defendants in that suit, that she was claiming the title to the property by way of her answer.

An attempt was made to revive the action on the Ham Davis suit, on May 21, 1945, by the plaintiff's attorney calling the court's attention to the plaintiff's death. All of the heirs of Ham Davis were named as defendants in the Ham Davis complaint. None of his heirs, except Jane Woolfolk, ever appeared in court to have the cause revived or to take any other steps in the case. None of the others had any notice of the proceedings, as required by law. On September 24, 1945, the plaintiff's complaint in the Ham Davis suit was dismissed and a decree was issued confirming the title to the land in appellant, Jane Woolfolk.

During his lifetime, R. M. Davis had sold several tracts of this land and in each case the appellee, W. H. Davis, joined in the deeds to convey this property to

purchasers. In the Spring of 1947, a Mr. Graves started improving a town lot in DeWitt, which was a part of the land in litigation. W. H. Davis made an inquiry into the matter and discovered that Jane Woolfolk had sold the lot to Graves on August 3, 1946. Upon confronting Jane Woolfolk with this matter, he was told that the property was hers and she could dispose of it as she pleased. Mr. Davis contends that this was the first knowledge he had that she was claiming title to the property. On May 13, 1950, the appellee, W. H. Davis, filed the instant suit against the appellants, setting up his claim to the property and asking for an accounting and partition of the lands in question. Appellants filed an answer, claiming title to the property. On July 3, 1952, the appellee, heirs of Myrtle McKenzie, filed an intervention in the action, claiming an interest in the property, as heirs of Ham Davis.

The appellants' contention that the judgment in the Ham Davis suit, rendered September 24, 1945, is res judicata, cannot be sustained. It is unnecessary to determine whether the attack by appellees on this judgment, is a direct or collateral attack. The judgment is void on the face of the record. It is a well settled principle that the record in a case embraces the successive judicial steps which have been taken and are necessary to show the jurisdiction of the court in the case. The necessary records for this purpose are the pleadings and exhibits thereto; the process or summons with proof of service thereof, and the record made by the court, such as intermediate orders and the final judgment.

The record here shows that there is a total lack of service upon any of the appellees; no pleadings either by complaint or cross-complaint to authorize the judgment. A judgment rendered without notice to the parties affected is void under our statute, Ark. Stats., 1947, § 29-107.

The appellees herein are barred from claiming any interest in the property as heirs of Ham Davis. At the

time of his death, Ham Davis had pending a suit against the appellants and appellees for the purpose of having his rights determined in the land here involved, and to have such rights enforced by the court. The appellants were in possession of the land and the suit of Ham Davis was to determine his interest in the property as against appellants. When Ham Davis died the suit abated, subject to the right of his heirs to have the action revived within one year from the next session of court after his death. They failed to have the cause revived within the time and manner provided by Ark. Stats., 1947, § 27-1012 to 27-1017.

The failure of the appellees to revive the action is a complete bar to any claim the appellees might have as heirs of Ham Davis in the property herein involved. See *Anglin* v. *Cravens,* 76 Ark. 122, 88 S. W. 833; *Keffer* v. *Stuart, Admr.,* 127 Ark. 498, 193 S. W. 83. The trial court erred in awarding to appellees that interest in the land which they would have taken as heirs of Ham Davis, had it not been for the pendency of the Ham Davis suit. The only interest claimed by the intervenors, as heirs of Myrtle McKenzie, deceased, was such interest as they might have as heirs of Ham Davis. Their intervention should have been dismissed by the court. This result also reduces the interest claimed by appellee, W. H. Davis. His interest would be reduced by 2/27th, which would leave his remaining interest as a 2/9th interest in the property here involved.

The trial court was correct in its findings and decree, except as to the heirs of Ham Davis. Appellee, W. H. Davis, insists that he received his first notice of Jane Woolfolk's claim to be absolute owner of the lands involved, in April of 1947. However, the appellants contend that W. H. Davis is bound by the public record of the answer filed in 1944, in the Ham Davis suit. The instant suit was filed in 1950 and is within seven years of the date the answer was filed. During the lifetime of R. M. Davis, the appellee, W. H. Davis, frequently talked to R. M. Davis about the affairs of

the common property. When a sale was made of any of the property, W. H. Davis joined with R. M. Davis and others in conveying such property. Thus, R. M. Davis recognized the interest that W. H. Davis held in the common property.

Possession of property, by one tenant in common is prima facie the possession of all tenants in common. The sole enjoyment of rents and profits by one tenant does not necessarily amount to a disseizin as to the other tenants in common. For possession by one tenant to be adverse to his co-tenants, the knowledge of such adverse claim must be brought home to the co-tenants, either directly or by such acts that notice may be presumed. R. M. Davis had the greater interest in this property and he had managed and operated it since the death of his mother in 1932. He had also managed it since the death of his brother, T. J. Davis, Jr., in 1935. There was never any disagreement between R. M. Davis and appellee, W. H. Davis. In fact there was no disagreement between said appellee and appellants, until sometime in April of 1947. Adverse possession is no defense in this case. *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690; *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958; *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809.

The appellant, Jane Woolfolk, claims title to the land by reason of certain deeds made to her by the State Land Commissioner and the City Improvement District of DeWitt. The purchases from these tax sales were made by R. M. Davis, at a time when he was one of the co-tenants and was in possession of the property. He was managing the property and collecting the rents and profits. It was his duty to pay the taxes out of these rents and profits. His daughter, Jane, was living with him in the home as a member of his household. The purchase of the tax title, under the proof adduced in this case, amounted only to the payment of the taxes and no title passed to the grantee. *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579; *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858; *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W.

2d 809; *Zachery* v. *Warmack,* 213 Ark. 808, 212 S. W. 2d 706.

The deed from Alberta Davis to appellee, Jane Woolfolk, does not strengthen Jane Woolfolk's title. The heirs of T. J. Davis, Jr., including the appellee, W. H. Davis, by agreement with Alberta Davis, conveyed to her certain of the common property as her dower. The heirs of T. J. Davis, Jr. took title to the remaining land by descent. The deed from Myrtle McKenzie to Jane Woolfolk, which was made at the request of R. M. Davis, was for the benefit of all the owners of the property. Common property was given Myrtle for her interest in the estate and the transfer of her interest was for the good of all the owners.

The appellants contend that appellee, W. H. Davis, by his deed to his mother and two brothers after his fathers death, conveyed the whole and with a warranty of title and that his after acquired title by inheritance inures to the appellants. It will be noted that the warranty in the deed was a special warranty and the grantors agreed to defend the title only against all claims by, through or under the grantors, and none others. It will also be noted the conveyance was to the grantees and their heirs. Appellee, W. H. Davis, was one of the five heirs of Jennie Davis and one of four heirs of T. J. Davis, Jr. The interest that appellee acquired after the conveyance, was as heir to the grantees or their heirs. There was nothing in the conveyance by which appellee waived his future right of inheritance from the grantees.

The deed in question was made to partition the estate of the deceased husband and father. No one contests the fact that the grantees failed in any way to get the complete title to the property, at the time the deed was made to them. There is no claim that the grantors did not have a legal estate in said lands. It is perfectly clear that all the parties to the deed knew the interest owned by the other, and knew that by said deed, the grantees would become the owners in fee simple of the

lands. There was no outstanding title to be acquired by the grantors that would inure to the grantees.

The decree of the trial court is affirmed, except as to the interest in the property claimed by appellees, as heirs of Ham Davis. The intervention of the intervenors is dismissed and appellee, W. H. Davis is declared the owner of a 2/9th interest in the property. The appellant, Jane Davis Woolfolk, is declared the owner of a 7/9th interest in the property, subject to the rights of her mother, Helen Davis, who is the widow of R. M. Davis. The case is affirmed in part and is reversed and remanded in part, as herein set out with instruction to proceed according to law and not inconsistent with this opinion. The costs are ordered paid as follows: by appellants 60% of the cost; by appellee W. H. Davis 20% of the cost; by appellees, the heirs of Myrtle McKenzie 20% of the cost.

METROPOLITAN LIFE INS. CO. *v.* KENDALL.

5-804 284 S. W. 2d 863

Opinion delivered December 19, 1955.

*Daily & Woods,* for appellant.

*Wiley W. Bean,* for appellee.

J. SEABORN HOLT, Associate Justice. Blakley A. Kendall, the son of appellees, made application to appellant, Metropolitan Life Insurance Company, in Missouri, April 14, 1953, for life insurance in the amount of $5,000. On May 20, 1953 the policy was issued to him in Missouri on his payment of premium of $94.75. Thereafter, December 31, 1953, Blakley A. Kendall died of malignant tumor of the liver. Appellees, his named beneficiaries, filed the present suit to recover on the policy. Appellant denied liability and specifically pleaded as a defense that the insured in his signed application, which was a part of the insurance contract, knowingly made false answers to material questions propounded to him and thereby induced appellant to issue the policy; when in fact, Blakley A. Kendall was not insurable when the policy was delivered to him. On a trial, a jury having been waived by agreement, the court found in favor of appellees for the face of the policy, $5,000, and entered judgment accordingly. This appeal followed.

"The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself, while the lex fori controls all that is connected merely with the remedy. . . . It is well settled in this State that, when a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of this State regulating the remedy and not according to the remedy of the State where the contract was made." *St. Louis-San Francisco Railway Co.* v. *Cox,* 171 Ark. 103, 283 S. W. 31.

For reversal appellant relied on but one point, that: "The trial court erred in excluding from evidence the appellant's offered depositions of Drs. Eber Simpson, J. B. Guccione, Louis F. Stephens, Charles Sparks and Clarence A. Bishop and Messrs. Eugene F. Nolan and D. W. Orr, as being privileged communications," or, as stated by appellees: "Were the depositions of the attending physicians and surgeons, and the records of the

hospitals, competent evidence at the trial in the lower court? Or, did appellees waive the privileged communications when they executed two authorizations, giving appellant the right to secure the medical history of appellees' deceased son?"

The application, which became part of the insurance contract, contained this provision: "The foregoing statements and answers are true and complete. It is agreed that: 1. The Statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, if one be issued. . . . I have read the foregoing answers before signing. They have been correctly written, as given by me, and are true and complete. There are no exceptions to any such answers other than as stated herein." The insurance policy contained this provision: "The Company shall incur no liability under this application until a policy has been delivered and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant . . ."

For the purpose of establishing the state of health and physical fitness of the assured, Blakley A. Kendall, from the date the policy was issued to his death, some seven (7) months later, appellant sought to put in evidence the deposition testimony of a number of physicians who had treated the assured in hospitals in Missouri and Arkansas during this period, and who had derived the information sought to be introduced by reason of having attended assured as indicated. On objection of appellees to the introduction of this testimony, on the ground that it was privileged and incompetent, the court denied its introduction, under the provisions of § 28-607, Ark. Stats. 1947. Appellant stoutly contends here that appellees waived the privilege accorded them by executing certain authorizations in their proof of loss in establishing their claim. It appears that on December 31, 1953 appellees signed the "Claimant's Statement" contained in appellant's printed form of "Proof

of Death." They jointly executed printed authorization as follows:

"To any physician or, To the superintendent of, and To the Superintendent of any other institution where the deceased person named below has been treated within three years.

"I am claiming the proceeds of policy number 199 802 411A issued by the Metropolitan Life Insurance Company, on the life of Blakley Kendall (deceased), and I request you to permit bearer, who is authorized by me, to make or obtain a copy in whole or in part or an abstract of any records you may have concerning the above named decedent.

"I authorize bearer, on my behalf, to submit such copy or abstract directly to the Metropolitan Life Insurance Company *as part of the proofs of said claim.*

/s/ Amos C. Kendall father
/s/ Lou B. Kendall mother"

Thereafter on February 1, 1954, appellees executed the following instrument:

"Request for and Consent to Release of Information from Claimant's Records To: Veterans Administration
Address . . . . . .

*Blakley A. Kendall*
(Name of Veteran)

"The Undersigned hereby requests and authorizes the Veterans Administration to release to Metropolitan Life Ins. Co. c/o Mr. J. A. George, or bearer, Address 1 Madison Ave., New York 10, N. Y., information from the claims file or clinical records of the above-named veteran relating to the item or items specified below, for each of which the dates or approximate dates of the periods to be covered are stated:

Item 1 — Information regarding dates of treatment and examination and advice—Complaint and brief history — Findings — Diagnosis — Autopsy findings for period from Nov. 21, 1946, to Dec. 23, 1953.

Item 2 — Information regarding date and basis for any award for period from Nov. 21, 1946, to Dec. 23, 1953. *This information is to be used for the following purposes: To facilitate consideration of policy claim —policy number 19802411A.*

/s/ Amos C. Kendall)
) Parents
/s/ Lou B. Kendall )"
*(Signature of Claimant)*
Hartman, Arkansas

Date: February 1, 1954
VA Form 10-3288
Mar. 1948

The insurance policy involved here contains no provision waiving the privilege as to the testimony of attending physicians, nor does it require the presentation of any such information as a part of the "Proof of Death." These authorizations clearly were furnished, at appellant's request, as part of proof of loss, in order to obtain a settlement of their claim for the insurance; "as part of the proof of said claim" in one, and "to facilitate consideration of policy claim" in the other. In similar circumstances the governing rule has been clearly announced by this court in *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, where we said: "According to the weight of authority, where a policy of insurance does not itself contain a provision for waiver of the privilege, the introduction in evidence of certificate of death given by a physician of the insured does not waive the provisions of the statute against physicians testifying concerning information received in the course of professional employment. . . . But whatever may be the state of the law on that question as established by the authorities, even if the rule be otherwise than as above stated, it can not be extended to cover a case like this, where the affidavit or certificate of the physician is not furnished pursuant to the requirements of the policy, but merely as a voluntary act in an effort to secure a settlement." This holding was reaffirmed in

*Aetna Life Ins. Co.* v. *McAdoo,* 106 F. 2d 618, (an Arkansas case, Sept. 12, 1939) by the Eighth Circuit Court of Appeals. In that case the claimant, beneficiary, executed the following authorization: "I hereby authorize and direct you, and each of you and/or any physician or surgeon in your employ or associated with you in any way, to give the Aetna Life Insurance Company, at any time requested, any and all information they may desire and which may have been acquired by you, or any of you, and/or such physician or surgeon or associate, in attending my father Alonzo D. McAdoo in a professional capacity, and I hereby waive, as to the Aetna Life Insurance Company all provisions of law prohibiting any physician or surgeon who has attended Alonzo D. McAdoo from disclosing any information thereby acquired." The court said: "The controversy is as to whether this waiver was a limited one for the purposes of adjustment and settlement of the claim or was general and covered use of that information in a suit involving the policy. It would seem that this matter is ruled against the company by *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. N. S. 493." 106 F. 2d 618.

Accordingly the judgment must be and is affirmed.

THOMPSON *v.* PHILLIPS.

5-805 284 S. W. 2d 842

Opinion delivered December 19, 1955.

*Tom Gentry* and *John K. Shamburger,* for appellant.

*E. M. Arnold,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal presents a question concerning election of remedies. The Trial Court was of the view that the appellant—by certain allegations in the original complaint—had elected to release the appellee. Accordingly the appellant's complaint was dismissed; and this appeal ensued.

On June 8, 1953 appellant (Thompson) filed the present action against L. A. Phillips individually and also against North Webster Parish Lease and Oil Company, Inc., an Arkansas corporation, hereinafter referred to merely as "Corporation." The original complaint alleged that L. A. Phillips was president of the corporation, and that the plaintiff had done certain work for which he was entitled to judgment for $5,807.50. The complaint stated:

"There was an agreement between the plaintiff, Cline Thompson and the said defendants that he would furnish his equipment and labor in performing the necessary work and that he would be paid therefor. . . .

"Plaintiff further states that at the time this contract was entered into, he was informed that the said North Webster Parish Lease and Oil Company, Incorporated had no money in its treasury, but the defendant, L. A. Phillips, who was President of said Corporation, personally guaranteed that the said Cline Thompson would be paid according to the terms of the contract above described. . . .

"That said defendant corporation and L. A. Phillips are justly indebted to the plaintiff Cline Thompson, in the amount of $5,807.50 for work performed under the terms of said contract. That demand has been made therefor and defendants have failed and refused to pay same. . . .

"Wherefore, Plaintiff Cline Thompson prays judgment against the said North Webster Parish Lease and Oil Company, Incorporated and L. A. Phillips, jointly and severally, in the sum of Five Thousand Eight Hundred Seven and 50/100 Dollars ($5,807.50), . . . . and for all other legal relief. . . ."

On September 14, 1953, in response to defendant's motion to make more definite and certain, Thompson filed an amended and substituted complaint, which contained these allegations:

"That plaintiff Cline Thompson states that on or about the 12th day of December, 1952, he was approached by J. T. McKinzey and L. A. Phillips, officials of the North Webster Parish Lease and Oil Company to clear some land and construct a road in Webster Parish, Louisiana, in order that the North Webster Parish Lease and Oil Company might drill an oil well upon said property. Said work was to be performed upon the L. L. Clements and the Joe Clements land in said Parish in Louisiana. It developed at this time that the North Webster Parish Lease and Oil Company had no funds with which to pay for the work to be performed by Thompson. In order to induce Thompson to perform this work, the said L. A. Phillips orally agreed with Thompson that he would personally pay him for doing this work. Upon Phillips' oral contract with Thompson to pay for the work performed, Thompson began the work soon thereafter and worked upon the project until about the middle of March, 1953, when he was told to keep his equipment on a standby basis. . . .

"That said defendant L. A. Phillips is justly indebted to the plaintiff Cline Thompson, in the amount of $5,807.50 under the terms of said contract. That demand has been made therefor and defendant has failed and refused to pay same."

In another pleading filed September 14, 1954, there were also these statements made by Thompson:

"That the contracts heretofore set forth in plaintiffs' original complaint and entered into between the plaintiffs and defendants were oral contracts. . . . That the agreement of L. A. Phillips was part of the consideration for plaintiffs' undertaking."

Still later (on February 17, 1955) in response to defendant's further insistence Thompson stated:

"That the plaintiff, Cline Thompson, states that some few days prior to the 12th day of December, 1952, he discussed with a Mr. J. S. Turner the possibility of the plaintiff being employed to clear some land and construct a road in Webster Parish, Louisiana, in order that the North Webster Parish Lease and Oil Company might drill an oil well upon said property. It developed that the North Webster Parish Lease & Oil Company had no money to pay for the work to be performed, and the plaintiff called the said L. A. Phillips in Little Rock, Arkansas, by long distance telephone from Minden, Louisiana, to discuss this work with him. In this long distance telephone conversation, which took place on or about the 12th day of December, 1952, the defendant, in order to get the land cleared and the road under construction, promised the plaintiff that if he would do the work that he, L. A. Phillips, would personally pay him for such work. That upon Phillips' oral contract with Thompson to pay for the work performed, Thompson began the work soon thereafter, and worked upon such project until on or about the 15th day of March, 1953, when Thompson was then instructed by Phillips to keep his equipment on a standby basis."

Based on all of the foregoing allegations in Thompson's pleadings, the defendant, L. A. Phillips, on February 18, 1955, filed this "Motion to Dismiss":

"That this action was originally filed on June 8, 1953, by plaintiff against North Webster Parish Lease and Oil Company, Inc., and against this defendant, L. A. Phillips; that in said original Complaint so filed Cline Thompson alleged 'that on or about the 15th day of De-

cember, 1952, he entered into a contract with the said defendant, North Webster Parish Lease and Oil Co., Inc., to build a road and clear land in Webster Parish, Louisiana, in order that said defendant corporation might drill an oil well upon said property.' Plaintiff also alleged in said Complaint that the said L. A. Phillips 'guaranteed that the said Cline Thompson would be paid according to the terms of the contract above described.' In response to a motion filed by defendants North Webster Parish Lease and Oil Company, Inc., and L. A. Phillips, plaintiff filed a reply herein on or about September 10, 1953, in which he stated that the 'contracts' heretofore set forth in plaintiff's original Complaint and entered into between the plaintiffs and defendants were oral contracts. Plaintiff has now elected to rely on an Amendment to an Amended and Substituted Complaint in which he alleges that he made a contract over long distance telephone with the defendant, L. A. Phillips, under which the said L. A. Phillips became primarily liable on the same obligation he originally alleged to have been incurred by defendant North Webster Parish Lease and Oil Company, Inc., and which he at that time alleged defendant L. A. Phillips orally guaranteed; that the allegations and theory of the Amended and Substituted Complaint with Amendment thereto are wholly inconsistent with the allegations in the original complaint; that plaintiff is now seeking a recovery from a defendant which recovery so sought is wholly inconsistent with that originally alleged in this suit; that the present allegations seek to hold the defendant L. A. Phillips primarily liable although the allegations in the original Complaint and Response to Motion to Make More Definite and Certain stated that the aforesaid Corporation was primarily liable; that the plaintiff is bound by his election of remedies as originally sought and is estopped to seek recovery against the defendant, L. A. Phillips, under an allegation that he is primarily liable for the debt sued on after first electing to sue the corporation as being primarily liable and defendant Phillips as being liable under a guaranty agreement.''

We have given the pleadings in considerable detail so that the full picture will be visible. The Trial Court sustained Phillips' Motion to Dismiss, and Thompson has appealed from the final order of dismissal of his claim against Phillips. The question is whether Thompson—by his pleadings in this case—*definitely and finally elected at any stage of these pleadings to pursue the corporation alone* as primarily liable and Phillips as only a guarantor. Appellee claims: (a) that in the original complaint Thompson sought to hold the corporation liable as original debtor and Phillips liable on an oral guaranty; (b) that the guaranty was within the Statute of Frauds[1] and therefore unenforceable; and (c) that because of the allegations in the original complaint, Thompson cannot now be heard to say that Phillips is liable on an enforceable original promise.[2] Thompson contends: (a) that the allegations in the original complaint showed a clear attempt to recover from both the Corporation and Phillips; (b) that the use of the word "guaranteed" in the original complaint is clarified in all subsequent pleadings; and (c) that there has been no allegation by Thompson to the effect that he was seeking recovery only from the Corporation on an original promise.

With the issue posed, we search for the applicable law. In 28 C. J. S. 1057 this definition is given:

"Election of remedies is the adoption of one of two or more coexisting remedies, with the effect of precluding a resort to the others."

And in discussing the necessity of election this is stated in 28 C. J. S. 1061 *et seq.*:

"Between Coexisting but Inconsistent Remedies. Generally, a party having two or more remedies which regardless of their form or class are based on inconsistent theories must elect between them; . . .

[1] The performance was in Louisiana; and Louisiana has a Statute of Frauds, involving the answering for debts, defaults and miscarriages of another, somewhat similar to the Arkansas Statute, § 38-101.

[2] The distinction between an original promise and a promise to answer for the debts of the other is well illustrated and discussed in our case of *Foster-Grayson Lbr. Co.* v. *Talley*, 190 Ark. 37, 76 S. W. 2d 950.

"Between Concurrent and Consistent Remedies. The pursuit of one remedy will exclude the pursuit of another only where the remedies are inconsistent; where remedies are concurrent and consistent, whether against the same person or different persons, a party may pursue one or all of such remedies until satisfaction is had, and similarly, no election is required between remedies for distinct causes of action arising out of separate and distinct facts."

In 18 Am. Jur. 129, in defining "Election of Remedies," the text says:

"Election is simply what the term imports—a choice shown by an overt act between two or more inconsistent rights, either of which may be asserted at the will of the chooser alone. An election of remedies may be defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. . . ."

And in stating the essentials[3] to constitute election it is said in 18 Am. Jur. 133:

"Stated briefly, the essential conditions or elements of election of remedies are: (1) The existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them. If any one of these elements is absent, the result of preclusion does not follow."

Our case of *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107, presents a classic example of election of remedies: there a litigant had sued at law for damages for breach of a contract to convey real estate; and such action was held to be an *election of remedies* so as to preclude a later suit for specific performance based on the same real estate contract. The

[3] One of the most enlightening discussions is that contained in the note in 116 A. L. R. 601 entitled "Doctrine of election of remedies as applicable where remedies are pursued against different persons." This Annotation in A. L. R. has caused the publishers of American Jurisprudence to add in the Pocket Supplements to the title on "Election of Remedies" a section numbered 27.1 concerning "Election against different persons."

case of *Home Life Ins. Co.* v. *Arnold,* 196 Ark. 1046, 120 S. W. 2d 1012, likewise involved an election of remedies. There the beneficiary of the policy had sued the reinsurance company (Central States Life Ins. Co.) upon the contract of reinsurance. We held that the beneficiary had thereby elected to affirm the reinsurance contract and could not later be heard to sue the original insurance company and allege that the reinsurance contract was void.

The case at bar is not governed by the foregoing cases, but is governed by the rule stated in *Wood & Henderson* v. *Claiborne,* 82 Ark. 514, 102 S. W. 219, 118 Am. St. Rep. 89, which is itself one of our leading cases on election of remedies. In *Wood* v. *Claiborne* a minor had been injured and a recovery had been made by his father as next friend. The attorneys who were successful in making the recovery paid the minor's money to the father of the minor, since there was no guardian. When Claiborne, the minor, reached maturity he sued his father and recovered judgment but was unable to obtain satisfaction. Thereupon Claiborne sued the attorneys for wrongfully paying his money to his father. The attorneys pleaded "election of remedies," contending that the suit against the father precluded the subsequent suit against the attorneys. This Court, speaking through Judge Riddick, held that there had been no election of remedies so as to prevent the action against the attorneys for wrongfully paying the money.

In the case at bar the pleadings reflect that throughout the entire negotiations leading up to the original contract it was recognized by the parties that the Corporation was without funds and that Thompson did the work after Phillips had agreed to pay for it. Under the case of *Foster-Grayson* v. *Talley,* 190 Ark. 37, 76 S. W. 2d 950, the allegations here were sufficient to make Phillips' promise an original undertaking, and when Thompson filed his first complaint he asked judgment against Phillips. He used the word "guaranteed" instead of "agreed" in his original complaint filed June 8, 1953;

but he entirely clarified his position when in the Amended and Substituted Complaint, filed September 14, 1953, he said that Phillips agreed that he "would personally pay" Thompson. In the prayer to the original complaint and at every step in the pleadings, Thompson showed his intention to hold Phillips liable for the debt. He never elected to look solely to the Corporation, and the Trial Court was in error in holding that Thompson had elected to release Phillips.

The judgment dismissing Thompson's complaint against Phillips is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

TURNER *v.* MEEK, EXCR.

5-806 284 S. W. 2d 848

Opinion delivered December 19, 1955.

*Bedwell & Bedwell,* for appellant.

*Thomas Harper* and *G. Byron Dobbs,* for appellee.

MINOR W. MILLWEE, Associate Justice. The issue here is whether a tort action against an estate is barred by our statute of nonclaim.

According to an agreed stipulation of facts, J. W. Meek died testate May 13, 1952, and defendant, Jim D. Meek, was appointed executor of his estate. On May 27,

1952, a notice to creditors was duly published calling upon all persons to present claims against the estate within six months, and the time for filing such claims expired November 27, 1952. On June 12, 1952, plaintiffs, A. J. and Sallye Turner, filed the instant action in circuit court against the defendant executor seeking damages for injuries allegedly sustained by Mrs. Turner, a nurse, by reason of a willful assault upon her by J. W. Meek while she was nursing him on May 8, 1952. Plaintiffs took a nonsuit on October 20, 1952, and on January 20, 1953, refiled their complaint which was subsequently amended to assert an action based solely on the alleged negligence of decedent. In the course of the administration of the estate, the probate court entered an order on December 19, 1952, allowing a partial fee to defendant's attorneys for certain services, including services rendered in connection with the present action.

Defendant pleaded the nonclaim statute as a bar to the instant action in his answer and a motion to dismiss, which was overruled on October 1, 1953. The case proceeded to trial and resulted in a judgment for plaintiffs on October 13, 1954. This judgment was set aside and a new trial ordered upon defendant's motion on November 10, 1954, and there was no appeal from such order. Defendant renewed his motion to dismiss which was submitted to the trial court upon the foregoing facts and the additional stipulation that neither plaintiff filed a claim with either the executor or the probate court; and that neither of the plaintiffs, nor anyone acting for them, ever filed with the probate court a copy of any complaint filed herein or any statement signed by plaintiffs, or their attorneys, setting forth the nature of the action, the claim or demand therein involved, the parties to the action and the court in which the action is pending. Upon this stipulation of facts, the circuit judge held the instant action barred by our nonclaim statute and plaintiffs have appealed.

A determination of the validity of the trial court's action involves a consideration of certain sections of the Probate Code [Act 140 of 1949] which made some sig-

nificant changes in our nonclaim statute. Section 110 of Act 140 appears as Ark. Stats., § 62-2601, and provides that, with certain exceptions which are not pertinent here, all claims against a decedent's estate are barred unless verified and presented to the personal representative or filed with the probate court within six months after the date of the first publication of notice to creditors.

Section 111 of Act 140 appears now as Ark. Stats., § 62-2602, and reads: "The provisions of Section 110 [§ 62-2601] shall not preclude the commencement or continuance of separate actions against the personal representative as such for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in Section 110 [§ 62-2601]. Any action pending against any person at the time of his death, which survives against the personal representative, shall be considered a claim duly filed against the estate from the time such action is revived, *and any action commenced against a personal representative as such after the death of the decedent shall be considered a claim duly filed against the estate from the time such action is commenced; provided that, within the time required by Section 110* [§ *62-2601*] *for filing claims against the estate, the plaintiff in such action files with the Probate Court in which the estate is being administered a copy of the petition for revivor or of the complaint, or a statement signed by the plaintiff or his attorney setting forth a description of the nature of the action, the claim or demand therein involved, the parties to the action, and the court in which the action is pending.* Nothing in this Section shall impair the individual liability of the personal representative for his own acts and contracts in the administration of the estate." (Italics supplied.)

Present counsel for plaintiffs, who did not represent them prior to January, 1954, concede there was no compliance with § 62-2601, *supra,* but earnestly contend there was a substantial compliance with § 62-2602 because defendant and his attorneys had knowledge of the pendency

of plaintiffs' action by reason of the service of summons on defendant and the order of the probate court of December 19, 1952, allowing a partial fee to defendant's attorneys for services, which included services rendered in connection with the instant action. In rejecting this contention the trial court stated:

"The Legislature, in enacting the remedy under Section 62-2602, seems to have had in mind that where an estate is sued some notice thereof in writing should be filed with the probate court having jurisdiction over the estate. A copy of the complaint may be filed, or, in lieu thereof, a signed statement giving all of the details ordinarily found in a complaint, may be filed. In the face of such language it is believed that if actual notice, such as the personal representative always has by service upon him of summons, were intended to suffice under this statute, that the Legislature would have so said if they wished the courts to so hold."

We concur in the circuit judge's interpretation of the statute. Section 62-2602, *supra,* amended § 99 of Pope's Digest which provided that all actions commenced against a personal representative after death of the testator or intestate should be considered legally exhibited claims against the estate from the time of service of process on said personal representative. The amended statute clearly placed the additional duty on the plaintiffs, and not upon the executor, to file either a copy of the complaint or a statement of the nature of the action, etc., with the probate court prior to November 27, 1952, and this was not done. In making proper determinations and orders relative to claims, family allowance, dower, etc., at the termination of the six-months period on November 27, 1952, the probate court was entitled to rely upon the statute, which was not complied with by the mere service of process on defendant in this action. As to the contention that the allowance of a fee to defendant's attorneys by the probate court on December 19, 1952, amounted to a substantial compliance with the stat-

ute, it is noted that the six-months period had already expired, and there was no action pending in the circuit court, at that time.

Plaintiffs' second and final point is that § 62-2602 is inapplicable for the reason that the claim asserted by them is contingent in nature under Ark. Stats., § 62-2610 (c), which provides: "Contingent claims not presented within the time prescribed by Section 110 (62-2601), or subsection b hereof, shall be barred as against the estate, but within the time now or hereafter permitted by law for bringing actions thereon, may be enforced against distributees of the estate to the extent of the assets of the estate or the proceeds thereof, remaining in the hands of such distributees." Plaintiffs argue that their claim remains contingent so long as it is undetermined judicially, and that they, therefore, have a right to proceed against the distributees of the estate under this provision of the statute.

We cannot agree that the claim involved here is "contingent" within the meaning of the statute. In those jurisdictions where the question has arisen, the courts have uniformly held that liability upon an unliquidated claim for damages arising out of a tort is not a "contingent claim" within the meaning of statutes relating to contingent claims against an estate. In passing on this issue in *Pierce* v. *Johnson,* 136 Ohio St. 95, 23 N. E. 2d 993, 125 A. L. R. 867, the court said: "In 21 American Jurisprudence, 582, Section 356, it is stated: 'According to the ordinary acceptance of the term, a contingent claim is one where the liability depends upon some future event which may or may not happen, and which, therefore, makes it wholly uncertain whether there ever will be a liability.' See also 11 Ruling Case Law, 205, Section 229.

"A liability on an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future. On the contrary, such claim is, as of necessity it must be, based on the theory that the event, the tort,

giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. A claim thus grounded cannot be said to be contingent."

Other decisions to the same effect are: *Rehn* v. *Bingaman,* 151 Neb. 196, 36 N. W. 2d 856; *Mueller* v. *Shackett,* 156 Neb. 881, 58 N. W. 2d 344; *Hicks* v. *Wilbur,* 38 R. I. 268, 94 A. 872; *Des Moines Transportation Co.* v. *Harring,* 238 Iowa 395, 27 N. W. 2d 210; *Helliker* v. *Bram,* (Mo.) 277 S. W. 2d 556. The distinguishing feature of a contingent claim is that the cause of action has not accrued. Any cause of action available to plaintiffs as a result of the alleged tort on May 8, 1952, accrued at that time, and any claim grounded thereon is unliquidated, but not contingent, within the meaning of the statute.

The trial court properly sustained the motion to dismiss, and the judgment is affirmed.

CULP *v.* SCURLOCK, COMMR. OF REVENUES.

5-793 284 S. W. 2d 851

Opinion delivered December 19, 1955.

*French & Camp,* for appellant.

*O. T. Ward* and *Herrn Northcutt,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellants for a writ of mandamus to compel the Commissioner of Revenues to issue permits authorizing the appellants to sell cigarettes at retail without payment of an Arkansas excise tax thereon. The appellants have places of business located either within three hundred feet of the Arkansas-Missouri state line or within a city adjacent to that line. Missouri does not now collect a tax upon the sale of cigarettes. The appellants, in claiming an exemption from the Arkansas tax, rely upon the last sentence in the following section of Act 249 of 1951, Ark. Stats. 1947, § 84-2304:

"There is hereby levied the following excises or privilege tax, to-wit: on all cigarettes a tax of three dollars ($3.00) per thousand cigarettes is hereby imposed. Provided, whenever there are two adjoining cities of a population of five thousand or more separated by a state line, the tax on cigarettes sold in such adjoining Arkansas city shall be at the rate imposed by law on cigarettes sold in such adjoining city without Arkansas, but not to exceed three dollars ($3.00) per thousand cigarettes. Provided, further, that the tax on cigarettes sold in Arkansas within three hundred (300) feet of a state line, or in any city in Arkansas which adjoins a state line, shall be at the rate imposed by law on cigarettes sold in the adjoining state, but not to exceed three dollars ($3.00) per thousand cigarettes."

Before examining the statute we mention a preliminary matter. It is suggested by the appellee's pleadings and brief that the issuance of a writ of mandamus would not terminate the dispute, since the form of retail permit used by the revenue department merely authorizes the holder to sell cigarettes, without reference to the matter of taxation. Even so, the complaint may equally well be treated as one for a declaratory judgment—a remedy peculiarly appropriate to controversies between private

citizens and public officials about the meaning of statutes. Ark. Stats., § 34-2502; *Quinones* v. *Landron,* (CCA 1) 99 F. 2d 618; *Alabama State Milk Control Bd.* v. *Graham,* 250 Ala. 49, 33 So. 2d 11; *Railroad Com'n* v. *Houston Nat. Gas Corp.,* (Tex. Civ. App.) 186 S. W. 2d 117. This complaint states all the facts necessary to a petition for a declaratory judgment, and it is the statement of facts rather than the prayer for relief that makes up the cause of action. *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S. W. 2d 633. Since the effect of a declaratory judgment in this case will be to terminate an actual controversy in a matter of public interest, it is manifestly desirable that the case be decided on its merits. See Ark. Stats., § 34-2505.

The appellee's argument against what seems to be the plain meaning of the exemption clause in question is twofold. First, it is insisted that since the statute provides that the Arkansas tax "shall be at the rate imposed by law" in the adjoining state, the legislature meant to condition the proviso upon the existence of at least some tax rate in the adjoining state. Hence it is argued that although a lower rate applies along the border of neighboring states that impose a cigarette tax, such as Oklahoma and Texas, it does not apply when the sister state has no tax at all, as in the case of Missouri.

The history of this section of the law conclusively refutes the appellee's contention. By Act 152 of 1929 the legislature imposed a tax upon the sale of cigarettes and directed by § 29 thereof that the first revenue arising from the tax should be paid into the Common School Fund. Section 30 of that act contained this significant language:

"Wherever there are two adjoining cities of a population of five thousand or more separated by a State line, the tax on tobacco products sold in such adjoining Arkansas city shall be at the same rate imposed by law on tobacco products sold in such adjoining city without Arkansas. Provided, however, that in the event there is no tax imposed by law upon tobacco products sold in

such adjoining city without Arkansas, then the schools in such adjoining city in Arkansas shall not be entitled to participate in the revenue derived from this Act."

It will be observed that the 1929 statute contained the very language now relied upon by the appellee: "the tax shall be at the same rate imposed by law" across the state line. Yet the legislature obviously meant for these words to include the situation in which there was no tax imposed on the other side of the line; for in the next sentence it was provided that in such a situation the local Arkansas schools would not be entitled to participate in the revenue from the tax. To adopt the appellee's construction of the exempting clause would involve the unjust condition, under the 1929 law, of the Arkansas citizens being required to pay the tax when there was no tax imposed by the adjoining state and yet being denied any share in the revenues simply because the sister state did not impose a tax. It goes without saying that no such inequitable result was intended by the legislature.

The language of the 1929 law was again used in Act 416 of 1941, with the same direction that the local schools should not participate in the revenue when there was no tax imposed across the line. By Act 109 of 1947 the legislature directed that the revenues from this tax be paid into the General Revenue Fund instead of the Common School Fund. Inasmuch as there was no longer any need for the special provision depriving the local schools of a share in the benefits of the tax, that clause of the prior law was not re-enacted.

Thus it is plain enough that in 1929 and again in 1941 the General Assembly meant for the exemption to apply to the situation now before us, in which no tax is imposed by the adjoining state. There is no reason to think that the legislature had a different intention when it repeated the identical language in Act 249 of 1951.

Second, the appellee's brief is primarily devoted to the practical argument that if retail outlets in Arkansas are permitted to sell unstamped cigarettes it will be next

to impossible to enforce the law against the importation of untaxed cigarettes, since the legal unstamped packages and the contraband ones will be indistinguishable. A complete answer to these fears is to be found in the statute itself, which enables the Commissioner of Revenues to anticipate the suggested condition. The statute authorizes the Commissioner to "prescribe the kind of stamps to be used in the administration of this act." Ark. Stats., § 84-2314. It also permits him "to make such rules and regulations as he deems requisite and advisable for the administration of this act." Section 84-2325. There is thus ample authority for the Commissioner to prescribe an identifying stamp for cigarettes lawfully exempt from the tax.

Reversed, a declaratory judgment to be entered here.

McFaddin, J., dissents.

Carrier *v.* Beck, County Judge.

5-807 285 S. W. 2d 326

Opinion delivered December 19, 1955.

[Rehearing denied January 23, 1956.]

*Marvin Brooks Norfleet,* for appellant.

*Hale & Fogleman,* for appellee.

George Rose Smith, J. On May 23, 1955, the county court of Crittenden County, without notice or a hearing, entered an order purporting to remove the appellant from office as a commissioner of Road Improvement District No. 7, the court finding that its action was "to

the best interests of the district." The appellant promptly filed a petition in the circuit court for a writ of certiorari to quash the county court order as being void. The circuit court sustained a demurrer to the appellant's petition upon the ground that no cause of action was stated, and the action was dismissed. The sole question is whether the county court, as an incident to its power to appoint the commissioners of the district, has the power to remove them for causes other than those specified in the governing statute.

This district was created by Act 55 of the 1919 Road Acts. Sections 5 and 8 of the statute invested the county court with power to appoint the original commissioners and to fill any vacancies that might occur. There is no fixed term of office for the commissioners, and the only provision for their removal is this sentence in § 8: "The said County Court may remove any commissioner for neglect of duty, incompetency or malfeasance in office, but only after a public trial on written notice served as a summons." The demurrer admits that the statutory procedure for the removal of a commissioner was not followed by the county court. The appellee insists, however, that the power of removal is a necessary incident to the power of appointment and may be exercised, without notice, for any reason other than the grounds specified by the statute.

This argument must be rejected upon the controlling authority of *Taylor* v. *Wallace,* 143 Ark. 67, 219 S. W. 314, and *Payne* v. *Malone,* 164 Ark. 323, 261 S. W. 632. The *Taylor* case arose under the general road law, which authorized the county court to appoint road district commissioners and to fill vacancies. There was, however, no express power in the county court to remove a commissioner. In holding that the power of removal did not exist we said: "The power conferred upon the county court to appoint three road commissioners at the time of making the order establishing the road district, pursuant to the terms of the act, is a special, and not a general, power. No such power exists in the county court except

by enactment of the General Assembly. The general power of supervision by the county court over roads, conferred by the Constitution, invests said court with no such power or authority. The delegation of the power being special, the extent thereof is limited to the express grant."

Even more directly in point is the *Payne* case, *supra,* which, like this one, arose under a special act creating a road improvement district and conferring authority on the county court to appoint the commissioners and to fill vacancies. The act was silent on the subject of removing the commissioners. A taxpayers' action was instituted in the county court to remove the commissioners for misconduct in office. In adhering to the rule announced in the *Taylor* case the court said: "The decision in that case is conclusive of the question that the county court has no right to remove commissioners unless the statute confers that power." It follows that in the case at bar the county court's power of removal must be exercised in conformity to the statute.

The decisions earnestly urged by the appellee, such as *Shurtleff* v. *United States,* 189 U. S. 311, 23 S. Ct. 535, 47 L. Ed. 828, are not in conflict with our own decisions. The *Shurtleff* case, for example, involved a general power to appoint a subordinate for whose conduct the appointing authority was responsible. In such a situation, as is more fully explained in *Myers* v. *United States,* 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160, and *Humphrey's Executor* v. *United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611, the power to remove an incompetent employee is essential if the appointing officer is to be held responsible for the proper discharge of the duties imposed by law upon his department. Consequently, as the court said in the *Shurtleff* case, "The right of removal would exist if the statute had not contained a word upon the subject." But the present case presents a fundamentally different situation. The county court is not responsible for the conduct of road improvement district commissioners. It is reasonable to suppose that the General

Assembly vested the power of appointment in the county court to avoid the inconvenience that would attend the exercise of that power by the various landowners in the district. In these circumstances the court's power of appointment is special, as the *Taylor* case held, and does not carry the power of removal as a logical incident thereto.

Reversed, the demurrer to be overruled.

BURKS *v.* COOK.

5-799 284 S. W. 2d 855

Opinion delivered December 19, 1955.

*Willis V. Lewis,* for appellant.

*Cockrill, Limerick & Laser* and *Abner McGehee,* for appellee.

PAUL WARD, Associate Justice. The question for decision in this case is: When are the organizers of a purported corporation individually liable for debts contracted in the name of such corporation? No oral testimony was taken in the trial court, and this case is presented to us on the pleadings, stipulations and the record.

On August 26, 1953, Articles of Incorporation of "National Truck Leasing System, Inc." were filed in the

office of the Secretary of State. These articles show the organizers of said corporation to be: Paul J. Burks, Frank E. Jarvis, William L. Keesee and Willis V. Lewis. Stock Certificate No. 4 shows that 6 shares of the purported corporation were issued to Willis V. Lewis on August 26, 1953. Certificate No. 5, of the same date, shows 6 shares issued to Paul J. Burks, and it is stipulated that these were the same shares that were executed to Lewis by Certificate No. 4. The record shows that on September 16, 1953, there was filed with the Secretary of State an "Amendment to Articles of Incorporation of National Truck Leasing System, Inc., changing name to: Motor Truck Rentals System, Inc."

Beginning on October 29, 1953, and ending on December 12, 1953, the appellees, a partnership, sold and charged to the Motor Truck Rentals System, Inc., articles of merchandise in the total amount of $623.65 which had not been paid for.

On June 14, 1954, appellees filed this suit against appellants [the original incorporators named above] to recover judgment for the articles above mentioned. It was alleged that the articles of incorporation and the amendment thereof had never been filed in the office of the Pulaski County Clerk as required by Ark. Stats., § 64-103; that the Motor Truck Rentals System, Inc., is a *de facto* corporation, and; that the stockholders or original organizers were individually liable as partners.

On June 18, 1954, the aforementioned Articles of Incorporation and the Amendment were filed in the office of the Pulaski County Clerk.

On April 22, 1955, the above factual situation was submitted to the trial judge, sitting as a jury, and he rendered a joint and several judgment against all appellants.

The judgment of the trial court must be affirmed in part on the authority of *Gazette Publishing Company* v. *Brady,* 204 Ark. 396, 162 S. W. 2d 494, and *Whitaker* v.

*Mitchell Manufacturing Co.,* 219 Ark. 779, 244 S. W. 2d 965.

Appellants frankly admit that the holdings in the above mentioned cases are contrary to their contention here. However, in a forceful brief they present an array of authorities in an effort to convince this court that the *Gazette* case, *supra,* [upon which the decision in the Whitaker case largely rests] should be overruled. In response to this contention on the part of appellants it is sufficient to say that this same argument was forcibly urged in the *Whitaker* case, *supra,* and there rejected. In the latter case the contention here urged by appellants was specifically called to the court's attention in a concurring opinion. Many of the authorities cited by appellants to sustain their contention were mentioned and discussed in the *Whitaker* case, *supra.* We can therefore see no good reason for discussing these cases again or for overruling the holding in the *Gazette* and *Whitaker* cases.

It is earnestly contended that the judgment of the trial court should be reversed insofar as it held appellant, Willis V. Lewis, liable. Lewis was one of the original organizers of the National Truck Leasing System, Inc., the name of which was later changed to Motor Truck Rentals System, Inc. In the *Gazette* case, *supra,* this court approved a statement made in the case of *Garnett* v. *Richardson,* 35 Ark. 144, that "in order to exempt the organizers of a corporation from personal liability for the debts of the concern, the articles of incorporation must be filed, in both the office of the Secretary of State and the office of the County Clerk." It is undisputed that in the present case neither the articles of incorporation nor the amendment had been, at the time suit was instituted, filed in the office of the County Clerk of Pulaski County. Thus it would seem from the above that Lewis must be held liable in this instance. However, we do not think that, under the facts and circumstances of this case, the above conclusion correctly follows.

We have present in this case a fact situation which was not present in the *Garnett* and *Gazette* cases, *supra,*

in that here credit was extended after Lewis ceased to be a member of the purported corporation. This fact question not being present in the cited cases we can feel sure that no special consideration was given to it. The *Garnett* opinion is short and certainly no consideration was given to the point under question in that case. The gist of the opinion in that case is found in the last sentence which reads as follows: "For purchases made by them before then they were personally liable as partners." From this it appears that the court was considering a case where the original incorporators made the purchases for which they were held liable. In this case Lewis had of course withdrawn from the purported corporation some two months before the purchases were made.

In this instance Lewis and the other original incorporators are placed in the role of partners by operation of law since they did not file articles of incorporation in the office of the County Clerk. Considering them as partners we have concluded that Lewis is not liable on the debt herein sued upon under the decisions of this court pertaining to a partnership. In the case of *Rector* v. *Robins,* 74 Ark. 437, 86 S. W. 667, a creditor sought to hold liable Robins, a member of a partnership, who withdrew from the partnership before the debt was contracted. This court there approved an instruction which stated that Robins would be liable if the creditor "extended the credit for the claim sued on in the faith of his belief that Robins was such a partner." The court again indicated on Page 443 of the Arkansas Reports that before Rector could hold Robins liable he must have extended credit upon the faith of Robins' partnership in the firm.

It cannot be said in the case under consideration that appellees extended credit to the Motor Truck Rentals System, Inc., because of their reliance on Lewis' financial responsibility. No evidence was taken in this case and therefore there is no showing that appellees extended credit because of Lewis.

In the case of *Raywinkle* v. *The Southern Coal Co.,* 117 Ark. 283, 174 S. W. 524, appellee sought to hold Ray-

winkle liable as a partner for a debt contracted after he had withdrawn from the partnership. In holding that Raywinkle was not liable this court, among other things, said:

"The plaintiff [appellee] during this time had no dealings whatever with the firm and cannot be said to have contracted with the firm on the credit of Raywinkle. Raywinkle's name never appeared in the firm and it was not shown that the firm in conducting its business ever used his name. Under these circumstances we do not think he was responsible for the debt of the plaintiff and the court erred in directing a verdict for the plaintiff."

This same question was considered in the case of *Anglin* v. *Marr Canning Co.*, 152 Ark. 1, 237 S. W. 440. There Anglin sought to recover against two partners who had withdrawn from the appellee partnership. This court in discussing the various instructions given by the trial court recognized that before appellant could recover he must have extended credit upon the faith he had in the financial responsibility of the former partners, or that the former partners' conduct had been such as to mislead appellant into believing they were still members of the partnership firm. It cannot, of course, be said in the case under consideration that Lewis' conduct in any way misled appellees, since no evidence was introduced. Neither did the "partnership" bear the name of Lewis.

Based upon the above observations it is our conclusion that the trial court erred in holding Lewis liable and the judgment is hereby reversed to that extent, but it is affirmed as to the other appellants.

Affirmed in part and reversed in part.

Opinion delivered December 19, 1955.

[Rehearing denied January 23, 1956.]

*Dinning & Dinning,* for appellant.

*O. C. Brewer* and *George K. Cracraft, Jr.,* for appellee.

PAUL WARD, Associate Justice. On this appeal we seek to distinguish between the meaning of the word "possession" as distinguished from the word "custody" as applied to an exclusion clause in a policy insuring against theft. The facts are undisputed.

Appellant, Phillips Motor Company, is a corporation engaged in the business of automobile dealer in the City of Helena. On November 4, 1952, late in the afternoon, a man named Edd Martin came to appellant's place of business and began negotiations to purchase a 1950 Dodge automobile valued at $1,425.00. After E. O. Phillips, manager of appellant, and Martin had taken a short drive in the automobile to try it out, Martin stated that he had about decided to buy and asked Phillips if he would take his check, stating that he would like to keep the automobile over night to further try it out. Phillips at first replied that he would under no conditions let him use the car over night. A short time later however, after

Martin had given Phillips his check for $1,550.00 on the First National Bank of DeWitt [marked in the left hand corner "for 1950 Dodge"] and after Phillips' insurance agent had issued a liability policy on the automobile to Martin, for which Martin paid $100.00, Phillips allowed Martin to take the automobile and drive it until the next morning. It was understood that Martin would return the automobile the next morning and, if he liked it, the check would be cashed and title papers to the automobile would be made out to him. Thereupon Martin drove away in the automobile and has not been heard from since. When his check was presented to the bank it was dishonored for lack of funds.

At all times mentioned herein, and in the ordinary course of business, appellant held an insurance policy [No. GWB 4905630] issued to it by appellee, insuring against any damage or loss by reason of theft of any automobile owned or held in connection with the operation of its business.

On the above state of facts appellant filed suit against appellee on said mentioned policy to recover the value of the Dodge automobile. For its answer appellee admitted the issuance of the policy but denied that plaintiff had suffered any loss insured against therein, affirmatively stating that said policy contains, among other provisions, the following exclusion:

"2. Exclusions — Such Policy Does Not Cover: (d) under the theft, larceny, Robbery, or pilferage coverage (if such policy covers these perils)—loss suffered by the insured in case he voluntarily parts with title to, or possession of any automobile at risk hereunder, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise."

After the introduction in evidence of oral testimony, excerpts from the said policy and the above mentioned check, the trial judge directed a verdict in favor of appellee.

In its brief appellant very clearly states the issue presented to us in these words:

"The question now before the court is whether or not, under these circumstances, which are undenied and unquestioned, the appellant delivered the lawful possession of the car to Edd Martin or whether, on the other hand, he delivered merely the custody of the car for the purpose of permitting him to try it out during the night."

It is, of course, the contention of appellant that it merely delivered *custody* of the automobile to Martin, and that therefore the exclusion clause copied above does not apply. We agree with appellant that if it did merely deliver *custody* to Martin and did not deliver *possession* to him [as these words are later interpreted], then the judgment of the trial court should be reversed.

To sustain its contention that only *custody* of the automobile was delivered to Martin appellee refers us to several decisions from other jurisdictions which we will mention later. However after careful consideration of the numerous decisions dealing with the question here presented we have concluded that, under the factual situation above stated, appellant delivered *possession* of the Dodge automobile to Martin, and that, consequently, the judgment of the trial court must be sustained.

In the case of *Galloway* v. *Marathon Insurance Company,* 220 Ark. 548, 248 S. W. 2d 699, where the same exclusion clause mentioned above was considered under facts somewhat similar to the facts in the case at bar, this court made a clear distinction between *possession* and *custody* as applied to this kind of a case. It was there stated:

"Construing the clause against the insurer, the courts hold that for the exception to apply the insured must part with possession as distinguished from mere custody. Thus where the insured's salesman entrusted the custody of the car to a hotel employee so that it could be driven to the hotel garage, it was held that possession had not been relinquished." [Citing *Bennett Chev. Co.* v. *Bankers and Shippers Ins. Co.,* 58 R. I. 16, 190 A. 863, 109 A. L. R. 1077.] "But when the dealer voluntarily parts with actual possession rather than mere custody,

the loss is excluded from the coverage of the contract.'' [Citing *Jacobson* v. *Aetna Cas. & Surety Co.,* 233 Minn. 383, 46 N. W. 2d 868.]

In the *Galloway* case, *supra,* the court held that the exclusion clause prevented recovery, but that opinion is not decisive of the question we are considering here, first because in that case title as well as possession had passed to the purchaser which is not true here, and second because that case did not announce any rule by which to distinguish between *possession* and *custody,* as it was not necessary to do so. The decisions of other jurisdictions however have pointed out rather consistently the way to make such distinction, and they have construed facts analogous to the facts here as indicating a departure with *possession* and not with *custody.* We will now examine some of these cases.

In the *Jacobson* case, *supra* [cited in the *Galloway* case, previously discussed] the court dealt with the identical exclusion clause and essentially the same facts as are present in the case under consideration, and the court held that the dealer parted with possession and not merely with custody, relieving the insurance company of liability. In a well written opinion the court pointed out the features which distinguished possession from custody. In general terms it was stated that if the dealer turns the car over to another person so that that person may render some service or benefit for the dealer, then the dealer parts only with custody and the insurance company is liable, but if the dealer allows a person to take an automobile for his own use and benefit then the dealer has parted with possession and the insurance company is not liable. In making this distinction the court there used this language:

''In other words, a voluntary surrender of possession, within the meaning of the policy's exclusionary clause, is effected only when the surrender of physical control is accompanied by an intent that the control so surrendered, though it be of only temporary duration, shall be exclusively vested in the recipient and shall by him be exercised, at his pleasure, for the immediate and

direct accomplishment of a purpose or use belonging to such recipient."

The same exclusion clause and essentially the same set of facts pertaining here were considered in *McDowell Motor Company* v. *New York Underwriters Ins. Co.,* 233 N. C. 251, 63 S. E. 2d 538, and the court, in holding the insurance company not liable stated: ". . . we think the exclusion clause does relieve the insurer from liability for theft where the possession of the car was voluntarily surrendered to another with the right to exercise control thereof for a purpose of his own." The *purpose* for which the automobile was turned over to the prospective customer in that case was to test it and show it to his wife for her approval or disapproval.

In the case of *Boyd* v. *Travelers Fire Ins. Co.* 147 Neb. 237, 22 N. W. 2d 700, the court held there was no liability on the insurance company under an exclusion clause exactly like the one in the case at bar and where the facts in all essentials were also the same. The same conclusion reached in the above case was reached in *Nelson* v. *Pennsylvania Fire Ins. Co.,* 154 Neb. 199, 47 N. W. 2d 432. The exclusion clause was exactly the same and the facts were in all essentials the same as those in the case at bar, although the case was reversed against the insurance company for an entirely different reason. One of the most recent cases affirming the holding in the cases above referred to is *Harry Dinkin, et al.* v. *The American Insurance Company,* 268 Wis. 138, 66 N. W. 2d 681. Not only is this decision based on the same kind of an exclusion clause and on essentially the same set of facts as those under consideration here but the opinion sets forth a clear statement of the reasons for the rule announced. In summing up these reasons the court said:

"We prefer the rule of the cases in which it has been held that if an owner voluntarily surrenders physical control of his automobile to a third party with the intent that the third party shall exercise exclusive dominion of the vehicle solely or primarily for the recipient's direct use or purpose as distinguished from a use

or purpose for the benefit of the owner, the insured has voluntarily surrendered possession within the meaning of the exclusionary clause of the policy and there is no coverage."

Appellant relies very strongly on the case of *Tripp* v. *United States Fire Ins. Co. of New York,* 141 Kan. 897, 44 Pac. 2d 236. We agree with appellant that the exclusion clause and the facts in that case are practically and materially the same as those in the case at bar, and also agree that the holding in that case cannot be reconciled with the holdings above mentioned. However that case was decided in 1935 and it has been considered and rejected in many of the cases to which we have referred. Apparently the court reached the conclusion it did largely by a reliance on the general rule that language in insurance policies should be construed most favorably to the insured. While we recognize this rule as sound and well established we do not feel at liberty to apply it here. The reason is that the particular exclusion clause we are dealing with has been so many times uniformly interpreted [in connection with practically the same factual situation obtaining here] that all doubt as to its meaning has been eliminated. Since the policy under consideration is standard and since the exclusion clause is so widely used we think it better for all concerned to maintain a uniform interpretation than to inject confusion by holding contrary to the clear weight of authority.

Affirmed.

Justice Holt concurs.

Justice Millwee dissents.

J. Seaborn Holt, J., concurring. I agree that the primary and decisive question in this case is, whether the Phillips Motor Company parted with possession of the car in question or just with its custody. I also agree that, on the facts presented in this record, the motor company parted with *possession* of the car in question and, therefore, cannot recover under the exclusion clause in the policy. Each case must turn, as I view it, on the particular facts therein. The majority opinion states that the

exclusion clause and the facts in the principal case relied upon by the motor company, *Tripp* v. *United States Fire Ins. Co. of New York,* 141 Kan. 897, 44 Pac. 2d 236, are "practically and materially the same as those in the case at bar." I agree that the exclusion clause in the Tripp Case is the same as in the present case, but there is a material distinction in the facts in that case with those in the present case before us. It is undisputed that when appellant allowed Martin to take the car overnight to try it out, he told Martin, in effect, that he would part with the car in this fashion; only if Martin would take out liability insurance on the car. In this connection appellee says in his brief:

"The appellant agreed to let him use the car that night provided he would insure it. The appellant's manager then called Mr. Charles Conditt of the James A. Hudson Insurance Company at his home and Mr. Conditt agreed to return to his office to write the policy. Mr. Hudson, Mr. Phillips, the manager of appellant, and the imposter met at the office of Mr. Conditt where Mr. Phillips identified the imposter as 'Edd Martin,' exhibiting an invoice of the sale. A policy of insurance was issued by Mr. Conditt showing 'Edd Martin' as sole and unconditional owner of the automobile. It was understood that on the following morning if the check was good and if the imposter was satisfied with the performance of the car and the engine was tuned the sale would be completed." There were no such facts as above in the *Tripp Case,* as the statement of the facts in the opinion in that case shows. Quoting from the opinion:

"Plaintiff was engaged in the automobile business at Stockton. On May 24, 1933, a man calling himself Hanson appeared at plaintiff's place of business with a Chevrolet coupe in which he had a number of surveying instruments. Plaintiff suggested to Hanson that he needed a larger car and Hanson looked at cars, trying them to see how the instruments would fit into them. Hanson told plaintiff he had to go to Palco to do some work and would be back to consider buying a certain sedan. Later the same day

Hanson called plaintiff and asked plaintiff to meet him at Plainville. Plaintiff took the sedan and met Hanson at Plainville where terms of trade were discussed. Before Hanson would make the trade he wanted to try the sedan, to which plaintiff agreed. Hanson stated he had no keys for his coupe and asked plaintiff to watch it while he tried out the sedan. Plaintiff agreed. Hanson got into the sedan, drove off and failed to come back.''

On facts, which as indicated do not appear in the Tripp Case, I think that the appellant, Phillips Motor Company, parted with possession and not custody and, therefore, concur in the result reached by the majority.

THOMAS *v.* THOMAS.

5-802 284 S. W. 2d 853

Opinion delivered December 19, 1955.

*McKay, Anderson & Crumpler,* for appellant.

*A. R. Cheatham,* for appellee.

SAM ROBINSON, Associate Justice. Appellee, Mrs. Stella Thomas, filed this suit attempting to establish a resulting trust in her favor in property previously conveyed to her husband, now deceased. The suit was filed on February 27, 1953. Appellants, non-residents of Arkansas, were named as defendants and were constructively summoned, but did not appear. On April 29, 1953, there was a decree sustaining Mrs. Thomas' contention as to a resulting trust in the property in question. On November 17, 1954, appellants filed a motion for a new

trial on authority of Ark. Stats., § 27-1907. The motion was overruled by the Chancellor and this appeal results.

Ark. Stats., § 27-1907, provides: "Where a judgment has been rendered against a defendant or defendants constructively summoned and who did not appear, such defendants or any one or more of them may at any time within two [2] years, and not thereafter, after the rendition of the judgment appear in open court and move to have the action retried; and, security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants as if there had been no judgment, and upon the new trial the court may confirm, modify or set aside the former judgment and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant or defendants paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it and yet remaining in his possession and pay to the defendant the value of any property which may have been taken under an attachment in the action or under the judgment and not restored."

Appellee, Mrs. Thomas, argues that the statute in question has no application here because the judgment is against the land. But, if the appellee does not own the land by reason of the trust she seeks to establish, appellants may own an interest therein. Therefore the decree in favor of the trust is, in effect, a judgment against appellants because they may have lost an interest in the land as a result of the decree which they seek to set aside.

Appellee relies on *Wilson* v. *Sadler,* 136 Ark. 415, 206 S. W. 754, but this case is not in point as it deals with confirmation of tax titles, a special statutory proceeding governed by the act itself. *Gleason* v. *Boone,* 123 Ark. 523, 185 S. W. 1093, holds that a foreclosure sale will not be set aside where the defendant has been constructively summoned, but that decision is based on the proposition that the judgment will not be set aside pending a hearing on the motion for a new trial, and there is

no redemption from the sale under the order of foreclosure.

*Howard* v. *Howard,* 152 Ark. 387, 238 S. W. 604, was a suit by a widow to establish a resulting trust. The defendants were non-residents constructively summoned, and a new trial was granted without question. There is no reason why the statute should not apply to the case at bar.

Reversed.

[redacted]

GRIMES *v.* EVANS.

5-801 285 S. W. 2d 510

Opinion delivered January 9, 1956.

[redacted]

*R. H. Peace,* for appellant.

*Claude E. Love,* for appellee.

LEE SEAMSTER, Chief Justice. The appellants prosecute this appeal from a decree of the Union Chancery Court, Second Division, which refused to declare certain deeds, absolute in form, to be mortgages and also refused to declare certain tracts of real estate to be held in trust by appellee for appellants.

The undisputed facts reveal that Hope Traylor, the father of appellants, purchased the south 92 feet of Lot 4, Block 1 of Simpson Addition to the City of El Dorado, Arkansas, from S. R. Morgan in 1925. On June 5, 1928, Hope Traylor obtained a loan in the amount of $500 from B. Davis. In consideration for this loan, Traylor

entered into an agreement with Davis, whereby, repayment of the loan would be made at the rate of $10 monthly, until the indebtedness was liquidated. As security for this loan, Davis required Traylor to execute and deliver to him, a mortgage on the above described property. Hope Traylor died, thereafter, without fully satisfying the amount of his indebtedness to Davis. On February 26, 1934, Davis filed a suit to foreclose the mortgage on the property, and shortly thereafter, the chancery court ordered the property to be sold on June 1, 1934, to satisfy the amount of the outstanding indebtedness on the mortgage. B. Davis submitted the highest bid for said property, whereby, the property was sold to him and a commissioner's deed was issued to him on June 11, 1934. The deed was recorded on June 12, 1934.

In order that Myra Traylor might save the homestead, B. Davis entered into a contract with Myra Traylor on September 17, 1935, whereby, she would pay him the sum of $400 for said property, of which $10 was paid in cash and a series of 39 notes were executed for the balance of $390, payable $10 monthly until the debt was liquidated. On the same date, B. Davis executed to Myra Traylor a sales contract or bond for title, binding himself to convey said property to her, upon payment of the above described indebtedness. Myra Traylor died in 1937, without fully satisfying the amount of the indebtedness.

On August 12, 1939, B. Davis conveyed the above mentioned lands by warranty deed to J. B. Evans, in consideration for the sum of $300. On the same day, August 12, 1939, the appellants herein, who were the occupants of the premises, executed a quitclaim deed to J. B. Evans relinquishing any interest that they might have in the property. The appellants continued to occupy the premises and made monthly payments of $10 each to J. B. Evans, until his death in 1949. Thereafter, the appellants made these monthly payments to Mrs. J. B. Evans, who was the sole beneficiary under J. B. Evans will until October of 1952, at which time Mrs.

Evans served notice upon appellants to vacate the premises.

The appellants filed the instant suit on November 12, 1954, claiming that J. B. Evans was holding the above described property in trust for them and they were entitled to have title declared in them; that the deeds executed by them in 1939 were given as a mortgage to secure a debt of $300, which debt has been fully satisfied. Upon trial of this cause, the chancellor dismissed the appellants' complaint for want of equity and quieted and confirmed title to the property in the appellee. On the appellee's cross-complaint, the chancellor found that appellants were tenants at will of appellee, whereby, judgment in the sum of $260 was awarded appellee, such amount representing 26 months rent owed by appellants. This appeal follows.

According to the testimony of the appellants, they entered into an oral contract with J. B. Evans, whereby, Evans loaned the appellants the sum of $300, with which to pay off an indebtedness on the property to B. Davis, in return for appellants promise to repay this amount in monthly installments of $10 each, with 10% interest until debt was liquidated. Appellants insist that J. B. Evans required them to execute to him a quitclaim deed to the property herein above described, said deed being dated August 12, 1939, and was given as security for repayment of the $300 loan. On the same date, B. Davis instead of executing the deed to appellants, did execute and deliver a deed to the property to J. B. Evans, who acquired title to the property for the specific purpose of holding this property in trust for appellants, until the $300 loan was repaid, at which time appellants allege that Evans agreed to reconvey the property to them. The appellants insist that payment was made in accordance with this oral agreement, until October of 1952, at which time they decided that an overpayment had been made on this loan and they refused to make any further payments and sought title to the property.

The testimony of the appellee Mrs. J. B. Evans was to the effect that J. B. Evans acquired title to the above

described property by an absolute sale of the property to him by B. Davis, on August 12, 1939. Appellee denied that J. B. Evans entered into an oral contract to reconvey the property to appellants and further testified that Evans did not loan the appellants the sum of $300. It is earnestly insisted that had Evans made this purported loan to appellants, they (appellants) would have personally liquidated their indebtedness to B. Davis and also would have procured title to the property in their own name, executing a mortgage to Evans to secure the loan.

The appellee further testified that appellants rented the property for $10 per month, and such payments were made from 1939 to September, 1952, a period of 13 years. In September of 1952, the appellants refused to make further rent payments, at which time the appellee served notice upon appellants to vacate the premises.

The testimony of Floyd Stein, an attorney who prepared all the deeds in question, corroborates the testimony that was adduced by appellee. Mr. Stein testified that he examined the title to the property for Mr. Evans, whereby, the examination revealed that said property was owned by B. Davis under and by virtue of a commissioner's deed executed on June 11, 1934. Stein further testified that he prepared a warranty deed to said property, which deed was executed before him as a notary public, conveying the property from B. Davis to J. B. Evans; that before he would approve the title to the property, he procured a quitclaim deed from appellants, since they were occupants of the premises; that the only reason for procuring a quitclaim deed from appellants, was to prevent any question being later raised by them that they were anything other than tenants at will of B. Davis. Mr. Stein also stated that the whole transaction was fully explained to all parties.

Appellants seek to reverse the decree of the trial court on the ground that this case calls for an application of the established rule in this State that a court of equity will treat a deed, absolute in form, as a mortgage, whenever executed for the loan of money or as security

for a debt. The general doctrine prevails in this State that the grantor may show that a deed absolute on its face was only intended to be a security for the payment of a debt and thus is a mortgage. Since the equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. If there is a debt existing with a loan of money in advance, and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. However, the presumption arises that the instrument is what it purports to be; and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. By this is meant that the evidence tending to show that the transaction was intended as security for debt, and thus to be a mortgage, must be sufficient to satisfy every reasonable mind without hesitation. See *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663; *Landers* v. *Denton,* 213 Ark. 87, 209 S. W. 2d 300; *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. 2d 308.

We do not think that the evidence is of that certain, unequivocal and convincing character that would authorize or justify a court of equity to treat the instruments as a mortgage instead of deeds. The oral testimony, when taken in consideration with the written instruments, renders it reasonably certain that it was the intention of the parties that the deeds should be absolute in fact, as well as in form.

After a careful consideration of the evidence, we are of the opinion that the decree of the chancery court was correct, and it will therefore be affirmed.

4821 285 S. W. 2d 515

Opinion delivered January 9, 1956.

No brief for appellant.

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

J. SEABORN HOLT, Associate Justice. May 16, 1955 a jury found appellant, John Gabbard, guilty of the crime of indecent exposure of the person under § 41-1127 Ark. Stats. 1947-Supplement, and fixed his punishment at a term of six months in prison. From the judgment comes this appeal. Only one brief, that of the State, has been filed here.

Appellant's motion for a new trial contains nine alleged assignments of errors. Under the first five he, in effect, contends that the evidence was not sufficient to support the verdict. We do not agree. Section 41-1127 above provides: "It shall be unlawful for any person with lascivious intent to knowingly and intentionally expose his or her private parts or genital organs to any other person, male or female, under the age of sixteen (16) years. [Acts 1953, No. 94, § 2, p. 281.]"

I

R. E. Griffin, a witness for the State, testified that appellant came to his home on Mitchell Street in Fayetteville and inquired for the mother of the little 14 year old girl involved here. Quoting from his testimony: "A. Well, he just come down there, said he wanted to talk with me awhile and this little girl and me was out in the yard there and he kept throwin' his gab at her and directly they went off to see her mother . . . Q. Now, did you hear him talking to the little girl? A. I sure did. Q. Do you remember what he said to her? A. I couldn't remember it all. He just said that he wanted to see her mother, it had been a long time since he had seen her. Q. Did she go with him in the car? A. She went with him in the car. Q. Which way did they leave from your house? A. They went east to the fair ground where the new street is. Q. Went east? A. Yes, east on Mitchell Street in front of my door. Q. When did you next see these two people that afternoon, if you did see them? A. Well, they come from the north and when he got even with this street, he stopped and let her out and she didn't much more than hit the ground until he put the gas to it and left. Q. Now, will you tell the jury or describe to the jury the condition of the little girl when she got out? A. Well, sir, she was a cryin' and she didn't get much further than that table there, she said, 'He mistreated me.' "

The little girl testified that Gabbard asked her where her mother was and she told him her mother was working at the Home Town Cafe. Gabbard asked her to go with him and she did. Gabbard drove out by the University farm and on out by the lime kiln and then stopped on the top of a mountain, then came around and opened the car door, shoved her down in the seat. He had his personal parts out and asked her to zip up his breeches but she refused to do so. A car then came along and he acted like something was wrong with the car. After the car passed he got on top of her. She was crying at the time. She saw his private parts when he got off her and that he tried to have sexual intercourse with her. As indicated, this evidence was ample to support the verdict.

II

Appellant next contends that the court erred in allowing R. E. Griffin to testify over his objections, that the prosecutrix told him [Griffin] on her return that the appellant had mistreated her. This evidence was properly admitted in the circumstances. It was proper evidence to show that this little girl accused appellant of the offense charged. It was proper for Griffin to state that the accusation of the prosecutrix was made to him, but he was not permitted to state any of the details as stated to him by the little girl. "The true rule would seem to be that while evidence may be admitted to show that the prosecutrix, within a reasonable time, reported the crime to an appropriate person and told what occurred, and the person receiving the information may testify that an accusation was made, yet it is not competent for such witness to support testimony of the prosecutrix by repeating in detail what was said by the prosecutrix." *Lindsey* v. *State,* 213 Ark. 136, 209 S. W. 2d 462.

III

Next, appellant says that the court erred in allowing the following question to be propounded to the mother of the prosecutrix and her answer:

"Q. As her mother, do you know whether or not she has menstruated yet?

A. No sir, she hasn't."

The record reflects there was no objection made to this question and answer. It is now too late to raise this question for the first time here. See *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702.

We have carefully examined the remaining assignments of alleged errors and find each to be wholly without merit. The judgment is affirmed.

BAKER *v.* HEDRICK.

5-785 285 S. W. 2d 910

Opinion delivered January 9, 1956.

[Rehearing denied February 6, 1956.]

*John F. Gibson,* for appellant.

*Clifton Bond,* for appellee.

ED. F. MCFADDIN, Associate Justice. We have before us on this appeal the validity of a local option election. Pursuant to Initiated Act No. 1 of 1942 (§ 48-801 et seq. Ark. Stats.[1]), a local option election was held in Bradley County on August 7, 1954. The Board of Election Commissioners duly certified the result of the election to be:

> 2001 votes *against* the sale or manufacture of intoxicating liquors;

[1] In *Denniston* v. *Riddle,* 210 Ark. 1039, 199 S. W. 2d 308, we considered this Initiated Act No. 1 of 1942; and in *Tollett* v. *Knod,* 210 Ark. 781, 197 S. W. 2d 744, we listed some of our cases involving the said Act.

1673 votes *for* the sale or manufacture of intoxicating liquors.

In other words, on the face of the returns, the "Drys" (appellees here) won the election by 328 votes. In due time the "Wets" (appellants here) filed a contest proceeding in the County Court which decided in favor of the contestees; and the contestants appealed to the Circuit Court. There, after an extended trial, the Court found that the contestees won the election by the aforesaid vote of 2001 to 1673. The contestants bring this appeal; and in effect present here one issue — that is, that the conduct and methods employed by the contestees before and during the election constituted such fraud, intimidation and coercion as to void the entire election.

Usually in an election contest the contestant challenges certain designated ballots or the returns from certain designated voting places; but the present election contest is not of that kind. Here, there is no attack on any specified ballots; rather the attack is on the entire election. This is the language of the contestants' petition:

"Come the undersigned contestants, . . . and for their contest of the local option election held in Bradley County, Arkansas, on August 7, 1954, under provisions of Initiated Act No. 1 of 1942, allege:

"1. That prior to and during the conduct of said election, there was such manifestation of intimidation exerted by the Bradley County Drys that many voters were actually prevented from voting as desired to such an extent that the results of the election do not reflect a true sentiment of the electors. That by reason of the intimidation exerted by the Bradley County Drys, the true result of the election cannot be ascertained with certainty.

"2. That fraud, intimidation, or coercion of voters in a system of illegal voting was permitted to such an extent that the result of the election would have been different if such practices had not been engaged in by the Bradley County Drys and certain election officials."

To support the foregoing allegations, the contestants, in Paragraphs 3 to 11 of their petition, alleged specific acts claimed to have been fraud, irregularities or intimidation committed by contestees or their leaders. The record here is voluminous, being approximately 700 pages of pleadings and testimony besides separate exhibits. At the conclusion of the trial, the Circuit Judge delivered his opinion. He named in order nearly every one of the more than forty witnesses who testified; discussed the extent and effect of the testimony of each such witness; and then discussed the combined effect of the testimony offered by each side. From all of the evidence the Circuit Judge found and declared that, even though there had been irregularities and illegalities (definitely named by him) in the election, nevertheless these were not sufficient to void the entire election. From a judgment rendered in accordance with that opinion and dismissing the contest, the contestants bring this appeal.

At the outset we mention that the findings of the Circuit Judge in an election contest have the force and effect that a jury verdict has in the ordinary circuit court case. *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024; *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940; *Logan* v. *Moody,* 219 Ark. 697, 244 S. W. 2d 499; and *Phillips* v. *Melton,* 222 Ark. 162, 257 S. W. 2d 931.

The appellants claim that the case at bar is ruled by the case of *Patton* v. *Coates,* 41 Ark. 111. That was a landmark case[2]. There, in the days immediately following the Reconstruction, an election was held for County Judge of Pulaski County, and the then recently enfranchised Negro voters attempted to see that every Negro voted for the same candidate: to insure the entire absence of opposition votes, armed bands paraded before some of the election places; various acts of force and intimidation are discussed in the opinion. The result was,

[2] On the point here involved, the case of *Patton* v. *Coates* has been cited in the following cases: *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723; *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680; *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940; and see also *Sumpter* v. *Duffie,* 80 Ark. 369, 97 S. W. 435; *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024; *Crissman* v. *Shaver,* 191 Ark. 692, 87 S. W. 2d 404; *Velvin* v. *Kent,* 198 Ark. 267, 128 S. W. 2d 686; and *Wilson* v. *Luck,* 203 Ark. 377, 156 S. W. 2d 795.

that this Court reversed a finding, that there had been a valid election, and remanded the case for further proceedings. Mr. Justice EAKIN, the author of that opinion, gave this test as to when an election should be set aside:

"The wrong should appear to have been clear and flagrant; and in its nature, diffusive in its influences; calculated to effect more than can be traced; and sufficiently potent to render the result really uncertain. If it be such, it defeats a free election, . . . If it be not so general and serious, the court cannot safely proceed beyond the exclusion of particular illegal votes, or the supply of particular legal votes rejected."

The appellant quotes the above as the test by which to judge this local option election in Bradley County held August 7, 1954; and for the purposes of this appeal, we accept the quotation as the standard by which to test this case, in order to see if the findings of the Circuit Court are without substantial evidence to sustain them.

Here we have these five as the principal irregularities or illegalities in this case:

(1) Letters were sent by the contestees to men in the Armed Services saying that if the recipient had voted "wet" in an absentee ballot and desired to change the ballot, the recipient could request a new ballot and vote again. Of course, such statement as to second voting, was entirely erroneous and in violation of § 3-1509 Ark. Stats. Within a very few days after mailing the said letters, the contestees learned of the illegality that had been proposed, and promptly dispatched a second letter to each recipient correcting the first one. There is absolutely no showing that the first letters resulted in any illegal voting. Their sending was unwarranted, unwise and illegal: but there is no showing that they resulted in a single duplicate ballot being cast in the election.

(2) The contestees heard that the contestants were trying to get the Negro voters to vote "wet" in the absentee box and then vote "wet" *again* in person at the August 7th election; and so the contestees sent mimeographed letters to about 1100 Negro voters urging them

to vote "dry" at all times, and enclosing a circular which stated that it was a fine of $100.00 to vote more than once in the same election. A portion of § 3-1121 Ark. Stats. was copied in the circular. It is claimed that this "$100.00 fine circular" was intimidation. The mimeographed letter (contestees' Exhibit No. 4) is in the most polite language, contains no threats or suggestions of intimidation, and explains that the circular is not a threat but a mere statement of a portion of the law. There were five witnesses who testified that they decided not to vote after seeing this circular because it "scared them." Let us assume that the circular, worded as it was, should not have been sent; nevertheless there is no proof that it affected more than five voters. Certainly such evidence is not sufficient to void an entire election.

(3) There is testimony that two ardent "drys" met with Negro voters individually and collectively and urged them to vote "dry." These meetings and conferences were not illegal: open and free discussion is always proper. Campaigning is one of the practices in our democratic system of society. One Negro said that he was "threatened" by such conversation; yet he admitted that he voted "wet," and the evidence showed that he worked for the "wets" all through the election period. Certainly he was not prevented or intimidated from voting or working with others for the side that he espoused. The testimony, that the white man "threatened" him, is without corroboration. These items (2) and (3) are the only portions of the testimony that bear on the matter of intimidation.

(4) It was shown that in two precincts the voting box on the August 7th local option election was located at a place 100 to 450 feet distant from where it had been located at the previous July 28th primary election; but in neither precinct was it shown that anyone was deterred or hindered from voting. In each precinct the voting box was at a place theretofore or thereafter used in other elections; and it was shown that it was not unusual to have the voting box either at the store or at the church a short distance away. Certainly there was noth-

ing in these two claims — involving only two boxes out of twenty-seven — to void an entire county-wide election.

(5) The greatest irregularity occurred in the absentee box in which the certified vote was 101 *against* the manufacture or sale of intoxicating liquors and 260 *for* the manufacture or sale of intoxicating liquors. It was shown that there were 94 requests for absentee ballots which were never honored because the notation on each envelope indicated it to be a ballot instead of a *request* for a ballot. These envelopes were made exhibits: each was addressed to the County Clerk at Warren, Arkansas, and bears on the face of the envelope these words: "Ballot, Local Option"; and in most instances the words, "Ballot, Local Option," are in the same handwriting as that of the address. The County Clerk testified that he thought these were *ballots,* instead of *requests for ballots;* and so he placed them in the receptacle for ballots; and it was not discovered until after the election that these were mere requests. If we should say that each one of the 94 requests was from a person who intended to vote "wet," and if we added these 94 to the 1673 ballots received by the contestants, still the result would not be sufficient to change the election. The Circuit Judge found as a fact that there was no fraud in regard to the absentee ballot box, and there is substantial evidence to sustain his findings.

There were other charges of illegalities and irregularities, but they lacked any substantial proof to support them. In *Velvin* v. *Kent,* 198 Ark. 267, 128 S. W. 2d 686, in speaking of charges of fraud and improper conduct of electors and officers of the election, this Court said:

"These charges were serious and grave, but they did not prove themselves. Forceful and emphatic denunciation at this time does not supply proof wholly lacking upon the trial."

The quoted statement finds application in the case at bar. Furthermore, in *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, Chief Justice Cockrill said:

"It is a serious thing to cast out the votes of innocent electors for acts done by others, and it is the province of the Courts to see that every legal vote cast is counted when the possibility exists."

Without prolonging this opinion to discuss each of the other claimed irregularities, it is sufficient to say that the Circuit Court did not condone any illegalities or irregularities that occurred in this election. Neither do we condone them, but we do say that there is substantial evidence to sustain the findings of the Circuit Court to the effect that all of the specific items of irregularities and illegalities, when totalled, were not sufficient to void the entire election within the test stated in *Patton* v. *Coates,* as heretofore quoted. It is a serious matter to throw out an entire election; and that result should not be reached unless the contestant has offered proof sufficient to satisfy the test in *Patton* v. *Coates.* The Circuit Judge found that the test had not been met in the case at bar; and there is substantial evidence to sustain his findings.

One other matter appears most significant. The poll tax list of Bradley County for the year of this election showed that there were 5053 poll taxes issued. There were a total of 3674 votes cast in this August 7th local option election, which total is more than 72% of the total poll tax receipts. Of course, maiden voters and "move-ins" might have increased the total voting capacity of 5053; but deaths and removals might have equalled the maiden voters and "move-ins." The point is, that the vote in this election of August 7th was 72% of the total poll tax receipts issued. It is not claimed that any of the 3674 votes were illegal. Only five people testified that they failed to vote because of the "$100.00 fine circular," and 94 requests for absentee ballots failed to be honored. There was no showing that *any one* of the remaining voters of Bradley County was deterred from voting or coerced to vote against his wishes. Furthermore the evidence discloses that in the primary election of July 28, 1954 — in which there was a most spirited race for nomination for United States Senator and for

Governor — there were only 3595 votes cast in all of Bradley County. So in the local option election of August 7th there were 79 more votes cast than in the primary election. This seems a most cogent argument against the contestants' allegation that "many voters were actually prevented from voting."

The Circuit Court found that the contestants' evidence failed to meet the test stated in *Patton* v. *Coates;* and we find substantial evidence to support the Circuit Court's finding.

The judgment is affirmed.

Mr. Justice ROBINSON not participating.

MAPLES *v.* STATE.

4824 **286 S. W. 2d 15**

Opinion delivered January 9, 1956.

[Rehearing denied February 13, 1956.]

*Frederick A. Newth, Jr.*, for appellant.

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

MINOR W. MILLWEE, Associate Justice. Appellant, Marvin Maples, was charged with second degree murder in the killing of Hugh Craighead. Upon a trial be-

fore the court sitting as a jury, under Ark. Stats. Sec. 43-2108, appellant was found guilty of manslaughter and his punishment fixed at 3 years in the penitentiary.

The killing occurred at the home of appellant at 1005 Allis Street in Little Rock, Arkansas, about 7 p. m. on July 31, 1954. According to three of appellant's close neighbors, who testified for the State, the deceased drove in front of appellant's home, walked upon the porch and knocked on the front door. Appellant came out on the porch for a short period and then went back in the house. A somewhat lengthy and noisy argument took place. Deceased started to leave and then walked back and was opening the outside front screen door when he was shot in the right side of the head with a shotgun at close range and fell backwards on the porch with his feet near the threshold and the open screen door resting against his left leg. Deceased was unarmed and the State's eyewitnesses observed no overt act on his part to do bodily harm to appellant or other inmates of the residence.

Several photographs made immediately after the shooting were introduced by the State without objection. They show blood, brain tissue and other particles of flesh from deceased's skull and scalp on both the floor and ceiling of the porch and in the front yard. The major portion of deceased's brain was lying in the front yard about 15 feet from the body. According to one of the photographs and the testimony of the deputy coroner and police officers, no blood or human tissue appeared on the inside of the house nor was there any other evidence of a struggle there.

Appellant and his wife testified that deceased cursed and threatened to kill both of them when appellant went out on the porch; and that appellant jerked away from deceased, reentered the house and fastened the screen door. When appellant started to a back room to get his gun, deceased started choking and beating Mrs. Maples and had her head between his legs choking her when appellant returned with the loaded shotgun and shot deceased while the latter was standing about 2 or 3 feet inside the house still choking Mrs. Maples. Although they

testified that deceased was a stranger to them, appellant identified deceased as the step-father of Betty Jean Moore, a girl who lived with appellant seven or eight years. Appellant further stated that deceased told him he had come, "to get revenge for Betty Jean Moore." Neither the State nor appellant sought to further develop the nature of the relationship of the parties or the cause of the apparent bad feeling existing between them. While Mrs. Maples testified that deceased inflicted scratches and bruises on her face, she admitted that a photograph taken immediately after the killing failed to reveal such injuries.

The sole contention for reversal is that the judgment is not supported by any substantial evidence. It is argued that the undisputed evidence shows, as a matter of law, that the killing was justified on the ground of self defense and more particularly in the necessary defense of appellant's home under Ark. Stats. Sec. 41-2234. This statute provides: "A manifest attempt and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any person, dwelling or being therein, shall be a justification of homicide."

In reference to this statute in *Brown* v. *State,* 55 Ark. 593, 18 S. W. 1051, the court said: "Following the doctrine of the common law, the statute regards the violent attempt to enter the house as equivalent to an assault upon the person to be injured; and when it is obviously about to be made, he may at once put himself in an attitude to repel the aggressor. It was not practicable to give a rule applicable to all cases for determining what acts or conduct will constitute the actual attempt to enter a house. But it must be a "manifest" attempt; and we take this to mean one so plainly made that no reasonable doubt will exist as to the purpose of the aggressor. At what point the effort to enter the house has begun, and how far it may be permitted to proceed with safety to the life or person of the individual assailed, must be determined by the circumstances of each case. And these are questions more of fact than of law."

In commenting on the *Brown* case in the opinion in *Hall* v. *State,* 113 Ark. 454, 168 S. W. 1122, Judge HART, speaking for the court, said: "In the case of *Brown* v. *State, supra,* the court held that an attack upon a man's dwelling is regarded in law as equivalent to an assault upon his person, and that in order to justify a killing in defense of one's house, or of the inmates thereof, it is not necessary that there should be actual danger, provided the defendant acts upon a reasonable apprehension of danger. But the court further said that it is the duty of the householder to prevent the entry by means not fatal, if he can do so consistently with his own safety. So it may be said that if the defendant kills where there are no reasonable grounds of apprehension of danger it is manslaughter; and if the killing is done with malice, express or implied, it is murder. Even though the deceased is attempting at the time unlawfully to enter the defendant's dwelling house, if the killing is with malice and ill will, and not for self-protection or the protection of the house, it is murder. See *State* v. *Scheele,* 57 Conn. 307, 14 Am. St. Rep. 106. For, as it is there said, 'the law of self-defense, or the defense of one's domicile, does not require the giving to evil-minded persons an opportunity to take the life of another on such easy terms.' "

Under our settled rule the trial court, sitting as a jury, is the sole judge of the credibility of the witnesses, and in determining the sufficiency of the evidence to support a verdict or judgment of conviction on appeal, we view it in the light most favorable to the State. *Cook* v. *State,* 196 Ark. 1133, 121 S. W. 2d 87. Of course, if the trial court was bound to accept the testimony of appellant and his wife as true, the killing was in necessary defense of both person and habitation. On the other hand, if the court believed the testimony of appellant's neighbors, as corroborated by that of the officers and the physical facts so vividly portrayed by the photographs, then the evidence was substantial and sufficient to sustain a conviction for a higher degree of homicide than manslaughter. In cases involving similar conflicts in the evidence, we have held that the fact finders were fully warranted in finding that the killing or assault was done

with malice or ill will and not in defense of the defendant's person or place of residence. *Bealmear* v. *State,* 104 Ark. 616, 150 S. W. 129; *Davis* v. *State,* 206 Ark. 726, 177 S. W. 2d 190.

Affirmed.

HARRIS *v.* HARRIS.

5-824 285 S. W. 2d 513

Opinion delivered January 9, 1956.

*Bailey, Warren & Bullion,* for appellant.

*John L. Hughes,* for appellee.

GEORGE ROSE SMITH, J. By this suit the appellant, Tom Harris, who has record title to an undivided seven-eighths interest in the forty-acre tract in controversy, seeks to quiet his title to the whole as against his brother John, the appellee, who is the apparent owner of the other one-eighth interest. The chancellor rejected Tom's claim of complete ownership and granted John's request for partition, the decree correctly directing that John's share be allotted to him from the unimproved portion of the property.

These litigants and the other six children of R. P. Harris inherited this tract, then unimproved, from their father. In 1933 Tom obtained from his seven brothers and sisters a written contract by which he agreed to purchase their interest in the land for $140, the money to be paid a year later. Tom immediately took possession of the land, built a house and other improvements thereon, and has lived on the property ever since. In 1937 the other six children executed a deed to Tom, but John refused to join in the conveyance and told Tom that he was claiming his interest as an heir.

In the trial court the appellant seems to have contended that he had acquired John's one-eighth interest by adverse possession. The proof does not support this contention. In order for the possession of a tenant in common to be adverse to his cotenant knowledge of the hostile claim must be brought home to the cotenant, either directly or by acts so notorious that notice may be presumed. *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809. Here it is doubtful if Tom intended to hold adversely to John, but even if he did the evidence falls short of showing that the required notice of a hostile claim was ever brought home to John.

In this court the appellant has abandoned his assertion of adverse possession and insists instead that the chancellor should have granted specific performance of the contract that John signed in 1933. Assuming that the record permits this question to be raised by the appellant, we find the contention to be without merit.

It is argued in the brief that Tom paid John his share of the purchase money, but the weight of the evidence is to the contrary. Tom did not testify that the money was ever paid to John; he merely says in substance that he was willing to offset the purchase money against a debt which he testified was owed to him by his brother. But John says that the debt had already been paid and that his reason for not signing the deed was Tom's failure to make payment. In our opinion John's point-blank refusal to execute the deed persuasively corroborates his version of the transaction.

In these circumstances the appellant has been guilty of laches in delaying the assertion of his claim for some seventeen years. He relies strongly upon cases like *Hargis* v. *Edrington,* 113 Ark. 433, 168 S. W. 1095, where it was said that "a vendee in possession is not barred from suing for specific performance by delay for any period in bringing his action, his possession being the continuous assertion of his claim. He may rest in security until his title or right of possession is attacked." In the cases cited, however, the vendee's only claim to the land lay in his contract of purchase; his possession was therefore unequivocally referable to that contract.

Here the situation is different. Inasmuch as Tom has been through the years a tenant in common owning a seven-eighths interest in the land his possession cannot be attributed solely to his executory agreement to buy John's one-eighth. More nearly in point than the cases cited by the appellant is the holding in *Haines* v. *McGlone,* 44 Ark. 79, where a tenant in common relied upon his possession as part performance of an oral contract for the purchase of his cotenant's interest. We held that since the possession could not be referred exclusively to the contract it failed to satisfy the statute of frauds. For the same reason Tom's possession, already rightful, cannot be regarded as such an assertion of his rights under the contract as to absolve him from the charge of laches. It was incumbent upon Tom to assert his claim promptly when his brother unqualifiedly refused to honor the agreement in 1937.

Affirmed.

BURGESS *v.* DANIEL PLUMBING & GAS CO., INC.

5-771 285 S. W. 2d 517

Opinion delivered January 9, 1956.

*P. H. Hardin,* for appellant.

*Harper, Harper & Young,* for appellee.

PAUL WARD, Associate Justice. This appeal challenges the permanent order of the Chancery Court of Sebastian County, Fort Smith District, which restrained Local Union No. 29 of Fort Smith from picketing the place of business of the Daniel Plumbing & Gas Company, Inc., while it was engaged, as a sub-contractor, in installing plumbing and pipe fittings for a new factory building being erected in Fort Smith for the Eastern Metal Products Corporation.

On March 16, 1955 the Daniel Company filed a complaint containing, in substance, the following material allegations: The Daniel Company is a corporation duly organized and existing under the laws of this state with

its principal place of business at Beebe, Arkansas; The appellants are officers and representatives of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 29; On or about February 8, 1955 the Daniel Company was awarded the contract for the installation of the necessary plumbing in the factory building above mentioned; On March 10, 1955 one of appellants, W. C. Atwell, placed a picket at said building site and continues to picket said site; On said date the Daniel Company was employing both union and non-union employees, and there is and has been no dispute between the Daniel Company and any of its employees over wages, hours or working conditions; The Daniel Company has not refused to negotiate with the union and has not discriminated against organized labor or said union; Said picketing is unlawful and is intended to obtain a closed shop, either contractually or non-contractually, in violation of the constitution of this state, and is intended to coerce the Daniel Company into unlawful discrimination against its employees who are not members of said union; As a result of the picketing all union employees of the Daniel Company and other contractors engaged in erecting said factory building have ceased working, and; Unless said picketing is restrained the Daniel Company will suffer irreparable damage. The prayer was for a temporary restraining order.

After a temporary restraining order was issued on March 18, 1955, the union, on April 9, 1955, answered that said temporary restraining order denies to them their right of free speech as guaranteed by the Federal Constitution; and the issuance of a permanent restraining order would likewise deprive them of the right of free speech.

*The general factual background* out of which this controversy arises is, summarily stated, as follows: The Daniel Company is a corporation located at Beebe. Its president is John B. Thurman of Little Rock and its active manager or superintendent is E. B. Daniel who lives at Beebe. Merl Daniel, the 28 year old son of E. B. Dan-

iel, acts as superintendent on specific jobs. The Daniel Company obtained a contract from J. S. Davis & Sons who in turn had the general contract for building a new factory building for the Eastern Metal Products Corporation at Fort Smith. The latter part of February 1955 young Daniel, as field superintendent of the Daniel Company, went to Fort Smith for the purpose of installing the plumbing equipment in said building, and had unloaded some material at the construction site. He got the job under way about the first of March 1955 and soon thereafter employed a Mr. Rice who was a union plumber living in Fort Smith and one other non-union plumber who lived at Beebe. Young Daniel was himself a plumber and did manual labor on the job as such.

After Rice had been working on the job for two days an agent of the union, Mr. Atwell, came on the job and stated to young Daniel that he wanted to negotiate to have Rice's wages raised to the extent of $1.00 an hour. While Rice had been working he was paid at the rate of $2.75 per hour which was the prevailing union wage scale for plumbers in Fort Smith, and Rice had made no demand for a wage increase. When Young Daniel told Atwell that he had no authority to negotiate for wage raises, Atwell immediately left and Rice walked off the job promptly thereafter. About an hour and twenty minutes later Rice was back picketing Daniel's place of operation. As a result of this all union men working for appellee and the general contractor walked off the job.

Set out below is a summary of the pertinent testimony of the witnesses.

*Felix Vozel,* a witness for appellee, is an employee of the J. S. Davis & Sons Construction Company which has the general contract for erecting the building in question. I have been such employee for 17 years. The Daniel Company started assembling its material about the 23rd or 24th of February 1955 but had not at that time started work on the job. About that time I saw Mr. Atwell, an agent for Local 29, at the construction site and he asked me who had unloaded the materials for the Daniel Company, and I told him I did not know.

I asked him what he was going to do about it and he replied that they were going to close the job down for 90 days.

*Lee Davis* a witness for appellee. I have lived in Fort Smith for 50 years and am a member and senior partner of the J. S. Davis Lumber Company, Construction Division, and we have a contract to erect the factory building in question. Our contract amounting to approximately $400,000 was awarded last fall. I am a member of and a contributor to the Fort Smith Industrial Foundation which promoted the securing of the Eastern Metal plant for Fort Smith, and as such attended a meeting of the Foundation Committee at the Chamber of Commerce building the latter part of February 1955. This meeting was called at the request of Mr. Folsom and Mr. Atwell [members of Local 29]. Besides those men at this meeting there were presidents of three local banks, Mr. Frank Shaw [an attorney] and Mr. Jack Rose [attorney for the union], and possibly some others. When Mr. Folsom was asked to state the purpose of the meeting he objected to my having a lawyer and a stenographer present. Mr. Folsom was informed that I had as much right to have an attorney there as he and his friend had, but he refused to talk because the stenographer was there to take notes on the meeting. I finally agreed to dismiss the stenographer. He then stated that "they were there in the interest of securing the work for Fort Smith Men." Mr. Atwell stated that he wanted to see Fort Smith men get the work, and I said you mean union men and, he said no, I don't mean union men; Mr. Atwell made a sign (pointing with his thumb) and said "Well we will take care of him over there." I inferred that he was pointing to the court house since things have happened as they did and because all of the men Daniel brought in here were turned down on getting a license. Daniel had 11 men take the examination for license and all of them failed. Mr. Atwell is the business manager of Local 29 of the Plumbers and Steam Fitters Union. Mr. Daniel was not present at the meeting and had not come on the job at that time, and neither was any representative of the Daniel Company present. Under our

general contract we have been employing union common labor and paying the union scale of wages. When the picketing started all my union men quit work and walked out. As far as I know the Daniel Company was employing both union and non-union plumbers and common laborers. None of our union employees have returned to work since the picket line was established, and our work is down and has been down since the 10th of March. The Daniel Company's contract amounts to about 10% of the entire construction cost of the building.

*Merl Daniel,* field superintendent of the Daniel Company. I am 28 years old and live at Beebe, Arkansas and am a stockholder in the Daniel Plumbing and Gas Company, Inc. which is a corporation; my father is secretary and treasurer of the company and John B. Thurman of Little Rock is the president. I am the field superintendent for our corporation in charge of the work at Fort Smith, but I had nothing to do with negotiating the contract with the corporation which it has with Eastern Metal Products Company. I am a licensed plumber and I work as such on these jobs including the one at Fort Smith. I unloaded a car load of soil pipe on February 23, 1955 — just took one day, and it was about a week after that before I got started work — around the first of March. I knew nothing of the meeting which has been described by Mr. Davis but learned about it later. Our firm usually employs both union and non-union men and I had both union and non-union journeymen plumbers on this job. I worked along trying to get the job started when the weather permitted until March 10th, and had both union and non-union journeymen plumbers on this job. I worked along trying to get the job started when the weather permitted until March 10th, and had been receiving material for the job. On that date Mr. Atwell came out on the job in the morning — it was the second time in my life that I had seen him. He said that all union contracts had been cancelled in town and that he was opening negotiations for new contracts and wanted to know if I would negotiate a contract with him; he said that he wanted a raise in pay from $2.75 an hour to $3.75 an hour. I had been paying the men on my job $2.75 an

hour which was the prevailing union scale in Fort Smith at that time. In employing men I made no distinction between union men and non-union men. Since coming to Fort Smith I had the local newspaper carry an ad for help wanted. [A copy of the ad reads as follows: "Journeymen plumbers, $2.75 hour. Apply Daniel Plumbing and Gas Company. Eastern Metal Products job."] This ad has run more or less continuously ever since I got to town. When I get the job fully going I will need about 8 or 10 men, but right now I need only 4, considering the weather and material. When anyone answered the ad I took their names and numbers so I could contact them later, and if local competent union or non-union plumbers apply I will employ them when I can and pay prevailing wages. I pay the same wages and have the same hours and conditions as prevail for union plumbers in Fort Smith.

When Atwell came to see me and wanted a dollar an hour raise and I told him that I wasn't in a position to negotiate until I saw my father and other members of the firm, Mr. Atwell said that would bring on more talk and immediately left. At the same time Mr. Rice (union employee) walked off with him — he had worked 2 days and one hour — and in an hour and twenty minutes Rice was back carrying a picket sign, and, alternating with others, continued to do so. When I started to work I had working for me Mr. McEwing and Mr. Smith who lived in Beebe and a little later I employed Jack Rice the union plumber who lives in Fort Smith. I also had a common laborer, Mr. Weese, who lives in Fort Smith and since the picket has been up I have hired two others, and this is all the help I needed as my material was fouled up. I still have the ad running in the paper asking for applicants. Recently I haven't called anyone to work for me because I haven't needed them and I thought that others (union men) wouldn't work anyway. I also have a Mr. Hamm and a Mr. Chambers working for me and they do not live in Fort Smith. One or two men are working for me as plumbers pending an examination in Fort Smith — they have a state license. I have made no investigation to find out if applicants were union or

non-union men. I think Mr. Hamm has a union card. This is March 18th and the picket sign has been up since March 10th, and Mr. Atwell has made no overture to me and has not talked to me any further — I am willing to negotiate. I asked the employment office for some men — 2 or 3 came down (Rice was one of them and he had a union card). The employment office has not sent me any more men and won't while the picket sign is up. I have never refused to negotiate — I just had no authority to negotiate. Rice did not complain about wages.

*Harvey Hopper,* witness for Daniel. I have lived in Fort Smith 24 years — my business is plumbing and heating. The prevailing wage for journeymen plumbers is $2.75 an hour. The present contracts with Fort Smith contractors expire July 1, 1955. No one in Fort Smith pays more than $2.75 an hour which is the prevailing wage. The union is picketing no other place in Fort Smith.

*W. C. Atwell,* witness for union. I am business agent for Journeymen and Apprentices Local 29. Rice called me March 10th and said contracts had been cancelled and said he wanted me to represent him. I told Daniel all contracts had been cancelled. Daniel said "I am in no position to negotiate anything now." I turned to Rice and said "Mr. Rice what do you want to do" and he said "Well I asked you to represent me." Although I am the negotiating agent for Local 29 I have not tried to bargain with Daniel since March 10th. All contracts with Fort Smith contractors have been cancelled. I did not ask for a closed shop. The purpose of the meeting at the Chamber of Commerce was to get Fort Smith men on the job. If non-union men do work on a job the union men must get off or be subject to fining. We have cancelled no contracts in Fort Smith since March 9th, but are negotiating. None of our men get $3.75 per hour. All contracts in Fort Smith were cancelled March 9th by agreement. We couldn't have cancelled the contracts before July 1, 1955, except by agreement. We are not picketing any one else in Fort Smith.

"Q. And now you mean to say that everybody in town

that has a union contract has agreed for it to be cancelled? A. Yes, sir." "We have contracts with Lutz Bros., L. D. Burris, Hayes Bros., G. O. Bell, John Rupp, Ralph O'Brien and George H. Donnas." "Q. By this cancellation you are talking about, that is all have been by agreement with these other fellows, so you said?" "A. Yes sir—We are not picketing any one else in Fort Smith."

After the temporary order was issued the following testimony was later introduced.

*Lester Burgess,* for appellants, lives in Oklahoma—employed with Burris Heating and Plumbing Company. I am President of Union 29. Our union men take a secret oath which I am unable to recall. When the union needs men they call the "hiring hall" and Mr. Atwell and he sends out the men. He does not send out non-union men. There are no non-union men up there. Members of the union support the "hiring hall." "Q. Therefore you are not interested in getting non-union plumbers any work? A. We are not interested because they do not belong to our organization." The purpose of the picket line is usually a protest against some condition or wage. We picketed in this instance because we felt that Daniel was discriminating against our members because he wasn't hiring the men we sent to him. The purpose of the picket line was to try to get some of our men to work. "Q. In other words, you are saying, in a round about way, that the purpose of it was to shut the job down, isn't it? A. Well it worked that way, I suppose, Yes." Daniel was bringing men in from over the state but didn't hire our men. All Fort Smith contracts were cancelled by mutual agreement. "Q. You mean to say that you contacted each of these union contractors and he agreed that his contract would be cancelled? A. Yes, sir. Q. Do you remember who they were? A. Well I believe that it was Burris Heating and Plumbing Co., Herb Andrews Plumbing Co., Hayes Bros., and Joe Bender." I know that contracts were cancelled with Lutz, Burris, Hayes Bros., Bell, Rupp, O'Brien and George

Donnas. Atwell was authorized to send out the letter of March 9th cancelling the contracts.

*G. O. Bell* — Lived in Fort Smith since 1922, 64 years old, is in the plumbing business and has been for 24 years, operates G. O. Bell Plumbing Co. — known as "union contractor" and has a contract with Local 29. I have been an officer in the union, president and on the board 30 years ago. I don't remember ever getting a letter from Mr. Atwell attempting to cancel contract (after looking at the letter) this is the first I have heard about it. I have had no notice of cancellation. "Q. State whether or not by mutual agreement with Mr. Atwell, or the union, you agreed to the cancellation of the contract? I haven't talked to the man in a year — I have had no conversation with Atwell or the union about negotiating a new contract."

*Fred Lutz,* member of Lutz Bros. Plumbing Co. I have been in business 10 years in Fort Smith — 50 years old — am a union contractor — contract with Local Union. I received the letter in question. "Q. Is that the first notice you had that it was cancelled? A. The first notice that it was cancelled, yes sir. Q. Since that have you had any negotiations with reference to a new contract with Mr. Atwell or any member of the union? A. Not so far."

*John Thurman,* president of Daniel Plumbing Co. I told Mr. Daniel to tell Mr. Atwell that if he wanted to negotiate to drop me a line and I would meet with him at any convenient time and be glad to talk with him.

*W. C. Atwell,* recalled. Since the temporary injunction I asked Merl Daniel if he would sit down and talk to us, he said he would let me know as soon as he got in touch with Mr. Thurman. I have never heard from him, he was in Florida.

After careful consideration of the record and also the arguments and citations presented by both sides we have concluded that this case presents to us a factual situation only. Stated another way, the question for con-

sideration relates to the weight and sufficiency of the evidence to support the Chancellor's finding. So considered, it is our further conclusion that the decision of the trial court is not against the weight of the evidence and that it must therefore be affirmed.

For clarity and convenience we classify appellants' alleged excuses or reasons for picketing appellee's place of operation as follows: (a) To secure work for Fort Smith labor both union and non-union; (b) To secure higher wages for Rice and perhaps other union employees of appellee; (c) Because appellee refused to employ union men, and; (d) Because appellee refused to negotiate.

It is our opinion that the weight of the testimony accords with the Chancellor's finding that appellants' alleged excuses or reasons for picketing were not sustained or that they were non-existent.

(a) It was not a permissible objective for Local 29 to picket in order to force appellee to employ Fort Smith labor (including non-union labor) in preference to labor from other sections of the state. Such objective would tend to retard rather than promote the welfare of the union. In the case of *Hughes, et al.* v. *Superior Court of California,* 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985, it was held unlawful to peacefully picket the owner of a store to force him to hire negro employees in proportion to their patronage. The reasoning employed there is, we think, applicable here. Moreover appellants' witnesses admitted that the union was not interested in securing jobs for any one except its own members.

(b) We are not convinced by the testimony that the real purpose of the picketing was to secure higher wages for Rice. Rice was already receiving the prevailing union wages and had not expressed any dissatisfaction to appellee. All other union employees in Fort Smith were working for the same wage scale, although no other job was being picketed and although (as the testimony shows) the union was not negotiating for higher wages with at least some of the union contractors. In fact it was not shown by any union contractor that it was negotiating

with appellant union. Statements were made that the union was negotiating with all Fort Smith contractors, but these uncorroborated statements were contradicted by two of the named contractors.

(c) We think the testimony justified the Chancellor's finding that appellee did not discriminate against union laborers. When the picket was established on March 10th, appellee was just getting the job under way and needed, at that time, very few employees and particularly plumbers. It is not clear from the record just how many employees appellee had on the job at the stated time, but it does appear that they were divided fairly equal between union and non-union men. It is clear that appellee was employing two union men. It was stated that appellee did not call for any union men after March 10th, and that those who did apply for work were refused. In the first place the testimony does not disclose any specific instance where any union man so applied. Appellee admits it has not asked the (union controlled) "hiring hall" for any union workers since March 10th, but, as is clearly evident, it would have been a futile gesture. Not being able to know what Merl Daniel's future plans were, it is possible that had the union waited a few days it might have been able to show discrimination but, in our opinion, none was shown to exist at the time the picket line was established.

(d) Likewise, we think, the testimony supports the finding that appellee did not refuse to arbitrate. Not only was it made clear that Merl Daniel had no authority to arbitrate, but he was given no reasonable chance to do so. It is not contended by appellants that Merl Daniel said he would not negotiate or that he was unwilling to do so. This was merely a hasty conclusion which Atwell drew and hastily acted upon. This conclusion, we think, was unjustified. It would not be justified in ordinary business relations and we know of no special reason why it should be here.

The remaining question is: Does the evidence sustain the Chancellor's conclusion that Local 29 was picketing

for a closed shop in violation of Amendment 34 of the Arkansas Constitution? We think it does.

It must be assumed that the able and experienced representatives of the union had some definite objective in establishing the picket line, otherwise their actions must be considered senseless. If, therefore, appellants were unable to establish any other reason for picketing in this instance, then it is not unreasonable to deduce that the real purpose was to obtain a closed shop. Portions of the testimony lend support to this deduction.

It is not disputed that Atwell stated, approximately a week before appellee's job actually began, that it would be closed down for 90 days. The incident at the Chamber of Commerce Hall is some indication that the union was planning to exert some kind of pressure or influence in behalf of its members. One union officer stated union members took a secret oath, the violation of which could subject them to penalties. Appellee made an unsuccessful effort to obtain the contents of this oath. Appellants' testimony was evasive and unsatisfactory concerning when and how contracts with Fort Smith contractors had been cancelled. Appellee's testimony in that connection raises a suspicion that appellants' whole contention in this regard may have been a subterfuge to justify the action they took. The testimony of appellant's witness, Burgess, may have significance relative to the real objective of the picket line. At least the Chancellor had a right to so consider it in connection with all the other facts and circumstances.

"Q. Does your constitution and rules discipline a union man who works with a non-union man.

A. Quite possibly does.

Q. Well I believe you also stated that the other main purpose was to obtain union labor throughout?

A. Well that kindly follows along with it.

Q. The whole idea of your union and your reason for existence is to obtain contracts where only union people will be employed, isn't it?

A. That is true but you will find in there a statement that any violation of state law cancels any portion of that.

Q. But your principal objective is to use every means you can to have the employers employ your members isn't it?

A. Well certainly.

Q. No others.

A. (No answer)"

Appellants stoutly maintained throughout that they were not picketing for a closed union shop, but this entire record is a reminder of the old adage that offtimes actions speak louder than words.

Without relying entirely or especially on any one fact or circumstance mentioned above, it is our opinion that the record as a whole justifies the Chancellor's decision that Local No. 29 established the picket line in question to force appellee to employ only union men, contrary to Amendment 34 of the Arkansas Constitution.

Affirmed.

Justices GEORGE ROSE SMITH and ROBINSON dissent.

SAM ROBINSON, J., dissenting. There is only one issue and that is whether the plumbers were picketing for the purpose of coercing Daniel into making a contract for a "closed shop" in violation of Amendment No. 34 to the Constitution of this State prohibiting discrimination for or against union labor. It is the contention of Daniel that the union was seeking a contract for a closed shop whereby Daniel would employ union labor only. There is an abundance of evidence to the effect that the union did not want to be discriminated against, but there is absolutely no evidence showing that the union wanted to bring about a violation of the constitutional amendment. The majority have not pointed out any substantial evidence to that effect and to say that the union men were seeking a closed shop is pure speculation.

It is conceded by all that picketing is unlawful in this State if it is for the purpose of forcing a closed shop; but the point here is that the evidence does not justify a conclusion that the union men were seeking an unlawful contract. It is practically undisputed that the union men felt that they were being discriminated against; they had a right to peacefully picket and thereby give publicity to such discrimination. *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093. The picket sign put up by the union read: "E. B. Daniel Plumbing & Butane Company is discriminating against organized labor and Local No. 29 Plumbers and Steam Fitters."

Daniel had a good-sized job; ten or twelve journeymen plumbers would be needed. There does not appear to have been a shortage of qualified plumbers in the city of Fort Smith. The union plumbers of that city, anticipating that Daniel would avoid giving them employment, brought about a meeting of members of the Chamber of Commerce and the contractor, Davis, in an effort to get work for the local men. Certainly these men were acting within their rights in trying to obtain employment. Daniel was running an ad daily in the local paper seeking to employ plumbers; the local union employment office which could have furnished the needed men was not contacted and only one union plumber was employed. Daniel caused about twelve applicants to take the examination for a plumber's license in Fort Smith, all of whom failed to pass the examination except Merl Daniel; he took the examination and passed it; there is absolutely no evidence that the examination was unfair or that the men who took it and failed were in fact qualified plumbers. The fact that Daniel was having these unqualified men take the examination, when local licensed union plumbers were available and wanted work, shows rather conclusively that Daniel was discriminating against the union members, especially so when Daniel continued to run the ad for plumbers. The evidence is convincing that Daniel did not want to employ union men and was doing everything possible to avoid it. Of course, the members of the

union wanted employment and, in an effort to obtain work, they attempted to bring economic pressure on Daniel by establishing a picket line to prevent discrimination against the union. This State has no law from any source which prohibits peaceful picketing in a situation such as is presented here.

The majority appear to stress the point that at the time of commencement of the picketing only one union man was employed by Daniel. The picketing would have been lawful if no union men had been in the employ of Daniel. *Senn* v. *Tile Layers Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229; *Cafeteria Union* v. *Angelos,* 320 U. S. 392, 64 S. Ct. 126, 88 L. Ed. 58; *A. F. of L.* v. *Swing,* 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855.

I am thoroughly convinced from the record in this case that the union men were not picketing for the purpose of coercing Daniel into entering into a contract for a closed shop in violation of the law of this State, but were picketing for the purpose of preventing discrimination against the union men.

Therefore, I respectfully dissent.

Mr. Justice George Rose Smith joins in this dissent.

Tyler *v.* Boucher.

5-816 285 S. W. 2d 524

Opinion delivered January 9, 1956.

*W. H. Kitchens, Jr.,* for appellant.

*Melvin T. Chambers,* for appellee.

SAM ROBINSON, J. This case concerns the title to minerals and royalty on a small acreage. Appellants, Addison L. Tyler, and his wife, Annie Tyler, purchased as an estate by the entirety 20 acres of land. The grantor reserved three-fourths of the minerals. In language of the oil business, the Tylers acquired "5 acres of minerals." Later, they sold 2½ acres of minerals. This case involves the remaining 2½ acres. Tyler conveyed to appellee, Melvin Boucher, this remaining 2½ acres. Mrs. Tyler did not join in the deed but steadfastly refused to do so, and, at the time Boucher received the deed from Tyler, he was aware of the fact that Mrs. Tyler had refused to sign it. However, he thought she owned only a dower interest and paid Tyler $1,875.00, the full purchase price agreed upon. When it was understood that Mrs. Tyler was part owner, Tyler refunded to Boucher $937.50, one-half the purchase price. Boucher then proceeded in an effort to prevail upon Mrs. Tyler to sell her interest in the minerals or royalty. Finally, she conveyed to Boucher certain royalty for which she was paid $50.00 in addition to the amount theretofore refunded to Boucher by Tyler, making a total of $987.50. The Tylers claim that, as part of the consideration for the royalty deed, Boucher was to destroy the mineral deed he had theretofore obtained and which Tyler alone had signed. The Chancellor held that Boucher had acquired in fee 1¼ acres in minerals by the mineral deed from Tyler and 1¼ acres of royalty by the deed executed by both Mr. and Mrs. Tyler.

There are two questions: First, is the evidence sufficient to set aside the mineral deed from Tyler to Boucher? We do not think so, although both the Tylers testified that the setting aside of the mineral deed was part of the consideration for the royalty deed. The royalty deed on its face recognizes the validity of the mineral deed. The royalty deed provides: "This conveyance considered with mineral deed Addison Lee Tyler to Melvin Boucher dated Oct. 18, 1952 conveys 1¼ acres Minerals and 1¼ acres royalty."

Next, just what interest did Boucher acquire by both deeds? The mineral deed was signed by Tyler alone. By this deed, Boucher acquired all of Tyler's interest in the minerals. But the mineral deed signed by Tyler alone would not affect Mrs. Tyler's right of survivorship or her rights to one-half of the rents and profits. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690; *Pope* v. *McBride,* 207 Ark. 940, 184 S. W. 2d 259. Hence, after Tyler gave the mineral deed and before Mrs. Tyler executed the royalty deed, she and Boucher were each entitled to one-half of the royalty income from the minerals. Two and one-half acres of minerals were owned. Mrs. Tyler would be entitled to all of the income from 1¼ acres of minerals and this royalty is exactly what she conveyed to Boucher by her deed. Although there is some ambiguity in the deed, it is clearly a deed to royalty. The deed provides "AN UNDIVIDED one/one hundred twenty eighth (1/128th) interest in and to all of the oil, gas and other minerals." Actually, as one of the owners by the entirety of 2½ acres of minerals out of 20 acres, Mrs. Tyler was entitled to a 1/128th royalty in the 20 acres. The deed further provides: "This conveyance is of 1¼ oil, gas and other minerals royalty acres over the entire spread of the hereinabove described lands." The land described is the 20 acres. The royalty from 1¼ acres is all Mrs. Tyler was entitled to as a tenant by the entirety.

Further, the deed provides: "It is the intention of the parties hereto that the grantee herein, his heirs or assigns, shall be entitled to receive hereunder one six-

teenth (1/16) of all oil and/or gas run to the credit of the royalty interest reserved under and by virtue of any oil and gas mining lease" and again: "In any event the grantee herein, his heirs or assigns, shall be deemed the owner of and shall be entitled to receive one one twenty eighth (1/128) part of all oil and gas produced and saved from said land, or any part thereof."

It is our conclusion that, by the mineral deed from Tyler, Boucher acquired 2½ mineral acres subject to Mrs. Tyler's right of survivorship; that before Mrs. Tyler executed the royalty deed she was entitled to one-half the royalty income from the 2½ acres, but by her deed she transferred her rights in 1¼ acres of royalty to Boucher. But she still has the right of survivorship in the 2½ acres of minerals and in the event she survives her husband she would be entitled to the royalty on 1¼ acres of minerals, as she only sold the royalty on 1¼ acres.

Reversed, with directions to enter a decree not inconsistent herewith.

OLIVER *v.* STATE.

4823 286 S. W. 2d 17

Opinion delivered January 16, 1956.

[Rehearing denied February 13, 1956.]

[redacted]

*Stein & Stein,* for appellant.

*Tom Gentry,* Attorney General, and *Thorp Thomas,* Ass't Atty. Gen., for appellee.

LEE SEAMSTER, Chief Justice. The appellant, Harold Oliver, was tried in Union Circuit Court, 1st division, under an information charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one H. H. Parks. A verdict was returned finding him guilty of murder in the second degree, and fixing his punishment at twenty-one years in the penitentiary, and from the judgment pronounced on that verdict is this appeal.

For reversal of the judgment, the appellant lists the following points: (1) the evidence is insufficient to support the verdict; (2) the court erred in giving State's instruction No. 7½; and, (3) the court erred in permitting the State to introduce the State's exhibit No. 7; also State's exhibits Nos. 8, 9, 3, 2, 12 and 10.

The evidence was to the following effect: On March 26, 1955, Harold Oliver, the appellant, along with Gene Jerry, Paul Martin and Harry Stevenson, were playing dominoes and drinking beer in the store of H. H. Parks, the victim. After playing four games, Martin had to leave, breaking up the domino game. Gene Jerry then bought a beer for himself, Oliver and Stevenson. Oliver then sat down at the counter directly in front of the stores cash register. Harry Stevenson was sitting on the next stool beside Oliver while Parks was standing behind the counter. J. C. Ward then entered the store and after inquiry Ward told Oliver that he would sell him some fish for twenty-five (25) cents per pound. Parks then said, "That is a devil of a note, me trying to sell them for fifty (50) cents dressed and you selling them (fish)

for twenty-five (25) cents in the rough." Oliver said, "Well, you don't blame me for trying to buy them as cheap as I can, do you?" Parks answered, "No." Shortly thereafter, Felton Haynes entered the store and Parks made an inquiry as to why his son-in-law had not brought him some fish as he had promised and Oliver interjected, "A man can't always do what he says about fish." Parks told Oliver, "I wasn't talking to you, and it is not any of your business." After Haynes left, Parks told Oliver that he should tend to his own business and not butt into his conversations with other people. Oliver then cursed Parks, who replied, "there was not but one man that ever called me that and got away with it and that was my daddy and he held a gun on me." Oliver reached up and removed a "no credit" sign from the top of the cash register. Parks then reached for a drawer behind the cash register and Oliver stood up, pulled a pistol and fired twice at Parks. Parks then ran to the end of the counter and Oliver moved in the same direction and emptied his gun into Parks. The evidence does not reflect whether Parks died immediately or a few minutes thereafter. Two witnesses, Harry F. Stevenson and Gene Jerry, testified that they did not see a gun in Parks' hand at anytime. Deputy Sheriff Kinard found only one pistol in the store and that one was on the floor under the counter, behind a five-gallon can.

Appellant, Harold Oliver, testified in his own behalf. He admitted that he shot and killed H. H. Parks but earnestly insists that he acted in self-defense, since he was under the belief that the deceased was going to either kill him or do him great bodily harm and injury. The appellant insists that the deceased removed a pistol from the drawer under the counter.

We do not attempt to detail all of the evidence. It suffices to say that after considering all of the evidence, and when we give to it, as we must, its strongest probative force in favor of the State, the evidence was ample to warrant the jury's verdict of murder in the second degree. This Court has many times held that it would give the testimony tending to support the verdict its

highest probative value. See *Powell* v. *State,* 213 Ark. 442, 210 S. W. 2d 909; *Everett* v. *State,* 213 Ark. 470, 210 S. W. 2d 918.

In his brief, the appellant alleges that the court erred in giving State's instruction No. 7½. The appellant fails to list this assignment in his motion for a new trial, therefore, this court will not take this assignment under consideration.

Finally, the appellant alleges that the court erred in permitting the State to introduce State's exhibits Nos. 2, 3, 7, 8, 9, 10 and 12. These exhibits were photographs of the body of the deceased, the scene of the shooting and a color picture showing the spot where the deceased fell, after he was mortally wounded.

A careful review of the record reveals that State's exhibits Nos. 3 and 10 were ruled out by the trial court. The State withdrew its exhibit No. 9. Therefore, there is no merit as to appellant's objection to these three exhibits.

Exhibits 7 and 12 are photographs of the scene of the killing. These pictures were introduced only after proper foundation was laid showing that they were properly taken after the killing and accurately show the condition of the premises with reference to the cash register, the "no credit" sign and the blood stains showing where the deceased fell after the shooting. Exhibit No. 8 is a picture showing two wounds in the back of the deceased's body; this picture was taken at the morgue. Exhibit No. 2 is a picture of the front of the deceased's body, which was taken at the scene of the shooting, after the body had been placed on a stretcher. The photographs of the deceased's body showing the bullet wounds are admissible to show the area of injury to the deceased.

The admission and relevancy of photographs must necessarily rest largely in the discretion of the trial judge. We find no abuse of discretion in the admission of photographs in the instant case. Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on wheth-

er it would be useful to enable the witness better to describe and the jury better to understand, the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible.

At the conclusion of all the testimony in the case, the trial court gave a number of instructions which we have carefully examined and find to be proper declarations of law as applicable to the facts presented. Appellant made no specific objections to any of the instructions; but rather made a general objection to all the instructions. Appellant's objection to the instructions at most was a general objection *en masse* to all of the instructions and cannot be sustained if any one of the instructions is good. *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466; *Tiner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *Massey* v. *State,* 207 Ark. 675, 182 S. W. 2d 671. As indicated, we think none of the instructions given by the trial court were erroneous.

We have examined other assignments in the motion for a new trial and find no prejudicial error in the record. The judgment is, therefore, affirmed.

GRIFFIN *v.* YOUNG.

5-814 286 S. W. 2d 486

Opinion delivered January 16, 1956.

[Rehearing denied February 27, 1956.]

*John B. Driver, McDaniel* and *Crow,* for appellant.

*John Marable,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal emphasizes the necessity of itemizing an account. Appellees filed action against appellant, alleging:

"Defendant is indebted to plaintiffs in the sum of $310.60, together with interest from September 24, 1949, to date, at the rate of six per cent per annum, for goods, wares and merchandise which defendant purchased from plaintiffs on the dates and in the amounts as is shown on the itemized and verified statement of the account attached as Exhibit 'A' hereto and made a part hereof."

The "itemized and verified statement of the account attached as Exhibit 'A' " merely contained information like this:

| | | | |
|---|---|---|---|
| "7-29-48 | Groceries | 6.72 | |
| 7-29-48 | " | 1.87 | |
| 7-31-48 | " | 4.94 | |
| 8- 4-48 | " | 6.86 | |
| 8- 5-48 | " | 3.23 | |
| 8- 7-48 | " | 13.26 | |
| 8-10-48 | " | .21 | |
| 8-10-48 | " | 2.49 | |
| 8-11-48 | " | .36 | |
| 8-14-48 | Paid on Account | | 20.00 |
| 8-14-48 | Groceries | 17.07 | |

| | | | |
|---|---|---|---|
| 8-21-48 | Paid on Account | | 15.00 |
| 8-21-48 | Groceries | 11.08 | |
| 8-28-48 | " | 10.67 | " |

In other words, the account merely gave a date, the general word "groceries" and the total of the purchases of groceries on the date shown.

Appellant (defendant) filed this motion:

"The defendant respectfully moves the Court to require the plaintiffs to make their complaint more definite and certain in the following particulars:

"1. To itemize the account sued on;

"2. To state each item alleged to have been purchased by the defendant, and the cost thereof."

The Court overruled the motion, tried the case, and rendered judgment for appellees; and the only point on appeal is the alleged error of the Trial Court in refusing to require the appellees to itemize the account.

In *Brooks* v. *International Shoe Co.,* 132 Ark. 386, 200 S. W. 1027, in regard to the necessity of an itemized account when requested, we said:

"It will be observed that the account filed by appellee did not purport to be an itemized account, but only to show the total amount of bills alleged to have been sold on the dates mentioned without giving a complete inventory of the goods sold.

"The word 'account' is said to have no inflexible technical meaning and is differently construed according to the connection in which it is used. However, in mercantile transactions it is invariably used in the sense of a detailed or itemized account. Bouvier defines the word as 'A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation.' Substantially the same definition is given in 1 Corpus Juris, p. 596, where it is said: 'To constitute an account, there must be a detailed statement of the various items, and there must be something which will furnish to the person having a

right thereto information which will enable him to make some reasonable test of its accuracy and honesty.' "

In the Brooks case the word was "merchandise"; here the word is "groceries." Other cases as to itemization are *Tylor* v. *Crouch,* 219 Ark. 858, 245 S. W. 2d 217; and *Terry* v. *Little,* 179 Ark. 954, 18 S. W. 2d 916. Under these cases it is clear that the defendant was entitled to have the account itemized by the plaintiffs, specifying the particular articles (i. e. ham, cheese, crackers, lard, etc.) covered by the generic word "groceries," and totalling the amount of the purchases on each day shown.

To avoid the effect of our holdings as previously quoted, appellees claim that in *Brooks* v. *International Shoe Co., supra,* this Court quoted a Statute (then contained in § 6128 Kirby's Digest), and that the present Statute (§ 27-1143 Ark. Stats.) omits the last sentence contained in the Kirby's Digest section and reading as follows:

"If upon an account, a copy thereof, must, in like manner, be filed with the pleadings."

Appellees point out that the last quoted sentence was contained in § 138 of our Civil Code of 1869 but was omitted from the Amendatory Act which was Act 48 of 1871. But the appellees' claim in this regard fails to go to the heart of the matter. The complaint [1] said that attached to it was an "itemized and verified statement of the account." The defendant asked to be furnished such "itemized statement." The plaintiffs failed to itemize the statement; and we have held that itemization is required when requested, unless good reason be shown for inability to itemize.

Furthermore we cannot see — in the record before us — anything that would support a holding that appellant has lost the right to raise the point on appeal. The order, overruling the motion to make more definite and certain, merely says:

[1] In Ark. Stats. Anno. Vol. 3, p. 1101 in the Appendix, there is Form No. 16, which gives the suggested form of complaint in an action on an account. The complaint here was similar to that form.

"And the Court, after hearing argument of counsel, overrules the said demurrer and motion."

Prior to Act 555 of 1953 an exception would have been required in order to save the point; but § 21 of Act 555 abolishes exceptions [2] and it is only necessary that the party at the time of the ruling makes known to the Court "the action which he desires the Court to take or his objections to the action of the Court and his grounds therefor." Certainly when the defendant filed in the Trial Court his motion to make more definite and certain, he made known the action which he desired the Court to take; and thus there is substantial compliance with § 21 of said Act 555.

The record before us contains only the pleadings in the Trial Court, but the appellees have not objected or claimed the record to be deficient. The appellant designated in the Trial Court as his point for appeal:

"The defendant herein, Roy Griffin, is appealing this case to the Supreme Court of Arkansas only from the Court's action in overruling the defendant's Motion to Make the Complaint More Definite and Certain."

Section 12 of Act 555 of 1953 says in part:

"Where the record has been abbreviated by agreement or *without objection from opposing parties,* no presumption shall be indulged that the findings of the trial court are supported by any matter omitted from the record." [3] (Italics supplied.)

When the defendant presented to the Trial Court his motion to have the statement itemized, the plaintiffs could have shown that they had furnished the only itemization they had, or they could have offered other excuses. But because of the said § 12 of Act 555, as above quoted, we cannot indulge the presumption that any such matters occurred. In this state of the record, we see no course open to us except to apply our cases concerning the necessity of itemizing an account when requested.

[2] This Section 21 is a copy of Rule 46 of the Federal Rules of Civil Procedure.

[3] This quoted sentence is not a part of Federal Rule 75(e) from which the first part of § 12 of Act 555 is copied.

Therefore, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Justices HOLT and WARD dissent.

DEVORE FARMS, INC. *v.* BUTLER HUNTING CLUB, INC.

5-815 286 S. W. 2d 491

Opinion delivered January 16, 1956.

[Rehearing denied February 27, 1956.]

*Botts & Botts,* for appellant.

*George E. Pike,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit by appellant, De Vore Farms, Inc., to restrain appellee, Butler Hunting Club Inc., from maintaining a dam across a bayou which allegedly obstructed the natural flow of said bayou and proper drainage of appellant's lands. Appellant also alleged that its lands had been rendered valueless for the purpose of growing timber, and damages in the sum of $20,000.00 were asked for merchantable timber already destroyed by reason of the flooding of its lands.

In its answer, appellee admitted maintenance of the dam upon its lands since 1938 but denied that it held water on appellant's lands or that any timber belonging to appellant had been destroyed by reason of the construc-

tion and maintenance of said dam. After an extended hearing the chancellor determined these factual issues in appellee's favor and, in the decree dismissing appellant's complaint, found: "The court finds that the plaintiff has failed to establish by a preponderance of the testimony that the excess water complained of by plaintiff was caused by the act of defendant in constructing and maintaining its dam. The court further finds that the plaintiff has failed to establish by a preponderance of the testimony that damages alleged by the plaintiff were caused by the acts of the defendant.". The sole issue is whether these findings are against the preponderance of the evidence.

Mill Bayou is a shallow, sluggish, non-navigable stream which runs in a southernly direction from a point near Almyra in Arkansas County until it flows into Big Bayou Meto about three miles above the point where that stream empties into the Arkansas River. The bottom lands through which Mill Bayou flows have an average width of about 2,000 feet and are generally lower in elevation than the adjacent countryside. There are approximately 20 dams in the area between Almyra and the point where Mill Bayou flows into Big Bayou Meto and the bottom lands are used primarily for duck hunting purposes and are unsuitable for general farming purposes.

Appellee is a Mississippi corporation licensed to do business in Arkansas and owns 600 acres in Arkansas County which it uses primarily for duck hunting purposes. Mill Bayou runs south through the 600-acre tract near its center. Appellant is an Arkansas corporation engaged in farming operations consisting of the growth of cattle, rice and oats. It owns 780 acres which it purchased in 1937. About one-half of said tract lies west of and adjacent to appellee's land and the other one-half lies northwest of appellee's lands. Mill Bayou traverses only a small portion of appellant's lands on the northeast corner and before it enters lands belonging to others which lie between the lands of the parties. Appellant's lands lie immediately below Bullock's Levee which is on a county highway that crosses Mill Bayou on the extreme northeast corner of appellant's land.

In 1939 appellee constructed a dam, or levee, along and just above the south line of its lands. The dam is about 2,000 feet long and begins at a point west of Mill Bayou and runs east across the main channel of the bayou and over the bottom lands east of the bayou. A drain pipe and floodgate were originally installed in the dam to control the water level but were abandoned in 1940 making the dam solid to the east end where the water flowed through a natural spillway between the end of the dam and higher ground further east. In the spring of 1953, a section of the east end of the dam 140 feet long washed out. In August, 1953, appellee replaced the washed out section by extending it in a northeasterly direction instead of due east as the original section ran. Appellant then filed the instant suit on November 28, 1953.

In an effort to sustain the allegations of its complaint, appellant introduced the testimony of W. J. and N. J. DeVore, manager and president, respectively, of appellant; also the testimony of Thomas J. Frickie, a consulting engineer, and H. L. Frank, a timber cruiser. Their testimony was generally to the effect that appellee's dam caused water to back upon appellant's bottom lands lying near Mill Bayou and a mile or more northwest of appellee's dam, resulting in the destruction of merchantable timber growing on said lands; and that the spillway of appellee's dam was inadequate to allow proper drainage of appellant's lands particularly after replacement of the east end of the dam in 1953. Other witnesses, who were employed by or tenants of the appellant, testified they had seen water higher on the north side of the dam than on the south side at different times, and had also observed dead timber on appellant's land as well as on other lands along the bayou.

W. J. DeVore testified that a considerable portion of appellant's bottom lands had flooded from year to year for "quite a while," and that the water was getting higher each year. He thought appellee's dam kept water on appellant's land and destroyed its timber; also that the new extension on the east end of the dam was

located on the site of the old spillway, which resulted in water being held higher and longer on appellant's lands than formerly. He stated that he complained when the dam was first constructed but did nothing about it until appellee constructed the new extension without a proper spillway. He admitted the existence of a dam on appellant's land which a former owner built for duck hunting purposes. Although he had wished "it wasn't there," he had done nothing to it except build a fence on it in one place. According to N. J. DeVore, his brother told him sometime after 1938 that too much timber was dying, and he took some water levels to determine the cause of the timber dying but "dropped the subject" at that time. He admitted that timber died on appellant's hill lands as well as in the bottoms in 1954 and thought timber died "a little each year." He also said that nobody cleared the lands in Mill Bayou Bottoms for farming purposes, and that said lands were used principally for duck hunting purposes.

Engineer Frickie made a survey in August, 1954 to determine elevations in the spillway area of appellee's dam and at certain points where dead timber was found on appellant's lands. He concluded that the spillway maintained by appellee afforded inadequate drainage to lands to the north, causing the timber to die. He started his survey from a government bench mark two miles northwest of the dam but took no elevations on the east side of the bayou. He thought the present spillway was higher than originally and found neither a depression nor a slough in the present spillway area. He introduced a plat upon which he noted a "timber damage line" established by his survey but did not survey the bayou which he thought ran straight as shown on the plat. Based on his assumption that the depression caused by the 1953 washout was a part of the old spillway, he thought that spillway afforded a 40% greater area for drainage and discharge purposes than the new spillway. He admitted the lands in question were normally flooded in the spring and winter months in the absence of a dam and had seen lands in the dam area flooded to an elevation of nearly 15 feet.

H. L. Frank cruised the timber on appellant's lands in November, 1953. On direct examination he testified that he found 68,000 feet of dead timber which he thought had died within three years and would have been worth $15.00 per thousand as green timber. When questioned by the court, he stated that he could not say what percentage of the timber had died within the past three or four years.

In opposition to the foregoing evidence, appellee introduced the testimony of T. J. Strode, County Surveyor of Arkansas County, and engineer John P. Powers, who made an extensive survey of all the lands in question on both sides of the bayou as well as other lands below appellee's dam and including lands in the dam area of Gillette Hunting Club which is located 3¼ miles south of appellee's dam. They took elevations in Mill Bayou and at numerous places over all the lands including the dam and spillway area and bottom lands of the appellant. Detailed plats of the survey were introduced which showed that all the elevations on appellant's lands where dead timber was found were considerably higher than the spillway at the east end of appellee's dam except in two sloughs and in one of these the dam on appellant's land was holding water in the slough. They started their survey at two government bench marks near the spillway which Frickie did not find. Strode used "Mean Sea Level" while Frickie used "Gulf Sea Level" in establishing elevations, which may have accounted for the slight differences in elevation found by each in the spillway area. Strode found the spillway of the Gillette Hunting Club dam considerably higher than the spillway in appellee's dam and saw water running upstream from the Gillette dam over appellee's dam in August, 1954.

Appellee also introduced evidence of the different elevations of waters held against the floodgate on Big Bayou Meto about 18 miles below appellee's dam over a period of several years as disclosed by records of the U. S. Engineers. According to Strode, these records and the elevations of the Gillette dam definitely show that waters were held on the Gillette and Butler Hunting Club

lands and the lands of appellant by this floodgate for such long periods as to kill the timber on the lands of all three. It was the considered opinion of both Strode and Powers that appellee's dam did not back or hold water on appellant's lands nor contribute to the destruction of timber on said lands. They also testified that appellee's natural spillway was the type ordinarily used in the area with certain advantages over an artificial spillway and was entirely adequate. They also stoutly disputed the testimony of Frickie to the effect that there was no depression or slough in appellee's spillway area and his assumption that the washed out section of the dam was a part of the old spillway. According to Strode, the replacement of the washed out portion in 1953 by extending it in a northeasterly direction increased the width of the spillway area and rendered it more efficient than as originally constructed in 1939.

The testimony of Strode and Powers was corroborated by that of several parties living in the vicinity who owned or farmed lands adjacent to the lands of appellant or lands lying between the lands of the parties. Their testimony was to the effect that water from appellee's dam did not flood either their own lands or those of the appellant; that all the bottom lands were normally flooded every year from January until June; that timber had been dying in the area as long as they could remember; and that the small amount of green timber in the area is unmerchantable.

There is no dispute as to the applicable law. Whether the natural flow or reasonable use doctrine of the riparian theory be applied, it is well settled by our decisions that one riparian owner along a non-navigable stream has no right to obstruct or interfere with the natural course of said stream to the detriment or damage of other riparian owners. *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110; *Thomas* v. *La Cotts,* 222 Ark. 171, 257 S. W. 2d 936; *Harris* v. *Brooks,* 225 Ark. 436, 283 S. W. 2d 129. As previously indicated, the question whether the construction and maintenance of the dam by appellee flooded appellant's lands and destroyed its tim-

ber is purely factual. While the testimony on this issue is conflicting, a careful consideration of the entire record convinces us that the surveys and observations by Strode and Powers for appellee were more comprehensive, detailed and perhaps more accurate than those presented by appellant. Their findings were corroborated by other farmers and landowners in the area similarly situated. The chancellor had the advantage over us of hearing and observing the witnesses, and we are unwilling to say his findings are against the preponderance of the evidence.

Affirmed.

RAY *v.* ROBBEN.

5-818 285 S. W. 2d 907

Opinion delivered January 16, 1956.

*Lem C. Bryan; Hill, Fitzhugh & Brizzolara,* for appellant.

*Hardin, Barton, Hardin & Garner,* for appellee.

George Rose Smith, J. This is a suit by the appellant for specific performance of a contract by which she was to sell a tourist court to the appellee for $17,500. At the close of the plaintiff's proof the chancellor announced upon his own initiative that the complaint would be dismissed without the necessity of hearing the defendant's testimony. In a memorandum opinion the chancellor gave several reasons, some of which are relied upon by the appellee, for holding that the plaintiff had failed to establish a prima facie case for relief.

The tourist court is situated on Lot 26 and an L-shaped portion of the adjoining Lot 25, in a designated block in Fort Smith. When the contract of sale was executed Lot 26 was owned by the appellant, Pearl Ray, and the portion of Lot 25, which had belonged to Mrs. Ray's husband at the time of his death, was owned by the Rays' three children with Mrs. Ray having a dower interest. There had been no administration upon Mr. Ray's estate.

On March 1, 1955, the contract was signed by the appellee and was signed for the appellant by her son Fred. Abstracts of title were delivered to the purchaser's attorneys, who prepared opinions listing a number of defects and suggesting the desired curative steps, chief of which were the appointment of an administrator for Ray's estate and the sale of the fractional lot by the administrator so that title might be vested in Mrs. Ray. These opinions were submitted to the seller's attorney, who began the required curative work. While this work was in progress the appellee gave notice that he was withdrawing from the agreement. The appellant nevertheless had the curative work carried to completion, offered to perform the contract, and brought this suit when the appellee refused to carry out the agreement.

The appellee first contends that this description in the contract is too indefinite to support a decree for specific performance: "A tourist court consisting of ten cabins, furnished, including all extra bedding, located on one full lot and a fractional part of adjoining lot. Said location being 3408 Midland Blvd., Fort Smith, Ark."

While the question is not free from difficulty, we think the description legally sufficient. It is settled that a valid description of land must furnish a key by which the property can be located. *Routen* v. *Walthour-Flake Co., Inc.,* 221 Ark. 354, 253 S. W. 2d 208. But the description is not objectionable merely because parol evidence must be resorted to in following the guide furnished by the instrument. Thus "15 acres known as the Mart Emmons place" is a good description, though obviously oral proof is needed to identify the land. *Davis* v. *Davis,* 171 Ark. 168, 283 S. W. 360; case note, 3 Ark. L. Rev. 219.

Here the proof shows that 3408 Midland Boulevard is the correct address for the ten cabins comprising the tourist court. With the exception of the Supreme Court of Washington, *Martin* v. *Seigel,* 35 Wash. 2d 223, 212 P. 2d 107, 23 A. L. R. 2d 1, the American courts uniformly uphold a description by street number. We sustained such a description in *Kempner* v. *Gans,* 87 Ark. 221, 111 S. W. 1123, 112 S. W. 1087. In a case much like this one, *Pence* v. *Archer,* 191 Tenn. 385, 234 S. W. 2d 820, the property was described as "a house and lot at 403 West Walnut Street." The tract actually consisted of four lots and a fraction of a fifth lot. Upon proof that the residence and surrounding yard had been used and considered as one lot the court upheld the description. In like manner the identity of a tourist court, containing ten cabins, located at 3408 Midland Boulevard, can be readily ascertained.

The chancellor stressed the fact that Fred Ray was without written authority to execute the agreement for his mother and the fact that Ray's authority as an agent was proved only by his own testimony, which the court considered incompetent. Neither point is well taken. Although a contract for the sale of land must be in writing,

an agent's authority to execute the contract for his principal may be conferred orally. *Vaught* v. *Paddock,* 98 Ark. 10, 135 S. W. 331. And the agent's testimony, as distinguished from his out-of-court declarations, is admissible to establish the agency. *Thompson* v. *Hollis & Co.,* 194 Ark. 1, 104 S. W. 2d 1065.

It is insisted that the contract lacks mutuality of obligation for the reason that Mrs. Ray did not have title to the fractional part of Lot 25 when the agreement was signed. This argument was rejected in *Elliott* v. *Hogue,* 113 Ark. 599 (mem.), 168 S. W. 1097. Inasmuch as there are often defects in a vendor's title it is a familiar rule that he is entitled to a reasonable time in which to perfect his title. *Sturgis* v. *Meadors,* 223 Ark. 359, 266 S. W. 2d 81. In the case at bar there is nothing to indicate that time was of the essence of the agreement or that the seller delayed unreasonably in meeting the title requirements imposed by the purchaser's attorneys.

The appellee contends that the appellant's present title is not merchantable and enumerates a variety of flaws that are said to exist. In considering this contention it must be remembered at the outset that a vendee who resists a suit for specific performance has the burden of pleading and proving the specific defects upon which he relies; the plaintiff cannot be expected to prove the negative. *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S. W. 588. Here the appellee's answer does not describe any given defect in the plaintiff's title. The appellee's present argument can be sustained only if the plaintiff's own proof establishes with a fair degree of certainty a fatal defect in her title.

The principal defect now asserted by the appellee is the supposed existence of a five-foot easement across the L-shaped tract that lies at the rear of Lot 25. Fred Ray testified that he understood that his father had given such an easement to the owner of the front portion of the lot, as a means of access to the alley. The agreement, if made, was apparently oral. Ray says that he explained the matter fully to the appellee, who made no objection. Whether there is really a valid easement, and,

if so, whether the appellee has waived his right to object, are questions that cannot be decided with certainty upon the plaintiff's proof alone. It is clear that this issue has not been fully developed, and since the appellee has the burden of proof the duty of producing additional evidence rests upon him.

These same considerations apply to nearly all the other attacks made by the appellee upon the appellant's title. Only one — an asserted irregularity in the devolution of an interest formerly owned by a bridge improvement district — finds much affirmative support in the proof, which includes the abstracts of title. This matter, however, was mentioned without objection in the purchaser's title opinion and was not put in issue by the answer. There was no reason for the plaintiff to anticipate an objection that the purchaser had twice failed to raise. It would plainly be unfair to allow this rather weak battery to be unmasked on appeal.

Reversed and remanded for further proceedings.

McFaddin and Ward, JJ., dissent.

Gardner *v.* Gardner.

5-828 286 S. W. 2d 23

Opinion delivered January 16, 1956.

[Rehearing denied February 13, 1956.]

*Cooper Jacoway,* for appellant.

*Owens, McHaney, Lofton & McHaney,* for appellee.

PAUL WARD, Associate Justice. This appeal challenges a decree of the chancery court granting a divorce to Melvyn J. Gardner. Appellant, Bernice A. Gardner, urges two grounds for a reversal: (a) Appellee had no *bona fide* residence in Arkansas, and (b) The evidence does not show three years separation as required by statute.

*Factual Background.* The parties were married in Boston in 1943. Sometime later they moved to Miami Beach, Florida where they and their four children established their residences and where Dr. Gardner engaged in the private practice of psychiatry. During the latter part of 1951, as a result of estranged marital relations, Dr. Gardner moved from their home to a hotel, and Mrs. Gardner secured a decree providing support for herself and the children. In June, 1953, Dr. Gardner gave up his private practice at Miami Beach and accepted employment with the Veterans Administration at Jefferson Barracks, Missouri. He remained there until about the first of November 1953 when he asked for and was given an assignment as psychiatrist at Fort Roots Veterans Hospital in North Little Rock, Arkansas. He arrived in North Little Rock on the 7th or 8th of November and began service at the hospital on the 9th. He began this action for divorce November 9, 1954.

(a) It is appellant's contention that the chancellor erred in holding appellee was a *bona fide* resident of this state. It is specifically urged, first, that appellee did not himself say he intended to make Arkansas his permanent home and, second, that there is no corroborating evidence or circumstance to show *animus manendi.*

While the evidence supporting the chancellor's finding on the question of residence could be more satisfactory yet we are unwilling to say such finding is against

the weight of the testimony. We think appellee did, in effect, say he intended to make Arkansas his permanent residence.

"Q. Do you have any present intention of changing your residence, Dr. Gardner?

A. I do not.

Q. Have you made any plans that are calculated to keep you here in this state for an extended period of time?

A. Yes, we have started the plan for a new group of research in projects which I estimate will take several years to complete.

Q. Do you intend to take an active part in those projects?

A. I do."

We recognize that mere declarations of intent by Dr. Gardner coupled with the fact that he had lived in this state one year when his complaint was filed do not meet the test of *bona fide* residence announced in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585 and subsequent decisions of this court. There is however present in this case an independent and extrinsic circumstance which, we think, is sufficient to show Dr. Gardner's intention to make this state his domicile. Dr. Henry M. Hawkins, who is Chief of Continued Treatment Service at Fort Roots Veterans Hospital, testified regarding appellee:

"Q. How long have you known him?

A. Since November 9, 1953.

Q. Where was he living when you met him?

A. He was living on the grounds and still does.

Q. Did he move to the North Little Rock Veterans Hospital on or about November 9, 1953?

A. November 9, to the best of my knowledge.

Q. Has he lived there continuously since that time?

A. Continuously.

Q. Do you know whether he has made any plans to continue to live in North Little Rock?

A. We have worked out projects that will take us several years to complete.

Q. Has he indicated his desire to participate in those projects?

A. Most certainly; he and I are doing them together.

Q. Did you say they will require an extended period of time to complete?

A. Yes, sir."

Dr. Hawkins who has been at his present location several years, admits that both he and appellee can be transferred by the government any time, yet, as stated by him, this is often the case where one is employed in private business. Every one is entitled to maintain a domicile somewhere regardless of the nature of his employment, and it is significant here, we think, that Dr. Gardner has abandoned his residence in Florida and has acquired one at no other place if not in Arkansas.

(b) We also think the evidence supports the chancellor's finding that appellant and appellee had lived apart without cohabitation for a period of three years. It was admitted by appellant and found by the Florida Court that they did not cohabit from August 28, 1951 to January 5, 1953, and appellant makes no contention that they cohabited thereafter. Appellee's father who lives in Philadelphia stated he saw his son in February 1952 and December 1953 and had talked with him over the phone at other times, and that he was sure the parties had lived separate and apart since the latter part of 1951. He also stated that he was in Miami Beach, Florida in January and February of 1952, 1953, and 1954, and had seen appellant on each occasion except the last one. Of course there is no positive corroboration which precludes the possibility that appellant and appellee may have cohabited on some one specific occasion during the three year period, but such corroboration is not required. See

*Wicker* v. *Wicker,* 223 Ark. 879, 269 S. W. 2d 311. In affirming the chancellor we recognize, and do not intend to violate, the rules against hearsay evidence, or the rule against collusive testimony in divorce cases. We do point out, in respect to testimony corroborating three years separation, that, under the circumstances disclosed here, the corroboration may be slight. There is no suggestion in this case that there exists any collusion between the parties. In dealing with a similar situation in *Kirk* v. *Kirk,* 218 Ark. 880, 239 S. W. 2d 6, we stated: "It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion, the corroboration only needs to be very slight."

We have decided that appellant's request for an attorney fee covering this appeal should be allowed in the amount of $150.00 and it is so ordered.

Affirmed.

Justice McFaddin dissents.

Justice Millwee not participating.

Ed. F. McFaddin, Associate Justice (dissenting). I am firmly of the view that the appellee did not establish a *bona fide* residence in Arkansas; and, therefore, I dissent from the majority holding. The appellee is a doctor in the Veterans Administration and is subject to being moved from place to place by the Veterans Administration just exactly like an officer in the Army is subject to being moved from place to place by the military authorities. All of this was developed in the evidence before us. In several cases we have held that a person in the armed services does not acquire a domicile in Arkansas by mere residence. See *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502; and *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876.

The most that Dr. Gardner has acquired in Arkansas is mere residence. In June, 1953 he was domiciled in Florida, in which State Mrs. Gardner secured a decree for support money for herself and children. Then Dr.

Gardner entered the service of the Veterans Administration. He was at Jefferson Barracks, Missouri until the first of November, 1953, when he was transferred to Arkansas. He frankly admitted that the Veterans Administration could reassign him to some other position in some other State at any time. Where then is the *animus manendi?* To establish a domicile in this State he must have the intention of *remaining in Arkansas,* rather than yielding to the Veterans Administration if it should seek to transfer him. He has never yet testified —nor has anyone testified for him—that he would stay in Arkansas rather than be reassigned by the Veterans Administration to some other State. It was shown that he was engaged in a project at Fort Roots that he liked very much and that it would take some time to complete the project; but that evidence is far short of showing that Dr. Gardner has the firm intention of *remaining in Arkansas,* even against an order of re-assignment by the Veterans Administration. Such, I understand, is the test for domicile.

I think the majority, in affirming this case, is weakening the effect of our holding in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, and other cases on domicile. Therefore I respectfully dissent.

5-833 287 S. W. 2d 8

Opinion delivered January 16, 1956.

**[Opinion on rehearing delivered March 5, 1956.]**

[redacted]

*Frank H. Cox,* for appellant.

*Alonzo D. Camp,* for appellee.

SAM ROBINSON, Associate Justice. This action was filed by appellee, George M. Williamson, December 15, 1954 to clear the title to certain property; there was a decree in his favor; the issue is whether appellee has acquired title by adverse possession; the facts are stipulated. Appellee's father purchased the property, the South Half of Lot 3 and the North 25 Feet of Lot 4, Block 9, Capitol View Addition to the City of Little Rock, in 1918. The property was forfeited to the State by the non-payment of taxes for the year 1932. On July 31, 1937, appellee's father and mother purchased the property from the State and received a deed to it. Appellee's father paid the general taxes on the property until his death in July 1946 and appellee's mother continued to pay the taxes until her death in 1954. Upon the death

of appellee's mother in 1954, he became the absolute owner of whatever title his father and mother had as tenants by the entirety. He and his predecessors in title have paid the general taxes on the property continuously since July 1937 to the time this suit was filed. It is further stipulated that since July 1937 the property has been unenclosed and unimproved within the meaning of Ark. Stats. Sec. 37-103.

The property is within the boundaries of Sewer Improvement District No. 94 of the City of Little Rock and the assessments due for the years 1931, 1932, 1933 and 1934 were not paid. On July 18, 1935, the District filed suit to foreclose its lien; on November 23, 1937, a decree was entered in favor of the District against appellee's father, as owner of the property, for delinquent assessments for 1931, 1932, 1933 and 1934. The judgment was not paid and on the 16th day of March, 1938, the duly appointed commissioner sold the property to the District; the sale was approved on the 12th of April, 1938. On the 12th of October, 1943, after the expiration of five years, H. S. Nixon, Commissioner in Chancery, executed a deed to W. I. Stout, Trustee; and, on the 26th day of May, 1944, Stout executed a quitclaim deed to the appellant herein, Ed Pinkert. On January 16, 1950, Pinkert filed an action in the Pulaski Chancery Court seeking to quiet his title. A decree was taken quieting the title as against Lee Williamson, a stranger to the title; but that case in no way affected appellee's title as neither he nor his predecessors in title were parties to that suit.

It will be recalled that appellee's predecessors in title purchased this property from the State in 1937; and by that deed they acquired color of title. The Improvement District had filed suit in 1935 to foreclose its lien for unpaid assessments for previous years and the decree foreclosing such lien was taken in 1937. Assuming that the Williamsons lost title to the property by reason of the foreclosure decree in favor of the Improvement District, the question that follows is: Was their color of title, which they had by reason of the 1937 deed from the State, destroyed? Although the decree foreclosing

in favor of the Improvement District for the unpaid assessments may have destroyed the title which the Williamsons obtained from the State, it did not destroy their color of title. There was no court order touching upon the deed the Williamsons had obtained from the State in 1937; that deed was not in issue in the foreclosure proceedings; no order was made by the Court with reference to it at all.

In *Moore* v. *Morris,* 118 Ark. 516, 177 S. W. 6, certain land had been patented by the State of Arkansas to P. K. Lester and T. J. Melton in 1856. Later, the property was acquired by one DeMoss by adverse possession. Still later, the heirs of Lester again came into possession of the land. The question was whether the original deed to their ancestor was sufficient to constitute color of title and thus support their claim of adverse possession. The Court said:

"It may be conceded (without so deciding) that appellees (those holding under DeMoss) have made sufficient showing to establish title in their ancester by adverse possession under color of title; nevertheless, the testimony shows very clearly that appellant (who holds under Lester) is entitled to have a decree quieting his title and declaring his right of possession. * * * Even if DeMoss or his heirs acquired title by adverse possession, that title was reacquired by the original owners, the Lester heirs, by payment of taxes under color of title under the Act of March 18, 1899. The undisputed evidence is that Lester and his heirs paid taxes on the land continuously up to the time it was sold to appellant. Their paper title, which constituted absolute title up to the time the ownership was wrested from them, if at all, by the adverse occupancy of DeMoss, continued thereafter at least as color of title, and the payment of taxes while the land was in a wild state and unoccupied restored the title to them by adverse possession according to the terms of the statute."

In *Brandon* v. *Parker,* 124 Ark. 379, 187 S. W. 312, the Court said:

"We think the controlling point here, as it was in the case of *Moore* v. *Morris, supra,* is that the color of title as such was not cancelled. The owner in the case cited lost his title, but his deed, not having been cancelled by any order or judgment of court, remained as color of title and entitled him to the benefit of the provisions of Section 5057 of Kirby's Digest [Ark. Stats. Sec. 37-102], upon complying with its terms."

"In the case of *Moore* v. *Morris,* the title to the land In *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858, it is said: was wrested from the holders of the record title by adverse possession for seven years. The court held that notwithstanding this fact, the record title continued in existence and remained as color of title so that the holder of the record title could reacquire title to the lands by payment of taxes for seven years under section 5057 of Kirby's Digest, the lands being wild and unoccupied lands. This rule was extended in *Brandon* v. *Parker.* There a person held lands under a donation deed and another person entered in possession of them within two years and acquired title by adverse possession. It was held that the donation deed of the first owner, although the lands were forfeited to the State under a void tax sale, remained as color of title so that the holder of it could acquire title by adverse possession for two years under Section 5061 of Kirby's Digest. The effect of the holding in those two cases was that although the first owner lost his title by the fact that another had acquired title by adverse possession, his deed or paper title not having been canceled by any order or judgment of the court, remained as color of title."

The Williamsons' deed from the State has not been cancelled by any order or judgment of the Court. It therefore constitutes color of title and although the Improvement District may have acquired the legal title to the property by the foreclosure in 1937, the Williamsons have paid the taxes on unimproved and unenclosed land under color of title since 1943 when the Commissioner in Chancery deeded the property to W. I. Stout, Pinkert's

predecessor in title. Williamson has therefore acquired title by adverse possession in accordance with Ark. Stat. § 37-102.

The decree is affirmed.

Justices MILLWEE and GEORGE ROSE SMITH dissent.

---

## SUPPLEMENTAL OPINION ON REHEARING

SAM ROBINSON, Associate Justice. On rehearing, appellant insists that when appellee's father obtained his deed from the State in 1937 he was, in effect, redeeming the land from a forfeiture for the non-payment of taxes; that a purchase of tax-forfeited land from the State by one who owned the land at the time of its forfeiture amounts to a redemption. This would be true in some circumstances, such as where there is a remainderman, but that situation does not exist here. Moreover, the father of the appellee was not the only purchaser from the State; appellee's mother was also a grantee, the result being an estate by the entirety. Prior to the purchase from the State, the mother had owned no interest in the land, but she acquired an interest in the 1937 deed from the State. Through the death of her husband, her estate by the entirety ripened into sole ownership, subject, of course, to any intervening divestiture.

In a similar situation, in the case of *Shepherd* v. *Cox,* 191 Miss. 715, 4 So. 2d 217, 136 A. L. R. 1346, the Supreme Court of Mississippi held that color of title was not destroyed. In *Cooper* v. *Cook,* 220 Ark. 344, 247 S. W. 2d 957, we approved the rule that "one cannot successfully claim adverse possession under color of title where he has deprived himself of the color of title relied upon by conveyance to another, or has been deprived of the color of title relied upon by a judgment or decree." 2 C. J. S. § 69. Mrs. Williamson, from whom the appellee inherited the property, was not a party to the Improvement District's foreclosure suit, and her deed from the State was not dealt with in that case. But, nevertheless, she

may have been deprived of her title by the foreclosure decree. Still, the question remains: Was she deprived of color of title? In three cases cited in the original opinion, this court held that one does not lose color of title by reason of actually losing title to the property by the adverse possession of another. In the situation existing here, there is no more reason to say that color of title was lost than it was in those cases.

GEORGE ROSE SMITH, J., dissenting. The three cases cited by the majority hold that the original owner's record title continues to be color of title after a stranger has acquired ownership by adverse possession. Those cases are not directly in point, since it is not contended that the appellant's claim of ownership rests upon adverse possession. Pinkert's title rests instead upon an improvement district sale, which concededly destroyed the appellee's actual title to the land. Such a sale also destroys the owner's color of title, for, as we held in *Cooper* v. *Cook,* 220 Ark. 344, 247 S. W. 2d 957: "One cannot successfully claim possession under color of title where he has been deprived of the color of title relied upon by a judgment, decree or involuntary sale of the land under authority of law." I do not see how the holding in the *Cooper* case, which the majority have not attempted to distinguish, can be reconciled with today's decision.

MILLWEE, J., joins in this dissent.

Opinion delivered January 23, 1956.

[redacted]

*House, Moses & Holmes,* for appellant.

*Wood & Smith,* for appellee.

LEE SEAMSTER, Chief Justice. The appellee, Mrs. Albert Rorex, brought this action against appellant, Pfeifers of Arkansas, to recover damages for physical injuries which she alleged she sustained as the result of a fall she suffered while a customer in appellant's department store in Little Rock, Arkansas, on October 25, 1954.

The negligence alleged in this case was the failure on the part of the appellant to exercise ordinary care to maintain its premises in a reasonably safe condition in that appellant had knowledge of but carelessly and negligently failed to remove a slick substance from the floor of its store or warn its visitors and customers of the presence thereof. The appellee further contends that while in the exercise of due care and regard for her own safety, she slipped on this slick substance and fell to the floor suffering serious physical injury.

The appellant's answer was a general denial of the allegations of the complaint and a plea of contributory negligence on the part of the appellee. This cause was tried in the Pulaski Circuit Court, Second Division, on May 16, 1955, resulting in a verdict and judgment in favor of appellee, in the sum of $5,000.

For a reversal of the trial court's judgment, appellant lists the following three points: (1) the trial court erred in refusing to direct a verdict for the appellant. The finding of the jury that defendant was negligent was contrary to the evidence, and there was no negligence as a matter of law; (2) the trial court erred in admitting the testimony of witness C. V. Lugar concerning certain statements allegedly made by an employee of the appellant; and, (3) the damages awarded by the jury were grossly excessive and there was no substantial evidence to support the amount of the verdict.

The testimony of appellee disclosed that on the occasion of the injury she entered appellant's store for the purpose of purchasing merchandise. She purchased several articles and was walking down the aisle of appellant's store when her right foot came in contact with a slippery substance on the floor, she slipped and turned completely around and fell to the floor. The appellee contended that she remained on the floor for about ten or twelve minutes since the employees of appellant would not allow her to move from her position after the fall in fear that she might have been seriously injured. Appellee further testified that this fall caused severe pain in the region of her left hip whereby appellant sent her in an ambulance to the Arkansas Baptist Hospital and she remained in the hospital for a period of 41 days after the fall. A period of three weeks elapsed, after she was admitted to the hospital, before she was able to walk and then only by holding to the back of a wheelchair.

The appellee further testified that after her release from the hospital it became necessary that she remain in Little Rock for a period of ten days in order to secure further treatments. On her return home, she could only move about her home by holding to furniture and other

objects. The appellee insists that the affected area was painful for a period of approximately seven months after the injury.

Dr. James W. Shuffield, a witness on behalf of appellant, testified that he examined the appellee on the date of the alleged injury and found her suffering from a bruised hip, strained muscles inside the right thigh and upper joints and muscular strain in the lower part of the back, with sensitivity of the bone utilized in sitting. Dr. Shuffield further testified that in his opinion, based solely upon objective findings, the appellee did not suffer any permanent disability by reason of the accident and could have been discharged from the hospital on or about November 8, 1954. The testimony revealed that subjectively the appellee's progress of recovery after the accident was very slow and the objective findings made by the doctor are those findings that can be revealed by X-ray or other visible means and are not by any means tantamount to a finding that appellee had completely recovered from the injury and had been restored to good health.

C. V. Lugar, a witness on behalf of appellee, testified that he was a customer in appellant's store on the day of the accident and saw the appellee slip and fall on some form of greasy substance on appellant's floor. Mr. Lugar further testified that immediately after this accident, he overheard an employee of appellant make a statement to the effect that the substance should have been removed from the floor before somebody slipped and fell. This statement was made approximately thirty seconds after the accident. At the time of the accident, Mr. Lugar was standing about ten feet in front of the spot or substance on which the appellee slipped and fell. Lugar further testified that he saw the woman who made this statement and presumed that she was an employee of appellant since she initially came out from behind a counter near the aisle and later, after issuing this statement, she went back in behind the counter.

Several of the witnesses for the appellant testified that shortly before the accident in which the appellee

slipped and fell to the floor, another customer had dropped a package on the floor of the aisle. When the package made contact with the floor its contents broke and an unidentified liquid substance seeped through the brown paper sack onto the appellant's floor. Most of these witnesses testified that only a short interval elapsed between the time the liquid seeped onto the floor and the time the appellee slipped on this substance and fell to the floor. No explanation was given as to what disposition was made of the brown paper sack nor as to identification of the woman who allegedly dropped the sack.

Mrs. Bernice Stein, one of appellant's employees, testified that she was standing behind a counter at a distance of about three or four feet from the spot where the unidentified woman dropped the package. Her attention was called to the incident when she heard a crash and saw this woman picking up a sack, with fluid seeping through the sack onto the floor. Mrs. Stein testified that she immediately proceeded to notify the department manager of the incident so that a porter could be procured to clean up the substance that was spilled on the floor.

Initially, the appellant contends that the court erred in refusing to direct a verdict for the defendant; the finding of the jury that defendant was negligent was contrary to the evidence and there was no negligence as a matter of law. None of the trial courts instructions are attacked by the appellant. The appellant insists that appellee offered no evidence whatsoever to prove her allegations of negligence on the part of the appellant nor did appellee offer evidence tending to show how the liquid had gotten on the floor or how long it had been there. The evidence reveals that appellee was a customer and was injured by a fall on some unidentified slippery substance while shopping in appellant's store. It was definitely established that there was a slick substance on the appellant's floor which precipitated the fall, and its presence was known by appellant's employees before appellee slipped on this substance and fell to the floor. The length of time the substance had been on the floor, how it got there, the sufficiency of care exercised by appellant's

employees after admitted notice, all were subject of conflicting versions and were properly submitted to the jury. It was in the province of the jury to decide whether the appellee exercised such care for her own safety as a person of ordinary prudence would have exercised under like circumstances. That is what the law required of appellee, and all that it required; and whether or not she did that was a question of fact to be determined by the jury from all the evidence. *Menser* v. *The Goodyear Tire and Rubber Co.,* 220 Ark. 315, 247 S. W. 2d 1019.

The appellant next contends that the trial court erred in admitting the testimony of witness C. V. Lugar, concerning certain statements allegedly made by an employee of the appellant. Lugar testified that immediately after Mrs. Rorex fell, a store employee stated, in substance, that the floor should have been cleaned up before somebody slipped and fell. We think that this statement was a spontaneous declaration uttered at the time of the occurrence of the accident and was clearly admissible as a part of the *res gestae.* It is not easy, always, to determine when a declaration is a part of the *res gestae.* It is dependent upon the particular circumstances under which the declaration is made. The circumstances of this case, both in point of time and in causal relation to the main transaction, bring it within the doctrine which admits the declaration in evidence as a part of the transaction itself. It is certain that the declaration was made immediately in point of time after the happenings of the accident; and that the declaration itself was the spontaneous emanation born of the excitement of the moment. See *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 2d 1053, and cases cited therein.

Finally, the appellant contends that the damages awarded by the jury to appellee were grossly excessive and there was no substantial evidence to support the amount of the verdict. The jury returned a verdict for $5,000, but we do not think it can be said to be excessive. The jury had before it evidence of a substantial nature that appellee's health, which had been good before the injury, changed to a sudden and prolonged pe-

riod of disability. A transition from good health to a condition of disability is itself of probative value.

We have often said the amount of damage to be awarded for personal injuries rests largely in the discretion of the trial jury. Many aspects of personal injury are difficult to compensate in monetary damage. 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 *Missouri Pac. R. Co.* v. *Hendrix,* 169 Ark. 825, 277 S. W. 337, this court 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." Also see *Meeks et al.* v. *Zimmerman et ux,* 223 Ark. 503, 266 S. W. 2d 827; *Coca-Cola Bottling Co. of Arkansas* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771, *Norris* v. *Johnson,* 214 Ark. 947, 218 S. W. 2d 720.

We cannot say that the amount of the verdict in this case is out of proportion to the injury suffered by appellee, Mrs. Albert Rorex, as to authorize us to interfere with the verdict on that ground.

The judgment of the trial court is affirmed.

WHITELEY *v.* PICKENS.

5-835 286 S. W. 2d 4

Opinion delivered January 23, 1956.

*Rex W. Perkins* and *David J. Burleson,* for appellant.

*James R. Hale,* for appellee.

J. Seaborn Holt, Associate Justice. Appellee obtained a judgment against appellant in the Municipal Court of the City of Fayetteville on April 12, 1955. On this same date appellant filed affidavit for an appeal, and later filed an appeal bond. On May 14, 1955, more than 30 days after entry of the judgment in the Municipal Court, appellant filed the transcript of the proceedings in the Washington Circuit Court. On May 16, 1955, appellee filed motion to dismiss appellant's appeal on the ground that it was not filed within the 30 day period which the law required. This motion was heard by the trial court on the proceedings (no testimony was taken) and the court sustained appellee's motion and dismissed the appeal. This appeal followed.

Appellant says: "This appeal rests solely upon the interpretation of Act 203 of 1953, and the application of that Act to the facts of this case." Act 203 of 1953 provides: "Section 1. Section 1 of Act 323 of 1939, being Section 26-1307 of the Statutes of the State of Arkansas, be and the same is hereby amended to read as follows: 'If a party appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment the clerk of the court or the justice of the peace of the court from which the appeal is taken must file the transcript of the judgment in the office of the Circuit Court Clerk within thirty (30) days after the rendition of the judgment.'

"Section 2. All laws and parts of law in conflict herewith are hereby repealed," etc.

Section 1 of Act 323 of 1939 [Now § 26-1307 Ark. Stats. 1947], which the above act amended, provided: "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." In construing this Section 1 of Act 323 of 1939 we said in *Lytle* v. *Hill,* 205 Ark. 789, 170 S. W. 2d 684, "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 . . . 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. It was so expressly held in the case of *Nowlin* v. *Merchants National Bank,* 192 Ark. 529, 92 S. W. 2d 390, and the holding in the case of *Bridgman* v. *Johnson,* 200 Ark. 990, 142 S. W. 2d 217, is to the same effect."

As we construe Act 203 of 1953, it just simply amended Section 1 of Act 323 of 1939 [§ 26-1307 Ark. Stats. 1947] so as to place the responsibility of filing the transcript, within the 30 day period, upon the clerk of the Municipal Court rather than upon "the party who appeals" but left the burden on appellant to see that the transcript was so filed within that period. The Act also omits and repeals that provision, or the last sentence, in Section 1 of Act 323 which says: "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." This Act 203, however, leaves in full force and effect, and does not repeal, the second subdivision of § 26-1302 Ark. Stats. 1947, which provides: "The appeal must be taken within thirty (30) days after the judgment was rendered, and not thereafter."

We hold that the burden was on appellant to see that the transcript was lodged with the Circuit Court within the 30 day period and that Act 203 of 1953, which was an amendment to Act 323 of 1939, does not change the law in this respect. Affirmed.

5-755 286 S. W. 2d 6

Opinion delivered January 23, 1956.

[redacted]

*Pat Mehaffy, Herschel H. Friday, Jr.,* for appellant.

*J. E. Lightle, Jr.,* for appellee.

Ed. F. McFaddin, Associate Justice. Appellee, as administrator of the estate of J. C. Caruth, claimed that his intestate was negligently killed by a train of appellant. From a verdict and judgment for appellee, there is this appeal.

I. *Sufficiency Of The Evidence.* Appellant most vigorously insists that there was no substantial evidence to sustain the verdict; and this point requires a review of the testimony. On the afternoon of April 19, 1953 the deceased, J. C. Caruth, was sitting on the edge of a cross tie on the main line track of the Missouri Pacific Railroad at a place north of Bald Knob in White County. He was struck and killed by a southbound train. The contention of the appellee was that if the trainmen had kept a lookout as required by law (§ 73-1002 Ark. Stats.),

they could have discovered Caruth's peril in time to have stopped the train without striking him[1].

The appellant's contention was that the trainmen did keep a proper and legal lookout, but that it was too late to stop the train when Caruth's peril was discovered and that it was discovered as soon as possible. A considerable portion of the testimony related to: (a) the straightness and levelness of the track for a considerable distance north from Caruth's position of peril; (b) the distance from Caruth at which the engineer and fireman could have discovered him on the track; and (c) the distance required to have stopped the train after Caruth's position of peril could have been discovered. The appellant introduced evidence that it was impossible for the train operators to have discovered Caruth at a distance greater than 1,320 feet; that it required 2,640 feet to stop the train; and that the train did in fact stop in said last mentioned distance.

But in testing on appeal the sufficiency of the evidence to take a case to the Jury, or to support the verdict rendered, it is our duty to examine the evidence in the light most favorable to the verdict[2]; and when so viewing the evidence in the case at bar, we find that the witnesses for appellee made a case for the Jury. Henry Varnell, City Marshal of Bald Knob, testified that by actual test he was able to state that at a distance of 6-10ths of a mile (i. e. 3,168 feet) to the north he could see a man seated on the track at the place where Caruth was seated; that standing in the middle of the railroad track and looking south he could, with his naked eye, see a man seated on a cross tie (as Caruth was) a distance of 3,100 feet down the track; and that the engineer in the locomotive would be elevated a few feet higher than a man merely standing. Other witnesses testified to visibility of 6-10ths of a mile (i. e. 3,168 feet); and it was shown that

[1] Some of our cases on discovered peril as applied to the Lookout Statute are: *Mo. Pac. R. Co.* v. *Coca-Cola Bottling Co.*, 154 Ark. 413, 242 S. W. 813; *Mo. Pac. R. Co.* v. *Manion*, 196 Ark. 981, 120 S. W. 2d 715; *Mo. Pac. R. Co.* v. *Taylor*, 200 Ark. 1, 137 S. W. 2d 747; and *St. L. S. F. Ry.* v. *Beasley*, 205 Ark. 688, 170 S. W. 2d 667.

[2] See *Ark. P. & L.* v. *Connelly*, 185 Ark. 693, 49 S. W. 2d 387; and *Albert* v. *Morris*, 208 Ark. 808, 187 S. W. 2d 909, and cases there cited.

at the time Caruth was killed it was a sunny day and there was nothing to obstruct the vision of the train operators for 6-10ths of a mile from the place where Caruth was seated.

The witness, Fletcher Caruth, testified: that he had worked for both the Rock Island and the Missouri Pacific Railroads as a porter and as a brakeman; that he had worked on passenger as well as freight trains, and on diesel as well as steam trains; that he knew the distance required to stop a diesel train; that he had worked as porter on the Missouri Pacific train from Poplar Bluff to Texarkana and knew the particular portion of the Missouri Pacific track where J. C. Caruth was struck by the train. After having been thus qualified the Court permitted the witness to testify that a diesel train with ten passenger and mail cars (as was the train that struck Caruth) proceeding south toward Bald Knob at 60 miles per hour on the track in question could stop within 1,200 to 1,500 feet from the point at which the train was when the brakes were applied. Fletcher Caruth also testified that at 75 miles per hour it would require something like ¼ of a mile (or 1,320 feet) to stop the train after the brakes were set, if the brakes were in good condition; and on cross-examination the witness said he did not think it would require as much as 2,800 feet distance to stop the train after the brakes were set.

It is argued that Fletcher Caruth did not know what he was talking about; but his credibility was for the jury. His testimony, if believed, was sufficient, along with all the other evidence, to take the case to the Jury on the questions of (a) whether a proper lookout was kept; (b) whether the engineer and fireman exercised due care; and (c) whether the brakes were in proper condition. We do not detail all the evidence because the foregoing covers the challenged issue. We conclude that the testimony was sufficient to take the case to the Jury on the point here concerned.

I. *Erroneous Instruction.* At the request of the plaintiff, and over defendant's general and special ex-

ceptions, the Court gave the following instruction to the Jury:

"You are instructed that if you find from a preponderance of the evidence in this case that the deceased, Joseph C. Caruth, was injured and killed by the operation of one of the trains of the defendant company, as alleged in the complaint, then you are told and instructed by the Court that the law presumes negligence on the part of the defendant company, and it will be your duty and you are instructed to find for the plaintiff, unless the defendant has overcome that presumption by a preponderance of the evidence in this case."

The appellee seeks to defend the above instruction by citing such cases as *St. L. S. W. Ry. Co.* v. *Vaughan,* 180 Ark. 559, 21 S. W. 2d 971; *Mo. Pac. R. Co.* v. *Overton,* 194 Ark. 754, 109 S. W. 2d 435; and *Mo. Pac. R. Co.* v. *Thompson,* 195 Ark. 665, 113 S. W. 2d 720. It is true that in some of these cases an instruction like the one here involved was sustained; but our later cases (necessitated by the decision of the U. S. Supreme Court in *Western & Atlantic R.* v. *Henderson,* 279 U. S. 639, 73 L. Ed. 884, 49 S. Ct. 445) have held fatally defective an instruction like the one here involved. Some of our later cases holding the instruction fatally defective are: *Mo. Pac. R. Co.* v. *Beard,* 198 Ark. 346, 128 S. W. 2d 697; *Mo. Pac. R. Co.* v. *Ross,*[3] 199 Ark. 182, 133 S. W. 2d 29; *St. L. S. F. Ry.* v. *Mangum,* 199 Ark. 767, 136 S. W. 2d 158; and *St. L. S. F. Ry.* v. *Hovley* (opinion on re-hearing), 199 Ark. 853, 137 S. W. 2d 231.

In *Mo. Pac. R. Co.* v. *Beard* (*supra*) this Court, speaking through Chief Justice Griffin Smith, said that the questioned instruction (there as here) made the presumption continuing evidence like the Georgia cases, rather than ". . . a mere temporary inference of fact that vanished upon the introduction of opposing evi-

[3] It is interesting to note that this Ross case was reversed because of the giving of an instruction like the one here involved, and that on second trial in the Circuit Court the defective instruction was omitted and the judgment for the plaintiff was affirmed by this Court, as reported in 150 S. W. 2d 211, as noted in 202 Ark. 1197.

dence," like the Mississippi cases; and Chief Justice Griffin Smith said:

"The instruction in the case at bar told the Jury, without qualification or reservation, to find for the plaintiff unless the defendants had overcome the legal presumption of negligence by a preponderance of the evidence."

The instruction in the case at bar uses the same fatal language as that contained in *Mo. Pac.* v. *Beard* (*supra*). Our cases reported after the Beard case, and cited above, have all held fatally defective an instruction like the one here.

Other questions raised need not be discussed because they may not occur on retrial. The judgment is reversed because of the instruction heretofore quoted.

Reversed and remanded.

Mr. Justice MILLWEE dissents as to reversal.

MARK *v.* MABERRY.

5-820 286 S. W. 2d 13

Opinion delivered January 23, 1956.

*J. B. Milham,* for appellant.

*Festus O. Butt,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is the third time we have been presented with the issue of ap-

pellee's personal liability to appellant in connection with the execution and foreclosure of separate mortgages given each by Springs Investment Company, a corporation. In the original suit, appellant, Anson Mark, Jr., sought to foreclose a second mortgage given him by the corporation. Appellee, Cecil E. Maberry, as first mortgagee, intervened in the suit and a decree was entered foreclosing his mortgage. The decree was adverse to appellant's numerous allegations as to the illegality of Springs Investment Company and the personal liability of appellee, and other incorporators, to appellant for the corporation's indebtedness to him under the second mortgage. The decree ordered a sale of the mortgaged premises in satisfaction of appellee's first mortgage and directed that any surplus be applied to payment of accrued interest found due on appellant's second mortgage, the principal of said debt being then unmatured. The decree in the original suit was affirmed June 5, 1953, in *Mark* v. *Maberry,* 222 Ark. 357, 260 S. W. 2d 455.

Appellee Maberry purchased the mortgaged property for less than the amount of his judgment at the foreclosure sale held July 28, 1953, pursuant to the decree in the first suit. On September 14, 1954, appellant filed the second suit against Springs Investment Company, appellee and the purchasers to whom appellee had sold the property. While this suit was primarily an attack on the validity of the 1953 foreclosure sale, it was again alleged that appellee was liable to appellant and the corporation on account of his alleged nonpayment for capital stock in the corporation, and that the purchasers from appellee should be required to apply future payments of the purchase price of the property in satisfaction of appellant's second mortgage indebtedness. The defendants' plea of res judicata was sustained by the trial court.

On appeal of the second decree, we upheld the action of the chancellor except as to appellant's right to be heard on his claim for judgment against the corporation on a note and prayer for receivership, saying: "The plea of res judicata is also a defense to the appellant's

present attempt to impose personal liability upon Cecil Maberry, since the issue of such liability was involved in the earlier case, supra, and is concluded by that decision. In one respect, however, Mark's complaint should not have been dismissed upon the plea of prior adjudication. He asserts in his present complaint that the first note in the series executed by Springs Investment Company became due, in the sum of $500, on July 1, 1954, and is unpaid. By amendment to the complaint Mark states that he is entitled to judgment upon this $500 note. The defendants' plea of res judicata does not reach this issue, since the principal of the debt had not yet matured when the first case was decided and was not involved in that litigation. It may be true that Springs Investment Company no longer has any assets from which a judgment might be collected, but the plaintiff is nevertheless entitled to be heard upon his claim against the corporation. On this issue the decree is reversed and the cause remanded. Whether a receiver should be appointed for the corporation is a matter to be determined by the chancellor upon remand." *Mark* v. *Springs Investment Company, et al.*, 225 Ark. 133, 279 S. W. 2d 843.

On remand, appellant filed an amended and substituted complaint in which he again attacked the validity of the foreclosure sale and asserted personal liability against appellee as in the former case, plus the additional allegation that appellee illegally acquired title to the mortgaged property in violation of Ark. Stats. Sec. 64-111 and thereby became liable to appellant for his claim against the corporation. In addition, appellant also asked for judgment against Springs Investment Company on a note for $1,000, which had matured since the second suit, and for $4,500 as the rental value of an apartment in the mortgaged premises allegedly occupied by appellee from May, 1948 to August, 1954. The prayer for receivership was also renewed. Appellee Maberry's separate plea of res judicata as to his personal liability was sustained by the trial court and Mark has again appealed.

Insofar as this record discloses, the questions of the liability of Springs Investment Company to appellant on

the $500 and $1,000 notes and the claim for apartment rental, as well as the matter of receivership, are all still pending in the trial court and the corporation is not a party to this appeal. The only issue here relates to appellee Maberry's personal liability to the appellant and it is clear from our opinion on the second appeal that this issue has been determined and redetermined. As to Maberry's personal liability, the only new matter alleged in the amended and substituted complaint here is his alleged liability under Ark. Stats. Sec. 64-111. This statute prohibits certain corporations from transferring their property to stockholders for the payment of any debt or upon any other consideration than the full cash value of the property. Obviously no such transfer is involved in this suit, and the validity of the foreclosure sale ordered by the court in the first suit has been fully and finally adjudicated insofar as appellee's personal liability to appellant is concerned. Since appellee's personal liability to appellant is the only issue before us on this appeal, it follows that the trial court correctly sustained his plea of res judicata. The decree is accordingly affirmed.

SHELTON *v.* HARRIS, ADMR.

5-780 286 S. W. 2d 20

Opinion delivered January 23, 1956.

*T. S. Lovett, Jr.,* for appellant.

*Wiley A. Branton,* for appellee.

GEORGE ROSE SMITH, J. This is an appeal from a probate court order holding that the appellant's claim against the estate of Ella Hampton, deceased, is barred by the three-year statute of limitations, which applies to oral contracts. Ark. Stats. 1947, § 37-206. It is contended by the appellant that the case is governed by the five-year statute, applicable to written contracts. Ark. Stats., § 37-209.

Early in 1949 the appellant lent $405 to Ella Hampton upon the borrower's oral promise to repay the money in the fall of that year. Ella Hampton died, without having repaid the debt, on December 16, 1952, which was more than three years after the last day of fall (November 30), 1949. After the appellee's appointment in 1954 as administrator of the decedent's estate the appellant filed her claim for $405 and accrued interest. The claim and its supporting affidavit refer only to the oral loan agreement between the parties. Upon the face of the pleadings the trial court was undoubtedly correct in applying the three-year statute.

In the course of the trial, however, the appellant testified that Ella Hampton, as security for the loan, had endorsed and pledged an overdue rent note for $450 that had been executed by Steve Hellems as maker to Ella as payee. This note was received in evidence without objection. It is now suggested that the appellant's claim was thereby converted to a demand upon a written contract or that the court should have treated the original claim as having been amended to conform to the proof.

Neither suggestion is sound. Ella Hampton was liable during her lifetime upon two separate contracts — the oral agreement to repay the $405 loan and the written endorsement of the $450 note. The appellant, entitled to but one satisfaction, elected to base her claim upon the oral obligation. Her proof is directed to that issue rather than to the materially different facts that would be needed to establish Ella Hampton's secondary liability as the endorser of Steve Hellems' note. The note was properly admitted in evidence, as it tended to corroborate the appellant's assertion that she had lent

money to the decedent. But it is plain that the borrower's act of endorsing a past-due note for $450 did not have the effect of reducing to writing her oral promise to repay a smaller sum in the fall of the year.

Nor, for at least two reasons, would the court have been justified in treating the claim as having been amended by the proof. In the first place, the amendment would have asserted a new cause of action, upon a different contract. We have held that it is reversible error for the trial court to permit such an amendment even when it is requested to do so. *Patrick* v. *Whitely,* 75 Ark. 465, 87 S. W. 1179. There would be still less justification for the court's commission of the same error upon its own motion.

Second, it is essential that a claim against an estate be supported by an affidavit in statutory form. Relatively slight deviations from the statutory language have been held fatal to the validity of the claim. *Superior Oil & Gas Co.* v. *Sudbury,* 146 Ark. 319, 225 S. W. 609; *Rinehart* v. *Wheeler,* 168 Ark. 251, 270 S. W. 537. The mere introduction of the Hellems note in evidence did not and could not bring into existence the affidavit that is vital to the assertion of a claim upon that note. Whether the probate court could, without infringing upon the doctrine of election of remedies, have permitted the appellant to withdraw her claim and substitute a demand founded upon the Hellems note, is a question not presented by this record. It is enough to say that the principle of treating the pleadings as amended by the proof cannot supply the mandatory requirement that a claim upon a written instrument be supported by proper verification.

Affirmed.

HOLT, J., dissents.

J. SEABORN HOLT, J. dissenting. Ella Hampton died interstate December 16, 1952 and Earnest Harris, her son, was appointed Administrator August 2, 1954. The parties are negroes. Appellant, Lula Shelton, in apt time (§ 62-2601 Ark. Stats.) filed the following claim:

"IN THE MATTER OF THE ESTATE OF ELLA HAMPTON, deceased.

AFFIDAVIT TO CLAIM AGAINST ESTATE

I, LULA SHELTON, do solemnly swear that the attached claim against the estate of ELLA HAMPTON, deceased, is correct, that nothing has been paid or delivered toward the satisfaction thereof except what is credited thereon, that there are no offsets to the same, to the knowledge of this affiant, except as therein stated, and that the sum of Six Hundred Seven and 50/100 Dollars ($607.50) is now justly due (or will or may become due as stated therein). I further state that if this claim is based upon a written instrument, the copy thereof, including all endorsements, which is attached hereto, is true and complete.

/s/ Lula Shelton

STATE OF ARKANSAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me this 19 day of August, 1954.

(SEAL) /s/ Theodore Jones

My Com. exp. 5/9/55

IN ACCOUNT WITH THE ESTATE
OF
ELLA HAMPTON, DECEASED

| | |
|---|---|
| ADVANCES MADE IN THE YEAR 1949: | |
| $100.00, 55.00, 40.00, 40.00, 50.00, 50.00, 50.00, 20.00 | $405.00 |
| INTEREST AT 10% from July 1, 1949, that date being average date of all advances | 202.50 |
| | $607.50" |

Hearing in Probate Court was held on the claim October 18, 1954 and an order entered February 21, 1955 . . . "that the said claim should not be allowed on account of it being founded on an oral contract and

thus barred by the Statute of Limitations prior to the death of the said Ella Hampton." This appeal followed.

Appellant says: "There is one issue involved in this appeal — that is: 1. Does the three-year (§ 37-206) or the five year (§ 37-209) statute of limitations apply?" Appellee agrees that the statute of limitations is the only issue but contends that the claim as filed is on an open account, amounting to an oral contract, on advances made by appellant and was, therefore, barred by the three-year statute of limitations prior to the death of Ella Hampton.

On the record presented I do not think the three year statute of limitations applies, but I am convinced that the five year statute of limitations does apply, and is controlling. It appears undisputed that during 1949 appellant, Lula Shelton, an aged negro, loaned decedent, Ella Hampton, a total of $405.00 and was given as security for the loan a pledge of a rent note in the amount of $450.00, executed in favor of Ella Hampton by Steve Hellums. This note was dated March 1, 1948 and was due November 15, 1948; it bore Ella Hampton's endorsement and was in the possession of Lula Shelton when the above hearing was had in Probate Court on the claim, and was introduced in evidence without objection, or claim of surprise, by appellee. Counsel for appellee says in his brief: . . . "There is evidence that the deceased gave the claimant a Rent Note as collateral security which the deceased 'endorsed' on the face of the Rent Note." At the time Ella Hampton died, December 16, 1952, approximately four years and one month had expired from its due date, November 15, 1948, and obviously it was not barred by the five year statute of limitations, and could be made the basis for appellant's claim.

Since this case comes to us for trial *de novo,* just as in a Chancery case, I think that when appellant introduced in evidence the pledged rent note above, as a basis for her contention that her claim was, in effect, on a written contract and not on an oral contract, it was then the duty of the trial court to permit appellant to

base her claim thereon and to treat the claim amended to conform to the proof by allowing appellant to attach the note to her claim and base it on the note. This written endorsement by Ella Hampton constituted the note a written contract, on which a claim could be based. In *Sommer* v. *Nakdimen,* 97 Fed. 2d 715, Circuit Court of Appeals, 8th Circuit (An Ark. Case) the Court said: . . . "Here the advancement of the money by Lazarus at defendant's request in and of itself constituted a complete contract. Each of the notes constituted separate written contracts. The endorsements on the notes constituted other written contracts. . . Had the amended petition alleged that the notes were endorsed and delivered to Lazarus in payment of the original debt or as collateral security therefor, and had recovery been demanded on the contract of endorsement, the case would have been altogether different from the present one." This hearing on the claim was held in October 1954 and well within the period for the filing of claims against this estate. As I see it the position of the administrator was not changed by appellant's failure to attach the note (or copy) to the claim as originally filed. Certainly I think appellant should be permitted, at any time within the period of filing claims, in a procedural matter as this, to amend her claim and attach thereto any written instrument upon which she might legally base her claim. Under the facts in this case the claimant substantially complied with § *112 of the 1949 Probate Code* [Acts 1949, No. 140, § 112, P. 304] now § *62-2603 Ark. Stats. 1947.* To hold otherwise would be to narrow the time limit within which appellant was permitted to file a claim and refuse her the right to amend and base her claim upon a written rather than an oral contract, and would allow the executor to hide behind a legal technicality, and give an interpretation to our Probate Code never intended. In short, the simple and undisputed facts were: Lula Shelton, an uneducated, sympathetic, friend and neighbor of Ella Hampton, out of her meager substance, made small loans to Ella totaling $405.00 in 1949, which Ella promised to repay that "fall." Since "fall"

embraces only the months of September, October and November, all agree that the claim would be barred by the three-year statute by approximately 13 days if based on an oral contract. It seems to me, however, that the majority in denying the claim when based on the pledged note, in effect clearly a written contract, are resorting to an unreasonably technical, strict and rigid construction of our claims statute and procedure thereunder that was never intended. Surely, in a case of this kind, on the facts presented, simple justice, equity, fairness and common sense, not only would warrant but would demand our holding that Lula Shelton should be allowed to amend her claim and base it on the written contract, pledged note, which was offered, in apt time, without objection.

I would reverse.

DILK, INDIVIDUALLY AND AS ADMX. *v.* SCOTT.

5-825 286 S. W. 2d 9

Opinion delivered January 23, 1956.

*Edwards & Edwards,* St. Louis, Mo.; *Linwood L. Brickhouse, Paul L. Barnard,* for appellant.

*Earl J. Lane,* for appellee.

PAUL WARD, Associate Justice. This appeal challenges the validity of a divorce decree rendered in the Circuit Court, City of St. Louis, Missouri, on October 5, 1948. Appellee [then Helen Edwards] married Moe Kanner on October 9, 1948 in the State of Missouri. Soon thereafter the Kanners moved to Hot Springs, Arkansas where, on July 6, 1951, they purchased property on Lake Hamilton, in Garland County, valued at Fifteen or Twenty Thousand Dollars. This property was conveyed to them by warranty deed in which the granting clause read: ". . . do hereby grant, bargain, sell and convey unto the said Moe Kanner and Helen Kanner, husband and wife, as tenants by the entirety . . ." Moe Kanner died August 19, 1951, and Helen Kanner married Dr. Jett O. Scott of Hot Springs on September 20, 1952.

At his death Moe Kanner was survived by his daughter and only heir, Lauretta Kanner Dilk, who instituted this action as an individual and as administratrix of the estate of her father. For the purpose of this opinion we will treat her in the capacity of an individual only.

In 1929 appellee was married to one Raymond D. Edwards with whom she lived for only a few months. On or about June 30, 1948, appellee filed a petition for divorce in the Missouri court above mentioned and on October 5, 1948 she was granted a decree of divorce from the said Raymond D. Edwards.

On July 19, 1954, Lauretta Kanner Dilk instituted this action in the Chancery Court of Garland County, Arkansas to recover one-half of the property above mentioned as the sole heir of her father, Moe Kanner. It was and is the contention of appellant that appellee's divorce from Raymond D. Edwards was null and void and that, consequently, appellee was not the legal wife of

Moe Kanner when the property above mentioned was purchased by them. Alleging these facts to be true it is further alleged and contended that appellee and Moe Kanner did not own the said property as tenants by the entirety but merely as tenants in common. Appellee's contention is that her divorce from Edwards was valid, that she and Moe Kanner owned said property by the entirety, and that at his death she became the owner in fee of all of the property by right of survival.

Aside from the question of laches pleaded by appellee, which it is not necessary to consider in this opinion, it is agreed by both parties that the only question for our consideration is the validity of the decree of divorce obtained by appellee from Edwards in the Missouri court. The trial judge refused to set aside the said divorce decree and we have concluded that the decree of the trial court must be affirmed.

It is the contention of appellant that the Missouri divorce decree is null and void and should be so declared by this court for the alleged reason that the procedure in the Missouri court to obtain service on Raymond D. Edwards by publication did not meet the requirements of the Missouri statute pertaining thereto.

In her brief appellant sets out the pertinent portion of Paragraph 3 of Section 506, 160 Mo. Rev. Stats. 1949 which pertains to service by publication. This section of the Missouri Statute provides for several alternative requirements to be met in procuring service by publication but only the ones pertinent to this case will be mentioned. It requires that the plaintiff or some person for the plaintiff shall allege either in a verified petition or an affidavit that: (1) The defendant is a non-resident of the State, or; (2) The defendant has "absented [himself] from [his] usual place of abode in this State." In the latter event the defendant's address must be shown, if it is known, or, if unknown, it must be so stated. After the showing is made the statute provides that "the court or judge or clerk thereof shall issue an order of publication of notice . . ."

Appellant, conceding this action to be a collateral attack on the Missouri divorce decree, still strenuously contends that under the Missouri law at least one of the above specified requirements must be met before the trial court could obtain jurisdiction and that it was not done in this case, citing extensively from *Orrick* v. *Orrick,* Mo. App., 233 S. W. 2d 826, and *Kunzi* v. *Hickman,* 243 Mo. 103, 147 S. W. 1002. As we read the *Kunzi* case, supra, the principal holding there, as it is pertinent to appellant's contention here, is: First the court laid down the general rule of law that:

"... the courts will presume, in a collateral proceeding, that a court of general jurisdiction properly acquired jurisdiction over the parties to the proceedings therein, nevertheless that presumption must yield and give way under the positive evidence disclosed by the record therein showing that no service whatever was had upon them. Or in other words, the recitals of jurisdiction or of service of process contained in the judgment must be construed in connection with the whole record, and may be overthrown by other recitals in the record of equal dignity and importing equal verity showing that the former recitals are untrue."

Relying upon the above pronouncement the essence of appellant's contention is that the record here shows positively that the Missouri court had no jurisdiction to render the said divorce decree. Without disagreeing with appellant as to the Missouri law in this connection, we cannot agree with appellant as to what the record shows in this case. In other words we do not agree that the evidence in the record before us shows positively that the Missouri court did not have jurisdiction. On the other hand we think the record shows just to the contrary. Let us therefore examine the record on this point.

(a) Appellee's verified petition in the divorce case contains the allegation that Raymond D. Edwards "absented himself from their usual place of abode . . . since the date of the separation" in 1929. It will be noted that this allegation is the exact language used in the statute quoted above with the exception that it does not con-

tain the words, "in this state." It appears to us that this deletion is immaterial for it is clearly stated in another part of the petition that Mrs. Edwards resided in the State of Missouri. Moreover, it is further stated in the petition that the "whereabouts of this defendant are unknown to her so that the ordinary process of law cannot be served on him in this state and she prays that an order of publication be granted . . . in compliance with the statutes . . ." (b) The minutes of proceedings in the Missouri case show that the Order of Publication was granted pursuant to the above prayer. This order is not shown in the record but it is not contended by appellant that it was not in proper form and content as required by law. (c) The same minutes show that the proof of publication was made. This proof was not introduced in the record but again there is no contention that it is not proper in all respects. (d) The record contains an affidavit of Raymond D. Edwards' "attorney and agent" stating that "the defendant [Edwards] was employed at a race track in the eastern part of the country."

Thus it appears that the Missouri court in said divorce proceeding must have felt justified in issuing the order of publication, and, after examining the petition, the affidavits, the order and proof of publication, it must have felt that it had jurisdiction to enter the decree of divorce on October 5, 1948. We think the record before us shows affirmatively that the Missouri court did have jurisdiction. Taking all the allegations in the petition and in the affidavit it conclusively appears that plaintiff was a resident of Missouri, that the defendant was not a resident of Missouri, that he had absented himself from his usual place of abode in Missouri and that his address was unknown. Not only does it so appear but we are also entitled to presume that the other papers mentioned in the divorce proceeding, but not shown in this record, may have contained information which gave the trial court jurisdiction.

In the case of *Ray* v. *Ray, et al.,* 330 Mo. 530, 50 S. W. 2d 142, the Supreme Court of Missouri said: **"Our circuit courts are courts of general jurisdiction, and the**

prevailing rule is that in a collateral attack upon a domestic judgment of a court of general jurisdiction every reasonable presumption is indulged to support the judgment." The court then quoted with approval: " 'It accordingly will be presumed that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found and that every step necessary to give jurisdiction has been taken.' " We have carefully examined the holdings in the *Orrick* and *Kunzi* cases, supra, and do not find that they are in any way contrary to the conclusion we have reached herein. The *Orrick* case, supra, was an opinion by the Court of Appeals and was considering a direct attack upon the decree of divorce. The *Kunzi* case, supra, is readily distinguishable on the facts from the case under consideration. There the records of the first trial showed affirmatively that the trial court had no jurisdiction to render a decree, while in the case under consideration not only is jurisdiction in the trial court shown by the record but by the presumption which we are entitled to draw from records not introduced.

Other decisions of the Supreme Court of Missouri are in accord with the conclusion which we have reached. In the case of *Sanders, et al.* v. *Savage,* 234 Mo. App. 9, 129 S. W. 2d 1061, the court said: "A judgment is not subject to collateral attack unless it affirmatively appears upon the face of the record that the court rendering judgment did not have jurisdiction of the subject matter or the person of the defendant, in which event the judgment is void." In *Drummond, et al.,* v. *Lynch, et al.,* 82 F. 806, the court, in dealing with a Missouri decree, after first stating that the recitals of the judgment record of a foreign judgment are not conclusive as to jurisdiction, stated: "The inquiry, however, must be confined to jurisdictional infirmities which would render the decree void, it cannot be here refused or impeached for mere irregularities."

In questions of this nature it is our understanding of the Missouri rule, as well as the general rule, that it is our duty to inquire whether the trial court in the first instance

had jurisdiction and not whether the publication statute was complied with, and that jurisdiction may be determined from the entire file of the first proceeding if it appears in the record, or from the presumption of jurisdiction that attaches to all judgments when collaterally attacked in the absence of material parts of the file in the first proceeding.

There are good reasons founded in public policy to support the rule that judgments of courts of record, particularly in divorce matters, should not be lightly regarded and should not be revoked for mere irregularities. In the case before us appellee certainly had every reason to believe that she had secured a valid divorce from Edwards in 1948, and relying on this belief she married Kanner and after his death married Dr. Scott. If the Edwards divorce decree is now nullified it is obvious that appellee will find herself in an embarrassing position.

We could not use words to express this concern of public policy more appropriate than those used by the Supreme Court of Missouri in *McDermott* v. *Gray,* 198 Mo. 266, 95 S. W. 431, where that court said:

"While there may be objections urged against the liberality of our divorce laws, in furnishing an easy method of dissolving the marriage relation, yet as long as the law exists and courts pronounce judgments in obedience to it dissolving such marriage relation, the tendency of the American courts is to regard such judgments as possessing elements of strength and stability which frequently do not attend other decrees and judgments. This is but a proper recognition of the principle of public policy which has repeatedly been respected by the courts for the reason that such decrees and judgments affect directly the status of the married persons by dissolving the marriage relation and thereby enabling them to contract new matrimonial relations with other and innocent persons. Therefore, such decrees and judgments should not be dealt lightly with. To do so would endanger the peace and good order of society, as well as the happiness and well being of those who have a right to rely upon the stability of such decrees."

It is therefore our opinion that the decree of the trial court refusing to set aside the divorce decree of the Missouri court is not against the weight of the testimony.

Affirmed.

WASHBURN *v.* HALL, SECRETARY OF STATE.

5-819 286 S. W. 2d 494

Opinion delivered January 23, 1956.

[Rehearing denied February 27, 1956.]

*Talbot Feild, Jr., Meehan & Moorhead,* for petitioners.

*Tom Gentry,* Attorney General, for respondent.

*Bailey, Warren & Bullion,* for intervenors.

SAM ROBINSON, Associate Justice. A petition for a referendum on Act No. 94 of the Acts of the General As-

sembly of Arkansas for 1955 was filed with C. G. Hall, Secretary of State. Acting upon the opinion of the Attorney General that the petition was insufficient because no popular name or ballot title was designated, the Secretary of State refused to certify it to the election officials. Contending that the petition is valid in every respect, Alex H. Washburn, and others, have filed an original action in this Court to compel the Secretary of State to certify the petition. The Attorney General, on behalf of the Secretary of State, has responded. Joe Ray, and others, Officers and Directors of the Arkansas Poultry Federation, have filed an intervention. The principal point in issue is whether Amendment No. 7 to the Constitution of Arkansas and Act No. 195 of the General Assembly for 1943, Ark. Stats. Sec. 2-208, have been complied with by the sponsors of the referendum petition.

Amendment No. 7 reserves to the people the right to refer and initiate laws; with reference to the petition to submit a measure to a vote of the people, the Amendment provides: "At the time of filing petitions, the exact title to be used on the ballot shall, by the petitioner, be submitted with the petition . . ." This amendment was adopted at the General Election in November 1920; it is in substitution of the I. and R. Amendment approved February 19, 1909. The enabling act for the 1909 amendment, Act No. 2 of the Extraordinary Session of the General Assembly for 1911, is repealed only in so far as it is in conflict with the 1920 amendment. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331. We mention the 1911 Act at this point because Section 2 thereof provides: "The petition and order for referendum shall be substantially in the following form." Then follows the form that must be used in preparing the petition.

In 1943, the General Assembly adopted Act No. 195, which is now Ark. Stats. § 2-208. It provides: "Before any initiative or referendum petition ordering a vote upon any amendment or act shall be circulated for obtaining signatures of petitioners, the sponsors shall submit the original draft thereof to the Attorney General,

with a proposed legislative or ballot title and popular name. The Attorney General shall, within 10 days, approve and certify or shall substitute and certify a more suitable and correct ballot title and popular name for each such amendment or act; the ballot title so submitted or supplied by the Attorney General shall briefly and concisely state the purpose of the proposed measure. If the Attorney General refused to act or if the sponsors feel aggrieved at his acts in such premises, they may, by petition, apply to the Supreme Court for proper relief.

As heretofore mentioned, the act which petitioners seek to refer is Act No. 94 of the Acts of the General Assembly of 1955. The substance of this act is that it exempts all feedstuffs used in growing or producing livestock and poultry from what is known as the Gross Receipts Tax Act and the Arkansas Compensating Tax Acts, otherwise the Sales Tax. On April 1, 1955, Mr. Washburn, one of the petitioners, wrote to the Attorney General as follows: "I submit herewith an original draft of a petition for a referendum on Act No. 94 of 1955 for your consideration in accordance with Sec. 2-208 Ark. Stats. 1947." With the letter was enclosed the original draft of the petition. The petition is headed in bold face capital letters: "PETITION FOR REFERENDUM." Then printed under the above is: "Sales Tax Exemption for Livestock and Poultry Feed." Following, in very small print is: "This law was House Bill No. 222 by Teague of Carroll, et al." Next is the petition itself and following the petition is: "Act No. 94, approved February 22, 1955"; thereafter is set out the act in full, including the title and enacting clause. On April 5, 1955, the Attorney General wrote to Mr. Washburn: "I have examined your form for petition for referendum on Act No. 94 of 1955 and in accordance with Ark. Stats. 1947 (2-208), the same as submitted is hereby approved."

Nothing is mentioned in either the letter from Washburn to the Attorney General or from the Attorney General to Washburn about a popular name or ballot title. The sponsors of the petition proceeded to obtain signatures thereto and when a sufficient number were obtained,

the petition was filed with the Secretary of State. There immediately arose the question of whether Amendment No. 7 and Ark. Stats. Sec. 2-208, Act 195 of 1943, had been complied with in respect to obtaining the approval of the Attorney General as to the popular name and ballot title before the petition was circulated. The Secretary of State promptly asked for the Attorney General's opinion about the matter. The Attorney General answered the Secretary of State as follows: "It is my opinion that, since the sponsor has not submitted a ballot title and popular name as required by Section 2-208, and has not submitted a ballot title to the State Board of Election Commissioners as required by the 7th Amendment, as Secretary of State or as a member of the State Board of Election Commissioners, you have no authority to certify, order or place this question on the ballot as the provisions of the Constitution and Statutes which have not been complied with are mandatory." The Secretary of State, in accordance with the opinion of the Attorney General, refused to certify the petition to the election officials. Shortly after receiving a letter from the Secretary of State refusing to certify the petition, the sponsors filed this original proceeding. It is the contention of the petitioners that the sub-heading on the petition "Sales Tax Exemption for Livestock and Poultry Feed" is the popular name and, since the act itself contains a title, this title should be considered as the ballot title; and that, in any event, the petitioners should be allowed to amend the petition by designating a popular name and ballot title.

Act No. 195 of 1943, Ark. Stats. § 2-208, is no unwarranted restriction on Amendment No. 7. Obviously, the Legislature considered that in signing a referendum or initiative petition the signer should have the benefit of a popular name and ballot title that would give as much information about the proposed act as is possible to give by such means. It is apparent that the Legislature considered that the safer method would be to first submit the proposed popular name and ballot title to the Attorney General of the State for his approval and, if he did not approve that which was submitted, he should sub-

stitute and certify more suitable ones. This statute in no way curtails the operation of Amendment No. 7 but is in aid of the amendment and insures the giving to the signer of the petition as much information as is possible and practicable with regard to what he is being asked to sign. Here, the Attorney General was not asked to approve a popular name or a ballot title. Nothing was pointed out to him as a popular name or ballot title which the circulators of the petition intended to use as such. The Attorney General says that he was not asked to approve or disapprove a popular name or ballot title and that he has not done so; that he only gave his opinion as to the form of the petition. The form of the petition is set out by Act No. 2 of the Extraordinary Session of 1911, and that part of the Act as to the form of the petition was not repealed by the 1920 amendment to the Constitution.

It is clear that the framers of Act 195 of 1943 intended that the Attorney General should pass on the sufficiency of the ballot title and the popular name before the petition is circulated. The Act provides: "If the Attorney General refused to act or if the sponsors feel aggrieved at his acts in the premises, they may, by petition, apply to the Supreme Court for proper relief." There is nothing complicated about Act 195; it is not difficult to follow; it is not calculated to make troublesome the right to take advantage of the I. and R. Amendment. It goes without saying that before any one could safely undertake to refer a measure to the people it would be necessary to review the Constitution and the Statutes pertaining to such referendum. It would be very easy to say to the Attorney General: "Now here is what we propose as a ballot title and this is what we propose as a popular name." And the Attorney General would be required to either approve that which had been submitted or substitute something else. If the sponsors should feel aggrieved at his acts, they would have the right to apply to the Supreme Court for proper relief. This is not a contest between the Attorney General and the sponsors of the referendum petition. It must be remembered that Act No. 94 was adopted by the General Assembly of the

State of Arkansas; and the sponsors of the Act, who we presume are the intervenors here, have some rights in the matter. If the Attorney General approved a ballot title and popular name that was calculated to be misleading or not suitable to the question to be voted on, there would be a remedy in the courts. But those interested in the adoption of the measure could hardly attack a popular name or ballot title when neither had been designated as such; and, especially so, when the Attorney General had not passed on a ballot title or popular name and in fact states that he had not been requested to give an opinion in respect to such title and name.

Petitioners cite *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248, where a petition to initiate a county salary act was filed with the County Clerk. It appears that the act as filed had a title which was sufficient to convey a fair meaning of the act; but such title was not designated as a ballot title. The Court held that although the title of the act was not designated the ballot title, there was substantial compliance with Amendment No. 7. This was also the holding in *Blocker* v. *Sewell,* 189 Ark. 924, 75 S. W. 2d 658; but both of those cases were decided many years prior to the adoption of Act No. 195 of 1943, Ark. Stats. § 2-208.

The ballot title should be complete enough to convey an intelligible idea of the scope and import of the proposed law, and it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must contain no partisan coloring. West*brook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331. See also *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884; *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470. The proposed popular name and ballot title should be submitted specifically to the Attorney General in order that he may determine whether the name and ballot title meet these requirements.

In *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547, Mr. Justice Frank Smith said: "It appears, therefore, that a very small per cent of our population may, at each general election, assemble the electorate into both a gen-

eral assembly and a constitutional convention. The law must, therefore, be, and is, that if a power so great may be exercised by a number so small, a substantial compliance with the provisions of the Constitution conferring these powers should be required." And it might be added that there should be substantial compliance with the statutes enacted in aid of the Constitution. "The great body of the electors, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. This is the purpose of the title." *Westbrook* v. *McDonald, supra.* There should be no confusion, no uncertainty, nothing indefinite, about what is designated as the popular name and ballot title when the petition is presented to the Attorney General. The popular name and ballot title should be called to the Attorney General's attention specifically so that he may act in accordance with the statute. Here, this was not done and the Attorney General has rendered no opinion approving a popular name or ballot title and the Secretary of State correctly refused to certify the petition to election officials.

As to petitioners' contention that time should be allowed to amend the petition for referendum by designating a popular name and ballot title, Ark. Stats. § 2-208 provides for obtaining the Attorney General's approval of popular name and ballot title before the petition is circulated; therefore, of course, it could not be amended by getting such approval after the circulation of the petition.

The petition to require the Secretary of State to certify the referendum petition is denied.

Justices McFaddin and Millwee dissent.

Justice George Rose Smith disqualified.

Minor W. Millwee, Associate Justice, dissenting. Ark. Stats., § 2-208 implements Amendment No. 7 of the Arkansas Constitution and reads:

"Before any initiative or referendum petition ordering a vote upon any amendment or act shall be circulated

for obtaining signatures of petitioners, the sponsors shall submit the original draft thereof to the Attorney General, with a proposed legislative or ballot title and popular name. The Attorney General shall, within ten days, approve and certify or shall substitute and certify a more suitable and correct ballot title and popular name for each such amendment or act; the ballot title so submitted or supplied by the Attorney General shall briefly and concisely state the purpose of the proposed measure. If the Attorney General refused to act or if the sponsors feel aggrieved at his acts in such premises they may, by petition, apply to the Supreme Court for proper relief."

Now the clear purpose of the above section is to insure that an I & R petition bears a ballot title and popular name which shall "briefly and concisely state the purpose of the proposed measure." It is equally clear that when a petition is submitted to the Attorney General under this section he shall either, "approve and certify or shall substitute and certify a more suitable and correct ballot title and popular name . . ."

On April 1, 1955, plaintiffs submitted to the Attorney General prior to circulation a petition which was headed in large bold type as follows:

PETITION FOR REFERENDUM
SALES TAX EXEMPTION FOR LIVESTOCK
AND POULTRY FEED

Below this followed the petition proper asking that Act No. 94 of 1955, entitled "An Act to Exempt Feedstuffs Used in Growing or Production of Livestock and/or Poultry in this State from the tax levied under the Gross Receipts Tax and that levied under the Compensating Tax Act, and for other purposes" be referred to a vote of the people at the 1956 General Election. In response to plaintiffs' request for a ruling on the petition, the Attorney General, on April 4, 1955, replied: "I have examined your form for petition for referendum on Act 94 of 1955 and in accordance with Ark. Stats. (1947) § 2-208 the same as submitted is hereby ap-

proved." In addition, the Attorney General furnished plaintiffs a set of "Instructions to Canvassers and Signers" signed by him and to be placed at the head of the petition. In the present action the Attorney General takes the position that the words which plaintiffs say constituted the ballot title and popular name are "vague, indefinite, false and misleading."

Plaintiffs proceeded to procure more than 34,000 signers to the approved petition, which was filed with the Secretary of State on June 8, 1955. Immediately the Secretary of State was beseiged with numerous letters and telegrams from interested legislators and officers of various poultry associations requesting him to obtain a ruling from the Attorney General as to the "legality of the title" of the petition. As one writer put it: "Up in this neck of the woods we hope to find something wrong with the whole thing. Would you be so kind as to ask the attorney general to give us a public official ruling on the thing. Let's hope it is unconstitutional or something." Apparently even greater pressure was applied to the Attorney General. After considerable jockeying back and forth in which the Secretary of State repeatedly sought a definite ruling in the matter, the Attorney General wrote the letter on June 22, 1955, which concluded: "It is my opinion that, since the sponsor has not submitted a ballot title and popular name as required by § 2-208, and has not submitted a ballot title to the State Board of Election Commissioners as required by the 7th Amendment, as Secretary of State or as a member of the State Board of Election Commissioners you have no authority to certify, order or place this question on the ballot as the provisions of the Constitution and statutes which have not been complied with are mandatory."

The pertinent issue would seem to be whether the Attorney General was correct in the opinion initially given the plaintiffs or the one finally rendered to the Secretary of State. The majority say the latter. While logical arguments may be advanced in support of either

view, the Attorney General was eminently correct in his first opinion, in my humble judgment.

The rules governing the sufficiency of ballot titles have been repeated in many decisions. They are summarized in *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470, as follows: "On the one hand, it is not required that the ballot title contain a synopsis of the amendment or statute. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884. It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331. We have recognized the impossibility of preparing a ballot title that would suit every one. *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716. Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, of omission, or of fallacy,' and it must not be tinged with partisan coloring. *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81." Another cardinal principle that runs through all our decisions is that the provisions reserving to the people the powers of initiative and referendum are to be given a liberal construction to effectuate the object and purpose thereby adopted. In *Ferrell* v. *Keel,* 105 Ark. 380, 151 S. W. 269, the court said such object and purpose, "was to increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper, legislation." In *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. 2d 72, we said that since such residium of power rests in the electors, "their acts should not be thwarted by strict or technical construction."

The petition form which was circulated after its approval by the Attorney General clearly reveals that it bears a sufficient ballot title and popular name. The plain and easily understood words: "Sales Tax Exemption For Livestock And Poultry Feed," briefly and concisely state the purpose of the proposed measure, as the law requires. A popular name is not required by the

Constitution, and its requirement is merely a legislative device to make it easy for voters to discuss a measure. *Pafford* v. *Hall*, 217 Ark. 734, 233 S. W. 2d 72. The plain and simple words used by the sponsors here serve that exact purpose and could have no other function. I have challenged the majority, and I defy anyone to submit a ballot title or popular name that more clearly, concisely, definitely and accurately sets forth the purposes of the Act in question.

I do not understand that the majority have found any fault with the substance of the words used by plaintiffs as a ballot title and popular name. What they do hold is that it is mandatory that the petition not only contain the tags or designations, "popular name" and "ballot title," following the words used as such, but that such designation must be called to the Attorney General's attention specifically; and that all this must be done on papers separate from the petition proper. This is a narrow, restricted and technical holding that overrules former cases and violates the whole spirit and intent of the I & R Amendment. We have held very definitely that the legislative title incorporated in a petition to initiate or refer a measure, is and does become the ballot title when so used even though it was not so designated. The majority blandly ignore the holdings in the *Coleman, Blocker* and *Hogan* cases to this effect by stating that they were decided prior to the enactment of Sec. 2-208.

While courts are not concerned with the wisdom or propriety of legislation, the people very definitely are. More than 34,000 Arkansas citizens felt that the Legislature acted wrongfully in exempting livestock and poultry feed from the sales tax while still exacting it on such vital necessities as medicine, milk and bread. In an earnest endeavor to make it possible for the people to determine for themselves whether this should be done, plaintiffs have become the unfortunate victims of a gross miscarriage of justice. Their valiant effort to exercise a precious constitutional right has now been completely thwarted by narrow, technical and illiberal judicial ac-

tion that is without precedent to sustain it. I would permit the people to vote on Act 94 and, therefore, dissent from the conclusion of the majority.

Justice McFaddin joins in this dissent.

Watkins *v.* Bright.

5-831 286 S. W. 2d 333

Opinion delivered January 30, 1956.

*Kenneth C. Coffelt,* for appellant.

*Ben M. McCray,* for appellee.

Lee Seamster, Chief Justice. This is an appeal by the appellants, from a judgment of the Saline Circuit Court, based on the verdict of a jury denying appellants' recovery from appellee for claimed personal injuries and property damage, arising out of an automobile accident which occurred in Benton, Arkansas, on September 1, 1954.

This dispute arose out of a collision between appellee's automobile and a vehicle driven by appellant, Mrs. Earl Watkins, which occurred at the intersection of South

Street and West Drive Street, in Benton. Immediately prior to the collision, Mrs. Watkins was driving her husband's automobile in a westerly direction on South Street and the appellee, Wayne Bright, was driving a vehicle, owned by Kelly Don Chandler, in a southerly direction on West Drive Street. The vehicles collided in the intersection, whereby, the vehicle being driven by Mrs. Watkins traveled another 150 feet further west, ran off the pavement and struck a house. The evidence conflicts as to the rate of speed that each vehicle was being driven immediately prior to the time of the collision. The appellants alleged that the accident was caused by the negligence on the part of the appellee in failing to yield the right-of-way. The appellee answered denying any negligence and in turn alleged that appellant, Mrs. Earl Watkins was negligent in the operation of her vehicle and was solely responsible for the collision, thereby praying that appellants' complaint be dismissed. The jury returned a verdict for the appellee from which the appellants appeal.

For reversal, the appellants contend the trial court erred in giving defendant's requested instruction Number 10, over the general and specific objections of the appellants. This instruction is as follows:

"You are instructed that when two motor vehicles approach an intersection at or about the same time, that it is the duty of the car approaching on the left to yield the right-of-way to the vehicle approaching on his right, but, however, where one vehicle has already entered the intersection, and the other vehicle has not, then the former vehicle has the right-of-way over the latter."

Appellants objected to this instruction and contend that it is not a correct declaration of the law applicable to this case, for the following reasons: (1) there is no street intersection as a street intersection is known in law in this case; (2) the undisputed testimony shows that Mrs. Watkins entered the street intersection first, therefore, the instruction would not apply even if there were a street intersection involved; and, (3) South Street at the time of the collision was a part of the highway sys-

tem of Arkansas, although the highway designation signs had been removed by the State Highway Department.

The purpose of instructions is to inform the jury of the legal principles applicable to the facts presented, and furnish a guide to assist in reaching a verdict. They are ordinarily read to the jury with continuity and unless contradictory as a matter of law must be considered as a whole. If, when so considered, the legal issues presented are properly explained, no prejudice results.

We hold that the trial court did not err by giving appellee's requested instruction Number 10, as modified. See *Ark. Stats.* (1947), § 75-621. It was not a binding instruction since it did not exclude from the jury an opportunity to decide which vehicle entered the intersection first or whose negligence caused the collision. The facts reveal that this collision occurred at a street intersection where West Drive Street enters South Street. The undisputed facts also reveal that the State Highway Department had removed the highway designation signs some thirty days prior to the time of the collision and the Highway Department had re-routed the traffic over the new highway. There were no stop signs on either street. The question of negligence was properly submitted to the jury and the jury found for the appellee.

The appellants contend that *Ark. Stats.* (1947) Sec. 75-623 controls in this case because South Street is a through highway. *Ark. Stats.* (1947) Sec. 75-412 subsection (F) defines a through highway and *Ark. Stats.* (1947) Sec. 75-645 authorizes the State Highway Commission, with reference to State Highways, and local authorities, with reference to the other highways under their jurisdiction, to designate through highways and erect stop signs at specified entrances thereto. In other words, in order to have a through highway at any particular intersection there must be erected a stop sign at the entrance of the intersection on the highway approaching the through highway. It is conceded that there was no stop sign on West Drive Street, at the intersection of South Street.

Finding no error, the case is affirmed.

HALLER *v.* HALLER.

5-811 286 S. W. 2d 331

Opinion delivered January 30, 1956.

[redacted]

*Peyton D. Moncrief, Virgil R. Moncrief, John W. Moncrief,* for appellant.

*Botts & Botts,* for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves title to a 160-acre tract of land in the Southern District of Arkansas County. Appellant was the brother of appellee's father, L. C. Haller, and claims title by virtue of a deed from L. C. Haller and wife, Ethel, in January 1924. A large part of the consideration in this deed was the assumption by appellant of a mortgage on the property held by the American Investment Company dated January 15, 1924. Appellee, Ralph Haller (L. C. Haller's son) primarily claimed title to the land and ownership by virtue of seven years adverse possession, and also that appellant had abandoned the property. On a trial the Chancellor upheld appellee's contention. The decree recited: "The court finds that the defendant, Ralph Haller, is the owner of the lands in controversy heretofore set out, subject to an indebtedness due Mary H. Brown . . . The court further finds that plaintiff abandoned said property and any title, claim or interest which he might have had in the same, or any part thereof, and that he presently has no title, right, or interest therein in any way whatsoever and that the defendant has acquired title to this property by reason of said abandonment, and possession and payment of taxes for more than seven years." . . . "The court fur-

ther finds that the defendant is not indebted to plaintiff in any sum . . ." This appeal followed.

After carefully reviewing the evidence, we have concluded that the findings of the trial court, that appellee acquired title by adverse possession, are not against a preponderance of the testimony. The preponderance of the evidence, in effect, shows that Ralph Haller, appellee, and his father before him, have been in possession of this land from the time it was purchased in 1917 at least up to 1944 and have claimed ownership up to the filing of the present suit, and they or the mortgagee have paid the taxes each year with the exception of 1924, 1925 and 1926 when they were paid by appellant. Appellant has never been in possession of the land. Ralph and his father lived on it, farmed it, cut and sold timber from it, pastured it, claimed it, the land was known as their land, they used it as their own, and have practically paid off the above mortgage. Appellant never collected any rentals or profits from the land and there was evidence that during the life of appellee's father, appellant made the statement, and also told Ralph in 1946, that he, appellant, had no interest in the land, but should appellee decide to sell he would be interested in buying. Appellant, however, denied making any such statement. It appears that appellant stood idly by for approximately 30 years exercising no control, or ownership, over said land while at the same time appellee and his father before him were in undisputed possession openly, notoriously and adversely. In these circumstances the governing rule is stated in an opinion by Judge McCulloch, *Tegarden* v. *Hurst,* 123 Ark. 354, 185 S. W. 463. "We are also of the opinion that the evidence shows very clearly an intention on the part of Hurst to hold the land in hostility to any other claim, and that even if there was no right to reformation that Hurst's occupancy ripened into a title by adverse possession for the statutory period. On that branch of the case, the defendants invoke the doctrine that where a grantor remains in possession, there is a presumption that he does so in subordination to the title he has granted, and not in hostility thereto. While that is true, there is an exception where the occu-

pancy continues unexplained for an unreasonable length of time and under those circumstances, the presumption is gradually overcome by lapse of time. *American Building & Loan Association* v. *Warren,* 101 Ark. 163, 141 S. W. 765. The fact that Hurst remained in undisputed possession of the land, openly and notoriously, for a period of fourteen years is sufficient to overcome the presumption that he was holding in subordination to his original grant. Such occupancy was, under the circumstances, sufficient notice to Tegarden as to the hostility of the possession." See also *St. L. Sw. Ry. Co.* v. *Fulkerson et al,* 177 Ark. 723, 7 S. W. 2d 789; *Davis* v. *Burford,* 197 Ark. 965, 125 S. W. 2d 789, where on the evidence it was held that adverse possession for a period of 23 years was sufficient; *Forrest* v. *Forrest,* 208 Ark. 48, 184 S. W. 2d 902, where we held under the facts there that a period of 10 years was sufficient.

As indicated, we hold that the Chancellor was warranted in finding from the evidence that appellee's possession had been of sufficient character to abate the presumption that they were occupying the land in subordination to the grant of Ralph's father (L. C. Haller) and mother, and since appellee and his father held continuous possession of the land for approximately 30 years they have on the facts presented acquired title by adverse possession. Affirmed.

CITY OF AUGUSTA *v.* ANGELO.

5-836 286 S. W. 2d 321

Opinion delivered January 30, 1956.

*Forrest E. Long,* for appellant.

*W. J. Dungan,* for appellee.

J. Seaborn Holt, Associate Justice. This is a suit by appellee, Angelo, to recover alleged salary due him, as City Marshal, for Augusta, Arkansas, a city of the second class. The parties have stipulated that:

"Ordinance No. 232, referred to in plaintiff's complaint was duly passed and published as required by law at the regular October, 1952, meeting of the City Council of said city and by its provisions did not take effect until January 1st, 1953.

"Ordinance No. 231, referred to in plaintiff's complaint, was duly passed and published as required by law at the regular September, 1952, meeting of the City Council of said City and by its provisions did not take effect until January 1st, 1953.

"Plaintiff was duly elected Marshal of the City of Augusta for a two year term ending January 1st, 1953; that plaintiff was duly elected over an opponent in the November 4th, 1952 General Election for the two year term ending January 1st, 1955, and duly qualified for said office, and was paid and accepted $2.00 per month during said period.

"Ordinance No. 226 referred to in plaintiff's complaint was duly passed and published and became effective January 1st, 1951, and under said ordinance plaintiff was paid a salary of $150.00 per month for the years 1951 and 1952.

"The respectively numbered exhibits attached hereto are true and certified copies of the original ordinances passed by the City of Augusta.

"The question of law herein presented is the validity of Ordinances No. 231 and 232, and in particular whether said ordinances are void or invalid as constituting an indirect abolishment of the office of City Marshal."

Ordinance 231 provides in part: "That the office of City Marshal shall not be abolished hereby, but all duties heretofore performed by the City Marshal shall be transferred to and become the duties of the Chief of Police under the direction of the Police Commission and City Council. The compensation to be received by any and all officers appointed hereunder shall be determined by the police commission with the approval of the City Council . . . All legal process issued by the Mayor shall be directed to the Chief of Police . . . All fees, rewards, and other special remuneration received by the Police Department or any member thereof, shall be deposited with the City Treasurer and credited to the general fund of the city . . . The Chief of Police shall take over and perform all duties in connection with said court that have been performed by the City Marshal."

Ordinance 232 provides: "Section 1: Beginning January 1, 1953, the salary of the various elected offices and officers shall be in amounts and payable at the time and in the manner set out as follows:

"Marshal—$24.00 per year payable $2.00 per month.

"Section 2: The provisions of this ordinance shall come into effect and be in force on January 1, 1953."

Trial resulted in a judgment for appellee in amount of $3,552 with 6% interest and costs. The judgment contained these findings by the court:

"The court finds that the said ordinances No. 231 and 232 are void, invalid and of no legal effect and their attempted adoption by the City Council was an ultra vires act, because the passage of the ordinances was an attempt to abolish the office of City Marshal of the City

of Augusta by indirect means, the finding of the court being that the said two ordinances are void, invalid and of no legal effect only to the extent that they affect the office and salary of the City Marshal of the City of Augusta.

"The court finds that the City of Augusta paid to the plaintiff, Jack M. Angelo, the sum of $2.00 on his salary for each of the months of 1953 and 1954, or a total of $48.00, and that the City of Augusta is thereby estopped to introduce testimony and to contend that the plaintiff, Jack M. Angelo, abandoned or vacated his office at any time during the years 1953 and 1954.

"The court finds that the plaintiff is entitled to recover the salary of $150.00 per month, as provided in ordinance No. 226 introduced herein, for the twelve months of 1953 and the twelve months of 1954, less the $2.00 per month paid in each month of the two years, or he is entitled to recover the sum of $3,552.00."

This appeal followed.

The question presented is one of law. The facts were undisputed and the trial court based its judgment solely on the pleadings and stipulation of facts above. We held in *McGill* v. *Miller,* 183 Ark. 585, Head Note No. 2, 37 2d S. W. 689: "Where testimony was undisputed and the conclusion deducible therefrom was one of law, the appellate court was not bound by the trial court's finding."

At the time the above ordinances were enacted the following sections of our statute were in effect and controlled: § 19-1103, Ark. Stats., 1947 "Marshal, recorder, and treasurer to continue in office until successor qualified — (The qualified voters of each city of the second class shall, at the same time, elect a city marshall [marshal], city recorder and treasurer.) Each of said officers shall continue in office until his successor is elected and qualified, and shall have such powers and perform such duties as are prescribed in this act, or as may be prescribed by any ordinance of such city, not inconsistent with the provisions of this act."

Section 19-1104, Ark. Stats., 1947 "Marshal—Powers and Duties — Appointment of Duties — Fees — The Marshal of cities of the second class shall execute and return all writs and process to him directed by the mayor, and, in criminal cases or cases of a violation of the city ordinance, he may serve the same in any part of the county; it shall be his duty to suppress all riots and disturbances and breaches of the peace, to apprehend all disorderly persons in the city, and to pursue and arrest any person fleeing from justice in any part of the State; to apprehend any person in the act of committing any offense against the laws of the State, or ordinances of the city, and forthwith to bring such persons before the mayor, or other competent authority, for examination or trial; he shall have power to appoint one or more deputies, for whose official acts he shall be responsible; he shall, in the discharge of his proper duties, have like powers, be subject to like responsibilities, and shall receive the like fees as Sheriffs and Constables in similar cases."

Clearly it appears under § 19-1103 that the office of City Marshal was an elective office by the qualified electors of Augusta. See *Thomas* v. *Sitton,* 213 Ark. 816, 212 S. W. 2d 710. The City Council at the time Ordinance 231 was enacted [which was prior to the effective date of Act 172 of 1953 which gives cities of the second class authority to appoint the City Marshal instead of electing] was without power to abolish the office of City Marshal and the ordinance was, therefore, void. See *City of Berryville* v. *Binam,* 222 Ark. 962, 264 S. W. 2d 421.

We think, however, that Ordinance 232 above is a valid enactment. As we construe § 19-1103 and § 19-1104 above, the City Council was not required to pay the duly elected City Marshal any certain or stated salary, or in fact, any salary at all. It could, however, if it so elected, pay him some salary, as the $2.00 per month here, in addition to "the like fees as Sheriffs and Constables in similar cases," received as provided in § 19-1104 above. Here appellee, Angelo, had been duly elected to the office of Marshal by the people. There was no vacancy in the office and he was not a "hold-over" officer.

As pointed out, the City's authority to fix appellee's salary was unrestricted except that it could not change his salary during any certain term once it had been fixed. We conclude, therefore, that appellee has been paid by the City all the salary ($2 per month) that the city agreed to pay him under Ordinance 232 during his elected term 1953 and 1954. The judgment is reversed and the cause remanded with directions to proceed not inconsistent with this opinion.

ARKANSAS STATE BOARD OF ARCHITECTS *v.* BANK BUILDING & EQUIPMENT CORP. OF AMERICA.

5-794 286 S. W. 2d 323

Opinion delivered January 30, 1956.

*Mehaffy, Smith & Williams, B. S. Clark,* for appellant.

*Harry S. Kramer, Jr.*; *Rose, Meek, House, Barron* and *Nash,* for appellee.

ED. F. MCFADDIN, Associate Justice. The issue posed on this appeal is whether the appellee has engaged in the practice of architecture in violation of Act 270 of 1941 (now found in § 71-301 *et seq.,* Ark. Stats.)

Appellant, Arkansas State Board of Architects (hereinafter called "Board"), filed suit to enjoin[1] appellee, Bank Building & Equipment Corporation of America (hereinafter called "Building Corporation"), from continuing to engage in certain activities which the Board alleged to be the practice of architecture and in violation of said Act 270. The Chancery Court held that the activities of the Building Corporation did not amount to the practice of architecture and dismissed the complaint; and from that decree the Board brings this appeal presenting the issue[2] as first stated above.

The evidence established that the Building Corporation is domiciled in St. Louis, Missouri, and qualified as a foreign corporation in this State; but is not licensed to engage in the practice of architecture under Act 270 of 1941 (§ 71-301 *et seq.*, Ark. Stats.); that the Building Corporation specializes in constructing bank buildings and planning and constructing the interiors thereof, and has an architectural department as an integral part of its business; that Mr. W. G. Knoebel — licensed as an architect in Arkansas — is the Chief Architect of the Building Corporation, and is the head of a staff of about two hundred persons in the architectural department of the Building Corporation; that none of these two hundred— except Mr. Knoebel — is licensed in Arkansas; that the general plan used by the Building Corporation, in obtaining and performing its contracts, is as follows: it solicits a bank that contemplates constructing a building or rearranging the interior thereof, and persuades the bank to sign a "survey agreement" in which the bank is

[1] Whether injunctive relief would be proper need not be considered because the parties have not raised the question and because the pleadings and record present a proper case for a declaratory judgment which could have brought the issue to a focus. See *Culp* v. *Commissioner of Revenues, ante* page 749, decided December 19, 1955.

[2] So far as our search discloses, this is the first case before us involving the said Act 270. Since neither side has raised any question concerning the constitutionality of the Act, we likewise by-pass that potentiality; but it is appropriate to mention that in 3 Am. Jur. 998, in discussing the licensing of architects, the text states the holdings of cases in these words: "In many States statutes are enforced which regulate architects in the practice of their profession. . . . It is well settled that the State may, in the exercise of the police power, thus regulate the profession. . . ."

designated as "owner" and the Building Corporation as "company"; and that the contract provides in part:

"1. Company shall consult with and advise Owner, and shall furnish suggestions and recommendations for proposed improvements.

"2. Company shall designate a qualified and registered architect to perform all architectural services that may be necessary in connection with the proposed work and improvements, and Company shall pay the architect for such services.

"3. Architect shall perform all architectural work, including preparation of all preliminary and working drawings, plans and specifications, and shall furnish Company all necessary data for preparation of survey.

"4. Periodic inspection trips shall be made as required, but not less than once each month during the progress of the job. These without charge and in addition to the trips for the awarding of contracts.

"5. Architect shall prepare Proposals and Contracts incidental to the work, issue certificates of payment, and keep proper and adequate records.

"6. The fee payable by Owner to Company shall be ..... per cent (.....) of all Architectural Work planned, including building improvements, mechanical work, interior equipment, furnishings and vault equipment . . ."

Here are excerpts from the testimony of the President of the Building Corporation regarding its activities under the contract:

". . . we go into a bank . . . and make a complete analysis of their entire operation; after we have completed that analysis we make the necessary recommendations to improve the work flow, the type of equipment that might be more efficient, and that is an extensive part of that survey agreement . . . then the architect takes over and makes the necessary plan to show the man what can be done to give them efficient work space.

"Q. When does the architect first come into the picture?

"A. He comes into the picture immediately on the necessity of any plan being done . . . The architectural department then has a meeting with our planning board, which consists of five men in the organization, of which the architect is one, and we make a complete analysis of what is going to be required . . . Then it goes into the architectural department to make the plans along the lines of that budget so when it is completed it will be practical for the bank to proceed with the operation . . .

"Q. Suppose the owner at that point decides to take competitive bids?

"A. We step out and continue to operate under our survey agreement . . .

"Q. If the owner decides to open it up to competition, you do not compete in the bidding?

"A. No, we step out of the picture and retain our status and Mr. Knoebel then takes over and performs the architectural services . . .

"Q. What is Mr. Knoebel's full name?

"A. Wilbur G. Knoebel. . . .

"Q. In what capacity is he employed?

"A. Chief architect of the Architectural Department.

"Q. Is he a full time employe?

"A. Yes, sir.

"Q. How many architects does he have working under him, licensed architects? You said he had 200 in his department . . . Do you know how many are licensed in Arkansas?

"A. Just one.

"Q. Mr. Knoebel?

"A. Yes . . .

"Q. Does Mr. Knoebel go personally — does he come personally to Arkansas on each of your jobs, or would he send one of the men under him?

"A. In most cases he would send a man under him. He does make trips in many cases.

"Q. You pay Mr. Knoebel a salary, I presume?

"A. He works on a salary and a fee basis; he gets a percentage of fees, depending on the volume.

"Q. Nevertheless, he can be discharged by your company at any time, couldn't he?

"A. If his services were unsatisfactory, yes, sir . . .

"Q. Who would receive his fee?

"A. Our survey agreement would provide for us getting the fee.

"Q. Your company would get the fees and your company would pay Mr. Knoebel according to your arrangements with him?

"A. That is right."

Under the above testimony of its President, it is clear that the Building Corporation is contracting in this State to furnish architectural services for constructing banks and rearranging the interiors thereof; that it has a staff of about two hundred architects to perform such service; that only one of these — Mr. Knoebel — is licensed in Arkansas to practice the profession of architecture; that he works for the Corporation as an employee; and that he details the inspection and supervision work to his subordinates, none of whom is licensed under the Arkansas law.

The Act 270 of 1941 provides in Section 2:

". . . no person shall practice architecture in this State, or engage in preparing plans, specifications, or preliminary data for the erection or alteration of any

building located within the boundaries of this State, or use the title 'architect' . . . unless such person shall have secured from the Examining Body a certificate of registration and license in the manner hereinafter provided . . ."

The appellee, Building Corporation, does not come within any exemption provided in Sub-section 2 of said Section II of the Act; and sub-section 3 of Section II of the Act provides:

"No corporation shall be licensed or registered to practice architecture in this State unless the principal of such corporation whose name appears in the corporation's name is a registered architect, and providing also that each such principal is so registered."

Thus the appellee, Building Corporation, as such, could not be authorized to practice architecture in this State, since Mr. Knoebel's name does not appear in the name of the Corporation. An architect is one whose occupation it is to form and devise plans and designs and draw up specifications for buildings or structures and to superintend their construction. In the case of *McGill* v. *Carlos,* Ohio Com. Pl. 81 N. E. 2d 726, one of the Ohio courts, in discussing the practice of architecture, used this pertinent language:

"Primarily, an architect is a person who plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge and skill are required in such preparation. The practice of architecture may also include the supervision of construction under such plans and specifications. See Webster's New International Dictionary; the New Century Dictionary; 3 Ohio Jur., Sec. 1, page 115; Kansas City Southern R. Co. v. Wallace, 38 Okl. 233, 132 P. 908, 46 L. R. A., N. S., 112; 3 Amer. Jur. Sec. 2, page 998."

The foregoing is exactly what the Building Corporation is doing under its contract and under the testimony of its

President and it is, therefore, acting in violation of the Arkansas Legislative Enactment here involved.

In answer to the appellant's contentions the appellee says: "We search the statute in vain for any language which would prohibit the appellee from agreeing to designate a qualified architect." In other words, the appellee contends that all it does is to designate Mr. Knoebel and that he is licensed. But the appellee, Building Corporation, is doing far more than a mere designation. It contracts with the "owner" to furnish plans and specifications (and it has a staff of two hundred employees in its architectural section to draw these plans); and then it provides the supervision of the construction. In short, the appellee, Building Corporation, is agreeing to have its own employees do the architectural work. The fundamental legal principle of agency — "*qui facit per alium, facit per se* (he who acts through another acts by himself)" — when applied here, proves that the Building Corporation is not merely "agreeing to designate a qualified architect": rather it is employing a staff of two hundred architects and it is engaged in the practice of architecture.

The appellee, Building Corporation, cannot hide behind the mask, that it has one architect licensed to practice in Arkansas; because the evidence shows that Mr. Knoebel acts in an advisory capacity over a staff of two hundred persons in the architectural department, and that he designates some of them — each of whom is unlicensed — to help fulfill the contracts that the appellee, Building Corporation, has in this State. We held in *Arkansas Bar Assn.* v. *Union National Bank,* 224 Ark. 48, 273 S. W. 2d 408, that if a bank should furnish the services of attorneys to its customers, the bank would be engaging in the practice of law. By the same token, appellee, Building Corporation, by furnishing the services of architects to its customers, is engaging in the practice of architecture.

Appellee cites cases from other States to justify its activities in Arkansas. Some of these cases are: *Joseph* v. *Drew,* 36 Cal. 2d 575, 225 Pac. 2d 504; *Walter M. Bal-*

*lard Corp.* v. *Dougherty,* 106 Cal. App. 2d 35, 234 Pac. 2d 745; *Baer* v. *Tippett,* 34 Cal. App. 2d 33, 92 Pac. 2d 1028; *Castaldi* v. *Reutermann,* 345 Ill. App. 510, 104 N. E. 2d 115; and *Continental Paper Grading Co.* v. *Howard T. Fisher & Associates,* 3 Ill. App. 2d 118, 120 N. E. 2d 577. But each of these cases from another State is based on a Statute different from our own. For instance, the California Statute, on which the cases from that State were based, allows a corporation to be licensed as an architect (see Sec. 5535 of the Business and Professional Code of California). The California Code also allows an unlicensed person to draw plans, specifications and drawings, provided such unlicensed person informs the other party in writing that the unlicensed person is *not* an architect (see Sec. 5537, Business and Professional Code of California). Thus the cases from other States are of little value to us in passing on our particular Statute as it is not shown or claimed that our Statute was borrowed from any other State.

It is not for this Court to consider the wisdom of the Arkansas Legislative Enactment in going as far as it did: since no constitutional question is urged here — and none raises itself — our duty is to measure the act in the present case by the yardstick of the statutory language. When so measured it is clear that the appellee, Building Corporation, is violating the Arkansas Statute.

The decree is reversed and the cause is remanded for further procedure not inconsistent with this opinion.

Justice George Rose Smith not participating.

Justice Ward dissents.

BULLOCK *v.* MINER.

5-796 286 S. W. 2d 328

Opinion delivered January 30, 1956.

*Donald Poe, Robert R. Brooksher,* for appellant.

*Hardin, Barton, Hardin & Garner,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellants, James Bullock and Shirley Jean Hall, are minors who, by their parents, brought separate actions against appellee, Joe Miner, to recover damages for personal injuries which they allegedly sustained on August 25, 1954, when a school bus in which they were riding was struck by appellee's truck on U. S. Highway 71 between Abbott and Mansfield, Arkansas. Each complaint alleged that, at the time of the collision, appellee's truck was being operated by Franklin Richey as the agent, servant and employee of appellee and while acting within the scope of his agency or employment, all of which appellee denied.

The cases were consolidated for trial to a jury. After appellants presented their testimony bearing on the issue of Richey's agency for or employment by appellee at the time of the collision, but before they had introduced all their proof, the trial court denied appellants' motion for a non-suit and granted appellee's motion for a directed verdict in his favor.

In directing a verdict for appellee, the circuit judge found, as a matter of law, that Richey was not acting as the agent or servant of appellee at the time of the col-

lision and was not, therefore, liable for his negligent acts. Thus it is agreed that the primary issue here is whether there is any substantial evidence to warrant a jury finding that the driver, Franklin Richey, was acting as the agent or servant of appellee and within the scope of his agency or employment at the time of the collision. In testing the correctness of the court's action in peremptorily instructing the jury on this issue, the evidence adduced must be given its strongest probative force in favor of the appellants. As this court stated in *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 170 S. W. 328: "In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury." See also, *Pugh* v. *Camp,* 213 Ark. 282, 210 S. W. 2d 120.

At a pretrial conference it was admitted that appellee was engaged in the junk business at Boles, Arkansas, and owned the truck involved in the accident; that said truck was being driven by Richey and was partly loaded with scrap iron; and that Richey, at times previous to the accident, had been employed by appellee. At the trial Richey and appellee were called as witnesses by appellants. Richey testified that, on the morning of the accident, he drove his own car to the home of appellee at Boles to see if he could catch a ride with appellee to Ft. Smith where Richey desired to make some inquiry about his prospective employment at O'Roark's Body & Paint Shop. Appellee told Richey that he and his wife were going to Ft. Smith later in the day, but that Richey could drive appellee's truck, which was partly loaded with junk, to O'Roark's shop where appellee would pick it up and deliver the junk to Yaffee Iron & Metal Co. in Ft. Smith where appellee always sold his junk. Richey attempted to fix the brakes on the 1948 model truck, which were known by appellee to be defective, and appellee gave him $1.00 with which to pur-

chase brake fluid. In making the repairs, Richey "plugged up" one of the brakes and so advised appellee. Richey proceeded in the truck toward Ft. Smith over Highway 71 until he came up behind the school bus which was slowing down for a stop. A car was approaching from the opposite direction and the truck struck the rear of the school bus when the brakes proved to be wholly defective and would not hold.

When Richey was questioned by appellee's counsel as to the nature of the agreement under which the truck was turned over to him, he answered: "Well, it wasn't exactly a loan. He (appellee) told me I could drive the truck up there. He told me I could drive the truck up there if I'd drive the load of iron up there." He also stated that he was to drive the truck to Ft. Smith for the ride up there as well as for the convenience of appellee, and that he might have driven it back to Boles if he had not secured the job at O'Roark's shop. While appellee denied that Richey was in his employ at the time of the collision, he stated that he had made similar trips for appellee prior to and since the collision; that Richey's working hours were usually irregular and he was paid by the hour; and that he frequently did things for appellee without charging for his services. He had intended to pick up an old car body at O'Roark's shop and bring it back to Boles to be dismantled for junk. According to the driver of the school bus, appellee came upon the scene shortly after the wreck and stated that "his brakes were supposed to have been fixed at Waldron," and that Richey was hauling a load of junk to Ft. Smith in his truck.

When the foregoing admissions and testimony are considered in the light most favorable to the appellants, we conclude that a jury question was made as to whether Richey was acting within the scope of his agency or employment and as the agent or servant of appellee at the time of the collision. It is true that an owner is not liable for negligence in the operation of his vehicle by an employee to whom he has rented or lent it and who is using it on a mission of his own or solely for his own

purposes. *White* v. *Sims,* 211 Ark. 499, 201 S. W. 2d 21. But it is also well settled that if a vehicle causing an accident belongs to the defendant, and is being operated at the time of the accident by a regular employee of the defendant, there is a reasonable but rebuttable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 218, 35 S. W. 2d 1010.

In cases involving facts quite similar to those adduced by the appellants here, we have held that the issues, as to whether the driver of the vehicle was acting as the agent or servant of the owner and within the scope of his agency or employment at the time of the accident, are for the jury and not the court. *Casteel* v. *Yantis-Harper Tire Co.,* 183 Ark. 475, 36 S. W. 2d 406; *Ball* v. *Hail,* 196 Ark. 491, 118 S. W. 2d 668; *Lion Oil Refining Company* v. *Smith,* 199 Ark. 397, 133 S. W. 2d 895. To the same effect are the cases of *Volentine* v. *Wyatt,* 164 Ark. 172, 261 S. W. 308, and *Richards* v. *McCall,* 187 Ark. 61, 58 S. W. 2d 432. In *West* v. *Wall,* 191 Ark. 856, 88 S. W. 2d 63, relied on by appellee, the driver was using the truck on an independent business trip for a partnership of which he was a member at the time of the accident which did not involve a defective condition of the vehicle.

Our conclusion that the evidence adduced by appellants is legally sufficient to warrant a jury finding for appellants on the issues presented is in harmony with the following rule approved by this court in *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, and numerous subsequent cases: "It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the

suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury."

While Richey is not made a party defendant, he could hardly be classed as a disinterested witness and his testimony on some points is contradicted by other evidence. For instance, his statement that he made repairs to the truck at appellee's home is contradicted by the bus driver's testimony that appellee said the brakes were to have been repaired at Waldron. And, even if the fact finders found Richey's testimony true *in toto*, it is certain that he was acting for the mutual benefit of himself and appellee and not solely for his own purposes in driving appellee's truck. On the whole case, we cannot say that a fair and reasonable inference might not have been deduced by the jury that Richey acted as the agent or servant of appellee and within the scope of his employment in the operation of the truck at the time of the collision.

While the issue probably will not arise again, the trial court also erred in overruling appellants' motion for a non-suit. See *Hall, Adm.*, v. *Chess & Wymond Co.*, 131 Ark. 36, 198 S. W. 523. For the error in instructing a verdict for appellee, the judgment is reversed and the cause remanded for trial.

WARREN, TAX ASSESSOR *v.* WHEATLEY.

5-845 286 S. W. 2d 334

Opinion delivered January 30, 1956.

*R. Julian Glover,* for appellee.

*Richard W. Hobbs,* for appellant.

George Rose Smith, J. This is a tax assessment proceeding involving thirteen parcels of land owned by the appellee. At its 1953 session the county board of equalization approved valuations totaling $143,100 that had been assigned to the lands by the county assessor. In appealing to the county court the property owner failed to publish, or to have the county clerk publish, the statutory notice that such an appeal had been taken. Ark. Stats. 1947, § 84-708. The county court, after a hearing, entered an order reducing the assessed valuations to $135,650. At the next term of court, however, the court set aside its order upon the ground that publication of the statutory notice was essential to its jurisdiction. That action was later reversed by the circuit court, which reinstated the original county court order. The county assessor has appealed from the judgment of the circuit court.

We think the county court was right in considering the publication of notice to be indispensable to its jurisdiction. It is commonplace for the legislature to prescribe certain jurisdictional steps in appellate procedure. Familiar examples include the filing of a notice of appeal to this court, *General Box Co.* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40, and the lodging of the transcript within thirty days after the rendition of judgment by a justice of the peace. *Bridgman* v. *Johnson,* 200 Ark. 990, 142 S. W. 2d 217.

The statute cited above provides that "the county court shall acquire no jurisdiction to hear such appeal" from the equalization board unless the required notice is published. The legislature could hardly have declared more explicitly that the notice is a prerequisite to the county court's power of review. Nor is the defect cured by the fact that here the assessor appeared and contested the case in the county court. The notice is more than a

mere summons by which the court acquires personal jurisdiction over the assessing officials. The statutory form of notice is expressly for the benefit of "any owner of property" in the county and was doubtless adopted to supply an omission that had been found to exist in an earlier law. *Pulaski County* v. *Commercial Nat. Bank,* 210 Ark. 124, 194 S. W. 2d 883; 5 Ark. L. Rev. 368. The legislature evidently believed that the giving of publicity to a matter of interest to other taxpayers is of sufficient importance to be made a condition to the court's jurisdiction of the subject matter.

It is also argued that the county court was without authority to vacate its original order after the lapse of the term. This order, however, was void for want of jurisdiction, as we have seen, and was therefore subject to the court's continuing power to expunge such an order from its records. *Walsh* v. *Hampton,* 96 Ark. 427, 132 S. W. 214; *State* v. *West,* 160 Ark. 413, 254 S. W. 828.

Reversed.

J. A. GIPSON *v.* CRAWFIS.

5-822 286 S. W. 2d 336

Opinion delivered January 30, 1956.

*Kenneth C. Coffelt,* for appellant.

*Bailey, Warren & Bullion,* for appellee.

PAUL WARD, Associate Justice. On May 2, 1955, appellant, for the benefit of himself as a taxpayer and for all taxpayers of Arkansas, instituted in the Chancery Court of Pulaski County Suit No. 102404 against Dr. E. H. Crawfis, Superintendent of the Arkansas State Hospital, K. W. Newman and W. E. Lester, as disbursing officers of the Hospital, and the Standard Accident Insurance Company, as surety for Newman and Lester. The charges against the appellees, as gathered from the pleadings and the admitted facts, may be stated as set out below. Crawfis, as Superintendent of the Hospital, unlawfully drew, and Newman and Lester unlawfully paid to him, money out of the cash funds of the Hospital and the State Treasury, in excess of his salary as prescribed by the Legislature. The prayer was that the defendants (appellees) be required to return the excess payments to the source from which it came and that they be restrained from similar activities in the future.

The excessive payments complained of are of three different kinds, viz:

1. The sum of $1,552.48 paid out of cash funds for moving Dr. Crawfis' household belongings from Cali-

fornia to Little Rock; 2. The sum of $1,947.30 paid out of cash funds for furniture and carpet for the house assigned to Dr. Crawfis by the Hospital [The complaint alleges that Dr. Crawfis has converted said furniture to his own use, but it conclusively appears that he has not and that it belongs to the State], and; 3. The sum of $1,447.67 being the amount paid out of money appropriated by the Legislature for the service of a maid assigned to Dr. Crawfis' home.

For answer to the above charges, the defendants (appellees) admit the above expenditures, but claim they were lawfully made under the provisions of Act 501 of 1953.

The Chairman and Members of the Hospital Board filed an intervention, adopting the defendants' answer, and stating that all said expenditures had been by them first duly considered and then approved.

We will for convenience hereafter refer to the above suit as the "First Case."

On April 18, 1955, a similar suit, No. 102296, had been filed in like manner by appellant against the same Mr. Newman and Mr. Lester. This suit, which we will hereafter refer to as the "Second Case," was by the trial court consolidated and heard with the First Case. The charges in the Second Case, as taken from the pleadings and admitted facts, are hereinafter set out.

1. In 1953 Newman held the position of Assistant Hospital Administrator which the 1953 Legislature created and fixed the salary of $6,500. Later the Hospital Board abolished this office and created a new position, designated as Director of Administration, and fixed the salary at $8,500. Newman entered upon the duties of the new position in February 1954 and held it until some time in October 1954 at the salary of $8,500 — an excess of $1,250 over the salary fixed by the Legislature as stated above. This excess of $1,250 was paid out of the cash funds of the Hospital. The prayer was for judgment against Newman for $1,250, and that he be restrained from drawing further excess salary.

2. Lester began working for the Hospital in January of 1954 as Chief Accountant at a salary of $4,500 as provided by the 1953 Legislature. On June 29, 1953 the Hospital Board created the office of Procurement and Disbursing Officer, and fixed the salary at $5,700. Lester drew this salary as Procurement and Disbursing Officer for one year prior to the filing of this suit, and has therefore drawn an excess in salary of $1,200. This excess was also paid out of the Hospital cash fund. The prayer was the same as in the Newman case.

By way of answer to the charges against him Newman admits drawing the salary of $8,500 for the time alleged but states: the office of Director of Administration was created by specific resolution of the Hospital Board, fixing the salary; that said office contained new and separate duties from any office or position theretofore existing, and; that it was all authorized by Act 127 of 1939. Lester admits drawing the salary of $5,700 as Procurement and Disbursing Officer for the alleged time, but states that the new position and salary were authorized by the Board, all of which was regular and proper.

The Hospital Board intervened in behalf of Newman and Lester, adopting their answers and exhibiting resolutions creating the two new positions or offices and fixing the salaries.

After hearing the testimony the chancellor dismissed appellant's complaint in both cases, and this appeal follows.

There is no material conflict in the testimony introduced in either of the cases, so instead of summarizing it separately we shall refer to it hereafter in the discussion that follows.

FIRST CASE. Appellant's argument for a reversal may be stated as follows: When the Legislature creates an office or position in any state institution, just as Act 501 of 1953 designated the office of Superintendent of the State Hospital and fixed the salary at $12,000, the governing body of that institution has no power to

pay or authorize the payment of a larger salary, and; The payments mentioned heretofore for the benefit of Dr. Crawfis amounted to an increase in his salary. In support of this argument appellant relies on Article 16 Section 4 of the Constitution and on the pronouncements in *Gipson* v. *Ingram,* 215 Ark. 812, 223 S. W. 2d 595. It is unnecessary to discuss the authorities above mentioned because we agree with appellant that when the Legislature designated the office or position of Superintendent of the State Hospital and fixed the salary, the Hospital Board had no right to increase his salary. We do not however agree that the three items complained of above amounted to an increase in Dr. Crawfis' salary. This being true it makes no difference therefore whether some of the items were paid for out of cash funds belonging to the Hospital. The status of an institution's cash fund was clearly stated in the *Ingram* case, supra, which held that such funds need not be paid into the State Treasury and thereafter appropriated by the legislature before they can be expended.

After careful consideration we have concluded that the Hospital Board had the right under the Appropriation Act 501 of 1953 to make the expenditure in each of the three items complained of. Section 2(3) of said Act appropriated $1,143,000 per year for maintenance. Section 3 of the Act states that "maintenance" is limited to include food and housing for the superintendent [along with numerous other employees]. We think the word "housing" must be interpreted to include household furniture and that the word "food" must be interpreted to include prepared food and not merely groceries. Therefore it clearly appears to us that the Board had authority to buy the furniture and carpet for Dr. Crawfis' house which was furnished to him. It is not quite so clear that this could include paying for moving Dr. Crawfis' household effects from California to Little Rock. It seems to follow however that if this had not been done then the Board would have been faced with the necessity of buying additional furnishings for the house. The mere fact that the Legislature entrusted to the Board the responsibility of spending over a million

dollars for maintenance compels the conclusion that it was the intention of the Legislature that the Board would have the right and duty of exercising wide discretion. The record leaves no doubt that the Board wisely exercised said discretion in employing Dr. Crawfis and we think they had considerable discretion in doing what they thought necessary to secure his services. Said Act 501 of 1953 provided for 74 waitresses and fixed the salary of each. The Act did not provide for any "maids." This seems to be the title which appellant has assigned to Ova Young who, it is admitted, was assigned to Dr. Crawfis' home. Undoubtedly she was one of the waitresses provided by the Legislature. Again, we think the Board did not abuse its discretion in assigning Ova Young to Dr. Crawfis' home, since he and his family were entitled to have their food prepared and served. It would be unreasonable to hold that the Legislature, in such instances, has the sole right to specify the exact duties to be performed by each of the numerous employees. That this assignment of Ova Young was not merely a subterfuge to increase Dr. Crawfis' salary is conclusively shown by the fact that she had previously served other superintendents in the same capacity.

Having concluded as we do that the Board was justified, in the exercise of its discretion, in classifying the first two items mentioned above as items of maintenance there can be no question but that the Board could have paid for these items out of the maintenance appropriation. Instead of doing this however they paid said items out of cash funds belonging to the Hospital, and it is contended that they had no right to do so. Support for this contention is sought to be found in the *Ingram* case, supra. We are unable however to find in the *Ingram* case any inhibition against such use of cash funds. The one definite holding in that case, as above stated, was that cash funds could not be used to pay an increase in salaries fixed by the Legislature, and, as heretofore stated, we are in thorough agreement with that holding. Except for this one limitation on the use of cash funds, the *Ingram* case placed no other limitation on the use of such funds. On the other hand the language in that opinion

indicates that the cash fund of any institution may be used for almost unlimited purposes aside from increasing salaries. On page 814 of the Arkansas Reports it shows that Gipson alleged "that the state agencies and institutions are expending cash funds as the governing boards see fit, and without legislative appropriation; . . ." With knowledge of the above allegation the court stated: "There is only one allegation that anything is being done in violation of what the legislature has permitted, and that allegation is that some portions of the cash funds are being used to supplement the salaries . . ." Again this court, in the *Ingram* case, in noting the absence of any provision in our present constitution requiring cash funds to be placed in the State Treasury, said: "Certainly, such omission leaves the legislature of this state free to provide that public money derived as in this case may be deposited as cash funds, for the use of the state agencies and institutions."

In the face of the above clear declarations by this court in regard to the use of cash funds of institutions we think it would lead to a confused situation for us to now hold that such funds could not be used for the two items mentioned above. If we should so hold it would be hard to understand how the governing board of any institution would ever know for what items it could expend cash funds. What rule could the board use to distinguish between what is for maintenance and what is not or when it is safe to use cash funds? As stated in the *Ingram* case, supra, the Legislature has the power to say what disposition shall be made of cash funds belonging to the state institutions, but up until now it has not done so. Until it does it seems to us that much must be left to the discretion of the governing board.

We therefore conclude that the trial court was right in dismissing appellant's complaint in this case and his action in so doing is hereby affirmed.

SECOND CASE. In the case of Newman we may fairly conclude from the record that the Hospital Board acted in all good faith and apparently with good sound business judgment when it abolished two of the positions

created by the Legislature in 1953 carrying a total of $11,000 in salaries and in lieu thereof created the position of Director of Administration with a salary of $8,500. In the case of Lester we are also convinced from the record that the Hospital Board thought it had the legal authority and thought they were acting for the best interest of the institution when it created the new position designated as Procurement and Disbursing Officer and fixed the salary at $5,700. In 1953 the Legislature passed Act 41 sometimes called the Fiscal Code Act. Among other things this Act set up a central purchasing agency for the state. Article 7 Section 3 of that Act no doubt led the Hospital Board to believe that it had the right to designate the purchasing agent for the Hospital.

Notwithstanding the above however we are forced to the conclusion that the Hospital Board did not have the power and authority to establish these positions or offices and designate the salaries. An examination of our Constitution as well as the former decisions of this court compels this conclusion.

Article 16, Section 4, of the Constitution reads as follows:

"The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law."

It seems that it would be sufficient in this connection merely to rely on the last sentence of the section above quoted. It says "the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law." It is admitted of course that the salaries of Newman and Lester were not in this instance fixed by law. The first part of the quoted section explains the meaning of "fixed by law." It says that the General Assembly shall fix the salaries and fees.

Also, as we shall later see, this power of the Legislature to create offices or positions and fix salaries cannot be delegated to any person or board.

The portion of the Constitution quoted above has heretofore been construed by this court in harmony with and support of the conclusion we have reached.

In the case of *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, this court declared unconstitutional portions of Act 264 of 1921 which, among other things, purported to give the Circuit, Chancery and County Judges the power to appoint deputies to certain county offices and fix their compensation. In reaching its conclusion the court quoted Article 16 Section 4 of the Constitution and then made this statement: "The power to fix the salaries and fees of all officers in the State and the number of their clerks and employees and their salaries, is a function, which, within the limits of the constitution, is lodged in the supreme law-making power of the State — the Legislature." After citing authorities the court also said: "The General Assembly cannot delegate this legislative power to any individual, officer, or board." In this same case the court very clearly stated the reason for such a constitutional provision. The court said that it was ". . . intended by the framers of our organic law to forestall, if possible, any extortion, extravagance, or corruption on the part of those entrusted with the administration of public office, and to promote the general welfare by protecting the people from exorbitant taxation in order to meet the necessary burdens of government."

The *Nixon* case, supra, was followed and quoted extensively in the case of *Director of Bureau of Legislative Research* v. *Mackrell,* 212 Ark. 40, 204 S. W. 2d 893. The court there was dealing with an Act of the 1947 Legislature which created the Legislative Council but failed to appropriate money to pay the employees provided for in the Act. It was alleged that the State Board of Fiscal Control was attempting to allocate funds to the Legislative Council to pay the salaries of the employees of that board. Relying largely upon the decision in the

*Nixon* case, supra, the court held that the payment of salaries in this manner would be in violation of Article 16 Section 4 of the Constitution. In speaking of this constitutional provision the court stated that its purpose was ". . . to prevent the expenditure of the people's tax money without having first procured their consent, expressed in legislative enactments . . ."

Under the views above expressed, there is no merit in appellees' contention that the Hospital Board had the right under Act 127 of 1939 and Act 240 of 1933 to create new positions for Newman and Lester and fix their salaries. The pertinent parts of said Act 127 relied on by appellees are now Ark. Stats. Sections 59-226 and 59-227, and the pertinent part of Act 240 is now Ark. Stats. Section 59-208. The first cited section provides that cash funds shall be deposited in a bank designated by the Hospital Board, and the second cited section authorizes the Board to use the cash funds for "maintenance, support and expenses of the State Hospital . . ." The last cited section authorizes the Board to employ ". . . such persons, guards, nurses, physicians, officers, assistants and attendants as may be necessary . . . and fix their compensation . . ."

We do not interpret the above sections as giving the Hospital Board authority to create new positions as was done here. If, however, they should be so interpreted then they would be, as heretofore shown, in conflict with Article 16 Section 4 of the Constitution.

The only remaining question is: Should Newman and Lester be compelled to repay the money received for excess salaries, being $1,250 in the case of Newman and $1,200 in the case of Lester? Our opinion is that this question must be answered in the affirmative.

As heretofore shown the excess payment in each instance was a violation of Article 16 Section 4 of the Constitution. In such cases this court has uniformly held that repayment can be enforced. One of the landmark cases is *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296. This case was cited with approval and commented on

extensively in the case of *Vick Consolidated School Dist. No. 21* v. *New,* 208 Ark. 874, 187 S. W. 2d 948. In the latter case the school district had paid New who had taught without a license contrary to the provisions of the law, and it was held that he had to repay the amount so received. At page 880 and 881 of the Arkansas Reports the court set forth three classifications where repayments in such instances could or could not be enforced. Under the third classification the court said:

"There are those cases in which an individual has dealt with the district, council, board, or other governmental subdivision *in plain violation of the letter of the statute,* and has received public money under a course of dealings *forbidden by statute.* In those cases the courts have not only refused the individual the *quantum meruit* for his services rendered, but have also allowed recovery by the governmental subdivision of any moneys paid the individual on a contract forbidden by statute." Citing the *Tallman* case, *supra,* and other cases.

The case of *Barber* v. *Edwards,* 200 Ark. 940, 141 S. W. 2d 831, dealt with a fencing district which had been enlarged and the Board of Assessors sought to increase the salary of the pound keeper due to the additional duties which he was forced to perform. In speaking of the legislative act which fixed the original salary the court said: "Section 1 of said Act 290 of 1905 fixed his salary at 'not exceeding $30.00 per month in addition to his fee as now provided by law.' Perhaps his duties were largely increased by reason of the annexation of the new territory in 1936, but his salary is still fixed by said act and may not now be increased by the board without authority of law."

In the Second Case since it appears that Newman's and Lester's excess salaries were paid out of the Hospital cash fund, Newman should be directed by the trial court upon remand to repay into the said fund $1,250, and Lester should be likewise directed to repay the sum of $1,200.

Accordingly the decree of the trial court in the First Case is affirmed, and the decree in the Second Case is reversed and remanded for further action as directed by this opinion.

Chief Justice SEAMSTER and Justices HOLT and ROBINSON dissent in Second case.

J. SEABORN HOLT, J., dissenting in part. I think the decree should be affirmed as to all of the appellees.

At the outset we must keep in mind that we are not dealing with State Funds that have been deposited in the State Treasury and, therefore, would be subject to Legislative control when and if so deposited. In other words, we are dealing with cash funds that have never been deposited in the State Treasury, but are kept in a separate State Hospital Fund. The Legislature, under our recent holding in *Gibson* v. *Ingram,* 215 Ark. 812, 223 S. W. 2d 595, has the power to require all cash funds to be deposited in the State Treasury, but it has not done so as to the cash funds here involved.

Under Ark. Stats. §§ 59-208, 59-226 and 59-227, I think the Hospital Board has the authority to do exactly what it did here. The majority, referring to the provisions of the above sections, point out that § 59-226 provides that cash funds shall be deposited in a bank designated by the Hospital Board, and Section 59-227 authorizes the Board to use the cash funds for maintenance, support, and expenses of the State Hospital. Section 59-208 provides: "The Board may employ, or may authorize the employment of, such persons, guards, nurses, physicians, officers, assistants and attendants as may be necessary for the efficient and economical administration of the hospital, and shall fix their compensation, which shall be payable monthly."

The record reflects that in February 1954 the Hospital Board was faced with the necessity of cutting back its cost of operation in order to meet a declining budget and in its judgment it became necessary to abolish certain positions then in existence and to consolidate and create new positions, consolidating the duties of certain of the

old positions, and were all paid for out of Cash Funds. The State Hospital Board, acting under what it considered to be the best interest of the State Hospital, created the position of Director of Administration and abolished the positions of Assistant Hospital Administrator and Director of Personnel. The salary of the Assistant Hospital Administrator was $6,500 a year and that of the Director of Personnel $4,500 a year, or a total of $11,000 a year. The new position created by the Board contained the duties of both of the above positions, plus additional duties, and the salary was set by the Board of Control at $8,500 a year, paid from Cash Funds, thereby effecting a savings of $2,500 a year, in addition to providing more efficient management. It is significant to note that the new position created by the Board was submitted to the 1955 Legislature and is now contained, on a permanent basis, in the Appropriation Act under the identical title as created by the Board of Control. It is hardly necessary to say that the wisdom and advisability of allowing State Agencies to effect policies of reorganization and retrenchment where possible cannot be seriously questioned. Necessarily these agencies, and particularly the Hospital Board, must and do have a broad discretion.

In the *Gibson* v. *Ingram* case above, we said: "It will be observed that in the quoted provisions from these Constitutions there is the requirement of deposit into the treasury. But when these Constitutions are compared with the present Arkansas Constitution (of 1874), it is clear that our present Constitution requires only that money in the treasury shall not be removed except by legislative appropriation. There is no requirement in the present Arkansas Constitution that all public money shall be paid into the state treasury. The absence of such a provision from our present Constitution appears to have been a studied and deliberate omission. Certainly, such omission leaves the Legislature of this State free to provide that public money derived as in this case may be deposited as cash funds, for use by the state agencies and institutions."

In my view there has been no violation here of any statute or constitutional provision of Arkansas.

The Chief Justice and Justice ROBINSON join in this dissent.

HICKS *v.* STATE.

4813 287 S. W. 2d 12

Opinion delivered January 30, 1956.

[Rehearing denied March 12, 1956.]

*Rex W. Perkins, W. B. Putman,* for appellant.

*Tom Gentry,* Atty. General, *Thorp Thomas,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. The appellant was charged with the crime of murder in the first degree. He was convicted of murder in the second degree. There is only one issue and that is whether the court erred in the giving of Instruction No. 11. Although specific objection was made to the giving of this instruction, the court did not rule on the objection and no exception was saved.

Ark. Stats. § 43-2723 provides: "In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted

in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that any prejudicial error was committed by the trial court in the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified at the discretion of the court." The above statute applies only in cases where there has been a conviction of a capital offense. Here, although the appellant was charged with a capital offense, he was convicted of a lesser offense. In *Edwards* v. *State,* 110 Ark. 590, 163 S. W. 155, Chief Justice McCulloch said: "The Act of 1909 [Ark. Stats., 43-2723] to which counsel for defendant refers in his brief, relates only to a case in which there had been a conviction of a capital offense, and in all other cases we are not permitted to review alleged errors to which no exception has been saved."

In *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702, it is said: "Appellant, in the instant case, has not been convicted of a capital offense. We are not permitted, therefore, to review alleged errors to which no exceptions have been saved." In the *Yarbrough* case, the court quotes as follows from *McKinley* v. *Broom,* 94 Ark. 147, 126 S. W. 391: "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.' "

In jury trials, either party has the right to have reduced to writing all of the instructions that are to be given by the court. Section 23 of Article 7 of the Constitution of Arkansas provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

The purpose of this constitutional provision is to give counsel for either party an opportunity to study the instructions and to make objections and exceptions in the judge's chambers, and, when done in that manner, there is no danger of the jury being influenced by rulings that the court makes on request for or objections to instructions.

In the case at bar, the record does not show at what point appellant made his objection to the instruction; in any event, no ruling of the court was obtained on the objection and no exception was saved. Therefore, we cannot consider the objection on appeal.

Affirmed.

WALKER *v.* BLANEY.

5-829 286 S. W. 2d 479

Opinion delivered February 6, 1956.

*Gus Causbie, W. J. Schoonover* and *James A. Robb,* for appellant.

No brief for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellants from a decree of the Sharp Chancery

Court, Northern District, whereby the trial court refused to grant judicial approval of a contract for the private sale of the remainder interest in a ninety (90) acre tract of real estate to the life tenant, and to have the proceeds reinvested, as directed by the court in some income producing property, the fund and accruements thereto to be held in trust for those persons constituting the ultimate vested remaindermen upon the death of the life tenant.

The appellants herein, Merle E. Walker and Helen Walker Blaney, are the only children of Samuel J. Walker, Jr. The appellee, Dennis Gerald Blaney, a minor, is the only child of Helen Walker Blaney. Merle E. Walker has no children. At the time of this suit there were no other bodily heirs of Samuel J. Walker, Jr.

The record reveals that on January 5, 1905, the appellants' father Samuel J. Walker, Jr., received a deed from his parents to the property here involved. The granting clause of the deed contained the provision that the property was to be conveyed "Unto the said Samuel J. Walker, Jr., and unto his bodily heirs and assigns forever." Later Samuel J. Walker, Jr., conveyed the land by mesne conveyance to one David V. Johnson, the present owner of the life estate. Thereafter, in a suit between David V. Johnson and the appellants, Merle E. Walker and Helen Walker Blaney, the Sharp Chancery Court decreed on January 13, 1951, that Johnson only held a life estate for and during the life of Samuel J. Walker, Jr. In the suit now upon appeal, the life tenant, David V. Johnson, is the proposed purchaser of the remainder interest in the tract of land.

The appellants and the appellee are the only contingent remaindermen in esse. Samuel J. Walker, Jr., is now seventy-two (72) years of age; Merle E. Walker is forty-nine (49) years of age and Helen Walker Blaney is thirty-one (31) years of age. The appellee will be eight (8) years old on May 9, 1956.

On September 29, 1954, David V. Johnson, the life tenant, entered into a contract with the appellants by

which he agreed to pay $1,600 for the total remainder interests in the land. The contract obligated the life tenant to pay all the costs, including attorney's fee involved in securing the necessary judicial approval for the sale of the land to the life tenant.

The trial court rendered a decree on June 13, 1955, whereby it made a finding as follows:

"That the said Samuel J. Walker, Jr., the life tenant under the terms of said deed is still living, and the persons who will constitute his bodily heirs and therefore take the ultimate fee simple title upon the termination of the life estate, are unknown and cannot be known with certainty until the death of the said tenant, and although all of the living descendants of the said Samuel J. Walker, Jr., are parties to this action, and constitute all of the known prospective bodily heirs of him, the class of persons who will take the remainder as such bodily heirs, may be increased or diminished by births or deaths during the pendency of the said life estate."

The trial court also found that the sum offered for the remainder interest in the land was a full and fair price; that the contract terms were fair, equitable and generous; that the actual fair market value of the land is not in excess of $15.00 per acre and the land produces an annual income of $10.00 for the entire tract. The trial court further found that said land was unsuitable for farming, unimproved and inaccessible, and what value it has consists entirely in the fact that it lies along Spring River and might be used for recreational purposes; that the market value of the land has reached its peak and the remaindermen all live in Oklahoma, far removed from the situs of the land, and have no desire to oversee their interest in the land.

The trial court further found that a public sale of the remainder interest in the land would attract no better price than that offered by the life tenant; that the rights and interests of the ultimate remaindermen were identical with the interests of the parties to this suit, who

are now possible remaindermen in esse; and, that the minor appellee in this case is sued individually and also as a representative of the ultimate vested remaindermen; in esse, and in posse.

In addition to the foregoing findings, the court found that the appellants had not shown as a matter of law that said sale was necessarily for the best interests of the minor appellee, but rather for the benefit and convenience of the appellants, and, therefore, denied the relief prayed and dismissed the complaint.

The instant case is before this court for trial de novo. Since the trial court found that all the factual contentions alleged by the appellants were true, the issue is whether the factual situation entitles the appellants to relief. The appellants earnestly submit that the fact that a minor contingent remainderman is involved is not sufficient to prohibit or justify the denial of relief to adult contingent remaindermen seeking the sale of the tract of land for the purpose of reinvestment. It is the opinion of this court that the circumstances found by the trial court to exist were sufficient, as a matter of law, to entitle appellants to have their estate sold. The record reveals that it would be to the best interest of the parties to have the land sold and the proceeds derived therefrom, invested and preserved for the benefit of the contingent remaindermen, who would be eligible to receive the proceeds upon the death of Samuel J. Walker, Jr.

We think the trial court erred in holding that, as a matter of law, it should deny the relief prayed for in the complaint. This court has held that equity has jurisdiction and power to order or permit the sale of a contingent remainder estate even if one of the remaindermen is a minor. *Bedford* v. *Bedford,* 105 Ark. 587, 152 S. W. 129. It will be noted that the minor in the instant case is only a contingent remainderman, his interest is prospective and depends upon his survival of his mother, who in turn must pre-decease her father, Samuel J. Walker, Jr. The Bedford case, supra, has been cited with ap-

proval in the following cases: *Hardy* v. *Hilton,* 211 Ark. 991, 204 S. W. 2d 163; *Wing* v. *Wing,* 212 Ark. 960, 208 S. W. 2d 776; and *Wigal* v. *Hensley,* 214 Ark. 409, 216 S. W. 2d 792.

The case is reversed and remanded with directions to approve the sale of the land. The Commissioner of the Court will be directed to execute and deliver a deed conveying the land involved to David V. Johnson, conditioned upon his payment of the sum of $1,600. The trial court is directed to appcint a trustee to invest the $1,600 in securities, such investment conditioned upon the approval of the court, and to hold all of said funds and increase thereof, until the death of Samuel J. Walker, Jr. Upon Samuel J. Walker, Jr.'s death the funds will then be distributed, under an order of the court, to the parties entitled thereto. The trustee will be required to give a bond, to also be approved by the court, in an amount sufficient to cover the amount of funds involved. The trustee will be directed to file an annual report with the court, and such other reports as the court may direct.

Reversed and remanded.

GRAYSON *v.* ARRINGTON.

5-817 286 S. W. 2d 501

Opinion delivered February 6, 1956.

[redacted]

*Wade Kitchens* and *W. H. Kitchens, Jr.,* for appellant.

*Warner, Warner & Ragon,* for appellee.

J. Seaborn Holt, Associate Justice. This is a suit by appellee, Arrington, to quiet his title to the oil, gas and other minerals in and under the W½ of NW¼ of NE¼ of Sec. 19, Tp. 19 S, R 18 W, Columbia County and to remove cloud on his title created by Sheriff's deed made pursuant to an execution sale to T. S. Grayson, now deceased, and who was survived by appellants. Appellee deraigned title from the State by virtue of a tax correction deed of August 19, 1946, duly recorded, and by a mineral deed dated September 7, 1946, recorded, and made by W. C. Taylor and wife to appellee. (Taylor had previously owned both surface and minerals but had conveyed the surface, which eventually went to T. S. Grayson, and retained all minerals.)

October 30, 1945, the State conveyed by tax deed to appellee the minerals in the 20 acres here involved, but erroneously described it to be in *Range 19 when it should have been Range 18.* The State did not own any interest in Range 19, but did own the royalty in the 20 acres in Range 18, which had forfeited for the 1941 taxes. In 1946 [exact date not shown] the State filed a confirmation suit to confirm its title to delinquent lands and mineral rights described therein [under Act 119, 1935, §§ 84-1315—84-1332, Ark. Stats. 1947], Case 6439, and included the oil, gas and minerals in the W½ NW¼ NE¼, Sec. 19, Tp. 19 S, *R 19 W.*

August 22, 1946, Grayson and Foster, who claimed to be the owners of the surface and mineral rights in said 20 acre tract in *Range 19,* intervened naming Arrington and his wife as cross-defendants.

September 23, 1946, on the first day of the next term of Court, Arrington and wife appeared by their attorney Ezra Garner and filed a *disclaimer* as to any

right, title or interest in the property claimed by Grayson and Foster in *Range 19*. On the same day a decree was entered finding that Grayson and Foster owned the oil, gas and minerals in the 20 acres described as W½ NW¼ NE¼, Sec. 19, Tp. 19 S, *R 19 W,* and that on October 30, 1945, Arrington had obtained a deed from the State Land Commissioner based on a purported sale of part of said lands in Range 19, for taxes of 1941, that said deed was void for the reason that all taxes had been paid in Range 19 and had not forfeited; that the complaint filed by the State in so far as it affected said land in Range 19 should be dismissed and it was decreed that said tax deed be cancelled and the title to the oil, gas and minerals be quieted in Grayson and Foster. The *court then ordered that Grayson and Foster* recover from Arrington all costs expended by them. It appears that Arrington, appellee, was without knowledge of this decree.

Execution was issued by appellants on the decree for costs, levy was made on the mineral rights of Arrington in the 20 acre tract located in Range 18 for the purpose of satisfying the judgment and the property was sold by the Sheriff to the said Grayson for $36 and deed executed to him. From the time appellee first obtained title to the 20 acres in Range 18, up to and including 1953, he paid all taxes charged thereon. On a trial of the present suit the trial court found that the judgment against Arrington in favor of Grayson and Foster in the confirmation suit for costs was void and without effect; that the Sheriff's deed to Grayson for minerals in the 20 acre tract in Range 18 constituted a cloud on Arrington's title; decreed that the deed be cancelled and title quieted in Arrington. For reversal appellants list these three points: "First, that the judgment for costs in the confirmation suit was not void; second, that the present suit constitutes a collateral attack on the confirmation decree of September 23, 1946; and third, that the judgment for costs in the confirmation suit was within the discretion of the chancellor."

Material facts appear not to be in dispute. After a careful review of the entire record we have concluded that the findings of the Chancellor were not against the preponderance of the evidence and, therefore, that the decree must be affirmed.

The confirmation suit was instituted pursuant to the provisions of Act 119 of 1935 as amended, [§§ 84-1315—84-1332 incl., Ark. Stats. 1947] and was based thereon. Grayson and Foster intervened in that suit as provided in § 84-1322. *Section 84-1327* above provides: "Court costs and the publication fees for the notice of such confirmation suit *shall hereafter be paid from the amounts received by the State for the confirmation of title of all lands certified to the State for non-payment of taxes.*"

*Section 84-1329* provides: "All costs and fees due and payable hereunder may be paid when proof is made that the services for which the payment is made have been fully performed."

*Section 84-1330* provides: "The State Land Commissioner shall hereafter, upon proper application therefor, refund the confirmation fees paid by any person, firm, corporation, association or trustee where the title to state lands have failed."

Since the above confirmation statute provides the specific method for the payment of costs in all confirmation suits in which the State seeks to establish its title, the trial court was without authority or power to disregard the statute and adjudge the costs on the intervention against appellee and that part of the judgment, assessing the costs against appellee, was therefore void because it was beyond the power of the court to make. *Section 84-1327* above, as indicated, expressly provides that all court costs incurred in such confirmation proceedings shall be paid from the amounts received by the State for the confirmation of title of all lands certified to the State for non-payment of taxes, and directed the Land Commissioner to refund costs paid by any person where the State's title has failed.

The general statute, in effect, allowing costs to be assessed by the trial court in the exercising of its sound discretion, § *27-2308, Ark. Stats. 1947,* relied upon strongly by appellant, has no application here where the court is clearly exercising special statutory power and the measure of the court's authority is the statute itself. Since the statute clearly provides the method for paying costs in confirmation suits, the court was without authority to disregard the statute and adjudge costs on the intervention against appellee. The rule of the law appears to be well settled that costs are a creature of the statute and can only be taxed by statutory authority: "We have often held that the allowance of costs is purely statutory, since at common law neither party is entitled to recover his costs." *Arkansas State Game & Fish Commission* v. *Kizer, et al.,* 222 Ark. 673, 262 S. W. 2d 265, 38 A. L. R. 2d 1372.

"A judgment is void when the court proceeds without authority and in a manner forbidden by law with respect to the matter being adjudicated, although it may have jurisdiction of the parties and of the subject matter," *Soper* v. *Foster,* 244 Ky. 658, 51 S. W. 2d 929.

"Where the court, as here, is exercising special statutory powers, the measure of its authority is the statute itself; and a judgment or order in excess of the power thereby conferred is null and void. In such a case even though the court may have jurisdiction of the general subject matter and of the parties, an adjudication with reference thereto which is not within the powers granted to it is coram non judice," *Aetna Cas. & S. Co.* v. *Bd. of Suprvs.,* 160 Va. 11, 168 S. E. 617, 626.

It is true, as appellant asserts, that Grayson and Foster intervened in the confirmation suit but this intervention and cross-complaint was not an independent action but was ancillary to the State's confirmation suit. "Intervention is not an independent proceeding, but an ancillary and supplemental one which, in the nature of things, unless otherwise provided for by legislation, must be in subordination to the main proceeding, and it may

be laid down as a general rule that an intervener is limited to the field of litigation open to the original parties. . . . " 39 Am. Jur., § 79, p. 950.

Here Grayson and Foster intervened and cross-complained [§ 84-1322 above] and claimed to own the minerals in the tract of land in Range 19, in which they made Arrington and wife cross-defendants. This intervention and cross-complaint was ancillary to the confirmation suit and was in no sense a new action. It is true that the present suit constitutes a collateral attack, however, since we hold that the decree for costs in the confirmation suit, and the Sheriff's deed made pursuant to the execution sale, were void, the court lacked authority and the power to make the decree and was subject to collateral attack. *Lambert* v. *Reeves,* 194 Ark. 1109, 110 S. W. 2d 503: "It is furthermore contended that this is a collateral attack upon the decree of confirmation. Even so, if the confirmation decree is void, in so far as it attempts to confirm a tax sale that is void for the defect above mentioned, then it is open to collateral attack, as a void judgment may be attacked collaterally."

The decree is affirmed.

Justice McFaddin not participating.

Justices Millwee and Smith dissent.

George Rose Smith, J., dissenting. This is an instance of a hard case making bad law. Grayson acquired title to Arrington's property under a writ of execution issued upon a relatively small judgment for costs. It is natural enough to sympathize with Arrington, even though he was at fault in not keeping himself informed about the progress of litigation to which he was a party. But that sympathy ought not to be carried to the extent of holding that the solemn judgment of a court of superior jurisdiction is a mere nullity, to be disregarded on collateral attack.

It is true, of course, that the legislature could have provided that the chancery court should be wholly without power to render a judgment for costs in a tax con-

firmation suit. But in my opinion that result should depend upon far more emphatic language than that used in the statute upon which today's decision rests.

The reason for the enactment of this statute is easily understood. When a state agency is directed to institute a suit some provision is ordinarily made for the payment of the court costs that must necessarily be incurred. In some instances the statute directs that the State shall not be required to pay costs as a condition to bringing suit; in other instances the legislature designates a fund from which the costs may be paid. The latter procedure has been followed in statutes directing the institution of proceedings to confirm the State's title to tax-forfeited land. It was provided by Act 119 of 1935, § 10, that the court costs should be paid from amounts received for the redemption or sale of such forfeited property. The present statute, enacted in 1943, authorizes the payment of court costs from amounts received by the State for the confirmation of title to lands certified for nonpayment of taxes. Ark. Stats. 1947, § 84-1327. As far as I can see, the purpose of the statute is to point out the fund from which the costs may be paid. There is nothing to indicate that the legislature meant to divest the chancery court of its routine authority to tax the costs according to the merits of the case. It may be true that, in view of the statute, the court committed an error that might have been corrected upon appeal. But I am altogether unwilling to say that the statute was intended to have the drastic effect of rendering the court's decree a mere nullity.

Opinion delivered February 6, 1956.

*C. M. Martin,* for appellant.

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

ED. F. MCFADDIN, Associate Justice. On an information charging him with first degree murder for the homicide of Edgar Thrower, the Jury convicted the appellant, Nathaniel Eddington, of second degree murder. His appeal brings before us the fifteen assignments contained in his motion for new trial.

I. *Sufficiency of the Evidence.* According to the appellant's witnesses, he was entirely without fault or guilt of any kind and was acting in his own necessary self defense and also in defense of his kinsman, Buddy Smith. But the long established rule governing appeals

in criminal cases is, that this Court views the evidence in the light most favorable to sustain the Jury verdict. *Dowell* v. *State,* 191 Ark. 311, 86 S. W. 2d 23; *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50; *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400; and *Lamb* v. *State,* 218 Ark. 602, 238 S. W. 2d 99. Whether to believe the State's witnesses or the defendant's witnesses was a decision for the Jury. *King* v. *State,* 194 Ark. 157, 106 S. W. 2d 582. The Jury elected to believe the State's witnesses; and our duty on appeal is to see whether the evidence, so viewed in the light most favorable to the State, is sufficient to sustain the conviction.

According to the State's witnesses, a party of four people—being (1) Napoleon Davis, (2) his wife, Versie Mae Davis, (3) Buddy Smith, and (4) the appellant—drove to the Busy Bee Cafe near Bearden about midnight of February 19, 1954, and found several other people in the cafe, where food and beer were being legally served. P. L. Wright and wife operated the cafe. Shortly after the appellant's party arrived at the cafe, a dispute arose to which appellant was not a party: Edgar Thrower, Timothy Thrower and O. D. Juniel "ganged up" on Napoleon Davis, causing him to hold his three adversaries at pistol point while he and his wife retreated to the cafe entrance and then to their car nearby. Appellant also left the cafe and entered the Davis car. Versie Mae Davis was driving, and Napoleon Davis and appellant were in the seat beside her. When the car stopped less than a block away from the cafe, appellant seized Napoleon Davis' pistol, jumped from the car, and raced back toward the Busy Bee Cafe. He saw Edgar Thrower and Buddy Smith standing about four feet apart. Appellant, from a distance of about fifty feet, yelled: "Look out, Buddy," and then shot Edgar Thrower in the chest, causing instant death. The testimony of P. L. Wright and Troy Lee Thompson (each claiming to have been an eye witness) was to the effect just stated.

Appellant admitted that he took the pistol from Napoleon Davis and used it in shooting Edgar Thrower. The Jury had the right to conclude that the grabbing of the pistol, the running back toward Edgar Thrower, the warning to Buddy Smith, and the shooting of Thrower, all showed sufficient malice and intention to constitute even a greater offense than second degree murder. Certainly the evidence is legally sufficient to support a conviction for second degree murder. See § 41-2206, Ark. Stats.

II. *Instruction.* The Court fully instructed the Jury on all applicable phases of homicide, self defense, burden of proof, presumption and all other appropriate matters; and the only assignment in the motion for new trial, relating to instructions, is the appellant's claim that the Court should have given his requested Instruction No. 2, which is a long instruction of two printed pages. There are several reasons why this requested instruction should not have been given, but it is sufficient to mention only one such reason: and that is, because the instruction was incorrect in stating the law as to self defense. The instruction concluded with this language:

"... and if, under all the circumstances, he, at the moment, believed, and had reasonable grounds to believe, that it was necessary to save his own life, or to protect himself from great bodily harm, he had the right to kill Edgar Thrower. *He not only had the right to kill him but under the law it was his legal duty to slay him,* and you will by your verdict acquit him; and if you have a reasonable doubt upon this proposition you will give him the benefit of the doubt and acquit him." (Italics our own.)

The italicized language does not correctly state the law regarding the claim of self defense. See § 41-2236, Ark. Stats. There is no "duty to slay" involved in the plea of self defense. It is only an excuse for homicide and not a duty to commit it: it is a defense and not a retribution. See generally: *Stoddard* v. *State,* 169 Ark.

594, 276 S. W. 358; and *Graves* v. *State,* 155 Ark. 30, 243 S. W. 855. So, without mentioning other vices in the instruction, we conclude that it was fatally defective in the use of the italicized language. The burden is on the party asking an instruction to ask one that is a correct statement of the law; and a Trial Court commits no error in refusing a requested instruction which is erroneous. See *Cellars* v. *State,* 214 Ark. 326, 216 S. W. 2d 47; *Chambers* v. *State,* 168 Ark. 248, 270 S. W. 528; and other cases collected in West's Arkansas Digest, "Criminal Law," 830.

III. *Absence of Weapons on the Body of Deceased.* The Trial Court permitted the coroner to testify that he searched the body of the deceased and found no weapons. The appellant objected to this evidence because the coroner did not search the body of the deceased until about an hour after the killing; but it was shown that the body had not been moved and the time lapse between the killing and the arrival of the coroner was fully explained to the Jury. Under these circumstances it was for the Jury to decide the weight and credibility to give to the testimony of the coroner. Furthermore, two other witnesses—Granville Warrick and George Redding—testified, without objection, that they made a search and found no weapons on the body of the deceased or near his body and that they were there and subsequently assisted the coroner wher he made his search. The testimony of these two witnesses was admitted without objection; and would tend to render harmless any possible error that might have been committed in the admission of the testimony of the coroner. See *Maxey* v. *State,* 76 Ark. 276, 88 S. W. 1009; and *LeGrand* v. *State,* 88 Ark. 135, 113 S. W. 1028.

IV. *Sale of Bootleg Whiskey.* In several assignments in the motion for new trial, appellant claims that the Court committed error in refusing appellant the right to interrogate witnesses as to whether P. L. Wright was selling bootleg whiskey at the Busy Bee Cafe. It was shown that the sale of beer was legal at the cafe but, of

course, the sale of bootleg whiskey would have been illegal. The defense attorney asked P. L. Wright on cross-examination:

"Q. So you say you had not just sold those three Negroes bootleg whiskey back in your kitchen?

"A. No, sir."

Again, the defense attorney asked P. L. Wright:

"Q. . . . and didn't Napoleon Davis and some other Negroes come to your house and buy some whiskey?

"A. No, sir."

After interrogating P. L. Wright and receiving these answers, the defense counsel sought to impeach Wright on this collateral matter by asking other witnesses if they had bought bootleg whiskey at Wright's restaurant or home. Of course, the question of whether Wright had sold bootleg whiskey was entirely *collateral*[1] to the issue of the homicide of Edgar Thrower; and when defense counsel had asked P. L. Wright the questions about the sale of bootleg whiskey and received the answers as quoted, then the defense counsel could not impeach Wright on this collateral matter which defense counsel had injected into the case. In *Hawkins* v. *State,* 223 Ark. 519, 267 S. W. 2d 1, in discussing impeaching witnesses on collateral matters, we said:

"While a witness may be questioned as to certain specific acts for impeachment purposes, however, if such

[1] On what is "collateral," there is a clear statement in an Annotation in 82 American State Reports, 51: "Since collateral matters cannot be made the basis of impeaching a witness by contradicting him, the question naturally arises, What are collateral matters? What test can be applied to determine whether a question is collateral to the issues or not? The very generally approved test may be found stated in the syllabus to *Saunders* v. *City etc. R. R. Co.*, 99 Tenn. 130, 41 S. W. 1031, as follows: 'Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute.' A frequently quoted test is cited in *Combs* v. *Winchester*, 39 N. H. 13, 75 Am. Dec. 203: 'The test whether the matter is collateral or not is this: If the answer of the witness is a matter which you would be allowed on your part to prove in evidence—if it had such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him.'"

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."

V. *Appellant's Attempt to Impeach the Testimony of Corene Green.* Troy Lee Thompson testified that he was an eye witness to the killing of Edgar Thrower. In an effort to impeach Thompson's testimony—that he was an eye witness—his mother, Corene Green, was called by appellant; and it was thought that she would testify that her son, Troy Lee Thompson, was asleep at her home at the time of the killing. But when Corene Green's testimony was not as expected on the point, appellant sought to impeach her testimony by offering certain unsworn statements it was claimed she had made to appellant's attorney. The Trial Court refused to allow such statements, after first finding and declaring that Corene Green was not a hostile witness. The Court's ruling is assigned as error; but we find no harmful error to have been committed. An impeaching witness may be impeached in most cases (58 Am. Jur. 370); but appellant offered no other witness to show that Troy Lee Thompson was asleep at his mother's home at the time of the killing of Edgar Thrower. If appellant's attorney had been allowed to testify as to the unsworn statements of Coreen Green, such testimony of the attorney would only have impeached Corene Green but would *not* have been any *substantive evidence* as to the whereabouts of Troy Lee Thompson. Our holding in *Comer* v. *State,* 222 Ark. 156, 257 S. W. 2d 564, is decisive on this point. We there said:

"We have often held that the prior inconsistent statements of a witness are admissible for impeachment but not as substantive evidence of their truth. *Minor* v. *State,* 162 Ark. 136, 258 S. W. 121; *Sisson* v. *State,* 168 Ark. 783, 272 S. W. 674."

In an Annotation in 82 American State Reports, 62, the holdings are summarized in this language:

"If a party cannot possibly help his case by impeaching his own witness, such impeachment will not be permitted: *Largin* v. *State,* 37 Tex. Cr. Rep. 574, 40 S. W. 280. The rule is, therefore, firmly established that a party can discredit his own witness by proof of his contradictory statements, only where such witness has testified to facts which are damaging to the party, and he has been injured by the testimony: *Bailey* v. *State,* 37 Tex. Cr. Rep. 579, 40 S. W. 280; *People* v. *Jacobs,* 49 Cal. 384; *Smith* v. *Briscoe,* 65 Md. 561, 5 Atl. 334; *Erwin* v. *State,* 32 Tex. Cr. Rep. 519, 24 S. W. 904; *Chism* v. *State,* 70 Miss. 742, 12 So. 852; *People* v. *Mitchell,* 94 Cal. 550, 29 Pac. 1106; *McDaniel* v. *State,* 53 Ga. 253. . . .

"Evidence offered solely to impeach a party's own witness and which has no other tendency is not admissible: *Nathan* v. *Sands,* 52 Neb. 660, 72 N. W. 1030; *Harlan* v. *Green,* 31 Misc. Rep. 261; 64 N. Y. Supp. 79."

Thus, no amount of evidence of contrary unsworn statements by Corene Green could have helped appellant's case or provided substantive testimony on the question of whether Troy Lee Thompson was asleep at his mother's home at the time Edgar Thrower was killed by appellant; and the trial court's ruling on the point was not prejudicial to appellant.

VI. *Other Assignments.* We have carefully studied all the other assignments in the motion for new trial and find none of them to possess merit.

Affirmed.

STAPLES *v.* BISHOP, SHERIFF UNION COUNTY.

5-838 286 S. W. 2d 505

Opinion delivered February 6, 1956.

*L. B. Smead, Walter L. Brown* and *Robert C. Compton,* for appellant.

*Tom Gentry,* Attorney General, and *Bruce Bennett,* for appellee.

MINOR W. MILLWEE, Associate Justice. This suit involves the constitutionality of Act 145 of 1955.

Appellant is engaged in the cattle business in Union County, Arkansas, where he originally brought suit in chancery court to restrain the sheriff and treasurer of Union County from enforcing Act 145 of 1955. The Union Chancery Court found that the State Police were necessary parties to the suit which was refiled in Pulaski Chancery Court and Herman E. Lindsey, State Police Director, was made a party defendant.

The complaint asserted unconstitutionality of Act 145 on two grounds, the first being that it is an amendment of Initiated Act No. 1 of 1950 and did not receive a two-thirds vote of all members elected to each house of the General Assembly as required by Amendment No.

7 of the Arkansas Constitution, and the second that it compels citizens to incriminate themselves in violation of Art. 2, § 8 of the Constitution. Appellees demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This appeal is from a decree sustaining the demurrer and dismissing the complaint when appellant refused to plead further.

The primary question is whether Act 145 of 1955 amended Initiated Act No. 1 of 1950 within the meaning of Amendment No. 7 of the Constitution (Ark. Stats., Vol. 1, p. 206) which provides that no measure approved by a vote of the people shall be "amended or repealed" by the General Assembly except by vote of two-thirds of all members elected to each house. Initiated Act No. 1 of 1950 (Ark. Stats., § 41-430, et seq.) made it a misdemeanor for the owners of cattle, horses, mules, hogs, sheep or goats to allow them to run at large on any public highway in the state, and provides that any qualified officer shall have authority to make arrests for violations of the act.

Act 145 was passed by the Legislature in 1955 by less than a two-thirds majority vote of both houses. The act makes it the duty of the sheriffs and members of the State Police to restrain and impound any animals found running at large on any public highway in the state. It also makes it the duty of county courts to provide enclosures for impounding said animals, which may be sold by the sheriff at public sale with the right of the owner to reclaim within 30 days of the first publication of notice of sale upon payment of the costs of taking up, feeding and care of such animals. Any net sale proceeds remaining at the end of each year in the fund to be kept by the sheriff in connection with the impounding and sale of animals must be deposited with the County Treasurer for the benefit of the County Road Fund.

In view of § 1 of Act 145 which states that the purpose of the act is to provide for more effective enforcement of the prohibition against animals being allowed to run at large in violation of Initiated Act No. 1 of 1950,

appellant insists that Act 145 amends Initiated Act No. 1 by providing for the taking up and impounding of animals found running at large on the highways in addition to the criminal penalty imposed upon violators by the initiated act. We do not agree that Act 145 "amended" Initiated Act No. 1 within the meaning of Amendment No. 7 of the Constitution.

As applied to statutes, an amendment has generally been defined by the courts as a legislative act designed to change some prior and existing law by adding to, or taking from it some particular provision. *State ex rel. Nagle* v. *Leader Co.,* 97 Mont. 586, 37 P. 2d 561; *Assets Reconst. Corp.* v. *Munson,* 81 Cal. App. 2d 363, 184 P. 2d 11; 50 Am. Jur., Statutes, § 3; 82 C. J. S., Statutes, § 243. In *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. 2d 362, this court held that an amendment of a statute involves some change or alteration in an existing statute which is direct and not consequential. In that case we also joined many other courts in approving the following definition of "Amendment in legislation" found in Bouvier's Law Dictionary, 3rd ed., p. 187: "An alteration or change of something proposed in a bill or established as law." Some courts have distinguished an "amendment" from a "supplemental act" by defining the latter as that which supplies a deficiency, adds to, extends or completes that which is already in existence without changing or modifying the original. *Lost Creek School Township, Vigo County* v. *York,* 215 Ind. 636, 21 N. E. 2d 58, 127 A. L. R. 1287.

Act 145 of 1955 does not in any manner "alter or change" Initiated Act No. 1 of 1950. There is nothing in Amendment No. 7 which prohibits legislation upon the same subject matter by a majority vote of less than two-thirds of the General Assembly so long as it does not amend or repeal the act or law approved by the electors. The Legislature has the power to provide for the impounding and sale of livestock found running at large in violation of law independently of Initiated Act No. 1 of 1950. *Howell* v. *Daughet,* 148 Ark. 450, 230 S. W. 559,

18 A. L. R. 63. The fact that Act 145 had for its purpose the more effective enforcement of the initiated act is immaterial unless it changed or altered it in some way. A comparison of the two acts shows that each is complete within itself, and that Initiated Act No. 1 still stands intact without alteration or change by Act 145. While the latter act may be supplemental to the former, it is not amendatory within the meaning of the Constitution.

Nor do we agree with appellant's contention that Act 145 compels the owner to be a witness against himself in violation of Art. 2, § 8 of the Constitution. While the act permits an owner to reclaim his impounded stock, it does not compel him to do so, nor does it necessarily follow that he thereby admits that he has violated Initiated Act No. 1 of 1950. One is not guilty of *allowing* his stock to run at large unless he knowingly permits them to do so. *De Queen* v. *Fenton,* 100 Ark. 504, 140 S. W. 716. Even though an owner reclaims his stock, he is still free to make any defense or contention he may have, or desire, with regard to whether he allowed the stock to run at large.

The able trial judge correctly held Act 145 valid and constitutional, and the decree is affirmed.

SPIKES *v.* HIBBARD.

5-839 286 S. W. 2d 477

Opinion delivered February 6, 1956.

*R. C. Waldron, Jack Holt* and *John F. Park,* for appellant.

*James A. Robb,* for appellee.

George Rose Smith, J. This suit for the partition of eighty acres of land was originally filed by four of the appellants. The complaint alleged that the plaintiffs owned an undivided five-eighths interest in the land and that the defendants owned the other three-eighths. By answer the defendants denied the plaintiffs' assertion of co-ownership, interposed a plea of adverse possession, and asked that the defendants' own title be quieted.

A substantial amount of testimony was taken, which seems to have indicated that other members of the plaintiffs' family have an interest in the land. About thirteen months after the suit was filed some 177 persons intervened and asked to be made parties plaintiff. Later on the original plaintiffs, by an amendment to their complaint, alleged that the five-eighths interest originally claimed by them is owned by specified branches of the Spikes family and the Stubblefield family. At this point the chancellor sustained a demurrer to the amended complaint, primarily upon the ground that equity is without jurisdiction to partition land that is in the possession of the defendants. The court also remarked that all necessary parties have not yet been brought into the case. Upon sustaining the demurrer the court dismissed the case.

It is our view that the court should have retained jurisdiction of the suit. Even if the complaint failed to state a ground for equitable relief the appellees supplied the defect by asking that their title be quieted. It is a familiar rule that one who has invoked the assistance of equity cannot later object to that jurisdiction unless the

subject matter of the litigation is wholly beyond equitable cognizance. *State use Arkansas County* v. *Pollard,* 171 Ark. 607, 286 S. W. 811. Nor, as the appellees now contend, could the point be raised upon the chancellor's own motion. An adequate basis for chancery jurisdiction having been pleaded, the case should have proceeded to trial in that court. As we said in *Marks* v. *F. G. Barton Cotton Co.,* 170 Ark. 637, 280 S. W. 674: "Their cross-bill was founded on matters clearly cognizable in equity, and this supplied any defect of jurisdiction. The original complaint and cross-bill were but one cause of action, and imposed upon the court the duty of granting relief to the party entitled to it."

It is argued by the appellees that the plaintiffs' amendment to their complaint stated a new cause of action, so that by demurring thereto the defendants raised the issue of jurisdiction at the first opportunity. The amendment did not assert a new cause of action; to the contrary, it adhered to the original prayer for a partition of the land. A pleading which merely brings in a new party having an interest in the same cause of action does not amount to the filing of a different suit. *H. B. Deal & Co.* v. *Bolding,* 225 Ark. 579, 283 S. W. 2d 855.

With respect to the suggested defect of parties it cannot be said with certainty at this stage of the litigation that the plaintiffs have failed to join all persons having an interest in the land. The plaintiffs' pleadings, which must be construed liberally on demurrer, sufficiently allege the existence of a tenancy in common and adequately state a cause of action for partition. The amended complaint is not as clear as it might be in describing the exact interests claimed by the various plaintiffs and intervenors, but such a want of clarity should be reached by a motion to make more definite rather than by a demurrer.

Reversed.

HOLT, J., not participating.

GARNER *v.* SCOTT.

5-841 286 S. W. 2d 481

Opinion delivered February 6, 1956.

[redacted]

*Marshall N. Carlisle* and *Tom Gentry,* for appellant.

*R. Julian Glover,* for appellee.

PAUL WARD, Associate Justice. Appellants, Thomas Garner and Gilbert Thomas, brought this action in the circuit court, asking for damages against appellees, based on the alleged negligence of Cecil Scott in driving a concrete mixer, belonging to C. J. Horner & Co., into the automobile in which they were riding. From a jury verdict in favor of appellees, comes this appeal.

For a reversal appellants make three assignments of error, viz.: (a) Inadmissible evidence; (b) Refusal to allow examination of certain witnesses, and; (c) Giving Instruction No. 7. We find it necessary to reverse the cause on the last assignment, and will therefore mention the first two only briefly.

In order to evaluate Instruction No. 7, it is necessary to set out a summary of the issues and the testimony.

The complaint alleges: Garner and Thomas, in a Chevrolet sedan, owned and driven by Garner, were driv-

ing north on Third Street in the City of Hot Springs when Scott "negligently, willfully, wantonly, and with malicious intent drove" the concrete mixer, suddenly and without warning, into the left side of the automobile, forcing it into the curb, and damaging it to the extent of $350 and injuring Gilbert Thomas in the amount of $2,500. The prayer was for the above amounts and for punitive damages for each of them in the amount of $5,000.

In addition to a general denial, appellees answered: (a) Appellants were guilty of contributory negligence; (b) Appellants were in pursuit of the driver [Scott] of the cement mixer with intent to do him bodily harm and to do physical damage to the cement mixer, and; (c) Scott was compelled by reason of the negligence of appellants either to collide with an approaching vehicle or to collide with the Chevrolet car.

By far the major portion of the testimony in this case concerned a state of ill feeling that was supposed to exist between appellants and the appellees as the result of a strike at the place of business of appellee C. J. Horner & Co. The first contention of appellants is that much of this testimony was inadmissible. Without at this time passing on the merit of that contention it suffices to say that much of it was first introduced by appellants. Appellants' second contention is that they should have been afforded an opportunity to examine one of appellees' witnesses to ascertain the source of his contemplated testimony. Regardless of whether appellants were denied any rights in all probability this question will not arise again.

This case seems to have been tried largely upon a theory somewhat novel to any reported decisions of this court. Appellees undertook to show that appellants were pursuing them with intent to do harm to Scott and damage to the cement mixer, and that in order to protect himself and the cement mixer Scott drove the mixer into the automobile in which appellants were riding. There is not a great deal of material conflict in the testimony

introduced by both sides relative to what happened shortly before the collision. Earlier in the day Scott had driven the cement mixer, which loaded weighed approximately 37,000 pounds, to different jobs in Hot Springs to deliver concrete. On these occasions he had noticed appellants following him in the automobile, and had noticed that they would park their automobile nearby while he was unloading. Scott's testimony was that they were apparently trying to force him to stop the truck in which he was riding and he thought they were bent on doing him or the truck harm. It was developed that appellants belonged to a union and that perhaps they were in sympathy with the strikers, but that Scott had refused to walk out with the other strikers. Just before the incident complained of Scott stated that after he entered Third Street going north appellants drove in front of him and he thought they were trying to block his progress, and that he drove at a somewhat excessive rate of speed in order to avoid an altercation. Scott testified that as long as he was in the cement mixer he was not afraid. Scott testified that immediately before the collision he drove up behind appellants' automobile and that as he was about to pass there was another car coming from the opposite direction and that he was forced either to drop back in the line of traffic behind appellants' automobile or drive his truck into the automobile. Scott does not deny that he did strike the back end of appellants' automobile and caused damage to it and injury to Gilbert Thomas.

There is no complaint made about the instructions relative to contributory negligence or any other feature of the case except the one instruction referred to above.

Under the above state of facts the trial court gave, over the general and specific objections of appellants, Instruction No. 7 which reads as follows:

"If you find from a preponderance of the evidence in this case, that plaintiffs were on a joint mission to do bodily harm to Cecil Scott or to damage the truck that he was driving, by forcing him to the curb or by forcing

him to stop so that bodily injury might be inflicted upon him, and that the defendant, Cecil Scott, honestly and without fault on his part, believed that plaintiffs were about to inflict upon him a bodily injury or damage the truck, or that it became necessary, and it appeared to the defendant Scott at the time, acting as a reasonable person, that it was necessary to defend himself, *and he did so by driving his truck into the car occupied by plaintiffs in order to prevent bodily harm to himself or damage to the truck,* then you are instructed that he was justified in doing so, and you will find the issues in favor of the defendants.'' (Emphasis supplied.)

We have given careful consideration to the wording of the above instruction and have concluded that the court should not have included that portion which is italicized above but should have inserted other suitable language similar to that hereafter suggested.

We find nothing wrong with the first portion of the instruction down to the part italicized, but as it now stands it amounts to the court telling the jury that Scott had a right to do exactly what he did. In other words Instruction No. 7 practically made Scott the sole judge of what to do to protect himself and did not, as it should have, require him to use only such means as were necessary under the circumstances to prevent harm, or, acting as a reasonably prudent person, to have tried to avoid harm to himself in some other way. For instance the jury might have thought that he could have pulled in behind appellants' automobile as the approaching vehicle passed and then continue on his way to a place of safety, particularly since he had stated that he was not afraid as long as he was in the cement mixer.

As stated before this case presents a somewhat novel situation but we find expressions in other decisions that confirm our conclusion that Instruction No. 7 was prejudicial.

The question of how much force is permissible in resisting an unlawful arrest was considered in *People* v.

*Cherry,* 307 N. Y. 308, 125 N. Y. S. 2d 654, 126 N. Y. S. 2d 603, 121 N. E. 2d 238, and the court at page 240 had this to say:

"If force is necessary to prevent an unlawful arrest, then force may be employed, the one limitation on its exercise being that the victim may not pursue his counterattack merely for the sake of revenge or the infliction of needless injury."

In *Fraguglia* v. *Sala,* 17 Cal. App. 2d 738, 62 Pac. 2d 783, it was said: "Force that one may use in self defense is that which reasonably appears necessary in view of all circumstances of the case, to prevent impending damages." At page 786 the court said the jury could find for the plaintiff even though the plaintiff was at fault "if you further find that the resulting assault and battery on the plaintiff by defendant was accompanied by greater force than was reasonably necessary for the purpose of self defense." It cites with approval 4 Am. Jur. 152 which says: "Generally stated the force that one may use in self defense is that which reasonably appears necessary in view of all of the circumstances of the case to prevent the impending injury."

*Randall* v. *Ridgely,* (La. App.) 185 So. 632. This was a civil action for damages in an assault and battery case. At page 633 the court said: "Under no theory can it be said that defendant was warranted in using any greater force than was necessary in ejecting plaintiff from the premises." On the same page it quotes with approval "A person defending himself from an attack becomes liable as an aggressor where the force employed is in excess of that which the law will tolerate in a given case for defensive purposes, and for the use of such excessive force he is liable both civilly and criminally."

*Downey* v. *Duff,* 106 Ark. 4, 152 S. W. 1010, this is a civil case in assault and battery. At top of page 7 the court approved the following instructions:

" 'If you find from the evidence that the plaintiff, Duff, made an assault upon the defendant Downey, with

a dangerous weapon and that Downey in good faith believed that it was necessary for him to strike Duff in order to prevent Duff from striking him with the weapon (to avoid the infliction of bodily harm upon himself) and that Downey used no more force than was necessary (as the situation appeared to the defendant under the circumstances) then you should find for the defendant.' "

" 'You are instructed that an assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another, and, if you find from a preponderance of the evidence that at the time defendant struck plaintiff, plaintiff was committing an assault upon him, the defendant was justified in using such force as appeared to him reasonably necessary, acting as a prudent person would under similar circumstances, to resist the assault of plaintiff, and to prevent any renewal of such assault, if such renewal could be reasonably apprehended.' "

Restatement of the Law, under Torts, § 70, at page 147, in this same connection it is said:

"The actor is not privileged to use any means of self defense which is intended or likely to cause a bodily harm or confinement in excess of that which the actor correctly or reasonably believes to be necessary for his protection."

At the bottom of page 148 it is stated that: "The actor must believe that the means which he applies are necessary to prevent the apprehended harm. . . . Not only must the actor so believe, but . . . his belief must be reasonable, that is, the circumstances which are known or should be known to the actor must be such that a reasonable man would so believe." And again at page 149: "The actor is not privileged to apply a particular force if he knows or should know that the apprehended harm can be prevented by the application of a force less in kind or degree . . ."

The judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

MURDOCK ACCEPTANCE CORPORATION *v.* SPEER, CHANCELLOR.

5-843 286 S. W. 2d 485

Opinion delivered February 6, 1956.

*H. D. Dickens, James M. McHaney* and *Owens, Ehrman & McHaney,* for petitioner.

*T. O. Abbott,* for respondent.

SAM ROBINSON, Associate Justice. Murdock Acceptance Corporation has filed in this court a petition for writ of prohibition questioning the jurisdiction of the Union Chancery Court in a case filed in that court by one D. E. Griffin to void for alleged usury a contract for the sale of an automobile. The issue here is whether Murdock waived the jurisdiction of the Union Chancery Court by filing an answer to the complaint without raising the question of jurisdiction and without reserving the jurisdictional question.

On the 5th day of May, 1955, Griffin filed his complaint in the Union Chancery Court. The summons was directed to the Sheriff of Pulaski County and was served on the defendant in Pulaski County by the Pulaski County Sheriff on the 20th day of May, 1955. On the 9th day of June, 1955, the defendant filed in the Union Chancery Court an answer to the complaint. The answer in no way raises as an issue the jurisdiction of the court. About two months later, on August 19, 1955, Murdock filed a motion to quash the service and dismiss the action, alleging that service was had on defendant in Pulaski County, where defendant had its sole place of busi-

ness and residence; that there had been no service on any agent of the defendant in Union County and that the Union Chancery Court had no jurisdiction to render judgment in the cause. The motion to dismiss was overruled. Murdock then filed in this court its petition for a writ of prohibition.

Ark. Stats., § 27-614, provides: "Where any action embraced in the preceding section is against a single defendant, the plaintiff shall not be entitled to judgment against him on the service of a summons in any other county than that in which the action is brought, unless he resided in that county at the commencement of the action or unless, having appeared therein, he fails to object, before the trial, to its proceeding against him." Petitioner stoutly contends that under the above statute the question of jurisdiction of the parties may be raised at any time before the trial and that such issue was raised in this case before the trial. Section 27-614 is certainly susceptible to the construction contended for by petitioner. However, this section of the statutes was originally adopted as Section 97 of the Civil Code which took effect January 1, 1869, and in a long line of cases this court has held that a general appearance will subject the defendant to the court's jurisdiction even though the suit is filed in the wrong venue. See Leflar on Conflict of Laws, page 141.

In *Mercer* v. *Motor Wheel Corporation,* 178 Ark. 383, 10 S. W. 2d 852, this court said: "This court is committed to the doctrine, by a long line of decisions, that taking any substantive step by defendant in an action brought against him in the courts operates as a general appearance, and waives the manner of process or any defects therein. *Hawkins* v. *Taylor,* 56 Ark. 45, 19 S. W. 105, 35 A. S. R. 82; *Carden* v. *Bailey,* 87 Ark. 230, 112 S. W. 743; *Dodson* v. *Butler,* 95 Ark. 617, 130 S. W. 581; *German Investment Co.* v. *Westbrook,* 101 Ark. 124, 141 S. W. 510; *Linn-McCabe Co.* v. *Williams,* 116 Ark. 307, 172 S. W. 895; *Bixley* v. *Taylor,* 122 Ark. 278, 183 S. W. 200." And the court further said: "According to the

Arkansas cases, a defendant against whom a suit has been filed, whether served at all, enters his appearance generally and for all purposes by taking substantive steps therein, such as answering, . . . Certainly no sound distinction can be drawn between a void process and no process at all. If a defendant may waive service entirely by participating in the trial, it logically follows that void service may be waived in the same manner."

Petitioners cite *Sloan* v. *Peoples Loan and Investment Company,* 195 Ark. 1085, 115 S. W. 2d 833, as authority for the proposition that the question of the jurisdiction of the court may be raised at any time before judgment even though there has been a general appearance by the one raising the question. Ark. Stats., § 27-614, on which petitioner relies, was not involved in the *Sloan* case. That was an action where a non-resident of the county was sued along with a resident of the county. There was a verdict in favor of the local resident and a verdict against the non-resident. Before the judgment was entered, the Peoples Loan and Investment Company —the non-resident—on the strength of Ark. Stats., § 27-615, filed an objection to a judgment being entered against it. Ark. Stats., § 27-615, provides that non-resident defendants may object to a judgment being entered against them where there had been a verdict for the resident defendant. Hence the *Sloan* case is not in point with the situation presented here.

By filing a general denial, without reserving the question of jurisdiction, the defendant waived the jurisdiction of the court as to the parties and the petition for prohibition is therefore denied.

5-883 286 S. W. 2d 489

Opinion delivered February 6, 1956.

*Wade & McAllister,* for appellant.

*Dickson & Putman* and *Rex W. Perkins,* for appellee.

PER CURIAM. Appellee Florence D. Cassidy obtained a $30,000 judgment against appellant Marjory Holt Rudolph in a personal injury case and the cause is here on appeal. Appellant has filed in this court a motion to be permitted to file a supersedeas bond in the sum of $25,000, alleging that she is insolvent and cannot make a $30,000 bond but that she has liability insurance and is able to make a $25,000 bond. The insurance carrier is not a party to the litigation. Since appellant alleges in the motion that she is insolvent it is obvious that a bond for only part of the judgment is for the benefit of one who is not a party to the action. Appellant is not merely asking that she be permitted to file a bond for a part of the judgment—she wants a particular $25,000 superseded —the $25,000 for which the insurance carrier may be liable. Otherwise the motion would be meaningless, as an order of this court merely allowing a supersedeas bond for part of the judgment and leaving appellee at liberty to attempt to collect the other part pending appeal would leave the judgment creditor in position to proceed against the carrier for that part of the judgment not superseded.

Actually, there are only two parties before this court: the appellant Rudolph and the appellee Cassidy. Appellant Rudolph says she should be allowed to make

a bond for part of the judgment because she cannot make bond for the judgment in full. The fact that she is insolvent and cannot make a supersedeas bond for the full amount of the judgment is no justification for this court authorizing a bond for a lesser amount, even assuming, but not deciding, that we are permitted to do so by Act 555 of 1953. If the insurance carrier were a party to this suit and seeking to make a bond only for the amount for which it could be held liable under the terms of its policy there might be good grounds for permitting it to do so, but the insurance company is not a party.

Appellant further contends that Ark. Stats., § 27-2125, authorizes the making of a bond for part of the judgment. The statute provides: "The supersedeas may be issued to stay proceedings on a part of a judgment or order, in which case the bond shall be varied so as to secure the party superseded." This statute has no application in a case where there is a money judgment against one person in favor of another person. If the judgment is for something in addition to money, such as a lien, as in *Royal Theatre* v. *Collins,* 102 Ark. 539, 144 S. W. 919, it could be "varied so as to secure the party superseded," and § 27-2125 would apply. But here, if appellant were permitted to make a supersedeas bond for only part of the money judgment appellee would have no security at all for the balance. Ark. Stats., § 27-2121, provides: "A supersedeas shall not be issued until the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, or the clerk of the Supreme Court, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal, or in the event of the failure of appellant to prosecute said appeal to a final judgment in the Supreme Court, or if said appeal shall for any cause be dismissed, that said sureties shall pay to the appellee all costs and damages and shall perform the judgment of the court appealed from; also that said appeal shall be prosecuted without delay; also, that he

will satisfy and perform the judgment or order appealed from in case it should be affirmed, and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, . . ."

The motion by appellant to be permitted to make a supersedeas bond for less than the full amount of judgment is denied.

SEAMSTER, C. J., not participating.

HARRISON *v.* TERRY DAIRY PRODUCTS, INC.

5-800 and 5-838 (consolidated) 287 S. W. 2d 473

Opinion delivered February 13, 1956.

[Rehearing denied March 19, 1956.]

*John K. Shamburger* and *Richard L. Pratt,* for appellant.

*Owens, McHaney, Lofton & McHaney,* for appellee.

LEE SEAMSTER, Chief Justice. This appeal by the appellants is from a temporary order of the Pulaski Chancery Court, first division, in restraining the appel-

lants from picketing the property of appellee. The appellants also seek, by writ of certiorari, to have this Court quash the Chancery Court order which found the appellants guilty of contempt and assessed punishment. The trial court found the appellants guilty of violating the terms of a temporary restraining order in which the appellants were restrained from committing acts of violence against the property and personnel of appellee; from intimidating the employees of appellee and from interfering with the orderly business of appellee.

On March 30, 1955, the appellant, a local of the International Teamsters Union, called a strike of employees of Terry Dairy Products Company, Inc., appellee herein. On March 31, 1955, appellee filed a verified petition in equity seeking an injunction against illegal picketing and other illegal conduct. The verified petition alleged (a) threats of physical harm to appellee's employees at the picket line and elsewhere; (b) use of force and threats of force to prevent appellee's employees from entering the plant premises; (c) use of "goon squads" to follow appellee's employees, who, by threats, intimidation, and physical violence endeavored to cause the employees to discontinue working for appellee; (d) the malicious damaging of property of Terry employees; (e) assault and battery on Terry employees; and, (f) mass picketing to disrupt appellee's business and to prevent ready access to and from the plant. No response was filed by the appellants.

Upon the verified petition the court, on April 2, 1955, entered a temporary order enjoining threats and acts of intimidation and violence against appellee's property, officers, agents, employees, or others doing business with appellee, and further interfering with the activities of employees of appellee. Pickets were limited in number to two, and the union, its members and agents, were enjoined from congregating in the general vicinity of appellee's plant.

On April 25, 1955, the appellee petitioned the court for an order adjudging the appellant union in contempt.

Although no response denying the verified petition was filed by appellants, the court heard evidence in support of the petition on April 28 and April 29 of 1955. The court found the appellant union in contempt of court and assessed a fine of $500 against the union. The court also found one of the union members, Dewey Burchfield, in contempt of court and assessed a $100 fine and a ten day jail sentence against Burchfield. The jail sentence was suspended pending good behavior. The court did not suspend the fines. Without setting out the evidence introduced, we find it was sufficient to justify the court's order. There was no appeal by either party from the court's order.

Thereafter, on July 14, 1955, the appellee filed a verified petition for order to show cause, alleging the following acts of violence:

"On the 14th day of July, 1955, at approximately two o'clock A. M., a heavy charge of dynamite was planted in the milk bottling room of plaintiff's (appellee's) plant and detonated, resulting in complete destruction of one bottling machine and extensive damage to other machinery and equipment in said room and to the building. On the same morning, a heavy charge of dynamite was placed in each of the boilers at plaintiff's plant. At approximately five o'clock A. M., when one of said boilers was turned on the dynamite planted therein was caused to explode, completely demolishing said boiler and seriously damaging other machinery and equipment in the boiler room and the building itself. The second boiler was not placed in operation, but was forthwith examined. Twenty-one sticks of dynamite, together with the necessary fuses and detonators to explode same were found inside said boiler, and said charge would have resulted in an explosion had the boiler been ignited. One of plaintiff's employees was injured by the aforesaid explosions and might easily have been killed."

"That on or about the 14th day of July, 1955, at an hour unknown to the plaintiff, some person or persons whose names are unknown to the plaintiff placed syrup

or other foreign substances in the gasoline tanks and motors of the trucks operated by the plaintiff to the end that said foreign substances caused material damage to the motors of said trucks when they were started, and wholly prevented their operation in the prosecution of plaintiff's business."

On July 15, 1955, the court revoked the appellants' authority to maintain any pickets, and directed that the fines previously levied, but unpaid, be paid forthwith, and that Burchfield be committed to jail. The court refused to take further testimony and the appellant thereupon filed its formal motion to vacate. The court overruled appellant's motion to vacate and provided that the order of arrest and commitment of Dewey Burchfield should be stayed pending appeal and that the $500 fine against the union and the $100 fine against Dewey Burchfield should be held by the clerk of the Chancery Court pending final determination of the issues in this cause. This appeal follows. The appellants also seek, by writ of certiorari, to have this court quash the Chancery Court order which found the appellants guilty of contempt and assessed punishment. The cases were consolidated for briefing and hearing.

Initially, the appellants contend that the chancellor, having failed to enjoin all picketing at the hearings on April 2 and April 28 and 29, had no power or authority thereafter to enter such injunction. This contention is based on two premises: (1) the court, having made one order with reference to picketing, could not thereafter modify or change its order; and (2) there being no appeal from the first order, such order became final and unalterable, unless there be proof of a change of conditions.

The appellants further contend that the trial court erred in revoking the suspension of fines and jail sentence of Dewey Burchfield and the Union. This contention is based on three premises: (1) there is no proof or allegation of any misconduct on the part of Dewey Burchfield or the Union; (2) the court's prior orders

were a complete adjudication of the status and legal rights; and, (3) the court's order was not authorized by law, i. e. the fines and the jail sentence.

The granting or refusing of injunctive relief rests within the judicial discretion of the trial court, and its action in the matter will be sustained on review, if that power has not been abused. This rule applies to the grant or denial of a temporary injunction, and to rulings on motion to dissolve the injunction. In the case of *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26, this court said, "the granting or dissolution of a temporary restraining order is within the discretion of the trial court. He can, at any time, make such orders as appear necessary to protect the interest of the parties, and his action will not be disturbed by this court unless it appears that the Chancellor abused his discretion."

Appellant seeks to attribute to a temporary order the final qualities of a decree or judgment for purposes of applying the doctrine of res adjudicata. An order pendente lite is always subject to the jurisdiction of the court until entry of a final decree. It may be rescinded or modified at the discretion of the court to meet the ends of justice. Its purpose is not to finally dispose of the litigation, but merely to serve the ends of justice until a final hearing can be held. The original order of April 2 specifically provides that it was made subject to the further order of the court. We do not think the Chancellor abused his discretion in this case.

Appellant earnestly contends that the order of the trial court of July 15, 1955, which revoked the suspended jail sentence (previously ordered by the court on April 29, 1955) and directed the sheriff to forthwith take into custody Dewey Burchfield and to commit him to jail for a period of ten days, was invalid. We think the trial court had no authority to revoke the suspended sentence at this later date.

In the case of *Stewart, et al.* v. *State,* 221 Ark. 496, 254 S. W. 2d 55, which was a case similar to the instant

case, this court held, "We think it best to state explicitly that in these circumstances the suspension of the sentence is in effect its complete remission. In ordinary criminal cases a suspended sentence is a useful deterrent to later wrongdoing. The same considerations do not apply in cases of contempt, and we are aware of no authority for an indefinite suspension in a case of this kind." So in the instant case, we think that the suspension of Dewey Burchfield's jail sentence was in effect its complete remission. No additional proof was introduced or pleadings filed to show that Burchfield had later violated the order of the court. Therefore, the court erred in revoking the suspended jail sentence.

The fines assessed were not suspended and the order issued July 15, 1955, to collect the fines already assessed against the appellants, was a proper order and is therefore approved.

The writ of certiorari will be denied, except as to the jail sentence of ten days assessed against Dewey Burchfield. The petition will be granted and the order sending him to jail will be quashed. With the modification mentioned the case is affirmed.

HARRIS *v.* HARRIS, ADMINISTRATRIX.

5-812 286 S. W. 2d 849

Opinion delivered February 13, 1956.

*C. M. Martin,* for appellant.

*L. B. Smead,* for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Dewey Harris, and Bennie Harris were the parents of Birdie Harris, who was killed in an automobile collision July 11, 1954. Dewey Harris and Bennie Harris have been divorced for some eight (8) years. Their daughter, Birdie, had also been married, was divorced December 15, 1950, and was 24 years of age at the time of her death. She had no children. A damage suit following the automobile mishap, and filed by her administratrix [her mother], resulted in a recovery for Birdie's estate of $4,000. Birdie died intestate and left no other estate. December 23, 1954, appellant [as Birdie's father] filed a petition in the Probate Court asking that the assets of the estate be disbursed equally between him and Bennie, and that the administration be closed. January 24, 1955, on petition of appellee, a partial distribution was made, $1,000 being paid to Dewey Harris and $1,000 to Bennie Harris, leaving a balance of $2,000. On February 17, 1955, Bennie Harris filed a claim against her daughter's estate for $3,000 and on a hearing the court allowed her $2,490. This appeal followed.

For reversal appellant relies on the following five points: 1, 2 and 3, in effect, question the sufficiency of the evidence and "4. Because the testimony of Bennie Harris, Administratrix, was incompetent and inadmissible for the purpose of establishing her claim against the estate of Birdie Harris, deceased. 5. Because the testimony of Frank Landers was not sufficient to establish the claim of Bennie Harris, Administratrix, against the estate of Birdie Harris, deceased."

Appellee based her claim against her daughter's estate on the following itemized account: "For expenditures on behalf of the decedent during the period from September, 1951, to May, 1954, during the school year,

only: Lunch—$10.00 per mo., Incidentals—$10.00 per mo., Food & Lodging—$30.00 per mo., Clothing & Shoes —$20.00 per mo., Books—$5.00 per mo., Medical & Dental —$5.00 per mo., Total—$80.00 per month.

"Total expenditure for 27 months @ $80.00 per month—$2,160.00.

"For expenditures on behalf of the decedent during the period September, 1951, to May, 1954, during vacation only: Incidentals—$10.00, Food & Lodging—$30.00, Clothing & Shoes—$10.00, Medical & Dental—$5.00, Total $55.00.

"Total expenditure for 6 months @ $55.00 per month, $330.00.

Total Expenditure.....$2,490.00."

There was evidence to the effect that Birdie, following her divorce December 15, 1950, had lived with her mother continuously until her accidental death July 11, 1954. During this period she went to school and it does not appear that she earned anything. Her mother [67 years old] received $75 a month from the government and earned $40 per month working for Frank Landers. Her mother testified that Birdie promised to pay her [Bennie Harris] for her [Birdie Harris'] expenses while she lived with her mother. On direct examination Birdie's mother testified:

"Q. Actually, Bennie, did Birdie finish school in May of 1954? A. Yes, sir, and she told me she was going to pay me—we made an agreement— MR. MARTIN: We object to any agreement between the Administratrix and the deceased. MR. ROWAN (continuing): Q. During the time she went to school, from September, 1951, until May, 1954, when she finished, who paid her expenses? A. Me."

Appellant's contention that this evidence of Birdie's mother was inadmissible as falling within the terms of Section 2 under "Schedule" to the Constitution of Arkansas, commonly referred to as the "Dead Man's Stat-

ute," must be sustained. It appears, however, that appellant brought out on his cross-examination of Bennie Harris the same testimony, in effect, that he complained about, as indicated, on her direct examination. He, therefore, waived the incompetency of this testimony, *Smith, Administratrix* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776. On Bennie Harris' cross-examination she testified:

"Q. Did you get a note for any of this money you gave her? A. I didn't have to because she told me she was going to give me back every cent. Q. How was she going to pay it back? A. Get a job and pay me back. . . . Q. Now why do you claim pay for Birdie after she is dead—why didn't you make the claim while she was living? A. I did make it—and she told me she was going to pay it when I put her through high school and she could get a job and make some money." . . .

In addition to the above testimony Frank Landers testified: . . . "That she [Bennie Harris] works for his wife in the house and has worked for her since 1951. That he knew her daughter, Birdie Harris. Q. Were you aware, or did you know any expenditures made by Bennie Harris for the purpose of educating Birdie Harris? A. Yes, sir. Q. How did you know of it? A. Well, a number of times Bennie would get money from me to take care of Birdie's school bills. Q. Did you hear any conversation between Birdie Harris and Bennie Harris regarding this matter? A. Yes, sir. Q. Tell the court what they were. A. Well, at one particular time, Birdie got off the bus and came in my house and asked her mother for some money for books, and her mother said she didn't have the money, and that it was costing a lot to send her through school, and she said—she didn't call her Mother, she called her Bennie,—and she said: 'Bennie, when I get through school I am going to pay every bit of this money back.'" . . .

The cause comes to us for trial de novo, just as in chancery appeals. The burden was on Birdie's mother to establish her claim. "It is incumbent upon the claim-

ant to show that, at the time the services were rendered, it was expected by both parties that she should receive compensation, but she may show this by circumstantial as well as by direct evidence. All the surrounding circumstances under which the services were performed may be proved, *Meers* v. *Potter,* 208 Ark. 965, 188 S. W. 2d 500.

After a careful review of all the testimony, some of which is contradicted by appellant, we have reached the conclusion that the preponderance of the testimony does not support a claim of appellee for more than $2,000. The claim will, therefore, be reduced to $2,000 and affirmed for this amount. All costs in the trial court and here to be paid out of the estate.

Justices SMITH and ROBINSON dissent.

GEORGE ROSE SMITH, J., dissenting. Our law sensibly frowns upon attempts to recover compensation for services rendered to the claimant's deceased parent or child. "Such services are enjoined by the reciprocal duties of the family relation, and are always presumed to have been prompted by natural love, rather than by the promise or hope of pecuniary reward." *Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898. The law may imply a promise to pay if the services are so extraordinary that they cannot be attributed to filial or parental devotion and would be rendered only with the expectation of compensation. But in the case of ordinary services the burden is on the claimant to prove a contract for reimbursement. *Lineback* v. *Smith,* 140 Ark. 500, 215 S. W. 662.

In this case the decedent was a young girl who, after an unsuccessful marriage, returned to live with her mother while she finished her schooling. The mother's claim is for board, room, clothing, and incidentals which she furnished during her daughter's school days. There is nothing extraordinary about services such as these. Probably the commonest example of unselfishness to be found is the self-denial undergone by parents in order to give their children an education. Most parents would

be affronted if the law implied an expectation of pecuniary reward on their part.

Hence the appellee's claim must rest upon proof of an express contract for reimbursement. All that is shown is that on two occasions the daughter said that when she finished school she was going to get a job and pay back every cent. It seems clear to me that such a voluntary unilateral promise does not create a contract. It is not suggested that the appellee supplied her daughter with the necessaries of life only because repayment had been promised. To the contrary, the appellee admits that she brought up eight other children without asking compensation for their food and shelter. In my opinion the majority decision is contrary to many precedents in our Reports and will encourage the filing of fictitious claims. I should add that the equities as between the appellee and her divorced husband, the appellant, are not our responsibility. It is probably true in most cases that all who share equally under the law of descent and distribution are not equally deserving as a matter of abstract justice.

ROBINSON, J., joins in this dissent.

DAVIS, ADMINISTRATRIX *v.* PERRYMAN.

5-840 286 S. W. 2d 844

Opinion delivered February 13, 1956.

*Gerland P. Patten,* for appellant.

*Wright, Harrison, Lindsey & Upton,* for appellee.

Ed. F. McFaddin, Associate Justice. The question posed is whether the appellant is barred from maintaining the present action because of previous litigation. The Trial Court answered the question in the affirmative and dismissed the complaint. This appeal ensued.

On November 3, 1954, Mrs. Rea Howell Davis, as administratrix of the estate of her husband, James Henry Davis, filed this present action in the Pulaski Circuit Court against Jerry T. Perryman, as sole defendant. The complaint alleged, *inter alia,* that on November 11, 1952, the said James Henry Davis was killed in a traffic collision between his car and a truck of the East Texas Motor Freight Lines, then driven by the defendant, Perryman, as servant of said East Texas Motor Freight Lines; that James Henry Davis was free of all negligence and that the collision occurred entirely because of the fault and negligence of the defendant, Perryman, against whom damages were prayed. In due time, the defendant filed his motion to dismiss, as follows:

". . . on January 30, 1954, Rea Howell Davis, Administratrix of the Estate of James Henry Davis, Deceased, filed suit against East Texas Motor Freight Lines, a corporation, in the United States District Court for the Eastern District of Arkansas, Western Division, which said suit bore civil No. 2743 and involved the same traffic accident involved here. . . . In the said civil action No. 2743, the only grounds alleged for liability on the part of East Texas Motor Freight Lines, a corporation, were that Jerry T. Perryman was guilty of negligence which proximately caused the collision and that the said Jerry T. Perryman was an employee of East Texas Motor Freight Lines and acting within the scope of his employment at the time of the traffic accident. East Texas Motor Freight Lines, a corporation, in its

answer in the District Court of the United States, Eastern District of Arkansas, Western Division, in Civil No. 2743, admitted that Jerry T. Perryman was an agent and employee of the East Texas Motor Freight Lines and acting within the scope of his employment at the time of the traffic accident. United States District Court Cause No. 2743 was tried before a jury on the issue of whether or not East Texas Motor Freight Lines, a corporation, was liable to Rea Howell Davis, Administratrix, because of negligence on the part of Jerry T. Perryman; and resulted in a verdict in favor of East Texas Motor Freight Lines on April 20, 1954. Judgment on the verdict in United States District Court was entered on April 20, 1954; Rea Howell Davis has never appealed from the said judgment in favor of East Texas Motor Freight Lines; and the said judgment has now become final. Defendant pleads the foregoing proceedings, orders and judgments . . . United States District Court No. 2743 as a bar to this cause of action."

At a hearing on said motion it was stipulated in open court by the respective parties, through their attorneys, that all of the allegations, contained in said motion to dismiss, were true. Thereupon, the Trial Court sustained the motion and dismissed the complaint; and appellant, claiming error, argues the two assignments now to be discussed.

*Assignment No. 1.* The appellant says: "*Res judicata does not apply, because in this case the East Texas Motor Freight Lines is not privy to Perryman, nor Perryman to the East Texas Motor Freight Lines.*" Among other authorities, appellant cites *Eldred* v. *Johnson,* 75 Ark. 1, 86 S. W. 670, to the effect that a judgment binds only parties to the action and those in privity with parties; and then appellant says that in the scope of such rule of *res judicata* a servant is not in privity with a master and an agent is not in privity with a principal; and to sustain such statement, appellant cites these Arkansas cases: *Mo. Pac. RR. Co.* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872; *Meyer* v. *Eichenbaum,* 202 Ark. 438, 150 S. W. 2d 958; *Gates* v. *Mortgage Loan, etc.,* 200 Ark.

276, 139 S. W. 2d 19; *Berryman* v. *Cudahy Pack. Co.,* 191 Ark. 533, 87 S. W. 2d 21; and in the oral argument before the Court, appellant added the cases of *Mo. Pac. RR. Co.* v. *Nelson,* 195 Ark. 883, 115 S. W. 2d 872; *Ark. P. & L. Co.* v. *Marsh,* 195 Ark. 1135, 115 S. W. 2d 825; and *Corder* v. *Norsworthy,* 194 Ark. 564, 109 S. W. 2d 136.

We respect the cases cited by the appellant and nothing herein in any way overrules the real holding in any of the cited cases; but we have here a factual situation materially different from that in any of the cited cases. Focused down to the distinct issue, the question here is whether the plaintiff, after an unsuccessful damage action against the master for the alleged negligent act of the servant, is barred from maintaining a subsequent action against the servant involving the same mishap, when it was and is conceded in both actions that the servant was all the time acting within the scope of his employment and the only questions in the two actions are negligence and contributory negligence.

Learned counsel for appellant has not cited us to any Arkansas case with facts like the one here, and our search has failed to disclose any such case; but the cases from other jurisdictions are overwhelming in holding that an action like the present one cannot be maintained when a previous action by the same plaintiff against either the master or the servant for the same alleged act of negligence has been finally decided against the plaintiff in the Courts—State or Federal[1]—of the same jurisdiction, and in which the scope of employment of the servant has been conceded at all times by the master and the only questions have been those of negligence and contributory negligence. The reason for the rule seems to be that the plaintiff has had a complete opportunity to have a court of competent jurisdiction in the forum pass on the questions of negligence and contributory

[1] In oral argument appellant's attorney, with becoming candor, conceded that trial in a Federal Court in the same State was equivalent to a trial in the State Court since the holding of the United States Supreme Court in *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, and the subsequent cases to the same effect.

negligence, and that the plaintiff is not entitled to have the same issue re-litigated.[2]

A leading case is that of *Giedrewicz* v. *Donovan,* 277 Mass. 563, 179 N. E. 246, decided by the Supreme Court of Massachusetts in 1932. There the facts disclose that the plaintiff brought an action against the master for injuries received because of the alleged negligence of the servant; that case was tried in the United States Court in Massachusetts and the master conceded that the servant was acting in the scope of employment, and the only issues were negligence and contributory negligence. That case was finally decided against the plaintiff; and then the plaintiff brought suit in the State Court of Massachusetts against the servant based on the same traffic mishap. The Supreme Judicial Court of Massachusetts, in the reported decision, held that the second action was barred because of the stated outcome of the first action. After recognizing the general rule, that a judgment is a bar to a subsequent action only when the parties or their privies are the same in both actions, the Court nevertheless held that the result of the first action prohibits the maintaining of the second action.

The Massachusetts Court quoted from the case of *Jenkins* v. *Atlantic Coast Line RR. Co.,* 89 S. C. 408, 71 S. E. 1010, as follows:

". . . the true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata,* or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a

[2] Such limited statement of the rule shows that a holding in favor of the plaintiff in the first action—whether against the master or the servant—is not *res judicata* on the questions of negligence and contributory negligence in a subsequent action, nor does the rule apply as long as the judgment obtained in the first action remains unsatisfied. It is only when the plaintiff has tried and lost that the rule applies; and then only where the only questions are negligence and/or contributory negligence.

judgment persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity."

Another case with facts like the one at bar is *Myhra* v. *Park,* 193 Minn. 290, 258 N. W. 515, decided by the Supreme Court of Minnesota in 1935. In that case, Myhra and his wife received injuries in a traffic mishap involving a car and a truck driven by Johnson, who was the servant and employee of Park. In the first action, Myhra filed against Park as the sole defendant, and sought damages for his car and his personal injuries, but did not mention any injuries sustained by his wife. It was conceded that Johnson was all the time acting in the scope of his employment, and the sole questions in the case were negligence and contributory negligence. The first action resulted in a decision in favor of Park. Thereafter, Myhra brought action against both Johnson and Park for amounts that he expended for medicine and hospital treatment of his wife and the loss of her services. The question was whether the first action against Park was a bar to the second action against Johnson, the servant. The Supreme Court of Minnesota stated the question:

"In view of the facts appearing in the instant case, is estoppel by verdict or bar by judgment available to the defendant, Tim Johnson? Plaintiff asserts that, because Johnson was not a party to the former action, there can be no estoppel as to him. The liability of defendant Park necessarily depended upon whether there was negligence on the part of his servant at the time and place of the accident. There is no question but that Park assumed responsibility for his servant's acts and conduct, even were that open to dispute. So the question presented is really this: Plaintiff having fully litigated the question of the servant's negligence in his action against the master and, after an adverse determination of such issue upon the merits, having based his new

cause of action upon the same facts, may he again litigate the same issue in an action against the servant?"

The Supreme Court of Minnesota, after reviewing numerous authorities, held that, since Myhra had litigated the question of the servant's negligence in his action against the master, he could not again litigate the same question in an action against the servant.

In 133 American Law Reports 181 there is an Annotation entitled: "Judgment in action growing out of accident as *res judicata,* as to negligence or contributory negligence, in later action growing out of the same accident by or against one not a party to the earlier action." On page 196 of that volume there is this statement:

"It is a prevailing rule that as regards actions growing out of an accident, in which liability is claimed on the ground of the alleged negligence of a servant or agent, a judgment in favor of either the master or principal on the one hand, or the servant or agent on the other, sued alone, is *res judicata,* or conclusive, as to such issue of negligence, in a subsequent action against the other, a derivative responsibility being present."[3]

In 23 American Law Reports 2d the Annotation on the same subject is supplemented, and cases adhering to the prevailing rule, as above quoted, are listed there and in supplemental volume, being: *Wolf* v. *Kenyon,* 273 N. Y. Supp. 170; *Tighe* v. *Skillings,* 297 Mass. 504, 9 N. E. 2d 532; *Lasher* v. *McAdam,* 211 N. Y. Supp. 395 and 215 N. Y. Supp. 876; *Jones* v. *Young,* 14 N. Y. Supp. 2d 84; *Fightmaster* v. *Tauber,* 43 Ohio App. 266, 183 N. E. 116; *King* v. *Stuart Motor Co.* (1943, DC Ga.), 52 F. Supp. 727; *Spitz* v. *BeMac Transport Co.* (1948), 334 Ill. App. 508, 79 N. E. 2d 859; *Overstreet* v. *Thomas* (1951), Ky., 239 S. W. 2d 939; *Silva* v. *Brown* (1946), 319 Mass. 466, 66 N. E. 2d 349; *Thirty Pines, Inc.* v. *Bersaw* (1942), 92

[3] Apparently the case holding contrary to the quoted statements from American Law Reports is the Kentucky case of *Myers* v. *Brown,* 250 Ky. 64, 61 S. W. 2d 1052, decided in 1933. But the value of the holding in *Myers* v. *Brown* is considerably weakened by the later Kentucky cases of *Blue Valley Creamery Co.* v. *Cronimus* (1937), 270 Ky. 496, 110 S. W. 2d 286, decided in 1937; and the case of *Overstreet* v. Thomas, ..... Ky. ..... , 239 S. W. 2d 939, decided in 1951.

N. H. 69, 24 A. 2d 500; *Canin* v. *Kesse* (1942), 20 N. J. Misc. 371, 28 A. 2d 68; *Jones* v. *Valisi* (1941), 111 Vt. 481, 18 A. 2d 179; *Laffoon* v. *Waterman S. S. Corp.* (DC NY), 111 F. Supp. 923; *Miller* v. *Simons,* 239 Minn. 523, 59 N. W. 2d 837; *Kelley* v. *Curtiss,* 16 N. J. 265, 108 A. 2d 431; *Templeton* v. *Scudder,* 16 N. J. Super. 576, 85 A. 2d 292; *Stone* v. *Carolina Coach Co.,* 238 N. C. 662, 78 S. E. 2d 605; and *Mooney* v. *Central Motor Lines, Inc.* (CA6th Ohio), 222 F. 2d 572.

At all events, we believe the rule of the Massachusetts and Minnesota cases is sound: and we hold that the plaintiff, after a prior unsuccessful damage action against the master or servant for alleged negligence of the servant, is barred from maintaining a subsequent action involving the same mishap when it was and is conceded in both actions that the servant was all the time acting within the scope of his employment and the only questions in the two actions are negligence and contributory negligence.[4]

*Assignment No. 2.* The appellant says: "*Estoppel by judgment does not apply because of lack of mutuality of estoppel.*" And to support this statement appellant cites: *Hogan* v. *Bright,* 214 Ark. 691, 218 S. W. 2d 80; *Treadwell* v. *Pitts,* 64 Ark. 447, 43 S. W. 142; *Avera* v. *Rice,* 64 Ark. 330, 42 S. W. 409; and *Berryman* v. *Cudahy Packing Co.,* 191 Ark. 533, 87 S. W. 2d 21. We admit that the general rule is that mutuality of estoppel is required. In the recent case of *Hogan* v. *Bright,* 214 Ark. 691, 218 S. W. 2d 80, we cited the earlier case of *Treadwell* v. *Pitts,* 64 Ark. 447, 43 S. W. 142, to sustain the statement: "Estoppels by judgment must be mutual." But, even so, the authorities generally recognize that in a situation as the one here, in which the plaintiff has already had a full and complete trial of the cause of

[4] We call attention to the fact that the cause of action here involved arose prior to our Comparative Negligence Statute, which is Act 191 of 1955. Therefore, neither side in the present litigation has mentioned that Act. Whether that Act might have any bearing in a case such as the one here is something that we have not considered; but we mention the point in an abundance of precaution because of some language contained in the case of *Mo. Pac.* v. *Nelson,* 195 Ark. 883, 115 S. W. 2d 872.

action against one party and the action against the second party is derivative from the first, then there is an exception to the general rule requiring mutuality in estoppel.

In the Massachusetts case of *Giedrewicz* v. *Donovan*, 277 Mass. 563, 179 N. E. 246, previously discussed, this matter of the exception to mutuality of estoppel was discussed, and the Massachusetts Court said:

"As a matter of public policy and in the interest of accomplishing justice, the better rule would seem to be that, if it is clearly established, in the trial of an action either against the employee or against the principal for damages caused by the employee's negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act of the same employee. In principle it would seem to be immaterial whether the first judgment was obtained in an action against the employer provided the only ground for holding the employer is the negligence of the employee and it clearly appears that in the first trial the employee was found to be free from culpability."[5]

In 50 Corpus Juris Secundum 294, in discussing mutuality of estoppel in matters of judgment, the text, after stating the general rule that estoppels must be mutual, then says:

"A well recognized exception to the rule of mutuality exists where the liability of defendant is altogether dependent on the culpability of one exonerated in a prior

[5] The Massachusetts Court quoted from the opinion of Judge VAN DEVANTER in *Portland Gold Mining Co.* v. *Stratton's Independence* (CCA8th), 158 F. 63, 16 L. R. A., N. S. 677: "Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way."

suit on the same facts, when sued by the same plaintiff. In such cases the unilateral character of the estoppel is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct action. It has also been held that the requirement of mutuality must yield to public policy, and that a plaintiff who deliberately selects his forum is bound by an adverse judgment therein in a second suit involving the same issues, even though defendant in the second suit was not a party, nor in privity with a party, in the first suit."[6]

We conclude that, in a situation like the one here, there is an exception as to the requirement of mutuality of estoppel. We, therefore, conclude that the trial court was correct in sustaining the motion to dismiss.

Affirmed.

---

[6] See also 34 Corpus Juris 988, where similar language shows that the exception is of long standing.

[redacted]

LADWIG *v.* THE ARLINGTON HOTEL COMPANY.

5-853 286 S. W. 2d 853

Opinion delivered February 13, 1956.

[redacted]

*Tom Gentry* and *Roy Finch, Jr.,* for appellant.

*House, Moses & Holmes; Wootton, Land & Matthews* and *Richard W. Hobbs,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellees are the owners of certain hotels and bathhouses located

outside the boundaries of Hot Springs National Park but within the city of Hot Springs, Arkansas, and are engaged in the business of giving baths in the therapeutic waters of the government-owned hot springs. Appellants are the officers and members of the "Arkansas Board of Massage," created pursuant to Act 180 of 1951, which is known as the "Massage Registration Act."[1]

Appellants brought this suit alleging appellees were employing many persons as masseurs and masseuses who were unqualified to engage in the practice of massaging because of their failure to obtain a certificate of registration in compliance with Act 180, and that such employment was in violation of Section 3 of said act. None of said employees were made defendants to the suit, it being alleged that individual criminal action against them would be so numerous that adequate relief could not be obtained against the irreparable injury which it was further alleged the public would suffer by failure of appellees to comply with the act. Appellants asked that appellees be enjoined from further violation of Sec. 3 (b) of said act.

Appellees demurred to the complaint on the following grounds: 1. The complaint does not state facts sufficient to constitute a cause of action. 2. Plaintiffs have no legal capacity to sue. 3. There is a defect of parties plaintiff. 4. There is a defect of parties defendant. The chancellor sustained the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action against appellees and overruled it as to other grounds urged. Upon appellants' failure to plead further, the complaint was dismissed. The appellant board members have appealed and part of the appellees have cross-appealed from the action of the court in refusing to sustain the demurrer on the additional grounds of appellants' incapacity to sue and a defect of parties defendant.

[1] In *Ladwig* v. *Nance*, 223 Ark. 559, 267 S. W. 2d 314, we held that Act 180 had no application to bathhouses located within the Hot Springs National Park.

The question on direct appeal is whether the complaint stated a cause of action against appellees for violation of Section 3 (b) of Act 180 of 1951 [Ark. Stats., Sec. 72-1203 (b)] which reads:

"It shall be unlawful for any person or persons to *operate* or conduct any Massage Establishment which does not conform to the sanitary regulations herein contained, or which may be adopted by the Board created herein, or to employ any person or persons as an *operator* or instructor who does not hold a certificate of registration, or to open and conduct a Massage Establishment or School in a place of residence in the State of Arkansas." (Italics supplied.)

It should be noted that the complaint does not charge that appellees failed to conform to sanitary regulations contained in the act, nor that they conducted a massage establishment or school in a "residence." So the real issue is whether the only other prohibition in Sec. 3 (b) makes it unlawful for appellees to employ any person as a masseur or masseuse who does not hold a certificate of registration, as appellants contend, or whether it merely makes it unlawful for them to employ any person as an "operator" of a massage establishment or an "instructor" in a massage school if such person does not hold a certificate of registration, as appellees insist. We think the chancellor correctly adopted the latter view.

To adopt appellants' contention, we must construe the word "operator" as having been used by the Legislature as synonymous with the words "masseur or masseuse." While it has various meanings, the Legislature obviously used the word "operator" in the subsection in the same sense that the word "operate" is used therein; and that is that an operator is "one who operates" a massage establishment, just as an "instructor" is one who instructs at a massage school. This is the first and general definition given the word in *Webster's New International Dictionary.* This view is fortified by consideration of other sections of the act which define the terms, "masseur and masseuse," "massage establish-

ment," "massage school" and "massage," but do not define "operator" or "instructor." Section 11 of the act makes it unlawful for any person "to own, manage or *operate* any massage school or establishment," unless certain sanitary requirements are met.

Even if there were some ambiguity in the meaning to be placed on the wording of Section 3 (b), we would reach the same conclusion. The act is in derogation of the common law and is highly penal with a maximum penalty of a jail sentence of six months and a fine of $500 upon conviction for violation of its provisions. Under our well settled rule it must be strictly construed in favor of those upon whom the burden is sought to be imposed, and nothing will be taken as intended that is not clearly expressed. *State* v. *International Harvester Company,* 79 Ark. 517, 96 S. W. 119. As this court said in *Holford* v. *State,* 173 Ark. 989, 294 S. W. 33: "There is no better settled rule in criminal jurisprudence than that criminal statutes must be strictly construed and pursued. The courts cannot, and should not, by construction or intendment, create offenses under statutes which are not in express terms created by the Legislature." See also, *Giles* v. *State,* 190 Ark. 218, 78 S. W. 2d 70.

Since we have concluded that the trial court correctly dismissed the complaint against appellees on the ground that it did not state facts sufficient to constitute a cause of action against them, we find it unnecessary to determine the moot question as to whether the court erred in refusing to sustain the demurrer on other grounds as contended by some of the appellees on cross-appeal.

Affirmed.

Justice WARD dissents.

GIPSON *v.* MANER, JUDGE.
5-757 and 5-758 Consolidated
GIPSON *v.* YOUNG, COUNTY TREASURER.

5-827 287 S. W. 2d 467

Opinion delivered February 13, 1956.

[Rehearing denied March 19, 1956.]

*Kenneth C. Coffelt,* for appellant.

*H. B. Means,* for appellee.

*Kenneth C. Coffelt,* for appellant.

*H. B. Means* and *J. M. Smallwood,* for appellee.

*Amici Curiae*: Harry P. Daily; L. Weems Trussell; Arnold M. Adams; Emery D. Curlee; Fred M. Pickens; W. D. Murphy, Jr.; Tompkins, McKenzie & McRae; Shaver & Shaver; Ned Stewart; and Jay W. Dickey.

GEORGE ROSE SMITH, J. The question in these cases is whether Acts 109 and 142 of 1955 are contrary to § 4 of Amendment 37 to the state constitution, which places a limitation upon the salary and expenses of circuit judges and chancellors.

It was provided by Amendment 15, approved in 1928, that the annual salary of these judges should be $3,600 each. Amendment 15 was superseded in 1946 by Amendment 37. Section 4 of the amendment now in force reads: "The General Assembly of Arkansas shall by law determine the amount and method of payment of salaries and expenses of Circuit Judges and Chancellors of the various Circuit and Chancery districts; provided that the salary and expenses of any Circuit Judge or Chancellor shall not be less than $4,800.00, nor more than $7,200.00 per year." At its first session after the adoption of the present amendment the legislature fixed the annual salary of these officers at the maximum figure of $7,200.00, and that amount is now being paid to each of them. Ark. Stats., 1947, § 22-348.

These cases involve the seventh judicial circuit, of which the appellee, Ernest Maner, is judge. By Act 109 of 1955 the legislature found that "the judge of the Seventh Judicial Circuit must provide the costs of travel and other costs incident to the holding of court in such district, and that such costs reduce the income of such judge to approximately $3,600 annually—a sum much less than that received by other public officials who fill less responsible positions." The Act then directs the judge to relieve the burden of current business by holding pre-trial conferences and adjourned days of court. It is next ascertained and declared that the expenses occasioned by duties imposed since the adoption of Amendment 37 amount to $200 a month, which sum is declared to be a necessary expense of the counties within the circuit. The Act directs the counties to pay to the circuit judge the sum of $200 monthly, of which $85 is to be paid by Hot Spring County, a like amount by Saline County, and $30 by Grant County.

The other statute in question, Act 142 of 1955, is of more general application. It amends Ark. Stats., § 22-349, by authorizing any circuit judge or chancellor to determine mileage and other expense occasioned by duties imposed since the adoption of Amendment 37 and

to direct that such expense be paid by the counties comprising the circuit or district.

On February 26, 1955, under the authority of Act 109, Judge Maner entered a circuit court order directing Saline County to pay $85 monthly to the circuit judge for necessary expenses. Two days later the appellant, as a citizen and taxpayer, filed his notice of appeal from that order; that appeal has been docketed here as Case No. 5-757. Later on Judge Maner set aside the brief order of February 26 and entered a more detailed order by which it was found that expenses attributable to duties imposed after the adoption of Amendment 37 amounted to $200 a month, which was apportioned among the three counties in the ratio specified by Act 109. Gipson's appeal from that order is Case No. 5-758.

In addition to appealing from the above orders, neither of which seems to have been preceded by the taking of testimony, Gipson filed a separate suit in the chancery court to enjoin the county treasurer from making the payments in question and from providing a telephone for the circuit judge's chambers. Trial of that case resulted in a decree denying all relief, it having been stipulated that the county should not pay for personal long-distance calls made by Judge Maner or anyone else. Gipson's appeal from that decree is Case No. 5-827.

The appellee in the first two cases has filed a motion to dismiss the appeals, upon the ground that there was no litigation in the trial court from which an appeal could be taken. This position is not well taken, for if the orders direct an unconstitutional expenditure of public funds they can be set aside either upon appeal or by certiorari. We need not determine which method of review is technically correct, for the real questions at issue are equally well presented by the third case and must in any event be decided. The motion to dismiss is therefore denied.

The appellant's objection to the county's furnishing a telephone for the judge's chambers can be answered quickly. This outlay does not constitute a per-

sonal expense for which the judge is being reimbursed; it is a payment made to the telephone company for a service reasonably necessary to the transaction of the court's official business. No one doubts the county's authority to provide a courtroom and judge's chambers, nor its duty to supply furniture, heat, light, stationery, and other ordinary requirements for the operation of a public office. Not long ago we approved the installation of air-conditioning as a proper county expenditure. *McArthur* v. *Campbell,* 225 Ark. 175, 280 S. W. 2d 221. There is no sound basis for drawing a distinction between telephone service and the many other facilities that are regarded as necessary to the conduct of a modern business office.

With respect to the principal question a number of able briefs have been filed in support of the validity of this legislation. We need not enumerate all the arguments that are advanced. The main contention is that the legislature is free to provide reimbursement for expenses incident to duties imposed since the adoption of Amendment 37. Most of the proof in the chancery case is directed to this issue. It is shown without dispute that the amount of travel necessary to the performance of a circuit judge's duties has been greatly increased by the enactment of laws pertaining to pre-trial conferences, adjourned days of court, etc. There is no reason to doubt the accuracy of the legislature's conclusion that as much as half of the salary authorized for circuit judges and chancellors may be consumed by hotel and travel expense. We know without proof that a trial judge's conscientious discharge of the heavy responsibilities placed upon him by law involves financial hardships of which the general public is wholly unaware.

The question, however, is one not of expediency but of constitutional law. We find it impossible to hold that Acts 109 and 142 are not in direct conflict with the plain language of the constitution. It makes little difference by which principle of constitutional interpretation the issue is tested; in each instance the result is the same.

It is a fundamental rule that the words of the constitution should ordinarily be given their obvious and natural meaning. *State ex rel. Norwood* v. *New York Life Ins. Co.,* 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099. Amendment 37 bluntly declares that "the salary and expenses of any Circuit Judge or Chancellor shall not be less than $4,800.00, nor more than $7,200.00 per year." This language is simple, direct, and unequivocal. It contains no hint that the limitation applies only to the expense of duties currently imposed. A statement as positive and explicit as this one is leaves no area of doubt that might call into play the exercise of judicial interpretation. If Amendment 37 does not have the effect of fixing a $7,200 maximum for salary and expenses, then, as far as we can see, the words have no meaning at all.

The basic spirit of the constitution is to be considered along with its literal meaning and may even prevail where a conflict exists. *Bailey, Lieutenant Governor,* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, 149 S. W. 2d 573. In this case there is no discernible conflict between the letter and the spirit. The broad purpose of § 4 of Amendment 37 was undoubtedly to set a definite limit, expressed in dollars and cents, upon the salary and expenses that can lawfully be paid to circuit judges and chancellors. It is perfectly clear that this purpose would be defeated if the present acts were upheld. The travel expense attributable to duties imposed since 1946 cannot be measured in dollars and cents or even be estimated with any degree of accuracy. If it should be held that Judge Maner's present additional duties entitle him to an allowance of $200 there would obviously be no limit to the further increases that with equal plausibility would have to be sustained in the future. The limitation that was intended by the people would be as effectively destroyed as if the amendment had not been adopted.

Especially applicable to this case is the rule that in determining the intention of the framers of a constitutional amendment the court must keep in mind the situation that the amendment was meant to remedy. *Matheny*

v. *Independence County,* 169 Ark. 925, 277 S. W. 22. By this test there can remain no doubt that one of the purposes of Amendment 37 was the elimination of expense allowances such as that now in dispute.

The original constitution, Art. 7, § 18, invested the legislature with almost unlimited authority to fix the compensation of circuit judges, the only restriction being that a judge's pay could not be diminished during his term of office. While that provision was in force many acts were passed to require the various counties to contribute to the expenses of circuit judges and chancellors. Amendment 15 referred only to the annual salaries of judges, not to their expenses, and the legislature continued to authorize the payment of expenses that were undoubtedly incurred. Some twenty-five of these special acts are cited in the index to the 1947 Annotated Statutes, Vol. 8, pp. 1302-04. It was with this background of experience that the constitution was amended to refer expressly to both salary and expenses. We are compelled to believe that the deliberate change in wording was intended to terminate a practice that would be revived if the present statutes were sustained.

We have studied carefully the many cases cited in the briefs, but none is applicable to this situation. More nearly in point than any other is the holding in *Ashton* v. *Ferguson,* 164 Ark. 254, 261 S. W. 624. There the legislature attempted to authorize an allowance of $100 to each of its members, despite a constitutional amendment strictly limiting the legislators' salary and mileage expense. The court unanimously held that the allowance was contrary to the constitution and void. A different rule cannot be applied to the judiciary.

Reversed.

WABBASEKA SCHOOL DISTRICT NO. 7 *v.* JOHNSON.

5-847 286 S. W. 2d 841

Opinion delivered February 13, 1956.

*Coleman, Gantt & Ramsay,* for appellant.

*Wiley A. Branton,* for appellee.

PAUL WARD, Associate Justice. Appellee, Rubye Johnson, sued the Wabbaseka School District No. 7, Jefferson County, for damages because of the District's refusal to allow her to teach a term of school in accordance with an alleged contract. The Circuit Judge, sitting as a jury, found in favor of appellee, and in doing so he made several specific findings of fact. Since these findings need be supported only by substantial testimony we shall not deem it necessary to set out the voluminous testimony at any great length.

Appellee taught during the 1951-1952 term of school under a written contract, holding a Fourth grade emergency license which expired on or about the first of September, 1952. When the term of school ended the latter part of May, 1952, neither party notified the other that the contract would not be continued through the next succeeding school term as is provided for in Ark. Stats., § 80-1304(b). Appellee's contract, which was on a regular printed form, contained a renewal provision with practically the same wording as contained in the statute hereafter quoted.

Within ten days or two weeks after school had closed appellee enrolled at the A. M. & N. College in Pine Bluff and attended said school until August 8th or 9th, 1952, and on September 11, 1952, she was issued a five-year Junior High teacher's license which she recorded in the County Supervisor's office on September 22, 1952.

In answer to appellee's complaint, appellant, in substance stated: (a) At the close of the 1951-1952 term it was understood by appellee that her selection as a teacher for the ensuing term was conditioned on a sufficient enrollment to justify retaining her as a teacher, and that it was ascertained that there was no such enrollment and that she was so notified; (b) Appellee's contract could be and was cancelled by 30 days notice; (c) Appellee did not keep herself available to teach, and, if available, she could have secured other employment at equal compensation, and; (d) Appellee earned as much as she would have had she been allowed to teach.

Some of the above contentions may have been abandoned by appellant. At least its arguments for a reversal are based on somewhat different points which we shall examine in order, viz: 1. Appellee had no contract of employment; 2. Appellee was ineligible for employment, and; 3. Appellee was not available for employment.

1. Under the undisputed facts in this case together with the facts found by the trial judge to exist, it is our conclusion that appellee did have a contract with the school district to teach during the 1952-1953 school term.

The pertinent part of Ark. Stats., § 80-1304(b) reads as follows:

"Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed in writing on the same terms and for the same salary, unless increased or decreased under the provisions of the law, for the school year next succeeding the date of termination fixed therein; unless within ten (10) days after the date of the termination of said school term, the teacher shall be notified by the school board in writing . . . or unless the teacher within ten (10) days after the close of school shall deliver or mail by registered mail to such school board his or her written resignation as such teacher, . . ."

It is not contended that appellant gave appellee notice of the kind or within the time mentioned in the above statute, nor is it contended that appellee notified appellant that she would not accept such employment. There was introduced some testimony on behalf of appellant that a member of the board attempted to give appellee notice that she would not be re-employed. It is not contended that notice was given to appellee but to her mother. Moreover the time of giving this notice does not appear to be definite and on the whole the trial judge was justified in finding that the statutory notice had not been given. Introduced into the evidence was a letter dated May 19, 1952 [a few days before school closed] signed by the school superintendent and delivered to appellee. Portions of this letter read as follows: "The school board has asked me to inform you that you have been re-employed . . . for the next school term (1952-1953). If you plan to leave us for work elsewhere I wish you would let me know as soon as possible; . . ." It is not contended that appellee answered this letter. The first notice appellee actually had that she would not be allowed to teach was a telephone call she received on September the 8th or 9th before the school term was to begin on the 15th of the same month. When these circumstances are considered in connection with the language of the above quoted statute we are forced to the

conclusion that the school district cannot now be allowed to take the position that appellee had no contract to teach during the 1952-1953 term. It seems to us that the above statutory provision was intended to be a protection to teachers in the matter of employment in circumstances similar to these. As said in the case of *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S. W. 2d 824, this statute tends to eliminate uncertainties and possible controversy.

There is no conflict, as contended by appellant, between the conclusion we have reached and the holding in *Johnson* v. *Wert,* 225 Ark. 91, 279 S. W. 2d 274. The cited case deals with the employment of a superintendent and that portion of Ark. Stats., § 80-1304(b) relating to superintendents does not contain the protective language used in that portion of the statute referring to teachers.

2. Appellant ably argues that, regardless of whether or not appellee had a contract, she was ineligible to teach or contract to teach during the 1952-1953 term. This argument is based on the conceded fact that appellee had no teacher's license from September 1, 1952, when her old license expired, until September 11, 1952, when she received a new license, and also because appellee's new license was not filed with the county supervisor before the new term began. It will be noted that appellee secured her new license a few days before the new school term began on September 15th.

It would be a harsh rule and one to which we would not willingly subscribe to hold that appellee was ineligible to teach during the term of school beginning on September 15, 1952, merely because there was a period of ten days [from September 1st to September 11th] during which she had no valid teacher's license. We can find nothing in the law that justifies any such interpretation and nothing that would impose such a hardship on the teaching profession. The law does require a teacher's license be filed with the county supervisor, and it is true that appellee's license in this instance was not so filed until September 22, 1952, but it must be kept in mind that on September 8th or 9th appellant had notified appellee that she would not be allowed to teach. This

fact may have caused appellee to delay filing her license with the county supervisor. Ark. Stats., § 80-1304, provides that warrants [issued for teaching] are void unless the teacher has a license but it clearly appears that had appellee been allowed to teach she would have had a license duly filed when the first warrant would have been issued to her.

In support of their contention on this point appellant cites *Vick Consolidated School District No. 21* v. *New,* 208 Ark. 874, 187 S. W. 2d 948, but we do not think the cited case is in point here. The holding in that case was that a teacher could not retain the salary which he had received for teaching during the time when he held no teacher's license.

3. The testimony does not justify appellant's contention that appellee was not available to teach during the 1952-1953 term or that she did not attempt to secure other employment. The trial court specifically found contrary to appellant's contention in this matter. The testimony shows that after appellee was notified on September 8th or 9th that she would not be allowed to teach, she got married on or about September 18, 1952. The trial judge was justified in finding that she did not decide to get married until after the September 8th or 9th notice. Appellee testified that she attempted to secure another teaching position in this state but that when she was unsuccessful she went with her husband to Chicago on October 10th. She stated she tried to get employment as a teacher in Chicago but was unable to do so because she did not have a college degree, and that she tried to get other employment but was successful only to a very limited degree. There is no testimony directly contradicting the above and we must conclude that there was substantial testimony to sustain the finding of the trial judge in this regard.

Affirmed.

Opinion delivered February 13, 1956.

[redacted]

*Martin, Dodds & Kidd,* for appellant.

*James W. Gallman* and *Ben J. Harrison,* for appellee.

SAM ROBINSON, Associate Justice. This case grows out of a controversy between stockholders of a small corporation engaged in the cleaning business. There are three points in issue: First, appellants, Earl D. Whitwell and his wife, Mary D., say they were induced by means of a fraudulent financial statement to purchase corporate stock from appellees, Carl J. Henry, Sr., and his wife, Virginia, and as a result thereof, they have been damaged and ask for a judgment against the Henrys for such alleged damages. Next, appellants contend that an increase in the capital stock of the corporation was contrary to law and void; lastly, it is maintained by appellants that the corporation had no authority to issue stock for debts owed by the corporation.

We cannot say the Chancellor's failure to find that the Henrys furnished a fraudulent financial statement to the Whitwells is contrary to a preponderance of the evidence. In an effort to prove the financial statement

fraudulent, the Whitwells introduced the testimony of two accountants, but we fail to see how the testimony proves fraud. It is true that there is a discrepancy in various financial statements made over a period of about a year, but, from the accountants' testimony, it appears that the discrepancy is due to bookkeeping methods and not to fraud.

Appellants' contention that the increase of capital stock is void is based on the assumption that the Board of Directors did not call the meeting of the stockholders at which the increase in stock was voted. Sixty days notice of the meeting for the purpose of increasing the capital stock was given to the stockholders. This notice was sent out by the Secretary and there is no showing that the Board of Directors did not authorize the calling of the stockholders' meeting. All of the stockholders were present at the meeting at which the increase of capital stock was authorized.

The capital stock was increased from 300 shares of No Par Value to 5,000 shares of $1.00 Par Value. The corporation owed Henry about $3,000.00; 2,250 shares having a par value of $1.00 per share were issued to Henry as part payment of the debt owed to him by the corporation. Appellants say the corporation could not legally issue stock in payment of a corporate debt. At the time the stock was issued to Henry the Whitwells owned 149 shares. They were given the opportunity to exercise their preëmptive right of purchasing additional stock out of the new issue on a pro-rata basis with the stock they already owned; but they did not desire to exercise their preëmptive right.

The question before us is not whether a corporation may pay a debt with a new issue of stock without giving those owning stock at the time an opportunity to purchase the new stock on a pro-rata basis with the stock then owned, it being undisputed that here appellants were given such opportunity. Article 12, § 8 of the Constitution of Arkansas provides: "No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, . . ." Here, there is

no showing that the corporation did not receive from the appellees money, property or labor for which the stock was issued.

Affirmed.

SELLERS *v.* BROWN.

5-849 287 S. W. 2d 471

Opinion delivered February 20, 1956.

[Rehearing denied March 19, 1956.]

*Langston & Walker,* for appellant.

*S. L. White,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellants and a cross-appeal by the appellees from a decree of the Pulaski Chancery Court, First Division. The appellants, Robert C. and Virginia Sellers, are a minister and his wife who formerly ministered to appellee church. The appellees are the official board members of the Central Assembly of God, a church and religious society located at 20th and Broadway Streets in the City of Little Rock, Arkansas.

The appellees instituted this action against appellants seeking to have a resulting trust established on the grounds that Sellers, as a regularly ordained minister of the Assemblies of God and acting in his official capacity as pastor for his congregation, had acquired title to cer-

tain property in his own name instead of procuring title to the property in the name of the church; that a portion of the payment for said property was made possible by using contributions made by members of the church; that thereafter Sellers sold the property for a profit and bought other property with the proceeds so that a church might be erected upon the latter property; that Sellers acquired title to the property in his own name whereby, appellees claim ownership and title through a resulting trust. The appellants filed an answer claiming that they owned the property outright and the church did not have any interest in the property at any time. The appellants further contended that appellees were indebted to them for certain sums expended for the benefit of the appellees and not repaid. Many suits for liens and materials, both secured and unsecured, were consolidated for trial.

Upon trial of the issues, the trial court found, among other things, that the property both real and personal located at 20th and Broadway Streets in Little Rock, Arkansas, belonged to appellee church and not to appellants. The church's interest in the real property was held to be subject to a mortgage. The court vested title to all personal property and furnishings in the church. The title to the real estate was subject to certain materialman's liens and mortgage, aggregating more than $21,000. The decree provided that if the mortgage and liens were not paid within 45 days, the receiver was ordered to sell the property. Thereafter, the receiver held the sale and the appellees purchased the property on a submitted bid of $60,000. In addition, the trial court awarded appellees judgment against appellants in the sum of $48.06. This appeal and cross-appeal follow.

For reversal, the appellants rely on the following points: (1) A trust did not arise under the law and under the undisputed proof in this cause; (2) appellees are estopped to assert a trust; (3) even under the trial court's theory of the case, the trial court should have left the title to the property at 20th and Broadway in Sellers and entered judgment against appellees in the

sum of $8,648.16; (4) the trial court adopted the wrong theory of the case, that of a resulting trust. If the appellees had any interest at all, it should have been under an equitable or "investment lien" theory as appellees termed it, not that of a resulting trust; and (5) appellees had no legal authority or capacity to maintain this suit.

The evidence reveals that in the early part of 1944, the appellants purchased a parcel of ground at 9th and Louisiana Streets, described as Lots 10, 11 and 12, in Block 89, Little Rock, Arkansas, as a suitable location for a church. The appellants agreed to pay $12,000 for said property, $2,500 in cash, the balance in monthly installments of $100 each. Title to the property was procured in the name of appellant Sellers and his wife. Sellers at that time was employed as the pastor of the First Assembly of God, a church located at 14th and Peyton Streets in Little Rock. Shortly thereafter, the appellant Sellers organized a Central Assembly of God Church; said church occupied the property at 9th and Louisiana Streets and Sellers was its pastor. At first, meetings of the church were held in an apartment house located on said property. Later a cellar was excavated on one of the lots, and a one-story terracotta building was erected over same in which meetings of the church were held for nine years.

On February 5, 1953, the appellants sold the property located at 9th and Louisiana Streets to Arkansas Power and Light Company for a sum of $105,000. Since the church was located upon the property, the appellant, Sellers, had several members of the board sign a disclaimer to the effect that title to the property was in Sellers and the church had no interest therein. This disclaimer was signed by the board upon the condition that Sellers would utilize the net proceeds from the sale of the property at 9th and Louisiana Streets to purchase a new site at 20th and Broadway Streets and build a new church thereon. The church congregation approved this action.

Shortly thereafter, Sellers purchased this site at 20th and Broadway for a total sum of $40,000, of which $23,000 was paid in cash and a mortgage assumed for the balance, and began construction on the new church. Sellers made a contract with one Graham Harp to furnish the material and supervise the building of a church structure. This contract was approved by a meeting of the congregation. Harp proceeded with the construction of the church until the funds became exhausted. At the time of the trial, there were outstanding liens, including the mortgage, in excess of $21,000. Unsecured debts amounted to more than $35,000. Sellers has resigned as pastor of the church and the appellees, as the official board of the Central Assembly of God Church of Little Rock, brought this suit against Sellers and his wife to divest them from title to the property.

Section 6 of the Constitution and by-laws of the church provide the following:

"Section 6. Property. 1. The title to all local Church property shall be vested in the local Church body with the responsibility and benefits thereunto. 2. All property shall be directed and controlled through the Deacon Board or duly elected Board of Trustees and their successors in office, such property being held in trust by such Board and subject to the wishes of the Church body in all procedure affecting property interest. 3. All such property shall be deeded so as to make it safe for an Assembly of God Church organization in times of a crisis or division, and to prevent its being diverted by any portion of the Church body to other Church interests or organizations. In event of an affiliation with such interest, or should it for any reason fail to function as an Assembly of God Church, all property rights are to come under supervision and into the hands of the Executive Presbytery of the Arkansas District Council of the Assemblies of God with headquarters now at Hot Springs, Arkansas, until an Assembly of God Church can properly function or the property be disposed of by said Board and the proceeds be used to promote the Assembly of God Church interest elsewhere."

The by-laws also provide:

"The General Council approves the holding of title to all church buildings, school or other institutions that are supported by funds solicited for the work of God through properly constituted corporations. It disapproves the holding title to such properties by the ministers of the Assemblies of God through private ownership, corporation of sole, closed corporation or any other type of ownership where initiative of action of final authority is not vested in a corporation or set in order by the District Council, title should be vested in properly qualified trustees."

The evidence shows that the appellees are the duly elected and qualified trustees of the Central Assembly of God Church and were authorized under the rules of the church to maintain this suit. The Chancellor based his decree upon the finding that a resulting trust had been established by the evidence. We cannot say that the court's decree was against the preponderance of the evidence.

On cross-appeal, the evidence shows that the appellee church had no interest in appellants' property located on 5010 Midland Road in Little Rock, Arkansas. The case is affirmed on cross-appeal.

Affirmed on appeal and on cross-appeal.

WELLS *v.* DERRICK.

5-850 287 S. W. 2d 4

Opinion delivered February 20, 1956.

*Dinning & Dinning,* for appellant.

*A. M. Coats,* for appellee.

J. Seaborn Holt, Associate Justice. Appellees, T. W. Derrick and Tunney Stinnett, leased from appellant, Arthur L. Wells, and operated for the years 1952 and 1953, two farms in Phillips County. Wells furnished appellees money with which to purchase equipment to operate these farms and with which to pay the costs of cultivating and harvesting the cotton crops grown thereon during these two years. According to Wells, and it appears to be conceded, there was a carry over indebtedness to him from appellees for the 1952 operations, and in February 1953 appellees executed their note, in the amount of $40,000 due December 15, 1953, to appellant which covered the above carry over from the 1952 crops and afforded a backlog of credit for funds to be furnished by Wells to appellees in producing the 1953 crop. To secure this note appellees executed a chattel mortgage covering not only all crops produced but also a large amount of valuable farm machinery such as tractors, cultivators, mowing and dusting machines, disks, plows and many large trucks and trailers. The facts disclose that during 1953, and before the above note became due, Wells, without the consent of appellees, went upon these farms, gathered up and took possession of the pledged chattels described in the mortgage and in effect converted them to his own use. This was done without complying with the terms of the mortgage, which required that the chattels be sold at public sale after notice upon default in payment of the secured debt. There was also no appraisement made of the property.

The present suit was filed by appellant to recover judgment for an alleged balance due him following the harvesting of the 1953 crops and after the proceeds from these crops had been applied on the above note. Appellant further prayed that the chattel mortgage lien above, which was given to secure the note, be foreclosed. On a trial the court found that the unpaid balance of the indebtedness of appellees to appellant as of March 22, 1954, was $29,294.09 but that Wells by his actions, in taking the chattels in disregard of the terms of the chattel mortgage and converting them to his own use, thereby elected to and did extinguish the balance due on the debt of appellees. The decree in part recited: "7. That the said Arthur L. Wells in going upon the premises of the defendant on the 14th of December, 1953, and taking possession of the chattels aforesaid, and converting the same to his own use and benefit and using the same in and about his business in the manner that he did and not having the same appraised in the manner provided by law, effected the extinguishment of any amount of the debt owing the plaintiff by the defendants after crediting the amounts received by the plaintiff from the sale of certain equipment and the crops, for the year 1953. That the plaintiff, Arthur L. Wells, having elected to take said property in extinguishment of the balance of the debt after crediting certain equipment and the sale of the crops for 1953 he is entitled to have title to said equipment vested in him.

"It is therefore ordered, adjudged and decreed by the court that title to the chattels described herein be and the same is hereby vested in Arthur L. Wells in complete satisfaction of any debt which the defendants may owe the said Arthur L. Wells growing out of the 1953 farm operation as set out herein."

This appeal followed. For reversal appellant says: ". . . appellant is prosecuting this appeal from that part of the decree which adjudges that the vesting of the title of the property described in the deed of trust be a complete satisfaction of any debt which the appellees may owe him." In other words, appellant contends that

the trial court erred in holding that appellant, by his actions, was required to accept the equipment and chattels so recovered in full satisfaction of the indebtedness of appellees to him. We agree with appellant that the court erred in so holding. It appears to be undisputed, as the court found, that the balance of appellees' indebtedness as of March 22, 1954, was $29,294.09. While it appears that appellant wrongfully converted the property in question and should have sold the property publicly under the power of sale provided in the chattel mortgage, however, we have many times held that the proper procedure, in circumstances such as are here presented, is to ascertain and charge appellant with the fair market value of the property at the time of its conversion by him and apply it on the debt and after this is done if there be any balance due appellant, he should have judgment for such amount. On the other hand, if the fair market value of the property was more than sufficient to extinguish the debt, then in this event appellees should be awarded this amount. Interest should be charged against appellant on the fair market value of the property from and after the date of its conversion. We held in *Perryman* v. *Abston, Wynne & Co.,* 164 Ark. 290, 261 S. W. 622: "[Headnote 3.] Mortgages—Conversion of Property by Mortgagee.—Where mortgagees took possession of mortgaged chattels, but failed to sell them under the power of sale in the mortgage, they are chargeable with their market value at the time of their conversion." We said in *Anderson* v. *Joseph,* 95 Ark. 573, 130 S. W. 165: "Where the defendant is a mortgagee, who was entitled to the possession, with power to sell at the time of the seizure or conversion, and who has become a wrongdoer by reason of the manner of acquiring possession, or in the irregularity of the sale, he is liable to the mortgagor (in the absence of proof of special damages) only for the value of the property at the time of the conversion, less the amount of mortgage debt. *McClure* v. *Hill,* 36 Ark. 268."

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

UNION COUNTY *v.* RICHARDSON.

5-810 287 S. W. 2d 1

Opinion delivered February 20, 1956.

*Bruce Bennett* and *William I. Prewitt,* for appellant.

*Walter L. Brown* and *Robert C. Compton,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal results from the condemnation of lands for the widening of a highway. The County Court of Union County made its order appropriating each of two parcels; and the landowners—Richardson and Harrell—filed their respective claims, which were denied. Appeals were perfected to the Union Circuit Court where the cases were consolidated and tried to a Jury. A verdict was rendered in favor of Mr. and Mrs. Richardson for $3,086.00, and in favor of Mr. and Mrs. Harrell for $4,000.00. Union County has appealed, urging the two assignments now to be discussed:

*Assignment No. 1*

The appellant says: "That the verdicts of the Jury were excessive; that there is no substantial evidence in the record to support these verdicts; that the verdicts are the result of bias and prejudice and that witnesses for plaintiffs failed to show any fair and reasonable basis for their opinion." In testing the sufficiency of the evidence to sustain the verdicts as against the attacks made by appellant in this assignment, we consider separately the evidence in each claim.

(a) *The Richardson Claim.* Mr. and Mrs. Richardson's property had a frontage of 740 feet on the highway and the County took a 30-foot strip from the entire frontage of the Richardson land. Here is Mr. Richardson's testimony, as contained in appellant's abstract:

"The taking required the moving of my fence back, the replanting of everything that I had there and the fixing of my driveway as it had been before. Union County moved my fence; they put the stakes up but that is as far as they went. I lost all of my fencing wire and the replacement value of it would be $140.00. The labor to put the fence wire on the stakes would cost $10.00 or $12.00. Along the front of my place, I had climbing roses placed 10 feet apart; I also had five pink dogwood trees, some bulbs and other things which were lost. My rose bushes were six years old. I believe the value of those rose bushes would be $4.00 each. I had about 10 crape myrtle trees there and about 2,000 bulbs. The value of the bulbs to me would be about $700.00. What they would be worth to somebody else would be a lot different. I would estimate the value of the pink dogwood trees at $200.00 each. I believe that I had between 35 and 50 oak trees and I would value them between $40.00 and $50.00 each.

"Before my land was taken I had a driveway which was blacktopped with cement side curbings. They have replaced my driveway with two cement slabs two feet wide. I believe it would cost $300.00 to $375.00 to put

my driveway back like it was. In my opinion, the tract of land taken by Union County would be worth at least $4,000.00. In my opinion the reasonable cash value of my property before it was taken was $37,500.00 and it was $32,500.00 afterwards."

The Richardsons introduced corroborative testimony; and the County introduced evidence tending to show that Mr. Richardson's ideas of his damages were tremendously magnified and that, in fact, he was benefited far more than he was damaged. But the problem of weighing the testimony of both sides was a matter for the Jury, as was also the question of determining the credibility of the witnesses. (*Bridgman* v. *Baxter County,* 202 Ark. 15, 148 S. W. 2d 673.) The Jury elected to adhere to the testimony of Richardson and his witnesses rather than to that of appellant's witnesses. We have detailed sufficient of Mr. Richardson's testimony to demonstrate that there was substantial evidence upon which to base the verdict of $3,086.00 for the Richardsons. In addition, the Jury actually viewed the premises. We find nothing to indicate that the Jury was biased or prejudiced; and we find that the witnesses showed the basis for their opinions. In short, appellant's first assignment is without merit insofar as concerns the Richardsons' claim, because Richardson and his witnesses made a case which measured up to the requirements contained in the cases relied on by appellant, to-wit: *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738; *Malvern & Ouachita River RR. Co.* v. *Smith,* 181 Ark. 626, 26 S. W. 2d 1107; *City of Harrison* v. *Moss,* 213 Ark. 721, 212 S. W. 2d 334; and *Texas Illinois Co.* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477.

(b) *The Harrell Claim.* Mr. and Mrs. Harrell's property had a frontage of 340 feet and a depth of only 150 feet; a twenty-foot strip was taken from the entire frontage, leaving a depth of only 130 feet and placing the Harrell home 20 feet closer to the highway. Here is a portion of Mr. Harrell's testimony, as contained in the appellant's abstract:

"Prior to the new Highway, my property was practically on a level with the road. It was a desirable place to live, but now it isn't. They took a number of the trees when they put the new road in. Prior to the taking we had a good gravel driveway on a level with the road. Now, my place sits on an embankment fully six feet high from the middle of the highway. My yard is now much smaller than it used to be; to have it as it was before would require the moving of the house and the excavation of some dirt. It would cost $2,000.00 to move all that dirt.

"I have lived on my property for nine years and it is my home. Before the new Highway was put in, I could have sold the property for $15,000.00 to $18,000.00. Now I do not believe I could get more than $7,000.00 or $8,000.00 for it."

Other witnesses for Harrell stated: that to grade down the Harrell lot and move back the house would cost $4,265.13[1]; that the value of the Harrell property before the taking was $18,000.00 and the value after the taking was only $8,000.00; and that the value of the Harrell property was reduced 50% by the taking. According to appellant's witnesses, the Harrells were really benefited by the taking; but, as heretofore stated, the matter of damages was for the Jury to decide on the conflicting testimony. It is sufficient for us to say that there is substantial evidence to support the verdict of $4,000.00 for the Harrells; and we conclude that the appellant's first assignment is also without merit regarding the Harrell claim.

*Assignment No. 2*

In this assignment the appellant says: "The Court erred in stating that assessed value was not proof of the value and in refusing to permit cross-examination of appellees relative to assessments, which error was not cured by subsequently permitting testimony by the as-

[1] The Trial Court stated that this evidence was admitted only to be considered with the other circumstances to arrive at the correct measure of damages.

sessor thereon." In the cross-examination of Mr. Richardson, this occurred:

"Q. How much do you have that property assessed for?

"Mr. Brown (interrupting): Your honor, we object to the question.

"The Court: The objection is sustained.

"A. What I think it is worth, and what I have it assessed for is two different things.

"The Court: The objection is sustained; that is not proof of the value. I have ruled on that.

"Mr. Hart: Note our exceptions to the ruling of the Court."

The appellant, in arguing this assignment, says:

"Ark. Stats. 76-521 provides that all Courts and juries in condemnation cases for Highways shall take in consideration the fact that lands are required to be assessed at 50% of their true value. Appellant recognizes that the assessed valuation is not a controlling factor in arriving at the value of condemned property; however, it is a factor to be considered. *Montgomery County* v. *Cearley,* 192 Ark. 868, 95 S. W. 2d 554 (1936); *Washington County* v. *Day,* 196 Ark. 147, 116 S. W. 2d 1051 (1940)."

We do not find anywhere in the record that the appellant sought to cross-examine either of the Harrells on the assessed valuation of their property. So this assignment goes only to the Richardson claim. But even as to it, we hold that the record shows the appellant has no just cause to complain.

The ruling in which the Court refused to allow Mr. Richardson to be cross-examined on the assessed value of his property appears on page 65 of the transcript. The next day in the course of the trial (and on page 210 of the transcript) the appellant was permitted to call the tax assessor of Union County, and he testified that the

Richardson property was assessed at $1,535.00 and the Harrell property was assessed at $300.00; and on cross-examination the assessor testified as follows:

"Q. Mr. Jerry, property is assessed, you have been there and you have looked over your books?

"A. Yes, sir.

"Q. That is no criterion for the valuing of property in this county is it?

"A. No, sir.

"Q. It is no test at all, is it?

"A. It's their assessment, Mr. Brown, their valuation they put on their property.

"Q. There is very valuable property in this county that is assessed at almost a nominal figure, is there?

"A. I imagine that is so."

Furthermore, at the request of the appellant, the Court instructed the Jury:

"You are instructed that the law of this State provides that all lands are required to be assessed at fifty per cent of their true value, and it is proper for you to consider this, together with all other facts and circumstances in evidence before you in fixing the value of the lands taken."

Since the appellant (1) never sought to recall Mr. Richardson for further cross-examination after the assessor testified; (2) never showed that Mr. Richardson personally knew for what amount the property was assessed; and (3) appellant's own witness, the tax assessor, testified, without objection, that in Union County assessed valuation had practically no relation to value—in view of all these matters and the instruction previously copied—we hold that the appellant is in no position to complain about the Court's ruling in regard to the cross-examination of Richardson.

Affirmed.

Opinion delivered February 20, 1956.

*Robert C. Compton* and *Walter L. Brown,* for appellant.

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

MINOR W. MILLWEE, Associate Justice. Defendant, Ross Cook, was charged with assault with intent to kill in the shooting and critical wounding of Richard Nowlin at Hampton, Arkansas, on the night of July 27, 1954. At the trial held July 14, 1955, the jury found defendant guilty and fixed his punishment at 21 years in the penitentiary.

Evidence adduced by the State tended to show that Richard Nowlin drove from his home in the Long Lake

community to Hampton on the night of the shooting to listen to the returns of the Democratic Primary Election held on that date. He went to Jodie's Cafe where he drank some beer and then to the courthouse where he remained until about midnight. He then returned to the cafe and drank another bottle of beer. The defendant came in the cafe and drank some beer but left while Nowlin was still there. Nowlin purchased four cans of beer to take home and started to his jeep which was parked across the street when he saw defendant sitting on a car near the cafe. As Nowlin approached, the defendant said to him, "I thought you was my friend." Nowlin replied, "I am. I try to be a friend to everybody." Defendant then reminded Nowlin of an occurrence several months previously when defendant had tried unsuccessfully to persuade Nowlin and his brother to procure and give false testimony favorable to defendant in a hog-stealing case in which defendant was implicated. After telling Nowlin to wait just a minute so that he could talk to him further, defendant walked across the street where he procured a .38 caliber pistol from his truck. He then returned and, after cursing Nowlin, drew the gun and shot him four times before he fell and once more through the ear while Nowlin was lying on the ground. Nowlin was unarmed and had paid no attention to defendant when he left to get his gun.

The only defense interposed by defendant was that he was too drunk at the time of the shooting to form the specific intent to kill necessary to sustain the charge. It is argued that no motive was shown for the shooting which could have only amounted to an aggravated assault. While defendant testified that he was too drunk to remember anything that happened after his arrival at Hampton in the afternoon prior to the shooting, his testimony was disputed by the sheriff and several other witnesses who observed and talked with him shortly before and after the shooting. Dr. P. H. Pinson, a defense witness, also testified that one in the condition of the defendant, as disclosed by his own testimony and that of

his wife, was capable of forming the intent to kill at the time of the shooting.

While we do not agree that a motive for the shooting was lacking, the State is not bound to prove a motive and its absence is only a circumstance to be considered with other facts and circumstances in determining guilt or innocence. *Hogue* v. *State,* 93 Ark. 316, 130 S. W. 167. The specific intent to kill need not have existed for any appreciable length of time and, in determining whether such intent existed, the jury may take into consideration the manner of assault, the nature of the weapon and the manner in which it was used and all other facts and circumstances tending to show the defendant's state of mind. *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46; *Tatum* v. *State,* 172 Ark. 244, 288 S. W. 904. The evidence here, viewed in the light most favorable to the State, was sufficient to sustain the jury's conclusion that defendant shot Nowlin with the specific intent to take his life.

In response to hypothetical questions based upon the testimony of defendant and his wife, Dr. Pinson stated that one in defendant's condition was capable of forming the intent to kill at the time of the shooting. While there was no plea of surprise by defendant at this testimony of his own witness, it is now argued that the court erred in limiting further interrogation to the question of defendant's ability to form an intent to kill. Since the shooting was admitted and there was no plea of insanity or any other defense except that of inability to form an intent to kill because of drunkenness, we hold there was no abuse of the trial court's discretion in confining the testimony of the witness to that issue.

Nor do we concur in defendant's contention that the evidence was insufficient to warrant the action of the jury in fixing his punishment at the maximum provided by law. The evidence is overwhelming that defendant committed a murderous assault upon Nowlin while he was unarmed and making no hostile demonstration of any kind toward defendant, and we find no abuse of dis-

cretion by the jury in fixing the punishment. We have examined other assignments and find no reversible error. The judgment is therefore affirmed.

[redacted]

MONSANTO CHEMICAL COMPANY *v.* ROBINSON.

5-830 290 S. W. 2d 6

Opinion delivered February 20, 1956.

[Rehearing denied June 4, 1956.]

[redacted]

*Gaughan, McClellan & Laney; Davis & Allen* and *Wallace Davis,* for appellant.

*John R. Thompson, W. S. Mitchell* and *Edward L. Wright,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants to enjoin the members of the Public Service Commission from hearing an application for a rate increase that was filed by the Arkansas Louisiana Gas Company. The chancellor sustained a demurrer to the complaint and dismissed the suit. The only question is whether a cause of action is stated.

The complaint alleges that on March 14, 1955, the gas company filed with the Commission an application for an increase in its rates to industrial consumers. The new schedule proposed by the applicant may be described as consisting of two parts. First, there is the usual graduated scale of prices for gas, the rate decreasing as the purchaser's consumption increases. The plaintiffs concede that this basic rate schedule is legal in form. Sec-

ond, there are two escalator clauses which the plaintiffs challenge as being unauthorized by statute. The first clause provides that the basic rates will be increased by the amount of any additional taxes imposed upon the gas company after the new rates become effective. The second clause provides that the basic rates will be increased or decreased to reflect subsequent changes in the cost of gas purchased by the gas company.

The complaint states that on April 4, 1955, the gas company tendered a surety bond for the purpose of putting the new schedule into immediate effect. Ark. Stats. 1947, § 73-217. On April 11 these appellants, as industrial consumers, filed a motion asking the Commission to dismiss the application on the ground that the escalator clauses are illegal. That motion was overruled by the Commission, which issued an order permitting the new basic rates to be collected under bond but refusing to allow the escalator clauses to take effect until the further order of the Commission. Thereafter the appellants filed the present suit for injunctive relief.

The appellants' argument is to this effect: Our statutes do not contemplate the use of escalator provisions in connection with public utility rates. The incorporation of such provisions in the gas company's proposed rate schedule renders the entire schedule void. The Commission is not authorized to put only a part of a proposed schedule into immediate effect under bond. The Commission has therefore acted beyond its jurisdiction and should be enjoined.

We do not find this argument persuasive. The escalator clauses, whether valid or not, are by their nature inherently separable from the scale of fixed basic rates. Those clauses are completely dormant until there is some change in the gas company's tax liability or in its wholesale cost of gas. If such a change occurs the increase would be passed on, dollar for dollar, to the company's customers. But if no such change should occur for, say, five years, the basic rates would remain in force for that length of time. It is evident that the basic rates must

in themselves be fair and that their fairness is in no way dependent upon the contingent operation of the adjustment clauses.

The complaint concedes that the Commission did not allow the escalator clauses to be put into effect under bond; so the appellants have suffered no pecuniary injury from the provisions of which they complain. It is not denied that if the schedule of basic rates had been filed without the escalator clauses the Commission would have had the authority to put those rates in force under bond. It is not denied that if the appellants' motion to dismiss had been granted by the Commission the gas company could have immediately refiled the same schedule of basic rates and put it into effect under bond. Thus the appellants' only grievance lies in the fact that the escalator clauses are physically on file in the office of the Commission. Upon that fact alone rest the contentions that the Commission is without jurisdiction and that the appellants have suffered an irreparable injury calling for the extraordinary remedy of injunctive relief. It is a sufficient answer to point out that the appellants have a complete and adequate remedy at law. It is not suggested that the Commission's hearing upon the merits of the gas company's application does not afford the appellants ample opportunity to attack the legality of the escalator clauses. In our opinion that is the correct and appropriate forum for the determination of this controversy.

Affirmed.

BURNS *v.* MEADORS.

5-837 287 S. W. 2d 893

Opinion delivered February 20, 1956.

[Rehearing denied April 2, 1956.]

*Rex W. Perkins* and *Hardin, Barton, Hardin & Garner,* for appellant.

*Jameson & Jameson,* for appellee.

PAUL WARD, Associate Justice. Appellees, O. D. Meadors and his wife, instituted this action against appellant, Lavada M. Burns, asking a rescission of a contract under the terms of which appellees agreed to purchase certain lands belonging to appellant and asking for damages, and, in lieu thereof, for damages to compensate for defects in the title. The issues were tried and judgment was rendered in favor of appellees, on the basis of a rescission and damages. From a decree in favor of appellees appellant prosecutes this appeal.

The complaint alleges that a written contract was entered into on December 1, 1951, whereby appellant agreed to sell and appellees agreed to buy approximately 415 acres of land for the total purchase price of $6,000 and that $4,000 had been paid to appellant under said contract; that the contract required appellant to deliver an abstract of title showing good title vested in her; that the description of the lands contained in the contract and in the deed proffered by appellant was indefinite and uncertain, and that a survey is necessary to obtain a definite metes and bounds description; that a deed to one-half of the mineral rights in and under said lands was outstanding; that when appellant delivered the abstract and the deed they showed appellant did not have a marketable title for the reason that the description was indefinite and uncertain and for the reason that an undivided one-half interest in the mineral rights was outstanding and that they immediately notified appellant of this situation; that they are entitled to be reimbursed for the $4,000 purchase price already paid and for the amount for which they had increased the value of the land while they were in possession thereof, or in the alternative, if a rescission should not be granted that they be awarded damages for the amount necessary to procure a definite description and the outstanding mineral lease.

Appellant entered a general denial and further stated: she admits that she did agree to sell appellees said lands for the price stated but subject to the reservation of the one-half interest in the mineral rights and that this fact was well understood by appellees at the time the agreement was entered into, and; it was an oversight of the draftsman of the contract and the deed that the reservation of the mineral rights was not included therein. Also, by way of cross complaint, appellant admits receipt of $4,000 and states that appellees delivered to her a check for the balance of the purchase price, and that this check could not be cashed because of insufficient funds, and prayed for judgment in the amount of said check.

After hearing the testimony the chancellor made the following findings: After appellees had delivered a check for the final payment to appellant they stopped payment thereon because they learned, after examination by an attorney, that the title to said lands was not good; appellees demanded of appellant that she make and convey to them a good title but that appellant refused, claiming that the proffered title was good; that the title offered by appellant to appellees was not a good title for the reasons that (a) the description of the land in the deed and abstract was indefinite and void and (b) appellant did not have title to an undivided one-half interest in the mineral rights; that appellant's failure to proffer a good title constituted a breach of the contract although appellees had performed all obligations imposed upon them by the contract, and; that appellant should be required to pay to appellees the sum of $7,011.86, including the $4,000 which appellees had paid on the contract and $623.83 interest thereon, taxes paid on said lands by appellees, the cost of abstracting paid by appellees, and $2,500 for enhancement in value of the land due to permanent improvements placed thereon less $300 which appellees had received for a water tank.

After a careful consideration of the entire case we have reached the conclusion the chancellor was correct in holding that appellees were entitled to a rescission of the contract to purchase. We base this decision on the fact that the description contained in the deed proffered by appellant to appellees was indefinite.

Since we base our decision on the ground above stated it is not necessary for us to pass upon two other questions which have been raised, viz.: (a) Appellant sought to reform the written contract to show that appellees agreed to take the land subject to an outstanding lease for one-half of the mineral rights, and; (b) appellees contend that the title was not marketable because of the outstanding mineral lease.

Although the deed itself does not state the exact number of acres to be conveyed the best obtainable esti-

mate indicates approximately 415 acres. The description of the lands in the deed which appellant delivered to appellees contains 13 parcels of land some described by metes and bounds, and the entire description covers three pages as it is copied in the record. We will call attention to the descriptions in some of these parcels which we consider indefinite.

1. "the Northeast quarter of the Southeast quarter of Section 13, (save and except lots and parcels aggregating 2 acres, more or less, out of the South West corner of said tract; conveyed by deed of record prior to the 15th day of April 1918, containing 38 acres, more or less."

2. "the Southeast quarter of the Southeast quarter of said Section 13 (save and except lots and parcels aggregating 16 acres, more or less, off of the West side of said forty acre tract and conveyed by deeds prior to the 15th day of April 1918, containing 24 acres herein, more or less."

3. "also a part of the Southeast quarter of the Northwest quarter of said Section 13, Township 13 North, Range 30 West, described as follows: Beginning at the North East corner of said forty acre tract, and running, thence South 670 feet; thence in a northwesterly direction 420 feet to the South East corner of a lot deeded to A. N. Cole; thence in a Northeasterly direction 210 feet; thence in a Northwesterly direction to the East line of County Road known as the Fayetteville and Van Buren Road; thence in a Northeasterly direction bordering on the East line of said road to the North line of said 40 acre tract; thence East to the beginning point, containing 8 acres, more or less."

4. This description purports to convey a part of the Northeast quarter of the Northeast quarter, Section 24, Township 13 North, Range 30 West, save and except that part lying South and West of the old Fayetteville and Van Buren public road. Then follows these three exceptions: (a) "The lots embraced in the First Division of Winslow Park"; (b) "Two lots and 13 feet of additional

frontage adjoining said lots and having the same depth in the Second Division of Winslow Park heretofore conveyed to Mrs. Caldwell McFedden," and; (c) "A parcel of land adjoining the First Division of Winslow Park but not a part thereof, heretofore sold to James A. Ward, Jr., comprising about one-third of an acre."

An examination of the above copied descriptions reveals that it is necessary to refer in many instances to other conveyances. It will be noted that in no instance is the book and page indicated where the conveyance may be found, and in some instances neither the grantor nor the grantee is mentioned, nor is the exact date of the conveyance indicated.

We are cognizant of the well established rule that a description is good if it contains a key by which it may be made good, but in this case we are forced to conclude that the descriptions copied above contain no such key. We are forced to this conclusion for the reasons set out hereafter. First, it is certain that appellant has introduced no evidence to show that the description contained in the deed can be made definite and certain by referring to the records, and she made no request for time and opportunity to do so. Second, the chancellor being confronted with the lack of evidence to show a definite description appointed a Master to see if a definite description could be obtained. The Master's report shows that he made an examination of the records in the recorder's office and was still unable to obtain a description. Appellant had ample opportunity to cross-examine the Master but did not do so, and she entered no objections. Under these circumstances and under the facts as shown by the record we must conclude that the chancellor was justified in finding that appellant had not furnished appellees a marketable or merchantable title due to the defects in the description of the lands, and to that extent he must be affirmed.

In assessing damages in favor of appellees the trial court rendered judgment in favor of appellees in the sum of $7,011.86. A careful review of the entire record con-

vinces us that this judgment for damages should be reduced by $1,600, leaving judgment in favor of appellees in the amount of $5,411.86.

The record in this case is lengthy and it is impossible to determine to a mathematical certainty what damages appellees have suffered, but we are thoroughly convinced that a reduction in the judgment to the extent above mentioned is justified. There are several grounds upon which we base this conclusion.

The total number of items of damages allowed by the chancellor totals $100 less than the judgment rendered. Appellees disposed of a large water tank on the premises and arbitrarily fixed the value at $300 which the court accepted. We note that appellees' own witness stated that the tank was worth $750. The trial court correctly held that appellees' damage for improvements placed on the property would be the amount they had increased its value. Pursuant to this ruling, appellees undertook to prove the value of the premises at the time of the trial. Appellee Meadors testified that the premises were worth $12,000, thus placing the enhanced value at $6,000. This was so unreasonable in the face of the testimony that the chancellor correctly refused to accept this figure. Appellees introduced George D. Kennick, a cattle raiser and real estate man, to prove the enhanced value of the land. This witness' testimony, however, is inconclusive and must be discounted to some extent. The essence of Kennick's testimony was that as a former appraiser of farm lands for the U. S. Government he would approve a loan on this farm for $5,000, and stated that the value in his judgment would be something less than twice that amount, or approximately $10,000. He made this estimate of the value of the farm from a somewhat casual examination just before the trial. He was not at first allowed to say what value he would have placed on the farm as of December 1, 1951, since the value as of that date was fixed by the court to be $6,000. Without this information there is no way of knowing to what extent the witness thought the farm had been enhanced in value

by reason of the improvements placed thereon. On cross-examination he was asked: Q. "Taking the tract as a whole, the whole 400 acres, can you give us your opinion as to its value in December 1951?" A. "I don't believe I can because I wasn't over it all in '51, we just went over it all, didn't go over it all yesterday but went over most of it, we could drive, but I never got out of the car but about once because it was bad weather up there." The above answer manifestly throws some doubt on the witness' ability to accurately judge the value of the farm shortly before the trial. Although Kennick was called by appellees to testify to the enhancement in value because of improvements placed thereon, yet it is obvious that he could not do so without knowing what the improvements were. In this connection he was asked if he could give the court some idea as to the value of the improvements and he gave this answer: "I can't answer that because I don't know. Because you have got to measure that land to tell. I could give an estimation of it, if I knew how many acres he had cleared." On the whole it appears to us that the witness did not make a careful examination of the farm, including the improvements supposed to have been placed thereon by appellees, and he gave no convincing reasons to justify his estimate that the farm was worth $10,000. Testimony given under these circumstances is subject to evaluation by this Court on a trial de novo. In the case of *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477, this Court was called upon to evaluate the testimony of certain witnesses as to damage done to land, and we said: "It is true that one or more witnesses for appellee placed the damage at a sum equaling the verdict returned by the jury, but the cross-examination of these witnesses failed to show any fair or reasonable basis for the opinion." Likewise in the case of *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, where a similar question was involved, this Court said: "Where a witness gives his opinion as to damages, such testimony must be considered in connection with the related facts upon which the opinion is based."

The trial court permitted appellees to introduce a large number of cancelled checks, not to show the extent of enhancement of value but to show that improvements were made. Even for this limited purpose, it seems to us the checks had little evidentiary value. Quite a few of the checks were dated before the contract was executed, and some show they were given for seed and fertilizer. Other checks were given for tools and implements which still were of value to appellees and did not enhance the value of the farm.

In the complaint appellees admit having received $500 for timber cut off the land in question. Appellant should have been given credit for this amount even though no testimony was introduced on that point. The case of *Bonacci* v. *Cerra,* 134 Neb. 476, 279 N. W. 173, announces the applicable rule this way:

"Statements, admissions and allegations in pleadings [upon which the case is tried] are always in evidence for all the purposes of the trial; they are before the court and jury, and may be used for any legitimate purpose."

It is our opinion that, under the facts and circumstances of this case, appellees should not have been allowed to recover $623.83 as interest on the money they had paid on the purchase price. It is true that appellant had the use of this money since the date of payment, but it is also true that appellees had had the use of the farm since the date of the contract to the time of trial, and apparently have possession now. This being true, we think appellees would be entitled to interest only from date of the decree of the trial court. This conclusion appears to be in harmony with the better rule. Pertinent to this question we find this statement in 171 A. L. R. at page 851:

"Where it appears in an action to recover back payments made under a contract for the sale of land which was procured by fraud or duress that the purchaser had possession of the property for all or a part of the time

elapsing after the execution of the contract, the courts seem to feel that it would be inequitable to permit the purchaser to receive interest on the sums paid by him during the period in which he had possession of the property with the corresponding right to enjoy the rents and profits thereof."

In 55 Am. Jur. 939 under the title "Vendor and Purchaser" and the subtitle "Interest on Payments Recoverable" this statement is made: "If the purchaser has been let into and remains in possession, he is not entitled, it has been held, to interest on the purchase money paid when he seeks to rescind the contract for the vendor's fraud or default." Sustaining the above rule the case of *Robinson, et al.* v. *Bressler, et al.,* 122 Neb. 461, 240 N. W. 564, 90 A. L. R. 600, is cited in which this question was discussed extensively under facts similar to the ones here. The court there, after discussing an allowance of interest by the trial court, made this statement: "There appears to be no occasion for the computation of interest at all up to the time of trial. By their voluntary acts the defendants had possession of the property and plaintiffs had possession of $125,000 of the purchase price which had been paid to them." We think this rule which disallows interest under the circumstances of this case is not only sound but equitable.

It follows from the above that the trial court is affirmed in holding that appellees were entitled to a rescission of the contract, but the judgment for damages rendered by the trial court in the amount of $7,011.86 should be reduced to the amount of $5,411.86, and it is so ordered.

Modified and affirmed.

Justice McFaddin concurs.

Ed. F. McFaddin, Associate Justice (Concurring). I completely concur with the result reached in this case; but on the matter of the title, I follow a different method of reasoning from that expressed in the majority opinion.

The first question decided by the majority is that the appellees were entitled to a rescission of the contract, because the description contained in the deed, proffered by the appellant to the appellees, was indefinite. To me, the description matter seems immaterial. The fact that the appellees went into possession of certain lands clearly showed that they knew what lands they were getting. It would have been very easy to have caused the lands to be surveyed while the appellees were in actual possession. In short, I think the possession taken by the appellees constituted a waiver of any question of insufficiency of description.

But, I think the appellees were entitled to a rescission of the contract of purchase because the uncontradicted evidence shows that there was an outstanding one-half interest in the mineral rights; that there was nothing in the *written contract* that exempted this one-half outstanding mineral interest; and that the appellants failed to prove by the quantum of proof required in such cases—that is, by evidence clear, cogent and convincing — that the original oral agreement was that half of the mineral rights would not go to the appellees. In *Orlicek* v. *Dockins,* 224 Ark. 593, 275 S. W. 2d 630, there was an outstanding mineral interest which the seller did not tender to the buyer, and we said: "We do not think that a merchantable title was tendered." So, in the case at bar, there was an outstanding mineral interest that was not tendered by the appellant, and thus the appellant failed to tender a merchantable title.

On the reduction of the damages, I thoroughly agree with the majority.

MORRIS *v.* SPARROW.

5-854 287 S. W. 2d 583

Opinion delivered February 20, 1956.

[Rehearing denied March 26, 1956.]

*Ben B. Williamson,* for appellant.

*Caldwell T. Bennett,* for appellee.

SAM ROBINSON, Associate Justice. Appellee Archie Sparrow filed this suit for specific performance, seeking to compel appellant Morris to deliver possession of a certain horse, which Sparrow claims Morris agreed to give him as part consideration for work done by Sparrow. The appeal is from a decree requiring the delivery of the horse.

Morris owns a cattle ranch near Mountain View, Arkansas, and he also participates in rodeos. Sparrow is a cowboy, and is experienced in training horses; occasionally he takes part in rodeos. He lives in Florida; while at a rodeo in that state, he and Morris made an agreement that they would go to Morris' ranch in Arkansas and, later, the two would go to Canada. After arriving at the Morris ranch, they changed their plans and decided that, while Morris went to Canada, Sparrow

would stay at the ranch and do the necessary work. The parties are in accord that Sparrow was to work 16 weeks for a money consideration of $400.00. But, Sparrow says that as an additional consideration he was to receive a brown horse called Keno, owned by Morris. However, Morris states that Sparrow was to get the horse only on condition that his work at the ranch was satisfactory, and that Sparrow failed to do a good job. Morris paid Sparrow the amount of money they agreed was due, but did not deliver the horse.

At the time Sparrow went to Morris' ranch, the horse in question was practically unbroken; but during his spare time, Sparrow trained the horse and, with a little additional training, he will be a first class roping horse.

First there is the issue of whether Sparrow can maintain, in equity, a suit to enforce, by specific performance, a contract for the delivery of personal property. Although it has been held that equity will not ordinarily enforce, by specific performance, a contract for the sale of chattels, it will do so where special and peculiar reasons exist which render it impossible for the injured party to obtain relief by way of damages in an action at law. *McCallister* v. *Patton,* 214 Ark. 293, 215 S. W. 2d 701. Moreover, specific performance is authorized by Ark. Stats., § 68-1468, which provides: "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. . . ." Certainly when one has made a roping horse out of a green, unbroken pony, such a horse would have a peculiar and unique value; if Sparrow is entitled to prevail, he has a right to the horse instead of its market value in dollars and cents.

Morris claims that the part of the agreement whereby Sparrow was to receive the horse was conditional,

depending on Sparrow doing a good job, and that he did not do such a job. Both parties were in Chancery Court and the Chancellor had a better opportunity than this Court to evaluate the testimony of the witnesses; we cannot say the Chancellor's finding in favor of Sparrow is against the preponderance of the evidence.

Finally, it is appellant's contention that there was an accord and satisfaction between the parties which now precludes appellee Sparrow from recovering the horse. After the 16-week period expired, according to the undisputed evidence, Morris owed Sparrow a balance in money of $167.00. The parties met at a bank at Mountain View where Morris gave Sparrow a check for that amount and made a notation on the check, "labor paid in full." Sparrow cashed the check, but he says that he only accepted it in payment of the money due, and that Morris still owes him the horse. Morris says the check was payment in full for everything he owed Sparrow; that the agreement about the horse was contingent on Sparrow doing a "good job," and that he had failed in that respect.

Does the notation on the check, "labor paid in full," conclusively show a settlement in full, or an accord and satisfaction, which bars Sparrow from enforcing the agreement as to the horse? We do not think so. In the first place, there was no dispute between the parties as to the amount of money due. Further, it does not appear that, at the time the check was delivered to Sparrow at the bank, it was clear that Morris did not intend to deliver the horse as agreed. In fact, while still at the bank, Morris agreed to turn the horse over to Sparrow, but wanted to do so on condition that Sparrow would not sell or dispose of him; Sparrow refused to accept the horse on that condition. Moreover, the check was for the correct amount of money, and if Sparrow had refused the check at that time, eventually he would have had to accept a check for that same amount, regardless of the disposition of the question about the horse. It is clear that the check was accepted by Sparrow only as payment in full of the money due, without considering the question

about the horse. Sparrow testified that he first learned that Morris did not intend to make an unconditional delivery of the horse when they were "down at the bank and he paid me in full." Obviously, Sparrow was referring to payment in full of the money due; at no time did he recede from the position that he was entitled to the horse. If there had been a disagreement between the parties as to the amount of money owed by Morris, and Sparrow had knowingly cashed a check marked "payment in full," perhaps he would have been bound by the notation on the check; but such is not the case here. The Court said, in *Worcester Color Co.* v. *Henry Wood's Sons Co.,* 209 Mass. 105, 95 N. E. 392: "It is not every use of the words 'in full to date,' or equivalent phrase, which constitutes an accord and satisfaction in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as to make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made. . . ." See also notes 34 A. L. R. 1055, 75 A. L. R. 923. Here, it appears that Sparrow, in accepting a check marked "labor paid in full," accepted it only as payment in full of the money due, about which there was no controversy.

Affirmed.

SCOTT *v.* LEGRANDE.

5-864 287 S. W. 2d 456

Opinion delivered February 27, 1956.

*Etheridge & Sawyer,* for appellant.

*Ovid T. Switzer* and *W. P. Switzer,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal from a judgment of the Ashley Circuit Court dismissing the appellant's action to have a materialmen's lien declared on the property of appellees.

The appellant contends that the notice mailed to the appellees is a substantial compliance with Sec. 51-608, Ark. Stats. 1947.

The notice was sent by registered mail and reads as follows:

"Mr. and Mrs. Willis LeGrande
500 N. Arkansas St.
Crossett, Arkansas
Dear Mr. and Mrs. LeGrande:

"This is to notify you that within ten days after you receive this notice, we will file lien on your property located at 500 N. Arkansas in Crossett, Ark., for materials bought and put in this property.

"Unless provisions are made within this time to satisfy the indebtedness.

"Signed: VICTOR SCOTT
Triangle Bldrs. Supply"

The notice is defective because it does not set forth in the notice the amount claimed and from whom the same is due. The notice was not served in person by anyone authorized to serve such notice as required by the above cited section of law.

This court has held that the materialmen's lien statute is in derogation of the common law and that anyone seeking its benefits must show a substantial compliance with the statute. *Doke, Admr.* v. *Benton County Lumber*

*Co.,* 114 Ark. 1, 169 S. W. 327; *Conway Lumber Company* v. *Hardin,* 119 Ark. 43, 177 S. W. 408.

The mailing of the notice by registered mail to the appellees is an insufficient compliance with this statute. The Supreme Court of Illinois, under a statute similar to ours, in the case of *Sykes Steel Roofing Company* v. *Bernstein,* 156 Ill. App. 500, held as follows:

"The notice of the subcontractor's claim required by the statute to be served upon the owner was sent to Bernstein & Wolf, such owners, through the United States mail by registered letter. Such method of service of such notice is not a compliance with the statute and was abortive as a foundation on which to rest the right given by the statute to a recovery against the owners. The statute requires the service of such notice to be personal, and in this regard the statute being in derogation of the common law, a substantial fulfillment of its conditions cannot be dispensed with nor a recovery sustained when it appears a material requirement of the statute has not been pursued."

We think the holding in the above case is the correct statement of the law applicable to the facts in this case under the above statute. Finding no error in the trial court's judgment, the case is affirmed.

[redacted]

EDWARDS *v.* KNOWLES.

5-857 287 S. W. 2d 449

Opinion delivered February 27, 1956.

[redacted]

*Brockman & Brockman* and *Sam M. Levine,* for appellant.

*Reinberger & Eilbott,* for appellee.

J. Seaborn Holt, Associate Justice. This appeal questions the action of the Jefferson Probate Court in admitting to probate the will of John W. Knowles, dated August 8, 1949.

For reversal appellants rely on the following points: "1. That the evidence and record conclusively show that the will was not executed at the time, place, or in the manner, alleged by the proponent of the will, and no other proof was submitted bearing on the execution of the will. 2. The proponent of the will has failed to produce testimony as to the circumstances attending the signing of the will and that there is no showing that the essential requirements in the execution of the will, as prescribed under Section 19 of Act 140 of the General Assembly of 1949, [now § 60-403 Ark. Stats. 1947 Supplement] were met and complied with."

It appears to be conceded that the signature of "John W. Knowles" to the will is authentic and that the testator executed it at a time when he possessed mental capacity to do so, and without undue influence. The will recited in part:

". . . IN TESTIMONY WHEREOF, I have hereunto set my hand, published and declared this to be my last will and testament in the presence of witnesses named below this 8th day of August, 1949.

/s/ John W. Knowles

John W. Knowles this day signed, published and declared the above as and for his last Will and Testament in our presence and at his request we have subscribed our names hereto as attesting witnesses in the presence of the testator and in the presence of each other.

ALL DONE this 8th day of August, 1949.

/s/ S. L. McCohn
/s/ Lillie M. Smith."

As indicated the testator signed the will. The living witness to the will, "S. L. McCohn" [sister-in-law of the testator] testified that she was called to the office of Mr. Toney, an attorney, by the testator and witnessed the will there; that, Mr. Toney was reading the will to the testator when she walked into his office; that, she saw the testator sign it and then at his request she signed it; that, the other witness, Lillie M. Smith [now deceased] was present and also at the testator's request signed the will in S. L. McCohn's presence and in the presence of the testator. Five other witnesses identified the signature of "Lillie M. Smith," the deceased witness to the will.

In their argument appellants say: "There is only one issue raised by the appeal in this cause. It can be resolved in the answer to the question as to whether or not the widow of John W. Knowles, as the petitioner for the probate of his will, has discharged the burden of proof devolving on her to show that the purported will was executed and witnessed in conformity with the Statutes.

"If the fantastic and incredible narrative of the widow and her sister attains the dignity of preponderant proof that the will was executed by Knowles and witnessed by the sister of the widow in Mr. Toney's law office, then, concededly, there is no validity to the contention of appellants that this matter should be reviewed in this Court. . . ."

In support of this contention they offer the testimony of two witnesses, Mr. Toney's secretary, Mrs. Armstrong, and that of Dr. Lawlah. Their testimony, however, which is negative in nature, can afford them little comfort. Mrs. Armstrong testified: "Q. And now can you tell this court the will wasn't executed in your office? A. No, I wouldn't say it wasn't, but I do not remember anything about the execution of it. . . . Q. If the court should ask this question 'Shirley Armstrong, you are under oath, tell us, was the will executed in Mr. Toney's office, or was it not?' You cannot give the answer? A. No. . . . Q. Under that condition, you certainly will not tell the court it was not executed in your office? A. No." [Tr. pages 72 & 73.]

In an effort to show that Knowles was confined to his bed and could not have gone to Mr. Toney's office to execute the will on August 8, 1949, they offered the testimony of Dr. Lawlah, who testified: "Q. Are you willing to swear he would not walk out August 8th? A. I was away, so I couldn't swear what happened on August 8th. Q. It has been sworn in this courtroom, that on August 8, 1949, he went to Mr. H. K. Toney's office and signed a will, which will is marked McCohn Exhibit 'A.' Could you swear he wasn't physically able to walk down town, or go in a car, to Mr. Kemp Toney's office? A. I could not. . . . Q. You didn't see this man from July 26th to September 1st? A. No."

After a review of all the evidence we have concluded that the findings of the trial court were not only not against the preponderance of the testimony but are supported by the great preponderance thereof.

On the general rule applying to the execution of wills we said in *Anthony* v. *College of the Ozarks,* 207 Ark. 212, 180 S. W. 2d 321, "No presumption of the due execution of a will arises from the mere production of an instrument purporting to be a last will and testament. . . . Where, however, in proceedings for the probate of an instrument as a will it appears to have been duly executed as such, and the attestation is established by proof of the handwriting of the witnesses or otherwise, although their testimony is not available, or they do not remember the transaction, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with all the requirements of law, including those relating to publication, attestation in the presence of the testator, and the affixing of the testator's signature prior to those of the witnesses."

Affirmed.

ACLIN *v.* MANHATTAN CREDIT CORPORATION.

5-877 287 S. W. 2d 451

Opinion delivered February 27, 1956.

[redacted]

*J. E. Lightle, Jr.,* for appellant.

*Talley & Owen* and *William L. Blair,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Manhattan Credit Corporation, brought this suit to recover $1,200 and interest alleged to be due on a note which was secured by a mortgage on an automobile. Material facts appear not to be in dispute and were stipulated as follows: "On March 15, 1955, the defendant, Mrs. Earnest Hughes, purchased from the defendants, Searcy Truck and Tractor Company, at their place of business at Searcy, Arkansas, the vehicle involved herein. Said purchase was completed about 4:00 p. m. on said date and Mrs. Hughes gave defendants a check upon the First National Bank of Little Rock, Arkansas, in the amount of $3,058.50 in full payment of the purchase price of said vehicle and including the sales tax and cost of the 1955 license. The defendants gave to Mrs. Hughes on the same afternoon the customary dealer's bill of sale," . . . which contained this provision, "And we hereby covenant that we are lawful owners of the above described motor vehicle, that the same is free from all incumbrances except *None.* That we have good right to sell same, and that we will warrant and defend the same against all lawful claims and demands whatsoever except *None.*"

"Defendants, on the same afternoon, accompanied the said Mrs. Hughes to the license bureau at Searcy, Arkansas, and assisted her in making application for an

Arkansas registration certificate and title certificate and giving their check for the sales tax and license tax; said application being attached hereto. . . . That said check was twice deposited for collection by the defendants, first, on March 19, 1955, and next on March 25, 1955, and was returned by the First National Bank of Little Rock, marked: 'Unable to locate account.' That the said Mrs. Earnest Hughes, Jr., had no account at said bank at said time. That on March 21, 1955, the said Mrs. Earnest E. Hughes applied to the plaintiffs, Manhattan Credit Corporation, for a loan on said automobile and on the 23rd day of March, 1955, the same was granted and she thereupon executed the note and mortgage described in plaintiff's complaint, the original of which are hereto attached. . . . That at the time said loan was made the said Mrs. Hughes had in her possession, and delivered to plaintiffs an Arkansas Registration Certificate and an Arkansas Certificate of Title in her name as the owner of the vehicle, showing no liens or encumbrances. That plaintiff advanced to the said Mrs. Hughes the sum of $1,200.00 and took her said note in the amount of $1,694.40, which included interest in the sum of $159.13, insurance premiums as follows: Collision and Comprehensive, $224.00, Liability, $43.50, Life Insurance, $67.77. That no amount has been paid upon plaintiff's note or mortgage and there is now due the plaintiffs the amount of $1,200.00, plus accrued interest of $38.00. That on or about April 1, 1955, the defendants, Searcy Truck and Tractor Company, repossessed the vehicle at the home of Mrs. Earnest E. Hughes, Jr., in Lonoke County. That the plaintiff, Manhattan Credit Corporation, after execution of said note and mortgage, obtained a certificate of title to said vehicle showing a lien in their favor; the same being attached hereto. . . ."

The trial court, sitting without a jury, found that Mrs. Hughes had obtained possession of the automobile by fraudulent means amounting to larceny but that "The issuance of a certificate of title to said vehicle (by the Arkansas Revenue Department) pursuant to the bill of sale, and the application for title showing no liens there-

on, gave to Mrs. Hughes, sufficient title to said vehicle to convey the same to innocent third parties. The plaintiff, the Manhattan Credit Corporation, was entitled to rely upon the certificate of title, issued by the State of Arkansas, in making said loan to the defendant, Mrs. Earnest Hughes, as against the defendant, the Searcy Truck and Tractor Company. By the mortgage upon said vehicle they obtained a superior title thereto as against the defendant, the Searcy Truck and Tractor Company,'' . . . and rendered judgment for appellee in amount of $1,200 plus $38 interest. This appeal followed.

Appellant says: ''. . . the issues presented by this appeal seem to narrow down to the question of whether the issuance of an Arkansas Certificate of Title is sufficient to give title to one who has secured possession of an automobile by larceny.''

Here the dealer, appellant, not only gave Mrs. Hughes possession of the car and a bill of sale, in which there was a covenant and warranty that the dealer, appellant, was the lawful owner of the automobile and same was free from all incumbrances, but in addition helped her to obtain a certificate of title under the provisions of our ''Motor Vehicles—Certificate of Title Act,'' §§ 75-101—75-191, Ark. Stats. (Supp.) 1947. Section 75-133, Par. 4 (b) provides that every owner who applies for a certificate of title must, among other things, ''when such application refers to a new vehicle [as here] purchased from a dealer the application shall be accompanied by a statement by the dealer or a bill of sale showing any lien retained by the dealer.'' As indicated, the bill of sale, showing no incumbrances was presented to the State Revenue Department and a certificate of title was duly issued to Mrs. Hughes based upon the bill of sale. In the circumstances, we hold that appellee had a right to rely upon the certificate of title and in good faith made the loan to Mrs. Hughes and was in the position of an innocent third party. The applicable rule is announced in 18 A. L. R. 2d 813 where it is stated: ''A situation frequently arises where the seller of an automobile, in taking a check in payment,

delivers the motor vehicle and certificate of title to the purchaser, and the latter transfers it to an innocent purchaser for value before the dealer learns that the payment check is forged or otherwise bad. In such circumstances a preliminary issue is raised as to whether the original purchaser receives any title at all which he can convey to an innocent purchaser. If it is found that he received even a voidable title, it is generally held that the innocent purchaser, relying upon the possession of the vehicle and the certificate of title, will be protected against the claims of the original seller.'' While Mrs. Hughes' title was voidable, it does not change the situation here. Our holding in the case of *Pingleton* v. *Shepherd,* 219 Ark. 473, 242 S. W. 2d 971, applies with equal force here: ''Section 68-1424, Ark. Stats., provides: 'Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.'

''This section of the statute is a part of the uniform sales act (§ 24), and is applicable to the situation presented here. The seller, Wortham, had a voidable title to the automobile by reason of having obtained it by falsely representing the check he gave for the purchase price to be good. But, his title had not been avoided at the time he sold the car to Shepherd, who bought the automobile in good faith, for value, having paid $1,455 for it, and without notice of the seller's defect of title. Shepherd, therefore, according to the statute, acquired good title to the automobile.''

Finding no error, the judgment is affirmed.

Opinion delivered February 27, 1956.

*Gene P. Houston,* for appellant.

*Neill Reed,* for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation results because the mortgagee in a chattel mortgage failed to have the mortgage recorded and also failed to observe the Statute and endorse the mortgage before filing it (§ 16-201, Ark. Stats.). Appellants, O. M. Pate and wife,[1] filed this suit in the Chancery Court against Troy Raney and wife, (a) to obtain judgment for $4,500.00 and interest on a series of notes, (b) to foreclose a vendor's lien on certain lands, and (c) to foreclose a chattel mortgage on certain described cattle. The Chancery Court awarded judgment in favor of the Pates for the money claim and also decreed a foreclosure of the vendor's lien

[1] While Mrs. Pate is a party, all matters herein were handled by Mr. Pate.

on the lands; so those issues pass out of this case entirely. Here, we are only concerned with the various issues arising in connection with the chattel mortgage.

The chattel mortgage from Raney to Pate was dated October 5, 1953, and was filed, but not recorded, in the office of the Circuit Clerk on October 7, 1953. It subsequently developed that the chattel mortgage had not been endorsed, as required by § 16-201, Ark. Stats.; and, as aforesaid, that omission caused this litigation. The Pate complaint, duly verified, was filed December 13, 1954, and alleged: that Troy Raney had left the State; that the cattle would be lost unless impounded; and that an immediate order should be made for the care and possession of the cattle. There was a *lis pendens* filed on the land, but not on the personal property. On December 21, 1954, the Court appointed the plaintiff, O. M. Pate, as receiver, under a bond of $750.00, to take charge of and care for the cattle and make report thereof. Pate made bond and took the oath as receiver. Report of the receiver was filed January 18, 1955, stating certain cattle to be in his possession.

On February 14, 1955, W. R. Griffin intervened in the foreclosure case of Pate v. Raney, alleging: that Griffin obtained judgment against Troy Raney and wife in the Cleburne Chancery Court in the case of Griffin v. Raney; that the judgment was unsatisfied in the amount of $2,269.17; that execution had been issued thereon on December 28, 1954; and that Griffin's execution lien was superior to Pate's chattel mortgage.[2] In answer to Griffin's intervention, Pate alleged that he took possession of the personal property on October 10, 1954, as mortgagee, and that his rights were superior to the lien of Griffin's execution.

With issues joined as to the superiority of the execution lien and of the chattel mortgage, the cause was tried on April 19, 1955; and resulted in a decree giving Pate and wife judgment for debt with the same as a lien

[2] Evidently this was on the theory that (1) Pate's mortgage was not endorsed; and (2) Pate had never taken actual possession of the cattle at any time, either as mortgagee or receiver.

on the lands;[3] but holding that Pate had no lien on the cattle since the mortgage was not endorsed and there had been no possession taken by Pate. The decree further found that Griffin's intervention should be dismissed for want of equity. Thus, as regards the cattle, neither Pate nor Griffin was allowed any lien by the decree of April 19, 1955, and both have duly appealed—Pate by direct appeal and Griffin by cross-appeal.

But further issues arose in the same case. Immediately after the said decree of April 19th, Griffin had an execution issued against Raney and wife for $2,269.87 and had the execution served on the cattle described in Pate's chattel mortgage. Pate then remembered that on April 2, 1955, he had gone to the Clerk's office and finally endorsed his chattel mortgage, as required by law, although the fact of such endorsement was never developed in the trial of April 19th. Based on these matters, Pate filed (1) a motion to quash Griffin's execution of April 19th and (2) a motion to modify the said decree of April 19th. There was a trial on these two motions on May 6, 1955, at the same term of the Court as the April 19th decree; and resulted in (1) a quashing of Griffin's execution and (2) a refusal to modify the decree of April 19th or to allow Pate to make proof of his actions of April 2nd in endorsing the chattel mortgage. From this trial of May 6, 1955, as also from the said decree of April 19th, both parties have duly and seasonably appealed—Pate by direct appeal and Griffin by cross-appeal. Pate lists five assignments on the direct appeal, and Griffin lists four assignments on the cross-appeal. We will consolidate the assignments under suitable topic headings.

I. *The Refusal of the Court on May 6th to Modify the Decree as Requested by Pate.* The purpose of Pate's efforts to modify the April 19th decree was to show that on April 2nd Pate had endorsed his chattel mortgage, as required by Statute. In refusing to allow the case to be reopened, the Chancellor said that all the information was available to Pate on April 19th at the trial, and that Pate

[3] As previously recited, the foreclosure of the lien on the lands is not questioned in this case.

was not entitled to have two trials in the case. We cannot say that the Chancellor abused his discretion in refusing to reopen the case. *Fromholz* v. *McGahey,* 120 Ark. 216, 179 S. W. 360; *Halk* v. *Soncini,* 208 Ark. 736, 187 S. W. 2d 960; *Troxler* v. *Spencer,* 223 Ark. 919, 270 S. W. 2d 936.

II. *The Action of the Court in Holding That Griffin Had No Lien on His Execution of December 28, 1954.* At the trial on April 19th Griffin introduced his execution which had issued in the case of Griffin v. Raney on December 28, 1954. It was shown that his execution had not been served and had been returned by the Sheriff. The Court held this execution was no lien on the cattle involved in this litigation; and the Court was correct. An execution must be returned within sixty days (§ 30-431, Ark. Stats.). This one was returned earlier; and when the Sheriff returned the execution unserved—whether for lack of indemnity bond or other good reason—then the execution became "*functus officio*"; that is, its power had been exhausted.

III. *The Action of the Court on May 6th in Quashing Griffin's Second Execution.* As previously recited, after the trial on April 19th (in which the Court held that neither side had a lien on the cattle), Griffin went immediately to the Clerk's office and had a second execution issued against Raney. In the trial on May 6th, the Court quashed this second execution because it recited that it was issued in the case of Pate v. Raney instead of the case of Griffin v. Raney. We need not consider the correctness of that reason, because in Topic IV *infra* we are holding that Pate should have been awarded a lien, in the decree of April 19th, on the cattle described in his mortgage. With that lien declared, naturally Griffin's second execution was inferior to such lien, and such holding disposes of the respective claims made.

IV. *The Refusal of the Court in the Decree of April 19th to Award Pate a Lien on the Cattle Described in His Chattel Mortgage.* In the decree of April 19th, the Court refused Pate a lien on the cattle described in his mort-

gage; and in this ruling the Court was in error. When it was shown that Griffin's execution of December 28th was not a lien on the cattle, then there was no adverse claimant to Pate's mortgage, and the issue was whether the mortgage was a lien as between Pate and Raney, even though the mortgage had never been properly endorsed. An unfiled, unendorsed chattel mortgage is good between the parties: the purpose of endorsing and filing is to make the mortgage valid as against third persons. *Ringo* v. *Wing,* 49 Ark. 457, 5 S. W. 787; *Thornton* v. *Findley,* 97 Ark. 432, 134 S. W. 627; *Ebbing* v. *Hassler,* 188 Ark. 766, 68 S. W. 2d 96. When Griffin's first execution failed, then there was no third person claiming a valid lien, and Pate's mortgage was good as against Raney. The Court should have so decreed.

V. *The Cattle Described in the Chattel Mortgage.* The chattel mortgage from Raney to Pate described the following property:

"1 Red Cow about 6 years old, with White Face Heifer Calf; 1 Brown Jersey about 5 years old, with two calves, 1 Bull and 1 Heifer; 1 Brown Jersey Cow about 8 years old, with White Face Heifer Calf; 1 White Face Heifer about two years old, no calf; 1 White Face Heifer about 18 months old; 1 Red Heifer about 16 months old." There is no language in the mortgage to cover any increase; and our Statute allows the increase of cows to be included only when the mortgage so states (§ 51-1003, Ark. Stats.). Therefore, all that Pate was entitled to was a lien on the specific animals described in his mortgage. So, as to these, the decree is reversed and the cause is remanded, with directions to award Pate a lien on the specific animals. In all other respects the decrees are affirmed.

VI. *Other Assignments.* Pate claims that the Court committed error in refusing to allow him his expenses as receiver; but the Court evidently found that he had never

actually taken possession of the property; so we leave that part of the decree undisturbed.

The costs of this appeal are to be paid equally by Pate and Griffin.

UNITED LOAN & INVESTMENT COMPANY *v.* CHILTON.

5-862 287 S. W. 2d 458

Opinion delivered February 27, 1956.

*John Marable,* for appellant.

*Briner & Briner,* for appellee.

MINOR W. MILLWEE, Associate Justice. The issue here is the constitutionality of Act 160 of 1955 insofar as it purports to invest municipal courts with jurisdiction of the subject matter in matters of contract where the amount in controversy is in excess of $300, excluding interest.

Appellant filed suit against appellee in the Municipal Court of Benton, Arkansas, for $330.00 plus interest allegedly due on a promissory note executed by appellee. The motion of appellee to dismiss for lack of jurisdiction was overruled by the municipal court. Upon appellee's failure to plead further, judgment was entered in favor of appellant for $415.00 and costs, as prayed in the complaint. On appeal to circuit court the motion of appellee to dismiss was sustained on the ground that municipal court had no jurisdiction in matters of contract where the amount in controversy exceeded the sum of $300.00, ex-

clusive of interest, and that the circuit court acquired no jurisdiction on appeal.

The correctness of the circuit court's action in sustaining the motion to dismiss depends upon whether the Legislature had the power and authority to enact that part of Act 160 of 1955 which reads:

"Section 1. That Section 22-709 of Arkansas Statutes (1947) be (the same is hereby) amended to read as follows:

"The Municipal Courts shall have original jurisdiction co-extensive with the County wherein the said Court is situated over the following matters: . . .

"Exclusive of Justices of the Peace and concurrent with the Circuit Court in matters of contract where the amount in controversy does not exceed the sum of Five Hundred Dollars ($500.00), excluding interest, but exceeds Three Hundred Dollars excluding interest; . . ."

Ark. Stats., § 22-709, supra, provided that the jurisdiction of municipal courts should be concurrent with justices of the peace and with the circuit court in matters of contract where the amount in controversy does not exceed the sum of $300.00 exclusive of interest. This section was based upon and in harmony with the several provisions of the Constitution which deal with the jurisdiction of municipal and justice of the peace courts. Sections 1 and 43 of Art. 7 of the Constitution refer to municipal courts and read:

"§ 1. The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery."

"§ 43. Corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and the General

Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law, and, until the General Assembly shall otherwise provide, they shall have the jurisdiction now provided by law."

By Sec. 40 of Art. 7, justices of the peace courts are vested with jurisdiction concurrent with circuit courts, "in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest . . ."

A municipal court, like a justice of the peace court, is a court of limited and restricted jurisdiction. *Bynum* v. *Patty,* 207 Ark. 1084, 184 S. W. 2d 254. In construing the foregoing sections of the Constitution in *State ex rel. Moose* v. *Woodruff,* 120 Ark. 406, 179 S. W. 813, this court held that while the language of Art. 7, Sec. 43, was not meant to confine the jurisdiction of municipal courts to such jurisdiction as might always be exercised by justices of the peace, "it was meant as authority for the Legislature to confer such jurisdiction upon municipal courts as might under the Constitution be conferred upon justices of the peace."

Since the jurisdiction of justices of the peace in matters of contract is expressly limited by Art. 7, Sec. 40, to cases where the amount in controversy does not exceed $300.00 exclusive of interest, the Legislature was powerless to confer jurisdiction upon municipal courts in excess of said jurisdictional limit. This was the effect of our holding in *Lingo* v. *Myers,* 211 Ark. 638, 201 S. W. 2d 745, where a legislative act purporting to vest jurisdiction in municipal and justice of the peace courts to determine actions of unlawful detainer was held void, and we said: "Under the plain language of the Constitution a justice of the peace 'shall not have jurisdiction where a lien on land or title or possession thereto is involved'; and the Constitution authorized the creation of municipal courts with only 'jurisdiction concurrent with justices of the peace in civil . . . matters . . .'" See also,

*Magnet Cove Barium Corporation* v. *Watt,* 215 Ark. 170, 219 S. W. 2d 761, where we held a municipal court judgment for damages to personal property void where the amount sought was in excess of the limits prescribed by Art. 7, Sec. 40, even though the amount of recovery was within said limits.

It follows that Act 160 of 1955 is unconstitutional and void insofar as it purports to invest municipal courts with jurisdiction to hear and determine matters of contract where the amount in controversy exceeds the sum of $300.00 exclusive of interest. The judgment of the circuit court sustaining the motion to dismiss is accordingly affirmed.

MILUM *v.* CLARK.

5-879 287 S. W. 2d 460

Opinion delivered February 27, 1956.

*N. J. Henley* and *J. Loyd Shouse,* for appellant.

*Fitton & Adams,* for appellee.

George Rose Smith, J. This is a suit by the appellees, Arlis and Lela Clark, for damages resulting from a head-on collision between their car and a truck being driven by A. B. Poynor. Mr. and Mrs. Clark were injured in the accident; their infant son was killed. The action was brought against Poynor and also against the appellant, R. W. Milum, it being alleged that the collision was partly caused by Milum's negligence in allowing a cow to run at large on the highway. The jury returned a $4,500 verdict for Clark against Poynor, a $4,000 verdict for Mrs. Clark against Milum, and a $500 verdict for Clark as administrator against Milum. Milum alone has appealed.

The plaintiffs' proof shows that on the evening of February 2, 1954, the Clark and Poynor vehicles were traveling toward each other on a stretch of highway that runs through a farm owned by Milum. When the vehicles were a short distance apart Poynor swerved to his left to avoid a cow in the road, but in doing so he entered the path of the Clark car and collided with it. The plaintiffs introduced evidence to show that cattle of unknown ownership had frequently been seen on the highway in this vicinity and that the cow which caused the accident was owned by Milum.

The weak point in the plaintiffs' case lay in their proof that Milum had been negligent. There was very little evidence to show that Milum's cattle had ever been

permitted to range along the highway or that he had been careless in allowing the animal in question to escape from its fenced pasture. In attempting to prove negligence on Milum's part the plaintiffs called Doyle Eoff as a witness. Eoff testified that he reached the scene soon after the collision, but the only cow he saw was a roan animal a quarter of a mile or more off the road. He said he did not know who owned the cow he saw. Asserting surprise, plaintiffs' counsel asked Eoff if he had not previously told certain persons that he had seen a roan cow at the scene of the accident, that the cow belonged to Milum, and that it had been running the highway all summer and fall. Eoff denied having made those statements. The plaintiffs were then permitted to prove by the persons named that Eoff had made the statements mentioned. The court instructed the jury that the testimony could be considered only as affecting the credibility of Eoff and not as establishing any material fact in the case.

The admission of this testimony was error, and, since it was the principal proof having a tendency to indicate negligence on Milum's part, the error was prejudicial. There is, of course, no doubt that in a proper situation a party may contradict his own witness by showing that he has made statements contrary to his present testimony. The Civil Code so provides, and the rule has been followed in many cases, both civil and criminal. Ark. Stats. 1947, § 28-706; *Ward* v. *Young,* 42 Ark. 542; *Shands* v. *State,* 118 Ark. 460, 177 S. W. 18; *Graves* v. *Gardner,* 137 Ark. 197, 208 S. W. 785.

For such evidence to be admissible, however, the witness to be impeached must have given substantive testimony damaging to the party who seeks to attack his credibility. It is settled that inconsistent prior statements cannot be used to impeach a witness who merely fails to give the positive testimony that the party expected from him. *Doran* v. *State,* 141 Ark. 442, 217 S. W. 485; *Murray* v. *State,* 151 Ark. 331, 236 S. W. 617; *Williams* v. *State,* 184 Ark. 622, 43 S. W. 2d 731. The reason is that the prior statements are not competent evidence of the basic

fact, being hearsay, and are admissible only as bearing on the issue of credibility. *Comer* v. *State,* 222 Ark. 156, 257 S. W. 2d 564. But if the witness has testified to nothing his credibility is immaterial. Here, for example, the plaintiffs called Eoff to prove that Milum's cow had roamed the highway for several months. Eoff neither affirmed nor denied that fact. His earlier assertions were not competent to prove that the cow had actually been at large. And since Eoff's credibility was unimportant the testimony could serve no legitimate end and yet would involve the danger that the jury might treat it as substantive evidence, despite the court's cautionary instruction. Wigmore on Evidence, § 1043. It should therefore have been excluded.

It is argued by the appellee that Eoff's credibility was really in issue, for the reason that certain statements made by him on cross-examination were detrimental to the plaintiffs. This argument is unsound. It is true that Eoff testified that Milum's fences were good and that he had never seen Milum's cows along the highway. As to the fences, however, every witness who described these fences said in effect that they were excellent. An attack upon Eoff's veracity would not have justified the jury in disregarding the undisputed proof that the fencing was good. As to the other point, there is virtually a total want of proof that Milum's cattle had been permitted to run at large. Again an attack upon Eoff's veracity would not have supplied substantial evidence to support the verdict. It is evident that the exclusionary rule would be nullified if the prior statements could be introduced under the guise of testing the witness's credibility upon a point having no significance in the case.

The appellant insists that the verdicts are so contradictory as to require judgment in Milum's favor. We do not agree. The finding that Milum is liable for Mrs. Clark's injuries and for the infant's death is not necessarily inconsistent with the finding that Milum is not liable for Clark's injuries. The jury may have believed that Clark was guilty of contributory negligence not im-

putable to his passengers. And if it be argued that Clark's verdict against Poynor negatives the existence of negligence on Clark's part, the answer is that the appellant is not entitled to complain of such an inconsistency. *Leech* v. *Mo. Pac. R. Co.,* 189 Ark. 161, 71 S. W. 2d 467; *Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 64. It is also argued that the case should be dismissed for want of any substantial evidence of Milum's negligence. We need not analyze the sufficiency of the testimony, for it is evident that the plaintiffs were surprised by Eoff's failure to testify to facts that may be susceptible of proof by other witnesses. In these circumstances we are unwilling to say that the case has been fully developed. *Longer* v. *Carter,* 102 Ark. 72, 143 S. W. 575; *Reynolds Metal Company* v. *Ball,* 217 Ark. 579, 232 S. W. 2d 441.

In this court the appellees have filed a motion to require the appellant to reimburse them for the cost of a supplemental abstract of the record. See Supreme Court Rule 9 (e). This additional abstract consists of (a) testimony describing the injuries sustained by Mrs. Clark, and (b) a detailed account, including extensive quotations from the record, of the proceedings pertinent to Eoff's testimony and its subsequent contradiction.

This motion misconceives the court's purpose in revising Rule 9. Since the new rule has not previously been discussed in an opinion, an explanatory comment may be of assistance to the bar as a whole. In its old form Rule 9 required the appellant to submit a fair abstract of the record, under penalty of dismissal of the appeal if the abstract were found to be insufficient. The penalty was so severe that it caused lawyers to resolve all doubts in favor of making a complete abstract of everything in the record, whether relevant to the issues on appeal or not. The result was that nearly every abstract was unnecessarily long, to the detriment alike of the lawyer who labored to prepare it, of the client who paid for its printing, and of the judges who were required to study much irrelevant matter.

It was to remedy this situation that Rule 9 was revised in 1954. The present rule requires that the abstract consist "of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision." The penalty of dismissal for insufficiency of the appellant's abstract has been eliminated, the rule now permitting the appellee at his option to supplement an abstract thought deficient. Compensation for the cost of the supplement may be awarded by the court in its discretion.

It is the purpose of the revised rule to encourage the submission of abstracts that are confined to those matters pertinent to the points involved on appeal. By this test we find no deficiency in this appellant's abstract. Since there is no contention that the verdicts are excessive, the testimony concerning Mrs. Clark's injuries was properly omitted. The original abstract of the Eoff testimony is amply sufficient to present the issue of law involved. The appellees' motion for reimbursement is denied.

Reversed and remanded.

RHINEHARDT *v.* LIGHT, JUDGE.

5-941 287 S. W. 2d 463

Opinion delivered February 27, 1956.

*Rieves & Smith* and *Henry S. Wilson,* for petitioner.

*Kirsch, Cathey & Brown,* for respondent.

GEORGE ROSE SMITH, J. This is a petition for a writ of prohibition to prevent the Greene circuit court from hearing a personal injury suit that is pending in that court. The only question is whether the Greene circuit court or the Crittenden circuit court first acquired jurisdiction of the controversy. See *Healey & Roth* v. *Huie, Judge,* 220 Ark. 16, 245 S. W. 2d 813.

On November 5, 1955, a car driven by Ralph Agee, a resident of Greene county, collided in Crittenden county with a car driven by the petitioner, Booker Rhinehardt, who lives in Crittenden county. On December 3 Agee and his wife brought suit in the Greene circuit court for their injuries. The dispute centers upon the validity of the summons issued in that case. The summons was erroneously directed to the sheriff of Greene county, but it was sent by the Agees' attorneys to the sheriff of Crittenden county and was there served by a deputy sheriff of that county.

Thereafter Rhinehardt brought suit in Crittenden county for his personal injuries and obtained valid service of process upon the Agees. The Agees then filed a motion in the Greene county case asking that their summons be amended to show that it was directed to the sheriff of Crittenden county and that the amendment be held to relate back to the issuance of the writ. Rhinehardt appeared specially to resist this motion and to ask that the service upon him be quashed. The respondent denied the motion to quash and granted the Agees' request that the summons be amended with retroactive effect. This petition for prohibition was then filed by Rhinehardt.

Each party relies upon a prior decision of this court as controlling authority. The case urged by the petitioner is *McIntosh* v. *Ponder, Judge,* 222 Ark. 701, 262 S. W. 2d 277. That case, like this one, involved a competition for jurisdiction as between suits arising out of the same traffic accident. The first suit was filed in Jackson county, but the process was defective in that it failed to make any reference to the county in which the case was pending. The writ was directed to the sheriff of Greene county and

required the defendant to answer "a complaint filed against him in the Circuit Court of said county." Before any effort was made to correct the defect the defendant brought an action of his own in Greene county and obtained valid service. Upon an application for prohibition it was argued that the error in the Jackson county writ rendered the process defective but not void. This contention was rejected, the court holding that the writ could not be retrospectively corrected so as to cut off the intervening rights that had arisen from the filing of the second suit.

The respondent's principal authority is *Chicago Mill & Lbr. Co.* v. *Lamb,* 174 Ark. 258, 295 S. W. 27. That case did not involve a conflict of jurisdiction. There the suit was filed in Prairie county and the summons was directed to the sheriff of that county. But, as in the case at bar, the writ was sent to another county for service. In sustaining the trial court's refusal to quash the service we held that the mistake was a mere clerical error which could be corrected despite the defendant's objection.

There is manifestly no conflict between the two decisions that are cited. In the *Lamb* case the defect of directing the writ to the sheriff of the wrong county was regarded as a clerical error that could be retroactively amended, in spite of the intervening motion to quash. In the *McIntosh* case the total failure to identify the court which issued the writ was held to render the summons void, so that it could not be retrospectively corrected to defeat jurisdiction in the rival case filed by the defendant.

Here the petitioner, whose rights undoubtedly intervened between the issuance of the Greene county summons and its subsequent correction, relies strongly upon this sentence in the *McIntosh* opinion: "But in the case at bar the right of McIntosh to litigate the issues in Greene county had intervened, and the court erred in overruling the petitioner's motions to quash." The petitioner contends that it is the existence of an intervening right which should control the decision in each instance. This argument does not reach the heart of the contro-

versy. The mere presence of an intervening right can never in itself be decisive, for it is obvious that whether an amendment is to be permitted to relate back is completely immaterial unless a right of some kind has arisen in the meantime.

The real issue is whether the Greene county writ was void or merely defective. In our opinion it was not void. The defect in the *McIntosh* summons was far more serious than that now complained of. There the summons failed to inform the defendant in which of the seventy-five counties he had been sued. The writ was actually misleading, as it was addressed to the sheriff of Greene county and referred only to the circuit court "of said county." That summons failed to accomplish its basic purpose, for it did not tell the defendant where he was expected to present his defense.

No similar objection can be made to the summons in this case. In spite of the irregularity in its address, it accomplished every purpose that the writ is meant to achieve. The defect, characterized in the *Lamb* case as a clerical error, cannot fairly be said to have adversely affected any substantive right of the petitioner. Since the adoption of the Civil Code our practice has been liberal in permitting amendments in furtherance of justice. "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party." Ark. Stats. 1947, § 27-1160. It would be a step backward to deny the privilege of amendment in this instance.

Writ denied.

McFaddin, Millwee and Ward, JJ., dissent.

HENDRIKSEN *v.* CUBAGE, TRUSTEE.

5-863 288 S. W. 2d 608

Opinion delivered February 27, 1956.

[Rehearing denied April 16, 1956.]

*Earl E. Hurt* and *Alfred Featherston,* for appellant.

*Witt & Witt* and *Wootton, Land & Matthews,* for appellee.

PAUL WARD, Associate Justice. This litigation involves the construction and effect of numerous deeds with respect to two hundred acres of land in Montgomery County intended for a recreation and reunion site for the lineal descendants of Drs. A. B. Clingman and Alfred Jones, now deceased.

Appellant, a daughter of Granville Jones, (who in turn was the son of the said Alfred Jones) instituted this suit in the Chancery Court of Montgomery County against certain Trustees of the Clingman-Jones Family Corporation to recover an undivided one-half interest in the two hundred acres under the terms of her father's will. The

trial court dismissed her complaint, and also made certain findings in favor of the defendants, as later noted, from which findings and decree the appellant prosecutes this appeal.

A historical background to this litigation is necessary to an understanding of the issues, and it can be briefly stated since there is no dispute about the essential facts.

Early in the year 1923 several of the descendants of Clingman and Jones decided to purchase some land for the purpose above mentioned, and pursuant to that purpose two hundred acres were purchased from J. R. Vaught and wife. The deed, dated September 3, 1923, was regular in form and the grantees were "Granville Jones, Isaac Jones, and Granville Cubage, Trustees." We will refer herein to this deed as "Deed No. 1." The proof shows that the above grantees were to hold the land in trust for the descendants and for the purpose heretofore mentioned.

Following the execution of the above deed, two more conveyances of the same land were made, but these two deeds need be mentioned only briefly since, with one exception noted later, they have little bearing on the questions here involved. On September 16, 1924, the above named Trustees conveyed the land to Isaac J. Jones in order to facilitate borrowing money to build a dam on the property, but this venture did not materialize at that time. We refer to this deed as "Deed No. 2." Later, at one of the numerous annual reunions of the families, it was decided to give Granville Jones (father of the appellant), a retired lecturer, the right to live on and use the proceeds of the land so that he might engage in writing at his leisure. For the above purpose Isaac Jones conveyed the land to Granville Jones, as directed by the family representatives. This is referred to as "Deed No. 3."

It appears that no one objected to Granville Jones having the use of the land for the purposes above mentioned, but one Trustee in particular thought such privilege should be differently conveyed. This result was

sought by the execution of "Deed No. 4." Consequently, on May 28, 1927, Granville Jones and his wife, Jessie Lyon Jones, executed a deed to "Granville Jones, Isaac Jones, Arthur Jones, Claude Jones, and Guilford Jones, as Trustees for themselves and other lineal descendants of Drs. A. B. Clingman and Alfred Jones, deceased, and to the successors of said Trustees," conveying said land. Following the description, the deed reads:

"With full right to any one of said lineal descendants to establish on said lands a summer cottage and use the same with all privileges thereto appertaining under such rules and regulations as may be prescribed by the said trustees, but specially reserving to the grantors, Granville Jones and Jessie Lyon Jones, all profits arising from concessions, summer resort privileges and other commercial and industrial use of the said land and of a dam and lake thereon known as 'Sylvan Lake' and other improvements heretofore placed on the said land of Granville Jones together with any future improvements incident to such use as a summer resort, when such improvements shall have been approved by a majority of the grantees as such Trustees, conditioned that no sale, transfer or assignment of these reservations, privileges and sources of revenue shall be made by the said Granville Jones and Jessie Lyon Jones, or either of them, without the approval of a majority of said Trustees expressed in writing."

It was, and is now, the contention of appellant that: (a) Deed No. 4 is void, as violative of the rule against perpetuities; (b) Her father, Granville Jones, therefore received a fee title to the land by virtue of deed No. 3, and; (c) Her father left her a one-half interest [also his wife a one-half interest] in the land by his last will which appears in the record. We are not in agreement with contention (b) above. Reserving, for the present, consideration of contention (a) above, it is clear from the testimony and the record, that appellant's father did not receive by deed No. 3 a fee title or a beneficial title. It is clear from the testimony that deed No. 3 was executed for the sole purpose of eventually achieving the results

attempted in deed No. 4. Both deeds were executed on the same day, indicating again that Granville Jones was not to receive any beneficial title in the land by virtue of deed No. 3. The record conclusively shows that the Trustees considered Granville Jones as a mere conduit of the legal title. We agree, therefore, with the trial court that Granville Jones did not have a fee title in the land at the time of his death, and that consequently his will passed no beneficial or equitable title. Our conclusion would be the same regardless of the validity or non-validity of deed No. 4.

A short time before this suit was filed (and after appellant had filed and dismissed a similar suit) appellees organized a corporation called the "Clingman-Jones Family Corporation." The articles of this corporation appear in the record, and its purpose is expressed in the third paragraph:

"SECOND: The nature of the business of the corporation and the objects or purposes to be transacted, promoted or carried on by it, are as follows, to-wit: To acquire, own, manage and control all properties held in common by the lineal descendants of Drs. A. B. Clingman and Alfred Jones."

In the record appears a deed, conveying said land, to this corporation. We designate this deed as "Deed No. 5," and will discuss it later.

At the close of the hearing, the court, after dismissing appellant's complaint, made two principal findings in favor of the appellees. (a) Deed No. 4 was reformed, and (b) title to the land was quieted in the Clingman-Jones Family Corporation. We shall now consider these findings in the order named.

(a) We think it is not material to the final disposition of this case, but also think the court was justified in making the reformation. All the reformation amounted to was to more clearly define the purposes and manner in which the grantees in deed No. 4 were to hold the land, and to provide for the succession of trustees. All changes

effected by the court were amply substantiated by the testimony.

(b) We have concluded that the court erred in quieting title in the new corporation, because we think deed No. 5 (from the Trustees in succession to the Clingman-Jones Family Corporation) violates the rule against perpetuities.

Apparently appellees were concerned that deed No. 4 might violate the rule against perpetuities, and so sought to evade that probability by the substitution of deed No. 5. We think no such result was achieved, and also think both deed No. 4 and deed No. 5 violate the rule. Since both deeds contain practically the same essential phraseology we will confine our consideration to deed No. 5.

In deed No. 5 (to the Family Corporation) there is a regular granting clause, and then, after the description of the land, there is a "." and this paragraph:

"As a memorial, vacation, and reunion campsite for said lineal descendants, with full right of any one of said descendants to establish a summer cottage on said lands and use the same with all the privileges appertaining, under such rules as may be prescribed by the Directors of the Clingman-Jones Family Corporation."

Before reaching a conclusion regarding the rule against perpetuities, we find it necessary to construe the effect of said deed No. 5 as a whole and in particular as to the language quoted above in an attempt to determine whether the deed vested a fee simple title in the Corporation, or whether the deed was in effect a conveyance in trust.

If, under this deed, the Corporation received a vested title in fee with the right to dispose of the land, we would be compelled to conclude that the rule was not violated.

After a careful consideration of the testimony relative to the purpose of the family organization, the Articles of Incorporation, and the language used in the deed

to the Corporation, we are impelled to the conclusions hereafter set out.

By the use of the words "lineal descendants" of Clingman and Jones in deeds No. 4 and No. 5 we do not think the Trustees or the family organization meant to refer only to persons then living but rather to those who might be later born. We get the impression from the undisputed evidence that the family had no intention of limiting the recreation and reunion project to those persons who were alive. In fact that is the very issue which prompts this litigation on the part of appellees. There has never been any contention that the living lineal descendants of Clingman and Jones did not have the right to establish and maintain a recreation and reunion project.

Likewise we can draw but one conclusion from the Articles of Incorporation, and that is that the sole purpose and power of the Corporation was to hold the land [in trust] for the "lineal descendants of Drs. A. B. Clingman and Alfred Jones." It is perfectly apparent that the Corporation would have violated its purpose and trust if it had disposed of the land or had used it for the benefit of anyone except the ones designated. This being true we cannot say the fee title vested in the Corporation at the time the deed was made or that it certainly would vest in the foreseeable future.

Our views concerning the Articles of Incorporation are confirmed by an examination of deed No. 5 by which the land was conveyed to the Corporation. This deed, in the portion above copied, shows that it was the intention of the grantors to limit the title conveyed. The right was reserved for "lineal descendants" [of Clingman and Jones] to use the land "as a memorial, vacation, and reunion campsite" and for "any one of said descendants to establish a summer cottage" on the land.

The fact that the granting clause in deed No. 5 is regular and, apparently, conveys a fee absolute and that the portion of the deed quoted above is a limitation thereon, avails appellees nothing under the established rule of

this court that we look to the four corners of the deed in order to arrive at the intention of the grantors. Also, in applying this rule here, we can look to the testimony introduced by appellees, and from this we have confirmation that they expected the family organization to extend indefinitely.

Having concluded that the Corporation was in effect a trustee and that the use of the land was not limited to those descendants who were alive at the time the deed was made, it follows, as a matter of law, that deed No. 5 is void because it violates the rule against perpetuities. The authorities are numerous and uniform to that effect. The general rule is very well stated in 41 Am. Jur. at page 50 under the heading "Rule Against Perpetuities," which, in part, reads:

"Although all the established forms have been complied with governing the alienation of property, the law, for reasons of public policy, still imposes some restrictions on the right to dispose of property. One of the most important of these restraints is the rule against perpetuities. The rule against perpetuities prohibits the creation of future interests or estates which by possibility may not become vested within the life or lives in being at the time of the testator's death or the effective date of the instrument creating the future interest, and twenty-one years thereafter," etc.

For some of the decisions of this court sustaining the above rule see: *Moody* v. *Walker,* 3 Ark. 147; *Union Trust Co.* v. *Rossi,* 180 Ark. 552, 22 S. W. 2d 370, and; *Fletcher* v. *Ferrill,* 216 Ark. 583, 227 S. W. 2d 448, 16 A. L. R. 2d 1240. For other jurisdictions see: *Shepperd* v. *Fisher,* 206 Mo. 208, 103 S. W. 989; *Beverlin* v. *First National Bank In Wichita,* 151 Kan. 307, 98 P. 2d 200, 155 A. L. R. 688; *Glock* v. *Glock et al.,* 110 N. J. 477, 160 A. 339; *Jackson et ux.* v. *Powell et ux.,* 225 N. C. 599, 35 S. E. 2d 892; *Lewis* v. *Cockrell et al.,* 80 Fed. Supp. 380, and; *Foley* v. *Nalley et al.,* 351 Ill. 194, 184 N. E. 316.

Having reached the conclusion that deeds Nos. 4 and 5 are void because they violate the rule against perpetuities, it follows from the record that the bare legal title to said land was in Granville Jones at the time of his death as a result of deed No. 3, and that this title passed by his will to appellant and to his widow, Jessie Lyon Jones. Since Jessie Lyon Jones is deceased her portion of the title would of course vest in her legal heirs in the absence of a will by her. It is also clear that the equitable or beneficial title to the land vests in the Trustees of the Clingman-Jones Family Organization for the benefit of the lineal heirs of Drs. A. B. Clingman and Alfred Jones. These Trustees are the ones named as grantees in deed No. 1 since, as we have indicated, the equitable or beneficial title was never conveyed by them. Since Granville Cubage is the only surviving Trustee the equitable or beneficial title now vests in him as such Trustee.

Before appellant and Jessie Lyon Jones can be divested of the bare legal title, they would have to be made parties to litigation for that purpose.

Affirmed in part and reversed in part as above indicated.

Justice McFaddin concurs in part and dissents in part.

Ed. F. McFaddin, Associate Justice (Dissenting in Part). Using the same designation of the deeds as contained in the majority opinion, I make the following observations:

Deed No. 1 was a regular warranty deed from J. R. Vaught and wife to "Granville Jones, Isaac J. Jones and Granville Cubage, Trustees," dated September 3, 1923. There was nothing in this deed to show the purpose for which the grantees were trustees, and so there was nothing to show that the deed violated the rule against perpetuities, or any other rule. I maintain that these grantees became seized with the legal title in trust for whomsoever the evidence might establish to be the beneficiaries. Under our State (§ 50-412 Ark. Stats.), any conveyance executed

by these trustees to a third person innocent of the trust would pass a good title. But the evidence here shows that there was no conveyance to any such innocent third person.

Deed No. 2 was from the three trustees (grantees in Deed No. 1) to Isaac J. Jones, and was dated September 16, 1924. The grantee was one of the three trustees; and the evidence shows beyond question that the sole purpose of this deed was to empower Isaac J. Jones to borrow some money to improve the trust property, and that no such loan was ever consummated. I maintain that the evidence establishes that this deed was in equity no more than a power of attorney and could be cancelled in this suit and the title reinvested in the grantees in Deed No. 1.

Deed No. 3 and Deed No. 4 were both dated and executed the same day, May 28, 1927. In Deed No. 3 Isaac J. Jones and wife conveyed the land to Granville Jones. The grantor, Isaac J. Jones, and the grantee, Granville Jones, were two of the trustees who were grantees in Deed No. 1. Each of them knew that Deed No. 2 conveyed no title to Isaac J. Jones except to obtain a loan, and each of them knew that no loan was obtained and that the title still rested in the three trustees who were the grantees in Deed No. 1. So I insist that Deed No. 3, in truth and in fact, conveyed nothing.

Deed No. 4 — executed contemporaneously with Deed No. 3 — was from Granville Jones and wife to "Granville Jones, Isaac J. Jones, Arthur Jones, Claude Jones and Gilford Jones, as trustees for themselves and other lineal descendants of Drs. A. B. Clingman and Alfred Jones." In this Deed No. 4, Granville Jones attempted to reserve certain rights to himself and wife, said attempted reservation being as follows:

"But specially reserving to grantors, Granville Jones and Jessie Lyon Jones, all profits arising from concessions, summer resort privileges, and other commercial and industrial use of said land and of a dam and lake thereon known as 'Sylvan Lake,' and other improvements

heretofore placed on said land of Granville Jones, together with any future improvements incident to such use as a summer resort, when such improvements shall have been approved by a majority of the grantees as such trustees, conditioned that no sale, transfer, or assignment of these reservations, privileges and sources of revenue shall be made by the said Granville Jones and Jessie Lyon Jones, or either of them, without the approval of a majority of said trustees expressed in writing."

I maintain that since nothing passed by Deed No. 3, then Deed No. 4 is a nullity and that all attempted "reservations" by Granville Jones and wife were and are nullities. The net result is that the title still rests in the grantees in Deed No. 1. This result disposes of all claims under the will of Granville Jones and all claims under the deed from Jessie Lyon Jones to Claude Jones, and likewise nullifies Deed No. 5.

Deed No. 5 was dated May 15, 1954: the grantors were Gilford Jones, J. Granville Cubage, Robert Highsmith, Herbert Chandler and Mrs. Lee J. Chandler, as trustees in succession to the trustees named in Deed No. 4. These grantor trustees claim to be the owners of the property by virtue of Deed No. 4; but with Deed No. 4 a nullity — as hereinbefore mentioned — the grantors in Deed No. 5 had nothing to convey. The grantee in Deed No. 5 was "the Clingman-Jones Family Corporation." The majority opinion holds that this Deed No. 5 is void as violative of the rule against perpetuities. That may be true; but the better reason — as I see it — is that the grantors in Deed No. 5 had no title to convey because they had received nothing by Deed No. 4.

Now, with the foregoing observations made, it is evident that I regard the legal title to still be in the grantees in Deed No. 1, or the surviving one of such grantees. Therefore, this suit is simply a suit to have a trust declared and enforced against the surviving trustee in Deed No. 1. Thus, if my opinion prevailed, the work of the Chancery Court on remand would be considerably simplified because, as I see it, Jessie Lyon Jones never

had any "bare legal title" or any other kind of title, and all the Chancery Court needs to do on remand is to determine the trust created by Deed No. 1 and enforce it; or proceed to partition the property, if the trust be violative of the rule of perpetuities.

THOMPSON *v.* STATE.

4828 287 S. W. 2d 465

Opinion delivered February 27, 1956.

*Eugene Coffelt,* for appellant.

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

SAM ROBINSON, Associate Justice. Appellant Irene Thompson appeals from a conviction of possessing liquor for sale in a dry county.

First, appellant contends that the trial court should have declared a mistrial because, in his opening statement to the jury, the Prosecuting Attorney said: "We expect to prove that these people bear the reputation of dealing in illicit liquor and have borne that reputation for some considerable length of time and bear that reputation now

in the community where they reside, that they have received numerous convictions for illicit dealing in liquor." Ark. Stats. 48-940 provides: "In any prosecution or proceeding for any violation of this act [the act which the defendant was charged with violating], the general reputation of the defendant or defendants for moonshining, bootlegging, or being engaged in the illicit manufacture of, or trade in, intoxicating liquors, shall be admissible in evidence against said defendant or defendants." Not only was defendant's reputation for dealing in illicit liquor admissible in evidence under the above mentioned statute, but evidence of convictions for violations of the liquor laws was also admissible. Of course, the Prosecuting Attorney had the right to mention in his opening statement the competent, relevant testimony he relied on for conviction. The statute, as set out above, clearly states that the defendant's reputation with regard to the liquor business is admissible, and this court has held in a large number of cases that evidence of violations and convictions for violating the liquor laws is admissible. *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713; *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386; *Larkin* v. *State,* 131 Ark. 445, 199 S. W. 382; *Lowery* v. *State,* 135 Ark. 159, 203 S. W. 838; *Burrell* v. *State,* 203 Ark. 1124, 160 S. W. 2d 218.

Appellant also argues that the court erred in not excusing for cause the venireman John E. Brown, alleging: "The juryman clearly displayed that he was prejudiced against the defendant. . . ." We have carefully examined the record, and it does not show any prejudice on the part of Mr. Brown.

Next, appellant states that the evidence is not sufficient to sustain the conviction. It is shown that appellant had the reputation of being engaged in the liquor business; that she had been convicted on prior occasions; that many people were noticed going in and out of the defendant's home, and that, later, these same people would be arrested for drunkenness. It is further shown that people who have the reputation of drinking go to appellant's home frequently. At the time of her arrest, appellant

had in her possession fourteen half pints of liquor of various brands. All of this evidence, when considered together, is sufficient to sustain a conviction of possessing liquor for sale in a dry county.

Finding no error, the judgment is affirmed.

[redacted]

[redacted]